IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 10 OF 1982

BETWEEN

SISTO WAMBUGU.....APPELLANT

AND

KAMAU NJUGUNA.....RESPONDENT

JUDGMENT

The subject matter of this case is a piece of land of some 9.87 acres at Othaya/Kihugiru/57 of which the appellant was registered as proprietor under the name Wambugu s/o Karuga on September 24, 1958. According to his case, as presented to the High Court, in the year 1966 he verbally agreed with the respondent to allow the latter to go into possession of the land and to cultivate it, but not to plant cash crops. He said he could not sell it to him because he, the appellant, had many children. The kind of produce he was permitted to plant were beans, maize and sweet potatoes.

As a result of a letter dated May 28, 1974 from the respondent (exhibit 3) the appellant again said that he did not agree to sell him the land. On July 11, 1975 (not July 11, 1976, as the amended plaint states) the appellant's then advocates wrote to the respondent's advocates giving their client 21 days to vacate, failing which they would begin proceedings for eviction. The respondent did not, however, vacate the land and had, indeed, lodged a caution claiming a purchaser's interest. The appellant seeks the removal of this caution, an order for eviction and, presumably, an injunction of the nature sought in the amended plaint.

The respondent's case however was that in 1958 there was an agreement between them for sale of the land for Kshs 2,485 of which the respondent had paid a total of Kshs 2,300. Kshs 800 is recorded as having been received in the document he produced as exhibit C or III, setting out the agreement, and the balance was to be paid at the rate of Kshs 200 per month commencing in March 1959. He said that he subsequently went to Ihururu, accompanied by three people, to pay the balance of the price to the appellant, but that the latter did not appear. Micah Kariuki, the fourth defence witness, confirmed this. At all events, Hannah Wairimu said she paid Kshs 600 to the appellant on the respondent's behalf on what seems to have been February 2, 1966 and a further Kshs 900 is recorded as having been paid on July 18, 1966 by the document exhibit A written out by Muchunu, the third defence witness. The appellant said that was a payment in respect of a lease, but Muchunu said that Kamau was purchasing the land and that the balance, whatever that amounted to, was to be paid in January 1967.

The respondent then cleared the land, built a house and planted in subsequent years 19,000 stems of tea. He did this on the basis that he had agreed to purchase the land. The appellant had never asked him to

vacate, but, after his letter of May 28, 1974, (again, not July 28, 1974) attempted to add Kshs 2,400 to the price. He ended by saying that he had been on the land throughout with the appellant's consent, though in his amended defence he alleged he had been in under that which he described as adverse possession for some nineteen years. He had never been given the title deed.

It will be observed that the appellant's case as disclosed by his original plaint, of which Mr Gaturu, who represented the respondent before this court, complained there was no copy in his record of appeal, was rather different. It was that while the appellant was in detention in 1958, his father had allowed the respondent to stay on the land at a rental of Kshs 750 per acre for thirteen years. Accordingly the claim was then for an order of eviction and Kshs 9,750 arrears of rent.

The learned trial judge preferred the version given by the respondent. He commented that the appellant was not sure of what story to tell the court. He rejected the appellant's account that he had merely permitted the respondent to cultivate the land and the suggestion of a lease. Accordingly he upheld the respondent's case that not only was there valid agreement but that the respondent had planted tea extensively on that basis, and that he would become the owner of the land. In effect he treated the respondent's claim that he was in adverse possession as a red herring and consequently he declined to deal with *Jandu v Kirpal* [1975] EA 225 (a case on adverse possession) which Mr Gaturu has also invited us to consider.

The situation therefore is that according to the respondent's own case he has not paid the full amount that he agreed to pay for this land. At the most he has paid Kshs 2,300 out of the Kshs 2,485, of which the last payment was Kshs 900 in July 1966, some 71/2 years after the agreement which he produced. There was no attempt to pay the Kshs 200 monthly instalments or to complete payment by October 1979 as the agreement provided. In those circumstances the respondent can hardly be heard to complain that he had received no title deed.

Although the appellant only conceded in cross-examination that the respondent had been allowed to graze on the land "earlier than 1966", from the evidence, the pleadings and the documents I conclude that the respondent has remained in physical occupation of the suit land from 1958 onwards, whatever the character of that possession may have been.

In my judgment the respondent cannot come to the court and obtain an order of the transfer of the land, as he sought in his counterclaim, which is in effect an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so. True, the amount remaining unpaid after the 1966 payments is relatively small, but on the respondent's own showing he did not pay the amount due under the 1958 agreement for well over seven years, for I do not regard the document exhibit A as evidencing a fresh agreement; it refers to the "balance remaining" and contains a written record of the manner in which the balance, due under the 1958 agreement (which at that time was Kshs 2,485 less the payments of Kshs 800 and Kshs 600 namely Kshs 1,085) would be liquidated. Neither do I regard the visit by the respondent to Ihururu as satisfactory evidence that he was ready and willing to pay the balance then due. In the first place, according to Micah Kariuki, that visit did not take place until 1978 or 1979 well after the appellant had begun this action, and secondly there is nothing to show that any attempts were made to follow this up. Moreover, if in reality only Kshs 185 was then due, it would seem strange that four persons had to make a special journey to Ihururu to pay this relatively small sum, which could easily have been paid between 1966 and 1974.

Accordingly, as it is my view that the respondent made no attempt to perform his obligations and to pay the remainder of the purchase price for several years after the balance was due, he cannot at this late stage obtain an order for transfer of the land pursuant to the contract, and registration of it in his name.

It remains therefore to consider the issue of adverse possession. There can be no doubt that, on the basis of the 1958 agreement, the respondent's possession, and it was exclusive possession, of the land was originally lawful in the sense that he entered with the leave and licence of the appellant in pursuance of (leaving aside for the moment the question of the former Land Control Act (cap 302) which the appellant raised in his first ground of appeal) a valid sale agreement. When was that leave and licence determined?

I think it can safely be said that this was, at earliest, when the appellant received the letter of May 28, 1974 and, at the latest, when the notice to vacate was sent on July 11, 1975 (this is different from the assertion of an owner's right so as to determine adverse possession, to which Potter JA referred in *Mwangi Githu v Livingstone Ndeete* Civ App 24 of 1979). It follows that during this period the respondent was not in adverse possession but with the permission of the appellant, for, in my opinion, the two cannot coexist.

It has not always been easy to determine precisely what is meant by the term "adverse possession". The words are of ancient lineage, and, before 1833, there had to be something in the nature of an ouster of the true owner. This was changed by the Limitation Acts, beginning with the Real Property Limitation (No 1) Act 1833, which did not in terms mention adverse possession. But the phrase reappeared in section 10(1) of the Limitation Act 1939, which is in similar terms to section 13(1) of our Limitation of Actions Act, cap 22, and of which Harman LJ said in *Hughes v Griffin* [1969] 1 WLR 23:

> "Notwithstanding that, the words 'adverse possession' have crept back into the statute of 1939, but there they only mean that a person is in adverse possession in whose favour time can run. Nevertheless it does seem to me that 'adverse possession' means to some extent at least that which it says. Time cannot run, as I see it, in favour of a licensee, and therefore he has no adverse possession. It can run in favour of a tenant at will, because by virtue of section 9 of the statute (our section 12) a tenancy at will is put an end to at the end of the year ... so that in thirteen years he acquires title to the land in question."

I have only included the last sentence regarding a tenant at will because that was the basis of the decision of Simpson J as he then was, in *Amos Wainaina v Belinda Murai* [1976] Kenya LR 227, a case which has frequently been cited in actions of this nature and which was subsequently brought on appeal to this court and dismissed (Civ App 46 of 1977).

Hughes v Griffin has been cited in *Megarry's Law of Real Property* on this topic (4th Edn) at p 1013 and, applying its reasoning, it is in my judgment evident that a person (here the appellant) must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or licence, which has not been determined.

There have been several cases, of which the *Livingstone Ndeete* case is one, in which the claimant of land puts his case in the alternative, that is to say by pleading the agreement under which he is entered, and then asking for an order based on subsequent adverse possession. For instance in *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. In *Jandu v Kirpal* (supra) Chanan Singh J held that:

> "The rule on 'permissive possession' is that possession does not become adverse before the end of the period during which (the possessor) is permitted to occupy the land."

The distinction between *Bridges v Mees* and the present case is that here the respondent never completed paying the purchase price. Neither did he at any time repudiate the contract, or treat it as at an end. Moreover, in *Bridges v Mees,* Harman J's rejection of the submission that possession can only be adverse if it is not referable to a lawful right, would seem not to be wholly consistent with the Court of Appeal decision in the recent case of *Hyde v Pearce* [1982] 1 All ER 1029, in which the plaintiff bought a house and a piece of land which was never, in the event, conveyed to him. Inadvertently the land included 60 sq feet belonging to a third party. The property, except this disputed area, was subsequently conveyed to the defendant. The plaintiff's licence to occupy was terminated in May 1958 by the vendors requesting the plaintiff to return the keys, which he never did, and remained in possession. He was bound to deliver up possession as the contract (under which he had entered) was rescinded or became void. The contract was, however, kept alive, and would no doubt have been completed if the dispute had been resolved. Templeman LJ said at 1037:

"Next, it seems to me it is material that the plaintiff never expressly repudiated or rescinded the contract at any time and there is certainly no evidence that the vendors repudiated or rescinded the contract. But it is said that there is no doubt that a right of action accrued because, once the vendors had demanded the keys, they determined his licence and they were entitled to go to court and to ask for the plaintiff to yield up possession and, therefore, it is said that time began to run under the Limitation Act 1939.

For my part, in the peculiar circumstances of this case, it seems to me that it is not sufficient to show that a right of action had accrued. The plaintiff must show some further quality, namely adverse possession. The plaintiff was allowed in possession as a purchaser pending completion; and he was allowed to stay there because he was a purchaser. If he had been a mere trespasser no doubt the vendors would have brought proceedings. But the vendors, in all the circumstances of the case, seem to have decided by accident or design to allow matters to drift on without taking steps to evict him from the premises, relying on the fact that it would all turn out right in the end when the purchase price was ascertained and completion took place.

For example, in the first ten years of the plaintiff's occupation, he could have taken up the same attitude and, as far as we know, would have taken up the same attitude which he had adopted down to September 1958 that he was a purchaser in possession awaiting ascertainment of the purchase price and completion. In those circumstances, it does not seem to me to be right that he can, in retrospect, say:

> 'Oh, that was all a mistake. True, I looked like a purchaser in possession, but the vendors could have evicted me; and, although I did not say so, although the contract was still subsisting, although I took no steps to repudiate it so that they were entitled to look on me as a purchaser, although they did not realise it and it may not have suited me at the time, I was in fact a purchaser in adverse possession quietly picking up the years which are necessary to elapse before the Limitation Act 1939 barred the vendors' title ...'

In my judgment, the plaintiff, having in effect been able to go in and stay under the contract, cannot now repudiate the contract with hindsight. As I have said, if at any time he made it clear that he was no longer bound by the contract, then different considerations would apply. Equally, no doubt, if he had made that clear, then the vendors would have taken action against him. It is only the fact that he was there as a purchaser pending completion which has enabled time to run in his favour, as he says, and which enables him to claim a title by adverse possession. Accordingly, in my judgment, although the full period required by the 1939 Act has elapsed, the plaintiff has not shown that he was in adverse possession."

That passage seems to me to cover this case. The respondent never repudiated the 1958 agreement, but adopted it by remaining in and cultivating the land, until the appellant made it clear that he was no longer going to allow the respondent to stay there by causing to be sent the letter of July 11, 1975. He, the respondent, cannot now be heard to say that this occupation was not under the agreement, but was adverse to the registered owner if the necessary period had elapsed. To this extent I am in agreement with the learned trial judge. But I respectfully disagree with him that the result of his finding of fact that the parties entered into the 1958 agreement in law is that the respondent and former defendant was entitled to have the land transferred to him, with, presumably, the further consequence that he should be registered as proprietor - for there has been no suggestion of a trust or of beneficial ownership in this case. For the foregoing reasons I would allow this appeal. I would set aside the order of the High Court dismissing the suit with costs and I would grant to the appellant the orders of eviction of the respondent and the injunction which he seeks. I would also, as a consequence of this, order that the caution entered by the respondent be vacated and that the total of Kshs 2,300 which the respondent has proved he has paid be repaid to him. Finally, I would order that the respondent pay the costs of this appeal and of the proceedings in the High Court.

Chesoni Ag JA. The appellant, Sisto Wambugu, is the registered proprietor of a parcel of land known as Othaya/Kihugiri/57 measuring 9.87 acres or thereabouts (hereinafter referred to as "the suit land"). On

July 13, 1977, he filed a suit against the respondent, Kamau Njuguna, in the High Court of Kenya at Nyeri and asked the court to order the respondent to move out from the suit land, for an order for a perpetual injunction restraining the respondent from trespassing on it and for the respondent's caution to be removed from the title. The suit was heard by O'Kubasu J, who dismissed it with costs. The appellant appealed to this court.

The appellant's case was that in January 1966 he orally permitted the respondent to enter and cultivate the suit land until the appellant was ready to use the land. In July 1975, he gave the respondent notice to vacate the land as he, the appellant, wanted to develop it but the respondent refused to move and illegally lodged a caution against the title. Although the appellant stated in the pleadings that he had, as a result of the respondent's refusal to move, suffered much loss and damage, he did not include general or special damages in his prayer. In his evidence, the appellant told the court that the suit land was his as far back as 1946 and in fact there was no dispute that the land had all along belonged to him. He said that he had allowed the respondent to graze on the suit land even earlier than 1966 but he denied that in 1958 the respondent was in possession of the land though he was grazing there. The appellant admitted receiving two payments of Kshs 900 and Kshs 600 respectively from the respondent but said that these were in respect of rent for the respondent's use of the land - the rent the appellant charged being Kshs 100 per acre. It is not clear whether the rent was Kshs 100 per acre per year or for the whole period the respondent used the land. The appellant said that he clearly told the respondent not to plant any permanent cash crops on the land. The appellant said that in 1966 he told the respondent that he could not sell the piece of land because he, the appellant, had very many children.

When the respondent filed his amended written statement of defence, he by way of counterclaim, asked that the appellant be ordered to transfer to and cause to be registered in the name of the respondent the suit land which orders the High Court made in his favour. The respondent's case was that the appellant agreed to sell the suit land to the respondent in 1958 for Kshs 2,485 which was Kshs 250 per acre, and he paid Kshs 800. The respondent further said that the parties agreed that the respondent would pay the balance of the purchase price later so that the appellant could give him the title deed. He produced in evidence exhibit C dated December 16, 1958 written in Kikuyu Language, the English translation of which Mr Gaturu for the respondent accepted as correct. That document reads as follows:

> "December 16, 1958
> An Agreement between Kamau and Sisto Wambugu Muratha, have agreed to enter into a sale agreement for the land measuring 9.87 acres and the purchase price is Kshs 2,485 Kamau has paid Kshs 800.
>
> The balance remaining Kshs 1,685. The balance remaining will start to be paid in March 1959 at Kshs 200 per every month. Date of completion will be October 1959."

The appellant however said in cross-examination that the signature on that document was not his. The respondent, all the same, moved onto and started developing the land and he planted 16,000 stems of tea on it. It was accepted he had paid the appellant Kshs 600 and Kshs 900. Nevertheless, the respondent admitted that though he had been negotiating for the purchase of the suit land since December 16, 1958, he had not paid the full purchase price, as he was supposed to have done by October 1959 or January 1967. The respondent said that the appellant told him that he wanted to be paid an extra Kshs 2,400. It was not clarified what the purpose of this extra payment was.

The respondent's wife, Hannah Wairimu (DW 2), who paid the Kshs 600 to the appellant told the High Court that her husband told her that the purchase price was Kshs 4,900. Another witness of the respondent, Isaya Nderitu Muchunu (DW 3), testified that the dealings between the parties relating to this land were in 1966; Kshs 900 was to be paid then and the balance to be paid in January 1967. It was a sale and not a lease. This witness did not know the sum still outstanding. Micah Kariuki (DW 4) said he took the measurements of the land during demarcation and caused it to be registered in the appellant's name. According to exhibit 1, registration in the appellant's name ie alias Wambugu s/o Thumi was on February 11, 1971 so one cannot be sure whether Micah confused the events of 1958 and 1966. Nevertheless, Micah's evidence was that the respondent went onto that land as a purchaser soon after demarcation. This

witness also said that in 1978 or 1979, which he changed to 1974 in cross-examination, he went to the appellant's home with the respondent who had Kshs 2,000 but they did not find the appellant and the appellant's father whom they met at home declined to take the money. He said the appellant had told him he wanted to sell the piece of land but he, Micah, did not know about the agreement. Micah also said that from the time of demarcation to the time he and the respondent took the Kshs 2,000 to the appellant was six months. Micah must have been a confused witness.

From the evidence I have set out above, the court had to reach a finding whether the parties entered a sale agreement of the suit land in December 1958 or January 1966. The appellant had denied signing the purported agreement of December 16, 1958 and there was no further evidence to prove that he was a party to that alleged agreement. Did such agreement exist? From exhibit C the agreement of 1958, if any, stipulated October 1959 as the date of completion which date the respondent failed to keep, but there was evidence that by then he was already and remained on the land. That agreement, though not the same as what a lawyer would write, can be said to fall within the rule "*id certum est quod certum reddi potest*" (that is certain which can be made certain) and I would say its terms were sufficiently stated. There was, generally speaking, evidence of a contract certain and definite in its terms, which the learned judge found to have been genuine.

By 1966 the respondent had not completed performing his part as there was no evidence that he had paid the balance of Kshs 1,685 and exhibit B is further evidence of that fact. Exhibit B reads as follows (English translation):

> "February 2, 1966
> According to the agreement of Kamau and Sisto of January 9, 1966 that he will pay Kshs 600 for land.
>
> Today date February 2, 1966 Kamau has given Sisto Kshs 600 and that money was brought by the wife of Kamau who is Wairimu with another woman called Muthoni Kariuki."

That note did not constitute a fresh contract but it impliedly purported to continue the life of the 1958 original agreement. We then come to exhibit A the English translation of which is as follows:

> "I Kamau s/o Njuguna our agreement with Sisto Wambugu concerning land about the balance of payment left today July 18, 1966 I have paid him Kshs 900 and the balance remaining I shall pay him in the month of January 1967 and at that time he will give me the title deed to the land."

As I have already said the appellant admitted receiving the two amounts of Kshs 600 and Kshs 900. Both parties admitted the money was paid for the suit land but while the appellant says it was for rent for use of the land, the respondent says it was part payment of the purchase price. The appellant does not expressly admit receipt of the Kshs 800 mentioned in exhibit C, but since he disowns the signature attributed to him on that document it may be taken that he denies receiving the Kshs 800. The appellant did not deny putting the respondent in possession of the suit land; what he denied was putting him there as a purchaser. It is one man's word against that of another for, in my view, the respondent's witnesses were so confused as to dates and value of the subject matter that no reliance could be put to their evidence as to the original intention of the parties. I am, nevertheless, satisfied that the evidence available supports the learned judge's finding that the parties entered a valid contract for sale of the suit land by the appellant to the respondent. The evidence adduced proved that the original purchase price agreed was Kshs 2,485. As to the Kshs 800, apart from mentioning it in exhibit C, the respondent spoke of it in his evidence on which he was not challenged. I am satisfied that the respondent paid Kshs 800 in 1958 and Kshs 1,500 in 1966. In my opinion, by 1966, the appellant was still prepared to give the respondent, whom he said was his friend, an opportunity to perform his part and he extended the time of completion to January 1967, but when the respondent failed to complete by then the appellant decided to let him use the land for grazing and cultivation of annual crops till the appellant himself could take over. By then the appellant must have been of the view that as the respondent had been using his land, the monies paid should be treated as rent if no sale materialised. The appellant's change of mind and repudiation of the contract came after January 1967. This is apparent from the following excerpts from the testimony of the appellant in the court below:

> "In the year 1966 I talked to Kamau Njuguna the defendant and told him that I could not sell the piece of land because I had very many children. In 1974 he wrote to me. He wrote to me in Kikuyu and English. The letter is dated May 28, 1974 ... After this letter I did not agree to sell him the land."

The question is, therefore, whether the appellant could lawfully repudiate the contract of sale of his suit land to the respondent.

I have been unable to get the case of *Roberts v Wyatt* [1810] 2 Taunt 268 cited at 9 *Halsbury's Laws of England* (4th Edn) p 366, para 531 F2 but the relevant statement says that contracts for the sale of land commonly give the vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that this right can only be exercised where time is of the essence, or if it is not, after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence. The position is explained by the following passage: *Halsbury's Laws of England* (ibid) para 485:

> "In cases where time is not originally of the essence of the contract, or where stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken."

In this case the agreement of 1958 did not state that time was of the essence nor did the appellant give the necessary notice making time of the essence. In my view, in 1966 when the appellant received the two amounts of Kshs 600 and Kshs 900, he affirmed the contract with new additional conditions that he would be paid Kshs 2,400 extra and the respondent would complete by January 1967. The respondent did not do anything to rectify his failure to complete in January 1967 until possibly by 1974 when, Micah said, there was a fruitless attempt to take Kshs 2,000 to the appellant. In my opinion, as the appellant had not taken the necessary steps to make time of the essence, he could not repudiate the contract on the ground of unreasonable delay by the respondent to perform.

The respondent admitted that he had not, even by the time of trial, paid the full purchase price. He failed to do so in October 1959, and, again failed to pay in January 1967. There was only one price for the suit land therefore the respondent's contractual obligation to pay the full purchase price was entire or indivisible. A contract is indivisible or entire when the consideration is one and entire (*Halsbury's Laws of England* (ibid) para 473, p 332). By 1966, when the appellant said he told the respondent that he was no longer interested in selling the land, only Kshs 800 had been paid and that was perhaps when the respondent offered to pay Kshs 600 on February 2, 1966 and Kshs 900 in July of the same year. Hannah said the price was Kshs 4,900 which is not far from Kshs 4,885 (original Kshs 2,485 + Kshs 2,400) that appears to have been the new price. Kshs 2,300 against the price of Kshs 4,885 or Kshs 4,900 was, in my opinion, not substantial performance and I would hold that there was failure of performance by the respondent. There was failure of consideration and on the persuasion of *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, failure to perform part of the contract constitutes failure to perform whole. In the circumstances, the appellant was, in my view, entitled to repudiate the contract of sale of the suit land for failure of performance and as the respondent had failed to perform his part, he could not demand performance by the appellant. I would therefore hold that although there was originally a contract of sale of the suit land, the contract was lawfully repudiated by the appellant and no specific performance thereof in favour of the respondent could be ordered.

I now turn to consider whether the respondent acquired title to the suit land by adverse possession. The following passage appears at p 490 of *Megarry's Manual of the Law of Real Property* (5th Edn):

> "Before 1833 the word 'adverse' was used in a highly technical sense; but today it merely means that there must be possession inconsistent with the title of the true owner and not, for example, possession by a trustee on his behalf. Time does not begin to run merely because the owner abandons possession, for until some other person has taken possession of the land there is nobody against whom the owner is failing to assert his rights. 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 ..."

And in the English case of *Walli's Cayton Bay Holiday Camp Ltd v Shell- Mex and BP Ltd* [1975] QB 94, although the facts were not the same as in this case but where adverse possession was an issue, Ormerod LJ said at 114:

> "The case, therefore, turns on whether or not the plaintiff can establish that they were in possession of the disputed land for the statutory period, within the meaning of the Limitation Act 1939, section 10. The qualifying words, in my opinion, are of crucial importance, for it appears to me that the word 'possession' in this section and its predecessors has acquired a special and restricted meaning. The overall impression created by the authorities is that the courts have always been reluctant to allow an encroacher or squatter to acquire a good title to land against the true owner, and have interpreted the word 'possession' in this context very narrowly. It is said to be a question of fact depending on the particular circumstances of the case ... but, to the relatively untutored eye, it has acquired all the appearances of a difficult question of law."

The general principle appears to be that until the contrary is proved, possession in law follows the right to possess: *Kynoch Ltd v Rowlands* [1912] 1 Ch 527, 534. Lindley MR in *Littledale v Liverpool College* [1900] 1 Ch 19, 21 put it in these words:

> "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 ..."

His Lordship continued:

> "The same point was made by Bramwell LJ in *Leigh v Jack* (1879) 5 Ex D 264, 272, where he said referring to the Statute of Limitations: 'Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession.' If this is the right way to approach the problem, the question becomes 'Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?' rather than 'Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?' It certainly makes it easier to understand the authorities if one adopts the first formulation."

On the question of dispossession, His Lordship said:

> "The next question, therefore, is what constitutes dispossession of the proprietor. Bramwell LJ in *Leigh v Jack* said at 273, that 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'."

I am persuaded and I would adopt the passages I have cited above from *Wallis'* case, supra.

The learned judge did not give any reason why he thought the case of *Jandu v Kirpal* [1975] EA 225 was not relevant to the present case. In that case the plaintiff alleged that he had in 1958 agreed to buy land from the owner and paid 10% of the agreed price. He registered a caveat claiming that the owner of the land was a trustee for him and that a vesting order should be made in his favour. On the question of adverse possession it was held that:

> vi) the plaintiff was put into possession with the consent of the owner but he had not paid the full purchase price, and no adverse act had been alleged;
> v) possession does not become adverse before the end of the period for which permission to occupy has been given.

The facts of that case were different but the holding on adverse possession was useful to take into account. The running of the time must be continuous and not suspended.

In my view, from December 16, 1958 to October 1959, the appellant allowed the respondent to stay on the land because he expected the latter to complete paying for it by October 1959. Time would start running only after the last day the respondent had failed to pay and as that date was not fixed I would fix it on October 31, 1959. But the conduct of the parties indicate that the appellant extended the time for completion to 1967 because it was in 1966 that he told the lower court that he told the respondent that he would no longer sell the suit land. With such extension of the date of completion, no time would run until after the expiration of the extension. On the other hand, even if time started running on November 1, 1959, it was suspended in January 1966 when the respondent appears to have tried to negotiate new terms of repayment and is purported to have undertaken to complete payment by January 1967. He was in possession of the land between January 1966 and 1967 by the appellant's permission on the understanding that he would perform his part completely by January 1967. If we assume, which I do not accept, that when the respondent failed to perform by January 1967 time would then start running from February 1967. From November 1959 to January 1966 is only six years and eight months and from February 1967 to July 11, 1975 when the appellant's lawyers gave the respondent notice to vacate the suit land is eight years five months and eleven days. Both periods are each less than the required continuous period of twelve years. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years, as to entitle him, the respondent, to title to that land by adverse possession.

I have not dealt with the ground of *res judicata* because the court was informed that the suit filed in the senior resident magistrate's court was the one transferred to and tried by the High Court from whose judgment this appeal lay. There was no need to go into the question of lack of the consent of the relevant land control board under the Land Control Act (cap 302) because the point of whether or not the land was in Trust Land Area to which until after 1960 that Act did not apply, was not argued in the High Court, and, at any rate, the point was not as relevant to this appeal.

For the reasons stated, I would allow this appeal with costs and award to the appellant the costs in the High Court too. I would set aside the High Court orders and grant the appellant the orders prayed for in his amended plaint. I would hear the parties on the time to be allowed for the respondent to move.

Kneller JA. The issues in the suit before the High Court at Nyeri (O'Kubasu J) were four-fold. First, was there an oral agreement between the parties whereby the respondent was to enter into the possession of the suit parcel and to cultivate it until the appellant could replace him on the land? Secondly, was there an oral agreement for the sale of this parcel by the appellant to the respondent? Thirdly, if so, had both parties fulfilled its terms? Fourthly, had the respondent been in adverse possession of the land for about nineteen years?

When it came to this appeal, and the evidence had to be reviewed and evaluated again, two more issues emerged in the memorandum. These were whether or not the Nyeri Senior Resident Magistrate had dealt with them in his Civil Suit 212 of 1976 so that the matter was *res judicata*, and whether the learned judge erred in law by failing to apply the provisions of the Land Control Act (cap 302).

Hancox JA and Chesoni Ag JA have dealt with the facts and the law exhaustively and I agree with the conclusions they reach.

So the answers to the issues are these. First, there was no oral agreement between them that the appellant would put the respondent in possession of this land and leave him to cultivate it until he could enter upon it and use it for himself. Secondly, there was an oral contract of sale between the two. Thirdly, the appellant performed his part of it but the respondent failed to do so by not completing his payments of the purchase price. Fourthly, the respondent was able to show that he was in occupation of the parcel from 1959 onwards but with the permission of the appellant which means that it was not adverse possession. Turning to the two issues raised in the memorandum, I also agree that the matter was not *res judicata* because the suit in the court of the senior resident magistrate did not go to hearing but was, instead,

transferred to the High Court. The parties did not have consent of the relevant land control board to this sale but there was no material on which this issue could be answered and, indeed, it was not one that was pleaded or was the basis of any submission in the High Court.

The upshot is that the appeal is allowed, the order of the High Court dismissing the suit with costs is set aside, the appellant is granted orders to evict the respondent from Othaya/Kihugiri/57, an injunction permanently restraining the respondent, members of his family, his servants or agents from remaining on or entering the land, the caution entered by the respondent is vacated, the respondent's counterclaim is dismissed with costs, the appellant should repay the respondent Kshs 2,300, and, finally, the respondent is to pay the appellant the costs of this appeal and the proceedings in the High Court.

Dated and delivered at Nairobi this 14th day of November, 1983.

A.A KNELLER

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JUDGE OF APPEAL

A.R.W HANCOX

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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