IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO 46 OF 1977

BETWEEN

BELINDA MURAI & 9 OTHERS .....APPELLANT

AND

AMOS WAINAINA .....RESPONDENT

JUDGMENT

This appeal arises out of a claim put forward by the respondent (to whom I shall refer as "Amos") to have become entitled by adverse possession to a parcel of land registered under the Registered Land Act (Cap 300) in the name of Ignatius Murai, now deceased. The circumstances under which Amos came to occupy this land, which is of some 8 acres in extent, will have to be examined in detail. The fact is that Amos was let into possession of that land in 1961 and that he is still in possession of it; he lives there with his family in a house with a corrugated iron roof; he has planted crops including over 1,000 coffee trees and he owns cattle. His possession has been exclusive and uninterrupted. Ignatius Murai was an important chief in Muranga District, which is inhabited by members of the Kikuyu tribe, whose lives are largely regulated by Kikuyu law and custom. Ignatius Murai (to whom I shall refer as "Chief Murai") died on May 16, 1974. He left as his heirs a widow ("Belinda") three brothers and six sons, who are the appellants in this appeal. These personal representatives consulted a firm of advocates, who on July 26, 1974 wrote to Amos, saying that the verbal licence granted to him by the late Chief Murai was now terminated and that without prejudice to his liability to be evicted without notice, Amos was given 30 days notice to quit the land. Amos in turn consulted advocates, who replied on September 10, 1974, denying that Amos occupied the land under licence, but alleging that Amos had been adopted by Chief Murai as a son and that the Chief had given him the land as his share of his prospective inheritance.

Amos then applied by originating summons under Order XXXVI rule 3(d) for a declaration that he had become entitled by adverse possession to the suit land, being land registered under the Registered Land Act, in accordance with the provisions of Section 38(1) of the Limitation of Actions Act (Cap 22) and for an order that he be registered as sole proprietor thereof. The defence, contained in an affidavit sworn by the first appellant Belinda, was that Amos occupied the land as a licensee and as such could not acquire a title by prescription.

At the trial before Simpson J, which occupied four hearing days, many witnesses were called on both sides. Amos told of his alleged adoption by Chief Murai, whose assistant he was and described how he was allowed on to the land in 1961 and had lived there ever since without paying rent, although he claimed to have given the Chief Kshs 7,200 in 1962 "as a reward." Amos and his witnesses were cross-examined to the effect that Amos had been allowed on the land as a *Muhoi*, which was denied. The

evidence of Belinda and her witnesses was that Amos was a *Muhoi*. In cross-examination Amos admitted that under Kikuyu customary law a *Muhoi* cannot acquire a prescriptive title of land. A *Muhoi* (plural *Ahoi*) is, according to the evidence, usually a poor person, who out of friendship on the part of a land-owner is allowed to occupy and cultivate an area of land, paying no rent, but subject to the clearly understood condition that he acquires no interest whatsoever in the land and can be required to vacate at any time, his only right being to harvest standing crops which he had planted. This being so, a *Muhoi* was not normally allowed to plant permanent crops or to erect permanent buildings.

It is unfortunate that Chief Murai was not alive to give evidence. He would have been able to say exactly on what terms Amos was allowed to occupy the suit land. There is no contemporary documentary evidence which casts any light on what exactly happened. Amos' story that he was adopted by the Chief and "given" the land and that he paid Kshs 7,200 "as a reward", was not believed by the trial judge. He did not make a finding as to whether or not Amos was in occupation as a *Muhoi*, because in his view:

> "Even if the plaintiff was a *Muhoi* this does not prevent him from acquiring registered land by adverse possession under the Limitation Act."

It must be borne in mind that the land the subject of this appeal is land registered under the provisions of the Registered Land Act. By Section 163 of that Act:

> "Subject to the provisions of this Act and save as may be provided by any written law for the time being in force, the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges, registered under this Act and interests therein …"

Under the common law of England, Amos was either a licensee or a tenant at will. Mr Gautama for the appellants submits that Amos was a *Muhoi* and therefore a licensee, so that his occupation, being purely permissive, cannot give rise to title by prescription. The learned trial judge made no finding as to whether Amos was a *Muhoi* beyond commenting that even if he was this did not prevent him from acquiring land by adverse possession under the Limitation Act. Mr Couldrey, for the respondent Amos, was also of the view that it was irrelevant to make finding as to Amos' exact status at customary law, because of Section 163 aforesaid, especially when read with Section 4 of the Act, which reads, so far as is relevant:

> "Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as is inconsistent with this Act."

Mr Gautama, on the other hand, relies on Section 3(2) of the Judicature Act (Cap 8), which reads:

> "(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without delay."

Mr Gautama submitted that although Section 163 aforesaid applies the common law to registered land, nevertheless local customary law prevails where, as in this case, the parties are subject to that law; so that, if the learned judge had made specific findings that Amos' status was that of a *Muhoi* and that a *Muhoi* acquires no interest whatsoever in land, the judge must have decided that Amos was a licensee and could not acquire a title by adverse possession. I prefer to follow the line of reasoning adopted by Trevelyan J in *I v I* [1971] EA 278, Bennett J in *Obiero v Opiyo* [1972] EA 227 and Kneller J in *Esiroyo v Esiroyo* [1975] EA 388, to the general effect that a written law prevails over customary law even when the parties are subject thereto, and that rights under customary law are not overriding interests where registered land is concerned. At the same time, where in the application of the written law and in this case of the common law, a question arises as to the intention of the parties at any particular time and the parties were then subject to customary law, it would seem that a court can well, in accordance with Section 3(2) of the Judicature Act, look to customary law "for guidance" and this I think the learned judge did. He defined

the issues in this case as follows - was Amos a donee, a licensee or a tenant at will? Amos contended that he had been "adopted" by Chief Murai and that following his adoption he was given the land as a prospective share of his inheritance. The learned judge did not believe this story. He then had to decide, having found that Amos had been in continuous and exclusive possession for over twelve years, whether Amos' possession of the suit land was as a licensee or a tenant at will. It is in this connection that a definite finding as to whether or not Amos was a *Muhoi* would in my opinion have been helpful.

At customary law a *Muhoi* can be ordered off the land at any time without notice and to that extent the position of a *Muhoi* can be equated to that of a tenant-at-will after the first year of the tenancy and I do not think that anything said by way of obiter in *Kimani v Gikanga* [1965] EA 735 should be taken as indicating that a *Muhoi* is for all purposes the equivalent of a tenant-at-will. He is not; even Amos conceded in evidence that a *Muhoi* cannot acquire a title against the owner; a *Muhoi* is on the land by the leave and licence and permission of the owner, but he is not a tenant of any sort. In holding that Amos was a tenant at will, the learned judge stressed that his possession had been exclusive - "a fact which is wholly inconsistent with his having been a mere licensee" *Lynes v Snaith* (1899) 1 QB 486. He noted, however, that this statement of the common law had been modified in *Cobb v Lane* [1952] 1 All ER 1199. The headnote to that case reads:

> "The fact of the exclusive occupation of property for an indefinite period is no longer inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been created depends on the intention of the parties and in ascertaining that intention the court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely a personal privilege without such interest."

To the same effect is what Scarman LJ had to say in *Heslop v Burns* [1974] 3 All ER 408:

> "The legal question is a question as to the intention of the parties. The legal balance still shows a tilt in favour of a tenancy at will, for once an exclusive occupation has been established, a tenancy at will is presumed, unless there are circumstances which negative it."

The learned judge, in dealing with the question of intention, dealt fully with the scanty material at his disposal. He noted that Chief Murai was not available to explain his intention. Amos' evidence could not be relied on. An independent witness Thomas, (DW 5) (called by the appellants) deposed that Chief Murai told him he had not sold the land to Amos but had "given him land to cultivate." In the learned judge's view:

> "One can, I think, assume that Ignatius Murai was interested in retaining the plaintiff as one of his subchiefs and providing him with land to cultivate would enable him to settle in the area and ensure his loyalty."

Chief Murai's elder brother Theresius (DW 2) did not know on what terms Amos was allowed to enter the land. He said that Chief Murai told him he had given the land to Amos, but only to cultivate. Even Chief Murai's widow, Belinda (DW 1), could only give negative evidence, to the effect that Chief Murai did not adopt Amos, or give him land. She ended her evidence in chief with these words:

> "That my husband never told me what he was doing with the land is true."

The learned judge also commented that Amos was allowed to build a house on the land to improve it, to cultivate permanent crops and bury his mother on the land. Chief Murai assisted him to borrow money on the land on the security of the registered title and failure to repay the money would have resulted in the sale of the land by the bank. It seems to me significant that Chief Murai was prepared to run that risk, unless he considered the land as already in effect alienated. If Chief Murai had installed Amos as a *Muhoi*, surely he would have made this clear to his widow and brothers and especially to Thomas who asked him what Amos was doing on the land and this would have been highly relevant to the question of intention. From all this I infer that the learned judge did not think that Amos was in possession as a

Muhoi but in some other capacity. I am of the same view. In these circumstances, having rejected Amos' contention that he was a donee, the learned judge was left with the only two alternatives known to the common law, which he had to apply to this piece of registered land and I cannot say that he was wrong in his final holding that:

> "the evidence adduced in the present case I think tends to strengthen rather than negative the presumption of a tenant at will." I find that the plaintiff was a tenant at will."

There was no satisfactory evidence as to the intention of the parties such as to rebut the presumption of a tenancy at will. There was no acknowledgement of Chief Murai's title in writing, signed by Amos, which under Section 24 of the Limitation Act could have defeated Amos' claim to have become entitled to the land by adverse possession and he is in my view entitled to the benefit of the learned judge's order that he be registered as such.

I would dismiss this appeal with costs, with a certificate for two advocates.

As Potter JA agrees, it is so ordered.

Majority judgment not signed by Miller JA.

Miller JA. This appeal is from the judgment of the High Court Nairobi (Simpson J) in Civil Case No 811 of 1975.

Whichever way it goes, the operative decision in this appeal will certainly have far-reaching consequences. I see this case partly as one of those instances where this question arises, ie, How far, if at all, can and does the law presume the intention of parties to a private agreement or arrangement? It is still correct to say that "an agreement is not a contract, even if there is consideration present, if from all the circumstances, the Court comes to the conclusion that the parties did not mean to enter a bargain which could be enforced at law. See *Balfour v Balfour* [1919] 2 KB 571 a leading common law case on this point. See also *Rose and Frank Company v Crompton and Brothers Ltd* [1925] AC 445 where an agreement stated to be binding in honour only and not to be subject to the jurisdiction of Law Courts was held by the House of Lords (reversing the decision of the Court of Appeal) not to be a contract. I make these observations because as would be seen later, it is patent in the judgment appealed from, that the learned trial judge was expressly and greatly motivated by the application of the common law as obtains in England as he proceeded to assess the evidence in the case and ultimately apply provisions of our Limitation Act (Cap 22). Indeed it can be clearly seen that in his resort to the common law the learned judge had signal regard for common law progression in England vis a vis Kenya; for he said:

> "I see no reason to hold that the common law as it developed in England should not be applicable here in Kenya."

The case was by way of Originating Summons filed on April 28, 1975 whereby the present respondent Amos Wainaina sought and obtained an order declaring him entitled to a parcel of land 3.36 hectares in area, comprised in Title Number Loc: S/Ngerere/Thombotho/172; and that he be registered as the sole proprietor thereof, in place of one Ignatius Murai (deceased) who is the registered proprietor under the Registered Land Act (Cap 300).

It is common ground that the respondent was in occupation of the land since 1961 and the respondent filed his Originating Summons on April 28, 1975. The deceased Ignatius Murai died on May 16, 1974 and it appears from the respondent's affidavit in support of his application in the High Court, that he was moved to seek the protection of statutory provisions clearly not hitherto contemplated in respect of his occupation of the land, when within three months of Murai's death, he received an advocate's letter informing him that the personal representatives of the late Murai wish to terminate the verbal licence under which he was occupying the land; and that he should deliver up vacant possession of the same, on pain of being sued to secure his eviction.

There is no doubt that the respondent went into occupation of the land by virtue of a verbal arrangement between himself and Murai and the application to the High Court was partly based on the contention that the respondent was at the time of the notice to vacate, already in continuous and uninterrupted possession of the land for a period of over twelve years; and was accordingly entitled to be registered as the proprietor under the Registered Land Act (Cap 300) by reason of "adverse possession" as provided by Section 38 of the Limitation of Actions Act (Cap 22).

As the factual basis of agreement or arrangement for being on the land, in the affidavit in support of his application to the High Court, the respondent averred:

> "As a result of my long association with the said Ignatius Murai, he adopted me as a son and in accordance with the Kikuyu custom in 1959; ... and verily believe that I entered the said land as a tenant-at-will (in any event) in 1961 when the said Ignatius Murai allowed me to occupy the said land without payment of rent."

On account of the respondent's failure to adduce satisfactory Kikuyu customary evidence in the High Court, the first ground of his claim of an *inter vivos* gift of the land by Murai in the spirit of the acclaimed customary family provision or inheritance correctly failed.

The learned trial judge then proceeded to consider the second ground of claim ie a tenancy-at-will and after much thought concluded:

> "The evidence in the present case, I think, tends to strengthen rather than negative the presumption of a tenant at will."

In arriving at this decision the learned judge examined dicta in the cases (1) *Lynes v Snaith* (1899) 1 QB 486, (2) *Cobb v Lane* [1952] 1 All ER, 1199 and (3) *Heslop v Burns* [1974] 3 All ER 406 with a view to deciding whether the respondent could be classified a licencee or a tenant-at-will. He reproduced the headnote of the case of *Cobb v Lane* (supra) part of which is as follows:

> "Whether or not a relationship of landlord and tenant has been created depends upon the intention of the parties and in ascertaining that intention the court must consider the circumstances in which the person claiming to be a tenant-at-will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely personal privilege without any such interest."

It is true that this headnote may not be considered as an extract of English literature; but I cannot help noting the grammatical significance of the phrases - "the circumstances in which", "went into occupation" and "was intended to have." I am firmly of the opinion that the conjoint significance of these phrases points to the intended reasons for or conditions of occupation. The learned judge then correctly referred to the broad basic principle, that once exclusive occupation has been established a tenancy at will is presumed and asked himself the all important question as directed by the authorities in certain cases ie "Are there any circumstances which negative it (the presumption)?" and in the answering of this question by the ultimate decision that the respondent was in this case a tenant-at-will, the learned judge described and assessed the usual and most helpful or reliable source for reasonable ascertaining of the intention of parties, in these terms:

> "Ignatius Murai is unfortunately not available to explain his intention. The plaintiff's evidence cannot be relied upon."

On these premises it is clear that a real difficulty arose in the search for the intention of the parties and in my judgment, the adoption of indicia in the dealings between the two men by way of circumstantial evidence in order to arrive at any reasonable presumption must rotate around the pivot of the plaintiff/respondent's own evidence which as the learned judge found, "cannot be relied upon" which I understand to mean, in proof of his claim, the basis and reason for his going into occupation having been shown to be untrue and consequently untenable.

This is an appropriate case for this Court's reappraising of the evidence in the court below and arriving at its own conclusion; and I consider it useful to pay the greatest of attention to what the parties themselves may have said or done, before attempting to affix legal principles and the written law; especially as in this case, the respondent himself made it absolutely clear to the court that at the time of his entering into occupation and possession, probable resort to law courts to classify the "family arrangement" between "father" and "son" and to introduce the concept "adverse" was not even conceived.

True it is that the person was in occupation of the parcel of land from 1961; but when in July, 1974 he was first faced with the request by advocate for the appellants that he should vacate the land, he contended through his then advocate's reply of September 17, 1974 that he occupied the land as an adopted son of the deceased (Ext B 14). He was then relying on inheritance and as mentioned above, that allegation failed.

A little later ie in April 1975 under the advice of a new advocate, he rectified his original stand and contended that he claims the land by way of adverse possession; and for purposes of his prayer in the High Court he expressly averred in his affidavit in support:

> "As a result of my long association with the said Ignatius Murai he adopted me as a son in accordance with Kikuyu custom in 1959."

It is therefore clear that the respondent called Kikuyu custom in aid of his claim. This is what he was aware of as between Murai and himself for his being on Murai's land.

If there was any doubt as to the nature and basis of the respondent's claim, these are portions of his evidence in chief as he defrayed the burden of proof cast upon him:

> "(a) I first entered the land in question in 1961. I entered as a child of Ignatius. He allowed me to do so. In 1959 he called all the sub-chiefs of Location 8. The ceremony had not come to an end. He told them this man is going to give a goat and it would be slaughtered and after eating together he will be my child and no-one will interfere with him in Nugoi Location. I was about 49 I think.
>
> (b) I paid to Ignatius no rent for occupation of the land. If a Kikuyu gives land rent-free, the tenant is called *Muhoi*. The land was given to me as his child; not his real child. He called me his child because I gave him a goat and he told people and he gave me promotion immediately."

In my view, the net result of the above account and in particular paragraph (b) coming from the mouth of the respondent himself, should leave little or no doubt that for purposes of the consensual arrangement between Murai and the respondent, the respondent's occupation of the plot of land was based on the Kikuyu customary practice - "Ahoi" and apart from my own assessment of the evidence in the case, I am fortified in this view, by this specific finding of the learned judge:

> "I have already said I am unable to believe that any adoption took place. Similarly I am not satisfied that the plaintiff was given the land as a gift whether as a prospective share of his inheritance or otherwise."

Further to this, the respondent having said in cross-examination "I had given Ignatius Murai Kshs 7,200 in 1962 as a reward but not for buying the land," the learned judge remarked in this behalf - "I am not satisfied he made any such payment;" and as if to crown it all, the respondent himself also said in cross-examination:

> "I could be called a *Muhoi* for one year but no longer. I agree a *Muhoi* never acquires ownership."

I see nothing in the respondent's evidence indicative of an intention for tenancy on accepted lines.

In my opinion, from this resolute admission by the respondent himself as to occupation, Murai being absent, even if the court did proceed to find as a fact that the stigma or classification "Muhoi" is

automatically removed after one year to the day by reason either of the evidence or by judicial notice, or both and having regard to variations of practice of native customs in different areas by people of the same tribe dealing with the same subject matter, the respondent can be seen to have himself answered the question as to intention at occupation.

Further to this and as to duration of the *Muhoi's* stay on the land and power to terminate, see Land Law in East Africa (1967) page 11. I am of opinion that the so-called "tenant" can by the custom of the area be no more than a mere licencee. This is nothing strange to English Medieval Society, Services and Tenures. Moreover, whereas in some countries an agreement for a lease may be as good as a lease, this is not so in Kenya. Perhaps, here, the sitting on another man's land without formal recognizable evidence is more closely guarded.

I am deeply concerned at the fact that there is no positive finding in the judgment, as to whether or not the respondent is or was a *Muhoi*. The status or classification *Muhoi* as opposed to "squatter", of necessity involves consensual intention; and the case for the appellants proceeded solely on that basis, therefore as within the dictum in *Cobb v Lane* (supra), there was by necessary implication an unbroken issue on the question of intention.

The case for the respondent is that once occupation for the statutory period as provided by Section 38 of the Limitation of Actions Act (Cap 22) has been established no question of having been a *Muhoi* (occupant) or further reference to, or dealings with the landowner arises; and his advocate most ably contends before this court, that in any case, by interpretation of the relevant statutory provisions, land-holding by custom and practice in Kenya have ceased to exist. He made and argued a most commendable and painstaking research into the statutory provisions against the background of Kenya's colonial past to the present day, drawing attention to provisions of Native Land Registration Ordinance 1959.

The Trust Land Ordinance Act (Cap 100) Laws of Kenya 1948, the Native Lands Trust Ordinance 1930, the Crown Lands Ordinance No 21 of 1902 (Laws of Kenya 1948), the Crown Lands (Amendment) Ordinance No 22 of 1926, the Preservation of Native Property Ordinance (Cap 283) 1959 and the Registered Land Act (Cap 300) 1963, with particular emphasis on the provisions of Section 163 of the last mentioned Act in conjunction with those of Section 38 Limitation of Actions Act (Cap 22) 1967.

Not surprisingly however, it does appear that as in England and elsewhere, "customs die hard"; and *Wananchi* of this land locality (unlike Kiambaa), despite statutory changes in nomenclature and in so far as their own property on their doorsteps is concerned, they seem to remember most of all, these provisions of the Kenya (Native Areas) Order in Council, 1939 ie

> "4(5) The Native Lands shall be subject at all times to all such rights in respect of land as are or may be enjoyed by native tribes, groups, families or individuals by virtue of existing native law and custom or any subsequent modification thereof, in so far as such rights are not repugnant to any law from time to time in force in the colony."

And what is more, by Section 27(a) of the Registered Land Act (Cap 300) the absolute ownership as well as "all appurtenant rights" of and in the land in question are vested in Murai. I am therefore sure that by whatever name it may be called a licensee as such to occupy freehold land is not prohibited. The important submissions of advocate for the respondent are as follows viz:

> "1) Murai's title to the land is freehold and the custom 'Ahoi' is known to freehold land; if anything, the practice 'Ahoi' was only of practical or procedural significance (Section 4 Cap 300).
>
> 2) It is true that Section 10 Magistrate's Courts Act (Cap 10) empowers the magistrate to hear and determine civil claims under customary law; but the land cannot be held both under statute and custom.
>
> 3) As considered by the learned trial judge, the respondent's length of occupation, the nature of his crops, building a house, the charging of the land to his benefit and the burial of his mother on the

land show that he was a tenant-at-will even if the land was customary land as the respondent for exceeded what he would have done had he been *Muhoi*.

4) One cannot have a *Muhoi* on land protected by statute; that is the question. In the alternative the respondent was not in effect or in fact a *Muhoi*.

5) It is not a question of imputing abolition of customary law. This is not unique; it was done in England. The Law of Property Act 1925 did a similar thing and the Judicature Act (Cap 8) itself did this; see *I v I* [1971] EA 281. Customary law must be subject to written law. The Act must apply to everybody.

6) We need not concern ourselves with intention of parties as this has been found by the judge. The respondent became a tenant-at-will (see reasons for affirming the judge's judgment)."

I shall return to examine in detail any of the above submissions I may consider necessary, except to say forthwith, that the last submission No 6 and the effectual finding thereon is of the greatest import and the crux of this appeal as I see it.

It would appear that as stated in the judgment, the learned judge was perhaps influenced by dicta in the case of *Kimani v Gikanga* [1965] EA 753 for said he - "Duffus JA as he then was, equated a *Muhoi* with a tenant-at-will." With respect, I do not think that tenancy at will was a salient point for specific determination in that case. I think that whether or not the claim sprang from registered land was the main point in that case; coupled with resulting precautions on the judicial treatment of evidence of custom. Be that as it may, the judgment under consideration in this appeal has as its basis for the decision arrived at the following:

"Even if the plaintiff was a *Muhoi* this does not prevent him from acquiring land by adverse possession under the Limitation Act (Cap 22)."

For my purposes it is apposite to restate that the respondent/claimant himself and whose evidence the learned judge said could not be relied upon did say - "a *Muhoi* never acquires ownership."

I consider it appropriate despite any repetition to reproduce the following which appears in the judgment immediately before the application of provisions of the Limitation Act (Cap 22).

"Scarman LJ following the passage from his judgment which I have quoted (and to which I shall myself refer later) went to mention the Rent Restriction Acts and the emergency of a licence to occupy as a possible mode of land holding. We have rent control and licence to occupy here and I see no reason to hold that the common law as it developed in England should not be applicable here in Kenya.

The plaintiff has established exclusive occupation. A tenancy at will is accordingly presumed. Are there any circumstances which negative it? Ignatius Murai is unfortunately not available to explain his intention. The plaintiff's evidence cannot be relied upon.

Thomas Ndindirukia, an independent witness, said that Ignatius told him that because the plaintiff had come from another area, he helped him by giving him land to cultivate so that he could help his children. One can, I think, assume that Ignatius Murai was interested in retaining the plaintiff as one of his sub-chiefs and providing him with land to cultivate would enable him to settle in the area and secure his loyalty."

As I see it, the final underlined portion of the above quotation is no matter of more assumption; but a parallel, comparative historical situation in the process of transition from certain feudal practices which took statutes and the common law of England many years to eradicate. The learned judge however appears to have overlooked other portions of the evidence of the "independent witness" Thomas Ndindirukia on what I consider essential points of his evidence and also to assess the same in the pail of

evidence as a whole, some of which was as usual, largely hearsay or tainted with interest. Ndindirukia is an ex-President of the African Court of the area in which the land in question is situated with eighteen years' service in that court, having resigned in 1964. He said he was well acquainted with Kikuyu custom and in his evidence-in-chief which was in no manner disturbed by cross-examination, he said that a "*Muhoi* is a person who borrows land and is given it; but he cannot acquire it permanently. He can only cultivate it up to the time when the owner requires it. He is not entitled to claim the land on the grounds of length of occupation. Kikuyus don't refuse to allow a *Muhoi* to borrow on the security of land." He went on to say that he himself has a *Muhoi* and depending on friendly relationship, he could allow a *Muhoi* to borrow money on the security of the land.

Generally and with reference to the respondent's advocate's submissions, I would be most surprised if it is without reason that the respondent as sub-chief of the same area as the late Chief Murai, both men no doubt taking part in the administration over matters of which Murai was President, the respondent would have, as he did, seriously commenced his claim to the land invoking custom had it not been the fact, that even at that stage, the limitation period about to elapse, he in truth and in fact was aware and was consciously relying on no other ground as between the landlord Murai and himself, but custom.

As to Murai's permitting the respondent to obtain money to an unlimited amount on the security of the land, I am forcefully drawn to reflect upon the evidence of the independent witness Ndindirukia, in this behalf; and I think, that with the respondent himself saying in cross-examination that he was bothering Ignatius asking for money causing Murai to borrow money on the security of the parcel of land, great care is needed in classifying this action when presuming one way or the other.

At all events and over the years up till Murai's death it is clear from the evidence, that the respondent made no effort to legally solidify his occupation of the land against Murai's title.

On the other hand, Murai held on to his right to the documents of title and the respondent portrayed himself even in evidence as the poor and needy. This situation in my view fails to support the allegation that the respondent sold his property in the area where he formerly lived, in order to use the "earmarked" proceeds for establishing a home or for developments on Murai's land. As I see it, the respondent on this portion of his evidence confessed to financial reliance on Murai; a global incident of the practice "Ahoi", including land holding.

In all circumstances of the case, the following view of the learned author in Megarry's 3rd Edition seems most appropriate:

> "Although a right to exclusive possession is an important indicial that a tenancy and not a licencee has been created, it now seems that even a licence may confer such a right. The true nature of such possessory licences is far from clear."

From my humble researches and without reference to a series of cases, it appears settled and I would say also practical that agreements must first be construed as a whole to ascertain the precise relationship between the parties and that relationship is then to be determined by law even though the parties themselves may affix coned names to it. This is to me, with respect, should have been the general tenor of the urgings of advocate for the respondent. I may be wrong, but I think that in this case, one must look at the relevant and cited statutory provisions from two standpoints of interpretation; on the one hand, that in relation to the subject matter itself; and on the other; the tool or directions for application. Without hesitation I have found exceeding great merit in the respondent's advocate's submissions on the legislature's transitional treatment of land as the subject matter; I must also say that if one agrees with the approach the learned trial judge adopted, he must be seen to have been correct; but I believe that I am right in saying, that when he said:

> "I see no reason to hold that the common law as it has developed in England should not be applicable here in Kenya."

He literally "took the bull by the horns" and it is in this respect that although I find myself satisfied to

walk along with him in the same general direction under the banner of the common law, I am forced to hesitate for the following reasons: (1) In Section 3(1) of the Interpretation and General Provisions Act (Cap 2) 1956:

> "common law means so much of the common law, including the doctrines of equity of England as has effect for the time being in Kenya."

I am therefore firmly of the opinion that these provisions do not as it were, direct a general or total transplant either as to quantity or as to duration (much to my own regret). It appears to me that the legislature gave these directions with the attaching reservations because it was done in the year 1956. Then followed the Judicature Act of 1967 providing in Section 3(2):

> "The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

For Kenya, the period 1956 to 1967 was highly important and historical to the country's legislatures. The seemingly unnecessary phrase "for the time being in Kenya" at the end of the definition of "common law" above, should tell the tale and it transpired that up till 1967 the legislature gave the above express directions to the judiciary. I construe the underlined portions of the Acts (immediately above) to be plain statutory language, clear, manifest and without doubt; and I am also alive to admonition in the decisions of such courts as may guide this court as well as the opinions of our celebrated authors on the question of the interpretation of statutes – piecemeal or consolidated, that it is not competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his own views as to what is right or reasonable.

It seems to me, that with the two above quoted statutory provisions which I consider to be directions for application by the judiciary, the learned judge's views with respect to the application of the common law and the legislature's mandatory directions as to African Customary Law, merged for treatment in the case. Indeed, it can be seen from the respondent's initial limb of claim before the court that he relied on custom thereby causing the learned judge to decide and find:

> "The ceremony described did not accord with Kikuyu custom as described by a former president of an African Court Thomas Ndindirukia. I am not satisfied the plaintiff was adopted as he claimed."

When it came to the question "Muhoi" however, although this witness Ndindirukia was classified as "independent", his evidence relating to the length of time the *Muhoi* in the case could stay on the land and his inability to acquire ownership; if true, did not fall either for express acceptance or rejection; although he clearly appears to have been acknowledged as an expert witness on the issue of adoption. Determination of the fundamental question of intention and the computing of time for purposes of the Limitation Act were in my view, immediately uppermost; even if assessors had to be called in. I must say in passing and with respect, that unless there was a predisposition to disregard evidence of custom whatever, which as shown immediately above was not expressly done, this case may have been as I think it was, a wonderful and perhaps long awaited opportunity to expressly pronounce upon the continuing existence of custom or otherwise, in that the case before the court involved the Chief, Sub-chief and President of Native Court with the principle and practice of custom vis-a-vis statute, a matter of great importance.

I am mindful of dicta in *I v I* [1971] EA 278, *Obiero v Opiyo and Others* [1972] EA 227 and *Esiroyo v Esiroyo and Another* [1973] EA 388 as well as the earlier case of *Kimani v Gikanga and Another* [1965] EA 735 to which the learned judge referred; and I would have been disposed to accept an interpretation to the effect that today there is nothing like recognisable customary law and/or practice in Kenya, if there existed in my view a considerable body of authority in that direction even though not binding on this

court and which had been acted upon for some appreciable length of time in all the circumstances.

I cannot conceive that any parliament gives and retains directions to the judiciary as in Section 3(2) of the Judicature Act without the greatest of consideration and I believe that the phrase "shall be guided by African Customary Law" is at least positively expressive of Parliament's logical anticipation of situations as in the present case; not that customary law should prevail over written law in any event and on every occasion but that in cases as directed, due regard must be given to custom and its recognisable ramifications. More particularly and in my humble opinion whilst as suggested, this perhaps inapplicable direction to the judiciary still remains on the statute books, due regard and obedience must be given to it until Parliament in like wisdom for its enactment, modifies or removes it. The words employed, are to no plain, clear and unambiguous.

As I mentioned earlier, there is perhaps nothing wrong in the learned judge's approach of reform as took place in England; but the problem in Kenya is still one of enormous proportions and as yet pointing the finger at many delicate arms of the social structure of the community; and although express legislative treatment of the question of the existence of custom and customary law may not have kept abreast with the march of time or with equal rapacity of transition as in England and other countries, if at all, I would hesitate to make a finding in this case which if effectual, it is tantamount to legislating for Parliament.

I see the provisions of Section 3 of the Judicature Act in awareness of the progressive transitional treatment of land and with the phrase "shall be guided by African Customary Law", as a matter of policy of statute, I quote and adopt the following of the learned author of Craies on Statute (7th Edition)

> "It is no doubt the duty of the courts so to construe statutes as to suppress the mischief against which they are directed and to advance the remedy they are intended to provide; but it is one thing to construe the words of a statute and another to extend the operation beyond what the words of it express."

It was on the evidentiary grounds of custom, primarily put up to the court by the respondent himself and similarly resisted by the appellants, that formed the basis of the contention. It is most natural to conclude, that at consensus for occupation of the land in this case, "intention" of necessity had to play part. On the very reliable judicial authority adopted by the learned judge and with which I agree, "the intention of the parties" was of the utmost importance. If as the learned judge unreservedly found, the basis or fundamental reasons and conditions for the occupation of the land by the respondent had not been reliably put before the court, how then and from what precise moment of time can one presume or inject "intention" if at all and of retroactive effect, particularly for the computing of time by limitation? I am confident that neither land nor time was on trial before the court, but the right to ownership of land. The fact that the crucial evidence sprang mainly from the wells of local custom should not detract from an allembracing search for intention including at least the customary flavour or practice of which the witnesses spoke. It is a valuable principle that in assessing the evidence of a witness regard must be had for what a person in the position of the witness testifying, is most likely to say.

On the evidence and with respect, I do not consider that the following circumstantial indicia on which the learned judge presumed in favour of the respondent the conclusions were reasonably drawn viz: (1) He assumed that "Murai provided the respondent, one of his subchiefs, with land to enable him to settle in the area and secure his loyalty." I think that this must be weighed against the simple, natural question … What if and when that loyalty waned or disappeared?

It may immediately be said that neither probability in fact took place as the respondent was on the land for just over the limitation period. In this regard and having considered all the evidence given in the case and treated the presumptions as carefully as I can, I now myself look over to England and quote and adopt this passage from Megarry's Manual of the Law of Real Property, 3rd Edition in dealing with limitation and which is of multiple purpose in the instant case:

> "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, thus cultivating the land and later

using it for training greyhounds (racing dogs), may fail to be 'adverse possession'."

He cited the case *Williams Brothers Direct Supply Ltd v Raftery* [1958] 1 QB 159 and I take guidance from the headnote together with that of *Cobb v Lane* (supra):

> "The plaintiffs, the registered owners of land at the rear of a row of shops with flats above, brought an action in the country court against the defendant, the tenant of one of the flats, for possession of the strip of land at the rear of his premises, an order for the removal of certain fencing and sheds on the land and damages for trespass. The defendant claimed that he was the owner of the land, having been in uninterrupted occupation of it for over twelve years and that he had thereby acquired a squatter's title under the provisions of the Limitation Act, 1939.
>
> At the hearing it was shown that the plaintiffs had bought the land in 1937 and intended to develop it when opportunity arose. For the defendant it was shown that in 1940 the tenants of the flats had begun cultivating the land at the rear of their premises as part of the war effort, some of them obtaining oral permission from the owners to do so. One H had cultivated the land behind flat No 367a and marked off a boundary to it with old bricks. In 1943 the defendant became tenant of No 367a, took over the land previously cultivated by H, without the owner's permission and without paying rent for it and continued to grow food on it until 1949, when he abandoned cultivation and turned part of the land over to the purposes of rearing greyhounds putting up sheds and a fence to keep the dogs in. He had no idea of taking over the land and had not kept the plaintiffs out, but had thought that he was exercising rights over the land to which he was entitled as tenant of No 367a:
>
> Held (1) that, on the evidence, the plaintiffs had never discontinued their possession. (2) that having regard to the nature of the property, the acts of user by the defendant did not interfere and were consistent with the purpose to which the owners intended to devote it and were not sufficient to amount of dispossession of them within the meaning of Section 5(1) of the Limitation Act, 1939; and that the owners were accordingly entitled to orders for possession and for the removal of the fencing and sheds and to nominal damages for trespass." and (2) - (back to the presumptions):-

Further to the respondent's confession of bothering impecuniosity and Murai's securing loans on the security of the land to the benefit of the respondent, I think that this must on the face of it spell generosity to the respondent an undoubted salaried officer rather than an indication that Murai intended the erosion of his title to the land in favour of the respondent.

At all events, the quantum of the loans was always under the control of the bank with Murai at the debtor's end of the transactions, the bank and Murai being aware that it was Murai's title (the land) which was at stake. It transpired that Murai died literally clutching on to his title's redemption and it also transpired that the title was not redeemed by the respondent but someone acting in Mural's interests. For what it is worth, I am satisfied on the evidence that Murai to his death never intended to discontinue his ownership of the land. Another point which ought not be left without some reflection in the exercise of presuming for purposes of application of "limitation", is the unfortunate situation that Murai is absent and there is nothing before the courts to indicate whether or not for purposes of the application of "limitation" if appropriate, time did at any stage commence to run afresh.

In my approach in this case, I decided to expressly consider the evidence of the witnesses as my paramount concern and unlike the learned trial judge, I have examined the common law position and the presumptions drawn by him. I cannot help expressing the view that it is unfortunate that assessors were not called in to assist the trial court if there appeared difficulties or insufficiencies in respect of the evidence; as Section 87(1), Civil Procedure Act provides:

> "Any court may in any cause or matter pending before it in which questions may arise as to the laws or customs of any tribe, caste or community, summon to its assistance one or more competent assessors and such assessors shall attend and assist accordingly."

I rule that this is the ancillary working tool to the directions of Section 3(2) of the Judicature Act; and should be operating at this very moment throughout the country, with questions touching land obviously not excepted and I conceive that had this been done, this matter might have ended in the High Court and no doubt to the satisfaction of both sides, at least with respect to loss of time, expense and sustained anxiety. It is also because of these latter living statutory provisions that for my part, I would have hesitated to make as it were a complete resort to the common law and reform in England laudable as that might be.

As I stated at the outset of my judgment, the decision in this appeal is of signal importance; and I therefore consider it appropriate to summarise the background and reasons for the results of my efforts:

1) I refuse to be moved by the suggestion to this court that customary law and practice affecting land have ceased to exist in Kenya.

2) As explained earlier, I stress that it is not for this court or any other court to pronounce ineffective, the dictates of parliament to recognize customs and customary law whilst those dictates are on the statute books.

3) Much as our courts hold in high esteem the legal and judicial process of England, it is most desirable for any judiciary to primarily apply its country's laws to the state and conditions of things within its jurisdiction before looking elsewhere.

4) Be it the common law or the suggested obsolete customary law, in this particular case, the court was in search of reasonable and just intentions of two men, one dead and the other alive; and even in England says Megarry … "In practice, it is comparatively unusual for a title to land to be acquired by limitation except in the case of encroachment upon neighbouring land" (which is not the case here). Upon examination and consideration of all the evidence, I have found that this case is not very much unlike the English cases of a gentleman's agreement although highly flavoured with Kikuyu custom. My considered judgment upon the above reasons and considerations is that I am forced to disagree with the decision of the learned trial judge.

I find that on the evidence the respondent occupied the land on the understanding that he would never acquire ownership thereof; and that by his customary law as well as by the application of the common law, to the said evidence, he can only be classified a licencee.

Accordingly and for my part I would allow this appeal, set aside the judgment of the High Court and dismiss the Originating Summons with costs to the appellants here and in the court below.

Dated and deliered at Nairobi this 20th day of January , 1981.

E.J.E LAW

.....

JUDGE OF APPEAL

C.H.E MILLER

.....

JUDGE OF APPEAL

K.D POTTER

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR