



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 2 OF 1997

SAMUEL MWANGI KIBUCHI.....APPELLANT

VERSUS

STEPHEN MUNENE GACHUIRI.....RESPONDENT

J U D G M E N T

Samuel Mwangi Kibuchi hereinafter referred to as the Appellant is dissatisfied with the judgment and order of the Senior Resident Magistrate Kerugoya delivered on 29th January 1997 in which the trial Magistrate declared the Respondent Stephen Munene Gachuiiri the owner of plot No.89 Kagumo Market (hereinafter referred to as suit land) and ordered the Appellant and his family, servants or agents to be evicted from the suit land and further restrained by an order of permanent injunction from trespassing or committing any acts of waste on the suit land.

The Appellant has filed a memorandum of appeal which raises 8 grounds. In short the Appellant contends that the trial Magistrate erred in law and fact in failing to appreciate that the Appellant had lived on the suit land openly for a period of more than 12 years and had therefore acquired right of title to the suit land by adverse possession and therefore the Respondent's right of title had been extinguished by operation of the law.

The suit in the lower court was initiated by the Respondent who by his plaint filed on 12th March 1996 claimed inter alia that He (i.e. Respondent) had bought the suit land in 1986 from one Samuel Ndegwa and that on 11th March 1996, the Appellant had without any claim of right or consent of the appellant trespassed onto the suit land by putting up unauthorized timber structures causing the Respondent to file his action. In his defence filed on 27th March 1996, the Appellant claimed that Samuel Ndegwa who sold the suit land to the Respondent was illegally registered as the proprietor of the suit land as the same belonged to the Appellant's grandfather one Daudi Kamwana and that his grandmother Esther Kamwana died and was buried on the suit land. The Appellant maintained in his defence that He has been residing on the suit land since 1980.

During the trial in the lower court, the Respondent and one Samuel Ndegwa Daudi (PW II) testified in support of the Respondent's case.

Their evidence was briefly that the Respondent bought the suit land from P.W. II in 1986. All the proper documentation was done and the transfer effected with the Kirinyaga County Council. The Respondent subsequently successfully applied for change of user of the plot to commercial. He obtained authority to develop the plot from the council in 1992 but when he went to develop the plot he found the Appellant and his grandmother on the plot. The Respondent reported the matter to the Council but was advised to

wait until the Appellants grandmother vacated the plot. The appellant's grandmother was apparently the step-mother of P.W. II. She subsequently died and was buried on the suit land.

In 1996 the Appellant put up a semi permanent building on the suit land. It was then that the Respondent filed his suit against the Appellant. It was contended for the Plaintiff that P.W. II was the rightful owner of the suit land which formerly belonged to his father Daudi Kamwana and that the Appellant who was his stepsister's son had no right to the suit land.

The Appellant called 5 witnesses in support of his defence. Their evidence was that the Appellant started living on the suit land in 1980 with his grandfather and grandmother. He built a house on the plot with the knowledge and consent of his uncle P.W. II. His uncle was later registered as the owner of the plot and wanted to evict the Appellant but the appellant's grandmother protested. The appellant's grandmother later died and was buried on the suit land. The appellant continued to live on the suit land and maintains that he is rightfully there.

The trial magistrate having considered this evidence found in favour of the Respondent and granted the orders as aforesated.

It is apparent from the evidence that the suit land initially belonged to Daudi Kamwana the father of P.W. II and grandfather of the appellant. All the witnesses testified to this except for D.W.IV George Muriuki Kiragu who claimed the suit land had been given to the appellant's grandmother by a former assistant chief in 1960. However even this witness conceded under cross examination that the suit land was registered in the name of Daudi Kamwana and not Esther Kamwana. I find that the suit land belonged to Daudi Kamwana. Indeed the Defendant accepted this in paragraph 2 of his defence. I find further that P.W. II who is the son of Daudi Kamwana became the owner of the plot after the death of Daudi Kamwana. It is not clear how the change was effected, but the records with the Kirinyaga County Council apparently reflected him as the owner of the suit land. If the suit land was improperly transferred to P.W. II, the transfer could only be properly challenged by an administrator of the estate of Daudi Kamwana. In any case P.W. II being a son of Daudi Kamwana would have priority over the Appellant who was only a nephew.

In his defence the appellant did not raise any issue with regard to him being entitled to the suit land by operation of law. The Appellant did not plead that the Respondent's claim was statute barred and cannot now raise it at this late stage. Be that as it may, it is evident that the appellant entered the suit land with the knowledge and consent of the owner who was Daudi Kamwana. He remained on the suit land after his grandfather's death with the consent of his grandmother and P.W. II. He cannot now turn round and claim that his possession of the suit land since 1980 was adverse to that of the owner. Although the Respondent bought the land in 1986 and did not give the Appellant consent to remain on the land, the Respondent raised an issue regarding the appellant's occupation and in fact brought a suit in 1996 which was before 12 years were up. The appellant could not therefore have acquired any prescriptive rights over the suit land. Having reconsidered and evaluated the evidence I come to the conclusion that the appellant had no right to be on the suit land and therefore the orders granted by the trial magistrate were in order.

Accordingly I find no merit in this appeal and do therefore dismiss it in its entirety. I award costs of the appeal to the Respondent.

Dated signed and delivered this 26th day of May 2005.

H. M. OKWENGU

JUDGE