



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 287 OF 2010

BETWEEN

MURUNGA KABANGI

WANJIKU KAMAU "A"

WANJIKU KAMAU "B".....APPELLANTS

AND

HANNAH WAIRIMU GITAU

MONICAH NYOKABI GITAU.....RESPONDENTS

*(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (J. M. Khamoni, J) dated 2<sup>nd</sup> June, 2000*

*in*

*Civil Suit No. 870 of 1999 (O.S)*

\*\*\*\*\*

JUDGMENT OF THE COURT

The sole issue that arises for our determination in this appeal is whether the doctrine of adverse possession applies to confer title to the appellants in respect of Land Parcel No. **Ngenda/Nyamangara/712 (the disputed land)** measuring approximately 2.6 Acres.

Two of the appellants (Wanjiku Kamau 'A' and Wanjiku Kamau 'B') are wives of the late **Kamau Gacha alias Kagangi Gacha (Gacha)** while the third appellant is his son. Gacha died on 29<sup>th</sup> August, 1995 and a grant of representation of his estate was issued to the three appellants on 24<sup>th</sup> September, 1998. Then the appellants went before the High Court seven months later, on 28<sup>th</sup> April, 1999, and took out an Originating Summons (OS) under *section 38* of the **Limitation of Actions Act** and **Order XXXVI Rule 3D** of the **Civil Procedure Rules**, claiming to be entitled to the disputed land which was registered in the names of the respondents. The basis for their claim was that they had '*exclusively, openly, continuously and without interruption*' been in possession of the disputed land for over 12 years. The right of the respondents to recover the land had therefore been extinguished and the appellants were entitled to be registered as the rightful owners through adverse possession. In their affidavit in support of the OS, the appellants swore that they had been in occupation of the disputed land since 1960 and had developed it by planting cash crops, for more than 39 years.

The two respondents are the wives of the late **Gitau Gatheru (Gatheru)** who died in 1988. He was the registered owner of the disputed land since its demarcation and registration in 1958. Upon his death, the respondents were issued with the grant of representation of his estate and on **10<sup>th</sup> June, 1998**, they were registered as the owners of the disputed land by transmission. When they were served with the OS, they entered appearance through counsel but did not file any defence or reply to the OS. Interlocutory judgment was therefore entered on 2<sup>nd</sup> February, 2000 and the OS was set down for formal proof. The appellants testified orally and the respondents' counsel was allowed to cross examine them. During cross examination it was put to the appellants witnesses that Gacha and Gatheru were friends and that Gatheru allegedly sold the disputed land to Gacha in 1960. No transfer of the land was made but Gacha's family took possession and commenced cultivation. They did not settle there as their own land on which they settled was adjacent to the disputed land. They have since been cultivating without interference and had indeed subdivided it into three portions for the three wives of Gacha. None of the witnesses knew

why the disputed land was never transferred to Gacha by Gatheru during their lifetime, if there was any sale of the land. Upon evaluating the evidence, **Khamoni, J.** who heard the suit, dismissed it. The learned Judge was not satisfied that the allegation of sale of the disputed land by Gatheru during the process of Land consolidation/adjudication was proved as no evidence was presented to explain why the first registration was made in the name of Gatheru and not Gacha. If the alleged sale was after registration of the land, the Judge also wondered whether any consent of the land Control Board was necessary, and in any event, why the land was not transferred to Gacha between 1960 and 1988 before Gatheru died. According to the learned Judge, the period between the registration of the property in the names of the respondents in 1998 and the filing of the suit in 1999 was not 12 years. As for adverse possession, the Judge found that the only basis for the claim was mere cultivation which, in his view, was not sufficient. Finally, the learned Judge questioned the apparent silence of the appellants through the process of Succession proceedings over the estate of Gatheru without raising any objection. In view of the various unanswered questions, the Judge was not satisfied that the appellants had proved their case, set aside the interlocutory judgment, and dismissed the OS, thus provoking the appeal before us.

At the hearing of the appeal, the appellants were represented by learned counsel Mr. Kamau who made oral submissions in relation to the 10 grounds laid out in the memorandum of appeal. Counsel submitted that the trial judge erred in focusing on the alleged sale of the disputed land when the issue before him was about adverse possession. The issue of sale was irrelevant. According to counsel, the death of Gatheru did not affect the running of time for purposes of adverse possession. Counsel also faulted the judge for stating that cultivation alone was not sufficient to found adverse possession. According to him, the appellants had been in possession, and proved it, from 1960 to 1999 when they filed the OS and no one had disturbed their possession. The Title of the appellants was extinguished in 1972 which was 12 years since possession was taken by the appellants. Finally, counsel submitted that the trial court was not at liberty to set aside the interlocutory judgment entered in favour of the appellants.

There was no appearance for the respondents at the hearing of the appeal and no written submissions were filed. We must, nevertheless, consider the appeal on its merits and have done so by way of re-hearing in order to draw out our own inferences of fact and to arrive at our own independent conclusions. See **Rule 29 (1) (a)** of the **Court of Appeal Rules**. As always, we are mindful that we have not had the advantage enjoyed by the learned Judge of hearing and observing the witnesses, and therefore becoming a better judge on credibility of the witnesses. We therefore make due allowance for our limitation and defer to the learned trial Judge's factual findings departing therefrom only where they are based on no evidence, involve a misapprehension of the evidence or where, on a consideration of the case as a whole they are unsustainable. See ***Mwanasokoni vs Kenya Bus Services Ltd [1985] KLR 931***.

As stated earlier, the single issue involved in this appeal is whether the appellants had established that they were entitled to be registered as the owners, by adverse possession, of the disputed land thereby defeating the rights of the registered owners whose title must be cancelled to give way to the registration of the trespasser-turned-owner in the eyes of the law.

In the recent case of ***David Munene Wamwati & 4 Others vs The Registered Trustees of the Anglican Church of Kenya & Another, Civil Appeal No. 36 of 2015 (UR)***, this Court had this to say:-

***"The conceptual and ethical dilemma presented by the law on adverse possession has long engaged judicial minds in this Court and we need not rehash it. This Court has on many occasions exposed the morality and justice of a law that permits a trespasser to morph, by mere advance of time, into the owner of land he entered into without permission of the owner and at absolutely no consideration thereby defeating an owner, a registered one at that, who in all likelihood invested funds in the purchase of the land. These concerns have been articulated with firmness and passion but have always borne the impotence of equity in the face of explicit provisions of law which must nonetheless be followed until a legislative intervention should effect much needed-change. See, for a thorough exposition of the controversies aroused by the law on adverse possession, the decision of our learned brothers Makhandia, Ouko and M'Inoti, JJA in MTANA LEWA vs. NGALA MWANGANDI [2015] eKLR. For all of its problematic nature, however, the law on adverse possession is itself quite simple. This Court, differently constituted put it thus in MATE GITABI vs. JANE KABUBU MUGA & OTHERS (Nyeri Civil Appeal No. 43 of 2015 (unreported));***

***"For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario. See also ELIVA NYOGESA LUSENAKA & ANOTHER vs. NATHAN WEKESA OMACHA – Kisumu Civil Appeal No. 134 of 1993 and KASUVE vs. MWAANI INVESTMENTS LTD & 4 OTHERS [2004] KLR 184 at page 188 where this Court stated as follows;***

***'In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.'*** See also ***Wanje vs Saikwa [1984] KLR 284.***"

And so the law is fairly well settled.

In this case, the appellants pleaded in their OS that Gacha and his family took possession of the disputed land in 1960 and planted coffee and other cash crops. They continued to do so for 39 years until they filed the OS in 1999. All this they did openly, and their occupation has been uninterrupted, continuous and exclusive. Gatheru, the registered original owner since 1958, never disturbed the entry and occupation during his lifetime, until his death in 1988. No one else, including the respondents disturbed the occupation either. Those averments were not rebutted through any written defence or reply to the OS, and no one turned up at the oral hearing of the OS to controvert the oral evidence tendered by the appellants. Indeed, interlocutory judgment had already been entered for the appellants thus reinforcing the averments beyond recall. It follows therefore, that as far as the openness, non-permission of the owner and non-interruption of the occupation is concerned, the appellants had satisfied those prerequisites and did so for at least the requisite period of twelve years. It did not matter that Gatheru died, and the disputed land was transferred to his legal representatives. Adverse possession had set in and was not

disturbed by such death.

That position was restated by this Court in the *Wamwati case (supra)*, when it stated thus:-

***"With respect, the mere passage or transfer of title from the registered owner to a third party does not interrupt or otherwise cancel out the adverse possession which must still be reckoned with reference to the time of its inception. See also Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1 KLR 184; and Kairu vs Gacheru [1988] KLR 297."***

The time of possession for purposes of this case was the year 1960 and not 1998 when the Title changed.

The trial court was blamed for dwelling on whether there was a sale of the disputed land between Gacha and Gatheru, and if so, whether the consent of the Land Control Board was necessary. We agree with the appellants that the issue was irrelevant and unnecessary to consider once the averments made in the OS, which had nothing to do with sale of the land, were uncontroverted. There was nothing to show that the entry of Gacha on the disputed land was consensual. It remained adverse throughout.

Finally, the learned Judge was criticised for holding that cultivation alone was not sufficient to found adverse possession. The criticism was well founded. In the case of *Githu vs Ndeete [1984] KLR 776* at p. 780, this Court endorsed the position stated in *Halsbury's Laws of England, 3<sup>rd</sup> Edn. Vol 24* at page 252, that:

***"To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by a 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."***

We have said enough to satisfy ourselves that this appeal has merit and ought to be allowed. We allow it with the result that the judgment of **Khamoni, J.** dated 2<sup>nd</sup> June, 2000 is set aside. It is substituted with an order granting the prayers made in the appellants' Originating Summons dated 21<sup>st</sup> April, 1999. For clarity, the orders are as follows:

***"(a) That the Plaintiffs are declared to have become entitled to the land parcel Ngena/Nyamangara/712 registered under the registered Lands Act (Cap 300 Laws of Kenya) by having had adverse possession of the said land for over twelve (12) years***

***(b) That the defendants title to the said land be and is hereby declared estinguished and or 'invalid, null and void and the plaintiffs be registered as proprietors of the suit land***

***(c) That the defendants do execute the necessary documents to effect the transfer of the land parcel Ngenda/Nyamangara/712 to the plaintiffs."***

In default of compliance with **Order (c)**, the Deputy Registrar of the court shall execute the documents of transfer.

The appellants shall have the costs of this appeal and of the Originating Summons.

Orders accordingly.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of March, 2019.**

**P. N. WAKI**

.....

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**