SAUL KUREBA v GANIZANI GOMA AND ATTORNEY GENERAL (1995) S.J. 5 (S.C.)

SUPREME COURT
GARDNER, SAKALA AND MUZYAMBA, JJ.S.
22ND NOVEMBER, 1994 AND 23RD FEBRUARY, 1995.

Flynote

Land - Disposition - Status of squatters on the land - Who has power to allocate land - Intention of Commissioner of Lands in making allocation of land.

Headnote

The appeal against ruling by the High Court Commissioner that a certificate of title was issued in error and that the Commissioner of Lands 15 at liberty to cancel same or replace it. The Commissioner of Lands entertained belief that appellant's application related solely to portion of land occupied by him. Land reserved for squatters and allocation thereof to appellant erroneous.

Held:

(i) Doctrine that purchaser of land entitled to evict squatters when he obtained title does not apply in this case. The only consideration is the intention of the Commissioner of Lands when a first certificate of title is granted and he has the right to limit the extent of land granted as well as the right to order rectification of the register.

(ii) The error that occurred in this case was one of those capable of rectification under s.11 of the Land and Deeds Registry Act Cap.287.

For the Appellant: K. M. Maketo of Christopher Russel Cook and Co.
For the first respondent: No appearance by Legal Aid Counsel
For the second respondent: No appearance

Judgment

GARDNER, J.S.: delivered the judgment of the court.

There being no appearance on behalf of the respondents this appeal was heard in their absence under the provisions of Rule 71 (1) (b) of the Supreme Court Rules.

This is an appeal from a review of a judgment by the High Court. The facts of the case are that the appellant, the first respondent and another were squatters on land which was a small part of a large agricultural holding which had been repossessed by the government. After repossession of the land it was sub-divided into small plots and the plot which the appellant and the others were squatting was designated as No. 4419/M. On the 2nd September, 1985 the appellant wrote to the Acting Commissioner of Lands a letter which read in part as follows:
"Dear Sir

RE: APPLIATION FOR A FARM LAND

I wish to apply for a 7 hectare farm land on former farm 15a the area bordered red on the attached plans.

> The said farm has been mine for over ten years and I am now very serious to go into farming to expand and diversify my business from Musami Butchery which is wholly mine in Matero and Mwanachingwala Butchery Cairo Road, of which Iam a shareholder....."
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> The appellant was advised to make his application throuh the District Council and such an application was accordingly made. The land referred to in the application was the whole of the plot marked 4419/M. This plot was then the subject of a preliminary survey and estimated to contain 14 hectares. The Commissioner of Lands approved the application and a fourteen year lease was granted to the appellant with effect from 1st September, 1988. During the perod of that lease the appellant arranged for a proper survey, as a result of which the area was found to be 16.027 hectares. He then applied for and was granted a 99 year lease for which a Certificate of Title was issued on the

25th June, 1991. After the issue of the Certificate of Title the appellant issued an originating summons supported by his affiidavit sworn on the 7th October, 1991 asking for an order for vacant possession against the first respondent. Both the squatters then made a complaint to the Commissioner of Lands that they were being dispossessed of land upon which they had been squatters for a longer period than had the appellant. The Commissioner of Lands called for the appellant to appear before him to consider the proper disposition of the land. The Legal Practitioner for the appellant saw the Commissioner of Lands and pointed out that the matter was sub-judice in the High Court, and, consequently, the appellant did not appear at the meeting with the Commissioner of Lands.

The originating summons then came on for hearing before a High Court Commissioner but no notice of hearing was given to the Commissioner of Lands, who was not then a party. It was alleged by the counsel for the first respondent that the Certificate of Title had been obtained by fraud. The affidavit in opposition to the originating summons referred to various documents which were not produced to the High Court Commissioner. The learned trial Commissioner found that no fraud had been proved and that the Title of the appellant under the Certificate of Title must stand.

The Attorney General then applied to be joined as an intervening party to represent the interests of the Commissioner of Lands. This application was granted, and, at the reading the affidavit in support of the case for the Commissioner of Lands and after hearing fresh evidence, the learned High Court Commissioner reviewed the original judgment and made an order finding that the Certificate of Title was issued in error and that the Commissioner of Lands be at liberty to cancel it and issue another one. It is against that order that the appellant now appeals.

Mr Maketo on behalf of the appellant argued a number of grounds of appeal. the first three grounds of appeal were that the Commissioner of lands had committed no error which warranted rectification, that in fact the evidence showed that all necessary procedures prior to the granting of the certificate were carried out and there was no manifest error in any of the documents. In this connection it was urged by Mr Maketo that there was no law that squatters rights should be considered by the Commissioner of Lands when granting certificates of title, and that, in this case, the first respondent and the other squatter were illegal settlers who had no rights to be protected and no interest to contradict the finality of the issue of the Certificate of Title which provides a good title against all other claimants. He maintained that the other parties could have applied for Title to the Land, and, as the appellant was the first and only person to apply for the land, he was entitled to it. He urgued that when a person applied for

and obtained title to land which had squatters on it he was entitled to evicr the squatters.

Mr Maketo alleged that there was bad faith on the part of the Commissioner of Lands who, he said, had acted ultra vires. He pointed out the fact that in his evidence the Commissioner of Lands had said that when a plot had been numbered the applicant could not add to or subtract from the area of the plot. He pointed out that, the appellant swore an affidavit alleging that it was the intention of the Commissioner of alienate a portion of the farm upon which marble had been found to inspectors who were represented by a Dr Wisneski. *

Finally, Mr Maketo argued that the Commissioner for Lands was not the apropriate person to have taken steps to rectify the register nor should he have been ordered to do so by the learned trial Commisssioner. He pointed out that under Section 11 of the Lands and Deeds Registry Act, Cap. 287, it is for the Registrar to deal with the rectification of the register. He maintained that the official for whom the Attorney General intervened should have been the registrar, and not the Commissioner of Lands.

In considering the arguments put forward so ably by Mr Maketo we have taken into acoount the trial evidence and the affidavits filed in the court below. As to whether or not there was an error which warranted correction under section 11 of the Act, we note that min the affidavit of the Chief Lands Officer, Mr. Nkunika, he ###### that there were three squaters on plot 4419/M; that initially the appellant was not among the squaters but after the death of a member of his family he came into occupation of part of the plot; that when a recommendation in favour of the appellant was received from the council the application was considered and approved by the Commissiner mof Lands in the genuine belief that the application strictly to the portion of land which the applicant occupied. As no physical inspection was conducted by the Commissioner to ascertain the exact portion occupied by the plaintiff, plot 4419/M was offered to the plaintiff on a 14 year lease in mthe best belief that the portion for which he obtained title did not encroach on land occupied by the other two squaters. He said that the appellant chose to live in with theother two squaters until he obtained the 99 year lease. The affidavit also contained an averment that the respondent's land included an orchard dwelling house and that the other squaters' land consisted of fields. In oral evidence this witness said that the land allocated to the appellant was reserved for squatters and that the application to the Council should have indicated that there were other squatters on the land applied for by the appellant. He said that it was a mistake for a lease to be issued comprising the whole of the land on the plot.

In her judgment the learned trial Commissioner accepted the evidence of Mr Nkunika that it was not intended to grant to the appellant title to any land upon which there were other squatters. It is clear from the finding of the learned trial Commissioner that no mala fides on the part of the Commissioner of Lands or his staff were established before the trial Commissioner. So far as the finding of marble on the land is concerned, this was raised in cross-examination of Mr. Nkunika, and he replied that the finding of marble had nothing to do with the question before the court because the question was one of allocating of the land to squatters.

If the Commissioner of Lands had the intension of allocating the land, which he said was intended for the respondent and the other squatter, to other parties, who were prospecting for marble, this would be an indication of mala fieds on the part of the Commissioner of Lands, but the learned trial Commissioner accepted that the intention of the Commissioner of Lands was to grant title to the other two squatters on the land and not to other parties who were prospecting for marble.

This case depends entirely on whether the Commissioner of Lands had power to decide to grant the land in question to those who were squatting ot it and if so, whether it was his honest intention in this case to grant to the appellant any land upon which there were other squatters at the time of the grant.

It was argued that the Council had approved the granting of the whole of plot 4419/M and that after their approval the Commissioner of Lands had no right to alter the hectarage of land granted to the appellant. The evidence indicated that the Council's function was to approve the character of the applicant and to indicate its approval of the grant of the plot in question. It was within the power of the Council to issue title to any land. This was the function of the Commissioner of Lands, and the evidence was that the final question of the extent of the land to be granted and persons to whom it should be granted was in the sole discretion of the Commissioner of Lands guided by the approval of the council. The Commissioner of Lands was therefore the proper authority to decide the extent of the land granted to the appellant.

The evidence of Mr Nkunika made it clear that it was the intention of the Commissioner of lands to grant land to squatters and there is nothing to suggest that the Commissioner of Lands had no power to make such a decision. The same evidence also makes it clear that it was the intention of the Commissioner to grant to the appellant only such land as he was occupying as a squatter. It was not necessary for the Commissioner of Lands to be aware of the existence of the other squatters at the time he made the allocation to the appellant. The position was that he intended to grant to the appellant, as a squatter, the land which he was in fact occupying, and no ther. Had the Commissioner known at the time of the existence of the other two squatters on the land marked on the plan as 4419/M, the evidence was that he would not have issued the Certificate of Title for the whole of the plot to the man. The learned trial Commissioner chose to believe this evidence and we can see no reasson why we should interfere with that finding.

The argument that a purchaser of land which has squatters on it is entitled to evict the squatters when he obtains the title does not apply in this case. The only consideration is the intention of the Commissioner of Lands and it is quite clear from the evidence that it was not that any other squatter on plot 4419/M should be evicted in favour of the appellant. The situation in this case was that all three squatters originally had not title to be on the land and it was not the intention of the Commissioner of Lands that the first applicant for the land should obtain title against the interest of the other two squatters.

We should make it clear that we agreed with the proposition that, in the ordinary way, one purchaser of land who acquires a Certificate of Title has a right to possession against all other persons on the land he has acquired, but, where a first certificate of Title is granted, the intention of the Commissioner of Lands is paramount, and he has the right to limit the extent of land granted to any applicant. He also has the right, to order rectification of the register if, as in this case, he discovers that the Certificate of Title which is issued does not limit the extent of the grant as he intended.

So far as the question of whether or not the error in this case is the type of error for which the register can be rectified, we have not doubt that, if the Commissioner of Lands intends to grant title to all the squatters who may be on a certain piece of land and a Certificate of Title is issued to one of the squatters, giving him possession of the whole of the land, this is the type of error that can be rectified under section 11 of the Lands and Deeds Act, Cap. 287. Section 11 (1) reads as follows:

> "Where any person alleges that any error or omission has been made in a register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactorily proved, correct such

error, or omission or entry as aforesaidd."

This means that the Commissioner of Lands may allege, as in this case, that an entry has been made in the register by mistake, and the Registrar shall, if satisfied, correct such entry. The Commissioner derives his authority to make grants of land from the Zambia (State Lands & Reserves) Orders 1928 to 1964 section 6, which gives power to the President to make such grants, and Statutory instrument No. 7 of 1964 whereby such power was delegated to the Commissioner of Lands. It follows, therefore, that the Commissioner had the power to make the grant in this case and to order the registrar to rectify the error in the registry when he found that a mistake had been made. Although Mr Maketo has argued that the Registrar should have been made a party to the action and should have been the one who was ordered to rectify the register, there was in fact no order for rectification of the Register in this case. The appellant had applied by way of originating summons for vacant possession of the land, no objection was taken to the form of action and, in the result, the learned trial Commissioner dismissed the application. For the record, however, we find that there would be no impropriety in an order by the Commissioner of Lands that his junior officer, the Registrar, should rectify the register to put right a mistake made in terms of section 11 of the Lands and Deeds Registry Act.
For the reasons we have given the appeal is dismissed with costs to the respondents.

Appeal dismissed
