



IN THE COURT OF APPEAL AT NAIROBI
(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CIVIL APPEAL NO 2 OF 1983

Between

MAWEU.....APPELLANT

AND

LIU RANCHING & FARMING

COOPERATIVE SOCIETY LTD.....RESPONDENT

(Appeal from the High Court at Nairobi, Porter J)

JUDGMENT

September 4, 1985, **Platt Ag JA** delivered the following Judgment.

This is an appeal from an order of the High Court striking out a defence and counterclaim, largely in reliance on *Gathure v Beverly* [1965] EA 515, a decision of the High Court following *Alibhai v Alibhai* [1938] 5 EACA 1, a decision of the Court of Appeal for Eastern Africa. Neither of these decisions is binding on the court, although respect would be paid to the decisions of the very old East African Court of Appeal. In the *Alibhai* case, it was decided that certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein.

Secondly, it was held that no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate. So it follows that from the time a person acquires registered land, the period of limitation runs from that time and not before.

In this case, the assumed facts were that the plaintiff society purchased land in 1971, which was registered in its name in that year. The plaintiff continues to allege that at the time of the purchase, the defendants and each of them were unlawfully residing on the land with their families, and thus trespassing as illegal squatters. They still continue to do so. As trespassers, the defendants are entitled to no notice. The defendants are twenty persons. They have not taken a representative action for other people, although there was some claim to representation during argument.

However, that may be, the suit was against these twenty defendants, who refused to vacate the land, and accordingly the plaintiffs prayed that they be ordered to do so. It was also prayed that they pay mesne profits and the costs.

The defendants alleged that they had settled on the land in 1933 and that there are some one hundred and forty settler families. They claim title by adverse possession, and in their counterclaim they ask for orders

that the plaintiff society transfers their land to them. The issues of fact are therefore whether the defendants sued were settlers from 1933 or what other time?

The plaint was brought in 1981, and therefore if adverse possession is to be proved, the defendants must have been, at least, in 12 years before the purchase. Those are matters for proof, but they lead to the assumption that occupation continued from at least 1969. If that were true then possession existed before the purchase of the land in 1971, and that leads to the issue of law decided by the learned trial judge. He held on the authorities set out above that any period of presumed possession before 1971, would not help the defendants even if they proved such possession.

This finding is the central question in this appeal, since the learned judge ordered the eviction of the defendants, even though he left mesne profits to be assessed later.

The defendants appeal on two grounds:-

- 1) that it was wrong in law to find “that limitation ran from the date of the acquisition of land by the respondent” society;
- 2) that the interpretation given to the Limitation of Actions Act (cap 22) was wrong.

In principle, it is a thing of wonder that title and adverse possession can ever be confused, since adverse possession by definition is the antithesis of title. How can one imagine that in an act concerning title, its registration and the effect of registration, one should find provisions about possession and adverse possession; unless the act’s framers wish to travel outside the basic cope of act? Adverse possession is essentially a matter for an Act on Limitation of Actions. How can adverse possession be described as an encumbrance, when the adverse possessor has no right to encumber the land, like other holders of rights and interests which they have acquired against the owner or the land. The situation then develops into a question whether the Registration of Titles Act (cap 281) deals with claims by possession.

The Court of Appeal for Eastern Africa warned themselves of this possibility by referring to *Belize Estate and Produce Co v Quilter* [1897] AC 367 where at p 369 the Privy Council could not find in a similar piece of legislation the Honduras Land Titles Registry Act, any intention of the legislature to deal with the question of possession. It was necessary to make that finding because the proposition before the court was that registration implied possession and excluded the Limitation Act of Honduras. The Privy Council rejected that argument and held that the registered proprietor was affected by adverse possession. In this appeal it was pointed out of course, that the Privy Council was dealing with a case of possession after acquisition and registration. True, but the Privy Council indicated that possession had not been dealt with, from which it follows that adverse possession might support a title by taking into consideration a period of possession prior to registration, in accordance with the common law. (See *Leigh v Jack* (1879) 5 Ex D 264, as explained in *Williams Brothers Ltd v Raftery* [1957] 3 ALL ER 593 at p 596 and 597).

The learned judge pointed out that it was only in the Registered Land Act (cap 300) that provision was made for an overriding interest status to be conferred on those acquiring title. The absence of such a provision in the Registration of Titles Act (cap 28) showed that he was bound to construe the latter act in accordance with authority. With that point in view, I would, with respect, quite agree. But so far from supporting the decision in *Alibhai’s* case, section 30(f) of the Registered Land Act (cap 300) illustrates the warning of the Privy Council, that the Registration of Titles Act (cap 281) does not deal with possession.

The significance of that situation is this, that the owner of registered land acquires an absolute and indefeasible title, to such an extent that he can immediately put any squatter or trespasser off the land. Any person else who has a right or interest in the land must be named as an encumbrancer.

The adverse possessor stoutly possesses the land, but he has not the slightest interest until the twelve years has been completed. Now he emerges as the owner, and however absolute and indefeasible the title is, it is lost for ever. What logic is there in saying that this concept of the absolute and indefeasible title

may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner's predecessor. How is it lost at all?

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.

The plaintiff Society of course relies upon the decision of the earlier court, but no argument on the point of principle was pressed that I could see, with great respect to learned counsel. Certainly he was unable to advance any cogent argument from the reasoning in *Alibhai's* case, or otherwise why absolute and indefeasible title interfered with the operation of the Limitation of Actions Act (cap 22). There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the Limitation of Actions Act (cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession. Consequently, in my view, the appeal must be allowed, the judgment and decree of the High Court should be set aside, and the record remitted to the High Court for the trial to continue.

I would so order and grant the costs to the appellants. I should add that I take no notice of any steps which the Society has taken to give some squatters land, since that does not affect the principles involved, or the issues raised on the appeal.

Hancox JA. The Respondent Co-operative Society purchased an area of 11,330 acres, comprising Land Reference 7612 at Kiu in the Machakos District, in 1971. The previous owners, Mousley and sons Ltd, had permitted a number of person, who have been referred to by the a compendious term "squatters" to stay on the land and, it seems from the letter written by one of them, Mr Samuel Wambuya Kamuya, dated August 26, 1981, that they, or their forbears, had settled on this land in 1933, before Mousley and Sons Ltd became the owners. Prior to the sale to the Respondent there was some scheme to sell the land to the squatters at Kshs 1,000.00 per family, leaving the individual families to demarcate it amongst themselves, but this foundered due to lack of official, presumably Land Control Board, consent.

Consent was given to the sale to the respondent by the Masaku Donyo Sabuk Divisional Land Control Board on June 10, 1970, subject to its agreement to lease 530 acres to eighteen families for the residue of the 999 year term from February 1, 1946, less three years, so as to give a reversion on the head lease to the respondent. The list of the eighteen "legal" squatters, (presumably the heads of the respective families), a term to which the learned judge made reference, appears in a letter from the respondent to its advocates, Messrs, J K Mulwa & Co, dated March 4, 1982. None of the present appellants, with exception, possibly, of Daudi Nzomo, the sixth appellant, appears in that list. The "illegal" squatters, including the twenty appellants, were given sixty days notice to vacate the land, so as to enable the respondent to carry out development projects, on March 18, 1980. The advocates letter followed over a year later on August 19, 1981. Neither was complied with and, consequently, the plaint claiming an order for vacant possession was filed on September 22, 1981.

However, in the period intervening between the two notices to vacate the Ministry of Co-operative Development and the District Commissioner, Machakos, became involved in the dispute. It seems that 1042 acres were offered to the squatters so as to enable one hundred and forty squatters and their families to live and graze their cattle. I assumed from Mr. Mulwa's submissions to us on behalf of the respondent that a further 492 acres were intended to be given to the appellants, making with the 550 acres allocated to the eighteen families, a total of 1042 acres. I also understood from Mr Mulwa that the one hundred and forty families were separate and distinct from the eighteen families envisaged in the land Control Board Consent.

This is not borne to by the correspondence. In his letter of June 27, 1981, the Provincial Cooperative

Officer, Eastern Province, identified the problem as being the refusal of the “illegal” squatters to settle in the 1042 acres allocated, and their desire to settle in any area that they chose within the Ranch. It would even appear from their letter of July 22, 1981, that the squatters were seeking yet more land. Nevertheless, Messrs Karuga Wandai & Co who were then acting for the squatters, accepted the 1042 acres by their letter of July 25, 1981. The correspondence is, unfortunately, not complete, but it would seem that the Ministry and the Administration had between them almost managed to achieve some kind of compromise when Messrs J K Mulwa & Co, sent their notice to vacate on August 19, 1981, containing the following passage:

“This notice takes into account the chief’s notice which expires on May 30, 1981 but the reason for such further notice is that our clients now do not wish to entertain any further requests of whatever nature from your clients. Any promise made to your client is equally abrogated.”

Which would indicate that the negotiations, if any, had broken down. The defence and counterclaim, seeking, *inter alia*, an order of transfer to them of the land the Appellants then occupied was filed on November 2, 1981. The Appellants also claimed therein that they had been in adverse possession of the land since 1933 and were entitled to it under the Limitation of Actions Act, cap 22. The Respondent, however, filled a Notice of Motion on February 15, 1982, seeking that the defence be struck out as disclosing no reasonable answer to the claim, under order 6 Rule 13 of the Civil Procedure Rules, and summary judgement under Order 35 Rules 1 and 2. The judge (Porter J) allowed both applications, struck out the defence and counterclaim, and entered judgement for the Respondent as prayed.

I am in respectful agreement with Platt Ag JA whose judgement I have had the advantage of reading in draft, that the questions of title to, and adverse possession of, Land are separate and distinct. As the learned judge in this case correctly appreciated, the Registered Land Act, cap 300, provides for a just such a situation as this, for in section 30(f) it states that the acquisition of land by a registered proprietor is subject to rights acquired, or in the process of being acquired, by prescription, as an overriding interest. If, therefore, the land in this case was registered land there would have been no difficulty from the squatters’ point of view – see Porter JA, with whom the rest of the court agreed, in *Mwangi Githu v Livingstone Ndeete and Others* Civil Appeal 4 of 1979, at page 4 of judgement.

The judge referred to section 21 of the Land Titles Act cap 282, which provides that every certificate of title issued under the Act is conclusive evidence of the matters therein contained. Accordingly the judge held, following *Tayebali Alibhai v Abdulhussein Alibhai* (1938) 5 EACA 1, that any period of adverse possession prior to the acquisition of title to the land by the Respondent was irrelevant for the purpose of the Appellants’ case. Section 21 of the Land Titles Court Ordinance, cap 143 of the 1926 Edition of the Laws of Kenya, under which *Alibhai’s* case was decided was identical to the present section, and the Court of Appeal for Eastern Africa in that case held that the registration under that Ordinance was the foundation of the title and that certificates issued thereunder conferred and absolute and indefeasible title to the property in question. Consequently there could be no entitlement or easement in favour of the respondent in that case, by virtue of the Limitation Ordinance to the staircase, wooden landing and balustrade which overlapped on to the appellants’ plot, unless the possession or use of it had existed for the prescribed period after the date of the grant of the certificate of title.

Unfortunately, however the Land Titles Act has no application to the present case LR 7612 is at Kiu in the Machakos District, whereas the Land Titles Act applies only to the areas stated in proclamations issued under section 2, and these are set out at page 43 of the Subsidiary Legislation cap 282. They cover Mombasa Island and other areas in and near the Coast Province. Why the learned Judge confused this Act with the one immediately preceding it, namely the Registration of Titles Act, cap 281, is beyond me, since the submissions of counsel in the High Court were directed to the latter Act and showed that the suit was registered thereunder. Possibly the reference to *Alibhai v Alibhai* may have misled the judge into thinking that the Land Titles Act applied because, of course the premises in that case were at Mombasa. Be that as it may it is an unfortunate mistake which led part to the Appellants being deprived of their right to defend the action.

Accordingly the relevant sections for the purposes of a decision in this case are section 23 and 36 of the

Registration of Titles Act, and not section 21 of the Land Titles Acts section 23 provides:-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

Section 36 relates to a memorandum of transfer, and provides:

“If a transfer purports to transfer the whole of the land mentioned in any grant or certificate of title, the registrar may, instead of cancelling the grant or certificate as provided by section 22 and 35, enter in the register and endorse on the grant or certificate a memorandum of the transfer, and deliver the grant or certificate with that memorandum shall be as effectual for the purpose of evidencing title, and for all other purposes of this Act, as if the grant or old certificate had been cancelled and a new certificate had been issued to the transferee in his own name, and the foregoing process in lieu of cancellation may be repeated upon every transfer of the whole of the land, but when in the opinion of the register any grant or certificate cannot for want of space or other cause conveniently bear any further endorsement, he may require cancellation and the issue of a new certificate.

This, indeed, is the section which was being considered by Miles, J, in *Gathure v Beverly* 1965/EA 514, in which he followed *Alibhai v Alibhai*, but only for the purpose of determining when the period of prescription would begin to run. Since the memorandum of the transfer of land to the Respondent is endorsed on the original grant as entry number, section 36 in the operative provision in this case.

It seems to me that the concepts of a certificate of title issued under the Registration of Titles Act (or the Land Titles Act) and a period of adverse possession are not necessarily mutually exclusive. I doubt whether the Court which decided *Alibhai v Alibhai* would necessarily take the same view today in a dispute over the occupation of land which involves the possibility of squatters' rights thereto.

In that case express reference was made by Sir Joseph Sheridan CJ to section 41 of the Limitation Ordinance, 1934, which applied the period laid down in the former Indian Limitation Act, which was said to be twenty years. I have been unable to find any provision in that Ordinance corresponding to section 38 of the present Limitation of Actions Act, cap 22, which provides:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

Accordingly it is not, in my view, surprising that the former Court of Appeal held that the period of limitation which conferred a possessory right could not prevail against a registered certificate of title granted in 1923. But in the instant case an action based on adverse possession is clearly maintainable, notwithstanding that a certificate of title has been issued, because section 38(1) of that Act, to which Mr Mugo, who now appears for the Appellants referred us, expressly provides that a person claiming to be so entitled may apply to the High Court for an order that he be registered in place of the person then registered as the owner of the land. Since section 38 refers back to section 37, and since the suit and here is registered under the Registration of Titles Act, in section 37, it follows that the Judge should not have held that the defence should be struck out and disclosing no reasonable answer to the plaintiff's claim or that there was no basis for the counterclaim. Section 37 itself reinforces the position by providing that the Limitation of Actions Act (which, of course, includes section 7) shall apply to land registered under the four Acts named therein in the same way as it applies to unregistered land. It goes on to provide that if the title would ordinarily be extinguished under the Limitation Act, it shall not, in the case of registered land, be extinguished, but shall be held in trust for the person who has acquired title as against the registered

proprietor.

Had the learned judge not overlooked the provisions of section 37 and 38 of the Limitation of Actions Act, I have no doubt he would not have taken the course he did with the consequence of entering judgement for the respondent. Clearly there existed triable issues in this case not the least of which was as to the acreage of the land offered for settlement as the affidavits and exhibited correspondence filed in the High Court in support of and against the motion showed moreover there is nothing on the record to show that the certificate of title was produced in the High Court. It was the Respondent's obligation to do so and the Judge should not have given summary judgement without calling for it. It was left to us in this Court to call for it and the original grant was produced although we did not see a separate certificate of title, as would appear to be envisaged in Section 22 and FORM C of the First Schedule to the Act.

I would therefore allow the appeal set aside the order of the High Court and direct that the trial should proceed. I draw attention to the fact that under order XXXVI rule 3D(1) of the Civil Procedure Rules and application under section 38 should be made by way of originating summons. However, the application for an order of transfer in the instant case was made by way of counterclaim and not by plaint. This point was not argued before us, but it would seem appropriate particularly if evidence has to be led for the issues between the parties to be decided in the present suit, rather than that the Appellants should be put to the express of bringing separate proceedings.

I would award the costs of the appeal and of the proceedings consequent on the notice of motion in the High Court to the appellants in any event. As Nyarangi JA and Platt Ag JA agree, the orders of this Court are as set out herein.

Nyarangi JA. I have had the advantage of reading in draft the judgement of Hancox JA and that of Platt Ag JA in agreeing with the two judgements I would add that there was a special condition of approval of sub-division under the consent to the transaction given pursuant to Section 6(1) of the Land Control Act, cap 302 that the respondent Co-operative Society would lease 550 acres to 18 families for the residue of the term of 999 years with effect from February 1, 1946 less the last 33 years. However, the affidavits and the letters exchanged between the representatives of the parties produced before the High Court during the hearing of the notice of motion disclosed a divergence of views about the acreage. That was an issue so basic to the litigation that it raised a triable issue and the appellants should have been allowed to put their case to the High Court.

I agree with the order on costs proposed by Hancox JA.

Dted and delivered at Nairobi this 4th day September , 1985

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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AG.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR