



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), WAKI & KIAGE, JJ.A.)

CIVIL APPEAL NO. 102 OF 2014

Solomon Muathe Mitau & 787 Others.....APPELLANTS

Nguni Group Ranch.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya

at Machakos (Lenaola, J.) delivered on the 27th May, 2009

in

H. C. C. C. No. 109 of 2001)

JUDGMENT OF THE COURT

Introduction

1. This is yet another claim of ownership of land through the doctrine of “**adverse possession**”. The claimants in this case, however, conflate the doctrine with “**prescription**” which they pleaded and cited the **Limitation of Actions Act**, Cap 22, Laws of Kenya, as the legal basis. There is a difference between the two. In the case of ***Benina Ndungwa Kinyumu & 4 Others vs National Land Commission [2015] eKLR, Angote, J.*** explained the distinction between the two, correctly in our view, in the following manner: “**18. There is a difference between acquiring a title to land by way of adverse possession and prescription. Of course, it has been said that the similarities between the doctrine of adverse possession and prescriptive easements far outweigh the differences because both result from the operation of the statute of limitation for trespass.**

19. The difference between the two doctrines lie primarily in determining what is accomplished. With adverse possession the goal is to acquire title to real property.

20. an easement by prescription however, is not directed towards the goal of acquiring title to property. Rather, it is directed towards acquiring an easement. So, if one uses, rather than possesses, the land of another, and the use is open and notorious, adverse, continuous and uninterrupted, for the statutory period, then one acquires an easement and can continue to use that land.

21. Unlike adverse possession, prescription is a non possessory interest in land through the long, continuous use of the land.”

The concept of acquisition of proprietary rights to land through prescription was introduced in the **Land Act [Section 7 (d)]** and the **Land Registration Act [Section 28 (h)]**, both enacted in the year 2012. However, the cause of action in the matter before us predates the two Acts and the distinction thus applies.

2. The claimants are now the appellants before us and we shall henceforth refer to them as such. They are described as “**Solomon Muathe Mitau & 787 Others**” but it is common ground that this was not a representative suit. No order was sought or made to that effect before the High Court and no signed consents were obtained or filed by the party who gave instructions for the filing of the suit. Furthermore there were sworn averments made, and findings by the High Court, that some of the claimants were wrongly enjoined in the suit, while many others were infants who had no capacity to sue. Be that as it may, we shall consider the appeal on its merits. The appellants are represented before us by learned counsel **Ms Elizabeth Macharia** assisted by **Evelasia Maina**, both instructed by M/s Mbaluka & Company Advocates.

3. The respondent is a group ranch registered under **The Land (Group Representatives) Act 1968** under a certificate issued on 17th February 1975. It had 452 members as at 25th September 1975 who were carrying out the business of cattle ranching. They were represented before us, as they were before the High Court, by learned counsel **Mr. Japheth Mwalimu**, instructed by M/s J.K. Mwalimu & Company Advocates.

Background

4. The dispute relates to a parcel of land measuring approximately 9,379 hectares or 23,213 Acres, situate in Maluma and Kalivu locations of Kitui County. It was registered as **Ikutha/Nguni/1** under the **Registered Land Act** in the respondents’ name on 17th February, 1975 and the Land Title was issued on 26th August, 1980 after removal of a restriction entered by the Chief Land Registrar pending an appeal before the Minister of Lands, which restriction was removed on 15th August, 1980. We shall refer to the parcel as „**the disputed land?**”.

5. By an Originating Summons (**the suit**) dated 19th July, 2001 and filed on 25th July, 2001, the appellants claimed that they had acquired “*prescriptive rights*” of the disputed land after being in continuous, quiet and uninterrupted actual possession of the whole of it for a period of over 12 years. They sought a declaration that they had acquired proprietary rights over the disputed land; that the respondent held the title in trust for them; and an order cancelling the registration in favour of the respondent. The suit was premised on the **Limitation of Actions Act** although the relevant Section was not cited but was prosecuted on the basis of **Section 38** of the Act since the appellants sought proprietary rights.

6. In support of the claim, **Solomon Muathe Mitau** swore an affidavit asserting that all the 788 persons, a list of whom he gave, had been in occupation of the entire disputed land long before it was registered in 1975 and none of the respondents has ever been on the land. He only learned about the existence of the respondent on 19th May 2001 when the chief of Kalivu location called a *baraza* to inform them that the land belonged to the respondent. The chief asked them to contribute sh.20,000 in order to have their respective portions surveyed in their names. Upon conducting a search in the land registry, Mitau found that the land had already been registered in the respondent’s name, but, in his view, erroneously so since it was the appellants’ land.

7. In response, the chairman of the respondent, **Samuel Kasimbu Ndumbali**, filed an affidavit and deposed about the registration of the group ranch in 1975; the membership of the group; the ranching activities on the disputed land by the respondent and its members without any interruption by anyone for a period of 20 years from 1975 to 1995; the decision by the general membership of the group to subdivide the disputed land after intermittent invasions on the ranch by trespassers in search of grazing land during dry seasons; the sanctioning of the subdivision plan by the relevant Land Control Board; and the engagement of a professional surveyor for the job in the year 2000, after members agreed to

contribute sh.20,000 each towards the survey costs. He denied that the appellants or any of them had ever resided on the disputed land and went further to list several of the appellants who were enjoined in the suit without their authority despite being members of the respondent; minors who were either in nursery school, at home or primary schools; others whose names were repeated and others who lived away from the locality, contending that it was only the 1st appellant who was prime mover of the fraudulent suit.

The evidence

8. Only seven out of the 788 appellants testified on their own behalf to establish their claims. As stated earlier, this was not a representative suit as there was no order sought or given to that effect. The only Directions given in accordance with the Rules before **Nambuye, J.** (as she then was) were that “*the originating Summons be converted into a plaint and viva voce evidence be taken*”. The seven individuals then testified variously before three different judges (**Wendoh, Sitati and Lenaola, JJ.**) over a period of about four years.

9. The combined effect of their evidence was that they all came from different parts of the larger Ukambani area, lived peacefully on the disputed land which was a grazing area under the county council of Kitui, and took part in establishing communal and social amenities on the land. But in 1995 they were asked by the Chairman of the ranch, Samuel Kasimbu Ndumbali, to pay Sh.20,000 for survey of the land by a private surveyor which they refused to do demanding a government surveyor who would do it for free. They were then threatened with eviction. They denied knowledge of any land adjudication in the area or registration of the land in the name of the respondent, which registration they sought to have cancelled.

10. On other varying aspects of their evidence, **Mitau** (PW1) testified that he went to the disputed land in 1965 and found a chief to whom he paid sh.1,200 and was shown a place to build. That is where he built his mud-walled, grass-thatched house but did not know the extent of the portion he occupied. **Muendo Mbaluka** (PW2) also testified that he left his original home in search of grazing land in the 1960s and he found vacant land in Ikutha. He paid sh.1200 to the local chief and was shown a place to settle and that is where he was settled until he attended the meeting in which they were asked to pay Sh.20,000 survey fees. He did not know the extent of the ranch or whether the portion he occupied was within the disputed land. He was not aware of the existence of the respondent or any of its officials. He admitted that some of his children, including one who was deceased, had been listed as plaintiffs although they could not claim different land from the one he was claiming.

11. **Juma Mulelu** (PW3) was born in Maluma location in 1973 and was settled in his parent’s land which his father acquired after leaving his original home in Mbooni. He has since been shown a place by his father to built when he started his own family in 1992. All he knew about the disputed land was what he was told by his father who did not testify. **Sammy Mutuku Katemi** (PW4) bought the portion of his land from another person in 1989 and took possession of it. He did not know the extent of it. Later in 2001 he saw survey process going on and he attended a meeting where they were asked to contribute sh. 20,000 for shares which he found not worth the value of the land and refused to pay. He testified further that where he occupied was not part of the disputed land, but was nevertheless told to vacate it in 2001.

12. **Muli Mutungi** (PW5) was another young man born in 1973 and who lived in his father’s land where he was given 6 Acres or so to reside with his family in 2003. All he knew about the land was what his father told him but the father did not testify. There was no attempt made to evict them until 2001 when Sh.20,000 was demanded. He would have paid it if it was being paid to a government surveyor. **Musango Mutie Mutuku** (PW6) was another entrant from Makueni who paid Sh.5,500 to the Assistant Chief and was shown about 5-8 acres to settle on. He was not aware that the land was owned by the respondent. Finally, **Pius Musyoki Mutua** (PW7) testified that he acquired about 20 acres of his land in 1991 after paying Sh.5,500 to the Assistant Chief of the area. He was not willing to pay a further Sh.20,000 for a private surveyor because he considered the amount he paid for the land to be sufficient purchase price. He had given out the names of his wife and several of his minor children to be included in the suit.

13. The evidence in rebuttal was given by **Samuel Kasimbu Ndumbale** on behalf of the respondent. It

was largely a rehash of the sworn affidavit together with the annexures filed in opposition to the suit. He reiterated that none of the appellants were in occupation of the disputed land when it was acquired in 1975 and only some of them were squatting on a livestock holding ground which was not part of the disputed land. It was only in 1995 when some of them, including the seven who testified, moved in and built temporary homes after instigation by politicians. The general membership of the group resolved to have the ranch subdivided in order to effectively keep away illegal grazers and they had the blessings of the relevant Land Control Board to do so. The amount of Sh. 20,000, he explained, was for survey fees and was agreed on by members of the respondent. It had nothing to do with any trespassers on the land. Only a few squatters remained on the land after many of them were evicted, he concluded.

The findings by the High Court

14. Upon evaluating the evidence on record, **Lenaola J.** (now Justice of the Supreme Court) rejected the appellants' claims and made findings which may be summarized as follows:-

(i) Without evidence as to how long each of the plaintiffs has been in occupation of the land, it would be difficult for this court to determine whether in fact each of them has been in possession for a period exceeding 12 years.

(ii) The period of entry into the land by each of the plaintiffs is not given in the pleadings and in evidence, PW1 and PW2 said that he entered in 1965; PW2 in 1965; PW3 said that he was born on the land in 1973 and that he was a son of one Mulelu Muia, a co-plaintiff; PW 4 said that he brought a portion of the land in 1989 and then he took possession on an unclear date; PW5 said that he was born in 1973 on the suit land and he knew no other home; PW6 said that he was shown the portion of land to occupy in 1988 but it is unclear when he took possession; PW7 said that he occupied the land in 1991. I am being asked to make a blanket declaration in respect of adverse possession by all the plaintiffs and yet the evidence in support of the claim cannot certainly support that common claim.

*(iii) The defendant insisted that some of the plaintiffs were minors and had no capacity to sue in their names. On 18.2.1004, the advocate for the plaintiff stated as follows: "**I have a list of minors listed as plaintiffs whom I will not call to court.**" If indeed there are minors amongst the list of plaintiffs who are they and what period of possession adverse to the title can be attributed to them? Without that evidence, no claim of adverse possession can be sustained.*

(iv) The whole essence of the law relating to adverse possession is possession itself. I have elsewhere above said that the period of possession by individual plaintiffs is unclear. However, where is the evidence that Nguni Group Ranch was itself dispossessed of the land? There is no evidence whatsoever that registered members of Nguni Group Ranch ever lost possession of or discontinued possession of the entire parcel of land and the plaintiffs took it over. In fact although the plaintiff collectively claim the 9379 hectares comprised in the title there is no evidence that they have been in possession of that acreage to the exclusion of registered members.

*(v) Granted, as was held in **Muthuita vs Wandie [1982] KLR 166** a party need not claim definable portions of land but in this case the land has been defined but there is no evidence that any portion of it was no longer in the possession of the registered proprietor and what portion of it if at all each or all of the plaintiffs is entitled to.*

(vi) Assuming for a minute that the plaintiffs are entitled to the suit land, there are mechanisms to enforce their claims within the Group Representatives Act other than by the approach they have taken. In fact from the evidence tendered, they may have disagreed with the registered representatives and they refused to pay the survey fee. It is telling that some of the named plaintiffs were later struck off the suit by their own application because they were not consulted when the suit was filed.

The appeal and submissions of counsel

15. The appellants through Ms. Macharia attacked those findings on the basis of nine grounds of appeal which were urged globally in written submissions and in short oral highlights. In counsel's view, the most important elements to prove were long, continuous and uninterrupted occupation and she cited the case of ***Moraa Ndege vs Moenga Moenga [2015] eKLR*** for that proposition. In her view, the appellants had proved those elements through PW1 and PW2 who entered into the disputed land in 1965 and built thereon, while others were born there. The settlers went further and built schools, markets, churches and boreholes. It did not matter that they did not know the extent of the portions they occupied as that would be ascertained during the normal Government land adjudication process. According to counsel, the dispute arose in 1991 when a hefty sum of sh.20,000 was demanded for a private surveyor instead of a government one. But by then the appellants had been on the land for about 30 years and their rights had crystallized. Referring to the evidence of the respondent, counsel submitted that there was admission of long occupation but there was no attempt to have the settlers evicted. The suit based on adverse possession should therefore have succeeded.

16. Ms. Macharia then made an argument on the propriety or legality of the title issued to the respondent which issue was neither raised before the High Court in pleadings, evidence or submissions of counsel and was not raised in any of the grounds of appeal. As correctly submitted by Mr. Mwalimu for the respondent, the issue in those circumstances does not lie for our consideration. See ***Rule 72 (a) of the Court of Appeal Rules, 2010***. At all events, such argument would be suicidal since adverse possession would not lie if there was no registered owner of the land.

17. In response to the issues raised on adverse possession, Mr. Mwalimu, in written submissions and short oral highlights, submitted that the number of the appellants listed, who were purportedly the original claimants under the doctrine of adverse possession was a hoax. That is because the sworn contentions were not rebutted that some of the appellants were in fact members of the respondent's group ranch and had obtained an order removing them from the suit; most of the others were minors who had no capacity to sue; some names were repeated; others were known residents of other places; and a good number was dead. In his submission, therefore, only the seven individuals who came forward and testified could be considered as parties to the suit and to this appeal since there was no order made for a representative suit.

18. Turning to the evidence, counsel submitted that the witnesses were not sure whether the portions they claimed were within the disputed land or the extent thereof. There was also admission that the constructions made were temporary and it was more probable, as contended by the respondent, that they were recent intrusions instigated by politicians who lied that there was free land to be acquired within the disputed land. The intrusions were nevertheless repulsed through the Provincial Administration and by the members resolving in 1995 to survey and subdivide the ranch for better control.

19. Citing the case of ***Titus Kasuve vs Mwaani Investments Ltd & 4 Others [2004] eKLR***, counsel submitted that there was no dispossession or discontinuance of possession proved. Those who testified that they went into possession through sale agreements would also have made entry with the permission of the sellers and the entry would thus not be adverse. The claim based on adverse possession therefore fails totally, he concluded.

Analysis and determination

20. We have gone at some length into factual analysis of this case because the parties, on a first appeal, expect us to do so in the manner of a retrial, and to reach our own conclusions on it. That power is also donated under ***Rule 29 (1) (a) of the Court of Appeal Rules, 2010***. Generally, however, the first appellate court will not lightly differ from the findings of fact of a trial court which had the benefit of seeing and hearing all the witnesses and assessing their credibility through their demeanor. It will only interfere if the findings are based on no evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the findings it did. See in particular ***Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278*** and ***Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870***.

20. The main issue, as we see it, is to determine firstly, whether on the facts, the appellants were in possession of the disputed land during the time and period pleaded in the suit and secondly, whether in

point of law, such possession was adverse. As this court stated in Kweyu vs Omuto [1990] KLR 709 at page 716:-

“In deciding the issue of adverse possession, the primary function of a court is to draw inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of facts, the question of whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts.”

21. Which leads us to a brief consideration of the law on adverse possession.

In a recent decision made by this bench in the case of Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui, Civil Appeal No. 95 of 2014 (UR), we restated the position as follows:-

“We think, after examination of numerous decisions including Gatimu Kinguru v/s Muya Gathangi (1976) KLR 253, Hosea vs Njiru (1974) E. A. 526, Sospeter Wanyoike vs Waithaka Kahiri (1979) KLR 236, Wanje vs Saikwa (No. 2) (1984) KLR 284, Githu vs Ndeete (1984) KLR 778, Nguyai vs Ngunayu (1984) KLR 606, Kisee Maweu vs Kiu Ranching (1982-88) 1KAR 746, Amos Weru Murigu vs Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002), Kasuve vs Mwaani Investments Ltd & 4 Others (2004) KLR 184, Samuel Miki Waweru vs Jane Njeri Richu (2007) eKLR, Muraguri Githitho vs Mathenge Thiongo [2009] eKLR, and others that were cited before us, that the law is settled and is anchored on Sections 7, 13, 17 and 38 of the Limitation of Actions Act.

Section 7 provides inter alia:-

“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 is first accrued to some person through whom he claims, to that person”.

Section 13 is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

Section 17 further provides 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.

Finally Section 38 states:-

“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.”

The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is 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. See Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996.

The onus is on the person or persons claiming adverse possession “.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No

force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration.” See Wanyoike Gathure vs Berverly (1965) EA 514, 519, per Miles J. and Kneller J (as he then was) in Kimani Ruchine vs Swift, Rutherford & Co. Ltd.”

22. We also examined the comparative common law appreciation of the doctrine by the Indian Supreme Court in the case of Karnataka Board of Wakf vs Government of India & Others (2004) 10 SCC 779 where the Court stated thus:-

“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.” (Emphasis added).

23. How does all that learning apply to this case?

All the 788 appellants, on the basis of the pleadings which are binding on them, set out to prove as facts that they were entitled to ownership of the whole of the 9,379 hectares or 23,213 Acres of the disputed land which:-

- a) they had been in continuous and uninterrupted possession of for 12 years or more;
- b) the possession was open and notorious to the knowledge of the owner;
- c) the possession was without the permission of the owner;
- d) they asserted a hostile title to the owner of the property.

See Titus Kigoro Munyi vs Peter Mburu Kimani [2015]eKLR.

24. As regards the period of possession, time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the certificate of title, for that is when the Title holder is *prima facie* entitled to possession and therefore entitled to take action against any intruder to the land. See the cases of Francis Gitonga Macharia vs Muiruri Waithaka C A No. 110 of 1997 and Paul Macharia Wangunya vs Mwangi Macharia Wangunya & Anor [2015] eKLR.

25. In this case, there is evidence that the respondent was registered as the first owner of the land in 1975. It did not matter that the land certificate was issued five years later in 1980 since there is an explanation for that delay on the face of the certificate, by the Chief Land Registrar. The respondent was in law entitled to take action against any intruder from the date of registration and it follows that evidence led for periods prior to the ownership of the land by the respondent was of no probative value.

26. It is clear from the record that 781 out of 788 individuals listed as claimants in the Originating Summons did not testify on the crucial aspect of possession of the disputed land or any part of it. They could easily have presented themselves for such evidence or instructed one or more of the other claimants to tender their evidence before the court in accordance with the rules of procedure. Rules of procedure are

not mere platitudes or technicalities. They make the process of judicial adjudication and determination fair, just, certain and even-handed as the Supreme Court affirmed in the case of **Zacharia Okoth Obado vs Edward Akong?o Oyugi & 2 Others [2014] eKLR**. There was no effort made in this case to have the evidence of the 781 claimants presented and considered in any lawful manner. Whatever the reason the appellants may have had for such omission, it lends credence to the assertions by the respondent that such persons were improperly enjoined in the suit and were properly removed as parties by the trial court; or they were minors who had no capacity to sue; or many were dead; or others hailed from far flung areas and had no interest in the suit. It is our finding, in those circumstances, that there was sufficient basis for the finding made by the trial court that the fact of possession, adverse or not, by those persons was not proved and their case was for dismissal.

27. Which leaves us with the seven persons who gave evidence. Two of them were born in 1973 - two years before the disputed land was registered in the respondent's name - and much of what they knew about the land was hearsay. According to them, they were shown where to build and cultivate by their fathers after they attained the age of majority and started their own families. That would logically place their claim of possession in the 1990s which would be outside the statutory limitation period before the suit was filed to forestall eviction. According to the other five witnesses, their initial entry was not hostile as they paid monetary consideration for permission to settle. In view of the uncertainty surrounding the extent of the portions they were shown, and whether it was within the disputed land or on a cattle holding ground nearby, there is no cogent evidence about the possession claimed, or its continuity.

28. In our assessment of the issue of possession, there was no evidence that the appellants occupied or took possession of the entire area of 9,379 hectares of land parcel **Ikutha/Nguni/1** as pleaded. There is no doubt, however, that there were intermittent incursions into a portion of that land after 1975 by persons, some of whom may well have been the seven appellants. The involvement of the Provincial

Administration to keep trespassers at bay as testified by the respondent and the resolution made to sub divide the land in order to deal with them effectively, attest to that. However, in our finding, their occupation was neither continuous nor peaceful. As was held in **Jandu vs. Kirpal & Another [1975] EA 225**:

“...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be visible, exclusive, open and notorious.”

29. In sum, we find no firm basis for interfering with the findings of the trial court which we uphold. The appeal is lacking in merit and we order that it be and is hereby dismissed with costs.

Dated and Delivered at Nairobi this 3rd day of March, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR