IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 224 OF 2005

ISSAC IMAKU KIOI.....APPELLANT

AND

PHYLLIS WAITHERA KINYUNGU.....1ST RESPONDENT

NELIA NYAMBURA KINYUNGU.....2ND RESPONDENT

LEAH WANGUI KINYUNGU.....3RD RESPONDENT

PATRICK MWANGI KINYUNGU.....4TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Isaac Lenaola, J**.) dated the 29th day of January, 2004* in H.C.C.C. No. 2550 of 1998 (O.S)

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JUDGMENT OF THE COURT

On 29th January 2004, the High Court sitting in Nairobi delivered a judgment dismissing with costs High Court Civil Suit No. **2550 of 1998,** (OS). The suit had been instituted by **Isaac Imaku Kioi,** "**the appellant**" and his mother, **Josephine Wambui Kioi**, (since deceased) claiming adverse possession of one half of all that piece or parcel of land known as **Loc. 9/Kanyenyaini/807** "*the suit property*" situate in Kangema, Murang'a County. The suit property was pleaded to be jointly registered in the names of **Phyllis Waithira Kinyungu, Nelia Nyambura, Leah wangui Kinyungu** and **Patrick Mawngi Kinyungu**, "the respondents" as successors in title. The court resolved that the appellants had not shown or proved to have been in possession of the suit property adversely for a period of 12 years as required under the provisions of the Limitations of Actions Act. Needless to say, the dismissal of the suit triggered the present appeal.

The background facts of the suit are that the appellant and his late mother were son and wife respectively of the late **Kioi Nduati** *"Kioi"* who passed on in 1982. The deceased and one, **Amos Kinyungu** *"Amos"*, also deceased were brothers. Amos was the husband of the 1st respondent (since deceased) and the other respondents are the issues of that union. In the suit, the appellant alleged that sometime in 1962, the two brothers, Kioi and Amos, jointly purchased the suit property and agreed to have it registered solely in the name of the elder brother, Amos. That the two brothers and their respective families shared the suit property equally, with each family occupying half of the suit property. Further that in 1968 the appellant's family planted 3,500 tea leave bushes and have been farming and tending to the same since. Most

importantly to his case, the appellant alleged that they had been in continuous occupation of the suit property since 1962 without any interruption, a period spanning over 12 years and had therefore become entitled to the suit property by virtue of the doctrine of adverse possession.

The above averments were denied by the respondents. In a replying affidavit sworn by the 4th respondent on behalf of all the respondents, he deposed that Amos was registered as the absolute proprietor of the suit property in 1962, a first registration and since then, they had possessed and occupied the suit property exclusively until 1992 when the appellant and his mother moved in and occupied a small portion by building what he described as a '*small corrugated iron sheet structure*'. It was deposed further that the appellant was born in a place called Kianjage where Kioi owned land and where his remains were interred upon his demise. The respondents alleged that the appellant was in fact the registered owner of the property known as No. Loc. 12/sub-loc. 5/2360 that Kioi owned in Kianjage through transmission. The respondents asserted their exclusive ownership of the tea bushes in the suit property and claimed the appellant had their own tea bushes and other developments in Kianjage.

The respondents also exhibited an affidavit sworn by the appellant's deceased mother in Murang'a Resident Magistrates' Court in **Succession Cause No. 9 of 1991** where she committed perjury by swearing falsely that she had been the sole wife of Amos. In the said affidavit, she further falsely claimed that she, the appellant and the 1st respondent were the only surviving persons entitled to inherit the estate of Amos. They deposed that subsequently the respondent was appointed the administrator of the estate of Amos on 7th November 1992 and the grant was confirmed by the High Court on 5th March 1993. The respondents therefore, claimed that if the appellant was in adverse possession of one half of the suit property, then the same was interrupted by those events. The respondents also claimed that the appellant and his mother had made attempts to annul the grant issued to the 1st respondent twice as aforesaid but were unsuccessful in both attempts.

On these set of facts and evidence adduced during the trial, L**enaola, J**. (as he then was) dismissed the appellant's suit holding that;

> ***"As the applicants have not shown that possession has been for a period exceeding 12 years, their claim on that aspect must fail. Having so failed, I see no further reason to go to other ingredients of proof of adverse possession."***

Aggrieved by this finding, the appellant lodged the present appeal based on 11 grounds. The grounds however can be condensed and addressed as follows, in our view; that the learned trial Judge failed to consider the appellant's evidence adduced during trial and or considered extraneous matters thereby arriving at a wrong decision; erred in failing to consider and analyze all the elements of adverse possession in view of the evidence adduced; and lastly, erred in holding that the appellant moved into the suit property in 1999 and not 1962.

The 1st respondent passed away on 17th January 2013 and since no application was made for her legal representative to be enjoined in the appeal within 12 months after her passing, the appeal against her abated under rule **99 (2)** of the Court of Appeal Rules on 24th February 2016. Subsequently, following the demise of the 2nd respondent on 11th March 2015, the appellant successfully applied to Court to have her substituted with **Teresia Waikuru Mwangi**, who had been granted letters of administration *ad litem* by the High Court on 9th March 2016. Those events significantly contributed to the delay in the hearing and disposal of this appeal. As it is therefore, this appeal is against the 2nd, 3rd and 4th respondents only.

The appeal was canvassed by way of written submissions. In his submissions dated 4th March 2015, the appellant, abandoned grounds 8, 9, 10 and 11 in his Memorandum of Appeal. The appellant submitted that in support of the remaining grounds of appeal that he had tendered before the trial court, exhibits and documents which he contends the trial Judge failed to consider, analyze or make any finding on. He pointed out that he produced before the court a Kenya Tea Development Authority (KTDA) verification certificate No. A70875 dated 11th December, 1995 issued to his late mother in respect of 1007 tea bushes

planted in 1968 on the suit property. Further that he produced a KTDA license No. 359001 issued on 16th April 1993 to his late mother in respect of 1130 tea plants in the suit property and a crop damage and compensation form issued to him on 12th May, 1989 by Kenya Power & Lighting Company (KPLC) Ltd in respect of his own damaged tea plants in the suit property. The appellant's contention with regard to these exhibits was that despite the Judge having referred to the said exhibits in his judgment, he failed to consider or determine their import one way or the other. As it were, the Judge did not relate the exhibits produced with the appellant's occupation of the suit property and so arrived at a wrong conclusion.

The appellant submitted further that the learned Judge failed to consider or give credence to the testimonies of his witnesses. He alleged that both PW2 (Kariuki Chege) and PW3 (Simeon Kuria Gathu) testified that the appellants and the respondents had shared or lived in the suit property together since 1962, with each family having a separate portion and that the tea bushes had been planted in the suit property in 1968. This evidence, according to the appellant collaborated the documents he tendered in evidence. He faulted the Judge for relying or latching on a statement by PW3 during his cross examination that the appellant and his mother moved into the suit property after the suit was filed but failed to consider the re-examination where the same witness testified that he did not know and/or was not sure when the appellant moved into the suit property.

Being son of Kioi and having been in possession of the suit property, the appellant maintained that he had a right to pursue or mount the claim for adverse possession as there was no legal requirement that a beneficiary had to first obtain letters of administration before commencing an adverse possession claim. This was in regard to the Judge's finding that the appellant obtained the letters of administration to the estate of his late mother who died in the year 2000 and not his father who had passed away in 1981. According to the appellant, the trial Judge contradicted himself by recognizing on one hand that his claim for adverse possession could stand on its own but at the same time remarking that he had not obtained a grant of letters of administration to his father's estate from whom his present claim on the suit property could be traced.

In his judgment, the Judge observed that he found the appellant to be less than an honest person. This the Judge attributed to the affidavit sworn by his late mother in a lower court where it was falsely stated that the appellant and his late mother were the sole beneficiaries of the estate of Amos. Further, the Judge had observed that the appellant, testified authoritatively on alleged events of 1962 yet he was not even born and did not state the sources of his information. In his submissions the appellant challenged those findings. He submitted that the lie attributed to him in the lower court in Murang'a neither originated from him nor was he a party in the proceedings. That the affidavit in question was sworn by his mother. Further that during his cross examination he disclosed the sources of his information to be his mother and from documents. In conclusion, the appellant maintained that time for purposes adverse possession started to run from 1962 or 1968 and not 1999 as held by the trial court.

The respondents on their part filed joint written submissions in which they pointed out that the suit property was jointly registered and held by them in equal shares. Since the 1st respondent was not substituted by her legal representative after her demise, they submitted that the appellant's appeal ought to fail because the fate of the 1st respondent's share in the suit property could not be conclusively determined. The respondents were further of the view that the documents or exhibits the trial Judge is alleged to have failed to consider by the appellant bore no evidentiary weight in satisfying the ingredients of adverse possession. This is especially since the documents produced only indicated when the tea bushes were planted but did not indicate who planted them. According to the respondents, the exhibits were not an indicator of occupation as the appellant claimed. In any case, they argued, the certificates were not issued as evidence of ownership and it was possible to issue more than one certificate in respect of the same piece of land. They maintained that they were the registered proprietors of the suit property and the KPLC certificate produced by the appellant was nothing unique since they had also previously been compensated for crop failure since the suit property also acted as a way leave.

The respondents denied that the appellant moved into or occupied the suit property from 1962 or 1968 as alleged and maintained that the appellant and his mother moved into the suit property sometime in 1999 after the suit had been instituted. This according to the respondents was supported by the evidence of

PW2 and PW3. It was also the respondents' submission that the appellant's witnesses or exhibits could not corroborate his claims that they moved into the suit property in 1962 or 1968. They also accused the appellant of giving contradictory testimony of where he resides by stating on one hand that he lived on the suit property but also admitting that he lived on another parcel of land. Though the respondents acknowledged that the appellant could bring a claim for adverse possession in his own right, they were of the view that the appellant in the circumstances of this case could not do so. They argued that since the appellant's father had never lived on the suit property, then the appellant could not '*inherit*' his father's claim to adverse possession if his father had never occupied the suit property. They asserted that the appellant did not plead that his father resided in the suit property and neither was any evidence led to prove the same. Further, that if the appellant's father in fact lived on the suit property then he would have been buried there and not in Kianjage. That if indeed the appellant's father lived on the suit property then one would have expected the appellant to pursue his interest therein through petitioning for letters of administration as opposed to that of his mother.

In support of the trial Judge's finding that the appellant was not a honest person, the respondents contended that since Murang'a Senior Principal Magistrate Petition No. 9 of 1999 had been filed by the appellant and his mother claiming to be beneficiaries of the estate of Amos, with the appellant listed as a son of Amos, knowing very well that the information was false, then the implication was that he was privy to the falsehoods. According to the respondents, such facts were material and could not be ignored by the trial Judge. They also supported the Judge's findings that the appellant and his mother moved into the suit property in 1999 after the filing of the suit. This according to the respondents was corroborated by the appellant's own witnesses, PW2 and PW3, who testified to that effect. Further, that whichever date the appellant entered the suit property, it was clear from the evidence adduced that it was not 1962, 1968 or 1969. That all evidence pointed to a date after the filing of the suit in the High Court. The respondents denied that the appellant's claim met the ingredients for adverse possession and contended that no single element of the same was proved.

The determination of this appeal in our view turns on a single issue; whether a case for adverse possession was made out by the appellant with regard to the suit property. As a first appellate Court, our duty is as espoused in rule **29** (1) of the Court of Appeal rules. We are called upon to reanalyze, revaluate, reassess, reappraise, interrogate and scrutinize the evidence tendered before the trial court and arrive at our own independent conclusion. Nevertheless, we have to bear in mind the fact that the trial court had the singular advantage of seeing and assessing the demeanor of witnesses as they testified and make allowance for it. See **Selle & Another v Associated Motor Boat Co. Ltd & 2 Others (1968) EA 123** and **Peter v Sunday Post (1958) 428**.

In pursuit of the above mandate, we are further guided by the principle that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on misapprehension of the evidence or the Judge is shown to have acted on wrong principles in reaching the findings.

The Limitations of Actions Act lays the statutory basis upon which a person may claim land through adverse possession. The statutory period stipulated before a person may bring a claim for adverse possession is provided for under section **7** of the Act which prohibits actions for recovery of land after 12 years from the date when the cause of action accrued. The provision provides:-

> ***"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."***

Further, sections **13** and **17** of the Act provide respectively that a right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run

and that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished. The appellant invoked section **38(1)** which enables a person who claims to have become entitled to land by adverse possession, to apply to the High Court to be declared and registered as the proprietor of the land, in lieu of the registered proprietor. The provision reads as follows;

> ***"38. (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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."***

Read together, the effect of the above provisions are to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land**.**

The principle of adverse possession has been the subject of litigation before our courts numerous times. Its constitutionality has also been challenged before this Court post the 2010 Constitutional era in **Mtana Lewa v Kahindi Ngala Mwagandi (2015) eKLR** and ultimately upheld. In that case, this Court quoted with approval, a passage from the Supreme Court of India which discussed the essentials of adverse possession in **Karnataka Board of Wakf v. Government of India & Others (2004) 10 SCC 779** as follows:

> ***"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."***

To succeed in a claim for adverse possession therefore, a plaintiff has to have been in open, peaceful and as of right, occupation of the suit property for at least 12 years. Has the appellant therefore met these elements?

In an affidavit in support of his originating summons, the appellant deposed that he or rather his father and family, had lived on the suit property since 1962, a period of about 36 years to 1998 when this claim was filed before the High Court. The appellant testified that he was born in 1965. In support of his assertions, he appeared as PW1 and testified that he was born and lived on their portion of the suit property. In 1968 they planted tea plants on their portion, which they continue to tend to. To prove the veracity of his claims, he produced some exhibits which he now faults the learned trial Judge for having failed to consider and analyze. He produced a certificate issued by KTDA to his mother, Josephine Kioi. The same was dated 11th December, 1995 and was issued to verify that 1007 tea bushes had been planted in 1968. Next, the appellant produced in evidence, a Tea Plantation Licence that had been issued by KTDA to his mother on 16th April, 1993. Finally he produced a Crop Damage & Compensation Form issued to him by KPLC in 1989. Discernable from these exhibits however, is that none proves that the appellant nor his father or mother occupied or lived on the suit property from 1962 when Kioi is alleged to have bought it. The dates on the exhibits relate to a later period and not to the more material period of 1960s. The respondents have been categorical in their case that Kioi never lived on the suit property as he resided in another parcel of land in a place called Kianjage where in fact his remains were interred. The appellant produced no document that was issued in his father's names prior to his demise in 1981 in regard to the suit property. There was also the argument that those documents could be issued to different persons in respect of the same parcel of land, which argument was never controverted at all by the appellant. In light of the foregoing, one would understand the respondents' argument that indeed the documents produced by the appellant carried or bore no evidentiary weight in satisfying the ingredients of

adverse possession. The learned trial Judge came to the same conclusion and the appellant cannot be heard to complain that he failed to consider or analyse the exhibits especially since the Judge acknowledged and referred to them in his determination.

Moving on, the appellant called two other witnesses in support of his case. PW2 testified that the suit property had been purchased by the two brothers in 1962 and registered in the name Amos. Further, that the families had lived on the land all along till around the year 2000 when a tussle over it started. However, the witness conceded during cross-examination and in his re-examination that the appellant and his mother moved into the suit property after the filing of the suit, sometime in 1999 and that they had a house built on it the same year. Considering the testimony of PW2, the trial Judge remarked as follows;

> *"**22. Fourthly, he calls a witness who contradicts him by saying that Kioi moved into the suit land after the filing this suit. This suit was filed on 17th November 1998. I believe the witness who says that Kioi moved into the land in 1999 or thereabouts**."*

The trial Court which had the opportunity to see, hear and observe the demeanor of the witnesses, considered the testimony of the appellant and concluded that he was obsessed with acquiring the suit property and seemed a less than honest person from his demeanor. On the other hand, the Judge assessed the demeanor of PW2 and came to the conclusion that the witness was reliable. In our view, there is no reason and none has been advanced to warrant this Court to interfere with that conclusion. In the case of **Tayab v Kinanu (1983) KLR 114** it was held that;

> *"**The appellate court will not interfere with a judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who gave evidence before him unless it was wrong in principle**."*

If that witness evidence is upheld, and there is no reason why it should not, then the import is that the appellant's claim of adverse possession in the suit property fails to meet one key ingredient; the 12 years statutory period. Ultimately, the Judge was right in holding that the appellant had not shown that the alleged adverse possession of the suit property had been for a period exceeding 12 years. Having reached this conclusion, consideration of the other aspects of adverse possession would have been superfluous. In our view, the judge was right to take that stand contrary to the position held by the appellant that he ought to have considered the other aspects of adverse possession as well.

This appeal therefore fails and is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 26th day of January, 2018.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR