REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

CORAM: GICHERU, SHAH & OWUOR JJ.A
CIVIL APPEAL NO. 57 OF 1997
BETWEEN

PETER NJAU KAIRU ....APPELLANT

AND

STEPHEN NDUNG'U NJENGA.............................1ST RESPONDENT

LEONARD MICHUKI MUNIU ....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya (Justice G. P. Mbito) dated 22nd day of November, 1996,

in

H.C.C.C. NO. 2859 OF 1995)

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JUDGMENT OF THE COURT

The subject-matter of this appeal is a piece or parcel of land now known as plot No. LIMURU/KAMIRITHU/1967 and I will henceforth in this judgment refer to the same as "the suit land". The suit land was originally part of a larger plot known as LIMURU/KAMIRITHU/598 having an area of approximately 0.45 of an acre. Plot No.598 was owned by Joshua Matejwa, William Wakahare, Leonard Michuki and Leah Wairimu as tenantsin- common, in equal shares. Matejwa's portion had a building on it from which he was trading. Next to Leonard Michuki's portion, there was the portion of William Wakahare on which portion one Francis Kairu Njau carried on some business.

Leonard Michuki's and Leah Wairimu's portions had no buildings thereOonn . 14th September, 1995 Stephen Ndungu Njenga (the respondent) filed a suit in the superior court, by way of an Originating Summons, under Order 36 rule 3D of the Civil Procedure Rules claiming a declaration that he had become entitled, by way of adverse possession of over twelve years, to be registered as proprietor of the suit land in place of Peter Njau Kairu, who (Kairu) had purchased the suit land from Leonard Michuki Muniu, the first defendant in the Superior Court. In the affidavit that he swore in support of the originating summons, Stephen Ndungu Njenga, said in material parts as follows:-

> ***"2.I bought said the land parcel from one Leonard Michuki Muniu being a portion of his share on LR LIMURU/KAMIRITHU/958 before its subdivision exhibit 'SNN2' under a written agreement exhibit 'SNN3' on or about the 14.8.1973 for the price of Ksh.1,500/-***

and a he goat at a cost of Ksh.100/- and immediately thereafter in or about August, 1973 I went into possession of his share which was then plot No.3.

3.Thereafter, I have continued to be in exclusive occupation of his share now LR LIMURU/KAMIRITHU/1967 until to date without any interruption. I have been cultivating the parcel of land until 1985 when I put up houses for commercial purposes and rented them to Francis Kairu Njau (the person who was occupying the portion of William Wakahare) on 10.10.95 annexed exhibit PNN4 who has been paying me rent to date."

It can be seen straight away that the first respondent was claiming to be in exclusive personal possession of the suit land at all material times. However, when the suit was heard before the superior court the first respondent quite categorically stated that he himself did not go into possession. He said:

"After the agreement (for sale) Gichuki and Michuki went to show me the plot.

The plot became mine. I then asked another old man, Kinuthia Michuki to look after the plot on my behalf. He is the father of my wife. He was cultivating the plot on my behalf.

Next to the plot part of which I had bought there was another old man called Kairu Njau who was leasing a shop in that plot. He wanted me to put up a building so that he could lease it from me. This was 1973.

I agreed in 1985 with him to put up a temporary house on my whole plot and would be paying me Shs.500/- per month.

This was in writing. This is the agreement. I produce it Ex.II. We had agreed that the building would be temporary until I would be ready to put up a permanent building on the plot.

The said old man put a building of Timber and iron sheets on the premises. The first structure was a hotel and the second one was a butchery and third one a bar. I had been receiving Shs.1,500/- per month until 1995."

In cross-examination the first respondent said:

"In paragraph 5 of the affidavit for injunction I said (sic) in occupation. I say that I allowed Kairu to construct on my behalf. I have an agreement to that effect. I say I cultivated as I allowed my inlaw to cultivate the land on my behalf. I say I cultivated because I am the one who allowed to cultivate on behalf."

We have set out at length the portions of the first respondent's evidence to show that he himself was never in personal occupation of the suit land. He was allegedly in occupation by the agency of either his father-in-law or Kairu.

At this stage it becomes necessary to inquire into the circumstances which would enable us to decide whether the first respondent's father-in-law was in possession as cultivator of suit land until 1985. He is Linus Kamundia Michuki. He lives at Kamandura and calls himself a peasant farmer. He gave evidence before the superior court to the effect that upon the first respondent's request, as the first respondent did not live near the suit land, he cultivated the land. This evidence as recorded is as follows:-

"When Ndungu came to me, he told me that he had bought Leonard's plots and that I should look after it for him as he stays very far. When I was told so I started developing the plot and fenced it. I cleared the plot and started cultivating it. I was shown the plot by Mr. Ndungu. I cultivated for one year. I continued after one year but later stopped when

Ndungu agreed with Kairu to start constructing on the plot. This was around 1982 to 1985. Some houses were put up on the plot.

They were three shops, hotel, a bar and a butchery:

Later on he said:

"I own about 30 acres of land. I cultivated the small plot as I was told to do so. It is not true that I could not occupy the plot. I am telling the truth."

It sounds rather strange that a man who owns 30 acres of his own land calls himself a peasant farmer and agrees to cultivate a fourth of an 0.45 acre plot or a 0.046 of an hectare plot. We think that the story of Linus Kamundia Michuki cultivating an 0.115 (or thereabout) acre of land for his son-in-law when he has his own 30 acres of land elsewhere is inherently improbable.

Linus, according to the first respondent, was in full occupation of the suit land from 1973 to 1985 but Linus himself said that he cultivated for one year, and continued thereafter but he was not specific about the period 1973 to 1985. For instance, besides what we have set out above, he also said:

"I cultivated the plot for over a year.

First year was to clear and put up a fence. I continued using as from 1973 upto 1983 or thereabouts when Kairu put up a building on it".

We do not see how it can take a person a whole year to, clear and fence a plot one-tenth of an acre. The evidence of Linus cannot be taken seriously. He was there obviously to bolster up the version of the first respondent.

Even the evidence of the first respondent is suspect. Whilst he says that immediately upon the alleged purchase of the suit land he asked Linus to cultivate the plot he adds that in 1973 Kairu wanted him (the first respondent) to put up a building so that he could lease it. It is strange that although as early as 1973 Kairu had shown interest to lease a building on the suit land it did not come to fruition, allegedly, until 1985. It would have been more prudent to put up a building in 1973 or 1974 rather than cultivate the land (small as it is) for nearly twelve years and then let some one else put up a building. The reason why we say this is that we are far from being satisfied as to the truthfulness of the evidence of the first respondent.

Section 38(1) of the Limitation of Actions Act, Cap 22, Laws of Kenya provides as follows:

"38(1)Where a person claims to be entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor in trust for the person who has acquired it."

In order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary. This of course does not mean that the trespasser must be all the time in possession.

He may for instance be in possession through his wife or an off-spring as those are members of his immediate family or a person appointed by him in that respect. Such title can only be deprived in the clearest of cases and it is for this reason that summary procedure in O.36 rule 3(D) is provided by the rule-makers in their wisdom, for summary adjudication thereof.

We would hasten to add that so long as the land in question is ascertained it does not help the defendant to urge that the exact area of land in dispute is not clear or that the boundaries defined are vague.

The first respondent allegedly purchased the share, in original number Limuru/Kamirithu/598, from Leonard Michuki on 14th August, 1973 for Shs.1,500/= plus one he-goat. His copurchaser then was George Gichuki who immediately upon signing of the agreement of sale gave up his part of the bargain to the first respondent. Although the first respondent is a mature seasoned person - he is a councillor and landlord - he never asked Leonard to legitimately transfer the suit land to him. This is not the behavior of a man of the world. It may also be that he had no interest in the suit land until a separate title was issued in 1995. It could well be that from 1973 to 1995 the suit land was not valuable to the first respondent who is stated to be a landlord to 200 tenants. We are not satisfied, on re-appraisal of the evidence, that the first respondent was truthful. He talked of personal occupation on oath in his affidavit but on oath in court he talked of occupation by his father-in-law first and then by Kairu. These two diametrically opposed statements both under oath belie his evidence.

Leonard did give evidence in Court. Instead of considering his evidence the learned judge said, astonishingly, that Leonard did not give evidence, and only called the father of the appellant to give evidence. This is a serious anomaly. Had the learned judge considered the evidence of Leonard he could well have come to a different conclusion. The learned judge found as a fact that the first respondent purchased the suit land in 1973 in the presence of the first defendant (Leonard) from Leonard's father and that Leonard was then a young man. But that is not correct.According to the alleged agreement for sale made in 1973 it is Leonard who sold the suit land to the first respondent and not Leonard's father Joseph M. Michuki. Joseph was allegedly the witness to the agreement for sale. The learned judge erred when he found that Joseph sold the land to the first respondent. Leonard was the registered owner of the land, one-fourth thereof, as tenant-in-common in equal share. This error on the part of the learned judge is, in our view, of a fundamental character. It puts the entire matter in a very different perspective.

We come now to the other grounds of appeal. The first ground of appeal cannot succeed for the simple reason that if there was a sale which became void for lack of the consent of the relevant Land Control Board, then, adverse possession, if all conditions are satisfied, would commence against the interests of the registered owner.

The third ground of appeal refers to the learned judge's finding that it was Leonard's father who sold the land to Stephen Ndung'u Njenga. We have already commented on this anomaly. We have also commented on the fourth ground of appeal, that is, that the learned judge erred in saying that Leonard did not give evidence.

The fifth ground of appeal, by itself, cannot stand as, as we have already pointed out that if the land is sufficiently identified, adverse possession could be decreed.

However that issue does not now fall to be decided.

The other grounds of appeal, mostly general, do not merit decision. We will only say that if there was proof of adverse possession, a purchaser for value could not acquire a title from the registered owner, as the registered owner's title could have stood extinguished after twelve years of adverse possession.

The first respondent has transferred the suit land to his own son, Tom Njiriri Ndungu, who was before this court and has opted to say nothing. The transfer was effected on 18th April, 1997 when this appeal or the intended appeal was still being actively pursued.

We have come to the conclusion that the first respondent Stephen Ndungu Njenga never acquired title by adverse possession. Such being the case he could not pass title to his son. In the result, we allow this appeal, with costs, and order that Tom Njiriri Ndungu do transfer the suit land to the appellant. The costs awarded to the appellant shall be paid by the first respondent, Stephen Ndungu Njenga.

Dated and delivered at Nairobi this 13th day of November, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR