



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 181 of 1996

JASON MASAI
APPELLANT

AND

MASAI KIPSAMII
RESPONDENT

**(Appeal from a judgment and decree of the High Court of Kenya at Bungoma (Justice Ong'udi)
dated 21st February, 1996**

IN

H. C. C. A. NO. 98 OF 1994)

JUDGMENT OF THE COURT

Jason Masai, the appellant, agreed to buy from Masai Arap Kipsami, the respondent, a parcel of land measuring 100ft x 100ft for a sum of Kshs. 4,000/= on 14th June, 1977. The respondent did not transfer the said parcel of land (the suit land) to the appellant.

Whilst the respondent contested the fact of possession by the appellant of the suit land before the superior court (Ong'udi J) from the date of agreement for sale (14th June, 1977), the learned judge did not make a finding on that contested issue. The learned judge had this question posed before him. As he did not answer it, it falls to us now to decide the issue. It is common ground that the agreement for the sale of suit land was made on 14th June, 1977. It is common ground that the agreed purchase price was a paid in full by the appellant.

At least it is alleged by the respondent that one letter was sent to the appellant by the chairman of the respondent's clan asking the appellant not to build any structures on the suit land. This was on 12th May, 1980. Again on 5th June, 1985, the chairman of the respondent's clan by a letter of that date warned the appellant not to build on the suit land.

It is clear to us therefore that the appellant was in possession of the suit land soon after the date of the agreement for sale. If he was not in such possession there would have been no need for the chairman of the clan to write such letters to which we have referred.

It is clear that the appellant's possession of the suit land became adverse to that of the respondent

when the contract for sale of land was breached by the respondent and when consent of the relevant land control board was not obtained for the proposed sale. Going even by the evidence of the respondent there was adverse possession as from 1980, that is, for a period of more than twelve (12) years from the date the appellant was warned not to build.

The only issue that now falls to be decided by us is whether or not the two letters written by the chairman of the clan interrupted the possession of the suit land by the appellant. Those two letters were not written by the respondent. They were probably written at the instigation of the respondent's family. There is no evidence whatsoever that the respondent attempted to obtain possession from the appellant either by physical entry or by filing a suit for possession. The said two letters, in our view, are insufficient to prevent the operation of the Limitation of Actions Act. Those letters did not in any way disturb the appellant's possession of the suit land. The appellant has therefore acquired title to the suit land by adverse possession.

The upshot is that this appeal is allowed with costs and it is ordered that the appellant be registered as proprietor of the suit Land (No. ELGON/CHEMOGE/270) in place of the respondent. The appellant will have costs of the suit in the superior court. The registrar or Deputy registrar of the superior court may execute appropriate documents for the transfer of the suit land if the respondent does not.

Dated and delivered at Kisumu this 14th day of March, 1997.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR