



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Law & Potter JJA)

CIVIL APPEAL 24 OF 1979

BETWEEN

MWANGI GITHU.....APPELLANT

AND

LIVINGSTONE NDEETE.....RESPONDENT

(Appeal from the High Court at Nairobi, Muli J)

JUDGMENT

The subject matter of this appeal is a freehold parcel of agricultural land of an area of approximately 1.25 hectares (4.1 acres) known as Loc. 12/ Sub.Loc.1.636 in Kangima Division of Muranga District of the Central Province.

There were two actions commenced in the High Court concerning the suit land which were consolidated for hearing. In High Court Civil Case No 1056 of 1976 the appellant as plaintiff filed a plaint against the first and second respondents claiming a declaration that he is the absolute owner of the suit land, an order for eviction of the defendants and an injunction restraining further acts of trespass, mesne profits, general damages for trespass and loss of profits and costs.

In High Court Civil Case No 1058 of 1976 all three respondents as plaintiffs claimed against the appellant as defendant that they were each entitled severally to a portion of the land, either by reason of an agreement between all the parties followed by the joint purchase of the land and its registration in the name of the appellant in trust for the respondents to the extent of their several agreed portions of the land, or alternatively by reason of the respondents having been in continuous and exclusive possession of their respective portions for a period exceeding 12 years and having thereby acquired title by adverse possession.

The consolidated actions were tried by Muli J. The learned judge dismissed the appellant's suit No 1056 of 1976 with costs, and gave judgment with costs for the respondents as plaintiffs in suit No 1058 of 1976. The respondents were granted a declaration that they are entitled to their respective portions of the suit land, and the subdivision of the land was ordered so that the first respondent would receive half an acre, the second respondent one acre and the third respondent half an acre.

The learned judge found that the appellant Mwangi Githu, the respondents Livingstone Ndeete and

Icheere Macharia, and Bedan Gichuru (now deceased, the husband of the second respondent) jointly purchased the land in 1959 in agreed proportions for Kshs 2,000 from Kiuna Wangaru.

The agreed cost per acre was Kshs 500, and Livingstone Ndeete and Icheere Macharia each contributed Kshs 250 for one half acre, Dedan Gichuru Kshs 500 for one acre, and Mwangi Githu Kshs 1,000 for 2 acres.

Then clan elders divided the land between the parties and the boundaries of the portions were marked by planting Maigoya trees. The parties took possession of their portions in 1960 and have been in possession since, and have planted coffee and other crops. At this time the suit land was not registered in the name of Kiuna Wangaru. According to a certified copy of the Land Registry exhibited in the action Kiuna became the first registered proprietor of the land on April 9, 1962, and Mwangi became the second registered proprietor on August 11, 1966.

The learned judge found that Mwangi Githu was registered as sole proprietor because all four parties could not be registered, the land being only four acres in area. He also found that when local Land Control Board consent was obtained, the respondents were present or were represented, and that was so because they had interests in the land as co-purchasers.

The learned judge also found that the respondents had been in continuous possession and exclusive control of their respective portions of the suit land, which were identifiable by boundaries of trees, since 1960.

On those facts the learned judge held, firstly, that Mwangi Githu held the suit land for himself and in trust for the respondents to the extent of the respective shares they had been in possession of since 1960. Alternatively, the learned judge held that the respondents had acquired title to their respective portions of the land by adverse possession for a period exceeding twelve years.

Mr Gaturu who appeared for the appellant submitted to us that the evidence adduced by and on behalf of the respondents was unreliable and contradictory, and that the learned judge was not justified in rejecting the evidence of the appellant plaintiff and his witness Kiuna Wangaru.

I do not accept this submission I agree with the learned judge that the evidence of the three respondents is generally consistent save for minor discrepancies, and that it is amply corroborated by the evidence of the independent witnesses, Duncan Kimani and Beron Mwangi. The learned judge rejected as false the appellant's evidence that he alone had purchased and paid for the suit land, and did not believe him when he said he had served notices on the respondents to quit the land. I see no reason to doubt the correctness of the learned judge's findings of fact.

During the course of the hearing of this appeal Mr Gaturu sought the leave of the court to include in his grounds of appeal that the second respondent is not competent to represent her deceased husband Bedan Gichuru, and sought leave to amend the defence accordingly. Mr Kariuki for the second respondent was granted leave to amend the plaint in suit No 1058 to the effect that the second respondent/plaintiff sues in a personal capacity and in a representative capacity as the administratrix of her deceased husband. That disposed of the matter.

It is convenient to consider first the learned judge's alternative decision that the respondents had established titles by adverse possession. Mr Gaturu attacked this part of the judgment on three grounds. Firstly, he submitted that change of ownership interrupts adverse possession, and that accordingly time did not begin to run against the appellant until he was registered as proprietor of the land in 1966. The answer to this submission is that immediately before the appellant became the registered proprietor in 1966 the respondents were in the course of acquiring rights under section 7 of the Limitation of Actions Act, cap 22, and by virtue of section 30 (f) of the Registered Land Act, cap 300, those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters.

The position is exactly the same in relation to registered land in England, where the statutory provisions

are to the same effect as the provisions of the Kenya Law just mentioned, see *Bridges v Mees*, 1957 ch 475.

Secondly, Mr Gaturu submitted that time ceased to run against the appellant when he gave notice to quit to the respondents in 1967 and 1968. The learned judge found as a fact that no such notices were given but apart from that this submission is unsound. Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire's Modern Law of Real Property*, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act. The appellant did not assert his right to the whole suit plot until he commenced suit No 1056 of 1976 on April 30, 1976.

Thirdly, Mr Gaturu, submitted that title by adverse possession cannot be acquired under the Limitation of Actions Act to a part only of the parcel of land to which the owner holds title. In other words the respondents could not become entitled by adverse possession to portions of the suit land. This submission appears to have been found on section 38 of the Limitation of Actions Act, the material part of which is as follows:

“(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

I do not construe the above provisions as imposing any such restriction on the acquisition of rights by adverse possession.

The case of *Gatimu Kinguru v Muya Gathangi* High Court Civil Case No 176 of 1973, is an example of an adverse possessor obtaining title by adverse possession to an identifiable portion of an owner's land. It is stated in volume 24 of Halsbury's Laws of England, 3rd edition, at page 252:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

And for further examples of adverse possession of part of an owner's land see the cases in footnotes (q) and (r).

I am satisfied that the appellant did nothing to assert his right to the portions of land in the possession of the respondents until he commenced legal proceedings on April 30, 1976. It would be sufficient for the respondents to show that their possession was uninterrupted since a date before April 30, 1964. Kiuna Wangaru was the registered proprietor from April 9, 1962, and Mwangi Githu from August 11, 1966.

I am satisfied that the respondents have established their respective titles by adverse possession and were entitled to the order made by Muli J. It seems to me not to be necessary to consider the alternative ground on which the learned judge found for the respondents.

For those reasons I would dismiss this appeal with costs. Paragraph 3 of the decree is lacking in precision, and I would replace it as follows:

“3. That the suit land parcel No Loc 12/Sub-Loc. 1/639 be subdivided so as to vest in the parties portions as follows:

(a) Livingstone Ndeete ½ acre

(b) Icheere Macharia ½ acre

(c) Lishba Wambui Bedan 1 acre; as at present demarcated and occupied by them.

(d) Mwangi Githu the remainder of the parcel”

Madan JA. I have had the advantage of reading the judgment of Potter JA in draft with which I agree. As Law JA also agrees, the appeal is ordered to be dismissed with costs.

Law JA. I have read the judgment of Potter JA in draft. I agree with it and concur in the order proposed by him.

Dated and Delivered at Nairobi this 8th day of July 1980.

C.B.MADAN

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JUDGE OF APPEAL

E.J.E.LAW

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I Certify that this is a true

copy of the original.

DEPUTY REGISTRAR