

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Civil Appeal 18 of 2004

HARUN PATEL LIVUDUAPPELLANT

VERSUS

EVANS MUDAKI KITENYIRESPONDENT

JUDGEMENT

The Appellant, Harun Patel Livudu, was the Defendant in the Lower court. He had been sued by the Respondent, Evans Mudaki Kitenyi, who sought a permanent injunction to restrain him from **“claiming, entering upon, remaining on or building on land title No. Maragoli/Magui/1228 which the Respondent averred was legally his property.”** The Respondent alleged that **“the Appellant had threatened to invade the land and had even entered it and felled trees.”** The Appellant filed defence and counter-claim and sought in the counter-claim orders for cancellation of the Respondent’s title and registration of his (Appellant’s) name as the proprietor thereof on the ground that he had acquired it by way of adverse possession.

Both parties gave evidence before the trial court and on 24-2-2003, the trial magistrate, F. M. Kinyanjui (SRM), delivered judgement in which he found for the Respondent to whom he granted the injunction sought. It is against this judgement that the Appellant appealed.

In the 7 grounds of appeal, the appellant challenged the judgement of the trial magistrate both on evidence and on law. He contended that the evidence did not prove the case. On law, he submitted that the law was not followed not least because, the title of the suit land should have been declared invalid.

The evidence indicated that the Respondent had bought the suit land from the same person who had also sold to the Appellant in August 1996. In July 1996, the same vendor, one Ismail Lumanye Musoliza, also sold to the Respondent. It was the Respondent who on 9-8-96 got registered as the proprietor of the suit land and on the same day a title deed was issued to him. The original title deed which was produced as an exhibit is still held by the court. It should be released to the Respondent, Evans Mudaki Kitenyi immediately and a copy of it retained in the court file.

The trial court in its judgement found that it had no jurisdiction to try the counter-claim which sought cancellation of the title on the basis of adverse possession. It also found that the Respondent was not privy to the suit between the Appellant and the said vendor.

The trial court found that the Respondent had proved his case and granted the reliefs sought.

I have perused the record and the evidence adduced in the trial court. The Appellant did not show in his evidence that as against the Respondent he had any legal right, title or interest or claim to entitle him to be on the suit land whose proprietor was shown to be the Respondent.

Mrs. Shinyada, learned counsel for the Appellant, urged me to find for the Appellant and order that the trial magistrate had disregarded the Appellant’s evidence. Moreover, said Mrs. Shinyada, the trial court disregarded the fact that the relief sought should have been eviction instead of injunction. In her view the Respondent had irregularly obtained the title deed. But there was no evidence adduced in the trial court to establish the alleged irregularities.

Mr. Kamau, learned counsel for the Respondent, urged the court to dismiss the appeal on the ground that it had no merit.

After a careful perusal of the record of appeal, I am satisfied that the Appellant's counter-claim was properly dismissed as the trial court had no jurisdiction under the provisions of the Limitation of Actions Act to try it.

As regards the suit, there was evidence on the balance of probabilities to entitle the Respondent to the judgement. The trial court had power to grant the relief sought. The Respondent was not privy to the case referred to as RMCC No.174/95 in which it was alleged the Appellant had judgement against the vendor. The irregularities alleged in the Respondent's title were not proved and the latter's title to the suit land appears to have been valid. After weighing one thing with another, it is my finding that the trial court's decision was correct.

In the circumstances, I dismiss the appeal with costs.

Delivered, dated and signed at Kakamega this 19th day of October, 2006.

G. B. M. KARIUKI

J U D G E