

UGANDA / JUDGMENT

Vellani v Khamis and Others

(Mombasa Civil Case No. 32 of 1944)

[1945] EACA 67 (1 January 1945)

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COURT

East African Court of Appeal

BEFORE

Thacker J

CASE / FILE NUMBER

Mombasa Civil Case No. 32 of 1944

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ORIGINAL CIVIL

Before THACKER, J.

MRS. SHIRIN VELLANI, Plaintiff

 $\mathbf{v}$.

(1) OMARI BIN KHAMIS, (2) TAHIBU BIN KHAMIS, (3) FATIMA BINTI KHAMIS, (4) MWANA ESHA BINTI KHAMIS, (5) BURHANI BINTI KHAMIS, Defendants

Mombasa Civil Case No. 32 of 1944

Sale of land—Undivided share—Caveat—Agreement between purchaser and other co-owners not to object to caveat pending subdivision—Breach of agreement -Specific performance.

The facts are fully stated in the judgment.

Held (19-9-45).—That a person claiming ownership of a piece of land whether surveyed or unsurveyed, under a contract of sale, has an equitable right entitling him to lodge a caveat to protect such interest.

Hassan for the Plaintiff.

No appearance for the first defendant.

D. D. Doshi for Defendants 2, 3, 4 and 5.

JUDGMENT.—This action was commenced before me on the 7th of March, and judgment was reserved on the 7th September. It is unfortunate that actions like this are protracted, but one of the reasons has been attempts at settlement. The action has not been distinguished, if I may say so, for its adherence to orthodox procedure. Arguments upon law were addressed to me, at the commencement, upon the interpretation of certain documents which had not been then exhibited, and it was not until I protested, that I should like to see the documents upon which I was asked to interpret, that evidence was led and the documents put in as exhibits. After that there was more legal argument.

The plaintiff is suing the five defendants for specific performance of an agreement which she entered into with them on 20th April, 1944. The five defendants are co-owners as tenants in common of a piece of land at Kanamai containing 11.63 acres, being plot No. 250 of section 3 which is registered in the office of the Recorder of Titles, Mombasa. By the said agreement, the plaintiff purchased from the first defendant his share in the land, i.e. an undivided two-sevenths share ... By the same agreement, the first defendant undertook to obtain the consent of the remaining defendants to the lodging of a caveat by the plaintiff against the said piece of land until such time as the land should have been subdivided. By the said agreement, it was also provided that the plaintiff's portion of the land was to have a sea frontage. In pursuance of the said agreement, all the defendants entered into an agreement with the plaintiff under seal dated 4th May, 1944, for a consideration therein appearing that the first defendant was to transfer to the plaintiff his share in the land, and secondly, that the remaining four defendants in the deed consented to this transfer by the first defendant and also agreed to the lodging of the caveat against that portion of the land until subdivision took place. The first defendant duly executed a transfer of all his right, title and interest in the piece of land to the plaintiff. The plaintiff then in pursuance of the agreement under seal of 4th May, lodged a caveat against the title in the said piece of land on the 12th June, 1944. The defendants thereafter objected to the lodging of the caveat and called for its removal. This the plaintiff has refused to do and this is one of the issues which have come before the Court. The plaintiff claims specific performance of the agreement under seal of 4th May, 1944, and further claims that the defendants 2 to 5 be ordered to withdraw their objections to the plaintiff's caveat.

It may be mentioned that the first defendant has not entered an appearance and is not defending this action. The defence of defendants 2 to 5 is that when they signed the agreement which contains their consent to the caveat, they were not aware of the fact that the agreement contained any such undertaking by them. They further say that when they signed the agreement, they were given to understand that they were giving their consent only to the proposed sale by the first defendant of his share to the plaintiff, and to nothing more.

There are two other legal defences. First, that the plaintiff is not entitled to lodge any caveat by reason of section 56 (1) of the Registration of Titles Ordinance, and secondly, that the caveat purports to create a restriction on any alienation of the property for an indefinite and unascertained period.

Evidence has been heard as to the allegation that the defendants 2 to 5 did not know the nature of the document they were signing and particulars were ordered as to the allegation of misrepresentation. These particulars which were filed on 5th May, state that one of Mr. Hassan's clerks gave them to understand in Kiswahili that the defendants were giving their consent only to the proposed sale. They were—so they say—not aware of the name of such clerk. However, the second defendant who gave evidence on his own behalf and presumably on behalf of the remaining three defendants, testified that no clerk of Mr. Hassan. at the meeting in Mr. Hassan's office, spoke to them in Kiswahili, or in any other language, and that no clerk gave them to understand that they were giving their consent only to the proposed sale. He admits that neither he nor any other defendant asked for the document to be read to them or translated to them and that there was nothing to prevent him or them doing that. He further states that it was the plaintiff's husband, Mr. Vellani, who read the document. There is, therefore, a strange inconsistency between the second defendant's evidence and the particulars filed. Mr. Vellani, on the other hand, says that the document was read out by Mr. Hassan's clerk, Mr. Gulamali, and translated to them by Gulamali. He. Vellani, was present when the document was signed by the defendants and when it was read over to them in Kiswahili.

I have no hesitation in accepting Mr. Vellani's evidence as against that of the second defendant who may quite well have forgotten what did take place before the defendants signed the document. In any case the defendants signed the document and they cannot now be heard to say that they did not know what they were signing. If it be a fact that the document was not read out or translated, they must be taken to have signed the document at their own risk. For my own part, I am reasonably sure that the defendants 2 to 5 did know to what they were putting their thumb marks.

The next defence is based on section 56 (1) of the Registration of Titles Ordinance, Cap. 142, which reads as follows: -

"Any person claiming an interest in any land, that is to say, some defined right relating to such land and not dependent solely on a personal or collateral contract, or if such person is a minor or of unsound mind the guardian, next friend or other person appointed by the court to act on behalf of the minor or person of unsound mind in the matter, may lodge a caveat with the registrar of the registration district within which such land is situated to the effect that no disposition of such land be made either absolutely or in such manner and to such extent only as in such caveat may be expressed, or until notice shall have been served on the caveator or unless the instrument of disposition be expressed to be subject to the claim of the caveator as may be required in such caveat, or to any conditions conformable to law expressed therein."

Mr. Doshi states that the plaintiff has no caveatable interest, as her right, if any, arises from exhibit A which is a personal contract, as he says. He says it is a personal contract so far as defendants 2 and 5 are concerned, and it may be collateral as far as the first defendant is concerned. I do not believe that this argument is sound. In my judgment, a person claiming

ownership—(note the word "claiming")-of a piece of land (as the plaintiff-does in this case), surveyed or unsurveyed, under a contract of sale, has an equitable right which is, in my view, a defined right within the meaning of section 56 (1). Accordingly the plaintiff is entitled to enter a caveat. It is, I believe, a settled practice that where a contract of sale is entered into in respect of a portion of land, the title being registered under the Registration of Titles Ordinance, the purchaser may enter a caveat to protect his equitable interest, because owing to the necessity of survey he cannot be registered as a proprietor. The principle of caveating is dealt with by Hogg (p. 1040) as follows: \$\$

"A caveat, though in one sense a statutory instrument, is not an instrument which purports to pass or create any estate, and the entry of the caveat on the register, is not spoken of as registration but as in the case of registration, the provisions of the statutes appear to regard a caveat as being entered on the register either in respect of some right to have an estate or interest which for the time being cannot be registered or for the protection of some person who cannot for the time being be registered as proprietor of some estate or interest."

The words, "not dependent solely on personal or collateral contract", in my view must mean such a contract as does not affect the land. In the case of Staples and Corby (Hogg, p. 1035), it was held that the covenant to deal with the plaintiff for beer was held to be a mere personal contract and not to be an actual interest in the land.

In my judgment the plaintiff has a caveatable interest and is therefore entitled to lodge a caveat. It may be mentioned that the caveat concerns only the plaintiff's portion of the land and that it does not prevent the defendants from dealing with their portions in the land, subject to the plaintiff's interest. Again, the defendants argue that the existence of the caveat creates a perpetual injunction against any alienation of the property or that this is a caveat for an indefinite time. I have been told in this connexion that survey of the land cannot be undertaken for something like 12 months owing to a shortage of surveyors and to the vast amount of work which they have to do at the present time. I can sympathize with this view of the defendants up to a point, but I repeat that the caveat does not prevent them from disposing of their own interest subject to the existing interest of the plaintiff. I think that the plaintiff should take steps to get the survey carried through in a reasonable time, and for this purpose I will give liberty to apply to both plaintiff and defendants. Meanwhile I shall order that the caveat do remain in force for a further period of six months.

I give judgment for the plaintiff and grant a decree of specific performance under clauses 2 \$(b)\$ and \$(c)\$ of the agreement under seal dated 4th May, and do order defendants 2 to 5 to withdraw their letter dated 8th September, 1944, written by them to the Registrar of Titles. The defendants are to consent to the remaining of the caveat upon the file against the title of the plaintiff's piece of land for a period, as I have said, of six months in order to give the plaintiff time to have the land surveyed and subdivided. If it is impracticable to get the survey carried through within that time, or if the survey is done before the expiration of six months, the plaintiff can apply under the order for liberty to apply which I have made. The defendants will pay the costs of this action.

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