IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, GITHINJI & VISRAM, JJ.A)

CIVIL APPEAL NO. 253 OF 2007

BETWEEN

MARY NDUTA MUTUNGI…….....1ST APPELLANT

LAWRENCE NJENGA MUTUNGI…….…....2ND APPELLANT

ROSE WAMBUI MUTUNGI…….....….3RD APPELLANT

FRANCIS MATHU MUTUNGI…….....4TH APPELLANT

BENSON MUTHEE MUTUNGI…….....5TH APPELLANT

JOHN MUCHAI MUTUNGI.……...…6TH APPELLANT

AND

WAMBUI NJENGA…….1ST RESPONDENT

WILFRED NG'ANG'A NJENGA……....2ND RESPONDENT

NJUGUNA NJENGA.…..……..…..….....3RD RESPONDENT

*(Being an appeal against the Judgment of the High Court of Kenya at Nairobi (**Osiemo, J.**) dated the 29th day of September, 2006*

in

H.C.C.C. No. 1229 of 1993

****

JUDGMENT OF THE COURT

[**1.**] The appellants appeal from the judgment of the High Court (**Osiemo, J**) declaring the respondents herein to be entitled to half share of land Title No. Githunguri/Githunguri 184 (suit land) by adverse possession and rectification of the land register sub-division and transfer.

[**2.**] The suit land which comprises of 5.2 acres was registered in the name of **Joseph Mutungi Ng'ang'a** on 10th December, 1958 under the **Registered Land Act** (now repealed). The registered proprietor died in about 1981. In 1989, the Public Trustee filed a **Succession Cause No. 1143 Of 1989** in the High Court at Nairobi.

A grant of representation to the estate of the deceased issued to the public trustee was confirmed on 28th May, 1992 and the estate distributed to the six appellants and three others as tenants in common equal shares. The 1st appellant is the widow of Joseph Mutungi Ng'ang'a and the 2nd, 3rd, 4th, 5th and 6th appellants are her children.

[3.] The 1st respondent is the widow of Njenga Ng'ang'a who died in about 1991. The 2nd and 3rd respondents are her children.

[4.] In 1993 the three respondents filed a suit in which they alleged amongst other things that:

(i) Njenga Ng'anga was a brother to Joseph Mutungi Ng'ang'a who were sons of Ng'ang'a Mutungi (who died in 1950)

(ii) The suit land previously composed various fragments and scattered pieces of land which, during the land demarcation and consolidation were registered in the name of Joseph Mutungi Ng'ang'a in trust for himself and his brother Njenga Ng'ang'a in equal shares.

(iii) The respondents and appellants have been in continuous open, exclusive and undisturbed occupation and possession of different half potions of the suit land since 1950s'.

(iv) The appellants have wrongfully claimed that they are the sole beneficial owners and that the respondents have no title, interest or share of the land.

The reliefs sought included a declaration that the appellants hold half share of the suit land in trust for the respondents and other heirs of Ng'ang'a Njenga and a declaration that respondents were entitled to half share of the suit land by adverse possession.

[**5**] The appellants filed a defence and counterclaim. They alleged, *inter alia,* that Njenga Ng'ang'a and Mutungi Ng'ang'a were step brothers and sons of Ng'ang'a Mutungi who died in 1952; that Ng'ang'a Mutungi did not own any land; that Mutungi Ng'ang'a purchased two pieces of land which were consolidated during land consolidation and demarcation to form the suit land; that by an act of grace Mutungi Ng'ang'a invited his step-brother to live on the land as he continued looking for alternative land; that the suit land was not registered in the name of Mutungi Ng'ang'a in trust for himself and his brother; that the occupation of land by Njenga Ng'anga and the respondents had been continually interrupted but they refused to vacate the land. By the counter-claim, the appellant sought an eviction order.

[**6.**] The respondents called five witnesses at the trial namely, **Teresia Wanja Ng'ang'a** (PW1) (Teresia) the mother of Njenga Ng'ang'a and Joseph Mutungi Ng'ang'a (Joseph), **Muniu Muchai** (PW2) (Muniu) **George Njogu Mugo** (PW3) (George) **Esther Wambui Njenga** (PW4) (Esther) and **Wilfred Ng'ang'a Njen**ga (Wilfred). On the other hand, the appellants called one witness **Mary Nduta Mutungi** (DW1) (Mary).

[**7.**] In brief Teresia testified that the suit land belonged to her and she is the one who caused Joseph Mutungi, her second son to be registered as her first born son Njenga Ng'ang'a was away. It was the evidence of Muniu that he was a member of Land Demarcation Committee in Githunguri; that the committee in 1958 registered the land in the name of Joseph Mutungi because Njenga Ng'ang'a was in detention. He further testified that when Njenga Ng'ang'a left detention, the committee sub-divided the land between the two and each built on his own portion and planted tea bushes and that the land belongs to the two brothers.

According to George, a school teacher, land demarcation in Githunguri took place between 1958-1959;

the land was ancestral land as Teresia inherited it from her deceased husband and caused it to be registered in the name of Joseph Mutungi as Njenga Ng'ang'a was away. He stated that women could not be registered as proprietors of land at that time and the land belongs to the two brothers. In addition George stated that the dispute first arose in 1992 when a family meeting was called by the 1st respondent to discuss the sub-division of the land but Wambui Njenga refused to have the land sub-divided and separate titles issued. On her part, Esther stated that she was married by Njenga Ng'ang'a in 1952 and moved into the suit land in 1960, and developed the land including digging a borehole in 1984. According to her, the land belonged to Teresia who caused Mutungi to be registered at the time her husband was under restriction. She testified that she was not aware of the succession case and when she discovered that the 1st appellant had been registered, she called a family meeting to subdivide the land. It was also her evidence that her husband is buried in the land and that she lives on the land with her two sons who have each built semi-permanent houses.

According to Wilfred, the first born son of Njenga Ng'ang'a, he moved into the land in 1960 and in 1982 built a semi-permanent house.

[**8.**] Mary Nduta, the 1st appellant gave evidence relating to the history of the land. Her evidence was brief as follows: She was married by Joseph Mutungi in 1952 and in 1958 during land demarcation Mutungi bought two pieces of land - 1½ acres from Evans Muchai and 2 acres from Gichuki Kimunya which two pieces of land were consolidated and registered in his name. Her father in law had no land of his own and was buried elsewhere. She moved into the suit land in 1959, and in 1960, Njenga Ng'ang'a moved into the land. She requested her husband to give her a place to stay and Mutungi gave him a place to build and cultivate. There were no terms but he was told to look for another land. Her husband planted 4000 tea bushes in 1962 and Njenga planted 1000 tea bushes in 1992-1993 after the death of her husband in 1987. There is a distinct boundary between the portion she occupies and the portion occupied by the respondents but she occupies a bigger portion of about 2½ acres while the respondents occupy about ¾ of an acre. There has never been any dispute over the land since demarcation but her husband had asked the respondents to vacate, before he died. When she filed the succession case, the 1st respondent did not raise any objection. It was her evidence that the 2nd and 3rd respondents live in Ruiru where they work

[**9.**] The learned judge considered the evidence and concluded:

> ***"Limitation is a defence by a person in possession of land adversely to the owner's rights. It is the owner of the land who is obliged to take reasonable steps to re-enter his land. This he can do by use of peaceful means or by instituting action to exert his rights over the land. The defendant had not resorted to any of those means. The plaintiff having been in possession of half share of the suit land in continuous and uninterrupted occupation since 1960, he is entitled to the said half share of the suit land by adverse possession and his claim therefore succeeds."***

[10.] The first ground of appeal is in essence that the court erred in law in giving judgment for adverse possession when the claim was fatally defective in that it was brought by way of a plaint instead of by originating summons.

Section 38(1) of the **Limitation of Actions Act** provides, *inter alia*, where a person claims to have become entitled by adverse possession to land, he shall apply to the High Court for an order to be registered as proprietor of the land instead of the person registered as proprietor.

Rule XXXVI 3(1) (1) [now Rule 37(7)(1)] of Civil Procedure Rules provides that an application under section 38 of the Limitation of Actions Act shall be made by originating summons. Rule XXXVI 3(1) (2) [now rule 37(7)(2)] provides that the originating summons shall be supported by an affidavit annexing an extract of title to the land in question.

As Rule 10(1) of order XXXVI (now rule 19(1) of Order 37 provides, the court has power and discretion to order proceedings brought by originating summons to continue as if the cause had been began by filing a plaint. This discretion can be used in spite of the fact that the cause could not have been begun by a

plaint (Order XXXVI) Rule 1093) now order 37 rule 19(3).

[**11.**] **Ms. Wambua** learned counsel for the appellant relied on several authorities – **Patrick A. Odako & Anor v William N. Kirew** ***[2000] eKLR***, **Githurai Ting'ang'a Co. Limited v Moki Savings Co-operative Society Limited** ***[1999] eKLR***; **Maina Njuguna v. Paul Njuguna Mwangi** ***[2000] eKLR***. Those authorities including **Bwana v Said [1991] 2 KAR 262** lay down the principles that a claim for adverse possession can only be made by originating summons.

On the other hand, Ms. Kiiru, learned counsel relied on the Ruling of Ouko, J. (as he then was) in **Joseph Mwangi Gachaga v. Naomi Wambui – High Court Nakuru Civil Suit No. 24/2011 [2012] eKLR**, where the learned Judge said;

> ***"Under order 37 rule 7 of Civil Procedure Rules, 2010, a claim based on adverse possession must be made by originating summons. The courts have for a long time moved away from insisting that a claim to property by adverse possession can only be made by an originating summons. Indeed the courts have held that in view of the fact that originating summons procedure is resorted to in simple and uncomplicated suits, originating summons may not be suitable in claim to land by adverse possession.***
>
> ***There are therefore numerous cases where the courts have allowed parties to raise adverse possession in their defence (****Wabala & Another v Okumu****) (1997) LLR 608 (CAK)* ***or by a plaint (****Lusenaka v Omocha****) (1994) LLR 578* ***or even by a counter claim."***

[**12.**] It is clear that the courts, particularly this Court have not been consistent on the question whether a claim to land by adverse possession not made by originating summons as prescribed by the rule is fatally defective. As late as 30th October, 2015, this Court in **Edwin G. K. Thiongo & Anor v Gichuru Kinuthia & 2 Others [2015] eKLR** said in part:

> ***"The respondent's claim to the suit land was made by way of a counter-claim as opposed to an originating summon. In our view, we find that the learned Judge of the High Court erred in failing to find that a claim for adverse possession must be made by way of an originating summons and not by way of a counter-claim as was the case before him."***

A few months later on 4th December, 2015 a differently constituted bench of this Court in **Gulam Miriam Noordin v. Julius Charo Karisa [2015] eKLR** said:

> ***"Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons."***

[**13.**] In the instant case the learned trial Judge said:

> ***"Counsel for the defendant challenged the validity of the suit on the ground that since the claim is by adverse possession, the suit ought to have been brought by way of an originating summons and not by way of a plaint. With due respect to counsel when a suit claim is through trust the plaintiff is quite in order to claim by adverse possession in the alternative"*** (*sic*)

[**14.**] The substantive law which confers a right to a person to acquire land registered in the name of another person by adverse possession merely gives a right to apply to the High Court without prescribing the procedure for enforcement of such right. The High Court has jurisdiction to entertain a claim to land by adverse possession. Thus a claim to land by adverse possession by a procedure other than the prescribed procedure does not go to the jurisdiction of the court to entertain the claim. It is merely a procedural irregularity which the court in its discretion and in the interest of justice can waive under Article 159(2)(d) of the Constitution which provides that in exercising judicial authority, the court shall be guided by the principle that justice shall be administered without undue regard to procedural

technicalities. It is the law that originating summons is not the appropriate procedure for determining contentions disputes. That must be one of the reasons why the rules give power to the High Court to convert proceedings brought by originating summons into proceedings brought by a plaint even where such proceedings would not have been brought by way of a plaint. It follows that where there is a breach of prescribed procedure, the main consideration is not the form but the nature of the proceedings and whether the procedure adopted will result in a just, efficacious and expeditious resolution of the dispute.

[**15.**] In the present case, the claim to land was mainly based on the doctrine of trust. Although it was not stated so, the claim to land by adverse possession was an alternative claim and the High Court undertook it as such. Apparently, the issue of the appropriate procedure was not framed. The trial continued over a long period and witnesses were heard and cross-examined. Apparently, it is only in the written submissions after the conclusion of the proceedings that the appellants' counsel raised the issue of procedure for the first time.

The dispute was contentious and had the suit been began by originating summons, it is probable that the court could have directed that the proceedings should continue as if filed by a plaint. It is not contended that the appellants were prejudiced by the procedure adopted. We hold therefore that the respondents applied the appropriate procedure for the resolution of the contentious dispute and dismiss the ground of appeal.

[**16.**] The 2nd and 3rd grounds of appeal which are the main grounds were argued together. They fault the High Court for allowing respectively, the claim for adverse possession when it had not been proved and when the exact acreage allegedly occupied by the respondents had not been proved. The appellants' counsel made submissions in respect of both the claim for land by trust and adverse possession and submitted that both were not proved. The respondents' counsel submitted on both claims.

[**17.**] The decision of the High Court was solely based on the claim to land by adverse possession and made no finding on the claim based on trust. Rule 94(1) of the Court of Appeal Rules provides:

> ***"A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of his contention".***

The grounds of appeal relate to the finding of the court that the respondents are entitled to land by adverse possession. In the absence of a notice of affirming the decision on the additional grounds based on trust, the Court can only consider the appeal before it.

[**18.**] The appellants' counsel has submitted that the legal requirements for adverse possession were not established by the respondents. It is her submission that Njenga Ng'ang'a was allowed by Joseph Mutungi to live in the land temporarily; that Njenga Ng'ang'a constructed temporary structures and planted a few tea bushes after the death of Joseph Mutungi; that the respondents have been occupying a smaller portion; that it is only the 1st respondent who occupies the land and that the 1st respondent has been told to vacate the land severally.

On the other hand, the respondents' counsel submitted that the respondents have lived on half portion of the land peacefully, continuously and without being interrupted for over 31 years; cultivated the land and constructed houses; Teresia and Njenga Ng'ang'a were buried in the land; that the 2nd and 3rd respondents were raised in the land and have constructed houses on the land and that neither Joseph Mutungi nor the 1st respondent have never re-entered the land.

[**19.**] The Court has re-evaluated the evidence and considered the respective submissions of counsel. There is overwhelming and uncontroverted evidence that Njenga Ng'ang'a and his family, the respondents herein, have lived on a distinct and identifiable portion of the suit land since 1960. By the time the suit was filed in 1993, and even before the succession was filed in 1992, the respondents had lived in the suit land as of right and openly and exclusively and had un-interrupted occupation for over 30 years. The mere change of ownership of the suit land as a result of the succession case would not have

interrupted adverse possession which in any case had matured. (See **Githu v Ndeete (1984) KLR 776**.

[**20.**] It is evident that Njenga Ng'ang'a's mother Teresia and Njenga Ng'ang'a himself were buried in the disputed land. It is also evident that Njenga Ng'ang'a and the respondents constructed houses on the suit land, cultivated and developed the land as their own including digging a well.

It was submitted that it is only the 1st respondent who occupies the land and that the 2nd and 3rd respondents live and work in Ruiru. However, there was overwhelming evidence that the 2nd and 3rd respondents were born and brought up in the suit land and each has constructed a semi-permanent house. They have lived together with their parents in the disputed portion of the land as a family and there was no evidence that they have abandoned the land or ceased to have physical control of the land. The possession of the land by the three respondents is a single possession exercised by the three jointly.

[**21.**] Although the 1st appellant claimed that Njenga Ng'ang'a had been told by her husband to vacate the land, she admitted in her evidence there has never been any family dispute about the land since demarcation. The evidence that Njenga Ng'ang'a had been asked to leave the land was refuted by both Muniu and George.

[**22.**] The 1st respondent relied on the sketch plan which she admitted was prepared by her son to support her claim that the appellants occupy a larger portion than the respondents. However, the sketch plan is just a rough sketch plan not drawn to scale. Furthermore, her evidence was not verified by concrete evidence such as a survey report. In addition, Muniu who was a member of the demarcation committee categorically stated that the land was sub-divided equally and a boundary planted between the two portions. His evidence was substantially supported by George who said that the land was divided equally. Thus, there was no concrete evidence that the appellants occupy a bigger portion than the respondents.

[**23.**] From the above analysis, we have come to the conclusion that the High Court reached the correct decision and this appeal has no merit.

[**24.**] As regards the costs, the High Court ordered each party to bear its costs. There is no cross-appeal against the order as to costs.

There was evidence from George which is supported by the minutes produced in the High Court that Teresia called elders to discuss the sub-division of the land into equal portions and that the elders resolved that the land be sub-divided equally but the appellants rejected the decision. Thus the litigation was precipitated by the appellants, resulting in the respondents incurring unnecessary costs. Thus it is just that the appellants should pay the costs of this appeal.

[**25.**] Accordingly, the appeal is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28th day of July, 2017.

P. KIHARA KARIUKI (PCA)

…….....

JUDGE OF APPEAL

E. M. GITHINJI

…….....

JUDGE OF APPEAL

ALNASHIR VISRAM

…….....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR