IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, TUNOI & O'KUBASU, JJ.A.
CIVIL APPEAL 130 OF 2003

BETWEEN

FARAJ MAHARUS *(Administrator of the Estate of*

KHADIJA RAJAB SULEIMAN)……APPELLANT

AND

J.B. MARTIN GLASS INDUSTRIES.…….....…….....…..…….1ST RESPONDENT

URBAN COUNCIL OF MARIAKANI…….…….....……..…2ND RESPONDENT

KENYA SUIT CASE MANUFACTURERS LTD….....…….3RD RESPONDENT

COMMISSIONER OF LANDS……..…..……...….....…….4TH RESPONDENT

JUDGMENT OF THE COURT

This is an appeal by the aggrieved plaintiff, ***FARAJ MAHARUS*** (***Administrator of the Estate of Khadija – Rajab Suleiman***), now the appellant, against the decision of Waki, J. (as he then was) given on 15th May, 1998 whereby he struck out the appellant's suit under Order 6 rule 13 (b)(c) and (d) of the Civil Procedure Rules for being frivolous, vexatious and an abuse of the process.

The appellant and the 1st and 3rd respondents lay claim to a parcel of land situate in Mazeras Township formerly known as plot No. 26 but since 1994, surveyed and described as L.R. No. 1043/111/54 measuring about 3.722 hectares or approximately 9.2 acres. It is common ground that it has at all material times to the suit been government land.

The genesis of the dispute giving rise to this appeal has a very interesting legal history going back to, more or less, the turn of the last century.

On 13th July, 1926, the Land Officer of the Colony and Protectorate of Kenya issued a Temporary Occupation Licence to one ***EFFENDI MURSAL MAHARUS*** who was a Sudanese pensioner and one of the 26 Sudanese soldiers settled on the same plot pursuant to an arrangement between the British and Italian Governments following the Cession of Jubaland in Sudan to the Italians. The Licence was granted subject to the Crown Lands Ordinance 1915, (later Government Lands Act). It was temporary and renewable yearly and was personal to the said Maharus during his lifetime and thereafter personal to his widow during her lifetime. His widow was ***KHADIJA RAJAB SULEIMAN***. It is not clear when those two licencees died but it is common ground that they were not living at the time material to the institution of the suit in the superior court.

The appellant instituted suit as the "Administrator of the Estate of the late ***Khadija Rajab Suleiman***". He also appears to lay a claim in his own right for having been born and raised on the suit property and for having occupied it for more than 26 years without let or hindrance, and so probably, acquired propriety rights as an adverse possessor. He asserts that since the filing of the suit on 15.6.95, he was issued with a letter of Allotment by the Commissioner of Lands. The letter is dated 21.6.95 addressed to one "***MAHARUS MURZAL***" presumably one and the same as "***FARAK MAHARUS***". The letter of Allotment relates to "***UNS. RESIDENTIAL PLOT NO. 26, MAZERAS***" for an area of plot measuring 1.310 Hectares (Approximately 3.2. Acres) The term is 99 years from 1.5.1995. The allotment was accepted by the allottee on 22.8.95 when he paid the required fees.

The 1st and 3rd respondents lay their claim on the same plot now comprised in Grant No. 26292 for a term of 99 years from 1.8.1978 issued to the 1st respondent on 11.10.1994 upon its registration under the Registration of Titles Act, subject to the provisions of the Government Lands Act Cap 280 Laws of Kenya. The Grant was issued pursuant to an application made in that behalf by the 1st respondent. This parcel of land was at the time occupied by various squatters including the appellant and all of them except the appellant voluntarily received ex gratia compensation for the developments made and being on the land and vacated therefrom. It is not in dispute that the 1st and 3rd respondents have since put up a multi-million shillings development for the manufacture of plastic products. That was after a temporary injunction initially granted to the appellant upon the filing of the suit was, by consent of the parties, lifted on 11.7.95 leaving only the houses of the appellant and his occupation uninterfered with.

By a plaint dated 15th June, 1995, the appellant averred, inter alia, that: -

"6. The late Khadija Rajab Suleiman inherited a licence to occupy plot LR. No. 1043/111/54 MAZERAS (then known as plot No. 26) from her late husband Effendi Mursal Maharus, the said licence was executed by the government on 13th July, 1926.

7. At all material times the fourth defendants have unlawfully leased the said plot to the 1st defendant without regard for the interest acquired by the estate and beneficiaries of Khadija Rajab Suleiman.

8. The second defendant has at all times unlawfully and wrongfully arrogated to itself power to allocate the said plot to the 3rd Defendant without regard for and consideration of the plaintiff's interest.

9. The 3rd Defendant has at about 6th June 1995 moved into the said plot LR 1043/111/54 MAZERAS and uprooted crops, plants and fence within the said plot. The value shall be stated at the hearing hereof. The 3rd Defendant threatens to pull down the dwelling houses belonging to the descendants, defendants and beneficiaries of the late Khadija Rajab Suleiman.

10. The Plaintiff and the descendants, dependants and beneficiaries of the estate of Khadija do not have anywhere else they can go and depend on the said plot for their livelihood.

11. It is the Plaintiff's case that the actions of all the defendants have put the estate's beneficiaries into untold suffering, uncertainty, insecurity, embarrassment, loss and damage."

The appellant sought a declaration that the actions complained of were illegal, null and void; an order compelling Commissioner of Lands to cancel the title so issued to the 1st respondent; an order to compel the Commissioner of Lands to issue the appellant with a good and valid title; an injunction to restrain the respondents from evicting the appellant and the beneficiaries of the estate of the late Khadija Rajab Suleiman and or alienating or disposing of or in any manner interfering with the suit plot. The appellant also sought damages, both general and punitive.

On 7th February, 1997, the 1st and 3rd respondents took out a Chamber Summons expressed to be brought under ***Order VI Rules 13 (b), (c) and (d)*** of the Civil Procedure Rules seeking to strike out the appellant's suit for being frivolous, vexatious and an abuse of the process of the court on the ground that the licence granted to the appellant's grandfather, Mursal Maharus, was not transferable or inheritable and

was determined on his widow's demise, and accordingly, the appellant's occupation of the suit property without the consent of the Government amounted to an act of trespass. The other ground relied upon by the respondents was that their title under Section 23 of the Registration of Titles Act, in the absence of proven fraud or mirepresentation, was indefeasible.

The application came up for hearing on 25th March, 1998. The record shows that counsel for the appellant, Mrs. Khaminwa, applied for adjournment to enable her file grounds of opposition because none had been filed by the then counsel acting for the appellant. Mr. Gikandi for the respondents strenuously opposed the application for adjournment. In a short ruling the learned Judge rejected the application for adjournment because the appellant had not filed any grounds of opposition or replying affidavit within time in compliance with Order 50 rule 16 of the Civil Procedure Rules. The learned Judge held: -

"There is clearly a case of indolence on the part of the plaintiff and their advocates. There is also an element of contempt of court orders for payment of court adjournment and other fees. These have not been denied. Although it is said that the matter involves land I think the transgressions of the plaintiff and his advocate outweigh the exercise of any discretion in his favour. For those reasons I decline to grant the adjournment sought."

The application then was prosecuted ex-parte after the learned Judge declined to give audience to the appellant's counsel.

The appellant submits before us that the learned Judge erred in declining to permit him opportunity to be heard in reply to the application. The records before us show that the appellant's conduct was pathetic, to say the least. He was not paying court adjournment fees as he was required to do thus stalling the prosecution of his own case. Moreover, having obtained an ex-parte injunction in 1995, he failed to prosecute the application thereto. In our view, he was definitely guilty of laches and thus not deserving of court's discretion. Again we think that a period of 3 months after taking over the brief was a sufficient time for Mrs. Khaminwa to prepare for the application. There were, in the circumstances, no good reasons for adjournment and the learned Judge was perfectly entitled to refuse the application for adjournment. It is trite that matters of adjournment of cases are an exercise in the court's discretion depending on the circumstances of each case. In the instant case the learned Judge properly exercised his discretion and it has not been shown to us that he was wrong nor that he had exercised his discretion on improper grounds. We do not see any merit in this ground of appeal.

Dr. Khaminwa argued before us, also, that the learned Judge erred in law in striking out the suit, without any valid reason. Why did the learned Judge strike out the suit? We will revisit his reasons for doing so.

These were, firstly, the disputed land has at all material times to the suit been public land vested in the Government under the Government Lands Act Chapter 280, Laws of Kenya and its precursor, the Crown Lands Ordinance. Disposition thereof can only therefore be in accordance with that Act. There was no disposition to the appellant under the Act.

Secondly, that there can be no adverse possession on public or Government Land however long one may have been squatting thereon without let or hindrance from the government. Therefore the appellant cannot benefit from the long period of his occupation of the disputed property.

Thirdly, the Temporary Occupation Licence issued in 1926 could not oust the Certificate of Title granted under the Registration of Titles Act. The appellant does not possess title under the Act.

It is indeed settled law in Kenya that a Temporary Occupation Licence to occupy Government Land is not sufficient to create or transfer title to the grantee or his personal representative. As was stated in ***RUNDA COFFEE ESTATE LTD V. UJAGAR SINGH [1966] E.A. 564:***

"It is the essence of a licence of this nature that it is personal to the licencee and creates no interest which can be disposed of by the licencee. As has been said well over 100 years ago, it creates nothing substantial which is assignable."

We would agree therefore, with the learned Judge that the licence to occupy the suit property came to an end upon the death of ***Effendi Maharus*** and his widow and as the appellant had nothing to show for the continued occupation of the suit land, his occupation as such amounted to trespass as against the registered proprietor.

The learned Judge correctly relied on the decision of this Court in ***WRECK MOTOR ENTERPRISES VS. COMMISSIONER OF LANDS***, ***Civil Appeal NO. 71 of 1997, (unreported).*** This decision affirms the sanctity of title under Section 23 of the Registration of Titles Act except on the ground of fraud or misrepresentation. As the basic fabric of the appellant's suit had been torn apart, there was no chance of it succeeding as there was no longer any legal foundation for it. It was plain and obvious that the suit was frivolous.

As it lacked foundation sustaining a hearing it would have amounted to wasting court's time. In the circumstances, we agree with the learned Judge that the suit was for striking out and was correctly struck out.

In the result this appeal fails and is ordered dismissed with costs.

DATED and DELIVERED at NAIROBI this 7th day of October, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR