



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: KWACH, AKIWUMI & SHAH, J.J.A)
CIVIL APPEAL NO. 20 OF 1993

BETWEEN

JOSEPH GACHUMI KIRITU.....APPELLANT

AND

LAWRENCE MUNYAMBU KABURA.....RESPONDENT

(Appeal from the Decree of the High Court of Kenya at
Nairobi (Justice Shields) dated the 27th June, 1991

in

H.C.C.C. NO. 2628 OF 1988 (O.S)

JUDGMENT OF SHAH J.A.

Joseph Gachumi Kiritu the appellant seeks orders to reverse the judgment of the superior court (Shields, J.) whereby Shields, J, ordered that the respondent, Lawrence Munyambu Kabura, be registered as the proprietor of a parcel of land known as LIMURU/NGECHA/688 pursuant to provision in Section 38 of the Limitations of Actions Act (Cap.22, Laws of Kenya) the learned judge found that the respondent agreed to purchase the said land and entered the suit land on foot of the contract (agreement) to buy the suit land. The learned judge also found that possession of the suit land by the respondent became adverse by virtue of payment of purchase price by the respondent in possession. For this second finding the learned judge relied on the decision of the superior court (Simpson J. as he then was) in the case of HOSEA V. NJIRU & ANOTHER [1974] E.A. 526, which case decided (inter alia) that on payment of purchase price by a purchaser in occupation his occupation becomes adverse to that of the vendor.

The facts in the case which unfortunately were not fully gone into by the learned judge were that the respondent bought from one Peter Mburu Kiritu a half acre parcel of land in 1974 at a price of Shs.5,000/=. This was what the respondent had stated in the superior court. This half acre was carved out of land parcel known as LIMURU/NGECHA/688. The respondent built a permanent house of 4 rooms on this parcel (half acre) of land when he was living with the appellant's daughter. This transaction he said was recorded in a book.

The respondent also bought one and a quarter acres of land again out of the same parcel of land that is LthiMsU RUt/iNmGeE CHfAr/o6m8 8, the appellant for which he paid a sum of Shs.9,000/= in three installments, that is, in 1974, 1975 and 1976.

Adverse possession, if any, would therefore begin in 1976, but there is no evidence of the exact date of

payment made in 1976. Adverse possession in such a case would start immediately after the date of last payment. See PUBLIC TRUSTEE VS. KAMAU WAMDIRI (1982-88) 1 K.A.R. 498 at page 505 where Kneller, J.A. (as he then was) said;

"The limitation period will begin to run from the date of payment of the purchase price in full or last instalment of it. See Herman, J. in BRIDGES VS. MEES [1975] 2 ALL E.R 577; and Simpson, J. (as he then was) in HOSES V. NJIRU (1974) E.A. 526 (K)."

Effectively therefore the respondent's interest, as adverse to that of the appellant and that of Peter Mburu Kiritu, commenced sometime in 1976 and not in 1974 as the learned judge found. The appellant relies on two grounds of appeal only, that is, grounds 2 and 4 of the memorandum of appeal. Ground 2 reads:

"The learned trial judge erred in failing to find that the plaintiff (respondent here) failed to discharge the burden of proof required to prove his case as set out in the suit in respect of his allegations as purchaser and his assertion of having acquired prescriptive rights over the suit premises under Section 38 of the Limitation of Actions Act (Cap.22)".

The respondent in his evidence in the superior court did not produce any evidence of such sale. Contracts for sales of land must be evidenced in writing. The respondent did not say what form of writing it was. He said "it was recorded in a book". The respondent does not say how the second transaction that is the transaction between him and the appellant was recorded, if at all. He simply stated that he bought one and a quarter acre piece out of LIMURU/NGECHA/688 from the appellant in 1974 for Shs.9,000/= and paid for the same by three installments. In cross-examination, the respondent stated:

"The defendant was my father-in-law. The land was consolidated with another piece of land. I bought land from the two, Peter Boro Kiritu and the defendant, but Peter died in 1982.

I made a search before buying and I had established that it was registered in the name of Peter Boro Kiritu. Initially we were to exchange pieces of land. I claim land because I purchased it and then stayed there. It is agricultural land. There was an agreement. I didn't go to Land Control Board. I started staying on the land in 1974 and built a permanent house. I thought brothers were the same.

Associated with daughter of defendant in 1970. We were staying in daughter's land. In 1974 I constructed a permanent house. Piece of land not sub-divided. Not another title deed. The one of 1¼ quarter (sic) is different. Never registered as owner".

If the respondent was as careful a man as to make a search before buying land (which he says he did), I foresee no difficulty in him producing some sort of documentary evidence of his purchase of the two parcels of land. My own assessment of the respondent's evidence is that he was not really telling the truth. It was very easy for him to say all documentary evidence was destroyed by his 'wife' - the appellant's daughter. That was a convenient but flippant way of getting out of a situation which obliged him to show some evidence of purchase of land.

Whilst he told the superior court that he completed paying for the second parcel of land in 1976 in his written statement of defence in Kiambu R.M.C.C. NO. 42 OF 1983, which case was consolidated with that of H.C.C.C. NO. 2628 OF 1988 (O.S) for hearing, he stated:

"2.The defendant does not admit the contents of paragraph 4 of the plaint in that he took possession of the plaintiffs share of land parcel No. LIMURU/NGECHA/688 in 1974 only after the sale transaction in which the plaintiff received the full consideration thereof and the plaintiff is put to strict proof thereof".

It is not possible for one to determine, in the absence of evidence as to the exact date of last instalment paid by the respondent and possibly the amount thereof, the exact date when possession of land by the respondent become adverse. It is a matter for the respondent (plaintiff) to prove and he did not prove it. It transpires therefore that the respondent did not properly or at all prove that he was in adverse possession

of suit land for a minimum of twelve years. The first ground of appeal as argued, therefore succeeds as I am unable to say with certainty that the respondent was in uninterrupted possession of the suit land for a minimum of twelve years.

Yet again in the case of SISTO WAMBUGU V. KAMAU NJUGUNA (1982-88) 1 KAR 217 it was held that as the defendant had, on his own showing, failed to pay the full purchase price he could not obtain that which was in effect specific performance of the agreement to sell the land and that (per Chesoni, Ag, JA.) time would only start running in favour of the defendant on the last day of his failure to pay the amount agreed, whether that date was taken as October 1979 or January 1967, to which date the defendant had subsequently agreed during negotiations in 1966, thus interrupting the period of adverse possession.

But that is not all. The other ground of appeal argued on behalf of the appellant is that the appellant having filed a suit, in 1983, for possession of the suit land the period of adverse possession was interrupted at the time that suit was filed.

It has been held by this Court in the case of PUBLIC TRUSTEE VS. KAMAU WANDURU (Supra) that filing of a suit by the owner or even the obtaining of a decree for possession, does not by itself interrupt the adverse possession period. It is a decision which I would respect. The principle of state decisis cannot be taken lightly by me. But there is one redeeming feature in the KAMAU WANDURU case and that is that if the suit for possession was kept alive by consistent efforts to recover possession the period of adverse possession may have been interrupted.

Madan JA. (as he then was) said in the KAMAU WANDURU case at page 502:-

"The respondent also submits that the second appellant's adverse possession was interrupted by virtue of the judgment in Civil Case No. 35 of 1978 which the respondent filed against her in the Resident Magistrate's Court at Murang'a.

Also by the respondent's physical entry upon the land in 1971. There is no judgment of any kind against the appellant in that suit it having been set aside".

In the same report (KAMAU WANDURU case) Kneller JA. (as he then was) said at page 505:- "He has not persisted in his suit to keep alive his right to recover possession and even a decree establishing his right without successful execution would not interrupt the adverse possession of Muthoni's. 2 Chitally & Rao's Indian Limitation Act (4R Edn. 1905) hh 1338-1340. SUBHAYA VS MOHAMED (1923) 50 IND. Appl 295; JANARDAM KESHAR ([1942] AIR Bombay 44; and SINGARAVELU VS CHOKKA MUDILIER [1927] Madras 88".

The case of Sisto Wambugu (Supra) relied upon by Mr. Muriithi for the appellant does not help him much on the issue as regards interruption of adverse possession by filing a suit for possession per se. Nevertheless reference to what Hancox J.A. (as he then was) said that case at page 54 when referring to the case of GITHU VS NDEETE, Civil appeal No. 24 of 1979 (unreported) is of assistance. No evidence was led to show what actual steps were taken to prosecute that suit earlier and with what result, if any. What was the position in the instant matter? In 1983 the appellant had filed a suit for possession in the Resident Magistrate's Court at Kiambu.

Defence to the claim therein was filed on or about 16th August, 1983. Thereafter there appears to have been no prosecution of that suit until the same was brought to the attention of the learned judge by the respondent's counsel. The judge ordered that that suit be transferred to the superior court, be consolidated with the suit in the superior court, and be disposed of together. Sisto Wambugu case really helps the appellant in showing that adverse possession period runs from the date of last payment as do the other cases to which I have referred.

Therefore going by KAMAU WANDURU case I am unable to say that filing of the suit per se interrupted the adverse possession of the respondent; but by the filing of suit, in my view, the appellant did clearly

manifest an intention to assert his right to occupy his own parcel of land.

So what is the situation relevant to this appeal? The appellant has been able to show that the respondent was unable to or did not show the exact date of last payment in the year 1976, when adverse possession period could have begun running. The claim for adverse possession of 12 years was not properly proved and I think the learned judge was wrong in not considering the time factor, that is to say, when did the period for adverse possession start running in the face of evidence by the respondent that he made the last payment for the land parcel in question in 1976, suit having been filed in July 1988.

Therefore in the end result I would allow this appeal, set aside the decree of the superior court. I concur with the orders proposed by my brother Kwach J.A.

Dated and delivered at Nairobi this 25th day of October, 1996.

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.