IN THE COURT OF APPEAL

AT ELDORET

(CORAM: WAKI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 57 OF 2017

BETWEEN

BRAMUEL NAMTALA MATUI.....APPELLANT

AND

ROSE NASIMIYU MULONGO.....RESPONDENT

(An appeal arising from the Judgment of the High Court of Kenya

at Bungoma (S. N. Mukunya, J) dated 10th March, 2017

in

H. C. C. A. No. 25 of 2013)

****

JUDGMENT OF THE COURT

The main issue for our determination in this second appeal is the construction and application of ***section 30 (g)*** of the **Registered Land Act (RLA), Cap 300)** (now repealed).

The matter concerns a parcel of land situate in Koshok village of Bungoma County, known as **Elgon/Namorio/815 (the disputed land**), measuring approximately 2.8 Hectares (about 7 Acres). It was first registered under the **RLA** on 1st April, 1969 in the name of John Olekete **(John).** John had a son, Haron Omutaba Olekete **(Haron)** who was married to Rose Nasimiyu **(Rose),** with whom they had four children. Rose is the respondent before us. In the year 1999 John took Haron and his family to the disputed land and, in the presence of clan witnesses, he identified a portion of two and a half acres which he gave out to Haron and family. According to one witness, it was given out as Haron's inheritance in the event of John's death. Haron and his family then settled on the portion of the disputed land by building their permanent residence and farming thereon. Five years later, in 2004, Haron died and was buried on that portion. He left Rose and the children on the land. On the other hand, John and the rest of the larger family resided on another piece of land in Mt. Elgon.

After 23 years of peaceful residence on the land, Rose was shocked when she was summoned before the Resident Magistrate's Court in Kimilili, by Bramwel Namtala Matui **(Bramwel),** who is the appellant before us. Bramwel had filed suit in that court on 2nd June, 2012 seeking an eviction order against Rose as well as her *"dependants, agents, heirs, employees, servants"* on the basis that he was the registered owner of the entire disputed land and that Rose was a trespasser who had no colour of right or any justifiable cause to occupy any portion of the disputed land.

It turned out that Bramwel, who was a lecturer at Moi University, Eldoret, had on 7th July, 2010, approached John and bought the disputed land which was transferred to him on 14th February, 2012 and a Title Deed issued. He knew there were permanent structures constructed on the land and a portion of it was occupied. He also knew that Rose was the widow of John's son and was resident there. But all he did before purchasing the disputed land was to conduct an official search which confirmed that there were no encumbrances registered against the Title. All along, Rose knew nothing about the transaction.

At the hearing of the suit, Bramwel called John who gave confusing evidence on the identity of the person he sold the land to, but nevertheless confirmed that he had sold it and was paid in full. He did not involve any family member because the land was his. He also confirmed that he had given one Acre to his late son Haron, but claimed that he wanted the deceased's family to move to another land in Mt. Elgon which he had bought. No evidence was given of such purchase.

Rose testified too and called two witnesses who confirmed that she had settled on the portion given to her family by the father-in-law, John, and had not trespassed on any other portion. She had nowhere else to live with her children. She counterclaimed for cancellation of Bramwel's Title and sought registration of ownership of the portion of the two and a half acres she occupied, in her favour.

Upon hearing the parties, the trial court **(Hon. S. K. Ngii)**, declined to assume jurisdiction on the counterclaim seeking cancellation of Title and struck it out. However, on the main suit, the court found as a fact that Rose and her family were in active occupation and use of a portion of the disputed land long before Bramwel bought it. As such, the court held, Rose was protected under ***section 30 (g)*** of the RLA which was the applicable statute at the time. The court held that whatever interest was acquired by Bramwel, it was subject to the rights of Rose who was in actual possession/occupation of the suit land. Bramwel knew about this before he bought the land but made no reasonable enquiries to find out the extent of Rose's interest. Rose was not a trespasser and cannot therefore be evicted, the court held.

Bramwel was aggrieved by those findings and he appealed to the High Court, principally claiming that he was an innocent purchaser without notice; that Rose was a bare licensee and trespasser who had no rights against the registered owner; and that the trial court had misconstrued ***section 30 (g)*** of RLA, which was irrelevant. Upon hearing the parties, the High Court **(S. N. Mukunya, J.)** dismissed the appeal on the grounds that ***section 30 (g)*** was properly applied and construed; that Rose was neither a licensee nor a trespasser as she was in occupation before the transfer; and that Rose had an overriding interest in the portion of the disputed land that she occupied.

Undeterred, Bramwel now comes before us on a second appeal which can only lie on issues of law. A raft of six grounds of appeal were listed in the memorandum of appeal but three of them were abandoned at the hearing of the appeal. The three remaining grounds are as follows:

> ***"1. That the learned trial judge erred in law and fact when he failed as a first Appellate court to re-evaluate the evidence in the subordinate court both on points of law and fact and come up with his own findings and conclusions hence occasioning a miscarriage of justice.***
>
> ***2. That the learned trial judge erred in law when he misinterpreted the provisions of section 30 (g) of the Registered land Act Chapter 300 Laws of Kenya (now repealed) hence occasioning a miscarriage of justice.***
>
> ***3. That the learned judge erred in law and fact when he failed to analyse the submissions and decisions by the Appellant and hence find that the Appellant as owner of title number Elgon/Namorio/815 was entitled to the orders sought in his appeal".***

Learned counsel for the appellant, **Mr. Omundi Bw'Ochiri,** orally urged those grounds globally, identifying the main legal issue as the construction and application of ***section 30 (g),*** RLA. In his view, the courts below failed to appreciate, firstly, that the section had an exception about an inquiry being made; and secondly, that the section did not apply. Counsel referred to the record to persuade us that Bramwel made an inquiry which confirmed that the widow, Rose had no interest in the land, and that John sold the land in order to buy another one. He distinguished the case of -***Kanyi Muthiora vs Maritha Nyokabi Muthiora [1984] eKLR***, which was relied on by Rose, on the ground that, unlike this case, there was no inquiry made in that case.

Counsel further submitted that the section was not applicable even if no inquiry was made since none was necessary. He cited the case of ***Michael Kimotho vs Nicholas Mugo [1997] eKLR*** where the appellant had conceded that he had been in possession of the suit land as a squatter and that he had no right or title to the suit land. The Court of Appeal held that he could not, in those circumstances, resist the claim of the respondent who was the registered owner.

He also relied on the High Court case of ***Hassan Kweyu Olango vs Kati Olango Bungoma Civil Suit No. 148 of 2002 (UR)*** *where* ***Sergon, J****. upheld the actions of a father who, as the registered owner of a parcel of land, sought to remove his son from the land and give it to his second wife. The son resisted the suit for eviction on the ground that he had been put in possession by his father and had developed it. But the court held that this was a 'family arrangement' amounting to 'a bare license' gratuitously given by the father, which gave no rise to an interest in the land. The bare licence could be withdrawn without notice or compliance with the rules of natural justice, the court held, and failure to vacate amounted to trespass. According to counsel, Rose was in the same position as the son in the* ***Olango*** *case.*

In response, learned counsel for Rose, **Mr. Wekesa E. Wanjala,** orally submitted that ***section 30 (g)*** applied to the extent that there was incontestable evidence that Rose, and her family had lawfully taken possession of a portion of the land when it was registered in the name of their father, who was the first registered owner. No inquiry was made about that occupation when the land was acquired by the appellant. He only made a fleeting official search which could not have disclosed the interest of Rose. They were overriding interests which need not have been noted in the register and the two courts below did not err in refusing to declare her as a trespasser.

We have considered the matter fully. As stated earlier, the main issue of law, as urged by the appellant's counsel, is the construction of ***section 30 (g)***, RLA and whether it is applicable to the facts and circumstances of this case.

It is trite, under the provisions of ***sections 27*** and ***28*** of the RLA that a registered proprietor enjoys absolute rights over his land subject only to express exceptions and overriding interests which need not be noted in the register. The sections, as relevant, provide as follows:

> "***27. Subject to this Act –***
>
> > ***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***
>
> ***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 -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

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. [Emphasis added].

Then comes ***section 30*** which enumerates eight of the '*liabilities, rights and interests'* that do not require registration but still override the interests of the registered owner. For purposes of this appeal, the rights listed under ***30 (g)*** are the relevant ones, thus:

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed."

For a long time, until the recent decision of the Supreme Court in the case of ***Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & Another [2018] eKLR*** the construction and application of ***section 30 (g)*** was, to say the least, confusing. Both the High Court and this Court in various decisions construed and applied it so inconsistently that there was no precedential value in the decisions. For example, in the case of ***Alan Kiama vs Ndia Mathunya & Others C. A. 42/197,*** Madan, JA referred to them as **"equitable rights",** stating:

"What meaning is to be given to section 30(g)? The rights under customary law may be argued to be extinguished by section 28 – Kneller, J. in Esiroyo vs Esiroyo [1973] E.A. 388, at p. 390. It must refer to equitable rights, it cannot be otherwise, it has to be so to be sensibly interpretable. Over-riding interests which arise in right only of possession or actual occupation without legal title are equitable rights which are binding on the land, therefore on the registered owner of it. Under section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute; they are not subject to interference or disturbance such as by eviction save when inquiry is made and they are not disclosed. In this case the respondents were in possession and actual occupation of the land and they also cultivated it to the knowledge of the appellant. He made no inquiry, any inquiry by him would have been superfluous; he had himself lived on the land together with the respondents for a time and knew that they cultivated it.

Over-riding interests which so exist or are so created are entitled to protection because they are equitable rights even if they have a customary law flavour or the concomitant aspect of cultivation, which is not listed in section 30. Equity always protects the just rights of the oppressed. Equity always prevents an injustice being perpetrated. Equity sanctifies the administration of justice. Cultivation of land is incidental and an appurtenance of an over-riding interest in right only of possession or actual occupation. There is nothing repugnant about the economic exploitation of land. That is what land is for."

Porter, JA in the same case found there was a '**trust**' arising out of physical possession, thus:

"The learned Judge held that the suit land was transferred to the appellant subject to the resulting trust in favour of the respondent. I think that was correct, not because of any fraud, but because the land was subject to an overriding interest created by the trust, under section 30(g) of the Land Registration Act (sic). The respondents are in actual occupation of the land".

In the case of ***Kanyi vs Muthiora*** *(1984) KLR 712,* **Nyarangi, JA** thought they were '**valid rights**'**:**

"I doubt like* Madan, J.A *did in Kiama vs Mathunya…, if rights under customary law are excluded by Section 30 of the Act. Had the legislature intended that customary law rights were to be excluded, nothing would have been easier than for it to say so. I would say any valid rights are included in Section 30 of the Act just as a trustee referred to in Section 28 of the Act could not fairly be interpreted and applied to exclude a trustee under customary law. Be that as it may, the trust, in favour of Maritha is a resulting one by virtue of Section 163 of the Act. Besides, having been in occupation of a portion of the suit land and no inquiry having been made, Maritha had created rights of an overriding nature under Section 30 (g) to which the appellant as proprietor was subject."

So did **Kneller, JA** in the same case, stating thus:

"Furthermore, the respondent under the trust which arose between her and the appellant in the circumstances of this case had rights against the appellant stemming from her possession and occupation of part of Muthiora's land though it was registered in the name of the appellant. This is an overriding interest which is not required to be noted on the register and the appellant's proprietorship is subject to it."

After a comprehensive analysis of decided cases, the Supreme Court in the ***M'Inanga Kiebia case (supra)*** discovered that the original sin was in the Court of Appeal decisions of ***Obiero vs Opiyo (1972) E. A 227*** and ***Esiroyo vs Esiroyo (1973) E.A 388*** wherein the Judges proclaimed the extinction of customary rights to land upon the registration of such land under ***sections 27*** and ***28*** of the RLA. The court found that the decisions were based on faulty conceptual and contextual premises which it diagnosed as follows:

"***Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature,***

scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest "ownership", in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as "ownership. (Bennett 1995:3 and Cocker 1966: 30-33)." [Emphasis added].

The Supreme Court then asked the million dollar question and answered it, in relevant parts, as follows:-

> ***"What is one to make of section 30(g) of the Registered Land Act? This recognizes as overriding interests:***
>
> ***"The rights of a person in possession, or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed."***
>
> ***....If the rights of a person arising under African customary law as evidenced by his/her being in possession or actual occupation of the land are not overriding interests under Section 30 (g) as decreed in Obiero vs Opiyo, what are they?***
>
> ***.....Such rights of a person that subsisted at the time of first registration, as evidenced by his being in possession or actual occupation, are rooted in customary law. They arise under African customary law. They derive their validity from African customary law. They are "rights to which one is entitled in right only of such possession or occupation". They have no equivalent either at common law or in equity. They do not arise through adverse possession, neither do they arise through prescription. ..... It is customary law and practice that clothes the rights of a person in possession or actual occupation, with legal validity. If customary law and practice, does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled. .....We now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust.***
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> ***We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero vs Opiyo and Esiroyo vs Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.....We agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act."*** [Emphasis added].

Was any inquiry made in the case before us to determine whether the rights claimed by Rose under ***section 30 (g)*** existed and, if so, the nature and extent thereof? We have gone through the record but we are not satisfied that the relevant inquiry in terms of ***section 30 (g)*** was made by the appellant. He was interested in the land only and he appeared to care less about the presence of Rose and her family once the official search confirmed that John was the registered owner. Such alacrity is always dangerous when it comes to purchase of land. Indeed, the seller appears to admit in his confused and confusing sworn evidence that he had ceded a portion of the land to his late son and family. It is not clear what the basis of such concession was. The trial court did not delve into the issue either, as it was only a Magistrate's court with doubtful jurisdiction over the matter. Considering that the ceding of the land was within a family setting and that in the words of the Supreme Court, *" the categories of a customary trust are not closed"*, we think it was necessary that an inquiry be made in the right forum before anyone could assert that Rose and her family were trespassers on the disputed land. None has been made so far, and we so find.

With that finding, it follows that this appeal is devoid of merit and we order that it be and is hereby dismissed with costs.

Dated and delivered at Eldoret this 28th day of June, 2019.

P. N. WAKI

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR