



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Potter JJA & Hancox Ag JA)

CIVIL APPEAL NO 12 OF 1982

PAUL MUTHUITAAPPELLANT

VERSUS

WANOE.....RESPONDENT

JUDGMENT

The three respondents, who are the mother and two younger brothers of the appellant, filed a suit against the appellant in the Resident Magistrate's Court at Embu. The subject matter of the dispute was a parcel of land of some 1.96 hectares known as Inoi/Ndimi Parcel Number 14 (herein referred to as the "suit land"). The main issue raised before the Resident Magistrate by the respondents as plaintiffs in the suit was whether or not the appellant defendant, who had become the registered proprietor of the suit land, held that land in trust for himself, his mother and his two brothers.

In their plaint the plaintiffs averred that Paul Muthuita, the father of the brothers and husband of their mother, who died in 1954 before land consolidation commenced, was possessed of some fragments of land which after his death were consolidated, demarcated and registered as the suit land. As Paul Muthuita had died, his widow, the first plaintiff, caused the suit land to be registered in the defendant's name, he being the eldest son, to hold the land in trust for all four members of the family. It was also averred in the plaint that the plaintiffs had been in continuous and uninterrupted occupation of the suit land since 1958/9 and had acquired a title to the land by adverse possession under the Limitation of Actions Act (Cap 22).

In his defence the defendant pleaded that land consolidation and registration came some five years after his father's death, and that his clan followed the usual course of putting the first son in the place of the deceased father. Just as the father was the sole proprietor of his land, so was the defendant registered as sole proprietor of the suit land. There was no trust and no registration of a trust. The plaintiffs were on the land not as proprietors but as members of his family with his consent.

At the hearing in the Resident Magistrate's Court the first plaintiff, the widow, gave evidence that the land was being bought by her husband from Gitara s/o Muturu, and that after her husband and Gitara had died she continued paying instalments of the purchase price to Gitara's son Simon Munene. When consolidation came some years later, she arranged for the defendant to be registered as proprietor of the suit land to hold it for all the family.

The younger brothers gave some confirmatory evidence of the purchase. Simon Munene Gitara confirmed that Paul Muthuita was buying land from his father, that the transaction took a long time and that the last payments were made to him by the first plaintiff. The land did not belong to the clan. The defendant gave

evidence that the suit premises were allotted to him by the clan, and that the plaintiffs each had other land of their own.

The learned Resident Magistrate found that the defendant was first registered under the Native Land Tenure Rules, 1956 in respect of the suit premises in about 1957, as the “private right holder.” In 1960 the defendant was registered under the Registered Land Act (Cap 300) as the sole proprietor of the suit land. The Resident Magistrate considered Sections 27, 28 and 30 of the Registered Land Act and concluded that the rights of a registered proprietor could not be defeated except by interests shown on the register or by overriding interests detailed in Section 30. In this he was wrong. He failed to note that Section 28 is subject to a proviso. Thus:

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject ... Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Furthermore, Section 126(1) of the Registered Land Act provides:

“126(1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words “as trustee”, but the Registrar shall not enter particulars of any trust in the register.

(3) Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust.”

In *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253, Madan J (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of Section 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct.

In view of that misdirection it is perhaps not surprising that the Resident Magistrate concluded that the evidence supported the defendant’s case. He did not deal with the claim based on adverse possession.

In the High Court the learned judge correctly directed himself as to the functions of a first appellate court and as to the relevant provisions of the Registered Land Act, and having carefully reviewed the evidence, found that the appellant was registered as proprietor of the suit premises as trustee for himself and the three plaintiffs. In my view there was ample evidence of the history of the suit land and of the relevant customary law on which the learned judge could find as he did. With respect I agree with the learned judge.

However, in my view the learned judge was not correct in saying that the Resident Magistrate had no jurisdiction to declare the existence of a trust. The jurisdiction of the Resident Magistrate was derived from Section 159 (now repealed) of the Registered Land Act.

Where the Resident Magistrate had jurisdiction under that section by virtue of the value or location of the subject matter, his jurisdiction was as wide as that of the High Court. This case is not concerned with trusts for sale under the Trusts of Land Act (Cap 290).

In this court Mr Maini who appeared for the appellant submitted that claims to be entitled to an interest in land under a trust and by reason of adverse possession were mutually incompatible and could not be advanced by the same plaintiffs in respect of the same land. As the respondents abandoned their claim to

title by adverse possession in this court, this point does not fall to be decided. But I would point out that the decision in Gatimu's case, on which the learned judge relied, is a decision which contradicts Mr Maini's submission, as do the authorities referred to by Hancox Ag JA in his judgment in this case. The respondents were right to abandon their claim based on adverse possession, because there was no evidence of what definable portions of the land had been exclusively occupied by them.

I would dismiss this appeal with costs. I would order that the land be subdivided into four equal portions as stated in the judgment of the High Court, namely 0.49 of a hectare (or as near thereto as may be) to each party.

Madan JA. Mr Maini's argument that the respondents are not in possession individually of definable portions of the land ignores an important aspect of the system of land holding in Kenya. The joint possession, occupation and user of land by more than one person is a common feature. Mr Maini himself recognised this in his learned treatise titled *Land Laws in East Africa*, Oxford University Press, page 192, as follows:

"Co-proprietorship is a matter of the utmost importance in a country such as Kenya, dealing as it does with multiple ownership."

Section 101(4) of the Registered Land Act impliedly accepts the notion of ownership of undefined portions of land. It provides:

"(4) Until the Minister otherwise prescribes under subsection (3) of this section, no dealing in respect of land in the special areas shall be registered which, if registered, would have the effect of vesting any parcel of land or a lease or charge in more than five proprietors."

I also agree that this appeal should be dismissed with costs. It is so ordered.

Hancox Ag JA. I agree that this appeal should be dismissed but I wish to add something of my own. While it was accepted by Mr Kariuki, who appeared for the respondents, and original plaintiffs in the action before the Resident Magistrate, that there was no evidence of Embu customary law on which the learned judge based his dictum that the present appellant was the registered proprietor of Inoi/Ndimi/14 as trustee for all the parties, there was ample other material enabling him so to find. In my respectful opinion in the circumstances of this case, he, quite rightly, differed from the view of the evidence which the trial court had formed and, notwithstanding that the Resident Magistrate had found the plaintiffs' evidence to be fabricated and contradictory, declared that the appellant held the suit land in trust for himself and then the respondents.

Though Mr Kariuki conceded in argument that this court was no longer concerned with the aspect of adverse possession, for my part I find it difficult to follow why the claim was ever based on Section 38 of the Limitation of Actions Act (Cap 22) in the first place.

The second respondent said in evidence that his father was purchasing the land in 1954, when he died, after which the first respondent continued with the sale. Simon Munene Gitara had said that the deceased was buying it from his father and that he had received Kshs 1,500 from the first respondent plus five head of cattle. The last payment was made in 1978. It Muthuita v Wanoe was therefore not clan land at all, and the right which the first respondent had stemmed from the purchase. She could not, however, be registered because women were not being registered as owners at that time. Possession can only be adverse if it is held against another party, in the sense of being hostile. This is self-evident from the language of Section 13(1) of the Act, which gives a definition of adverse possession, as follows:

"A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land."

As regards Mr Maini's submission on behalf of the appellant, that the concepts of adverse possession and of trust were mutually exclusive, so that the learned Judge erred when he said that the Respondents' entitlement was based on both, this is not correct in law. Frequently in this country the two go hand in hand, as occurred in *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253, where Madan J (as he then was) found in favour of the defendant on these two heads of his counterclaim. There the defendant occupied the land for well over twelve years after he came out of detention, during which time the plaintiff had become the registered owner of the land, and claimed adverse possession and a declaration that he was a half owner of it. After finding adverse possession established, Madan J observed:

"It seems to me that the defendant is also entitled to succeed on his claim under the heading of trust and his prayer for rectification of the register to include his name as half-owner of the land simply has to be granted. The Court's holding is that the plaintiff is a trustee for the defendant for half the land."

Bridges v Mees [1957] 2 All ER 577 was an English case in which identical provisions in the Limitation Act 1939 were in point, though, the facts and the basis of the trust, were different. In dealing with the question whether a beneficial owner can hold adversely to the trustee, Harman J referred to Section 7(3) of the Act, which is identical to Section 18(2) of our Act, namely:

"Where land is held upon trust, including a trust for sale, and the period of limitation prescribed for an action by the trustees to recover the land has expired, the estate of the trustees is not extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but when the right of action is so barred the estate of the trustee is extinguished."

and held that for twelve years from the date when the vendor became a trustee of the legal estate:

"... no beneficiary had any right of action to recover. It seems to me to follow that from that date the period of limitation could and therefore did run in favour of the beneficial owner and that thus (but for the provisions as to registered land) the trustees' title would have been extinguished - in 1948."

It is clear from this passage (relating to identical statutory provisions) that even if the possession is referable to a lawful right it can still be adverse as against the holder of the legal estate eg a trustee. Therefore a legal owner, being registered in respect of the whole of the land, had throughout the twelve-year period the right to resume possession and to bring an action for that purpose. But if the respondents prove they have held possession for twelve years or more, and that they have been entitled to a beneficial interest in it, the period of limitation would run in their favour because, though entitled to a beneficial interest in it, their possession is nonetheless 'adverse' (within the meaning of Section 13(1)) to that of the owner of the legal estate (here the appellant). Even more clear is the following statement from *Underhill's Law of Trusts & Trustees* 13th Edition at p 361:

"... it is apprehended that any other" (that is other than a trustee of settled land or land on trust for sale) "trustee, including a constructive trustee (as for example a vendor under an uncompleted contract), is liable to be divested of the legal estate by possession of a person entitled in equity in exactly the same way as if the latter were a stranger."

Although Section 7(5), indeed the whole of Section 7 of the 1939 Act (to which that passage refers) is absent from our Act, it only applied to settled land and to land held on trust for sale. Therefore it does not detract, in my view, from the general position as regards trustees stated therein; neither do I agree with Mr Maini's submission that adverse possession must be of the whole of the land, see Madan J in *Kinguru v Gathangi* (supra) at p 260 letter F & G and *Abdul Karim v Member for Lands and Mines* [1958] at p 441 letters H & I. For the reasons given by Potter JA and the foregoing I consider the judge was right in his conclusion and I, too, would dismiss the appeal with costs.

I concur in the order proposed by Potter JA.

Dated and delivered at Nairobi this 3rd day of December, 1982.

C.B MADAN

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

A.R.W HANCOX

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR