



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 212 OF 2012

BETWEEN

ISAAC CYPRIANO SHINGORE APPELLANT

VERSUS

KIPKETER TOGOM RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret, (A. Mshila, J.) dated 8th June, 2012

in

HCCC NO. 128 OF 2006 (OS)

JUDGMENT OF THE COURT

1. In a judgment (erroneously labeled as a ruling) delivered on 8th June 2012, the High Court (A. Mshila, J.) decreed that the respondent had acquired the property known as Title Number Nandi/Kaptich/357 (the property) by adverse possession and is entitled to be registered as proprietor thereof; that the appellant's title thereto was extinguished and that the title to the property be issued to the respondent.
2. Aggrieved by that decision, the appellant contends that the learned Judge was wrong in upholding the respondent's claim for adverse possession despite evidence that possession had in fact been interrupted on account of various legal proceedings; and that the impugned judgment was in any case delivered in the absence of the appellant and without notice to him, thereby vitiating the same.

The facts

3. To a large extent the facts are not in dispute. The appellant's father Mayenya Irodanga was initially the registered owner of the property. After his death, his wife Erica Manyeni (the appellant's mother) purported to sell the property. She entered into an agreement for sale dated 27th June 1982 under which she agreed to sell, and the respondent agreed to purchase the property for Kshs. 8,600.00. She did not have the capacity to do so as she had not obtained grant of letters of representation in respect of the estate of her late husband, and neither was she the registered owner of the property. Consent of the relevant land control board was also not obtained in respect

of that transaction. That notwithstanding, the respondent asserted that he paid the purchase price and took possession of the property on 27th June 1982.

4. A grant of letters of administration for the estate of Mayenya Irodanga issued by the High Court to the appellant was confirmed on 27th April 2000. The certificate of confirmation of grant named the appellant as the sole beneficiary and heir in respect of the property. The appellant was thereafter registered as the proprietor of the property and a title deed in respect thereof issued to him.
5. On 17th August 2005, the appellant had a letter written to the respondent complaining that the respondent had trespassed on the property since the year 1982 and demanded payment of damages for trespass. The appellant gave the respondent “only this year” to remove himself from the property and threatened the respondent with legal action unless he paid the damages and vacated the property.
6. Against that background, the respondent commenced suit by Originating Summons in the High Court at Eldoret against the appellant seeking orders that were granted in the impugned judgment delivered on 8th June 2012.

The appeal and submissions by counsel

7. During the hearing of the appeal before us, Mr. C. K. Njuguna learned counsel for the appellant referred to the grounds of appeal and submitted that the respondent’s claim for adverse possession was not maintainable and the judge erred in allowing it; that the sale agreement entered into between Erica Manyeni and the respondent could not be the basis upon which the respondent could base his claim for adverse possession as Erica Manyeni had no title to the property that she could pass to the respondent; that the respondent’s possession of the property was interrupted when he objected to the appointment of the appellant as an administrator of the estate of Mayenya Irodanga and also by initiating proceedings before a Land Dispute Tribunal. Counsel found support for that argument in the decision of this Court in **Peter Mbiri Michuki vs. Samuel Mugo Michuki [2014] eKLR.**
8. The appellant’s other complaint was that the judgment delivered on 8th June 2012 is in any case invalid as it was delivered without notice to the appellant. In that regard, counsel referred us to the decision of this Court in **Ngoso General Contractors Ltd vs. Gichunge [2005] 1 KLR 737** for the proposition that notice of delivery of judgment is a mandatory requirement under the Civil Procedure Rules.
9. In response to the complaint that notice of delivery of judgment was not given, learned counsel for the respondent Mr. D. K. N. Magare in opposing the appeal stated that all the parties had notice of delivery of the judgment.
10. According to Mr. Magare the judgment the High Court is sound; the respondent demonstrated that he was in continuous and uninterrupted possession of the property since taking possession after entering into the agreement for sale on 27th June 1982; that the objection proceedings by the respondent challenging the appellant as administrator or the proceedings he initiated in the Land Disputes Tribunal cannot be construed as interrupting the respondent’s occupation of the property. Counsel cited numerous authorities in the respondent’s list and bundle of authorities including **Nyoro Kimwe vs. John Anderson Githinji [2009] eKLR** and **Samuel Miki Waweru vs. Jane Njeri Richu [2007] eKLR.**

Analysis and determination

11. Having considered the appeal and submissions by counsel, the question we have to determine is whether the High Court was right in holding, as it did, that the respondent had acquired title over the property by adverse possession. In **Titus Mutuku Kasuve vs. Mwaani Investments Ltd and**

4 other, Civil Appeal No. 35 of 2002, this Court stated:

“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of this land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – Wanje vs. Saikwa (No.2) [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – See Githu vs. Ndeete [1984] KLR 776.

12. We have reviewed the evidence. There is no question that the respondent entered into possession of the property in June 1982 based on a sale agreement entered into with the widow of the registered owner. At that time, the property was registered in the name of appellant’s father Mayenya Irodanga. The widow did not have capacity to enter into that agreement for sale. Consent of the relevant land control board was also not obtained. The result is that if the agreement for sale was not void ab initio for lack of capacity on the part of the widow, it became void by operation of law for want of the consent of the relevant control board. And as this Court said in **Samuel Miki Waweru vs. Jane Njeri Richu** (supra) *“the continuation of possession by the respondent thereafter could not be referable to the agreement of sale... as it was an independent possession adverse to the title of the original owner.”* In that case this Court went on to hold that:

*“...where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under **Section 6 (1)** of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”*

13. By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent’s possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

14. As the Court held in **Githu Vs. Ndeete [1984]KLR 776** *“Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire’s Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”* In **Mount Carmel Investments Ltd vs. Peter Thurlow Ltd and another [1988] 3All ER 12g**, the Court of Appeal, in England held:

“The mere assertion by the true owner of a claim to possession of land in a letter sent to a squatter was not sufficient to prevent the squatter obtaining title by adverse possession. Accordingly, the letter sent to the defendants by the plaintiff’s solicitors did not have the effect of causing the defendants to cease to be in possession for the purposes of acquiring title by adverse possession.”

See also The Law of Real Property by R. Megarry, Sweet & Maxwell, 2012 at para 35–7. The letter dated 17/8/2005 written on behalf of the appellant demanding that the respondent should vacate the property was therefore not sufficient to prevent the Respondent obtaining title to the property by adverse

possession. In effect the respondent was in continuous, uninterrupted and exclusive possession of the property.

15.Regarding the appellant’s complaint that judgment was delivered without notice, the record of proceedings before us appears to be incomplete. The last attendance before court based on the proceedings made available was on 6th December 2011 when judgment was reserved for 21st February 2012. Both parties were represented on that occasion. When judgment was delivered on 8th June 2012, there was no appearance for the defendant while somebody held brief for Njuguna who was indicated as appearing for the plaintiff. There is therefore insufficient material before us on the basis of which we can make a finding whether notice of judgment was given to both parties. We cannot therefore say with any certainty that the respondent did not have prior knowledge of the delivery date or that notice of delivery of judgment was not given. It would certainly be unusual that one party had notice of delivery of the judgment while the other did not. We therefore reject this complaint.

16.For those reasons the appeal fails and is dismissed. Each party shall bear its own costs of the appeal.

Orders accordingly.

Dated at Eldoret this 15th day of April, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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.

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DEPUTY REGISTRAR