IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Nyarangi, Apaloo & Masime JJA)

CIVIL APPEAL NO 42 OF 1987

KAIRU.....APPELLANT

VERSUS

GACHERU.....RESPONDENT

JUDGMENT

(Appeal from the High Court at Nairobi, Shields J)

June 30, 1988, **Apaloo JA** delivered the following judgment.

The dispute in this case involves two parcels of land registered in the name of the appellant as title numbers, LOC13/Gitugi – Matuto/T29 and T30. At some time prior to 1978, they were registered in the name of one Mwangi Macharia who was the registered proprietor. (I shall hereafter call him Mwangi.) Mwangi sold the two plots to the appellant in October 1978. The latter registered these plots under the Registered Land Act and was, on 19 October 1978, issued with two land certificates. The evidence shows that although he obtained title to the plots, the appellant did not enter into possession of either plot. The first significant act of ownership he did on them was to fence them both. They were adjacent plots.

It was this act that gave rise to the action which culminated in this appeal. The respondent claimed that he had bought these two parcels of land ten years earlier. One Muthee Macharia the deceased brother of Mwangi sold No T29 to him on 20 April 1968. On the same day, Mwangi himself sold him T30. The respondent said he entered into possession of the two plots and exercised on both acts of ownership openly and undisturbed from the date of his purchase on 20 April 1968 till they were fenced by the appellant.

The respondent also said that when he entered into possession of the plots, he grew on them napier grass, planted bananas on them and also constructed a cowshed and toilet on them. The respondent accordingly claimed that having been in open and undisturbed possession of the land for at least 12 years, he acquired adverse title to them against the appellant who was the registered owner. The appellant, for his part, swore in a replying affidavit, that he took possession of the lands as soon as he purchased them and at that time, according to his affidavit:

> ‘There was nobody in occupation, there were no crops and there was no visible development as alleged in the plaintiff’s affidavit.’

The appellant also contended in his affidavit that Muthee who allegedly sold plot 29 to the respondent had

> ‘no *locus stand*i in the matter as he had no interest in the premises and any agreement entered into was null and void’.

The respondent initiated the proceedings by originating summons and sought a declaration that the appellant’s title to both plots was extinguished and that it be declared he held such title in trust for him. As the appellant took issue with the respondent on the facts, this matter could only properly be determined by a plaint. To avoid multiplicity of proceedings, the learned trial judge, proposed to treat the originating summons as a plaint and thereafter resolve the issues joined between them and make consequential orders. Counsel for the appellant did not object to this course. Evidence was accordingly led by both parties on this footing.

On the evidence presented to the court by both sides, the issues which emerged for decision were:

> 1. Did both Muthee and Mwangi sell the two plots to the respondent in 1968?
>
> 2. If so, did the respondent enter into possession of both plots?
>
> 3. If the answer to question 2 is in the affirmative, did the respondent remain in adverse possession against the registered owner for at least 12 years?

In a brief but clear judgment, the learned judge (Shields J) found that the respondent purchased both lands from the Macharias and went into possession of the date of purchase namely, 20 April 1968. The judge also found that upon entry into possession, the respondent ‘remained in sole beneficial and exclusive possession of the same’. The learned judge then held that the appellant fenced the plots sometime in the latter half of May 1980 ‘after the Macharias and their transferee’s title had been extinguished’. Accordingly, the judge concluded that the respondent has acquired title to the suit premises. He therefore directed the registrar to amend the register to conform with his holding. He also granted possession of the disputed lands to the respondent.

The appellant says that that judgment was wrong and ought to be reversed and all orders adverse to the appellant made consequent upon the judgment be set aside. Before dealing with the grounds of appeal, it must be pointed out that the issues which emerged from the evidence and which I have set out above, are all simple issues of fact. In a large measure, they depend on the credibility of the two sets of witnesses who testified before the court, that is, those called by the respondent and those called by the appellant. The learned judge expressed belief in the respondent’s version of the facts. Clearly, he must have made a favourable impression on the court because the judge observed that: ‘The plaintiff struck me as a bright and intelligent man who would take action as soon as his rights were invaded’. Except on one point involving date, the judge said: ‘I accept the rest of the plaintiff’s [ie the respondent’s] evidence and that of his witness.’ The judge’s preference for the respondent’s evidence was not seriously challenged before us. That evidence entitled the learned judge to decide the three issues I have set out in the respondent’s favour. It will also entitle the judge to hold, as he did, that having been in exclusive possession of the suit lands from April 1968 to May 1980, the respondent acquired adverse title to them.

That brings me to the rounds on which the judgment was challenged. The first ground reads:

> ‘The learned judge erred in taking the evidence in a scanty, unorthodox and unconventional manner rendering it incoherent and difficult to comprehend or to be given any meaning.’

For this counsel relied on Ord 17, r 5 of the Civil Procedure Rules which enacts that:

> ‘The evidence of each witness shall be taken down in writing by or in the presence and under the personal direction and superintendence of the judge, not ordinarily in the form of question and answer but in that of narrative and when completed shall be signed by the judge.’

I think there is something to be said for the contention that the evidence was not recorded in conventional manner. The learned judge made a precis of the evidence and some of the sentences were so brief that

they had no vowels. Whether the learned judge was pressed for time or not, it is difficult to say. One would hope that that learned judge would, when recording evidence in future, be mindful of the requirement of Ord 17, r 5. But I cannot accept that the laconic form used by the judge makes the evidence incoherent and difficult to comprehend. Counsel himself referred to portions of his evidence to make his contentions of substance and did not appear to have had any difficulty in following the evidence as recorded. At all events, beyond pointing out the peculiar manner in which the evidence was recorded, counsel did not suggest that complaint alone justified a setting aside of the judgment. I do not think so either.

When the appellant's complaint against the judgment passed from form to substance, it was asserted in ground 2 that:

> 'The learned judge erred in law in that he did not address himself or direct his mind to the law pertaining to adverse possession.'

That contention has little weight. The judge is presumed to know the law. Indeed the law is said to be in the judge's bosom. The judge did not make any pronouncement which suggests that his appreciation of the law relating to adverse possession was faulty. It is clear that on the facts which he found, he must have applied the law to reach the conclusion that: 'the Macharias and their transferee's title had been extinguished'. That can only arise by acquisition of prescriptive title by the respondent. Clearly, this ground must fail. In ground 3, it was averred that:

> 'The learned judge erred in that he concluded that the respondent had been in adverse possession of the suit premises for a period of over 12 years while the evidence pointed to the fact that such adverse possession, if any, was less than twelve years.'

That is a minor factual complaint which is, in any case, inaccurate. The judge found that the respondent went into possession of the suit premises on 20 April, 1968 and was dispossessed by the appellant 'in the latter half of May 1980'. By simple arithmetic, it should not be difficult to find that from 20 April, 1968 to 19 April, 1980 is 12 years. From 20 April to the latter half of May should be approximately another one month. So in all, the adverse possession found by the judge was 12 years, one month. One does not need the brain of Einstein to conclude that that period is just over 12 years.

It was next complained in ground 6 that:

> 'The learned judge erred in that he did not appreciate that the plaintiff's adverse possession, if any, of the suit premises was interrupted by acquisition of title and assumption of possession by the defendant of the suit premises before the expiry of the twelve years.'

True, the appellant obtained title from Mwangi which he registered in October 1978. But his claim that he then entered into the suit premises, in December 1978 to interrupt the respondent's acquisition of prescriptive title was rejected by the judge. Indeed, the court found that the appellant sought to enter the suit land in the latter half of May 1980. He found, and in my opinion, correctly, that at that date, the 12-year period of limitation had run out and the title of the appellants as well as that of his predecessorin-title was extinguished. That, in my opinion, is a correct appreciation of the relevant law.

The next complaint numbered as ground 7 was formulated in these words:

> 'The learned judge erred in that he failed to appreciate that the claim for adverse possession by the plaintiff could not lie against the defendant but against the previous holder of title.'

Counsel did not produce any authority for this proposition which appears to be a statement of law. In my opinion, there is no legal warrant for it. On the proved facts of this case, the respondent entered into the suit premises on 20 April 1968. From that day, his possession was adverse to the registered proprietor who was then Mwangi. Over ten years after the respondent began that adverse possession against him, Mwangi sold the premises to the appellant. This was in October 1978. The appellant, according to the

judge's finding, did nothing to interrupt the respondent's acquisition of prescriptive title until May 1980. At that date, the 12-year period had run out. But the appellant took Mwangi's title subject to the right of the respondent in adverse possession and that the limitation period of 12 years commenced in April 1968 when Mwangi was the registered owner and was not interrupted till May 1980, 20 months after the alienation of the land to the appellant.

If the period the respondent was in adverse possession against Mwangi were to be excluded and the period of limitation reckoned only when the appellant became registered proprietor, an owner of land whose title was in danger of being lost by prescription can better his lot by the simple device of alienating the land just a day before the 12-year period ran out. But it is elementary that a grantor of land cannot grant better title than he has. The appellant took Mwangi's title subject to the rights of a prior purchaser in adverse possession. That the law relating to prescription affects not only present holders of title but their predecessors in title is shown by s 7 of the Limitation of Actions Act. That section says:

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued, to some *person through whom he claims* to that person.' (Emphasis mine.)

In the context of this case, this means that if instead of the respondent bringing the suit for possession, the appellant had brought it, the respondent would be entitled to set up his adverse possession from 20 April 1968 in as much as that is the date on which the cause of action accrued to Mwangi through whom the appellant derived title. It is manifest that the learned trial judge was fully cognizant of this principle. That was why he held that: 'The Macharias and their transferee's title had been extinguished.' In my opinion, the learned judge's appreciation of the law of prescription was correct. It is Counsel's appreciation of it that is faulty.

In grounds 4 and 5, it was alleged the judge erred in believing the respondent's evidence while rejecting the appellant's and was also in error in not evaluating the evidence before reaching his factual conclusion. Without disrespect to counsel, there is hardly any merit in those two grounds. It should suffice to say that although the judgment was brief, the learned judge's conclusion was well reasoned and the appellant has failed to show any flaw in the reasoning of the court. I think those two grounds must fail and I hold that they have.

Had the plots in dispute not been registered under the Registered Land Act, the appellant's title would have been extinguished *ipso facto* after 12 years from the date of adverse possession. Section 37 of the Act, however, keeps that title alive in the appellant as trustee for the respondent. The respondent is entitled under s 38 of the Act to ask the High Court to order that he has registered as the owner of the land in place of the appellant. The respondent prayed for such order and the learned judge acceded. In my opinion, he was right.

One complaint which counsel for the appellant made to us repeatedly, was that Mwangi the original vendor of the land to the parties should have been joined to the suit. It was said if he had been sued, the court would have been enabled to look at the respondent's purchase of the suit premises and when the respondent's adverse possession actually commenced.

I cannot see why the respondent should be obliged to sue Mwangi, against whom he sought no relief. The sale by Mwangi to the respondent could be, and was indeed, proved without joining him as a party. The sale of plot T30 by Mwangi to the respondent was reduced into writing as indeed the simultaneous sale by Muthee of plot T29. By reducing the sales into writing, albeit in Kikuyu, both Mwangi and Muthee provided reliable evidence of the sales. This was buttressed by the respondent's immediate entry into the suit plots and the open and undisturbed acts of ownership performed by him.

The relief the respondent sought was a declaration that he had become owner of the suit premises by adverse possession and that inasmuch as the legal title remained vested in the appellant, he held that title in trust for him. Neither does the respondent need the joinder of Mwangi to establish this claim against the appellant, nor does the latter need Mwangi as a joint defendant to enable him to resist the respondent's

claim. In my opinion, from the stand point of the respondent, the joinder of Mwangi would have been pointless and I am satisfied that there was no need for the respondent to incur the trouble and expense of joining Mwangi. I think counsel's contrary submission was unsound.

In my opinion, the judgment and the consequential orders made by the court below were right and ought to be affirmed. I would accordingly dismiss this appeal with costs.

Nyarangi JA. I agree with Apaloo JA's judgment but would like to state briefly my reasons for dismissing the appeal.

The judge would have been justified in holding that the appellant purchased the material parcel of land after the respondent had been in adverse possession for a little over ten years. On the evidence, the respondent continued to be in adverse possession until 12 years were over. The appellant did not dispossess the respondent and so, as purchaser, he took subject to overriding interests then subsisting – s 30 of the Registered Land Act.

In the situation that presented itself, it is clear that that respondent bought the plot and took possession on 20 April, 1968. He was dispossessed in June 1980, having been in adverse possession for over 12 years. Thereafter, the appellant had s 7 of the Limitation of Actions Act, Cap 22 (the Act) to contend with.

There is no doubt that the purchase of land by the appellant did not affect adverse possession. Also, there is no doubt that on 20 April, 1968, the appellant held the parcel of land in trust for the respondent (s 37 (a) of the Act). For that reason the respondent was well within his rights, pursuant to s 38 of the Act, to apply to the High Court for an order that he be registered as the proprietor of the land in place of the appellant.

I agree with the criticism which has been made by counsel for the appellant of the form of taking the evidence. It is yet possible to appreciate the proceedings.

I do not, with great respect, share the view of Apaloo JA on the judgment appealed from. In my view the judgment is scanty and contravenes ord 22, r 4 of the Civil Procedure Code. Fortunately, the inadequacy is not fatal, this being a first appeal and there being the evidence to sustain the conclusion of the High Court. It follows that I find that the appeal should be dismissed with costs. As Masime JA also agrees, the order of the court is that the appeal is dismissed with costs.

Masime JA. I have had the advantage of reading in draft the judgments of Nyarangi and Apaloo JJA. For the reasons they have both given I agree that the appeal should be dismissed. I also share Nyarangi JA's censure of the learned trial judge's manner of recording the evidence and writing the judgment.

As regards the substance of the appellant's case, I would add that if the land in dispute had been agricultural land it is probable that the respondent's overriding interests would become known in the process of obtaining Land Control Board consent. The appellant might then have taken steps to clothe his bare title with possession as soon as he purchased the plots.

Dated and delivered at Nairobi this 30th day of **June , 1988**

J.O. NYARANGI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR