



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, OMOLO & LAKHA, JJ.A.)

CIVIL APPEAL NO. 119 OF 1993

BETWEEN

JAMES KABUI KINYANJUI.....APPELLANT

AND

GATHONI MWITHIGA (Substituted).....RESPONDENT

(Appeal from a judgment of the High Court of Kenya

at Nairobi (Dugdale, J.) dated 19th January, 1988

in

H.C.C.C. NO. 2843 OF 1993)

JUDGMENT OF THE COURT

James Kabui Kinyanjui (the appellant) sued Nahashon Mwithaga Kimani in the superior court seeking, among other reliefs, a declaration that the said Nahashon Mwithaga Kimani (the defendant) was not entitled to remain on or enter the appellants' land on Plot L.R. No. Dagoretti/Kinoo/388 (the suit land) and a permanent injunction restraining the defendant from entering or remaining on the suit land.

The defendant filed a defence in which he denied the appellant's claim and averred that he was entitled to the suit land by adverse possession having entered the suit land and remained in continuous and uninterrupted occupation since 18th December, 1965. The appellant filed a reply in which he denied the defendant's claim based on adverse possession.

The trial Judge heard the evidence and held that the defendant's claim to title by adverse possession had been made out on a balance of probabilities, and he dismissed the appellant's suit with costs, giving rise to the present appeal. The defendant died in April, 1993, and on the application of the appellant, his widow, Gathoni Mwithaga, has been substituted as the respondent in this appeal by an order of this Court made on 4th April, 1995.

Notwithstanding the number of grounds of appeal stated in the memorandum of appeal, the main complaint by the appellant before us was that the learned Judge erred in law and in fact in holding that the defendant had proved his claim to possession and title by adverse possession. The defendant's evidence before the Judge was that he had purchased the suit land from the appellant's predecessor in title, one

James Gichuhi, way back in 1965 and although he took possession, he could not be registered as proprietor because the vendor refused to cooperate in the application for the consent of the local land control board. As the suit land is agricultural land the consent to the transaction had to be obtained within 3 months at that time and in default of this, the agreement became void for all purposes under the provisions of the Land Control Act (Cap. 302). After the agreement became void by operation of law, the defendant remained in possession and continued to cultivate the suit land.

The original proprietor, James Gichuhi, sold and transferred the suit land to the appellant on 24th October, 1980. Mrs Githae, for the appellant, submitted that by lodging a caution against the appellant's title, and filing a number of suits in the subordinate court to assert his claim to the suit land, the defendant had thereby acknowledged the appellant's title, and time had therefore ceased to run for the purposes of the defendant's claim based on adverse possession. This submission cannot be correct because in taking those steps, the defendant was simply asserting his own claim to the suit land without in any way acknowledging the appellant's title. There is no other step the defendant, or his successors and assignees could have taken to assert their right to be registered as proprietors in place of the appellant except by filing a suit in the superior court.

Mrs Githae also complained that the Judge had gone too far in holding that the defendant had established his title by adverse possession, but as he did not order that the defendant be registered as proprietor in place of the appellant, we are satisfied the Judge acted within his powers.

For these reasons, the appeal fails and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 10th day of July, 1996.

R.O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

