REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal 140 of 1996

KEDUIWO A. MARISIN

KIPTONUI A. MARISIN

BASISA A. SITIENEI

TARITIET A. CHERUIYOT

LEDAMA OLE KIPKETER

LESHAN OLE KIPKETER

CHEMOSUSU A. LEMBECHWA

MAINA OLE KEIWA……APPELLANT

AND

SAMUEL KIPSIGE ARAP SOI (Suing on behalf of KILANDA VILLAGE GROUP)……RESPONDENT

(Appeal against the judgment and decree of the High Court of Kenya at Nakuru

(Tanui, J.) dated 6th may, 1993

IN

H.C.C.C. NO. 280 OF 1982)

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JUDGMENT OF THE COURT

Principally, the appellants' appeal turns on whether or not the learned trial judge, Tanui, J., could order the cancellation of a first registration under section 143(1) of the Registered Land Act, Chapter 300 of the Laws of Kenya, hereinafter called the Act. At the conclusion of his judgment dated and delivered

on 6th May, 1993, the learned trial judge had this to say:

"In the present case the Vice-Chairman of the Land Adjudication Committee did not allow the rights and interests of people residing on the disputed parcel of land to be ascertained before registration but he went ahead and allocated it himself to his relative. In the circumstances I find that the Legislature did not anticipate such acts when it passed the Act. The provisions of section 143(1) ought to be strictly limited. Having considered all the facts and the circumstances of this case I declare and hold that the eight defendants hold the titles to the eight parcels of land quoted above in trust for the people who occupied the said parcels at the time of this adjudication. The Land Registrar is therefore ordered to cancel them and to go and ascertain the rights and interests of those who were on the ground during the adjudication process at Ololulunga and to effect the registration of their interests in the title. The plaintiff will have the costs of this suit."

In an amended plaint filed in the superior court on 12th July 1991 the respondent purporting to sue on his own behalf and on behalf of a village group known as Kilanda Village Group comprising of 24 families sought inter alia declarations that he and the 24 families of Kilanda Village Group had by virtue of their occupation proprietary rights over land parcels numbers Narok/CisMara/Ololulunga/122, 162, 164, 165, 166, 167 and 168 registered respectively in the names of the appellants and that the latter held the said parcels of land in trust for them. He also sought adjudication of these parcels of land in favour of the 24 families of Kilanda Village Group who should then be registered as the proprietors of the same.

According to the respondent, long before land adjudication in Ololulunga Adjudication Section, he, together with the other families of Kilanda Village Group were in occupation of the land now comprising of the eight parcels of land referred to above and continued to occupy the same during the adjudication process in respect thereof. It was only in 1974 that he learnt that the land they were and had been occupying had been adjudicated in favour of Leshan Ole Kipketer (D.W.1) as land parcel number 122 which he subsequently subdivided into eight parcels which were registered in the names of the appellants as earlier indicated in this judgment. Soon thereafter, restrictions were placed on the titles to the said parcel of land restricting registration on the same of any dealings except under the order of the Chief Land Registrar. The respondent then instituted proceedings in the superior court against the appellants seeking the reliefs referred to above.

The land the subject-matter of the proceedings in the superior court, hereinafter referred to as the suit land, was one of the four subdivisions of the land belonging to Titawet Sangei (D.W.2) each of which subdivision he gave to each of his four brothers amongst whom, according to him, was D.W.1. The suit land is situated at Ololulunga Location of the Narok District. During the land adjudication in Ololulunga Adjudication Section, this land, as indicated earlier in this judgment, was allocated to D.W.1 and registered as land parcel number Narok/Cis-Mara/122. D.W.2 was the Vice-Chairman of the Ololulunga Adjudication Committee that allocated the suit land to D.W.1. Thereafter, this land was re-parceled into eight parcels of land which together were the subject-matter of the suit in the superior court and in respect of which this appeal relates.

According to D.W.2, when the suit land now comprising of the eight parcels of land referred to above was allocated to D.W.1 it was not in the occupation of anyone. Indeed, according to him, the respondent too was given land at Segemiat within Motio Land Adjudication Section in respect of which latter he (D.W.2) was the Chairman of the Adjudication Committee. In 1975, D.W.1 together with the other seven appellants developed the suit land and planted wheat. After harvesting the wheat, the respondent together with the members of the 24 families of the Kilanda Village Group in respect of which he purportedly instituted the suit in the superior court invaded the suit land and have to date remained in occupation of the same.

At the hearing of this appeal at Nakuru on 26th September,1997, counsel for the appellants, Mr. Otachi, besides submitting that the respondent in the absence of compliance with order 1 rules 8 and 22 of the Civil Procedure Rules had no capacity to institute the proceedings in the superior court in a representative capacity on behalf of Kilanda Village Group/Ololulunga Section contended that the registration of the suit land now comprising of the eight parcels of land registered in the names of the appellants being a first registration could not under section 143(1) of the Act be cancelled or amended even if the same was obtained by fraud. On account of this, the learned trial judge was, according to counsel, in error when he ordered the cancellation of the titles to the eight parcels of land comprising the suit land. Counsel further submitted that the respondent having not come to court under section 30(g) of the Act could not avail himself of the same.

While conceding that rectification of the register in regard to a first registration was not available to the learned trial judge under section 143(1) of the Act, Mr. Ochieng-Odhiambo who appeared in this appeal with Mr. Rotich for the respondent contended that as a matter of law section 30(g) of the Act was available to the respondent.

At the outset, it would appear from the record of this appeal that the respondent did not comply with the relevant provisions of Order 1 rules 8 and 22 of the Civil Procedure Rules regarding representative suits. He had therefore no capacity to bring a representative suit in the superior court against the appellants on behalf of Kilanda Village Group/Ololulunga Section. He could only have proceeded in that suit on his own behalf and not on behalf of others.

From the passage of the judgment of the learned trial judge set out at the beginning of this judgment, it is apparent that the basis of his decision in the suit before him was the misconduct of the Vice-Chairman of Ololulunga Adjudication Committee, D.W.2, who, according to him, allocated the suit land to his relative,D.W.1., without allowing the rights and interests of the people residing thereon to be ascertained. This, according to the learned trial judge, was a factor not anticipated by the Legislature and hence the provisions of section 143(1) of the Act ought to be strictly limited. Yet, under the relevant provisions of sections 21 and 22 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya a procedure is laid down for redress to any person affected and aggrieved by the decision of an adjudication committee. Thereafter, section 26 of the said Act sets out the procedure for objection in regard to the incorrectness or incompleteness of the adjudication register by anyone affected by the same culminating in the right of appeal to the Minister in this regard under section 29 of the same Act. If therefore the respondent was aggrieved by the decision of Ololulunga Adjudication Committee in regard to the suit land now comprising of the eight parcels of land the subject-matter of this appeal, he should have availed himself of the relevant provisions of the Land Adjudication Act as are referred to above which it appears he did not do. Having not done so, not even fraud or mistake would have affected the first registration of the suit land. Hence, the holding by the learned trial judge that the suit land was held in trust for the people who occupied it at the time of adjudication required the establishment of such trust. Save for the allegation, which was denied by D.W.1 and D.W.2, that the respondent had been in occupation of the suit land long before the onset of the adjudication process in Ololulunga Location of Narok District, there was nothing else in the nature of recognising, let alone establishing, the existence of a trust in favour of the respondent over the suit land. This being so, no trust could attach to the eight parcels of land re-parceled from the suit land in favour of the respondent. Consequently, the learned trial judge could not have been right when he ordered the cancellation of titles in respect of these parcels of land as earlier indicated in this judgment.

Section 30(g) of the Act stipulates that:

“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the

following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(a) ……..

(b) ……..

(c) ……..

(d) ……..

(e) ……..

(f) ……

(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:

Provided that the Register may direct registration of any of the ……., rights…….hereinbefore defined in such manner as he thinks fit."

From what we have attempted to outline above, it seems to us that the foregoing section had nothing to do with the decision of the learned trial judge and in the circumstances of the case before him, even if the same was available to the respondent, we do not think that it could have advanced his case against the appellants an inch further. In the upshot, we think that the appellant's appeal must succeed. Accordingly, we allow the same, set aside the judgment and decree of the superior court entered in favour of the respondent and substitute therefor an order dismissing his suit in that court with costs to the appellants. The appellants shall also have the costs of this appeal.

Dated and delivered at Nairobi this 17th day of October, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL