REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 1401 OF 1971

DANIEL KIMANI RUCHINE & OTHERS.....PLAINTIFFS

VERSUS

SWIFT, RUTHERFORD CO LTD & ANOTHER.....DEFENDANT

JUDGMENT

The river Marura Thara rises in the Aberdares and flows down past Makuyu which is a small trading centre between Thika and Murang'a. The river is joined by a tributary (called the Mutoho) somewhere near Makuyu. It also spreads out and forms a swamp on part of an estate called the Punda Milia estate. "*Punda Milia*" is the Kiswahili for a zebra. The land in and around this fen is black cotton with a high percentage of clay. It is reasonably fertile. The estate used to be made up of land parcels 321 and 322 in the Land Registry; but is now Land Reference No 322/11. Its area is about 4000 acres.

The late Mr Daniel Kimani Ruchine and Mr Ngiri Kibenge, on behalf of themselves and another 702 *Wakikuyu* heads of families (together calling themselves the "Marura Thara family"), claim by adverse possession about 1000 acres of this estate. They ask for an order declaring they are the true owners of these acres; another order commanding a government surveyor to mark them off with boundaries and then sub-divide them into plots for their families; another order telling the Registrar of land titles to correct his books so that they appear in them as the registered owners of them; any other order the Court finds necessary to achieve all this for them; and the costs of this action.

Swift, Rutherford & Co Ltd ("Rutherford" is sometimes spelt "Rutherfoord"), the first defendant, during the relevant period, was a limited liability company which used to carry on a business of farming coffee on the next-door estate, Mugera coffee estate, Makuyu, and sisal on Punda Milia estate.

The Punda Milia self-help group, which is incorporated under the Land Group Representatives Act 1968 is made up of over 2000 *Wakikuyu* from the main Kikuyu areas in this country.

The plaintiffs' claim is based on their assertion that they have cultivated these 1000 acres, which are part of their "ancestral land", as a clan, for forty years or more. This is not accepted by the first defendant, the company, which declares it does not know the plaintiffs or anything about them. It denies that any of them has been on the estate or any part of it for any period or has cultivated it for any length of time. Alternatively, the company pleads, that such possession or cultivation of any part of Punda Milia estate was done without the knowledge or permission of the company.

The second defendant, the society, is now the registered freehold proprietor of both estates and intends to remain so because, among other things, its defence embraces that of the company. The company and the society asked for the plaintiffs' suit to be dismissed with costs.

The plaintiffs' witnesses were the second plaintiff, Mr Ngiri Kibenge, a retired cook, aged 70, from Kamahuha location; Mr Wainaina Gachomo,a farmer aged 72, from the same area who now lives in the neighbouring location of Gaichanjiru; and Mr Lasaro Gikonyo, also an elderly farmer living in Gaichanjiru.

The only witness called by the company was its last managing director, Mrs Jean Marrinan. She was born a Rutherfoord in 1919 on Punda Milia. She went to England for schooling when she was nine (in 1928). She came back to Kenya in 1939, when she was nineteen, worked in Nairobi and spent from Friday to Monday on the estate for the next five years (1939 to 1944). She married Mr Robert Goodhart in 1944 and then they lived on the estate until he died on 1st July 1961. He had been managing director of this company for these seventeen years and she followed him. She left the estate in 1971 when the society entered into possession of it. Her assistant managers, Mr Berridge, Mr Anderson and Mr Remedios, were not called as witnesses because Mr Berridge was not in Kenya and the others died in 1974 and 1975 respectively.

The society called its manager, Mr Peter Mwangi Chege of Kamahuha (or "Location 17" as it used to be called). He was a worker on the estate. He is about fifty now and organises all the other members of the society and these two estates they bought from the company.

The issues at the end of the evidence and the submissions were: (1) have the plaintiffs shown (on the balance of probabilities) that the Marura Thara family was ever in adverse possession of the 1000 acres? (2) if so, have they proved (by the same standard) that the adverse possession was for a sufficient length of time and of a sufficiently defined area for them to succeed either partially or entirely? (3) have the plaintiffs shown on the balance of probabilities that a large amorphous group (such as the Marura Thara family) can acquire property by adverse possession? (4) was the procedure adopted in this suit incorrect? (5) if so, would it prevent them from succeeding?

The evidence adduced for the parties was, briefly, this. The plaintiffs cannot remember a time when some members of their family did not openly cultivate some part of Punda Milia estate and especially in and around the swamp with maize, bananas, arrowroot, peas, sugarcane, beans, mangoes, vegetables and grass. They built their cottages there and zarebas for their livestock before and after 1903 (which is when the Europeans invaded the area). They met and came to know Swift, Rutherfoord and another whom they called "Kofia Mbaya" (although it was not clear whether this nickname described the state of his headgear or was a colloquial description of his character). These three planted coffee and sisal in between the plaintiffs' gardens but never expelled them or paid them compensation or rent for the use of what was the land of the Marura Thara people.

At the same time the plaintiffs had other gardens, grazing areas and cottages in the two locations from which they all sprang, Kamahuha and Gaichanjiru, which are on the Murang'a side of the swamp and Punda Milia estate and stretch across the main road towards the Aberdares.

Later, when land adjudication teams came to them, they proved their ownership of various plots or were alloted them in such scheme as the one at another nearby village (called Sabasaba) or even on neighbouring estates such as Santamor. Their wives and children lived on these other plots and the men trafficked between them. They were and are not landless.

The society offered them membership but they refused to join on a point of principle. Why should they put up the money to buy Punda Milia when it was theirs from time immemorial?

They asserted, finally, that the land in the two locations and the estates called "Kakatina", "Changai", and "Santamor", the roads, the railway, the swamp and the company's areas belonged to the Marura Thara family and not the Republic, administration police, railway, the company or the society.

The company, for its part, traced the history of the Punda Milia estate in this way. On 15th July 1906 King Edward VII, by an indenture of lease for ninety-nine years, granted 4148 acres to Swift, Rutherfoord and Cowen from 1st January 1906, with an option to convert into a freehold, for 2 rupees an acre. The

option was exercised. Another indenture turned the lease into a conveyance of the freehold on 15th July 1907. Then these three formed a company on 20th November 1917 and another indenture of 22nd February 1918 transferred the estate to the company and revealed the sale price of these acres was 8296 rupees. The company was, therefore, the freehold owner of those acres in what was then the Fort Hall district of the Kenya province of the East Africa Protectorate. This was all covered by the Crown Lands Ordinance 1915. It was registered on 2nd May 1918 at 2·30 pm in Nairobi.

There were sporadic troubles with the people of what were called the native land units across the swamp. It is not revealed in the evidence how the matter was dealt with in the early days. The area was, however, surveyed and mapped between October 1949 and February 1951 and the result emerges in two maps. The boundary of the company was declared to run along the middle of the swamp and the river that fed and drained it. It was marked with 40-gallon drums filled with cement and sunk along the line. Beacons 9 feet high were set up in 18 inch cement roundels. Metal rails joined the drums and the beacons and double lines of sisal were planted between them. Their positions were marked on some more maps. The median line is in green and the edge of the swamp etched in with red. There was an aerial survey in 1958 and copies of what could be seen from on high were given to the company in 1962. The area between the middle of the swamp and the edge of it on the estate was about 60 acres.

The company planted sisal on this estate. It was in 3-foot ridges and 12 inches apart, so not much cultivation could be done where the sisal was. Now and again little gardens appeared down along the estate edge of the swamp and in the drier parts of it. The Goodhart, Berridge, Anderson, Remedios and the estate workers were always quick to erase the gardens and harry the gardeners who were, presumably, members of the Marura Thara family. The company vehemently denied that any cottages or zarebas were planted on the estate by those trespassers and asked the Court to peer at the photographs to verify this in 1958.

The local district officer at the end of October 1961 marked the swamp boundary again for the company and the people of the locations and he followed the line down the middle of the swamp and the river. 50 acres of the estate were sold to the Government for a dispensary and a police station at Makuyu.

There were extensive floods towards the end of the year in 1961 and in 1962 the swamp was obliterated with much surrounding land by flood. So for a time no one cultivated anything on the area in dispute between the plaintiffs and the company. The people of the two locations raised the matter with their members of Parliament, Dr Kiano and Mr Gachago, as they used to with Mr Eliud Mathu. There were various meetings between them all with the administration and police. There was another survey and, in 1969, Mr D K Mutua of the Lands Department in a letter dated 30th November 1969 estimated the area used by the plaintiffs as 100 acres at the most.

Other documents tendered by the company buttress the company’s allegation that the local chief, the district officer, the police officer, and the district commissioner were all involved in settling disputes between company and the illegal users of the swamp land on Punda Milia estate between the end of August 1966 and the end of March 1967.

The price of sisal began to fall at the end of 1966 but still the company found the money to replace the beacons that year.

The company decided, however, to sell these two estates. This was in the middle of 1968. The buyers were the society. The Murang’a land control board was approached for consent with an application dated 19th July 1968. There was an objection from the plaintiifs and their representatives. It was either rejected or not answered (which is the same thing). Instead, the Land Control Board agreed to the transfer from the company to the society which took place on 18th August 1972. The intervening period had been spent in negotiating the price which was finally agreed at Shs 970,000 and paid by the society to the company. The plaintiffs’ advocate entered a caveat forbidding registration of any dealing with this land unless the transaction was expressed to be subject to their claim. This was at 3·15 pm on 6th August 1971 in the Land Titles Registry in Nairobi. Nevertheless, the company and the society say that the transfer was registered on 26th September 1972.

The society sent forth its manager to testify about the estate and the swamp and the plaintiffs' claims. He had been, it will be recalled, a worker for the company for some years. He had also secretly cultivated a patch or two now and again for himself; but whenever the manager came to see or hear of this he was removed from his clandestine allotment and rebuked. He was even charged with trespass sometime in 1968. He had joined the society which had 2000 *Wakikuyu* members from Nyeri and Embu. 500 of them had been employed by the company. Each member paid up Shs 330 and then they bought the company's two estates. They set aside 131 acres of Punda Milia for roads, schools and so forth and the rest was surveyed and divided into lots of 2 acres for each member to cultivate and build a cottage on. They all combined to farm Mugera as a cattle and coffee estate. They had drained the swamp and that now burgeoned with their bananas and their maize. The plaintiffs had never possessed the swamp or its fringes on Punda Milia estate and they had not had any houses on it for the society to burn down in 1973 or at any other time. He did not recall the plaintiffs being rounded up and charged with trespassing on this area in 1973.

Those were the three accounts of the plaintiffs' connections with the swamp on Punda Milia estate. The three wise men for the plaintiffs spoke vaguely of their relatives' age-old claim to all the land they could see round there and it was not restricted in the end to what they could gaze upon from anyone point, but seemed to be all they could behold from wherever anyone of them happened to be at any time. They claimed all the land there all round the compass. Vagueness was matched by exaggeration. They were not clear whether they were a house or a family or a clan or a group. They seemed to number all those in the area who were not members of the society. They did not have the same story to tell about what their cultivation of the swamp and around it had been interrupted. The company and the society refuted the claim firmly. The company had the documents and the society took over the story from the company from about July 1968. When it comes to credibility the plaintiffs were not to be believed and the defendants were.

The evidence established, therefore, that of all the acres on the Punda Milia estate no more than 100 at any time had been cultivated by any of the plaintiffs. This was done without permission. The cultivation had been for no more than a season or two. It was never clear just which relative or member of the family had cultivated which garden in what area or near the swamp for what period of time. They were harried by the company and its employees. They were driven out by the floods of 1961 and 1962 when the mud made it impossible to cultivate even sisal in that part of the estate.

Those are the facts. What is the law?

Soon after the British took Kenya under their protection all land was declared to be Crown land; see section 5 of the Crown Lands Ordinance 1902. The Commissioner of Lands was not to sell or lease any land occupied by the Africans; see section 30. Any land so occupied was deemed to be excluded from any lease or sale; see section 31 (1).

Later, the rights of the Africans to any land outside any of the areas reserved for them were extinguished by section 71 of the Trusts Lands Ordinance, unless preserved by a certificate of the Governor.

All titles and interest in land were confirmed on 12th December 1964 by section 20 of the Constitution of Kenya (Amendment) Act 1964, so there is no going behind what happened between 1902 and 1965.

The title of the company and the society are registered. This registration confers an absolute and indefeasible title to the property referred to in the registration and is subject to no other interests than these mentioned in it; see section 23 of the Registration of Titles Act. No period of possession prior to registration can be relied on for the purpose of acquiring a title by way of prescription. It would be tantamount to saying the two defendants did not have a title of an absolute and indefeasible character. There has never been, in Kenya, any provision for preserving undisclosed interests, such as Tanganyika had in section 44(3) of the Land Registry Ordinance Tanganyika, (cap 70) which declared: "The estate of the first registered owner of the land is subject to any estate adverse to and in derogation of his title and subsisting or capable of arising at the time of the first registration." (See *Suleman Virji & Sons v Abdurehman bin Mohamed Afua* (1923) 9 KLR 167, at page 171).

Rights and registrations can be challenged, however, on the grounds of fraud, misrepresentation and adverse possession; section 23(1) of the Registration of Titles Act; and see also *Tayebali Adamji Alibhai v Abdulhussein Adamji Alibhai* (1938) 5 EACA.

We are concerned only with adverse possession, although fraud was mentioned once early on in the preliminary skirmishes in these proceedings before Chanan Singh J on 15th December 1973. The plaintiffs have to prove adverse possession; see *Ahmed Abdulkarim v Member for Lands and Mines* [1958] EA 436, 441. The standard of proof will be the ordinary one in a civil matter, namely on the balance of probabilities.

The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecario* (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration; see *Wanyoike Gathure v Beverly* [1965] EA 514, 518, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; see sections 9(1) and 13 of the Limitation of Actions Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (eg if the area is flooded) then dispossession for that period cannot occur (see generally paragraphs 481 and 482 on pages 251, 252, of 24 *Halsbury's Laws of England* (3rd Edn)).

The plaintiffs have to show exclusive uninterrupted possession of the land without fraud for twelve years (see sections 7 and 17 of the Limitation of Actions Act) before the date of the filing of the plaint, which was 15th September 1971.

Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because these are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it. The resources or status of the claimants is not a factor in the correct approach to deciding what constitutes a sufficient degree of sole possession and user. The standard is an objective one and related to the nature and situation of the land. Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time; see, generally, *West Bank Estates Ltd v Arthur* [1966] 3 WLR 750.

The procedure for asserting this claim for adjudication is by originating summons; see sections 37 and 38 of the Limitation of Actions Act, order of the 36 Civil Procedure Rules and *Salim v Boyd* [1971] EA 550. It should not be by presentation of a plaint; and, if it is, the plaint should be struck out *(E v E* [1970] EA 604, 606), unless it has occasioned no prejudice; see *Boyes v Gathure* [1969] EA 385.

The answers to the issues are: (1) the plaintiffs did not show on the balance of probabilities that the Marura Thara family was in adverse possession of 1000 acres on the Punda Milia estate, or any more than 100 acres for very short periods; (2) the plaintiffs failed to prove by the same standard that any adverse possession was for twelve years, or any sufficiently defined period of time, or of any specific area, such as would enable them to succeed entirely or partially; (3) the plaintiffs failed to show on the balance of probabilities that a large amorphous group (such as the Marura Thara family) can acquire property (such as the 1000 acres of this estate) by adverse possession by this form of cultivation; (4) the procedure adopted by the plaintiffs was incorrect; but (5) that point alone could not prevent the plaintiffs from succeeding, because it was not urged until the evidence and submissions were concluded (by which time its incorrectness had caused no prejudice to any party). The plaintiffs' claim is dismissed.

Claim dismissed with costs.

Dated and delivered at Nairobi this 7th January 1977.

A. A Kneller

JUDGE