



REPUBLIC OF KENYA

IN THE HIGH COURT OF NAIROBI

CIVIL CASE 759 OF 1971

AMBALE.....PLAINTIFF

VERSUS

MASOLIA.....DEFENDANT

JUDGMENT

The Plaintiff in his plaint against the defendant claims that he, and I quote:-

“is the owner by birth right descending from his forefathers of a portion of land measuring 1/2 acre of land registered under the land Registration Act Laws of Kenya as Parcel No 1917 Ebusikale in West Bunyore Kakamega District comprising two acres or thereabouts.”

It is admitted by the Plaintiff in his plaint that “In the year 1964 Land Consolidation was declared in the Plaintiff’s Location” and that by then he was on official transfer duty in Lugari Division of Kakamega District, which is his District. The plaintiff then in his plaint went on to complain and aver that

“During the period of Land Consolidation the Defendant used his position as a Pastor or Church leader and despite the representation of the plaintiff’s wife, Liguru and the President of the Land Committee in his area the Defendant represented himself to the Land Survey people or those concerned with the surveying, drew the map of Ematenji Church on a single page and in consequence this land consolidation proceeded and his land was combined with that of the Church to be known as Parcel No 1917 Ebusikale in West Bunyore Kakamega District.”

The Plaintiff went on to complain and aver in his plaint that

“Contrary to the Plaintiff’s birth right recited hereinbefore and without the Plaintiff’s consent or knowledge and or that of the Plaintiff’s representatives aforesaid and in fraud of the Plaintiff’s right at the time of allocation of the land now known as Parcel No 1917 Ebusikale in West Bunyore Location Kakamega District by the relevant authority had the same registered in the name of Ematenge Church of God Church who holds the title thereof in that name exclusive of the Plaintiff under the Registered Land Act Laws of Kenya Revised Edition.”

The plaintiff went on to aver that the defendant had no right to combine his land with that of the said Church without the plaintiff’s consent.

There is no dispute that the piece of parcel of land No 1917 is registered in the name of Ematenge Church of God as is evidenced by Ex 1 which was handed into Court with the consent of Mr Khaminwa for the plaintiff and Mr Wako for the defendant. In fact this is the plaintiff’s complaint that he is not mentioned as a co-owner or having any right title or interest in this very piece of land. Mr Khaminwa was not

prepared however, to admit, when asked by the Court, that the registration of the Ematenge Church of God of which the defendant is a pastor was the first registration under the Registered Land Act (Cap 300). There can, however, be no doubt that the registration of the Ematenge Church of God was the first registration under the Registered Land Act from the very wording and nature of the plaintiff's complaints and averments contained in his plaint, which admittedly could, I think, have been drafted with more clarity.

The preliminary points which I now have to decide were first raised in the defence of the defendant in paragraph 7 of the defence and by order of this Court of July 28, 1975, the points raised in paragraph 7 of the defence were to be listed for disposal before the main hearing and Mr Wako advocate for the defendant was to supply Mr Khaminwa, advocate for the plaintiff with more particulars of the points which he did by letter of February 4, 1976 wherein it is stated, *inter alia*:-

“1. The above mentioned action does not lie because the machinery provided by Statute has not been exhausted. In particular, the Plaintiff does not show that the Plaintiff exercised his legal rights conferred on him by Section 17 and 26 of the Land Consolidation Act AND/OR sections 21, 22, 26 and 29 of the Land Adjudication Act.

2. Without prejudice to (1), the above mentioned action does not lie in view of the provisions of the Registered Land Act and in particular S 143 of the said Act as the Plaintiffs action is against the First Registration. Further the Plaintiff does not show in the Plaint that he exercised the legal rights conferred on him by S 150 of the Registered Land Act. In any event, the institution of this suit does not comply with the said section.

3. Without prejudice to (1) and (2), the suit does not lie as the plaint and the particulars supplied by the plaintiff do not disclose fraud.”

At the commencement of the argument of the preliminary points Mr Khaminwa argued that Mr Wako must confine himself to paragraph 7 of the defence as pleaded. Mr Khaminwa went on to argue that the further particulars given by letter of February 4, 1976, on the order of this Court went beyond what had been pleaded. By this I understood Mr Khaminwa to say that Mr Wako could only prefer me to the provisions of the Registered Land Act in arguing his point of law.

Mr Wako pointed out that the further particulars of his points of law taken had been ordered by the court”– in the order of July 28, 1975, and in any event on a matter of law one did not have to confine oneself to any one particular Statute and that in fact all Statutes that could show that a suit was improper or misconceived or did not lie was relevant and should be brought to the attention of the court. Mr Wako went on to say that a preliminary point of law need not be pleaded in the pleadings and that any point of law raised need not be pleaded. I allowed Mr Wako to plead his points of law in full and at length. (If I may, I would remark that I do think it courteous to one's opponent to give him details of any point of law to be taken, so time is not wasted at the hearing).

Mr Wako during the course of his arguments most helpfully took the court through the relevant acts and sections of such acts and sections of such acts showing the procedure applicable to land, which is to become first registered under the Registered Land Act. I do not propose to record the procedure in this ruling since it can be found and read in the relevant acts.

The allegations in this case made by the plaintiff in his plaint relate to the period prior to the first registration of the property. There is no allegation that the proper procedure was not carried out by the authorities concerned so that as far as this matter is concerned the *omnia praesumunter rite esse acta* rule applies. There are provisions provided in the procedure before first registration for an aggrieved person to take steps, if he so wishes, but there is nothing to suggest in the plaintiff's pleadings that any advantage was so taken by him and denied him.

The plaintiff instead brings this action against the defendant.

It is one point of Mr Wako for the defendant that this action does not lie because the machinery provided by Statute has not been exhausted and in this regard I was referred to the case of *Odhiambo v Odinyo and Another* [1973] EA 416. I note this point, but find from what follows herein that I need not make a ruling on this point.

The second point taken by Mr Wako was that this action does not lie in view of the provisions of the Registered Land Act Section 143 as the plaintiff's action is against the first registration which provides in section:-

“143 (1) Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

It was Mr Wako's argument that rectification of a register may be made by directing that any registration be cancelled or amended, except in the case of first registration and in this regard reference was made to the case of *Obiero v Opiyo and Others* [1972] EA 227 where in the headnote it is said:-

“HELD: (1) even if fraud had been proved the plaintiff's title was indefeasible as it was a first registration”

and in the judgment of Bennette, J it is said and I quote:-

“No serious attempt has been made by the defendants to prove the allegation in para 8 of the defence that the plaintiff had the land registered in her name by concealment of false representation of material facts. I am not satisfied that the plaintiff obtained registration by fraud or by mistake. Even had she done so, it would seem from S 143 (1) of the Registered Land Act (Cap 300) that her title would be indefeasible since this was a first registration. It is plain from the evidence that before the plaintiff's title was registered, there had been conflicting claims to the land which were determined in her favour by a land Adjudication Committee.”

Bennett, J's remarks to the effect that even if the plaintiff in that case had obtained first registration by fraud or mistake the plaintiff's title would be indefeasible may well be *obiter*, but I am of the opinion and find in this case that even if fraud or mistake is shown, as is alleged, the title of the Ematenge Church of God on a proper construction of Section 143 of the Registered Lands Act is indefeasible.

Mr Khaminwa in his opening reply to Mr Wako said he had 3 points namely:-

1 Customary rights, which he conceded later were not overriding on the authority of *Esirayo v Esiroyo and Another* reported in 1973 EA 388 at page 390 from which I quote:-

“The matter is taken out of the purview of customary law by the provisions of the Registered Land Act. The Plaintiff is the registered proprietor of plot 309. The rights of the defendants under customary law have been extinguished. S 28 of the Registered Land Act confers upon the registered proprietor “a title free from all other interests and claims whatsoever” subject to the lease, charges and encumbrances shown in the register and such overriding interests as are not quoted in the register. There are no encumbrances noted on the certificate. The Plaintiff's title is free of encumbrances. Rights arising under customary law are not among the interests listed in S 30 of the act as overriding interests.”

2. Fraud – I find by Section 143 (1) of the Registered Land Act supported by the dictum of Bennett, J in the case of *Obiero v Opiyo and Others supra* that even if fraud is shown the title of the Ematengi Church of God in this case is indefeasible since it is a first registration under the Registered Lands Act, and I so rule; and

3. That he was asking for a declaration that his client was a lawful owner of the land in question.

In the prayer to the plaint the plaintiff is asking for a declaration that he is a beneficial owner of the undivided 2 acres as tenant in common in respect of Parcel No 1917 Ebusikale West, Bunyore in Kakamega District, and a vesting of such rights title and interest in the plaintiff by registration in due course of law.

It is Mr Khaminwa's argument that this action can be brought and maintained by the Plaintiff against the defendant by reason of the defendant's alleged fraud, particulars of which were supplied when asked for and are in the file, but by the provisions of section 143 of the Registered Land Act and the dictum of Bennett J in the case of *Obiero v Opiyo and Others supra* I find that this is not so. It appears to me that the Plaintiff has brought this suit against the defendant in an attempt to circumvent the procedure provided before first registration for the purpose of first registration and the aims and objects of such procedure. For the reasons already previously given in this ruling I find that this suit is improper and misconceived and cannot be brought against the defendant in an endeavor to obtain the declaration asked for or the vesting order also asked for. The Plaintiff's suit is accordingly dismissed with costs to the defendant.

Dated and Delivered in Nairobi this 20th day of February 1976.

J.H.S.TODD

JUDGE