



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, KOOME & KANTAI, J.J.A)**

**CIVIL APPEAL NO 335 OF 2010**

**BETWEEN**

**LAZARO KABEBE.....APPELLANT**

**VERSUS**

**NDEGE MAKAU.....1<sup>ST</sup> RESPONDENT**

**ANJELO NJAIBU MUGO.....2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nairobi (Osiero, J.) dated 27<sup>th</sup> February 2006*

*in*

*H.C.C.C. No. 1222 of 1999)*

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**JUDGMENT OF THE COURT**

[1] The land dispute that has given rise to the instant appeal is about ownership of a parcel of land that was originally known as land reference no. Baragwi/Thumaita/426 (hereinafter referred to as the original suit land) measuring approximately 5.4 acres. The registered proprietor of the entire parcel was Ndege Makau, the 1<sup>st</sup> respondent.

[2] The brief facts which were accepted by the learned trial Judge in resolving the dispute can be summarized. Sometimes in 1973, Lazaro Kabebe, (appellant) jointly with Silas Njogu Mariana entered into an agreement with 1<sup>st</sup> respondent to purchase the suit land at an agreed price of Ksh 6,000/=. The appellant contended that he paid part of the purchase price and was given vacant possession and carried out various developments on the same. The appellant stated in the supporting affidavit that as owner of the suit land, he cleared the land of bushes, planted trees, constructed houses for his entire family of 5 sons and their wives who have lived there as of right and without any interference by any party. The appellant blamed the 1<sup>st</sup> respondent who he alleged colluded with the co- purchaser to disposes him of the land by pretending the co- purchaser had withdrawn from the deal and the 1<sup>st</sup> respondent purported to sell the land to Anjelo Njaibo Mugo, the 2<sup>nd</sup> respondent.

[3] According to the appellant, the 1<sup>st</sup> respondent failed or neglected to obtain the requisite land control board consent to transfer the suit land, instead, he purported to subdivide the suit land into two portions being title Nos. **Baragwe/Thumaita/ 817 and 818**. The 1<sup>st</sup> respondent sold to the 2<sup>nd</sup> respondent one of the parcels known as **Baragwe/Thumaita/ 818** measuring about 3 acres while the 1<sup>st</sup> respondent was registered as proprietor of title no **Baragwe/Thumaita/ 817**. The appellant made several unsuccessful attempts to compel the 1<sup>st</sup> respondent to transfer the original suit land to him. For example in 1977, the appellant filed Nairobi, HCCC No. 963 of 1977 against the 1<sup>st</sup> respondent and his brother Silas Njogu Mariano with whom he had co-purchased the suit land. In the said suit, the appellant was seeking, *inter alia*, an order of specific performance or in the alternative, refund of monies he expended towards the development of the suit land.

[4] It is not clear to us what became of the aforesaid suit, as what now gave rise to the present appeal was an Originating Summons taken out by the appellant on 21<sup>st</sup> June, 1999. It is predicated on the provisions of the then **Order XXXVI Rule 7, 3D** of the Civil Procedure Rules and **Sections 37 and 38** of the Limitation of Actions Act and **Section 3A** of the Civil Procedure Act. The appellant sought a declaration that by virtue of his adverse possession of title Nos. Baragwe/Thumaita/ 817 and 818, he had become the owner thereof; thus he be registered as proprietor in place of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and District Land Registrar Kerugoya, be directed to transfer the suit parcels to him without requiring any consent from the Land Control Board.

[5] The 1<sup>st</sup> respondent opposed the Originating Summons through a replying affidavit which he swore also on behalf of the 2<sup>nd</sup> respondent on 27<sup>th</sup> September, 1999. The 1<sup>st</sup> respondent admitted that he agreed to sell the original suit land to Silas Njogu Mariano who is a brother of the appellant at an agreed price of Ksh 6,000/=. It was after that agreement that the appellant entered the suit land and begun utilizing it with the permission of the said Silas. The sale was however never completed as the Land Control Board Consent was never obtained. Also sometimes in 1977, the said Silas changed his mind about the land transaction and demanded immediate refund of his Ksh 6,000/= paid as purchase price and a further sum of Ksh 2500/= being the interest he had incurred. The 1<sup>st</sup> respondent contended that since he had no money to refund to Silas, he approached the 2<sup>nd</sup> respondent to buy 3 acres from the original suit land, which the 2<sup>nd</sup> respondent did agree to buy. The 1<sup>st</sup> respondent was therefore able to refund to Silas a sum of 8500/= and the parcels of land were subsequently subdivided into two portions **Baragwe/Thumaita/ 817 and 818**. The 2<sup>nd</sup> respondent was registered as proprietor of No. 818, while the 1<sup>st</sup> respondent is the proprietor of No. 817.

[6] According to the 1<sup>st</sup> respondent, the appellant stubbornly and illegally continued to occupy the entire original suit land inspite of repeated requests requiring him to vacate; the appellant also registered restrictions on the two parcels of land at the Kerugoya Lands office that prohibited the respondents as registered owners from dealing with the suit land. The 2<sup>nd</sup> respondent, in his bid to recover the land filed a suit before the Senior Resident Magistrate in **Embu-SRMCC No. 5 of 1988**, the matter was referred to the Land Disputes Tribunal, which ruled in his favour, but the appellant filed an appeal before the Provincial Disputes Tribunal which appeal was never determined.

[7] The determination of the O/S dragged in the High Court for many years with the hearing starting on 26<sup>th</sup> September, 2005 before Osiemo J. The appellant and both respondents gave evidence and the learned Judge rendered his judgment on 27<sup>th</sup> February, 2006, the following being an excerpt of the key findings by the learned Judge:-

**“The sale of the suit land to the plaintiff became null and void due to failure to obtain the Land Control Consent as required by the Land Control Act. But he has taken possession and could claim the suit land by virtue of adverse possession. But since there was interruption in 1977 and 1987 in respect of the 3 acres which were later transferred to the 2<sup>nd</sup> defendant he cannot claim title by virtue of adverse possession as far as the 3 acres were concerned. The title to the 3 acres was legally passed to the (sic) said defendant who lawfully purchased the**

same and managed to obtain consent for subdivision and transfer. But for the remaining 2.5 acres which have been in possession of the plaintiff for the last 26 years continuously and uninterrupted (sic) he has proved that he is entitled to the same by virtue of adverse possession.

Accordingly, I enter judgement as follows;

“The plaintiff is entitled to 2.5 acres by virtue of adverse possession and the 2<sup>nd</sup> defendant is entitled to 3 acres which he purchased and were registered in his name. Each party bears own costs.”

[8] Aggrieved by the aforesaid judgment, the appellant has appealed listing 5 grounds of appeal by which he challenges the decision of the learned Judge as follows;

1. THAT the learned trial Judge erred in law and in fact by holding that the 2<sup>nd</sup> defendant had proved that there was interruption in 1977 in the adverse possession by the plaintiff when the second defendant filed suit in Embu RMCC No. 51 of 1977 in which he sought orders to evict the appellant herein from the suit land when no documentary proof was adduced before the trial judge of the existence of the said suit.

2. THAT the learned Judge erred in law and in fact by holding that there was an interruption in 1987 when the second respondent herein purchased 3 acres out of the suit land which action was illegal as litigation was pending in the superior court.

3. THAT the learned Judge erred in law and in fact by not considering **section 91 (1)** of the Civil Procedure Act which was relevant to place the parties in the position they would have been, had it not been for the dismissal of the suit which was later reinstated.

4. THAT the learned Judge erred in law and in fact by not considering and making a finding on all issues agreed and raised before court.

5. THAT the learned Judge erred in law and in fact by not finding that the appellant herein had adduced sufficient evidence that he had been in continuous, uninterrupted and exclusive possession of the whole land from 1973.

[9] Learned Counsel for the appellant filed written submissions on 23/03/2016.

When the appeal came up for hearing on 31<sup>st</sup> January, 2017, Ms Kerubo Nyamwea holding brief for Mr Ndege for the appellant, adopted the written submissions and did not make oral highlights. The respondents did not attend Court for the hearing, although both were served with a hearing notice through registered post to their last known address and out of abundance of caution, they were personally served with the day's hearing notices. Thus the hearing proceeded under the provisions of **Rule 102 (2)** of the Court of Appeal Rules which provides that on the day scheduled for hearing, if the appellant is present and the respondent is absent, the appeal can be heard.

[10] In the written submissions, counsel for the appellant appears to have amplified only two grounds; that is the finding that the appellant was not in possession of the 3 acres; and failure by the learned Judge to address and determine all the agreed issues. In this regard, counsel cited the provisions of **Section 7** of the Limitation of Actions Act to support the appellant's claim of adverse possession of the suit land. According to the appellant, he was in possession for over 12 years in regard to the entire original parcel of land and the Judge erred by finding for him in regard to only 2.5 acres. The appellant contended that his possession of the entire original suit land was actual, un-interrupted and continuous. Counsel cited the case of **Mbugua Njuguna v Elijah Mburu Wanyoike & Another** Civil Appeal No 27 of 2002 in which this Court stated as follows

“The provisions of the Land Control Act apply where there is a claim of title to agricultural

land based on an agreement being a transaction or dealing in land and not where the claim is based on the operation of the law such as by adverse possession and where an abortive sale of agricultural land due to non compliance with land control law, the limitation period for purposes of adverse possession begins to run on the day the claimant is up in possession and to the last day when the application for consent of the Land Control Board should have been made – see Public Trustee v. Wanduru [1984] KLR 314. Applying that authority to this case the period of 12 years begun to run on 11<sup>th</sup> November, 1964 when appellant was shown the boundaries of the 4 acres and thereby put in exclusive possession of the four acres.”

[11] In further submissions, it was stated that the evidence before the learned Judge clearly proved the appellant was in adverse possession for the entire 5.5 acres comprising of the original title to the suit land; there was no evidence that the 2<sup>nd</sup> respondent asserted his rights over the 3 acres, therefore the appellant’s occupation and possession was un-interrupted. Moreover when the suit land was subdivided in March 1987, the appellant had already filed **Nairobi HCCC No 963 of 1977**, which was dismissed for non-attendance, but was later reinstated in March 1987; the appellant also relentlessly opposed the subdivision and registration thereto by filing an application but the court directed the matter be determined after the substantive hearing. Learned counsel also faulted the Judge for failing to consider and apply **Section 91 (1)** of the Civil procedure Act. The learned Judge is also said to have failed to consider that the alleged sale of the suit land to the 1<sup>st</sup> respondent was illegal as the land was sold when the matter was still pending in court. Counsel in his written submissions urged us to allow the appeal.

[12] This being a first appeal, it is our duty to re-evaluate the evidence and make our own conclusions remembering that we have neither seen nor heard the witnesses hence due allowance must be made for this. (See Selle v. Associated Motor Boat Company Ltd [1968] E.A. 123 at p. 126 and Williamson Diamonds Ltd. v. Brown [1970] E.A.1.) We have carefully considered both the affidavit and oral evidence presented before the learned trial Judge and it is clear what the appellant set out to prove in the originating summons was a claim of adverse possession.

[13] This was not a complex matter since the facts could easily be found in the affidavit and the oral evidence that was adduced; moreover the facts were also not largely disputed; that is in 1973, the 1<sup>st</sup> respondent entered into an agreement to sell the original suit land to the appellant and his brother Silas Njogu Mariano. What is disputed is whether the occupation by the appellant was interrupted in 1977 when the 1<sup>st</sup> respondent sold the same parcel of land to the 2<sup>nd</sup> respondent and whether indeed Silas rescinded the agreement of 1973, upon which he was refunded the entire purchase price. Be that as it may, the record shows the learned trial Judge allowed oral evidence to be adduced in addition to the affidavits as the main issue for determination was whether the appellant proved adverse possession as per the claim. In Kimani Ruchire v. Swift Rutherford & Co. Ltd. [1980] KLR,10 at pg 16 letter B, **Kneller J** (as he then was) said:-

**“The plaintiffs have 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 persuasion). 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 purposes or any endeavours to interrupt it or by way of recurrent consideration.”**

[14] We have considered the submissions by learned counsel appearing for the appellant herein and in our view, the suit in the superior court was decided upon the evidence both by way of affidavit and oral evidence which formed part of the pleadings. The appellant’s claim was principally predicated on **section 38** of the Limitation of Actions Act, the material part of which provides as follows;-

**“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.**

**(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”**

[15] The learned Judge considered all the material that was before him, assessed the credibility of the witnesses and in the end took the view that the appellant did not prove that he was in adverse possession for the entire parcel of land but only on the portion of 2.5 acres which was registered in the name of the 1<sup>st</sup> respondent and therefore judgement was entered for the appellant as such. To us, this finding is predicated on both the facts and the law as what was to be proved (or disproved) was that the appellant had not acquired title by adverse possession for the entire original parcel measuring 5.5 acres but for 2.5 acres for which he was found to have been in continuous possession without interruption for a period of over twelve years. In the celebrated case of *Peters v. Sunday Post* [1958] E.A. 424 and p. 429 E Sir **Kenneth O’Connor P.** said:-

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

[16] In dealing with circumstances in which this Court may interfere with factual findings of the High Court, this Court cited the foregoing with approval in *Kiruga v. Kiruga & Another* [1988] KLR 348 and went on to emphasize and hold as follows:-

**“2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.**

**3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.**

**4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be *disturbed*.”**

[17] Although both issues of law and facts were intertwined in this matter, basically the issue was whether the appellant’s occupation of the suit land was continuous and uninterrupted bearing in mind that in 1977, that is four years after he took possession of the suit land, there was interruption when the 1<sup>st</sup> respondent sold a portion of 3 acres of the suit land to the 2<sup>nd</sup> respondent and the appellant was given notice to vacate. The appellant resisted the notice and filed **Nairobi HCCC No. 963 of 1977** in which he admitted that the 1<sup>st</sup> respondent had issued him with a notice to vacate and to remove his developments on the parcel of land. What is more significant in our view regarding proof of adverse possession by the appellant as far as the 3 acres registered in the name of the 2<sup>nd</sup> respondent are concerned, is the fact that in 1988, the 2<sup>nd</sup> respondent filed a case at Embu being **SRMCC No 5 of 1988** claiming his portion of land. The record show that the dispute was referred to the Land Disputes Tribunal; the said dispute was decided in favour of the 2<sup>nd</sup> respondent; the appellant appealed before the Provincial Appeals Committee but the outcome of the said appeal was not disclosed.

[18] We agree with the learned trial Judge that the appellant did not establish a right by way of adverse possession in respect of 3 acres registered in favour of the 2<sup>nd</sup> respondent’s name. This was because time stopped running in the first instance in 1977 when there was demand of the entire suit land by the 1<sup>st</sup> respondent which interrupted the quiet and continuous possession. Possession was further interrupted in 1988, by way of another law suit in Embu filed by the 2<sup>nd</sup> respondent who was claiming 3 acres as registered owner. The present suit was filed in June, 1999 which was after about 10 years of un-

interrupted possession since 1988. In the case of **Githu v Ndeete** [1984] KLR page 776 Madan, Law & Potter JJA had the following to say about change of ownership in a claim of adverse possession;-

**“...Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.**

**A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land to which the owner holds title.”**

[19] We think we have given sufficient reasons why we are satisfied that the learned Judge carefully considered the evidence before him and having evaluated the same, came to the right conclusion that the appellant had not proved adverse possession for 3 acres, but as far as the 2.5 acres were concerned, the appellant’s possession and occupation was not interrupted from 1977. This finding having disposed of the entire suit, the other issues which the learned Judge is assailed for failing to consider and determine became tangential or peripheral and could not have affected the outcome. It was not therefore necessary for the learned Judge to make any determination on them. We do not find it necessary to determine them for purposes of this appeal either. We have, on our part, re-evaluated the evidence, assessed the same and making our own conclusion (*and remembering that we did not have the benefit of seeing and hearing the witnesses*), we have come to the same conclusion, as did the learned Judge.

Consequently, we are of the opinion that this appeal lacks merit and the same is dismissed and as the respondents did not appear, we make no orders as to costs.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of April, 2017.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**