



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Madan, Kneller JJA & Chesoni Ag JA )**

**CIVIL APPEAL NO. 73 OF 1982**

**BETWEEN**

**PUBLIC TRUSTEE.....APPELLANT**

**AND**

**WANDURU NDEGWA.....RESPONDENT**

**(Appeal from the High Court at Nairobi, Todd J)**

**JUDGMENT**

**Madan JA** On March 16, 1967, the late Mr Stanley Gathungu Mathu entered into a written agreement with Mr Wanduru Ndegwa for the purchase of Mr Ndegwa's agricultural land parcel No Loc 8/Manyutha-Ndutumi/84 comprising 1.82 hectares situated in Murang'a District, and registered under the Registered Land Act (cap 300). The purchase price of Kshs 4,720 was paid in full by Mr Mathu immediately on the signing of the agreement of sale on that day by the respondent on behalf of his father.

At the time of the making of this land deal the relevant provisions of the law were set out in section 218(2), chapter XII, part 3 of the Constitution (LN No 718 of 1963) which provided that an agreement for the sale of agricultural land as defined in section 215(1)

“shall be absolutely void for all purposes (a) at the expiration of three months after making of the agreement if application for consent has not been made within that time to the appropriate Divisional Board ...”.

The objects of these provisions were later reproduced in the Land Control Act, 1967 (cap 302) as follows:

“PART IV – CONTROL OF DEALINGS IN

AGRICULTURAL LAND

6(1) Each of the following transaction, that is to say: (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) An agreement to be a party to a controlled transaction becomes void for all purposes:

(a) at the expiration of three months after the making of the agreement, if application for the appropriate land control board's consent has not been made within that time;"

Now the period of three months for the making of the application for consent has been increased to six months after the making of the agreement, and notwithstanding that the period of six months may have expired, the High Court may extend that period where it considers there is sufficient reason to do so. The Statute Law (Repeal and Miscellaneous Amendments) Act No 13 of 1980 (section 2).

Mr Mathu with his wife and the other members of his family entered upon and took possession of the whole land forthwith on the same day, ie March 16, 1967. They arranged for cultivation of the land. Mr Mathu's father who lived upon his own *shamba* nearby, overseered labour, cultivation and development of the land. Mr Mathu and his wife were then both working at Thika. They came to the land regularly, planted trees, crops and euphorbia hedge surrounding the entire land. They also started to build a permanent house thereon in 1975. It was completed in 1977. Mrs Mathu has been living on the land in their house with her four children since January, 1978.

Mr Stanley Gathungu Mathu died on October 6, 1977. The first appellant, the Public Trustee, stepped in to administer his estate. The second appellant Mrs Beatrice Muthoni is Mr Mathu's widow, and also his heir. The respondent's father died on July 15, 1973. The respondent succeeded to his estate on April 21, 1977 having been so appointed in Succession Case No 199 of 1976 in the district magistrate's court at Kiharu. The order of the court was:

"By consent Kamau Wanduru acknowledges that Stanley Gathungu Mathu is a purchaser of parcel No Manyutha/Ndutumi/84 which Kamau Wanduru inherits as he is son of the deceased. Certificate of succession to issue in the name of Kamau Wanduru."

On April 2, 1979 the two appellants by originating summons filed by them asked for a declaration stating that Mrs Muthoni had become entitled under section 38 of the Limitation of Actions Act (cap 22) (hereafter referred to as the Act) to be registered as the sole proprietor by adverse possession of the suit land parcel No 84 in place of its present registered owner the respondent.

In her affidavit supporting the summons Mrs Muthoni deponed that she and her husband entered upon the suit land on March 16, 1967 on which day they also paid in full the purchase price for it, and from that date they had also been in continuous adverse possession of it for twelve years.

The suit was heard by Todd J in the High Court. He held that Mr Mathu and his wife Mrs Beatrice Muthoni, and she after the death of her husband in 1977, had proved continuous, open, exclusive and undisturbed possession of the suit land since March 16, 1967 to the date of filing of the suit. He however dismissed the summons on the ground that the filing of it on April 2, 1979 was premature by about 2 1/2 months since the twelve years adverse possession has to be calculated from a date three months after June 16, 1979 when the agreement of sale between the parties became void for all purposes. Thus it is a simple arithmetical exercise that when the suit was filed the period of twelve years mentioned in section 7 of the Act had not yet expired to debar the respondent from taking action for recovery of the suit land. *Sospeter Wanyoike v Waithaka Kehari*, CA 29 of 1980, (unreported). The learned judge seems to have treated the agreement of sale as providing the appellants' cause of action. Not so. The appellants were claiming title to the suit land by adverse possession under the Act.

With respect the learned judge also overlooked paragraph 9 of Mrs Muthoni's affidavit in support of the summons wherein she deponed:

"9. I am advised by my advocate and verily believe that my said husband and I have now been in continuous adverse possession of the said land parcel No Loc 8/ Manyutha/Ndutumi/84 for twelve years because: (a) We entered the same on March 16, 1967 having paid the full purchase price and (b) the consent of the divisional Land Control Board to the said agreement of sale was never obtained with the

result that (it) became void for all purposes”.

The appellant’s cause of action was clearly contained in sub-paragraph (a) above, and not in sub-paragraph (b), nor in sub-paragraphs (a) and (b) together. The appellants by conceding in sub-paragraph (b) that the agreement of sale became void for all purposes they themselves pointed out the disability which would prevent their suit from succeeding under the agreement.

In this court the appellant’s first ground of appeal is that the learned judge correctly found that the second appellant was in continuous, open, exclusive and undisturbed possession of the suit land since March 16, 1967 and that the full purchase price for the land having been paid on the same day, viz, March 16, 1967 the learned judge ought to have held that the second appellant had completed adverse possession of the suit land for over twelve years before the institution of the suit on April 2, 1979.

Of course, calculated from the date of payment of the purchase price on March 16, 1967 and on the basis of it, the full span of twelve years’ adverse possession and more had already run when the suit was filed on April 2, 1979. The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive (as the learned judge found it to be so in this case) 28 *Halsbury* 4th Edition paragraph 769. Under section 9 of the Act the right of action accrues on the date of dispossession or discontinuance.

Section 7 of the Act provides:

“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.”

A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor: *Bridges v Mees* (1957) 1 Ch 475 at 484; referred to with approval by this court in *Mwangi Githu v Livingstone Ndete and Others*, CA No 24 of 1979 (unreported).

The respondent, who has also cross-appealed, submits that the agreement in this case being related to a controlled transaction became void for all purposes on the date of the making of the agreement because consent of the Divisional Board was not obtained in respect of it; or, in other words, no enforceable claim could arise under the agreement no matter when adverse possession began to run because it became void *ab initio* for all purposes for lack of consent. This argument is based upon the enticement of the words “for all purposes”. This is right so far as it goes but only if the claim is on an agreement for the sale of agricultural land as stated in section 218(2) (*supra*), or, as more appropriately stated in the Land Control Act (*supra*), a transaction in agricultural land. What the land control legislation prohibits without consent is an agreement, a transaction or a dealing in agricultural land which comes about as a result of a volitional act between parties themselves. The ownership of land of whatever type is also mutable by operation of law, eg by succession or by adverse possession. The provisions of the Land Control Act have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land.

It cannot be that section 218(2) (*supra*), whittled down by three months, or, now by six months, or even longer period if the High Court so orders, the period of limitation of twelve years provided by section 7 of the Act which is of general application. If not it would make section 7 chaotic, and also emasculate section 38 of the Act. It could never have been the intention of the legislature that the provisions of the Limitation of Actions Act should be subject to unconnected amendments to the Land Control Act. The period of three months referred to in section 218 (2) (*supra*) was purely procedural, as also the period of six months now, or any other period, and not intended to curtail or reduce any period of limitation enacted by the Act. Its operation was also confined to making extinct only agreements for the sale of agricultural land without consent.

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. Moreover the respondent was asserting his own right in the suit and the appellants did not make any acknowledgement of his right under sections 23(1) or 24 of the Act which provide that where a right of action (including of a foreclosure action) to recover land has accrued, and section 23(1)

(b)(i) the person in possession of the land or moveable property acknowledges the title of the person to whom the right of action has accrued

the right accrues on and not before the date of the acknowledgement. Section 24 requires that every acknowledgement of the kind mentioned in section 23 must be in writing and signed by the person making it. The appellants neither made nor signed any acknowledgment of the kind mentioned in section 23. The learned judge expressly made the correct finding that the respondent did not enter upon the land to disturb or break the adverse possession.

The respondent further submits that the contract with the respondent commenced from the date of his appointment in the Succession Case on April 21, 1977. The contract for sale of the land was made with the respondent's late father on March 16, 1967 from which date the right of action first accrued to the father against Mr Mathu as the purchaser. At best the respondent can be only said to be claiming through his father; the right of action therefore accrued to him on March 16, 1967. I think this is exactly the kind of situation contemplated in section 7 (supra).

Whether direct or derivative, in any event the respondent's title was subject to the purchaser's over-riding interest given by the Registered Land Act (cap 300), and which the respondent knew about he having signed the agreement of sale on behalf of his father.

The respondent further submits that adverse possession was also interrupted by an offer made by the second appellant in a letter written on her behalf by her advocate Mr Karuga Wandai on December 16, 1977 offering to buy the said land at Kshs 6,000 per acre. This letter was referred to and produced during the second appellant's cross-examination. She denied having authorized or instructed Mr Wandai to make any such offer on her behalf to the respondent. The onus then shifted on to the respondent to establish the authenticity of the offer either by calling Mr Wandai as a witness or otherwise. The respondent did not do so. He did not pursue the matter further. He abandoned it.

For these reasons the second appellant was in adverse possession first together with her late husband, and after his death, she by herself for more than twelve years on April 2, 1979. On that and even before that date she had acquired an indefeasible title to the land by adverse possession at the end of twelve years. Therefore the appellants ought not to have been non-suited.

For these reasons I would set aside the decree of the High Court, and substitute therefor the orders sought in the originating summons. I would give the costs of the suit in the High Court and also of this appeal and the cross-appeal which is ordered to be dismissed, to the appellants but without a certificate for two advocates which has been asked for. I cannot see any justification for it. The proceedings become prolix due to the arithmetical miscalculation of 12 years. Apart from that it was a straightforward and short case. As Kneller JA and Chesoni Ag JA agree it is so ordered.

**Kneller JA.** Mrs Muthoni's application to the High Court was based on two facts. First her husband paid the full purchase price and together they went into possession of this parcel of land on March 16, 1977 under a written agreement of the same date. Secondly, the agreement become null and void for all purposes because no application was made to the local Land Control Board for its consent to this controlled transaction on or before June 17, 1977 or at all.

She based it on both those facts in paragraph 9 of her March 31, 1979 affidavit in support of her summons (and her written statement of defence filed on December 6, 1978 in the senior resident magistrate,

Murang'a's Civil Suit 35 of 1978) but during the trial they were split and the second was abandoned. And rightly so, because her adverse possession that was based on the fact that consent to this transaction was not applied for in time or at all began to run from three months after the agreement which was June 17, 1977 and not from the date of the agreement March 16, 1977 according to the relevant provisions of section 218(2)(a) of the Constitution of Kenya (Amendment) Act, 1965 (No 14 of 1965) and a decision of this court *Sospeter Wanyoike v Waithaka Kehari* Civil Appeal 29 of 1980 (Madan, Potter & Miller JJA). So Mrs Muthoni's adverse possession on that score, as the learned judge held, was premature by just about 2 1/2 months by the date her summons was filed which was April 2, 1979.

The suit land which Wandugu Ndegwa alias Wanduru Kimani sold to Stanley Gathungu Muthoni on March 16, 1967 was 'agricultural land' and the transaction was a controlled one so the Divisional Land Control Board's consent was required for it: section 218(1) (*ibid*): and between March 15, 1967 and June 19, 1967 the law was that:

"Any agreement to be a party to any land transaction shall be absolutely void for all purposes:

(a) at the expiration of three months after the making of the agreement if application for consent has not been made within that time to the appropriate Divisional

Board; or

(b) if an application is made and refused at the end of 30 days from such refusal or, where an appeal from such refusal has been instituted under section 220 of this Constitution, on the dismissal of the appeal."

section 218(2) (*ibid*)

Whatever may be the consequence of later land control legislation so far as the Muthoni Wanduru agreement of mid-March 16, 1967 is concerned the failure to make an application for consent within the next three months did not make it *void ab initio* but only from June 17, 1967.

But what about the first fact, namely, that the Muthoni's had been from March 16, 1977 and, as Todd J found, in continuous, open exclusive and undisturbed possession of the suit land since that date? This was registered land and Wanduru was its registered proprietor. He had the title which the register give him. The absolute ownership of it together with all rights and privileges belonging or appurtenant thereto was vested in him according to section 27(a) Registered Land Act (cap 300). In England, it would be said he was seized of an estate in fee simple.

Wanduru's rights of a proprietor were rights which were not liable to be defeated except as provided [for] in that Act and he held them free from all other interest and claims whatsoever but subject to leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and, unless the contrary is shown in the register, to such liabilities, rights and interest as affect it and are declared by section 30 of the Act not to require noting on the register. Nothing in all this, however, relieves a proprietor from any duty or obligation to which he is subject as a trustee section 28 (*ibid*).

Among those liabilities, rights and interest that affect the registered proprietor's rights which do not have to be noted on the register are the over-riding interest of rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription and the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed. Section 30(f)(a) (*ibid*).

The Muthoni's were in possession or actual occupation under the agreement but that was null and void for all purposes from June 17, 1967 so any inquiry made of them about that right would indicate it did not survive for more than three months. Wanduru and later Kamau's registration were subject to the Muthonis rights. What were they? They had none under the contract for it was null and void. They had no equitable interest in the land. They could not bring an action for specific performance by a conveyance of

the legal estate.

What about their rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions?

This brings in the Limitation of Actions Act (cap 22) which applies to registered land in a special way. The title of the registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. Section 37 (a) Limitation of Actions Act.

Mrs Muthoni applied to the High Court for an order that she be registered as the proprietor of the land in place of the person then registered as proprietor of it which is a right provided for in section 38 (*ibid*).

The absent registered owner always retains the legal estate and this *prima facie* entitles him to resume possession from anyone in possession or actual occupation from the date of the possession or actual occupation but if he does not exercise it he may not bring an action to recover the land after the end of twelve years section 7 (*ibid*). Whether or not an action to resume possession would have succeeded is irrelevant. In *re Cussons* (1904) 74 LJ Ch 296.

The Muthonis' possession and occupation dates from March 16, 1967 and Wanduru as the registered proprietor had the right to resume possession from that date and so had Kamau who claims through his father Wanduru. Section 7 (*ibid*).

Neither exercised it successfully, so on March 17, 1979 that right disappeared and Kamau as the bare trustee of the legal estate for purchaser must now submit to the orders for which Mrs Muthoni asks in her originating summons. The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser *cestui qui trust* to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this *prima facie* entitles him to resume possession from the purchaser in possession.

The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges v Mees*, [1957] 1 Ch 475; and Simpson J (as he then was) in *Hosea v Njiru Ors*, [1974] EA 526 (K). The upshot is that although Kamau is the proprietor of this registered land Mrs Muthoni is in possession and actual occupation of it and has been in possession of it for over twelve years so she has rights acquired under the Limitation of Actions Act which is an over-riding interest in it that it does not have to be entered on the register so Kamau's is a bare trustee for Mrs Muthoni who is entitled to the reliefs she claims.

If the land were not registered land it might be argued that lawful entry by a purchaser under a written contract would confer a lawful title and his possession could not be adverse. Wanduru and Kamau would not have had any right to make entry and resume possession of the land. This would be so, too, for the first 3 months after the agreement, payment of the full purchase price and entry into possession if only the 1963 land control legislation applied. Cf eg *Megarry's Law of Real Property*, 4th edition, 1013, *Hughes v Griffin*, [1969] 1 WLR 30; *Hyde v Pearce*, [1982] 1 All ER 1029. 1037 Templeman LJ and *Sisto Wambugu v Kamau Njuguna* Civil Appeal 10 of 1982 Hancox JA.

The cross appeal fails, in my judgment, for the following reasons. The learned judge found Wanduru and or Kamau had no agent on the parcel after March 16, 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 prevent the operation of the Limitation of Actions Act. They did not disturb the Muthonis' possession. *Doe d Lovell v Smith* (1844), 3 LT CS 53, 126; *Doe d Baker v*

*Coombes* (1850), 9 CB 714. On October 5, 1978 Kamau obtained from the resident magistrate Murang'a an order for the eviction of the Muthoni's which was set aside on November 23, 1978.

Kamau was by a consent order declared by the third class district magistrate Kiharu on April 21, 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 only April 21, 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.

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 the Muthoni's. *Chitally and Rao's Indian Limitation Act*, 4th edition 1965 Vol 11 pp 1338-1340. *Subbaya v Mohamed* [1923] 50 Ind App 295 (PC); *Vishnu Janardan v Mohader Keshar* [1942] AIR Bom 44; and *Singaravelu v Chokka Mudaliar* 1923 Mad 88. Nor would the offer in a letter of December 16, 1977 by Mrs Muthoni's former advocate to buy the land for Kshs 6,000 an acre because Mrs Muthoni declared it was sent without her authority and the advocate was not called to disprove it. I would, with all due respect, dissent from the view that this was a straightforward case but otherwise I agree with the orders proposed by Madan JA.

**Chesoni Ag JA.** The originating summons filed by the appellant and dated March 29, 1979 reads as follows (only paragraph (i)):

“The second plaintiff Mrs Beatrice Muthoni widow of Stanley Gathungu Mathu be declared to have become entitled by virtue of adverse possession of twelve years to all that piece or parcel of land containing 1.92 hectares or thereabouts registered under the Registered Land Act (chapter 300, Laws of Kenya) and comprised in Title Number Loc 8/Munyutha/Ndutumi/84 and situate at Munyutha-Ndutumi area of location 8 in Murang'a District.”

The appellants' claim was, therefore, founded on adverse possession and not contract of sale. A transaction as envisaged under section 6 of the Land Control Act (cap 302) is a voluntary act, which adverse possession is not. The Land Control Act did not, in my view, apply to Beatrice Muthoni's claim and so it was irrelevant whether or not the consent of the land control board was sought and/or obtained. Time started running the day the appellant and her late husband took possession of the suit land and that was March 16, 1967 for that was the date the respondent's possession was discontinued. Twelve years had expired by the time this suit was filed in April 1979. The learned judge erred by calculating the time of limitation subject to the provisions of the Land Control Act especially as to when the contract of sale became null and void under the Act. The twelve years' period under section 7 of the Limitation of Actions Act is not whittled by the Land Control Act.

I agree with the judgment of Madan JA which I had the advantage of reading in draft that this appeal be allowed, and I also agree with the orders proposed therein.

**Dated and Delivered at Nairobi this 9th day of May 1984.**

**C.B.MADAN**

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**JUDGE OF APPEAL**

**A.A.KNELLER**

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**JUDGE OF APPEAL**

**Z.R.CHESONI**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**