



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 424 OF 1972

KARANJA MATHERI PLAINTIFF

VERSUS

SARAH WANJIRU KANYI DEFENDANT

JUDGMENT

This case raises an issue in relation to the operation of the Limitation of Actions Act and the Land Control Act and a consideration of the question whether they conflict and, if so, which should prevail.

In my findings of fact delivered at the conclusion of the evidence I held that the plaintiff has been in undisturbed possession adversely to the defendant for more than twelve years of what I referred to as “the disputed portion” of the plot of land shown in the register as “Karai/Gikambura/T 49 ‘B’”, and that, subject to the issue to which I have referred, the defendant, as the registered proprietor of the entire plot, holds the disputed portion in trust for the plaintiff but without prejudice to the estate or interest of any other person which had not been extinguished by section 37 of the Limitation of Actions Act (to which for brevity I will refer as “the Limitation Act”). This disputed portion consists of a half share of the plot, the boundaries of which appear not to have been strictly defined but which include a dwelling-house built by the plaintiff.

In the plaint, the plaintiff seeks declaration but to the effect, first, that the defendant’s right to recover any portion of the plot is barred, and, secondly, that the plaintiff is entitled to be registered as the proprietor of the entire, but during the course of the hearing Mr Muite, who appeared for the plaintiff, made it clear that the claim is being restricted to the disputed portion only, for the reason that, although now in possession of the whole plot, the plaintiff’s possession of the other portion (to which I will refer as “the second portion”) adversely to the defendant does not extend to a period of twelve years. On this basis I am assuming, I understand with the concurrence of the parties, that despite the two portions being comprised in a single registered title, the adverse occupation by the plaintiff of the disputed portion for upwards of twelve years does not in law constitute adverse occupation by him of the second portion for the same period.

Having reached the findings of fact to which I have referred, I expressed the view that, although by virtue of section 38 of the Limitation Act the plaintiff appeared to be entitled to apply to the Court for an order that the be registered as the proprietor of the disputed portion in place of the defendant, there were two possible obstacles in his path, namely, the necessity for land control consent (which, it is conceded, has not been sought or obtained) and, the demarcation of the physical boundary between the two portions. I therefore adjourned the hearing to enable the plaintiff to produce evidence for the purpose of demarcating the boundary and I invited the assistance of the Attorney-General as *amicus curiae* in regard to the

question of the necessity for obtaining land control consent. The Attorney-General has now been kind enough to appear by counsel to argue the matter of land control consent and it has been agreed that this should be dealt with before the plaintiff seeks to produce evidence relative to the demarcation of the boundary.

The Land Control Act was passed on 11th December 1967 and came into operation on the following day. The Limitation Act was passed on 19th April 1968 and, by section 1, is deemed to have come into operation retrospectively on 1st December 1967. Accordingly, the later of the two Acts came into operation first, a factor which must be borne in mind in the application for the principle of interpretation that, in the case of conflict, the later of two statutes in date of enactment may be regarded as constituting an amendment of the earlier. Here the position would seem to be that the Court must regard the Limitation Act as having already been in operation when the Land Control Act was passed and brought into force but that, nevertheless, by having been enacted subsequently to the Land Control Act, the Limitation Act should be construed as having by implication amended it if and in so far as the two conflict.

By section 7 of the Limitation Act it is provided that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him; section 13(1) declares that 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; section 17 enacts that, subject to section 18, at the expiration of the period prescribed by the Act, for a person to bring an action to recover land the title of that person to the land is extinguished; and section 18 states that the Act applies to equitable interests in land in like manner as it applies to legal estates.

Section 6(1) of the Land Control Act declares that each of the following (amongst other) transactions is void for all purposes unless the local land control board has given its consent in respect of the transaction in accordance with the Act: (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated in a land control area; and (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots, in an area to which the development and Use of Land Planning Regulations 1961 for the time being apply.

It is common ground that the plot with which we are concerned comprises agricultural land within a land control area and there being no suggestion that the plot is in an area to which the regulations of 1961 have application, it is clear that the relief now sought by the plaintiff in the first declaration involves, in a general sense, both a "transfer" and a "partition" of land and that the relief sought in the second declaration, if granted and implemented, will or may result in the division of the plot into two parcels to be held under separate titles. The first question, therefore, is whether the granting by the Court to the plaintiff of these declarations, or of either of them, would constitute either a transfer, partition or other disposal of or dealing with the land within the meaning of section 6(1) (a) of the Act, or a division of the land within the meaning of section 6(1) (b), so as to require in either case the prior consent of the local land control board.

It was suggested by counsel for the plaintiff that the question could be avoided by the Court granting the declarations sought subject to the board subsequently granting its consent, and it was said by counsel for the Attorney-General that in practice the board (or, on appeal therefrom, the provincial land control appeals board or the central land control appeals board) would never fail to grant consent rather than defeat or impede the order of the court. I am not persuaded that this would be a correct approach to the matter. In the first place, section 6(1) renders void a transaction falling within its terms unless the board "has given its consent" in accordance with the Act, and this suggests that the consent of the board, if it be necessary, shall have been given prior to the transaction. In this respect, section 6(2), which deals with agreements to be a party to a controlled transaction, is distinguishable for it allows of a period of three months after the making of the agreement for the obtaining of land control consent. Furthermore, section 9(1) of the Act defines the principles, which a board must follow in deciding whether to grant or refuse its consent in respect of a controlled transaction, and a desire to facilitate the implementation of an order of this or any other court is not numbered among these principles. It would therefore be an abuse of its

powers if the board, in deciding to grant or to refuse its consent, were to allow itself to be influenced by a consideration such as the implementation of an order which, in the case of the High Court, would itself have been made without any necessary regard to those principles.

In its essence the issue is whether the extinction of the interest of the defendant under sections 7 and 17 of the Limitation Act in the disputed portion and the resultant conferring of that interest upon the plaintiff, leading to the division of the existing plot into two parcels, constitute one or more of the “transactions” caught by section 6(1) of the Land Control Act, in particular by the words “transfer.... or other disposal of or dealing with” the land in paragraph (a), or the word “division” in paragraph (b). Counsel for the plaintiff relies upon the very recent decision in *Ruchine v Swift Rutherford & Co Ltd* (unreported) where the plaintiffs sought declarations similar to those claimed here on the basis of adverse possession of land in a land control area, and Kneller J held that it was not necessary for the plaintiffs to have obtained such consent prior to filing the suit. Counsel for the Attorney-General referred me to *Salim v Boyd* [1971] EA 550, but there is no suggestion in the report of that case that the land there was in a land control area or that the provisions of the Land Control Act were considered. He also contended that the present parties are tenants-in-common and that therefore the plaintiff’s possession was not adverse to the defendant, but I have already found that the plaintiff has been in undisturbed possession of the disputed portion adversely to the interest of the defendant and of her deceased husband for the requisite twelve years. Reference was also made to *Bridges v Mees* [1957] 1 Ch 475, but it is of little assistance.

No other authorities were cited but an analogy, not perhaps perfect, with the position which has arisen here is to be found in *Mayor of Brighton v Guardians of the Poor of Brighton* (1880) 5 CPD 368. There the defendants had had exclusive possession as tenants at will for upwards of twelve years of certain offices in the municipal buildings owned by the plaintiffs and in an action of ejectment they pleaded the Limitation Act. The plaintiffs in reply relied upon the fact that under section 19 of their private Act they were expressly prohibited from selling any portion of their property without the consent of the inhabitants of the parish of Brighton in vestry assembled first had and obtained and contended that, since no such consent had been obtained to the acquisition by the defendants of a possessory title, the Limitation Act did not apply. The Court, however, rejected this contention, saying in the course of its judgment that:

It was said that the plaintiffs could not sell without the consent of the vestry, and therefore could not by neglect lose that which they could not alienate without the consent of the vestry ... there are no words apt to exclude or capable of excluding the operation of the Act ... an express power is given to sell with the consent of the vestry. There are no words in the 19th section which can control the effect of the Statute of Limitations, or can have any reference to the loss of an estate by a want of possession for a length of time. This decision was followed in *Bobbett v South Eastern Railway Co* (1882) 9 QBD 424, and, so far as I have been able to ascertain, has not been dissented from.

In the present case there are no words in the Land Control Act purporting to affect the application of the Limitation Act or to prevent the loss of title to land by want of possession for the stipulated time or its transfer to the new occupier, and in my opinion the Limitation Act should be so construed that its operation will not be defeated by the operation of section 6(1) (a) of the Land Control Act.

With regard to the impact of section 6(1) (b) of the Land Control Act upon the position and to the proposition that consent must be obtained to a division of a plot into two or more parcels as an inherent part of the intendment of that Act and that the absence of such consent will defeat the operation of sections 7 and 17 of the Limitation Act, I have come to the same conclusion as that which I have expressed in relation to section 6(1) (a), namely that the Limitation Act must prevail over the Land Control Act if and in so far as they may be inconsistent and that the effect of section 6(1) (b) of the latter cannot be such that the absence of consent will defeat sections 7 and 17 of the former. In so holding I recognise that a measure of distinction is open to be drawn between paragraphs (a) and (b) of section 6(1) inasmuch as the necessity for consent to the division of a plot into two or more parcels to be held under separate titles is in a sense accorded greater emphasis than the necessity for consent to a dealing not leading to the creation of separate titles, as witness section 6(3) which excepts from the operation of section 6 the transmission of land by virtue of the will or intestacy of a deceased person unless that transmission would result in the division of the land into two or more parcels to be held under separate

tittles. In this context, it may be observed the relevant provisions of the Law of Succession Act 1972, when it comes into operation, may have to be considered. Nevertheless I do not think that for present purposes these considerations are sufficient to prevent sections 7 and 17 of the Limitation Act from prevailing over paragraph (b) of section 6(1) of the Land Control Act if and in so far as they may conflict.

Finally, regard must be had to section 20(1) of the Land Control Act enjoining the Registrar of Titles or the Land Registry, as the case may be, to refuse to register an instrument effecting what under that Act would be a controlled transaction unless satisfied either that any consent required by the Act has been given or that no consent is required. The instrument in question in the present case will be the order or orders of this Court and, on the grounds which I have indicated, I declare that no consent thereto is required by the Act.

The question as to land control consent having been disposed of, I will now adjourn the further hearing of the suit to enable the problem as to the demarcation of the physical boundary between the two portions of the plot to be dealt with. It will be for the plaintiff to determine whether notice of the further hearing should be given to Mr Kiango, to whom, it was said, the defendant had purported to sell an interest in the plot and who is not bound by this present judgment.

I am obliged to counsel for the Attorney-General for the assistance which he has given the Court and it will not be necessary for him to attend further.

Order accordingly.

Dated at Nairobi this 7th day of June 1976.

L.G.E HARRIS

.....

JUDGE