IN THE COURT OF APPEAL

AT MOMBASA

(Coram:Hancox JA, Chesoni & Nyarangi Ag JJA)

CIVIL APPEAL NO. 72 OF 1982

BETWEEN

WANJE & OTHERS.....APPELLANTS

AND

A.K.SAIKWA & OTHERS.....RESPONDENTS

(Appeal from the High Court at Mombasa, Schofield J)

JUDGMENT

Chesoni Ag JA The four respondents A K Saikwa, AC Kanyarati, SW Kibogo and William Gachenga are the registered owners of a piece of land known as plot No 384/II situate on the Mainland Mombasa and comprising 444 acres or thereabout. They purchased it from Hussein Dairy Limited in 1974 and the transfer into their names was registered on September 6, 1974.

The appellants were alleged to have been living on the land when the respondents bought it, but Hussein Dairy Limited assured the purchasers that the appellants, who were then referred to as squatters, could be removed by serving on them three months' notice. In his evidence Mr Kanyarati said that he informed the authorities that he was going to remove the appellants. The appellants wrote to the Provincial Commissioner informing him that they would not move. That letter is dated October 3, 1974. The Chief had on September 30 asked the appellants to let the respondent use the land. On December 10, 1974 the District Commissioner for Mombasa District held a meeting whereat all the squatters on the land were given one month's notice to vacate, but the appellants defied the notice. No further steps were taken until early 1981 when the respondents filed a suit by way of plaint in the High Court at Mombasa seeking a declaration that the appellants were not entitled to enter and reside upon the land or cause others to do so. The respondents also asked for eviction of the appellants and damages against them. The suit was heard by Schofield J who granted the orders prayed for and calculated the damages at Kshs 1,000 per annum beginning from 1975 and ending in 1982, which he fixed the total at Kshs 7,000. This appeal is from that decision on the following five grounds:-

1. The learned judge erred when he arrived at the conclusion that the defendants did not have a right to occupy the property despite their adverse possession of it for a period upwards of 12 years.

2. The learned judge failed to appreciate and take into consideration the provisions of section 7 of the Law of Limitations Act cap 22 Laws of Kenya in which 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, and that by section 17 of the same Act the title of the respondents had extinguished.

3. The learned judge erred in holding that a meeting held to notify the appellants of respondents right over the property operated to defeat the provisions of sections 7 and 17 of the Limitation Act (cap 22).

4. The learned judge erred in deciding that the appellants were trespassers.

5. On the whole the decision of the learned judge is against the weight of the evidence adduced at the trial.

Mr Kupalia for the appellants applied for and was granted leave to withdraw the appeals of fourteen appellants who had died since the filing of the appeal. These are:-

“No 5 Isofwa Fondo ” 45 Karisa Mchafu

” 6 Mwangadi Bumbo ” 63 Kazungu

” 10 Chembe Kitutu ” 65 Balozi Maitha

” 20 Mwarizangu ” 67 Abdulla Kamango

” 27 Kitsao Kea ” 69 Abdulla Mohamed

” 28 Job Kea ” 79 Mbui Baya

” 38 Kenga Mwashiombo ” 91 Musobo Shoka

We struck out their appeals with no order as to costs.

Mr Kupalia submitted that the appellants had been occupying the land before August 20, 1961 when they were issued with licences by Mr Morrison; these licences lapsed when Hussein Dairy Ltd bought the land on November 7, 1962, and thereafter the appellants became tenants at will, a tenancy that was terminable by the respondents after twelve months from November 7, 1962 that is on November 7, 1963; the respondents did not take any effective action till January 17, 1981 when this suit was filed in the High Court, which was over 17 years since 1963 and the appellants had established a claim of adverse possession.

In the High Court the parties agreed as follows:-

“(1) It is not an issue that the plaintiffs are the registered proprietors of land Ref No 384 section II mainland Mombasa. Title No Cr 6432.

(2) What interests known in law do the defendants have in this land?

Are they:-

a) licences

b) tenants

c) invitees

d) do they have a right of way or

e) are they trespassers."

It is clear that at the hearing adverse possession was not an issue before the lower court. In the High Court the appellants called two witnesses namely Joshua Mashaka (DW 1) and Gibson Kayungu Mwagadi (DW 2) who testified on their own and the other ninety-four defendants' (appellants') behalf. Neither Mashaka nor Mwangadi spoke of adverse possession. Mashaka said that he was 61 years of age and born on that *shamba* ie the disputed land. He referred to a meeting held between the appellants and the son of the original proprietor of the land namely Alexander Morrison, when the younger Morrison told the appellants that they would pay a rent of Kshs 3 per month. This may be evidence of a month to month tenancy or of a licence. Mr Kupalia referred to paragraph 5 of the defence and read the portion which said that the appellants' (then defendants) stay and occupation of the said farm had been with the express and or implied consent of all former owners and said that that was a pleading of adverse possession.

Mr Kamere for the respondents argued that adverse possession had not only not been pleaded but also not established as a fact. It was mentioned for the first time in Mr Kupalia's submission after the close of the defence case. Paragraph 5 of the defence negated adverse possession because the appellants having been permitted to occupy the land their occupation was not illegal and hence not adverse. He also argued that the appellants' possession could not be adverse when even by the time of the trial of the suit they said that they were negotiating to buy the land. He referred to the case of *Sisto Wambugu v Kamau Njuguna* Civil Application No 10 of 1982 (unreported). In dealing with the issue of adverse possession the learned judge said this:-

"Although not pleaded, the advocate for the defendants in his closing speech suggested that the defendants have a right to occupy the property because they had been in adverse possession of it, I suppose he is saying for a period of 13 years. It would be for the defendants to satisfy me that they have a right to occupy the property in view of their adverse possession of it. Their occupation was by licence until Hussein Dairy Limited bought the property on the November 7, 1962. Just before the 12 years period had elapsed (ie before November 7, 1974) the title was transferred to the present plaintiffs … The question of adverse possession was not pleaded and the fact of adverse possession was not proved by the defendants."

When the appeal came up for hearing on January 26 1984 Mr Mburu who was holding brief for Mr Kupalia applied for leave to adduce additional fresh evidence in support of adverse possession. Joshua Mashaka swore an affidavit in support of the application and in it repeated what the appellants' two witnesses had said in the High Court. He said that after the death of Alexander Morrison in 1960 Mr Fareweather Morrison allowed the appellants to continue staying on the land subject to the payment by them of a monthly rent of Kshs 3, and that In 1962 they were informed by administrative officials that the land had been bought by Hussein Dairy Ltd. As there was almost no new or fresh evidence we refused leave. Mashaka said that Mr Morrison did not physically occupy the land, but the appellants did with his consent. As stated in *Megarry's Manual of the Laws of Real Property* 5th Edn p 490:-

"If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title."

In *Littledale v Liverpool College* [1900] 1 CL 19 at p 21, Lindley MR put it correctly that in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it, and, in answering the question "what constitutes dispossession of a proprietor?" Bramwell LJ said in *Leigh v Jack* (1879) Ex D 264 at p 273:-

"to defeat a title by dispossessing the former owner 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it."

See also *Sisto Wambugu v Kamau Njuguna* Civil App No 10 of 1982 (unreported).

The appellants' evidence was that Alexander Morrison permitted them to stay on the land until 1960

when he died. A person who occupies another person's land with that other person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of his land and the possession is not illegal. Again, there is no adverse possession when land is occupied under a licence until the licence has been determined. As I have already said Mr Kupalia said that his clients were tenants at will till November 7, 1963. He must have had in mind section 12(1) of the Limitation of Actions Act which provides that a tenancy at will is taken to be determined at the end of one year from its commencement, unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy accrues at the date of such termination.

The appellants' evidence was that all owners including the respondents allowed them to stay on the land, and, that although Hussein Dairy Ltd initially rejected their offer to purchase it they continued pressing for purchase of the land and even opposed the respondents' application for consent of the Land Control Board and appealed to the Provincial Land Control Appeals board. When the land was eventually transferred to the respondents the appellants continued negotiations for purchase of it and Mr Saika had even agreed to sell to them his share. They insisted on remaining on the land because they considered themselves as intending buyers of that land. Usually tenancy at will is determined at the will of either party and a demand by the landlord for possession is sufficient. Death of either party determines the tenancy. Notice by the tenant is not effectual unless he gives up possession: *The Indian Transfer of Property Act, 1882* by Mulla, 2nd Edn p 569. In *Jowitt's Dictionary of English Law*, 2nd Edn vol 2 p 1749 it is stated that a purchaser of land is sometimes let into possession pending completion of the purchase as a tenant at will – *Pearl Berg v May* [1951] Ch 699. There was no evidence that that tenancy was determined until when the respondents demanded possession on January 17, 1975. That would then be the date when time started running, that is January 17, 1975. When the suit was filed on January 17,1981 only 6 years had run which was about half of the period required to establish adverse possession.

I would, for the reasons stated, agree with the learned judge that the appellants did not, establish a right over the land by way of adverse possession and the twelve years' period had not matured when the suit was filed so even if it had been pleaded adverse possession was not available to the appellants. It follows that even if the appellants had, which they did not, established acts done which were inconsistent with the true owner's enjoyment of the soil, they would not have succeeded as those acts would not have been for twelve continuous years. The cases of *Wainaina v Murai and others* [1976] KLR 227 at p 231 and *Gatimu Kinguru v Muya Gathangi* [1976] KLR 253 at p 260 were of no assistance to the appellants' case, as they worked the land by consent of the owners.

The appellants could not succeed on the claim based on adverse possession; they are not on the land as licencees, (the licences having lapsed in 1962) and they are neither tenants nor invitees. They have no right known in law to be on the respondents' land. Any right they had to be on the land has now been effectively determined. Accordingly I would dismiss the appeal by the surviving eighty appellants.

Hancox JA. I agree with the judgment of Chesoni Ag JA which has just been delivered.

When Hussein Dairy Ltd bought the land which is the subject matter of these proceedings on November 7, 1962, the individual licences granted to the ninety-four appellants (fourteen of whom have since died and whose appeals have therefore been withdrawn) by Alastair Fairweather Morrison, as executor of the late Alexander Morrison deceased. These licences were granted on August 20, 1961, and entitled each licencee to erect and occupy one dwelling hut on the land, and to cultivate annual crops for the subsistence of the occupier and his family at a licence fee of Kshs 3 per month, terminable by the executor by three months' notice.

Hussein Dairy Ltd did not grant fresh licences to the occupiers (as they were called in the original licences). The evidence of Joshua Mashaka, the third appellant, given before Schofield J suggests that Hussein Dairy did not want the appellants on that which had become its land and that their continued occupation of it was against its wishes, as the judge found. It was nevertheless prepared to negotiate with them as the minutes of the Provincial Land Appeals Board show. Moreover, Hussein Dairy seems to have taken no active steps to have them evicted, nor did it make any effectual assertion of its rights against the occupiers during the period of its ownership.

When Hussein Dairy sold the land to the four respondents on September 6, 1974, immediate steps were taken to gain possession of it, the Chief making a request on September 30, 1974, to the appellant to allow the respondents to "use" the plot, followed by a protest from the appellants to the Provincial Commissioner of October 3, 1974, and the third respondent giving them one month's notice to quit on December 19, 1974. The suit seeking their eviction was not, however, filed until January 17, 1981.

Mr Kupalia, on behalf of the remaining appellants, has submitted that they became entitled to the land by adverse possession under section 7 of the Limitation of Actions Act, cap 22, notwithstanding that this was not raised in the court below until Mr Kupalia was making his final submission. He said that they became tenants at will of Hussein Dairy for twelve months after it purchased the land (presumably by virtue of section 12(1) of the Act), and thereafter were in adverse possession aggregating more than seventeen years of continuous uninterrupted possession under section 13, by the time the suit was filed in 1981. He said that both Hussein Dairy and the present registered owners had full knowledge of the existence of the "squatters" and that the latter purchased the land with full knowledge that Hussein Dairy had never gained possession of the land, and that it had "transferred its inability to occupy to the present respondents."

I must confess that I find this a novel proposition of law, but it does appear that although Hussein Dairy were not at all times willing to sell the land to the appellants, there was some possibility of its doing so because, as is recited in the minutes of the Provincial Land Control Appeal Board meeting of May 3, 1974, the Local Land Control Board held up their initial consent to the sale to the respondents to enable the "squatters" to raise the purchase money. As they could not do so, consent was given on January 31, 1974, and the appeal against it was dismissed on May 3, 1974.

After the transfer there were two abortive prosecutions for criminal trespass, and then further fruitless negotiations between the parties for the sale of the property to the appellants, as evidenced by the correspondence exhibited at the trial, though not included in the appeal record. I agree with Chesoni Ag JA that during the period of Hussein Dairy's ownership the appellants were not licencees, nor trespassers, but tenants at will. This is a form of permissive occupation and may arise, for instance, if a purchaser is let into the possession of land, pending completion. A tenancy at will, however, is what it says, and requires no notice to determine it. It is clear from the commentary in *Mulla* to section 105 of the Transfer of Property Act that a demand by the landlord for possession is sufficient for this purpose. Accordingly, I would hold that while the appellants were tenants at will they could not be trespassers, for the reasons stated in the this court's decision in *Sisto Wambugu v Kamau Njuguna,* Civil Appeal No 10 of 1982, as the leave and licence, and, indeed, permission of a registered owner for on occupier to be on the land is inconsistent with his being a trespasser. Therefore the claim of adverse possession (even if, which I do not accept, Mr Kupalia's submission that paragraph 5 of the defence contained a rolled-up plea of adverse possession be correct), cannot be sustained on the evidence adduced in this case, because the appellant's possession could only have become adverse after January 17, 1975, when the period of the notice to quit given by the respondents expired. From then until January 17, 1981, is barely six years and even that period may have been interrupted by the negotiations with the first respondent for the sale of his share of the land, thus creating a further tenancy at will.

It is just conceivable that, if the case had been properly pleaded and presented on this footing, twelve years' adverse possession might have been shown between the time when Hussein Dairy bought the land on November 7, 1962, and when the notice to quit was given by the subsequent owners on December 19, 1974, but, as I said, the evidence in this case, and indeed the case pleaded in the defence, was the other way and I agree with the learned judge, that, on the evidence as it stood the fact for twelve years' adverse possession was not established.

It is true, on the authority of *Gatimu Kinguru v Muya Gathangi* 1976 KLR 253, at P 261, which has been accepted in this court, that cultivation of land (which occurred here) can be sufficient to prove adverse possession, but in the instant case that was referable to the licences granted by Mr Morrison and did not unequivocally establish adverse possession.

As adverse possession was, even though it is contained in three separate grounds in the Memorandum of

Appeal, the basis of the appeal, and was also the subject of an earlier application for a re-appraisal of the evidence, it follows that, that claim having failed, the appeal also fails and must be dismissed.

As Nyarangi Ag JA also agrees it is so ordered.

Nyarangi Ag JA. The appellants as defendants admitted in paragraph 2 of their written statement of defence that the respondents did purchase the material farm from Husseini Dairy Ltd but denied that it was ever the intention of Hussein Dairy Ltd to convey and transfer absolute ownership of the said farm and or interest belonging to the defendants, Mr Kupalia for the appellants developed the theme of that paragraph in his contention that when Husseini Dairy Ltd sold the land to the present respondents, the company did so with the full knowledge that it (Hussein Dairy Ltd) had not occupied the land and it was transferring the inability to occupy to the respondents.

But there is evidence that Husseini Dairy Ltd who were registered owners of the land were inclined to sell the land to appellants. It would therefore appear that Hussein Dairy Ltd did not at any time face any inability to gain possession of the land. The company allowed the appellants to remain on the land and to raise the purchase money. During that time Hussein Dairy Ltd was aware of the presence on the land of the appellants and the appellants recognised Hussein Dairy as the landlords. The appellants were not therefore trespassers but tenants at will, who had not and who were incapable of constituting an inability to occupation by Hussein Dairy Ltd. The appellants as tenants at will were in the position of purchasers who had been permitted to remain on the land while negotiations were continued, *Pearlberg v May* [1951] Ch 899, and the necessary consent was obtained.

Mr Kupalia submitted that the proper legal action by the respondents to recover the land from the possession of the appellants was the institution of HCCC No 45 of 1981 The respondents did not have to file a suit against the appellants, who were tenants at will, to obtain possession. A demand by the respondents for possession would have sufficed – *Transfer of Property Act*, 1882, Mulla, 2nd edition, page 569.

Mr Kupalia made the point that the appellants have been cultivating the land and reside on the land and that those activities, constitute adverse possession. However, the cultivation and the residence was with the express permissive possession and did not become adverse during the time the appellants were allowed to occupy the land.

On the evidence the tenancy at will was determined in September 1974 when the respondents demanded possession. Insufficient time had run by January 17, 1981 on which date the suit was filed. A claim on adverse possession would not be sustainable in the circumstances. The appellants, for whom I feel considerable sympathy, might have succeeded on adverse possession if they had kept quiet and remained on the land as squatters from 1962 to December 1974, but this was not the case. I agree that the appeal be dismissed.

Dated and Delivered at Mombasa this 27th day of July 1984.

A.R.W.HANCOX

.....

JUDGE OF APPEAL

Z.R.CHESONI

.....

AG.JUDGE OF APPEAL

J.O.NYARANGI

.....

AG.JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR