



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, GATEMBU, MURGOR, JJA

CIVIL APPEAL NO. 101 OF 2015 KISUMU

BETWEEN

**PRISCA NAROTSO ETYANGA**

**Alias PRISCA NAROTSO ETYANG'I.....APPELLANT**

AND

**JAMES GITAU GACHAIYA**

**Suing on behalf of a Legal Representative of**

**ELIZABETH NJERI GITAU.....RESPONDENT**

*(Appeal from the Judgment and Order of the High Court of Kenya at Busia*

*(S. M. Kibunja, J) delivered on 26<sup>th</sup> August, 2015*

*in*

***BUSIA H.C. ELC. NO. 35 OF 2014)***

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**JUDGMENT OF THE COURT**

1. This is an appeal from the judgment and decree of the Land and Environment Court at Busia delivered on 26<sup>th</sup> August 2015 decreeing that the respondent had acquired by adverse possession 0.02 hectares of the appellant's property known as Title Number North Teso/Kocholia/789 and ordering the appellant to subdivide the said parcel and to transfer 0.02 hectares thereof to the respondent as the administrator of the estate of Elizabeth Njeri Gitau, deceased.

**Background**

2. On 19<sup>th</sup> March 2010, the respondent, suing on his own behalf and as the legal representative of the estate of his late mother, Elizabeth Njeri Gitau, deceased, commenced suit in the High Court at Busia against the appellant seeking a declaration that the respondent had acquired 0.02 hectares of the appellant's property known as Title Number North Teso/Kocholia/789 by adverse possession.

3. The respondent's case was that in 1977, his late mother bought the appellant's commercial plot measuring 0.02 hectares with a commercial building on it that was to be excised from Title Number North Teso/Kocholia/789. The purchase price was Kshs. 46,000.00. The respondent contended that at the time of purchase, that portion was clearly demarcated by a fence and that they immediately occupied the plot and rented out part of the premises. The respondent asserted that the deceased had paid the full purchase price and obtained consent of the land control board to subdivide and transfer the portion purchased, but the appellant avoided signing the transfer forms thereby frustrating her from getting her title deed. The respondent further claimed that the appellant charged the property with Barclays Bank to secure a loan. The respondent claimed that the appellant's title to the demarcated portion measuring 0.02 hectares had been extinguished by adverse possession.

4. In opposition to the originating summons, the appellant filed a replying affidavit and counterclaim denying the respondent's claim. She asserted that she let out one of the buildings on the property to the deceased for Kshs. 45,000.00 for a period of 9 years for a bar business; that she occupied the building for a period of 5 to 6 years and then disappeared leaving the business in the hands of a friend. She was categorical that she had *"never sold any part of the property to the [respondent's] mother"* and that she did not occupy the property for more than 6 years, leave alone 12 years as claimed. She asserted that the consent of the land control board produced by the respondent in respect of the subdivision and transfer were *"fraudulent documents."* She complained that the respondent had unlawfully and unfairly lodged a caution against the title and sought, by counterclaim, an order for the removal of the caution.

5. In his testimony before the trial court, the respondent stated that he was appointed by the court as the administrator of the estate of the deceased; that his mother, the deceased, established a home on the property after purchasing it from the appellant and put up a commercial building with three doors where she was living and operating a bar and butchery; that she had bought the property for Kshs.46, 000.00 but had not obtained title by the time of her death on 22<sup>nd</sup> June 1992; that upon the death of the deceased, he endeavored to have the appellant transfer the property, but which was in vain; that he filed a caution against the title which the appellant attempted to remove; that the Land Registrar declined to lift the caution after hearing the parties; that he established from Malaba Land Control Board that consent to subdivide the property and transfer the portion measuring 0.02 hectares to the deceased was granted on 21<sup>st</sup> December 1977; and that the deceased was in occupation of the property from 1977. He went on to say that in 1988 his mother left Amagoro for Nairobi and rented out the property to one Robert Njiiri Mbugua, and had since rented out the premises to other people. He stated that prior to filing suit, he wrote a demand letter to the appellant. He denied that his mother had paid only Kshs. 10,000.00 maintaining that the total purchase price of Kshs. 46,000.00 had been paid.

6. Robert Njiiri Mbugua testified as PW2. He stated that he knew the deceased and that he had rented her premises from 1988 to 1993 prior to which the deceased was living on the property and operating business before moving to Nairobi. He stated that the deceased had shown him a sale agreement in 1988 indicating that she had bought the property.

7. George Gachaiya Mbitiru, (PW3) a brother of the deceased, testified that the deceased bought and settled on the property with her children including the respondent in 1977 where she remained until she got sick and returned to Nairobi in 1991.

8. In her testimony before the trial court, the appellant stated that the deceased used to reside on the and offered to buy a portion; that she accepted to sell a portion to her at an agreed price of Kshs. 46,000.00; that the deceased paid only Kshs. 10,000.00; that they went to Amagoro Land Control Board and on learning that the deceased had not paid the whole purchase price, the board told them to return after the payment of the full purchase price; that the deceased *"later brought the consent that indicated that Shs. 10,000.00 had been paid"* and that later the son conspired with the surveyor to subdivide the land. She conceded that she signed the application for consent of the land control board. She stated further that in 2009 she went to the plot and found a tenant operating on the plot; that she informed that tenant that the respondent had not cleared with her and that *"he should start paying rent to"* her and thereafter started issuing rent receipts. She asserted that she was in possession of the property when the respondent instituted suit in 2010.

9. Job Otemba (DW2) stated in his testimony that he was a tenant on the property running a hotel business. He stated that he initially got the premises from one Oriwa before the respondent demanded that the rent should be paid to him. Thereafter, the appellant claimed that rent should be paid to her. From July 2009 until 19<sup>th</sup> March 2012 he was paying Kshs. 3,000.00; that at one point the respondent claimed to be the one entitled to collect rent and later the appellant claimed to be the one entitled to collect the rent.

10. After hearing the parties, the learned trial Judge identified the following issues for determination. One, whether the deceased entered into a sale agreement over the property in 1977 and whether the deceased took possession. Second, whether the deceased's occupation of the property became adverse and if so from when. Three, whether the occupation and possession of the property by the deceased and the respondent was "open, notorious and continuous for over 12 years" and if so whether the appellant's title to that portion was extinguished. Four, whether the respondent should be declared the owner of the property.

11. On the question whether the deceased entered into a sale agreement over the property in 1977 and whether the deceased took possession, the trial Judge found as a fact that the documents produced, namely the application for consent of land control board dated 20<sup>th</sup> December 1977 and the letter of consent dated 21<sup>st</sup> December 1977 confirmed the sale of the property for Kshs. 46,000.00. The Judge also found as a fact that the deceased and her son, the respondent, and their tenants took possession of the property in 1977 and used it until 2009 when the appellant demanded rent from the then tenant.

12. The learned Judge also found the appellant was determined to frustrate the deceased's efforts to transfer the property in that she charged the whole land without first ensuring that the portion of 0.02 hectares was excised and transferred to the deceased. The Judge went on to state that the deceased could have moved the court for specific performance after the appellant declined to complete the subdivision and transfer of the portion of 0.02 hectares; that the appellant would also have sued the deceased for the balance of the purchase price but none sued the other for performance of the contract; that the consent of the land control board was obtained on 21<sup>st</sup> December 1977 and the appellant's claim against the purchaser thereafter was for the unpaid purchase price, if any, and that the purchaser's possession of the 0.02 hectares portion after 21<sup>st</sup> December 1977 was not with the [appellant's] permission and was therefore adverse to her title." According to the Judge, the period of 12 years from 21<sup>st</sup> December 1977 ended on 21<sup>st</sup> December 1989" and since the appellant did not take any steps to recover the plot within the time set

under Section 7 of Limitation of Actions Act, Chapter 22 of the Laws of Kenya and after the period of 12 years, her right to recover the plot lapsed. This clearly shows that by the time the deceased died in 1992, she had been in possession of the plot for a period of over 14 years.

13. The Judge also found that the deceased, the respondent and their tenants were in open, notorious and continuous possession from 21<sup>st</sup> December 1977 to the time the suit was filed.

14. Based on those findings, the Judge ordered that the appellant do subdivide the portion of 0.02 hectares occupied by the respondent and his deceased mother since 1977 from her land parcel North Teso/Kocholia/789 and transfer it to the respondent, James Gitau Gachaiya as the administrator of the estate of Elizabeth Njeri Gitau forthwith; that should the appellant decline to sign any of the documents necessary to give effect to the subdivision and transfer, the Deputy Registrar was empowered to sign all such documents on her behalf. The appellant was also ordered to pay the respondent's costs of the suit.

#### **The appeal and submissions by counsel**

15. Aggrieved, the appellant lodged this appeal in which he complains that the trial Judge erred in: holding that the deceased had paid the entire purchase price; that holding that the respondent became the adverse possessor of the property on or about 21<sup>st</sup> December 1989 when there was no evidence to show who was in possession between 1986 to 1993; in holding that adverse possession started running on 21<sup>st</sup> December 1977 when there was no evidence when possession of the property took place.

16. Learned counsel for the appellant, Mr. Emmanuel Situma, submitted that whereas it is conceded that there was a sale transaction of the property between the deceased and the appellant, there was no evidence that the balance of the purchase price of Kshs. 36,000.00 was paid; that the land control board consent produced before the trial court indicates that Kshs. 10,000.00 was paid; that the appellant's testimony was that she had received Kshs. 10,000.00 only from the deceased; that consequently the entry of the deceased into possession of the property was as a licensee with the permission of the owner; that time for purposes of limitation could not therefore begin to run in December 1977 as the Judge found; that the deceased remained on the property as a purchaser and time for purposes of adverse possession could not run in the absence of the balance of the purchase price. Furthermore, counsel argued, the respondent was not in possession of the property when the suit was filed.

17. Opposing the appeal, learned counsel for the respondent, Mr. Moses Wanyama submitted that the appellant did not in her affidavit in opposition to the originating summons assert that the balance of the purchase price was not paid; that in any case the appellant did not between 1977 and 1988 demand to be paid any money and has never since demanded payment of the alleged balance of the purchase price; that the learned Judge correctly observed that the consideration indicated in the land control board consent had been altered; that the claim for adverse possession was indeed established and the High Court correctly granted the orders that it did and that the respondent has been in possession of the property all through.

#### **Determination**

18. We have considered the appeal and submissions by counsel. The issue in this appeal is whether the learned trial Judge was right in holding that the respondent acquired the position of an adverse possessor. As submitted by counsel, the answer to that question in turn depends on whether the learned trial Judge erred in holding that the deceased, the respondent's mother, had fully paid the purchase price for the property.

19. This Court recently summarized the necessary ingredients to sustain a claim for adverse possession in the case of **Samuel Kihamba v Mary Mbaisi [2015] eKLR** where the Court stated:

***“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land. See Eliva Nyongesa Lusenaka & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur). These prerequisites are required of any claimant...”***

20. In the earlier case of **Wambugu vs. Njuguna, [1983] KLR 172** this Court held that in order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having discontinued his possession of it; that the Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession; that the proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period. [See also **Wanje v Saikwa (No 2) [1984] KLR 284**]

21. Possession by itself cannot therefore found a claim for adverse possession. It is when it is adverse that it can found a claim in favour of the person in adverse possession. See **Sammy Likuyi Adiemu vs. Charles Shamwati Shisikani [2014] eKLR**.

22. In **Public Trustee vs. Wanduru [1984] KLR 314**, this Court relying on an English case of **Bridges vs. Mees (1957) 1 Ch. 475** that was cited with approval in **Mwangi Githu vs. Livingstone Ndete and others, CA Non. 24 of 1979** held that a purchaser in possession of land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run as against the vendor. That principle was further articulated by this Court in **Jaswantkumarba Benesingh Jethwa v Postal Corporation of Kenya [2015] eKLR** where the Court explained that:

***“It is however necessary to distinguish between a purchaser in possession under an agreement of sale pending completion and a purchaser in possession, who has paid the whole of the purchase price, pending registration of transfer so far as it relates to when the time starts running for purposes of adverse possession. This distinction was clearly brought out in Wambugu v Njuguna (supra). There, it was held that where a claimant is in exclusive possession under a contract of sale pending completion, he is in possession with leave and licence of the vendor and possession can only be adverse once the contract is repudiated or rescinded (see also Mungania v Imanyara (supra)).***

***It was further held that where a claimant is in exclusive possession under a contract of sale, the claimant’s possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. Where, however, the purchaser is put in possession after paying the full purchase price, his possession becomes adverse to that of the vendor when he took possession for that is the time when vendor’s possession was discontinued (Public Trustee v Wanduru, (supra)).*** [Emphasis]

23. The learned trial Judge was therefore right in proceeding on the basis that the claim for adverse possession was sustainable if the payment of the purchase price had been completed. The learned Judge appears to have adopted a two-pronged approach. On the one hand he seems to have proceeded on the basis that even if the full purchase price was not paid in full, the contract for the purchase was either rescinded or repudiated, which in effect terminated possession by consent. On the other hand, the learned Judge also proceeded on the basis that the payment of the purchase price was completed in which event possession became adverse when the appellant’s possession was thereby discontinued.

24. Based on our review and evaluation of the evidence, we think the finding by the learned Judge that the respondent’s mother had fully paid the purchase price was well supported. To begin with, the appellant denied in her affidavit and counterclaim in answer to the claim for adverse possession that she had agreed to sell the property. She asserted at the time that she let out one of the building to the deceased in 1977 for a period of 9 years for a rental of Kshs. 45,000.00. Subsequently she changed her version of the story and conceded that she indeed agreed to sell the property to the deceased for a price of Kshs. 46,000.00 but asserted that only Kshs. 10,000.00 was paid leaving a balance of Kshs. 36,000.00 that was never paid with the result that the continued possession of the property by the deceased was as a licensee. [A licensee has no possession **[Hughes vs. Griffin [1969] 1 WLR 23]**

25. The appellant relied on the letter of consent of Amagoro Land Control Board dated 21<sup>st</sup> December 1977 with respect to the subdivision and transfer of the property from the appellant to the deceased as evidence to show that the consideration paid was only Kshs. 10,000.00. She however conceded that there were alterations in that consent letter relating to the amount of consideration. She also conceded that she was privy to the application for consent of the land control board in which the price was indicated as Kshs. 46,000.00.

26. There is no evidence whatsoever that at any time after 1977 the appellant demanded payment of the alleged balance of the purchase price either from the deceased or from the respondent. There is therefore no basis for faulting the finding by the trial Judge that the deceased had fully paid the purchase price. The finding by the learned Judge that the deceased had paid the full purchase price for the property is therefore well founded with the result that conclusion by the learned Judge that the deceased’s “possession of the 0.02 hectares portion after 21st December 1977 was not with the [appellant’s] permission and was therefore adverse to her title” is supported by the evidence.

27. We do not, therefore, have a basis for interfering with the finding by the learned Judge. The appeal is has no merit. It is hereby dismissed with costs to the respondent.

Orders accordingly.

**Dated and delivered at Kisumu this 28<sup>th</sup> day of September, 2017.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**