IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MAKHANDIA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO 155 OF 2008

BETWEEN

BEATRICE WANJERI MWANGI (Substituted as the Legal Representative

of **MWANGI KANYARI (deceased))**.....**APPELLANT**

AND

GITHII KANYARI.....**RESPONDENT**

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Hon. Mr. Justice J.A Osiemo) dated and delivered on 10th May 2008

in

H.C.C.C. No. 1576 of 1997)

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JUDGMENT OF THE COURT

1. This is an appeal against the judgment and decree of the High Court of Kenya at Nairobi (Osiemo J.), dated and delivered on 10th May 2008 where the learned Judge found in favour of the respondent herein and made orders that the appellant herein transfer 0.7 acres out a portion of Land **Parcel No. LOC. 19/RWATHIA/283 Kangema Division, Muranga District,** measuring 1.4 acres (hereafter referred to as the suit property), to the respondent having acquired the same by adverse possession.

2. The original appellant, Mwangi Kanyari, died on 15th April, 2011 and was duly substituted by his legal representative (administrix) Beatrice Wanjeri Mwangi by an order of this Court on 23rd September 2016.

3. The genesis of this appeal is that vide Originating Summons dated 23rd June,1997 and affidavit in support thereof, the respondent sought a declaration that he was entitled through adverse possession to a half (½) share of the suit property which originally belonged to their late father, one Zacharia Kanyari. The land was registered under the Registered Land Act in the name of the appellant.

4. According to the respondent, the appellant who is his elder brother, was registered owner of the suit property to hold the same in trust on his behalf. The respondent deposed that he had occupied the suit property since 1959 during which time he farmed on the land and also built a home there in 1963 where

he lived with his family. Further, that he had in 1985 installed piped water on the suit property. He contended that he had lived on the suit property continuously and without interruption for 48 years. He also relied on the testimonies of two witnesses who further attested to his averments. It was also the respondent's case that the appellant's right to the suit property had been extinguished in his favour by virtue of **section 37** and **38(1)** of the Limitation of Actions Act and he had therefore acquired the same by adverse possession.

5. The claim was opposed vide the appellant's replying affidavit sworn on 14th July,1997 where the appellant conceded that he and the respondent were brothers and that the suit property was registered in his name as the sole proprietor. Relying on his own evidence and that of one other witness, he challenged the respondent's claim on grounds that the respondent was a licensee. He averred that he, on humanitarian grounds, allowed the respondent to occupy a small portion of the suit property and granted him a license to build on and cultivate the portion thereof sometime in 1965 when the respondent got married.

6. He contended that since the respondent's entry and occupation on the suit property was by the appellant's consent such license could not crystalize into adverse possession. He deponed that sometime in 1984 after the respondent acquired his own property, he requested him to vacate since it was no longer necessary to allow him to stay on the suit property. The respondent nonetheless declined to vacate hence prompting the appellant to file for an eviction order against him vide **Muranga P.M.C.C No. 5 of 1986.** The respondent in opposition of the same filed a defence and counterclaim claiming the suit property on grounds that the appellant held it in trust for him. Ultimately, an eviction order was issued and the respondent subsequently appealed which appeal was dismissed.

7. The appellant further deposed that the plaintiff's act of filing a counterclaim in the court below claiming that the suit property was held in trust for him by the appellant was an admission of the appellant's title hence the respondent's claim of adverse possession could not stand. He deposed that time for purposes of adverse possession started running in favour of the respondent sometime in 1984 but was interrupted by the filing of Muranga P.M.C.C No. 5 of 1986 and not on the date before the counterclaim was filed.

8. He contended that the respondent did not prove his claim for adverse possession to the required threshold. He maintained that there was no

documentary evidence to prove that the respondent occupied exactly a half (½) share measuring approximately 0.7 acres of the suit property. Further, that the evidence on record showed that the respondent

cultivated his cash crops (tea and coffee) on a different parcel of land, Land Parcel No. LOC.19/ RWATHIA/1579, and not on the suit property.

9. The learned trial Judge in the analysis and consideration of the case before him appreciated the now settled principles applicable in a claim for adverse possession. He cited this Court's findings in the cases of **Ndato v. Itumo & 2 Others** (2002) 2 KLR 638 page 641 and **Githi v. Ndete** (1984) KLR 776 page 781 and restated that in a claim for adverse possession under the Limitation of Actions Act, time stops running either when the owner asserts his right, i.e. by taking legal proceedings against the adverse possessor or makes an effective entry into the land, or when his right is admitted by the adverse possessor.

10. Having carefully considered the evidence on record and the parties' submissions he found that:-

> ***"It is common ground that for the plaintiff to succeed in a claim for adverse possession he must prove that he has been in peaceful, open and uninterrupted possession of the land in question for a period of twelve years and above. In this case it is quite obvious that possession by the plaintiff since 1963 or thereabouts was open, uninterrupted and adverse to the title of the defendant. An attempt to interrupt time in 1986 when the defendant filed a case in Muran'ga Court did not stop time from running since the defendant's title to the suit land had extinguished***

12 years after the plaintiff took possession."

11. Ultimately, vide his judgment dated 10th May, 2008, the learned Judge allowed the respondent's claim and declared the respondent to be the lawful proprietor of the suit property under the doctrine of adverse possession and ordered that he be registered as the sole proprietor of the portion of 0.7 acres claimed in the Originating Summons.

12. Aggrieved by the above findings, the appellant proffered the instant appeal. The appeal is premised on grounds *inter alia* that the learned Judged erred in fact and law by finding that: the respondent had proved his claim for adverse possession to the threshold required by law; the respondent was entitled to exactly half portion of the suit property despite lack of evidence, documentary or otherwise; time stopped running upon the filing of Muran'ga P.M.C.C No. 5 of 1986 hence ceasing the respondent's claim for adverse possession.

13. The appeal was canvassed through written submissions at the plenary hearing on 24th June, 2019. Learned Counsel Mr. Kirubi appeared for the appellant while Mr. Mwangi Kigotho held brief for Mr. Kinuthia for the respondent. They both relied on the written submissions filed earlier and informed the Court that they would not be highlighting the same. We have read and given careful consideration to the said submissions.

14. In his submissions, learned counsel for the appellant submitted that according to the evidence on record before the High Court the parties were blood brothers, the appellant being the respondent's elder brother. He contended that the suit property on first registration on 17th April, 1963 was registered in the appellant's name as the absolute proprietor.

15. Counsel submitted that the appellant allowed the respondent to build and cultivate a small portion around 1965, as the respondent had not inherited any land from their late father. He maintained that such entry and occupation of his land by the respondent was with the appellant's consent and that permission and a licence cannot transform or crystalize into adverse possession.

16. He further submitted that upon acquisition by the respondent of his own land, it was no longer necessary for the respondent to continue occupying and cultivating the appellant's land therefore the appellant terminated the respondent's license by way of a notice of eviction.

Further, that such license expires on notice by the appellant to the respondent and however long the licence takes the latter remains a licensee and the title cannot be acquired by adverse possession.

17. Counsel submitted that the main issue for determination before this Court is whether the period between 1965 when the respondent permitted the respondent to occupy and use a portion of the suit property up to 1986 when the appellant gave notice to vacate the respondent had acquired the disputed portion by adverse possession.

18. He submitted that between 1965 and 1984 the respondent was in occupation of the suit property with consent and permission of the appellant. However, that the appellant had exercised his rights as the proprietor of the suit property by issuing notice to vacate against the respondent in 1984. He further cited this Court's case of **Wambugu v. Njuguna (1983) KLR 172** where it was held that:-

> ***"Where a claimant is in exclusive possession of the land with leave and permission of the registered owner, time starts to run for adverse possession at the time the license is determined. Prior to the determination of the license the occupation is not adverse but with permission. This is because the occupation can only be either with permission or adverse, the two concepts cannot co-exist."***

He maintained that adverse possession contemplates two concepts:

dispossession and discontinuance of possession.

19. He argued that in view of the forgoing, the twelve (12) years statutory period for adverse possession started running when the appellant gave an eviction notice to the respondent hence termination of the license, but stopped running in 1986 when the appellant filed the suit against the respondent for eviction.

20. Relying on the case of **Kasuve v. Mwaani Investments Ltd & 4 Others Civil Appeal No. 35 of 2002 KLR** and **Mbira v. Gachuhi (2002) IEALR 137** counsel submitted that for a claim of adverse possession to succeed it must be proved that one was in exclusive possession of the land openly and notoriously as of right with such possession being adverse to the rightful owner and without interruption for a period of 12 years.

21. Urging the Court to allow the appeal, counsel submitted that the appellant was a victim of his own generosity and that despite the respondent having acquired his own parcel of land, he had refused to vacate the suit property, which was a portion of the appellant's property, claiming an entitlement through adverse possession. See: **Mbui v. Maranya (1993) KLR 726.**

22. Opposing the appeal, counsel for the respondent submitted reiterating the respondent's and respondent's witnesses' testimonies before the High Court that: the suit property was registered in the appellant's name but that it was subdivided equally between him and the appellant and clear boundaries were put; the respondent had lived on the suit property for 48 years continuously from 1963 and; the respondent's actual possession was evidenced by the fact that he had built a 3-roomed semi-permanent house where he lived with his family, reared cattle and tilled the suit property for subsistence farming, and installed piped water on it (which was evidenced through water bill receipts). He argued that in view of the foregoing it was evident that the respondent had been in uninterrupted possession of the suit property for a period of over 12 years hence was entitled through adverse possession. He also contended that the learned Judge in his judgment properly analyzed the factual evidence before him and was right to hold that the respondent's claim for adverse possession had been established to the required threshold.

23. Counsel argued that by virtue of the findings in the eviction proceedings instituted by the appellant in **Muranga P.M.C.C No. 5 of 1986**. the appellant had lived on the suit property for 23 years and that the filing of the suit did not stop the time for adverse possession from running. He further argued that the appellant's suit for eviction was filed too late by 11 years. He urged the Court to dismiss the appeal.

24. This being a first appeal, the duty of this Court is as was stated in the case of **Abok James Odera t/a A.J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where this Court pronounced itself as follows: -

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-***
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> ***"On a first appeal from the High Court, the Court of***
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> ***Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

25. From a careful perusal of the record of appeal, parties' submissions and the authorities the issue arising for determination can be discerned to be: *Whether the learned judge erred in fact and law by finding that respondent was entitled to be declared the registered proprietor of the suit property under the doctrine of adverse possession.*

26. The principle of adverse possession is clearly set out in **Wambugu vs Njuguna [1983] KLR 172**, where this Court expressed itself as follows:-

> ***"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it."***
>
> **…**
>
> ***"The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."***

27. Further, the query as to whether the respondent was in adverse possession of the suit property is a matter of evidence as was in **Mbira v. Gachuhi (2002) 1 EALR 137** where this Court held that, ***"… a persoN who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption…"*** (Emphasis added.)

28. As was held in the **Mbira case** (Supra) it was upon the respondent to prove that he had used the suit property as of right. Accordingly, the respondent herein appearing before the trial Court was obligated to not only show his uninterrupted possession, but also that the appellant had knowledge (or the means of knowing) actual or constructive, of the possession or occupation. Additionally, the possession ought to have been continuous. It must not have been broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration (See also: **Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.**

29. In his findings before the trial Court, it is evident that the learned Judge was properly guided when he held thus; "**It is common ground that for the plaintiff to succeed in a claim for adverse possession, he must prove that he has been in peaceful, open and uninterrupted possession of the land in question for a period of twelve years and above".**

30. It is common ground that the suit property was registered in the appellant's name. It is also common ground that the respondent entered the suit property sometime in 1963 or thereabouts and that the appellant instituted a suit seeking to evict the respondent from the suit property sometime in 1986. Further, it is common ground that the respondent built a house on the suit property where he lived with his family, cultivated the same, reared animals and installed piped water on the land. That said however, the courts have severally held that adverse possession is a question of both law and fact. Possession *per se* for whatever length of time would not constitute adverse possession. It is incumbent on the person claiming adverse possession to establish that the possession was hostile and not with condonation or permission of the registered owner. See **Mbira-vs-Gachuhi (supra**).

31. This brings us to the question whether the respondent's entry into the suit property was notorious and hostile. On one hand, the appellant alleged that the respondent's occupation of the land was with permission while on the other hand, the respondent averred that his entry on the property was by virtue of the fact that the land was initially owned by their father and that the appellant held the same in trust for him. As established earlier, it is not in dispute that the appellant and the respondent are brothers and that the initial owner was their late father. It is also not in contention that the suit land was registered in the names of the appellant in 1963.

32. From the respondent's affidavit in support of the Originating summons, he deposes that he moved into the suit land in 1959 and has lived there to date. He does not however say how he got into the suit

property. He appears to leverage on the fact that he has lived in the suit property for a long time and is consequently entitled to ownership of the same by adverse possession. As we have stated above, possession alone does not suffice. What we gather from the record is that the respondent and the appellant were living together during their late father's lifetime as brothers with full knowledge that the suit property was registered in the appellant's name. According to the appellant, he allowed the respondent to build a house in the latter's land because the respondent had no land then. Once his father got another parcel of land, he called his sons and asked the respondent to move from the appellant's land and gave him his own portion. This is admitted in the proceedings before the trial court. The respondent nonetheless refused to leave.

33. From the pleadings and evidence adduced in **Muran'ga R.M.C.C No.5 of**

1986, in which the respondent filed a counterclaim, he never claimed adverse possession. His evidence was to the effect that the land was registered in the appellant's name in trust for him. If indeed he had a claim based on adverse possession, why did he not lodge that claim. It would appear to us that the reason for this is because he was living there with full consent of the appellant. The demand by the appellant that the respondent vacates his (appellant's) land only after he was given an alternative land by their father cannot be coincidental. It gives credence to the appellant's explanation that he had permitted the respondent to live on the suit premises because he had nowhere else to go.

34. Further, we do not see how the respondent would have lived together with the appellant on the same portion of land during the lifetime of their father who was also living nearby, if the appellant had not allowed him to do so. He would have kicked him out. The respondent's long occupation of the suit property was in our view with permission and that would explain why he never claimed the suit property by way of adverse possession when he was taken to court in 1986. The appellant admitted in his own evidence that the respondent had erected a house on the suit property; installed piped water on the same and that he still uses the water; he had planted bananas and maize on the suit property; but he did most of those things before he was given his own parcel of land namely, **Parcel Number LOC.19/RWATHIA/1579.**

35. With respect to the learned Judge, he does not seem to have given sufficient consideration to the appellant's claim that the respondent was a licensee on the suit property as he had been allowed to live there until he got his own parcel of land. The respondent abused the appellant's magnanimity and kindness by refusing to vacate and instead turning back and claiming what did not clearly belong to him. We are persuaded that this was the kind of situation in the mind of **Kuloba J,** in **Mbui vs Maranya (1993) KLR** when he opined

> ***"Now, in this Country, go to the countryside, where our largest population resides and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African Milk of generosity and kindness. Our way of living has always been to defend on one another for mutual survival and progress. This is at every level.***
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> ***To us if you want help. If you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow these things, he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement all over the county, are actually living on the lands of their friends their clansmen, neighbours or even void land sale agreements. They do not even think of claiming or losing tile, by adverse possession …… I would be surprised if anyone***
>
> ***pretended to be ignorant of these things. And ignorance on the part of a Judge would be a calamity for the innocent.***
>
> ***The keeping on our land of landless relatives, clansmen***

> *… **for long periods of time until they are able to buy their own is a custom we know … The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideas and sound cultural foundations and destabilize the society.”***

36. In conclusion, our finding is that although the respondent proved long occupation of the suit property, he failed to establish that the said occupation was without the appellant’s permission. On our part, we are convinced that the respondent stayed on the appellant’s suit property with permission. His claim of adverse possession cannot therefore lie. We find this appeal meritorious. We allow it but like the learned Judge of the High Court, in view of the circumstances of the case order that each party bears its own costs both in this Court and before the High Court.

Dated and delivered at Nairobi this 22nd day of November, 2019.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR