IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, AKIWUMI & SHAH, JJ.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

CIVIL SUIT NO. 2628 OF 1988 (0.S)
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JUDGMENT OF AKIWUMI, J.A.

The respondent had in a suit filed in the superior court by way of an originating summons, claimed to have acquired the suit land, LIMURU/NGECHA/688, through being in adverse possession of it against the appellant for over twelve years from an undisclosed date in 1974, to July, 1988, when the suit was filed. The respondent sought consequential orders that the original owner of the suit land, the appellant, do execute a transfer of the suit land to him failing which, such a transfer be executed by an authorized officer of the court. In the respondent's affidavit in support of the originating summons, he deponed that he had bought the suit land from the appellant in 1974, and had already paid the agreed purchase price of 14,000/=. He had also since 1974, upto the filing of his suit, been in continuous uninterrupted occupation of the suit land which he had extensively developed and had thus, acquired a prescriptive right over the suit land by virtue of s.38 of the Limitation of Actions Act. He further concluded in his affidavit that:

> **" ... I have all along made my rights known to the Defendant but he has refused to transfer the said land to me".**

These rights must also include his rights which he had deponed to much earlier in his affidavit, as the purchaser of the suit land for the agreed purchase price of 14,000/= which he had paid the appellant in full. But in spite of this, the respondent chose to base his claim on adverse possession, and not on one for specific performance.

The appellant in his replying affidavit, alleged that the respondent had been only a mere licensee on the suit land where he the appellant, had allowed the respondent to live with the appellant's daughter, and that the respondent, after this relationship had broken down in 1982, had in spite of being asked to do so, refused to leave the suit land. The appellant had been compelled in 1984, to sue the respondent in the Kiambu Senior Resident Magistrate's Court, for his eviction from the suit land. In his defence to that suit which is dated 16th August, 1993, the respondent averred that he was not the appellant's licensee but had bought and paid for the suit land and had been in occupation since 1974.

The respondent's suit brought by originating summons, and the appellant's suit brought by his plaint, were consolidated for trial in the superior court before Shields J. What is clear is that by the time when the respondent filed his originating summons dated 4th July, 1988, he was aware that the appellant had sued him in the Kiambu Senior Resident Magistrate's Court for eviction from the suit land. Indeed, the respondent had filed his defence to this which was dated 16th August, 1983. So when nearly five years

later, the respondent filed his originating summons, he must have been aware of the legal challenge which the appellant had brought against his occupation of the suit land. But the respondent in his sworn statement namely, his affidavit in support of his originating summons, in my view, deliberately kept silent about this, which can only be with the intention to deceive.

The respondent gave evidence at the trial of the consolidated suits in which he said, as he had averred in his defence filed in the suit in the Kiambu Senior Resident Magistrate's Court, that he had bought and paid for the appellant's portion of the suit land, the remaining portion being what he had bought from Peter Mburu Kivatu. But this is different from what he had deponed in his affidavit in support of the originating summons, with respect to the suit land, as that which he himself, had bought:

> **"... during the year 1974 I had bought from the Defendant the whole of the said parcel of land at an agreed purchase price of 14,000/= which I paid in full.".**

The other parts of the respondent's evidence are also of significance. In his examination in chief he said the following which is confirmed by the judges handwritten notes of the trial:

> **"Father (defendant) came by force in 1986.".**

He then continued as follows:

> **"There was a case Mr. Vohra said - Joseph had won and could go and cultivate. He came with a tractor and cultivated half of the land. Uprooted 522 orange trees, 15 banana trees. Reported the matter to court. He was warned by District Commissioner, OCPD and also court. He never came back.".**

But what else could the appellant do under these particular circumstances? The appellant may not have come back but what he did in 1986, and one is not told when in that year this had occured, amount to a repudiation of whatever contract he had with the respondent and a physical interruption of the respondent's "openly peacefully" adverse possession of the suit land. But was this before or after twelve years of the respondent's alleged adverse possession of the suit land had elapsed? There is no easy answer to this. In the respondent's originating summons, it is alleged rather curiously, without giving any particulars as to when in 1974, he had bought the land and gone into occupation, that he had been in continuous occupation since 1974. Without these particulars, it would be impossible to tell when in 1974, the respondent's twelve years of adverse possession had begun or when in 1986, it had ended. And this uncertainity remains unaffected even if the action instituted by the appellant in the Kiambu Senior Resident Magistrate's Court cannot be said to amount to an interruption of the period of adverse possession. On the other hand, it must be remembered that the appellant's entry by force onto the suit land in 1986, when according to the respondent, he cultivated half of it with a tractor, is clearly a physical interruption of the respondent's peaceful occupation of the suit land. On his own evidence therefore, the respondent has not shown that he was in undisturbed occupation of the suit land for twelve years. This position will remain unchanged even if it could be said that the suit land being agricultural land, and its sale not having been blessed by the consent of the Land Control Board, had become void for all purposes three months or later after its alleged sale. The respondent also in his evidence, described the suit brought against him by the appellant in the Kiambu Senior Resident Magistrate's Court, merely as a device to evict him from the suit land after the appellant's daughter had left him.

Inspite of the foregoing, evidence, the learned judge of the superior court, in a somewhat embarrassingly brief judgment, paid no attention, to the important issue whether the respondent's allegedly uninterrupted adverse possession of the suit land for twelve continuous years, had been disrupted or not, or to the respondent's own evidence on that important issue. This was a misdirection on his part.

The learned judge of the superior court, having held that he believed the respondent's story that he had gone into possession on an undisclosed date in 1974, after he had bought the suit land from the appellant and that he was not a mere licensee of the appellant's as alleged by him, simply went on, without paying any regard to the evidence before him that this may not be so, to conclude that the respondent had been in

uninterrupted adverse possession of the suit land for twelve continuous years. It may be true as the learned judge held on the authority of Hosea v Njiri and Others (1974) B.A. 526, that upon the respondent having entered into possession of the suit land upon his agreement to purchase it from the appellant, his possession thereafter, became adverse to the appellant, but he completely ignored evidence before him that could be construed to show that there had indeed, been an interruption of the respondent's continued adverse occupation of the suit land for twelve years before filing his originating summons. This evidence consists firstly, of the earlier suit which the appellant had filed against the respondent for his eviction from the suit land. It also consists of the respondent's own evidence at the trial, which I have already analysed, and which does not really support his case, that the appellant had in 1986, before he filed his originating summons, forcibly interrupted his peaceful and continuous occupation of the suit land. The respondent, it can be said, had not discharged the onus upon him to prove that he had been in uninterrupted and peaceful adverse possession of the suit land for twelve years before filing his originating summons.

The second ground of the appellant's grounds of appeal is that:

> **"The Learned trial Judge erred in failing to find that the plaintiff had 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)".**

In my view, and on this ground alone, the appeal succeeds and I will allow the appeal and set aside the judgment of the superior court. The appellant will have his costs of this appeal. In view of the respondent's long residence on the suit land he should be given some time to arrange his departure therefrom. I would suggest six months.

During the hearing of this appeal our attention was drawn to the authority of this court, The Public Trustee and Mrs. Beatrice Mathari v. Kamau Wandaru (1982 - 88) 1 KAR 498, and though this does not affect my earlier decision to allow the present appeal, I feel that I should comment on it because of the legal points raised therein. Our attention was particularly drawn to the following passage of the judgment of Kneller JA as he then was, at page 505:

> **"The learned judge found Wanduru and or Kamau had no agent on the parcel after 16 March 1967 and that was clearly correct.**
> **Any entries upon it by them under a claim of right, and attempts to take possession, were, in the circumstances of this case, insufficient to present (sic) the operation of the Limitation of Actions Act. They did not disturb the Muthoni's possession Lovell v Smith (1844) 3 LTCS 53, 126; Baker v Coombes (1850) 9 CB 714.**
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> **On 5 October 1978 Kamau obtained from the resident magistrate, Muranga, (sic) order for the eviction of the Muthoni's which was set aside on 23 November 1978.**
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> **Kamau was by a consent order declared by the third class district magistrate, Kiharu, on 21 April 1977 to have inherited the parcel from Wanduru in Land Succession Suit 199 of 1976. This does not, however, mean the Muthoni's possession runs from on 21 April 1977 against him. His right to bring an action to recover this land as I have said accrues to him through Wanduru. Section 7 Limitation of Actions Act.**
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> **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 and Rao's Indian Limitation Act (4th edn. 1965) pp 1338-1340. Subbaaya v Mohamed (1923) 50 Ind App 295; Janardany, Keshar (1942) AIR Bombay 44; and Singaravelu v Chokka Mudaliar [1923] Madraso 88."**

My comments on this passage of Kneller JA are with respect to the present appeal, as follows: In the particular circumstances of the present appeal, it is my view, that appellant's attempt to take possession as

already described in the words of the respondent himself, is sufficient to prevent the operation of the Limitations of Actions Act. It is true that the appellant's suit in the Kiambu Senior Resident Magistrate's Court, was consolidated with the respondent's originating summons and dismissed by the superior court, but can it in these days be said, to be in consonance with the maintenance of law and order, that whilst the invasion of the suit land by the use of force would be sufficient to prevent the operation of the Limitation of Actions Act, the more civilized and legal step of challenging the respondent's occupation of the suit land by instituting proceedings in a court of law, would not do? This issue is not exactly on all fours with what was described in The Public Trustee. Kneller JA, however, did not draw attention in his judgment to any supporting text or observations from the four authorities cited by him in his judgment. I have, however, been able to obtain only one of these authorities namely, the Privy Council case of Subbaiya Pandaram v Mohamed Mustapha Maracayar (1923) vol. L. Indian Appeals. I may be wrong, but the decision in that authority, as can be seen from its head note and holding, does not directly apply to the point raised on behalf of the respondent in the present appeal, namely, that by filing a suit in a court of law as the appellant did, did not amount to a disruption of the respondent's continuous adverse possession. The head note and the holding in Subbaiya Pandaram are as follows:

> **"By a registered deed executed in 1890 the appellant's grandfather endowed a chattaram with immovable property. In 1898 the first respondent purchased part of the property at a sale in execution of a decree against the appellant's father, the then trustee, for debts incurred by him; the purchaser and the other respondents who claimed under him had been in possession since that date. In 1904, in a suit to which the first respondent was a defendant, the appellant obtained a decree declaring the validity of the trust. In 1913 the appellant, having been appointed trustee by the District Judge, sued the respondents for possession of the purchased property:**
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> **HELD,that the decree of 1904 did not operate as res judicata so as to preclude the respondents from asserting that the property was now theirs, and that the suit was barred under either art. 134 or art. 144 of the Indian Limitation Act, 1908, Sch. 1; the decree merely emphasized the fact that the purchaser's possession was adverse. Further, that under s.10 of that Act a claim to recover trust property from an assignee for valuable consideration with notice can be defeated by adverse possession.**".

I would say in conclusion that Subbaiya Pandaram is not entirely apt to the issues raised in the present appeal.

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

A.M. AKIWUMI
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JUDGE OF APPEAL