



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: KWACH, SHAH & BOSIRE JJ.A)

CIVIL APPEAL NO.110 OF 1997

BETWEEN

FRANCIS GITONGA MACHARIA ..... APPELLANT

AND

MUIRURI WAITHAKA ..... RESPONDENT

(Appeal from the ruling and order of the High Court  
of Kenya at Nairobi of the Honourable  
Justice Shields delivered on the 26th day  
of April, 1989

in

H.C.C.C. No.1172 of 1986 (O.S)

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JUDGMENT OF THE COURT

On 15th April 1986, the appellant Francis Gitonga Macharia, (the appellant), brought before the superior court at Nairobi, an Originating Summons under section 38 of the Limitation of Actions Act, claiming an interest in a parcel of land known as Kiine/Kibingoti/Nguguine/1029, by adverse possession. In the alternative he claimed a declaration that he was a beneficiary of the land. He named Muriru Waithaka, the respondent in this appeal, as the defendant. The Originating Summons was supported by an affidavit which was sworn by the appellant himself. To that affidavit was annexed an abstract of title to the aforesaid parcel of land which on a casual glance shows that the respondent was first registered as proprietor of the subject land on 16th December, 1974. The appellant deposed in his affidavit, inter alia that the aforesaid land was purchased and paid for by him but at his request and in agreement with the respondent he had it registered in the name of the latter on the understanding that the respondent would later refund the money to him. In the event that he failed to refund the money the land would be transferred to the appellant. The alternative claim was based on that averment.

The respondent was served with the Originating Summons and later filed a replying affidavit denying the appellant's claim in its entirety. In due course the matter was referred to arbitration of the District Officer, Ndia Division, with the assistance of four elders who later rendered a majority award dismissing the appellant's claim.

The appellant was aggrieved by the decision and moved the superior court under O.XLV rule 17 of the Civil Procedure Rules seeking an order setting aside the award and in the alternative remitting the award back to the arbitrators for a decision. In an affidavit in support of that application the appellant averred, inter alia, that the umpire had misconducted himself. The application was heard by Shields

J., who after hearing the parties declined to grant the orders which were sought in the application and

dismissed the application with costs and thereby provoked this appeal. The main complaint in this appeal is that the learned Judge of the superior court improperly exercised his discretion in the application, and the appellant prays that we allow his appeal, and order that his suit before the superior court be remitted to the arbitrators for reconsideration. We have considered this appeal with anxiety. It is quite clear from the affidavit in support of the Originating Summons that as at the date of the suit the prescribed twelve years limitation period for bringing an action based on adverse possession of land had not run in favour of the appellant. He deponed that he went into possession of the suit land sometime in March 1974. As at the that date the respondent had not become a registered owner of the suit land. As we stated earlier he became registered as owner on 16th December, 1974, and by 15th April, 1986, a period of twelve years had not run. Consequently the appellant's claim based on adverse possession was premature and therefore incompetent. It was not capable of being referred.

As for the appellant's alternative claim that the respondent was holding the suit land in trust for him, to the extent that it was brought by Originating Summons other than by plaint, it was also incompetent.

In the above circumstances and for the reasons we have given above, the appeal has no merit. It is dismissed but with no order as to costs.

Dated and delivered at Nairobi this 6th day of February

1998.

R.O. KWACH .....

JUDGE OF APPEAL

A.B. SHAH .....

JUDGE OF APPEAL

S.E.O. BOSIRE .....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR