

UGANDA / JUDGMENT

Alibhai v Alibhai (Civ. App. No. 12/1937) [1938] EACA 1 (1 January 1938)

[1938] EACA 1

COURT

East African Court of Appeal

BEFORE

Francis, Ag. C.J. (Uganda), Law, C.J (Zanzibar),
Sheridan, (C.J. Kenya)

CASE / FILE NUMBER

Civ. App. No. 12/1937

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR JOSEPH SHERIDAN, C. J. (Kenya); SIR CHARLES LAW, C. J. (Zanzibar); and FRANCIS, Ag. C. J. (Uganda).

TAYEBALI ADAMJI ALIBHAI, Appellant (Original Plaintiff) v.

ABDULHUSSEIN ADAMJI ALIBHAI, Respondent (Original Defendant).

Civ. App. No. 12/1937

(Appeal from decision of Lucie Smith, J. (Kenya)).

Title to land—Registered land—Certificate of ownership—Easement -Prescription-Proof of title-Evidence-Limitation Ordinance, 1934, sec. 41—Land Titles Ordinance, Cap. 143—Registration of Titles Ordinance, Cap. 142.

In 1923 the plaintiff became the registered owner of the whole of plot 415 of section V, Mombasa, and the defendant became the registered owner of the whole of the adjoining plot No. 416. The said plots were separated by a wall. For many years prior to 1915, a staircase leaning against the said wall, and a wooden landing and balustrade which together gave access to the upper portion of the house built on plot No. 416 encroached on part of plot No. 415.

From 1893 both plots were held by one A, the father of the parties. In 1915 as a result of proceedings for partition the plaintiff joined in a conveyance to the defendant of the lands now comprising plot No. 416 "together with all buildings, erections, fixtures and trees thereon and all rights, easements, advantages and appurtenances whatsoever to the said hereditaments appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant

thereto", and the defendant joined in a similar conveyance of the lands, etc., now comprising plot 415 to the plaintiff.

In 1923 certificates of ownership in respect of their respective properties were granted to the plaintiff and defendant under the Land Titles Ordinance, 1908.

The plaintiff claimed (1) an order that the defendant do pull down and remove the said staircase and the wooden landing and balustrade or so much of each of these as are beyond the boundary line between the plots 415 and 416 and thus form an encroachment in the plaintiff's land and the plaintiff's portion of the wall between the said plots; (2) vacant possession of the area of the plaintiff's land and possession of the plaintiff's wall encroached upon by the retention and use of the said staircase, wooden landing and balustrade.

The defendant counter-claimed for a declaration (1) that the defendant is entitled to the land on which the said staircase, etc., stand and overhang; or (2) that the defendant has acquired an easement in respect thereof and of the plaintiff's wall against which the staircase stands.

The Supreme Court dismissed the claim and allowed the counterclaim by declaring an easement to exist.

The plaintiff appealed.

Held \$(24-2-38)\$.—(1) That certificates of ownership issued under the Land Titles Ordinance, Cap. 143, must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein.

- (2) That no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of certificate.
- (3) That the period of prescription applicable to the case is that prescribed by section 41 of the Limitation Ordinance, 1934, namely twenty years.

Budhdeo for the appellant.

Sethna and Doshi for the respondent.

Budhdeo.-The certificates of title are conclusive evidence of title against all persons, section 21, Cap. 143, Laws of Kenya. Rights of persons other than the person to whom the certificate is issued must appear on the certificate, sec. 27, Cap. 143. The respondent has no certificate of interest, section 20, Cap. 143.

A certificate of title is a grant under the Registration of Titles Ordinance, Cap. 142, section 2, and is conclusive, section 23.

Registration of grants issued after 1919 is compulsory, section 20, Cap. 142.

The applicable prescriptive period is 20 years under the Limitation Ordinance, 1934, section 41. It runs from the date of certificate of title. Even if it commenced in 1915 the period had not expired on 19-12-34 which is the date, the plaint was filed.

He referred to *Suleman Virji and Sons v. Abdurehman bin Mohamed Afua* (9 K. L. R. 167); *Belize Estate and Produce Co. v. Quilter* (1897 A. C. 367); *Land Registry Ordinance*, Vol. 2, *Laws of Tanganyika*, p. 643 and on the question of costs to *re Reid Hewitt and Co. v. Joseph* (1918 A. C. 717).

Sethna.—Respondent claims easement by implicit term, arising from the general words of the conveyance. That which was enjoyed before 1915 became an easement on the execution of the conveyance. Appellant's suit is for possession of land and is subject to section 10 of the Limitation Ordinance, 1934. Time began to run in favour of the respondent from the date of the conveyance.

The easement claimed is not an interest in land. He referred to *Belize Estate and Produce v. Quilter* (supra); *Henry William Farrar v. Yusufali Abdulhussein Adamii* (16 K. L. R. 40); *Kooystra v. Lucas* (106 E. R. 1394); *Kay v. Oxley* (10 Q. B. 360); *Bayley v. G. W. Railway Co.* (26 Ch. D. 434); *Barkshire v. Grubb* (18 Ch. D. 616); *Simpson v. Weber* (133 L. T. 46) and on the question of costs to *Bird v. Standard Oil Co. of Canada, Ltd.* (114 L. T. 316).

Budhdeo replied.

Sir Joseph Sheridan, C. J.—This appeal in the view I take of it may be disposed of in a short judgment. Once it became clear that what was in dispute was something which required a certificate under the Land Titles Ordinance to support it and that the respondent was not possessed of such a certificate the appellant was bound to succeed. It is not a mere right over property but "immovable property" as defined in the Land Titles Ordinance that is in dispute and in as much that property is included in the Certificate of Title of the appellant and excluded from that of the respondent no claim to it can be recognised. In view of what I have said it is not strictly necessary to examine the correctness of the decision of the learned trial Judge on the basis of his finding that what was in dispute was an easement acquired by prescription. He found that the period necessary for the acquisition of a title was 12 years. Counsel before this Court were agreed that this was incorrect, that in view of section 41 of the Limitation Ordinance, 1934, the correct period was 20 years. Had what was in dispute been an easement this would have been of importance only on the assumption of the soundness of Mr. Sethna's argument that the period for the purpose of acquiring a prescriptive title ran from the 18th January, 1915, the date of the partition conveyance; for since the suit was filed on the 19th December, 1934, the respondent could not have acquired a title by prescription against the appellant on that date. I think it desirable to say that on any view of the case, I find myself in agreement with Mr. Budhdeo's submission that initial registration under the Land Titles Ordinance must be taken to be the foundation of title and that the certificates of title issued thereunder must be regarded as conferring an absolute and indefeasible title to the property referred to therein and subject to no other interests than those mentioned therein (and there are none). Hogg at page 85 of his book "Registration of Title to Land throughout the Empire", says "In most jurisdictions initial

registration overrides title by possession already in existence", and at page 74, "In some jurisdictions the Statutes expressly save the rights of persons in possession of land from the 'wet sponge' effect of registration". In Tanganyika for instance the Legislature thought fit to enact in section 44 (3) of Cap. 70 of the Laws of Tanganyika that "The estate of the first registered owner of land is subject to any estate adverse to or in derogation of his title and subsisting or capable of arising at the time of first registration". No such legislation has been enacted in Kenya. It seems to me that any suggestion that any period prior to the date of registration could be relied on for the purpose of acquiring a title by way of prescription would be tantamount to saying that the appellant did not have a title of an absolute and indefeasible character, thus flying in the face of section 21 of the Land Titles Ordinance. If further reason were needed in favour of the appellant, I should be prepared to agree with Mr. Budhdeo that there could be no question of the respondent acquiring a title by prescription against him, as the appellant was not adjudged to possess the property in issue until he obtained the certificate of title in September, 1923. As Pickering J. said in the case of *Suleman Virji v. Abdulrehman bin Mahomed Afua* (9 E. A. L. R. 167), "the whole machinery of the Land Registration Ordinance fails unless full recognition is given to the indefeasibility of grants".

In coming to a decision in this appeal, I have been exercised by the judgment of the Privy Council in the case of **Belize Estate and* Produce Co. v. Quilter* (1897 A. C. 367). The expression in the judgment that "Their Lordships are unable to discover either in section 30 or in any other clause of the Act, a single expression that the Legislature meant to deal with any question of possession", at first suggests that a title by way of adverse possession might be acquired

by taking into consideration a period of possession prior to registration. But bearing in mind the cardinal principle that the case can only be regarded as an authority for what it actually decided one refers to the specific question that the Privy Council were called upon to decide, viz. whether twenty years possession commenced subsequently to registration of the appellant's title established a title adverse to the registered owner. The dictum of Lord Watson who delivered the judgment of the Board must therefore be limited to that specific question and when he spoke of possession he must be deemed to have referred to possession subsequently to registration which was the one question calling for decision. At page 372 of the judgment there is an expression which also leads me to the conclusion that the application of the Act of Limitation refers to possession as from the date of registration; it reads: "a person who, without title, has been in adverse possession of registered land for upwards of twenty years", the suggestive words being to my mind registered land. Then again in the statement of the case at the beginning of the report there is reference to "exempting a registered owner from the operation of the Statute" of Limitations on his registered title". For these reasons, I am of the opinion that the acquisition of a title against the registered owner by adverse possession must be taken as connoting such possession as dates from the granting of the certificate of title. This being so, section 10 of the Limitation Ordinance, 1934, cannot assist the respondent.

I would allow the appeal with costs in this Court and the Supreme Court.

Sir Charles Law, C. J.—Certificates of Ownership, a form of Certificates of Title, were granted to the appellant and respondent in September, 1923, in respect of adjoining lands (section 20 (2) (a) Land Titles Court Ordinance Cap. 143). Such certificates are conclusive proof of everything included therein, and conclusive evidence against all persons for that purpose (section 21).

The respondent's claim to the staircase, wooden landing and balustrade in suit, so far as they affect appellant's land, amounted to a claim to an interest in immovable property which he should have put forward before the Certificate of Ownership was granted to the appellant (section 15 (2) (b)). It was a claim to an interest based on a contract; a partition made in 1915. Had respondent established that claim at the proper time he would have been granted a Certificate of Interest (section 20 (2) (c)). He did not do so, and consequently cannot now put it forward. In view of the definition of the word "Grant" in section 2, Registration of Titles Ordinance, Cap. 142, the Certificates of Ownership above referred to became Certificates of Title for the purposes of Cap. 142, and, by reason of section 23 thereof, both appellant and respondent became proprietors of their respective lands as absolute and indefeasible owners as from the respective dates in September, 1923, when their Certificates of Ownership were granted to them. And because of the definition of the word "land" also in section 2, Cap. 142, there can be no doubt that the respondent's claim to an interest in appellant's land became absolutely extinguished. No fraud or wrongdoing has been suggested against appellant, and consequently the respondent cannot attack or go behind appellant's title.

It would seem, therefore, that only after September, 1923, could respondent gain an adverse title by possession against appellant's registered title.

This action was filed by appellant in December, 1934. Obviously, by that date, it had not been possible for respondent to have had exclusive enjoyment of the staircase, etc., for the necessary prescriptive period of 20 years (section 41, Limitation Ordinance, 1934.) nor for the period of 12 years (section 10, Limitation Ordinance, 1934,) to entitle him to resist appellant's entry on his own land to recover that staircase, etc., and the land on which it stands. In the circumstances. the appeal should be allowed and judgment entered for the appellant as prayed for in paragraphs (i) and (ii) of his plaint. The appellant should have his costs in this Court and in the Court below.

Francis, Ag. C. J.—Judgments read by President and Sir Charles Law, Chief Justice, Zanzibar, with which I concur.

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Prepared on 14 October 2026 · Esheria