REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 79 of 1996

HARRISON NGIGE KAARA…….....APPELLANT

AND

1. **GICHOBI KAARA**

2. **SHADRACK NJANJA KAARA…….....……..RESPONDENTS**

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Honourable Justice M. Ole Keiwua) dated 20th December, 1994

IN

H.C.C.C. NO. 2484 OF 1997 (O.S))

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JUDGMENT OF THE COURT

In the suit commenced in the superior court by Originating Summons under the provisions of S.38 of the Limitation Act, Cap 22 Laws of Kenya, and 0.36 rule 3D of the Civil Procedure Rules, the appellant, Harrison Ngige Kaara, claimed to have become entitled by adverse possession to a parcel of land known as No. Inoi/Kaitheri/259, and prayed for, inter alia, an order that he be registered as the proprietor thereof. Gichobi Kaara and Shadrack Njanja Kaara, who are brothers, but step-brothers of the appellant, were named as the defendants. The appellant's claim was dismissed with costs principally because that Court (Ole Keiwua J.) did not think that on the facts and circumstances of the case adverse possession could arise; in the court's view because the appellant was the son of the predecessor in title of the suit property and, therefore his dependant. Additionally, that if adverse possession could and did arise then time was interrupted by a consent order in a succession cause before a magistrate's court which was recorded with the appellant's approval. This appeal is from that dismissal. Before dealing with the issues raised in the appeal we propose first, to set out the background facts.

The suit premises was originally part of a larger parcel of land known as Inoi/Kaitheri/154, which was first registered on 7th March, 1960 under the Registered Land Act, Cap 300 Laws of Kenya, with Kaara Nguru, since deceased, as the first registered owner. He had two wives, Wangithi Kaara alias Margaret Wagichugu Kaara and Mumu Kaara. Upon his death on 4th November, 1972, the said parcel of land transmitted to his two widows in equal shares under Kerugoya District Magistrate's Court

Succession case No. 66 of 1974, presumably to hold their respective shares in trust for their respective children. Subsequently, and pursuant to an order made in that case by consent of all beneficiaries the land was subdivided into two equal portions which were renumbered Inoi/Kaitheri/258 and Inoi/Kaitheri/259 and, thereafter the former portion was registered in the name of Mumu Kaara, who is the mother of the appellant, while the other portion was registered in the name of Margaret Wagichugu Kaara, the mother of the both respondents.

It would appear to us that although, as we stated earlier, Kaara Nguru's land was by consent of all the beneficiaries subdivided into two equal shares with a view to each of his widows taking a share, Mumu Kaara must have later had a change of mind because she refused to sign the necessary documents to effect subdivision and transfer of the resultant sub-divisions to herself and her co-widow. Consequently the Court which had made the order was successfully moved for an order authorizing the executive officer of that court to execute those documents on her behalf. That order was made on 3rd October, 1985.

The appellant did not commence this suit until 19th June, 1987. About the same time he also instituted High Court Civil Case No. 2483 of 1987 against his own mother claiming land parcel No. Inoi/Katheri/258, which suit we understand is still pending. The details of the claim in that suit are not before us.

In his Originating Summons the appellant prayed for orders that he had become entitled to land parcel No. Inoi/Kaitheri/259, by adverse possession by virtue of his occupation of it since 1956, that he is entitled to be registered as owner thereof, that the respondents as defendants in that suit execute the necessary documents to affect transfer of the land to him, that in the event that they fail to do so a vesting order issue vesting the land in him, that an injunction issue restraining the respondents from interfering with his possession of the suit land, and that the respondents were holding the land in trust for him. In his affidavit in support of the Originating Summons the appellant has deponed, inter alia, that the suit land was originally given to him by his Umbi clan Mbari ya Gitara, but he later, in 1958 on his father's request transferred it to him and his said father in turn joined the same to his three acres to make 7 acres which then became one acre more than the minimum 6 acres the Agricultural Finance Corporation required, presumably as securities before they could lend him some money. The appellant however, retained possession and continued developing it. His father however, died in 1971 before he could retransfer it back to him. His case, therefore, was that having been in possession of the land since 1955 or 1956, openly and adversely to his father's interest for over 12 years and his father having not taken any step to remove him from the land he had acquired prescriptive rights over it as entitled him to be declared as the owner of it.

The respondents do not appear to have filed a replying affidavit to the Originating Summons. However, their response appears in an affidavit Gichobi Kaara swore in support of a chamber summons dated 17th July, 1987, in which both respondents unsuccessfully sought orders that the Originating Summons be struck out for being an abuse of the process of the court and for disclosing no reasonable cause of action. They also sought a further order to remove the appellant with his crops from the suit premises. In that affidavit it was disclosed to the court, for the first time, that the suit premises had been culled out of L. R. No. Inoi/Katheri/154, pursuant to the consent order in Kerugoya District Magistrate Succession Case No. 66 of 1974. It was further deponed that the appellant did not, subsequently or at all, challenged that order and that, prima facie, showed he acknowledged that L.R. No. Inor/Katheri/154, from which the suit premises was culled was family land.

The respondent's case in the superior court which the court accepted and on that basis declined to grant the prayers in the Originating Summons, was that on the facts and circumstances of this case adverse possession could not arise because the appellant was the son of the registered owner of the suit premises and his position was no more than that of a dependant who was in possession with the permission of the owner. Furthermore, that even assuming adverse possession could arise time could only start running after the death of the parties' father, which time was in any case interrupted when the consent order in Kerugoya District Magistrate Succession Case No. 66 of 1974, was recorded and acted upon which order was in the nature of a compromise. Consequently, as at the date of the suit the limitation period had not fully run as would have entitled the appellant to the reliefs sought.

In this appeal the appellant challenges the superior court's decision principally, on the ground that the court fell into error when it held that the making and execution of the consent order, above, interrupted the running of the limitation period. Additionally, that the trial judge erred in law in concluding that the appellant's occupation of the suit premises was not adverse to the interests of the respondents over it.

The law on adverse possession is clear. S.7 of the Limitation of Actions Act, cap 22, Laws of Kenya, provides for a 12 years limitation period for actions to recover land. That period does not start running unless the land is in the possession of some person or persons whose interest in it is hostile to that of the owner thereof. Possession is hostile if it is open, without right, without force or fraud and exclusive. In other words the adverse possessor must be shown to be using the land as though it is solely his own before a right of action to recover it can be said to have accrued for the limitation period to start running.

As we stated earlier, the appellant's case as pleaded was that he originally owned 4 acres of L.R. NO. Inoi/Katheri/154. Evidence was however adduced in the court below to the effect that the appellant's father was the first registered owner of that parcel of land. There was no documentary evidence adduced to show that the appellant ever owned that land or any part thereof. The appellant himself admitted under cross-examination that his father was the owner of that parcel of land and that after his death, he, the appellant, caused the Land Registrar of the area where the land falls to commence succession proceedings before the District Magistrate's Court, at Kerugoya. He also admitted that he took part in the proceedings which culminated in a consent order being recorded to the effect that that land would be shared equally between his father's two widows. So, as at the date of the succession cause the appellant did not consider himself to be entitled to the land or any part thereof as an adverse possessor. He was claiming a share of it as a beneficiary of his deceased father's estate. Hence his concurrence to the making of the consent order in the succession cause. It is also noteworthy that after the making of that order on 11th April, 1980, a period well over 7 years lapsed before he brought this action implying that this action was an afterthought.

The foregoing apart the appellant's case as presented in the court below was substantially at variance with his case as originally pleaded. The appellant testified that he was claiming he whole of L.R. No. Inoi/Kaitheri/259, as an adverse possessor on the ground that he had in 1971 erected on it a permanent house and had been cultivation it since 1956. Under cross-examination however, he admitted that the house was on L.R. No. Inoi/Kaitheri/258, that he has not been using he whole of the L.R. 259, but only about half acre of it and that the 4 acres which he said he had transferred to his father in 1958 fell on L.R. No. 258. In view of that and considering that the appellant admitted under cross-examination that the respondent's mother was buried on the suit premises it is quite clear to us that the land was part of Kaara Mburu's land which he freely allowed his wives and children to cultivate and probably live thereon. Neither his wives nor children or any of them had exclusive possession or use of it. Nor could any of them properly claim to be more entitled to it than the others. Clearly the circumstances show that the appellant, the respondents and the rest of Kaara Mburu's family members were on L.R. Inoi/Kaitheri/154 by reason of being his wives or children and not otherwise. None of them had any exclusive possession thereof as would entitle him or her to hold an adverse interest over it. The trial judge was, therefore, right to hold that the appellant was in the position of the registered proprietor's dependant and that in that position no adverse possession over the land could arise. Moreover, the appellant's conduct prior to instituting this suit and the manner he presented his case in the superior court clearly shows that his claim was not bona fide.

As to whether the succession cause interrupted the limitation period we do not consider that the issue is still alive for determination considering the conclusion we have come to above. Even assuming it was, the appellant having consented to the subdivision of parcel No. Inoi/Kaitheri/154 into two equal shares for distribution between his deceased father's two houses a rebutable presumption was thereby raised that he had acknowledge that the other family members were entitled to an interest in the land. So by dint of s.23 of the Limitation of Actions Act the limitation period, is at all it was running, was thereby interrupted.

In the result we find no basis, for disturbing the learned trial judge's decision and, accordingly the appeal fails and is dismissed with costs to the respondents.

Dated at Nairobi and delivered this 30th day of April, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL