



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: J. E. GICHERU A. M. AKIWUM G. S. PALL

CIVIL APPEAL 49 OF 1996

WILLIAM GATUHI MURATHE.....APPELLANT

AND

GAKURU GATHIMBI.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Shields) dated 26th day of January, 1993

IN

H. C. C. C. NO. 920 OF 1979)

JUDGMENT OF THE COURT

The only point in issue in this appeal is whether the respondent's adverse possession of the suit land could be terminated by the institution of an action by the appellant by way of a counterclaim, challenging the respondent's possession and occupation of the suit land and seeking recovery of possession thereof, from the respondent.

The backdrop to this matter is briefly, as follows. The respondent had alleged that on 26th September, 1972, he brought the suit land from one Ayub Nguyai "B" and by 6th March, 1973, had made part payment to Ayub Nguyai "B". The suit land being agricultural land, the consent of the relevant Land Control Board was required in order to validate the sale of the suit land, but which could not be obtained because of the frequent sickness of Ayub Nguyai "B" who died in 1974. The sale of the suit land which had taken place on 26th September, 1972, became three months thereafter, on 27th December, 1972, because of the lack of the consent of the Land Control Board, void for all purposes. After the death of Ayub Nguyai "B", his two sons and heirs contrary to their promise to the respondent that they would honour their father's intention to transfer the suit land to the respondent, and even though they were paid the outstanding purchase price on the suit land, sold it to the appellant behind the back of the respondent, and who succeeded, in spite of the respondent having lodged a caution against it, in having the suit land registered in his name. Upon the discovery of this deception by Ayub Nguyai "B"'s sons, the respondent brought his action in 1974 against the two sons, the appellant and the Attorney General seeking as against the sons, specific performance of the agreement between him and Ayub Nguyai "B", damages for breach of contract and the execution by them of all necessary documents and in the alternative, refund of the purchase price already paid by the respondent with interest thereon. The relief sought from the Attorney

General was the rectification of the register of the relevant Land Registry so as to show the respondent as the registered proprietor of the suit land. As against the appellant, the only relief sought was a declaration that he had no interest at all in the suit land or if he had any, he held it in trust for the respondent.

Even though the respondent had averred in one of the paragraphs of his plaint that he:

“has been in possession of the said land for over twelve years (since early 1967) and is entitled to the suit land by way of adverse possession under the provisions of the Limitation of Actions Act.”,

he did not specifically seek a relief declaring him to be the owner of the suit land through uninterrupted adverse possession for more than twelve years, of the suit land as against the sons of Ayub Nguyai “B” or the appellant.

However, only the appellant who at the time, was registered as the proprietor of the suit land filed a defence to the respondent’s plaint filed on or about 9th April, 1979, and which was in summary, that the agreement for the sale of the suit land between Ayub Nguyai “B” and the respondent had become void since the consent of the Land Control Board to the agreement had not been given within the statutory period and also that he was the registered proprietor of the suit land. The appellant counterclaimed for the dismissal of the suit brought against him and for possession of the suit land and for the payment of mesne profits by the respondent.

The respondent’s reply and defence to the counterclaim, do not contain any matter which is relevant to the appeal before us.

The suit then seemed to have dragged on unheard in the High Court until 25th April, 1991, when the High Court ordered that the respondent, who appeared not to be interested in having the suit determined quickly, should immediately set it down for hearing failing which the appellant would be at liberty to proceed with his counterclaim. The respondent did not comply with this order and the appellant then proceeded with his counterclaim. The issue that was considered at the hearing of the appellant’s counterclaim was not whether the appellant’s counterclaim was time barred, but rather whether the respondent had been in adverse possession of the suit land for twelve continuous years so as to defeat the appellant’s counterclaim.

From the respondent’s plaint, and although a passing averment had been made to his having been in occupation of the suit land since 1967, his claim of adverse possession of the suit land for the purposes of his action, could only have began from the time when the statutory period for obtaining the consent of the Land Control Board lapsed and the agreement became void, prior to which, there was no evidence to establish that if the respondent had been in occupation of the suit land, it was without the consent of Ayub Nguyai “B”.

The judge’s notes of the hearing of the counterclaim is scanty. His judgement, however, throws some light on the issues that were considered by him. He first held rather vaguely and unhelpfully, and without determining when the respondent’s adverse possession actually began to run, that:

“.....as the Plaintiff has now been in possession for more than 12 years I was not prepared to Order eviction...”,

For this, the learned judge relied on section 30(f) of the Registered Land Act which makes registered land subject to the overriding interests of rights acquired by adverse possession. This statutory provision would only be applicable if it is shown and which was not, that the respondent had been in twelve continuous and uninterrupted years of adverse possession of the suit land. The learned judge also relied on the submissions of counsel in Pugh v Heath (1982) 7 A. C. 235 (a case involving the foreclosure of a mortgage) that:

“That statute having once begun to run nothing could stop it except the events mentioned in the statute, and here they did not happen. Merely bringing ejectment does not prevent the statute from running...nor

even judgement in ejectment without possession.”,

and then went on to say that:

“This being the legal position I do not think I should make any order at the 3rd defendant’s behest for the eviction of the Plaintiff.”

But in Pugh v Heath (supra), the House of Lords had upheld an appeal from the judgement of the Court of Appeal in the case of Heath v Pugh (1881) (C.A) C.P.D. 345, which we will now briefly consider. In that case, the plaintiffs who were the legal mortgagees of mortgaged land had obtained an order of foreclosure absolute which had only vested the ownership of the mortgaged land in them. It was held that an action brought by the plaintiffs within twenty years after the order for foreclosure was obtained, to recover possession of mortgaged land was not barred by the Statutes of Limitation although more than twenty years had elapsed since the mortgaged land had been conveyed to the plaintiffs. Lord Selbourne L. C. in the judgement of the Court of Appeal put the matter succinctly thus:

“The plaintiffs are not barred by the statute, because after the institution of the Chancery suit it ceased to run against them; and by the present action they are seeking to enforce that right of possession which was for the time being given to them, indefeasibly, by the decree absolute for foreclosure in that suit.

The appellant has appealed against the learned judge’s decision dismissing his counterclaim on the grounds that the learned judge erred in holding that the respondent had obtained title to the suit land by being in implied uninterrupted adverse possession for more than twelve years by the time he gave his judgement, in relying on cases concerning the recovery by a mortgagee of mortgaged land and in not holding that the appellant’s counterclaim was an action to recover land within the meaning of section 7 of the Limitation of Actions Act and that as such, time ceased to run in favour of the respondent upon its institution.

As we have already observed, the circumstances of the respondent’s suit show that even if he had been in occupation of Ayub Nguyai “B”’s land as far back as 1967, he was no more than the a licensee whose possession only became adverse when the sale agreement between him and Ayub Nguyai “B” did not materialise and he continued in occupation.

The next issue is whether this adverse possession which at the earliest, began in December, 1972, could be said to have been for more than twelve uninterrupted years as the learned judge held, by the time when he delivered his judgement? In this connection, we note that the learned judge, having strangely, preferred the submissions of counsel as opposed to the judgement itself, in Pugh v Heath (supra), and without really considering the effect of the appellant’s counterclaim as constituting an interruption of the respondent’s period of adverse possession, dismissed the appellant’s counterclaim. Apart from this, we have found the offhanded manner in which the learned judge dealt with the appellants’ counterclaim rather embarrassing.

We must now consider the applicable law that affects the appellant’s counterclaim, which was an action, brought to recover land. Section 7 of the Limitation of Actions Act, provides that such an action may not be brought after the end of twelve years from the date on which the right accrued. This means that the appellant, having bought and having been registered as the proprietor of the suit land and thereby claiming ownership in the suit land, could seek to recover it from the respondent, but only if he did so within twelve years after he acquired the suit land. The appellant’s counterclaim shows, and this the learned judge did not consider at all, that he acquired the suit land in 1979 and had in the same year, filed his counterclaim which had been prompted by the respondent’s suit which was also filed earlier that year. By this time, the respondent could only have been in uninterrupted adverse possession firstly against Ayub Nguyai “B” and subsequently if against the respondent, for at most, less than eight years.

But was the appellant’s counterclaim sufficient to cause a break in the period of adverse possession of the suit land by the respondent? If one can draw an analogy from Heath v Pugh (supra), it would seem that the appellant having become registered as the proprietor of the suit land, he could sue for its

possession and that upon bringing his counterclaim, which has the same effect as a cross suit brought under Order VIII r 2 of the Civil Procedure Rules, the time of the respondent's adverse possession ceased to run against him. This issue has now been settled in Kenya. In the unanimous judgment of this Court in the case of Joseph Gachumi Kiritu v Lawrence Munyambu Kabura Civil Appeal No. 20 of 1993, (unreported) which reviewed previous judgments of this Court on the issue, it was held that the filing of a suit for recovery of land would stop time from running for the purpose of section 38 of the Limitation of Action Act under which a person may claim to have become entitled to land by adverse possession. It is worthwhile setting out here in some detail, the following excerpt from the judgement of Kwach J. A. in Kiritu v Kabura (supra):

“The passage from Cheshire's Modern Law of Real property to which Potter JA made reference in Githua v Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says-

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor.

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.’

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. And on this particular point I will go with the potter JA . The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed.

In my judgement, therefore, time stopped to run against the appellant when he filed the Kiambu case in 1984. That case was not withdrawn or discontinued but was transferred to the High Court in Nairobi and consolidated with the O.S. taken out by the respondent. On the respondent's own testimony before the learned Judge, he went into possession in 1974 and since the appellant filed his possession suit in 1984, time ceased to run against him because by taking that step the appellant, as owner, asserted his right. So therefore when the respondent took out his O.S. in July 1988, he had not been in continuous and uninterrupted possession for 12 years for the purposes of section 38 of the Act, and he was not therefore entitled to judgement.”

Even if as we have said, that the respondent's adverse possession against Ayub Nguyai “B” began in 1972, which was before the appellant was registered as the proprietor of the suit land, then the uninterrupted adverse possession that would enable the respondent to claim to be entitled to the suit land, would end in 1985. A fortiori, by the time when the appellant filed his counterclaim in 1979, and which effectively interrupted the respondent's adverse possession of the suit land, the respondent had not achieved twelve years of uninterrupted adverse possession of the suit land as against the appellant.

It is clear that the learned judge had not bothered to consider all the relevant issues which if he had

done, could not have come to the conclusion that the respondent had been in uninterrupted adverse possession for more than twelve years as against the appellant by the time he heard the appellant's counterclaim.

The appellant's appeal succeeds, the judgement of the learned judge and its related decree are hereby set aside and it is hereby ordered that the appellant as the registered proprietor of the suit land, shall have vacant possession of the suit land. The cost of this appeal and of the court below shall be to the appellant.

Dated and delivered at Nairobi this 6th day of March, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL