IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, GATEMBU & SICHALE, JJ.A)

CIVIL APPEAL NO 38 OF 2017

BETWEEN

M'MBAONI M'ITHARA..APPELLANT

VERSUS

JAMES MBAKA...RESPONDENT

(Being an appeal from the High Court at Chuka, formally Meru Environment & Land Case No 40 of 2004 (Njoroge J) delivered on 8th March, 2017

in

Environment & Land Case No. 110 of 2017)

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JUDGMENT OF THE COURT

[1] The subject matter of this appeal are pieces of land known as Land Reference No. Karingani/ Mugirirwa/ 907 and Karingani/ Mugirirwa/908 (suit land). The suit before the High court was filed by M'Mbaoni M'Ithara (appellant) by way of an originating summons in which he required James Mbaka (respondent) to transfer to him the suit lands which he claimed to have acquired by virtue of adverse possession. This claim was predicated under **Section 38** of the Limitation of Actions Act, which provides;-

> **"(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."**

[2] The said suit was filed on the 27th April, 2004; the appellant was seeking a determination of several questions; whether the suit land was measuring 5.34 acres; whether he was in possession of the whole; whether he had obtained title to the suit land by Limitation of Actions Act and the doctrine of adverse possession; how the suit should be determined and last but not least who should pay the costs.

[3] The suit was supported by the appellant's affidavit sworn on 26th day of April, 2004 where he deposed that he bought the suit land from the respondent and his mother on 1st February, 1969, paid full consideration and took possession immediately. He claimed to have carried out developments on the suit land consisting of permanent houses, planted coffee, macadamia and fruit trees, piped water and other food crops. The appellant contended that he had lived on the suit land openly, continuously and notoriously without any interference or interruption from the registered owner or any member of his family. He urged the court to find that he had become the owner of the suit premises.

[4] As would have been expected, the suit was opposed by the respondent who is the registered owner of the suit lands. He contended that he permitted the appellant to occupy portions of the suit lands out of compassion, but he has refused and repulsed any attempts by the respondent to vacate the land. That the appellant with his family entered the suit land in 1980 on condition that he would vacate upon demand. The appellant however declined to vacate the suit lands which is currently occupied by his children and when the respondent made

some attempts to repossess it, he was repulsed by the appellant's children. According to the respondent the appellant has not occupied the suit land continuously and without interruption as claimed. It is not even occupied by the appellant but his children as the appellant lives on a separate piece of land.

[5] The parties also gave oral evidence with the appellant testifying and calling two other witnesses. The appellant told the court that the suit lands originally comprised of one title being No. 371 which was registered in the name of Mbaka Karumba father to the respondent. The said Mbaka Karumba died in 1954. The respondent sold the entire parcel of land measuring approximately 5.34 acres to the appellant in 1969 for Ksh 1,837. 50 (Ksh one thousand eight hundred thirty seven and fifty cents). Francis Mbandi (PW2) testified that he witnessed the sale of the suit land in 1969 and the appellant took possession. However his evidence revealed something rather surprising when he said the suit land was sold by one Mbioki a brother to the respondents father as his father had passed away so as to pay school fees for the respondent and his sister; that the respondent was young when the land was sold.

[6] Jamlick Mwirichia (PW3), a neighbor as his home is next to the suit land told the court that he was also related to the respondent. He confirmed having witnessed the sale of the suit land to the appellant but he said it was sold by Evangeline Ciokatiro and Mbioki Imundi, the mother and uncle of the respondent respectively. He said he was then aged 28 years old and the father of the respondent died when he was very young. However during cross-examination this witness said Mbioki Imundi was not a brother of the respondent's father, but a member of the clan who had inherited the respondent's mother; further it was the respondent and his mother who sold the land while Mbioki was a witness.

[7] The respondent also gave evidence, adopting his statement which he had filed in defence of the suit. He confirmed that he was the registered owner of the suit land. He denied selling it to the appellant but having given him permission in 1980 to cultivate the land which is presently occupied by the appellants' children as the appellant has other parcels of land. He claimed that he had made several request and attempts to evict the appellant from the suit land but all his efforts did not yield success as he was always repulsed by the appellant's children. The respondent denied having sold the suit lands to the appellant or that the appellant had acquired prescriptive rights to dispossess him of the suit lands.

[8] The above evidence was partly heard by Ouko J., (as he then was) who recorded the evidence by the appellant and his witnesses whereas the defence it was completed by Njoroge J., who concluded the evidence, determined the matter and issued the following orders;-

> **1. "This suit is dismissed**
>
> **2. It is declared that Land Parcel No. KARINGANI/ MUGIRIRWA/907 and Land Parcel No. KARIGANI/MUGIRIRWA/908 belong to the defendant.**
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> **3. The plaintiff and any other person laying claim on Land Parcel KARINGANI/MUGIRIRWA 907 and Land Parcel No KARINGANI/MUGIRIRWA/908 should vacate the lands within 6 months of the date of delivery of this judgment failing which the OCS in charge of the area where the suit lands are situated shall facilitate the apposite eviction.**
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> **4. Costs are awarded to the defendant."**

[9] These are the orders that precipitated this appeal that is predicated on some 5 grounds of appeal, which generally fault the learned Judge for not finding there was evidence of adverse possession. We reproduce them verbatim that is, to wit;-

> 1. The honourable Judge erred in law in misconstruing the principles of Limitation of actions Act and adverse possession and as a result he came to the wrong conclusion in his judgement.
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> 2. The honourable Judge erred in law in finding that the respondent was a minor during the sale of the disputed parcel of land when there was no such evidence on record.
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> 3. The learned Judge erred in law in failing to find that the appellant has occupied the Suitland for a period of over 12 years in a manner adverse to the respondent's interest and as such he has obtained the title to the Suitland by the principle of adverse to the respondent's interest and as such he has obtained the title to the Suitland by the principle of adverse possession and Limitation of actions Act.
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> 4. The learned Judge erred in law and in facts in deciding the whole case in a biased manner
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> 5. The learned Judge erred in law and in facts in deciding the whole case against the weight of evidence.

[10] During the plenary hearing of this appeal, both Mr. Kimathi learned counsel for the appellant and Mr. Murithi for the respondent relied on their respective written submissions and did not make any oral highlight. As per counsel for the appellant, the learned Judge was faulted for not finding the appellant had acquired the suit lands by adverse possession; Where the deal falls through later either by operation of the law or by repudiation of the contract and the purchaser remains in the land without interruption, peacefully and as of right for a period of 12 years, the registered owner gets disposed of the title by law. The appellant bought the suit lands in 1969, but the respondent refused or neglected to obtain the land control board consent within the requisite period to facilitate a transfer to the appellant; since the sale agreement became void after 6 months of the appellant's failure to obtain the consent, the occupation by the appellant became adverse from 1970 onward. Counsel cited the case of; **Wambugu vs Njuguna** (1983) KLR 172 and emphasized on the following;-

> **"Where the claimant is in exclusive possession of land with the leave and the license of the appellant in pursuance to a valid agreement, the possession become adverse and time begins to ran at the time the license is determined".**

[11] On the second ground of appeal, that challenges the finding that when the suit lands were sold the respondent was a minor, counsel submitted that was not part of the evidence and even if it was, the respondent had a valid title which he could transact with his mother. Moreover the respondent never took any initiative to recover the suit land which was an indication that he had accepted the appellant was the lawful owner. Counsel further submitted that the Judge ignored the evidence by the appellant's two witnesses who were his neighbors; they confirmed the appellant was in occupation of the suit land for more than 12 years. In his view there was overwhelming evidence which we should consider and allow the appeal. Counsel did not pursue other grounds of appeal raising issues of bias by the trial Judge.

[12] The appeal was opposed; Mr. Murithi learned counsel for the respondent begun his submissions by criticizing the record of appeal that did not have primary documents such as the certified copy of the decree according to the provisions of **Rule 87 (1) (h)** of the Court of appeal Rules. As per counsel this omission rendered the appeal incompetent and he cited the decision in the case of **Chege vs Suleiman** (1988) e KLR where this Court differently constituted held that failure to include a decree or order of the High court was fatal as there was no competent appeal. Counsel submitted that this defect cannot be remedied by the overriding objectives in the administration of justice.

[13] On the substantive appeal counsel supported the impugned judgement arguing that the Judge properly considered the evidence tendered and found it incoherent as to whether there was a valid sale, by the respondent who was said to have been a minor, the suit lands that were in the name of his father who died in 1954 and the fact that the appellant was unable to prove to the required standard that there was any sale, he admitted there was a written agreement which was with his lawyer but made no efforts to produce it in court. According to counsel for the respondent, the evidence before the trial court, showed that it was more probable that the appellant was permitted by the respondent to cultivate the suit lands then it was supported a sale. He cited the authority in the case of;- **Muchanga Investments Ltd Vs Safari Unlimited (Africa) Ltd & 2 Others** [2009] e KLR. This Court made reference to the case of ***WAMBO v NJUGUNA 1983 KLR 172*** at holding 4 where the Court held:-

> **"Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."**

[14] Counsel for the respondent further submitted that there was conflicting accounts as to how the appellant came to occupy the suit lands; these questions were left hanging; that is whether the appellant occupied the suit lands through a sale, whether there was a valid sale by other parties who were not the registered owner; who sold the land, was it the respondent who was a minor, or his uncles and finally when did the contract of sale (if any) cease. All these questions that were not answered by the evidence by the appellant supported the conclusion drawn by the Judge that the appellant failed to proof on a balance of probabilities that he had acquired prescriptive rights by way of adverse possession of the suit property.

[15] This is a first appeal and that being so, we have a duty to re-evaluate the evidence relied on by the trial court and arrive at our own independent conclusion. In the case of ***Ephantus Mwangi & Geofrey Nguyo Ngatia -vs- Duncan Mwangi Wambugu, (1982-1988) 1 KAR 278,*** this Court held that it would hesitate before reversing the decision of a trial Judge on findings of facts. It will only do so if, first, it appears that the Judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that the Judges impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the Judge is shown demonstrably to have acted on wrong principle. See also the authority in the case of; - ***Peters -vs- Sunday Post, [1958] E.A. 424*** at p. 429 Sir Kenneth O'Connor P said:-

> **"It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."**

[16] Upon going through the evidence, and submissions by both counsel as well as record of appeal including the judgment by the trial court, the single issue that we discern for our determination is whether the appellant was entitled to the order that he be registered as proprietor of the suit lands having acquired it by adverse possession. The issue of whether there is a competent appeal ought to fall by the way side because the respondent ought to have made an application under **Rule 84** to strike out the appeal on the grounds that no appeal lies because the appellant had failed to include an essential document. In the alternative, the respondent could have filed a supplementary record. Gone are the days when appeals were struck for failure to include primary documents. The said **Rule 84** provides as follows;-

> **"A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the Notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**
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> **Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of the service of the notice of appeal or record of appeal as the case may be."**

Although failure by counsel for the appellant to include a decree that is a primary document as provided for under the Rules of this Court is highly deprecated, the solution is not a drastic one as argued by counsel for the respondent.

[17] Did the appellant's evidence pass muster that he was entitled to be registered as proprietor of the suit lands by virtue of adverse possession. We have looked at the evidence adduced by the appellant and his witnesses which is aptly summarized by the trial Judge as follows;-

> **"The plaintiff testified that he bought the suit land from the defendant in 1969 and the defendant delivered possession to him**

the same year. On the other hand the defendant denied that he sold the disputed land to the defendant. His testimony was that he allowed the plaintiff to use the suit land on condition that he would vacate it on demand.

I note that even though the plaintiff testified that he had an agreement for sale which he said was in the custody of his advocate, he did not produce it.

It is pellucid that the plaintiff has not given evidence concerning when the sale agreement collapsed from which time the period necessary for adverse possession to accrue would start running".

[18] The very character or ingredients of adverse possession must be proved by facts. Therefore we agree that if the appellant entered the suit land as of right because of a sale agreement, it was necessary to adduce evidence about the said agreement and in particular when the agreement collapsed. See the case of ***WAMBUGU VS NJUGUNA, (1983) KLR 172 at holding 4***, where this Court held:

"Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist."

Further in the case of ***SAMUEL MIKI WAWERU VS JANE NJERI RICHU, CA NO 122 OF 2001***, (unreported) this Court said:

"It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in JANDU VS KIRPAL [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of SISTO WAMBUGU VS KAMAU NJUGUNA, 1982 – 88 1 KLR 217 relied on by Mr Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of a license or possession of such land only after the period of validity of the contract unless and until the contract of sale has first been repudiated as required by the parties in which case, adverse possession starts from the date of the termination of the contract."

[19] The appellant had a duty to establish indeed he occupied the suit lands by virtue of a contract of sale, which means he entered through a license, and when the validity of the contract ceased to give way for a claim of occupation without permission. (*nec vi nec clam, nec precario*) without force, without secret and without permission. We agree with the learned Judge that this aspect was missing in the evidence before the High court and it was inappropriate for counsel for the appellant to attempt to introduce it through submissions which persisted even during the hearing of the appeal when Mr. Kimathi submitted that the respondent failed to obtain the requisite land control board consent to facilitate a transfer. We find there was no such evidence that was adduced.

[20] Another disturbing angle to this dispute was introduced by the evidence of PW2 who contradicted the appellant by saying that the suit land was sold to the appellant by the brothers of the father of the respondent who had died in 1954. That the respondent was a minor when the land was sold. A further twist to the facts was introduced by PW3 who said indeed the suit lands were sold by the respondent's mother Evangeline Ciokatiro and Mbioki Imunde who had inherited the respondent's mother. The respondent refused to transfer the suit lands on obtaining an identification card meaning the respondent was a minor. No letters of administration over the estate of the father of the respondent were obtained before he could enter a sale agreement. In our considered view this evidence did not point to a valid sale agreement, even if there was a sale agreement, it was invalid and could not have given the color of right or license to the appellant with which to claim the suit lands under adverse possession. In stating so the Judge took into account the dicta in the case of;- **Kweyu Vs Omutut [1990] KLR 709** this Court (Gicheru JA stated as page 716:-

"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but in reality is). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto **use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously."**

[21] If indeed the respondent was a minor and there was no evidence to show he was not, the appellant could not have obtained a colour of right as against a minor; that he could have acquired colour of right through an invalid sale agreement which was entered into with strangers without the necessary letters of administration. What was also lacking in the appellant's evidence which is the tapestry that would bind him to the land was the time when permission ceased and adversity started to run. It bears repeating that even if the appellant occupied the suit lands pursuant a valid sale agreement (in this case there was no proof of a valid sale transaction), time does not start running for purposes of adverse possession, until the agreement is terminated. Therefore the claim of adverse possession was not proved and the learned Judge was right in holding so.

[22] For the aforesaid reasons we find no justification for interfering with the judgement by the High court and the orders made there in. We

find no merit in this appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nyeri this 6th day of February 2019.

M.K. KOOME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR