**CIVIL APPEAL**

- **Does a possessor of land have a right which can be protected by law?**
- **Under what circumstances will appellant court interfere with trial court's finding of fact.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL APPEAL CASE NO. 90 OF 2009**

***Being an appeal from the decision/judgment of C.N. Ndubi Senior Resident Magistrate Chuka P.M.C.C. No. 23 of 2009)***

**BETHA KANINI BAINI ..... APPELLANT**

**VERSUS**

**AGNES ITHIRU NJOKA ..... RESPONDENT**

**JUDGMENT**

The respondent sued the appellant before the Senior Resident Magistrate Court Chuka in Civil Case No. 23 of 2009. In that suit, she sought an order for permanent injunction to restrain the appellant and her family from burying the remains of Allan Kirimi deceased (Kirimi) on the suit property *Magumoni/Mukuuni/91*. The respondent in her claim pleaded that the suit property was registered in her deceased husband's name, namely, Elisues Njoka Ambutu alias Eliseus Njoka Nkambi (Njoka). She also pleaded that the appellant was the mother of Kirimi and that she had no legal basis to bury the body of Kirimi on the suit property. That Kirimi had no blood relation with her late husband Njoka. That claim was denied by the appellant. In her defence the appellant pleaded that she was the common law wife of Njoka. That they were blessed with three children among whom was Kirimi. That they whoever separated and she remarried. The appellant in her defence pleaded that because Kirimi was the son of Njoka it was the responsibility of the respondent to bury Kirimi on the suit property. The resident magistrate at Chuka who heard the case gave judgment for the respondent and ordered for a permanent injunction to issue restraining the appellant from burying Kirimi's body on the suit property. It is that decision which is the subject of this appeal. This being the first appellant court, it is my duty to re-evaluate the evidence, analyze it and come to my own conclusion, but in so doing, I must give allowance to the fact that I have neither seen nor heard the witnesses. See the case of **Selle v. Associated Motor Boat Company** [1968] E.A. 123. The respondent in her evidence which was corroborated by her witnesses was that she was married to Njoka in 1958 at church under the African Christian Marriage and Divorce Ordinance. Njoka died in 1994. She exhibited in evidence a letter written by the chief which

stated that she and Njoka were blessed with ten children. She resided on the suit property from the date she got married to Njoka and was still on that property when she gave evidence. She denied that the appellant was the wife of Njoka and further denied that Kirimi was the son of Njoka. She stated that Kirimi lived with his mother the appellant and had built a house on that land. She denied that Kirimi had lived on the suit property. PW2 was the brother of the appellant's husband Baini. In evidence, he confirmed that when the appellant got married to his brother Baini she went into that marriage with three children which included Kirimi. He however did not know the father of those three children. That Kirimi lived on the land of Baini where he had built a permanent house. In his lifetime Kirimi did not move from the land of Baini. PW3 was a village elder. He also confirmed that Kirimi lived on the land which belong to Baini and he often saw him on that land when he visited. He stated that he had never known Kirimi to be a son of Njoka. On being re-examined, he said that he would have known in his capacity as a village elder if Kirimi had been chased away from Njoka's land. The appellant in evidence stated that she was married to Njoka in 1968 whilst Njoka worked as a nurse in Ishiara area. They were blessed with three children, Kirimi being one of them. They separated but their children went to live with Njoka. She denied that Kirimi had built a house at Baini's land. When she was cross examined, she accepted that she had no proof before court that Kirimi was son of Njoka. DW2 was a step brother of Njoka. He said that Kirimi was son of Njoka and that Njoka did introduce the appellant to him as his wife in 1969. DW2 said that he was involved in the marriage negotiations of the appellant with Njoka. He however accepted that Kirimi had not built a house on Njoka's land. DW2 on being cross examined admitted that there was a dispute that existed between him and the respondent over the issue of land. DW3 was a sister of Kirimi. She said that Njoka was their father and that at one time she and Kirimi lived on Njoka's land but left due to the mistreatment by the respondent. Contrary to the evidence of the appellant and of DW2 she stated that Njoka had in his lifetime shown Kirimi where to build on his land. The appellant in her earlier evidence stated that Njoka died before showing Kirimi where to build. Before the Chuka Magistrate Court, there were issues that were identified for consideration but it is only one issue that the appellant has submitted on in her appeal. It is the issue of *locus standi* of the respondent in the lower court case. On that issue, the learned trial magistrate had this to say in her considered judgment:-

> ***"Ownership of land can only be proved by registration. It has been rightly submitted by both parties herein that Magumoni/Mukuuni/91 is the registered property of the late Eliseus Njoka Nkambi. However, without a shadow of doubt the plaintiff (Respondent) herein has continuously been in actual possession of the said land since sometime in the year 1958 todate. She had lived on this land parcel, born all her 10 children and raised them on this land and she still continues to occupy the said land parcel despite the death of her husband the registered owner (sic). During her continued occupation there's no other person who has claimed ownership of the said land parcel and from their facts it can be correctly inferred that by her continued and uninterrupted possession, she has adversely acquired possession of the said land and I rightly then so its current owner. By virtue of these she attains the capacity to sue and protect any interests affecting the said land parcel. It is therefore the finding of this court that the plaintiff has locus to file suit and seek the orders prayed for herein."***

As correctly argued by the appellant, in an action where a party is enforcing the rights of the estate of a deceased person where the deceased died intestate, it is imperative for a grant to be obtained from court before such enforcement. It is so provided under section 82 of the Law of Succession Act. Under that section, it provides that personal representative have the following powers amongst others. It provides that they have power – ***(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.***

The question then to determine is whether the respondent was enforcing the rights of the deceased estate per se. The evidence which was uncontroverted was that the respondent had occupied the suit property from 1958 when she got married to Njoka. As she filed the case before the Chuka Magistrate Court, she

was still in occupation of that land. Did that possession give her right which can be protected in law? I answer that question in the affirmative. Possession of land if lawful entitles the possessor to exercise right to possess, use and enjoy that land. It can indeed be said that the rights of a possessor of land are akin to the rights of a registered owner. Those rights in my view are enforceable. A possessor can enforce those rights against one seeking to either eject them from the land or to interfere with their occupation of it. In the case **Asher V. Whitlock** [1865] L.R.I.Q.B.I. the rights of a possessor were considered. The pertinent statements of that case are as follows:-

> ***"But I take it as clearly established, that possession is good against all the world except the person who can show a good title and it would be mischievous to change this established doctrine. In Doe V. Dyeball [1829] Mood & M. 346 one year's possession by the plaintiff was held good against a person who came and turned him out; and there are other authorities to the same effect……Therefore I think the action can be maintained inasmuch as the defendant had not acquired any title by length of possession……..but at law I think the right of the original possessor is clear. On simple ground that possession is good title against all but the true owner……"***

I am therefore for different reason to those considered by the trial magistrate in agreement with her conclusion in her judgment. The respondent had *locus standi* to protect her interest on the suit property as a possessor. If the appellant had indeed buried the remains of Kirimi on the suit property that act would have interfered with the respondent's rights of possession of the suit property. This is because the appellant did not prove that Kirimi was the son of Njoka. That was the finding made by the trial court. I find that I cannot interfere with that finding of fact. The circumstances under which the appellant court would interfere with the finding of fact by a trial court were well set out in the case **Ramji Ratna & Company Limited Vs. Wood Products (Kenya) Limited** Civil Appeal Case No. 117 of 2001 where the court stated thus:-

> *"This is a first appeal and so this court is obliged to reconsider the evidence, assess it and make appropriate conclusions on such evidence, but always remembering that we have neither seen nor heard the witnesses – see* ***Peters Vs. Sunday Post Ltd [1958] E.A. 424, Selle & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] E.A. 123 and Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278.*** *In the last case* ***Hancox J.A.*** *put it thus at p. 292 of the report:-*
>
> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the findings he did."***
>
> ***"The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particularly circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally."***

There is no basis in my view of interfering with the trail court's finding of fact. The appellant's appeal for the reasons set out above is hereby dismissed and the costs are awarded to the respondent.

**Dated, signed and delivered at Meru this 10th day of February 2011.**

**MARY KASANGO**

**JUDGE**