



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO 15 OF 1984

MUNGANIA.....PLAINTIFF

V

IMANYARA.....DEFENDANT

Land - adverse possession - whether purchaser can rightly claim adverse possession - when does a claim for adverse possession arise.

Land - overriding rights - rights under limitation of actions - whether they qualify as overriding rights.

Civil Practice and Procedure - amendment of pleadings - without leave - when this is permissible under the Civil Procedure Rules (cap ...) - amendment of defence without - when leave had been granted for amendment of plaint - whether leave to amend the defence is presumed to have been given.

Civil Practice and Procedure - discontinuation of suit - discretion of judge to disallow application to discontinue suit - guiding principles.

The appellant entered into a sale agreement with the 1st respondent for sale of the 1st respondent's land and subsequently filed a claim for adverse possession and sought to have the respondents evicted from the land. The 1st respondent denied selling the plot in question and asserted the sale was in respect of another property. On the hearing the appellant who was the plaintiff in the High Court sought to withdraw the case or transfer it to another or refer it to arbitration. The judge declined to accede to these requests and the appellant proceeded to defend the counterclaim having opted to call no evidence in support of his claim. The judge heard the respondent and gave judgment on the counterclaim against the appellant and dismissed the appellant's suit.

The appellant appealed on grounds that the learned judge erred in law in his interpretation and application of the doctrine of adverse possession and the refusal to allow the withdrawal of the case as well as his holding that adverse possession was not proved and the finding that fraud was not proved inter alia.

Held:

1. When the plaintiff was granted leave to file an amended plaint no liberty was given to the 1st defendant to amend his defence, but the amendment of defence was a necessary consequential step flowing from the amendment order in favour of the appellant. Additionally the pleadings were not closed and the 1st defendant was at liberty to amend without leave.

2. If a party enters land under an agreement he cannot quietly pick up years which will ultimately entitle

him to maintain an action for adverse possession.

3. Until the agreement is terminated or rescinded possession is not adverse to anyone as required by sections 7 and 13 of the Limitation of Actions Act.

4. Adverse possession must be a clearly established by continuous and uninterrupted possession, on the part of the person claiming, for over 12 years.

5. The second respondent having purchased the land in 1974 took it subject to rights of being acquired under the Limitation of Actions Act as they would be overriding interests under section 30(f) of the Registered Land Act but since the appellant has pleaded and testified that he was in occupation under an agreement for sale between him and the 1st respondent he could not have been in the course of acquiring rights under the Limitation of Actions Act on October 10, 1974. On any showing therefore, the appellant was not in adverse possession against any of the respondents for the requisite twelve years.

Appeal dismissed.

Cases

1. Sisto Wambugo v Kamau Njuguna , Civil Appeal 10 of 1982

2. Gatimu Kinguru v Muya Gathangi, [1976] KLR 253 Statutes

1. Civil Procedure Rules order VIA rule 1(1), 1(2)(a); order VII rule 1(1) and (2), order VIII rule 1(1), 1(2); order XXIV rule 2(2), rule 17 (3)

2. Limitation of Actions Act , cap 22 sections 7, 13

3. Registered Land Act cap 300 section 30(f) Advocates

Mr Kioga for Appellant (plaintiff then)

Mr Kariuni for Appellant

May 24, 1984, Chesoni Ag JA delivered the following Judgment.

In 1974 the appellant, Wilson M'Mungania, filed a civil suit against the first respondent, Gerald M' Imanyara, asking the High Court to order M' Imanyara to transfer a piece of land, Kithoka/33, measuring about 3.1 acres to him and in the alternative the first respondent to pay the appellant's development expenses of Kshs 25,600 plus costs of the suit. The basis of the appellant's claim was an alleged purchase of the suit land in March 1965. M' Imanyara filed a defence in May, 1975 denying the alleged sale and stated that, without prejudice, and in the alternative he sold and transferred to the appellant land reference No Kithoka/120/20 and, if the appellant was occupying Kithoka/33, it was by mistake and the respondent did not own Kithoka/33. The respondent further denied liability for Kshs 25,600 and prayed for dismissal of the suit with costs.

Nothing seems to have happened in the matter till March 4, 1980 when the summons for Directions was heard. On November 27, 1981, Mr Kioga for the appellant (plaintiff then) successfully applied for leave to amend the plaint, and include Mutungi Njogu, the 2nd respondent, as codefendant.

The amended plaint was filed on December 9, 1981, and on December 16, 1981 Mbaya & Co Advocates filed an Amended Defence and a Defence Counterclaim for Imanyara and Njogu respectively.

When the case came up for hearing before Patel J on May 26, 1983, Kariuki for the appellant applied for the trial to be before another judge and if the court were to proceed with the hearing then to refer the matter to arbitration or transfer it to the Senior Resident Magistrate at Meru. No reasons were assigned for

the application and the learned judge, rejected the application which Mr Mbaya had opposed. Mr Kariuki then made a further application under order XXIV rule 2(2) of the Civil Procedure Rules to discontinue the suit. That application again was rejected whereupon (in the result of which) Mr Kariuki offered no evidence in respect of the suit he had filed, but said that he would defend the counterclaim included in the 2nd correspondent's Defence of December 16, 1981. Contrary to that which the learned judge said there is no formal defence to the counterclaim filed by the appellant as required by order VIII rule 1(1) and (2), as read with rule 17 (3) of the same Order of the Civil Procedure Rules. Nevertheless, the learned judge allowed the appellant to argue against the counterclaim at the hearing and he dismissed the appellant's suit with costs and gave judgment for the 2nd respondent against the appellant. The appellant was ordered to deliver vacant possession of the suit land to the 2nd respondent on or before May 31, 1984, and in default to be evicted. The judge further ordered the appellant to pay to the 2nd respondent mesne profits at Kshs 5,000 per annum from October 19, 1974 till vacant possession is given, plus costs of the counterclaim.

Mungania has now appealed to this court against Patel J's judgment on twelve grounds six of which were abandoned at the hearing. The remainder were that the learned judge erred in law in his interpretation and application of doctrine of adverse possession, holding that adverse possession was not proved; evaluation of the whole case, refusal to allow the applicant to withdraw the case, finding that fraud had not been proved between the respondents; and that the whole decision was contrary to the weight of the evidence.

In the order granting leave to file an Amended plaint no liberty was given to the 1st defendant to amend his Defence if he wished, but the Amended Defence was necessary consequential step flowing from the amendment order in favour of the appellant. Above all the pleadings had not closed and a party may, without the leave of the court amend his pleading once, at anytime before the pleadings are closed. Again where an amended plaint is served on a defendant, if he has already filed a defence, he may amend his defence: see order VIA rule 1(1) and (2)(a) of the Civil Procedure Rules. As to the 2nd respondents Defence and Counterclaim this was filed within 7 days after the filing of the Amended plaint. It was the first time Njogu had been served. He had fifteen days within which to file the defence and counterclaim unless the court had prescribed any other time within which to do: order VII rule 1(1) and (2). His pleading was filed in time. Both the Amended Defence and counterclaim of the 1st and 2nd respondents respectively required no leave of the court to be filed and they were not filed out of time. Fraud and adverse possession were pleaded in the Amended Plaint, but the appellant led no evidence in support of his case in the result of which these allegations were not proved. An allegation of fraud being a most serious allegation requires a very heavy burden of proof on the part of the party making it. As to the transfer of the case to another judge there was no reason given for the application and the same may be said for the request to discontinue the suit. Discontinuing of a suit is a matter involving an exercise of a discretion and there is no evidence that the learned judge exercised the discretion unjudiciously or on wrong principles as to necessitate this court's interference.

When the appellant gave evidence in defence against the counterclaim he said that he purchased from Mungania 6.10 acres for Kshs 1,500 on March 28, 1965, and went onto and started cultivating the land that same month.

He never specified the land nor did he refer to Kithoka /33. He said that he had rights by adverse possession, but over which land? Adverse possession cannot exist in vacuum. Even if he said he did not, when he filed action in 1974 he had been on the land for at most 9 years which were less than 12 years by 3 years. He had acquired no right by adverse possession. The principles of natural justice were observed at the trial as the appellant was heard in defence against the counterclaim when he even had filed no defence to the counterclaim. He, on his own choice, after the application for transfer and discontinuance were refused, declined to lead evidence to prove his claim and his allegations that the court prevented him from adducing evidence has not been therefore made out.

In fact the reason for the court rejecting the appellant's application to discontinue the suit must have been to compel him established his claim.

The learned judge correctly evaluated the evidence and the decision is not against the weight of evidence.

There is no merit in this appeal which I would dismiss with costs.

Hancox JA. I am in agreement with the judgment of Chesoni Ag JA which I have had the advantage of reading in draft. The decision of this court in *Sisto Wambugo v Kamau Njuguna*, Civil Appeal 10 of 1982, makes it perfectly clear that, if a party enters land under an agreement, he cannot quietly pick up years which will ultimately entitle him to maintain an action for adverse possession, unless and until the agreement is terminated or rescinded for until then his possession is not adverse to anyone as required by sections 7 and 13 of the Limitation of Actions Act, cap 22.

In the instant case the appellant's possession was not adverse to the first respondent until the 1965 agreement, under which, according to his own case, he entered the suit land, (assuming it was the same land) came to an end. There is no evidence that it came to an end before October 10, 1974, when the second respondent became the registered proprietor. Thereafter assuming the appellant was in adverse possession as against the second respondent, this state of affairs only subsisted until, at the latest, December, 16, 1981, when the counterclaim was brought, (making a total of just over seven years' adverse possession), for I do not believe that the second respondent purchased the land in 1965. This evidence of his was contrary to the register and contrary to the allegation in his counterclaim. Thus this case is distinguished from *Gatimu Kinguru v Muya Gathangi*, [1976] KLR 253 to which Mr Menye, on behalf of the appellant drew our attention because in that case the evidence clearly established over 12 years' continuous and uninterrupted adverse possession on the part of the defendant. If on the other hand, the 1965 Agreement did not refer to the same land then the whole basis of the appellant's case collapses. I have not dealt with Land Control point as this ground of appeal was abandoned.

It is perfectly true that the second respondent having, as I am satisfied purchased the land in 1974, he would take it subject to rights in the course of being acquired under the Limitation of Actions Act., as they would be overriding interests under section 30(f) of the Registered Land Act cap 300. But since the appellant himself pleaded and testified that he was in occupation under an agreement for sale between him and the first respondent, he could not have been "in the course of acquiring rights" under the Limitation Act on October 10, 1974. So any possession adverse to the second respondent must have commenced then. On any showing, therefore, the appellant was not in adverse possession against either of the respondents for the requisite twelve years.

Accordingly, despite a degree of uneasiness I have felt about the circumstances leading up to the appellant offering no evidence, including the learned judge's failure to ascertain why the appellant wished the case to be transferred to another judge, to arbitration, or to the Senior Resident Magistrate, Meru, I am satisfied that this appeal must fail, as it equally must have done if this evidence and this material had been before another court.

As Nyarangi Ag JA also agrees this appeal will be dismissed and the orders will be as proposed by Chesoni Ag JA. Nyarangi Ag JA. I agree.