



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram: Law, Miller JJA & Simpson Ag JA )**

**CIVIL APPEAL NO. 16 OF 1981**

**BETWEEN**

**ISHMAEL ITHONGO.....APPELLANT**

**AND**

**GEOFFREY ITHONGO THINDIU,.....RESPONDENT**

**JUDGMENT**

This is an appeal from the judgment in the High court (Nairobi) Civil Case No 1031 of 1977 (per Scriven J) dated July 31, 1979.

The appellant Ishmael Ithongo made an application to the court on June 12, 1977 for an order that he be registered as the proprietor of the whole of Land Parcel Kabete/Kibichiko 190 under the provisions of the Limitation of Actions Act (Cap 22), hereinafter referred to as the Act. His grounds for the application which was dismissed were that:

1. He has been openly peacefully and as of right in possession of the said parcel of land since 1957.
2. He has since then been cultivating the land and exercising all rights of ownership.
3. And in the premises the right of the registered proprietor Geoffrey Ithongo Thindiu is time barred under the provisions of the Act

The appellant is contending that by weight of evidence he had established adverse possession of the land in question from 1957. That the learned judge was wrong in finding on the evidence; (1) that the limitation period did not start to run until 1976 and (2) that the said finding was as a result of operation of the provisions of Section 26, Limitation Act (Cap 22).

In assessing the evidence before him, the learned trial judge found that “the period of adverse possession is in some doubt”. He further explained this view in these terms:

“I am not satisfied that he (the plaintiff appellant) has proved true adverse possession, and the onus is on him to do so until 1974. Even if he had proved adverse possession, I should then have no hesitation in saying that his inactivity from 1960 to 1976 except to claim compensation in his son’s name for road widening which would amount to laches if for example the defendant entered the land in 1960, amount in law, here, to conceal fraud.”

It is clear that the learned trial judge remained uncertain to positively find whether or not time of adverse possession as such had been in favour of the appellant's claim and he made the following the firm basis of his judgment:

"I hold that this plaintiff was fraudulent within the meaning of the Act and so even if time had otherwise run as he alleged from 1957 or even 1960; it could not in fact have done so by virtue of Section 26 of (Cap 22)".

It is also evident that the learned judge kept in mind the principle that a good title cannot be shown merely by proving adverse possession of land for however long a period. There must be two co-existing factors for the establishing of a good title by operation of the Act. It must be shown (1) who was the true owner of the interest in the land in question and (2) that he has been barred by the lapse of time.

Turning to Section 26 of the Act, it provides:

"Where, in the case of an action for which a period of limitation is prescribed, either —

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it."

By reason of customary inheritance practice, two areas of land in different localities were notionally brought into a common pool for distribution amongst the sons of the deceased father and his two wives. The areas of land are at Kibichiko and at Kanyariri and the distribution was done under the joint administration of the accepted authority of the two eldest sons of the wives or widows. The respondent having received a portion of land at Kanyariri, and becoming the registered proprietor thereof, did not in 1960, go through with an agreed transfer of land to the appellant at Kibichiko. Being also the registered proprietor of the portion at Kibichiko, the respondent retracted from the transfer agreement and insisted that he wanted to retain both parcels of land. He took no part in further steps to adjust or rectify the position but went into possession of the portion at Kanyariri. The respondent's contention that he did not know that he was also the registered proprietor of a portion at Kibichiko from March 1957 is untenable. At the same time the appellant from 1957 remained in possession of the Kibichiko portion; and has become fully established there over the years, all to the knowledge of the respondent. In my view, the respondent intended to hold on to the Kibichiko allotment perhaps for the benefit of his off-spring with the passage of time. True it is that the appellant did on one occasion lay claim for compensation for road widening through the suit land in the name of his son; but that act in itself could not amount to fraud or concealed fraud for purposes of the operation of Section 26 of the Act. Indeed, on the facts of the case as well as within the principles and practice of the custom of the parties, I see the respondent as it were estopped from denying that he holds and retains the Kanyariri allotment instead of an allotment at Kibichiko.

I therefore agree with the judgment of Law JA that this appeal be allowed and the orders he has proposed.

**Law JA.** This appeal arises out of an originating summons taken out by the appellant under Sections 37 and 38 of the Limitation of Actions Act (Cap 22) (hereinafter referred to as "the Act"), praying for an order that he be registered to as the proprietor of Land parcel Kabete/Kibichiko/190, on the ground that from 1957 until the date of the summons, June 12, 1977 he had been peacefully and as of right in possession of that parcel, cultivating the land openly and exercising all rights of ownership. The respondent, who was the defendant in the court below, was registered as the absolute proprietor of the land, which is about 5 acres in area, on March 28, 1957. The learned judge found in favour of the respondent and dismissed the summons, with costs, holding —

- (a) that the precise period of adverse possession had not been proved by clear and unequivocal evidence;
- (b) that the respondent did not know until December 27, 1976 that he was the registered proprietor of the suit land;
- (c) that the respondents ignorance was due to fraud as defined in Section 2(1) of the Act.

The appellant, represented by Mr Muite, has appealed to this court against the dismissal of his originating summons. The respondent, represented by Mr Muite, supports the judgment the subject of this appeal. The background to this appeal is unusual and must be set out in some detail. The appellant and the respondent are half brothers, having the same father but different mothers. It is not known when the father died, but it was long before land consolidation and registration began. The father had three sons by his first wife, Gideon, the appellant and Richard, and two sons by the second wife, Edward and the respondent. There was a gap of some thirty years between these two families. When the father died he owned land of his own at Kanyariri, and more land at Kibichiko, which according to the appellant was what is known as Maha land, which I understand to mean land brought into a family by a wife, and which on the death of the husband, is under customary law, shared by the sons. The respondent and his brother were born on the land at Kanyariri, and one would have expected that, on the death of their father, they would have been given land at Kanyariri. The learned judge was of the view that the Kibichiko land was not proved to have been Maha land, but I think it must have been, because if not, Edward and the respondent would have claimed much more than five acres, and Edward would not have agreed to exchange his five acres for three acres of inferior land at Kanyariri. After the father's death, the elder sons Gideon and the appellant assumed the responsibilities of "Muramati" at Kibichiko and at Kanyariri. "Muramati" is an expression which is difficult to define; as I understand it, it involves elements akin to the exercise of the duties of the administrator of a deceased's estate, of a trustee, and of a guardian. For instance, on the death of a father, the eldest son, or an uncle, may well assume the functions of Muramati, take responsibility for collecting and distributing the assets, act as guardian of the younger members of the family, and look after their interests, their education and so on. Land consolidation came first to the area where Kibichiko is situated, and it was decided that the respondent and his brother Edward should each be given five acres there, although Kibichiko was not of their "house" but of that of their elder half-brothers, and they were registered as such. At about the same time Edward wrote to Gideon saying that "we" would rather have land at Kanyariri even though it would be less than at Kibichiko. It is not clear whom Edward meant by "we", whether he meant himself and his wife, or whether he was purporting to act on behalf of the respondent as well. Be that as it may, Edward and the respondent were each given three acres at Kanyariri, and were duly registered as proprietors thereof under the Registered Land Act, and both went into possession, built homes and established themselves there with their wives and families. This was in 1960 Edward at the same time transferred his five acres at Kibichiko to the appellant. The respondent did not, and herein lies the crux of this appeal. The appellant says that he and the respondent went to see Chief Wilson, W - was a member of the Land Consolidation board, on March 16, 1960, in order to arrange the transfer of the Kibichiko plot to the appellant who wanted it for his son Harry.

When the chief asked the respondent if he agreed, he replied that he claimed the land at Kibichiko as well as the three acres at Kanyariri. The matter was then adjourned to a meeting of the board on April 19, 1960 but the respondent did not attend. The appellant was there given a form (Ex 11) describing his son Harry as the owner of parcel 190, but the form was not signed by the chairman and the Registrar of Lands at Kiambu refused to alter the register. The respondent denies that any of these things happened. He denies even knowing that he had been registered as proprietor of parcel 190 at Kibichiko. He says that he knew that the land at Kibichiko had been subdivided, and that when he went to ask for his share, he was told by Gideon that he (Gideon) Edward and Richard had shared it, and that he (the respondent) was to share the land at Kanyaririr, and that in due course he got three acres there.

It must be remembered that at his time the respondent, who was born in 1923, was a grown-up man in his thirties. I find it difficult to believe that with all the publicity attendant upon land demarcation and consolidation, which he knew was taking place, he did not know that he had been allocated five acres at Kibichiko and registered as proprietor. It is true that he did nothing to assert his proprietary rights there,

but went to live on his smaller plot, together with his brother Edward. It is also difficult to believe that he did not learn from Edward about his exchange of the land at Kibichiko for the land at Kanyariri.

There was ample evidence, even from defence witnesses, that the appellant took possession of plot 190 at Kibichiko in 1957, and exercised proprietary rights thereon by installing a servant, building a house and a dip, planting wattle trees and crops, and leasing part of the land to tenants, until 1976, when his son Harry had returned from the United States where he had been educated. The appellant, on December 27, 1976, asked the respondent to execute a fresh transfer to replace the defective one obtained from the Land Board in 1960. The learned trial judge said that he was satisfied that the defendant did not know until December 27, 1976, that he was the registered proprietor of parcel 190. To my mind, the inference is at least equally strong that, on December 27, 1976, the respondent first became aware that he was still the registered proprietor of parcel 190, having been under the impression that his title had been transferred to the appellant, as was Edward's in 1960, in exchange for the land at Kanyariri. In my view, it is immaterial (in the absence of fraud) whether the respondent knew or did not know that he was the registered proprietor of parcel 190. I have no doubt, on the evidence, that the appellant was in possession of that land from 1957 for the best part of twenty years. I respectfully differ from the learned trial judge's contrary finding in this regard. That possession was adverse to the title of the lawful owner, whoever he might be. A right to land is extinguished, in the absence of fraud, after the statutory period, although the owner is unaware that adverse possession has been taken (*Rains v Buxton* [1880] 14 Ch D 537.) As is stated in *Rustomjee on Limitation and adverse Possession* at p 1380, ignorance on the part of the owner whether of his right or of the infringement of his right does not prevent ... the operation of the statute.

That leaves for consideration the question of fraud. The learned judge adverted to Section 26 of the Act which states that where, in case of an action for which a period of limitation is prescribed, the action is based on the fraud of the defendant or his agent, or the right of action is concealed by the fraud of any such person, the period of limitation does not begin to run until the plaintiff has discovered the fraud, and commented that he could only make sense of the section by transposing the words "plaintiff" and "defendant". With respect, the meaning of the section is perfectly clear in its ordinary sense, and the reversal of its provisions cannot be allowed. The section is designed to protect a plaintiff from having his rights defeated by limitation where the action is based on the fraud, or the right of action has been concealed by the fraud, of a defendant; it has no application to this case. I agree however that the appellant in this case could not succeed if he had led the respondent to act to his detriment by fraud, and that fraud for the purposes of the Act is as defined in Section 2(1) — "fraud" includes conduct which, having regard to some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other.

What fraud or unconscionable thing has the appellant been shown to have done on the evidence adduced in this case? Even accepting the respondent's evidence, it was Gideon and not the appellant who told him that the land at Kibichiko had been given to Richard, Edward and Gideon. The fact that land had been given to Edward, his whole brother, should surely have put the respondent on inquiry. Although the respondent denied visiting chief Wilson with the appellant, the learned judge seems to have thought that such a visit did take place, and so do I. The object of this visit, on March 16, 1960 was to try to arrange for the transfer of the title to parcel 190 from the respondent to the appellant. If that is so, the respondent must have known of his title to that parcel, or his presence would not have been required. I believe that the respondent thought that, as a result of that visit, and of the subsequent appointment before the Board which he did not attend, his title to parcel 190 had been transferred in exchange for the three acres at Kanyariri, and that it came as a genuine surprise to him to learn on December 27, 1976, that contrary to his belief he was still the registered proprietor. By then the appellant had acquired a title by adverse possession, openly and without fraud, and the fact that the respondent may have been ignorant of his title and of the infringement of his right does not avail him.

For these reasons I would allow this appeal, with costs, and substitute for the judgment and decree dismissing the appellant's originating summons a judgment and decree giving judgment for the appellant on that summons, with costs, for an order that the appellant be registered as the proprietor of land parcel Kabete/ Kibichiko/190. I would give the respondent three months from today to vacate that parcel and to remove his personal property therefrom.

As **Miller JA** and **Simpson Ag JA** agree, it is so ordered.

**Dated and Delivered at Nairobi this 10th day of July 1981.**

**E.J.E.LAW**

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**JUDGE OF APPEAL**

**C.H.E.MILLER**

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**JUDGE OF APPEAL**

**A.H.SIMPSON**

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**AG.JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**