



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 182 OF 2013

BETWEEN

TRANS-NZOIA CHINGANO GRAIN GROWERS

FARMERS CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

GUTONGORIO FARM LIMITED 3RD RESPONDENT

CLEMENT SOLOMON MUNA 4TH RESPONDENT

SAMUEL NG'ANG'A MUNGA 5TH RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale, (Obaga, J.) dated 29th April, 2014

in

KITALE HIGH COURT PETITION NO. 2 OF 2010)

JUDGMENT OF THE COURT

INTRODUCTION

1. The appellant filed a constitutional petition in the High Court of Kenya at Kitale and stated, *inter alia*, that its members were the original owners of a parcel of land known as **L. R. No. 1800/4** measuring 1695 acres, hereinafter referred to as “*the suit land*,” that during the colonial era the members were forcibly evicted from the suit land by the colonial government, and that after independence the suit land was left in the hands of some of the members.

2. The appellant further averred that in 1988 its members formed a co-operative society known as Trans-Nzoia Chingano Farmers Co-operative Society Limited but unknown to them, the suit land had been

purchased by one Appollos Mwangi Muma sometimes in 1969. The appellant alleged that the said acquisition was fraudulent as no Land Control Board consent had been obtained. The appellant contended that the registered owner's title to the suit land had long been extinguished by virtue of its members' adverse possession of the same. The appellant prayed that respondents be ordered to transfer the suit land to herself.

3. The 3rd respondent filed a replying affidavit that was sworn by **Appollos Hiram Muna**, a director of the company. He stated that his late father, Appollos Mwangi Muna, became the registered owner of the suit land in 1972, having purchased it from one David Wanguhu.

4. Appollos Mwangi had employees in the suit land and after termination of their employment the employees refused to move out of the farm, whereupon a suit for their eviction was filed, **HCCC NO. 61 of 1984** at Eldoret.

5. By a consent judgment entered on 5th July, 1985, the defendants in the aforesaid suit and all those claiming under them agreed to vacate the suit land by 10th September, 1985, upon payment of an ex-gratia sum of Kshs.35,000/=. The defendants failed to move out and they were forcefully evicted.

6. Thereafter the appellant instituted several claims over the suit land but lost all of them. The 3rd respondent further stated that his late father transferred the suit land to Gutongorio Farm Limited, which in turn surrendered the same to the Government in exchange of a sub divisional scheme and issuance of individual titles to hundreds of people under the repealed Registered Land Act.

7. The respondents contended that the suit as filed did not raise any constitutional issues and the appellant's claim over the suit land under the doctrine of adverse possession was wrongly founded and misconceived.

8. Dismissing the appellant's case, the High Court held that a party cannot bring a claim of land under the doctrine of adverse possession by way of a constitutional petition. The court further ruled that the appellant had no valid claim over the suit land.

9. Being aggrieved by the High Court decision, the appellant preferred an appeal to this Court. In its memorandum of appeal, the appellant stated the learned judge erred in law and in fact: by failing to make a finding as to how the suit land was transferred from the Government of Kenya to a Mr. Rajji and eventually to the 3rd, 4th and 5th respondents; by failing to consider other grounds raised by the appellant apart from adverse possession; by holding that claims of land under the doctrine of adverse possession cannot be brought by way of a constitutional petition; and by failing to consider the constitutionality of the petition.

10. **Mr. Mokuu**, learned counsel for the appellant, submitted that the transfer of the suit land to the current owners was suspect, adding that the respondents did not provide sufficient evidence as to how they had acquired the suit land. Counsel further submitted that the appellant's members were brutally evicted from the suit land, in a manner that amounted to violation of their constitutional rights but the learned judge failed to take that into consideration.

11. **Mr. Odongo**, learned counsel for the 1st and 2nd respondents, submitted that the constitutional petition that was filed by the appellants before the High Court had not revealed the specific provisions of the Constitution that had been violated, the manner of the violation of that right and the evidence of violation, if at all.

12. Counsel added that none of the documents annexed to the appellant's affidavit in support of their petition showed that the appellant ever had proprietary interest over the suit land.

13. **Mr. Kiarie**, learned counsel for the 3rd respondent, supported Mr. Odongo's submissions. Regarding ownership of the suit land, he stated that in 1964, the Trans-Nzoia Divisional Land Control Board

granted consent to the former colonial owner of the suit land, one William Fowler Ranson, to transfer it to David Wanguhu and Appollos Mwangi. Later, David Wanguhu transferred his half undivided share to Appollos Mwangi. The members of Trans-Nzoia Chingano Grain Growers Farmers Co-operative Society Limited, the appellant, that was incorporated in 1988, were employees of Appollos Mwangi and it was in that capacity that they had occupied a portion of the suit land. They had no right to claim the suit land under the doctrine of adverse possession, and, in any event, they had lawfully been evicted from the suit land. He urged the Court to dismiss the appeal.

14. We have carefully considered the record of appeal and the submissions by counsel. The appellant's constitutional petition alleged, *inter alia*, that they had acquired the suit land by way of adverse possession; that its members had unlawfully been evicted from the land; and prayed for a declaration that its constitutional rights had been breached by the respondents.

15. The heading of the petition reads, *inter alia*: "IN THE MATTER OF ARTICLES 21 (1), 22 (3) C, 23 (1) & (3), 40 (1) (a) and (b) (2) (a) & (b) and 40 (6) OF THE NEW CONSTITUTION OF KENYA." There is however no reference to any specific constitutional right that is alleged to have been violated as breached, as well as the manner in which the alleged breach was committed, if at all.

16. A close reading of the petition as well as the affidavit sworn in support thereof clearly demonstrates that the petitioner's claim was purely civil in nature but had been disguised as a constitutional petition in the hope that it will escape the sieve of time limitation.

17. The appellant's claim over the suit land was mainly based on the doctrine of adverse possession. We do not agree that failure to bring the claim by way of an originating summons *per se* can invalidate a competent claim if it is brought as a Constitutional petition. Such a petition can be deemed to be a plaint, as it often happens to originating summons. The learned judge held that a party cannot bring such a claim by way of a constitutional petition; that it ought to have been brought by way of an originating summons as required under **Order 37 rule 7 (1)** of the **Civil Procedure Rules**.

18. But even if we were to overlook that procedural requirement and deem the constitutional petition as having been properly filed, we do not think that the appellant established any valid claim over the suit land, either by way of adverse possession or otherwise

19. The history of the suit land as contained in the affidavits sworn by the parties is fairly clear. In 1917 the suit land was demised by the colonial government to one JOHN BARTRAM STEYN for a term of 999 years from 1st June, 1913. As at 1963 when Kenya became independent, the said lease was held by William Fowler Ranson who, in 1972, at a consideration of Kshs.170,000/= assigned the same to David Wanguhu and Appollos Mwangi. David Wanguhu later transferred his half undivided share to Appollos Mwangi.

20. The issue of ownership of the *suit land* was *res judicata*, even as the date of filing of the constitutional petition. Some of the members of the appellant co-operative society were employees of Appollos Mwangi who refused to move out of the suit land after their services were terminated. A suit for their eviction, **HCCC No. 61 of 1984**, was instituted against the former employees and as stated earlier, a consent judgment was recorded to the effect that the defendants were to move out of the suit land, upon payment of Kshs.35,000/=. That money was deposited in court and the defendants were eventually evicted.

21. We cannot say that the eviction of the defendants was a violation of their constitutional rights, if any, since it was pursuant to a consent judgment. We are unable to comment on the manner in which the eviction was carried out since there is no sufficient evidence before us, save the appellant's contention that it was done brutally. There were other subsequent cases between the parties herein which we all decided in favour of the 3rd respondent.

22. In view of the foregoing, we find this appeal lacking in merit. Consequently, it is dismissed with costs to the 1st and 3rd respondents.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.