



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & MURGOR, J.J.A.)

CIVIL APPEAL NO. 306 OF 2013

BETWEEN

**PERIS NYIHA KANG'ETHE, JANE WANJIKU KANG'ETHE, NJERI KANG'ETHE AND
MANASES KIHU KANG'ETHE (Suing as the administrators of the Estate**

of the late Serah Njeri Kang'ethe APPELLANTS

AND

FORTUNATUS CHARLES KAMAU RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ougo, J.)

delivered on 21st December, 2012 in

E.L.C. No. 2288 of 2007 (O.S.)

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal is against the judgment of Ougo, J. delivered on 21st December, 2012 in which the court declared that the respondent had acquired title and became the proprietor of a parcel of land known as **L.R. No. Dagoretti/Kangemi/711** (the suit land) by way of adverse possession; and further directed that the respondent be registered as the proprietor of the suit land in place of the late **Serah Njeri Kang'ethe**.

2. Being aggrieved by that decision, the appellants, as administrators of the estate of the late Serah Njeri Kang'ethe, preferred an appeal to this Court. Later on we shall set out the grounds of the appeal, but first, a summary of the pleadings and the evidence tendered before the High Court.

THE RESPONDENT'S CASE

3. In his affidavit in support of an amended Originating Summons, **Fortunatus Charles Kamau**, the applicant (now the respondent), stated that the suit land, which contains by measurement approximately 0.4 hectares or thereabout, was initially part of a larger parcel of land known as **L.R. No. Dagoretti/Kangemi/165**, which was registered in the name of the late **Ashford Kang'ethe King'ang'i**

(Ashford), who died around 1977; that Ashford sold the suit land to the respondent in 1973 at an agreed price of Kshs.36,000/=; that the respondent paid the full purchase price and took possession of the suit land, fenced it, built a timber yard thereon; started on the suit land a saw milling business in partnership with one Francis Kinuthia; and that Ashford passed away before he had transferred the suit land to the respondent.

4. The respondent further stated that he continued to occupy the suit land after the demise of Ashford; that Serah Njeri Kang'ethe (Serah), the administratrix of Ashford's estate, did not interfere with the respondent's occupation of the suit land nor raise any claim over it; that in 1996 after the death of Serah, the appellants wrote to the respondent demanding that he vacates the suit land; that he did not vacate the suit land but instead instructed his advocate to file suit against the appellants; that during the existence of the suit Njeri King'ang'i, one of the administrators of Serah, demolished the timber yard, the office block and the fence that he had erected round the suit property; that the respondent lodged a complaint with the police and Njeri was arrested, charged and convicted of the offence of malicious damage to property. The respondent averred that he had been in continuous occupation and possession of the suit land for a period of over 12 years and therefore entitled to be registered as proprietor of the same in place of Serah.

THE APPELLANT'S REPLY

5. The appellants filed a replying affidavit that was sworn by **Peris Nyiha Kang'ethe**, for and on behalf of the administrators of Serah's estate. They averred that before his death, Ashford had rented a portion of his land to the respondent and his partner, Francis Kamau Kinuthia, who put up structures that they were using as a timber yard and an office; that there was no sale agreement between the respondent and Ashford; that in 1982 the respondent and his partner relocated their timber business to Londiani and abandoned the use, possession and occupation of the suit land and also ceased to pay rent; that in 1996 the respondent was asked to remove his structures from the suit land but he refused; that as a result Njeri King'ang'i (one of the appellants) instructed a court broker to demolish the timber structures; and that since 1982 the respondent had not occupied the suit land.

THE RESPONDENT'S TESTIMONY

6. The respondent gave oral evidence that accorded with his depositions in the affidavit sworn in support of the originating summons. In cross-examination, he stated that there was no written sale agreement between him and Ashford; that since 1982 he was unable to continue with the timber business at the suit land but he left the structures that he had put on the suit land and moved his business operations to Londiani.

7. The respondent's evidence was supported by **Francis Kamau Kinuthia, PW3**, the respondent's partner, who testified that the suit land was bought in 1973 for Kshs.36,000/= and they carried on timber business on suit land until 1982 when they moved to Londiani; but the timber structures that they had put up with the respondent remained on the suit land until 1997 when they were demolished by the appellants.

8. **Peter Ochieng Misiara, PW2**, told the trial court that he was a former employee of Eagle Watch Security Company; that in 1998 the respondent had hired the said security company to guard the suit land; that whilst there some invaders entered into the suit land and demolished the structures that had been erected there.

THE APPELLANTS' TESTIMONY

9. The appellant called two witnesses. Peris Nyiha, DW1, reiterated the contents of her replying affidavit. According to her, the respondent had leased the suit land and was supposed to have been paying a monthly rent of Kshs.500/= but he had refused to do so.

10. **David Mwaura Wathing**, DW2, a nephew of Ashford, told the trial court that the respondent did not purchase the suit land from Ashford; that the respondent had merely leased from Ashford a parcel of land

at a rent of Kshs.500/= per month, but Ashford did not issue any receipt on account of the rent paid.

THE TRIAL COURT'S DECISION AND GROUNDS OF APPEAL

11. Having considered the evidence on record as well as the parties' written submissions, the learned judge was satisfied that the respondent had proved his case. She rejected the appellant's contention that the respondent had leased the suit land from Ashford as alleged but the respondent had refused to pay rent; saying that there was no evidence of any demand for rent, either by Ashford or Serah.

12. In their grounds of appeal, the appellants argued, *inter alia*, that the learned judge erred in fact and in law: in making a finding that the respondent had been in continuous and uninterrupted possession of the suit land from 1973 to 1996 or thereabout; in finding that the respondent had bought the suit land from Ashford in 1973 when there was no evidence in support thereof; in failing to appreciate that the respondent's entry into the suit land was with the permission of Ashford and thus the occupation could not have been adverse; in holding that the suit land was demarcated and/or identifiable as at the time the respondent took possession of it; and in ordering that the respondent be registered as the proprietor of the suit land, whereas the particular parcel of land that the respondent was claiming had not been established, in the absence of title No. Dagoretti/Kangemi/711 in 1973, and in view of the respondent's evidence that he was not claiming the parcel of land Ashford had initially allowed him to occupy.

SUBMISSIONS BY COUNSEL BEFORE THIS COURT

13. **Mr. Oscar Litoro**, learned counsel for the appellants, citing this Court's decision in **WAMBUGU v NJUGUNA [1983] KLR 173**, submitted that adverse possessory rights are acquired only by actual, continuous and uninterrupted use of land for a period of at least 12 years; further, the use or possession of the land must be inconsistent with the owner's use and enjoyment thereof. In this appeal, possession of the suit land by the respondent was not adverse, it was pursuant to permission granted by the registered owner, counsel submitted.

14. Secondly, he submitted, the High Court erred in holding that the respondent had been in occupation of the suit land for 23 years at the time the appellants issued an eviction notice dated 23rd October, 1996. He contended that the respondent's occupation of the suit land ended in 1982, a period of 9 years, though he re-entered it in 1996 when he placed guards thereon; that from 1996 to 2007 when the respondent filed the suit in the High Court was a period of 10 years and 11 months.

15. The appellants' counsel added that from 1982 to 1996 there was no activity or business on the suit land; it was therefore an error of law for the learned trial judge to hold that the respondent was in possession of the suit land over that period of time. Counsel cited this Court's decision in **ROBERT SHUME & 3 OTHERS v SAMSON KAZUNGU KALAMA [2015] eKLR**, where the court relied on the decision of **WABALA v OKUMU [1997] LLR 609 (CAK)**, where it was held:

“That in these circumstances, the learned magistrate was perfectly justified in coming to the conclusion that the respondent had failed to prove that he had been in occupation of the land for a continuous period of twelve years. We think that it would not only be wrong but also dangerous to introduce the concept of constructive occupation. To be able to acquire title to land registered in another person's name, one had to literally be in occupation of the land, for mere presence of crops on land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land.”

16. The appellants' counsel further submitted that the respondent did not prove that he had purchased the suit land from Ashford; that there was no sale agreement between the respondent and Ashford; that under **section 3 (1) and (2)** of the **Law of Contract Act** no action to charge a person upon any special promise to answer a debt, default or miscarriage of another person could lie, unless the agreement or memorandum upon which such suit is brought is in writing and signed by the party charged therewith or any party authorized by him.

17. Lastly, the appellants' counsel argued that the suit land was not demarcated or identifiable at the time the respondent alleged to have acquired it; that Ashford died before he had completed the subdivision of the original parcel of land. It was not therefore possible to state with precision the portion allegedly occupied by the respondent and the boundaries thereof, which are important elements in a case of adverse possession. Counsel relied on this Court's decision in **TITUS MUTUKU KASUVE v MWAANI INVESTMENTS LIMITED & 4 OTHERS [2004] eKLR**.

For these reasons, Mr. Litoro urged this Court to dismiss the appeal.

THE RESPONDENT'S SUBMISSIONS

18. Both **Mr. Brown Kairaria** and **Mr. Michael Amalemba** appeared for the respondent. They relied on their written submissions that were highlighted by Mr. Kairaria. The respondent's learned counsel submitted that the respondent had proved all the necessary ingredients for grant of his claim over the suit land under the doctrine of adverse possession in terms of the provisions of **sections 7, 13 and 38** of the **Limitation of Actions Act**. Counsel reiterated that the respondent lawfully purchased the suit land in 1973; that he took possession of it and developed it; he remained in occupation until his structures were unlawfully demolished in 1997; and that the suit land was properly identifiable and its boundaries were well marked, as its size was one acre and it had been fenced.

19. In response to the provisions of **section 3(1) (2) and (3)** of the **Law of Contract Act**, Mr. Kairaria submitted that the respondent and Ashford entered into an oral agreement and therefore the provisions of **section 3(3)** of the **Law of Contract Act** which came into effect on 1st June, 2003 were not applicable at the time the oral agreement was made.

20. Regarding the mode of occupation of the suit land after 1982 when the respondent stopped operating his timber business at the yard that he had established on the suit land, the respondent's counsel submitted that the occupation was in line with what this Court held in **PETER MBIRI MICHUKI v SAMUEL MUGO MICHUKI (supra)**, that, "**possession of land or any property for that matter need not be actual and physical, it can also be constructive.**"

21. The respondent's learned counsel further submitted that although the initial entry into the suit land by respondent was by virtue of the oral sale agreement, the respondent's continued possession of the suit land became hostile and therefore adverse to the appellant's title after lapse of six (6) months within which the parties ought to have obtained the area Land Control Board's consent.

22. On the basis of the foregoing submissions, Mr. Kairaria urged this Court to dismiss the appeal.

ANALYSIS AND DETERMINATION

23. The substantive issue for determination in this appeal is whether the respondent sufficiently proved the necessary ingredients for an adverse claim to land. The law on this issue is now well settled. In **KIMANI RUCHINE v SWIFT RUTHERFORD & CO. LIMITED [1980] eKLR**, the Court held that:

"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 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 Gathire v Berverly (1965) EA 514, 518, 519 per Miles, J."

24. Similarly, in **KIM PAVEY & 2 OTHERS v LOISE WAMBUI NJOROGE & ANOTHER [2011] eKLR**, the Court delivered itself thus:

"To prove title by adverse possession it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was

adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances – see R.E. Megarry & Wade – The Law of Real Property 4th Edition page 1014.”

See also **WAMBUGU v NJUGUNA [1983] KLR 172.**

25. In this appeal, the respondent averred that he entered into an oral agreement with Ashford for sale of the suit land in 1973 and the respondent paid the entire purchase price of Kshs.36,000/=. Thereafter he took possession of the suit land with full knowledge of Ashford. There is no evidence that the area Land Control Board consented to the said transaction as required. Under **section 6(1)** of the **Land Control Act**, where consent of the Land Control Board is not obtained within six months from the date of commencement of the transaction, the controlled transaction becomes null and void, such that even if the initial entry into the land was with permission of the registered owner, continued possession, if not legal, becomes adverse from the time the transaction became void. See **WAWERU v RICHU [2007] 1 E.A. 403.**

26. The respondent testified that from 1973 he was in continuous, open and peaceful occupation of the suit land, with the full knowledge of Ashford, and thereafter of the administratrix of Ashford's estate. The appellant's advocate's letter dated 23rd October, 1996, which was the first letter ever written to the respondent in respect of the suit land says it all. The letter read as follows:

“RE: L.R. DAGORETTI/KANGEMI/711 part of the estate of the late Serah Njeri Kang'ethe (deceased)

We act for the Administrators of the above mentioned estate under whose instructions we write to you as hereunder:-

That the administrators of the said estate in a meeting held on 6th September, 1996 gave you [2] Two weeks from the date thereof within which you are to furnish the administrators with evidence to support your allegation of a sale transaction in respect of all that piece of land known as LR No. DAGORETTI/KANGEMI/711 between yourself and the late Ashford Kang'ethe King'ang'i.

In the circumstances our instructions are to request you to demolish and/or remove any and all structures of any sort that you might have erected on the said LR NO. DAGORETTI/KANGEMI/711 by the 5th day of December, 1996.

TAKE NOTICE that unless this demand letter is complied with by yourself within the stated period, we have mandatory instructions to institute court proceedings against you for the relevant relief without any further recourse to you and at your risk as to costs and other consequences resulting therefrom.

Yours faithfully

(signed)

Kahari & Kiai

Advocates

Client”

27. The respondent's advocates responded to the said letter on 8th

November, 1996 as follows:

“RE: L.R. Dagoretti/Kangemi/711 Transaction Between F.C. Kamau t/a Sor Saw Mills and the Late Ashford Kangethe Kingangi

The above matter and yours of 23rd October 1996 refer. We have been retained by MR. F.C. KAMAU with instructions to address you as herein below:-

- 1. That in 1973 the above captioned persons entered into a contract – Mr. F.C. Kamau on the one part as the purchaser and the late Ashford Kangethe Kingangi on the other part as the vendor of the above named parcel of land.***
- 2. That in consideration for the transfer of property in the said parcel of land, Mr. F.C. Kamau paid Kshs.36,000/= (Thirty Six Thousand Shillings) to the late A.K. Kingangi. Payment thereof was made in four (4) parts by Cheque.***
- 3. That in October 1973, Mr. F.C. Kamau commenced his lawful occupation of the parcel of land which was 1 (one) acre in size.***
- 4. That in the meantime, Mr. F.C. Kamau requested the late A.K. Kingangi to sub-divide the parcel for purposes of registration but the latter was reluctant until his demise in 1981.***
- 5. That as it were in the alternative and/or without prejudice to the foregoing, Mr. F.C. Kamau’s claim of title to the said property lies under Section 30(1) of the Limitation of Actions Act Cap. 22 i.e. Mr. F.C. Kamau having been in adverse possession of the said parcel for 23 years running is entitled to apply for registration as proprietor thereof.***

Therefore, in the light of the foregoing, your demand that our client Mr. Kamau should;

“demolish and/or remove any and all structures” erected on the said parcel is as misplaced as much as it is ill-advised.

Your threats to institute legal proceedings herein shall be equally ill-advised as we have instructions to vigorously defend our client to vindicate his rights.

Yours faithfully,

(signed)

For: MWANGI MBUTHIA & CO. ADVOCATES

BC. Mr. F.C. Kamau

P.O. Box 14651

NAIROBI.”

28. From the foregoing, and taking into consideration the evidence adduced by the respondent, we entertain no doubt that indeed the respondent entered into an oral agreement with Ashford for sale of the suit land and thereafter took possession, put up wooden timber structures and fenced the land.

29. It is not in contention that the respondent’s structures on the suit land were unlawfully demolished by Njeri King’ang’i, a member of the appellants’ family, on 28th June, 1997. As a result, the said Njeri was charged and convicted of the offence of malicious damage to property contrary to **section 339(9)** of the **Penal Code**.

30. The fact that the respondent and his partner moved their timber business from the suit land to Londiani in 1982 did not imply that the respondent had moved out of the suit land. His timber structures

remained there until 1997. More importantly, between 1973 and 1996 when the appellants sent a demand letter to the respondent, a period of 23 years had elapsed. During this period, there was no attempt by either Ashford, Serah or the appellants to evict the respondent or regain the suit land, if at all they were opposed to his occupation of the same.

31. One other issue that was raised by the appellants' learned counsel in his submissions was that the suit land was not identifiable at the time the respondent took possession of it, and therefore the respondent's claim was unsustainable. We disagree. Evidence tendered by the respondent and his business partner, PW3, was to the effect that a portion of the initial parcel of land that they were purchasing from Ashford was taken up by the dual Nairobi-Nakuru highway and Ashford compensated them with an equal parcel of land, which was surveyed, beacons planted thereon and subsequently fenced. The suit land was therefore clearly demarcated and identifiable.

32. Having carefully reviewed the entire record of appeal, we are satisfied that the learned trial judge arrived at a well founded decision. The respondent proved all the ingredients of a claim based on the doctrine of adverse possession. We hereby affirm the findings and orders made by the High Court and dismiss this appeal with costs to the respondent. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of November, 2017.

D.K. MUSINGA

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR