



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 289 OF 2013

BETWEEN

KEZIAH STELLA PYMAN 1ST APPELLANT

MARK GRIFFITHS PYMAN 2ND APPELLANT

REENA PYMAN 3RD APPELLANT

VERSUS

PAUL MWOLOLO MUTEVU 1ST RESPONDENT

ESTHER WANJIRU CHEGE 2ND RESPONDENT

FRANCIS M. NDAMBUKI 3RD RESPONDENT

FRANCIS KIHUMBA GITAHU 4TH RESPONDENT

ANTHONY MUKARU KAMAU 5TH RESPONDENT

DAVID NAMASAKA 6TH RESPONDENT

DINA NAFULA NAMASAKA 7TH RESPONDENT

DANIEL MUTISYA NDOLO 8TH RESPONDENT

JAPHETH WEKESA MANALI 9TH RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale, (J. R. Karanja, J.) dated 18th October, 2012

in

HCCC NO. 93 OF 2011)

JUDGMENT OF THE COURT

1. In a ruling delivered on 18th October 2012, the High Court at Kitale (J. R. Karanja, J.) declared that the appellants' right over 8 acres portion of LR NO. 3036/5 was extinguished by adverse possession upon expiry of 12 years the respondents remained in exclusive and uninterrupted possession of their respective portions; that upon the expiry of the 12 years the appellants held the land in trust for the respondents; that the respondents be registered as owners of the respective portions exclusively held by them; and that the appellants do execute all documents to facilitate the registration of the transfers in favour of the respondents and in default the Deputy Registrar of the Court to do so.

2. Aggrieved by that decision, the appellants lodged the present appeal. In his written and oral submissions before this Court, Mr. J. Chebii, learned counsel for the appellants, basing his arguments on the appellants' memorandum of appeal submitted that Josephine V. N. Pyman (deceased) who died on 18th February 1990 was the registered proprietor the property known as L.R. No. 3036/5 (the suit property); that between 1990 and February 1996, without first obtaining a grant of letter of administration to the deceased's estate, the deceased's children entered into agreements with the respondents for the sale of portions of the suit property to the respondents; that a grant of letters of administration of the estate of the deceased was issued on 17th July 2003; that the ruling of the learned Judge contradicted an earlier ruling of the court in Succession Cause No. 26 of 1995 where Mwilu, J. (as she then was) found that the respondents did not have a valid claim against the estate of the deceased; that the learned Judge should have held that dealings with the suit property by the children of the deceased without a grant of letters of administration violated the Law of Succession Act and was therefore null and void.

3. According to counsel, the learned Judge erred further in finding that the suit property, held in trust for the dependants and beneficiaries of the deceased, could be the subject of adverse possession.

4. Opposing the appeal, learned counsel for the respondents, Mr. P. N. Kiarie, filed written submissions, which he highlighted before us. He submitted that the appeal is devoid of merit and should be dismissed; that contrary to the submission by counsel for the appellants, the ruling of the court in Succession Cause No. 26 of 1995 was not concerned with nullification of the agreements for sale under which the respondents purchased the portions of the suit property as there was no application for nullification of the sales before that court; that the Judge correctly found on the evidence that the respondents' possession of portions of the suit property was adverse to the appellants who had never taken any legal steps to repossess the 8 acres occupied by the respondents; that the respondents were put in possession of the identified portions of the suit land measuring 8 acres in aggregate upon entering into agreements for sale with the sons of the deceased; that one of the sons of the deceased, John Pyman, was appointed as the administrator of the estate of the deceased on 6th July 1995; that the estate was dispossessed of those portions of land; that considering the suit land was agricultural and land control board consent was not obtained in relation to the sale agreements for the portions of 8 acres of the suit property purchased by the respondents, the sales became null and void under Section 6(1) of the Land Control Act six months after the dates of the respective sale agreements; that remaining in possession after expiry of six months became adverse to the estate of the deceased; and that the possession remained uninterrupted up to the time the respondents filed suit in the High Court.

5. We have considered the appeal and the submissions by learned counsel. The issue for our determination is whether the holding by the learned Judge that the respondents acquired title over the 8 acres of the suit property by adverse possession and that the appellants' rights thereon are extinguished is supported by the evidence.

6. This being a first appeal we are entitled to draw our own conclusions based upon a reevaluation and review of the evidence on record. The evidence before the High Court was exclusively affidavit evidence. Each one of the respondents swore an affidavit stating how they purchased their portions of the suit property and how they were placed in possession, having paid the full purchase price and the developments they have undertaken on the respective portions of the property they occupy. Keziah Stella Pyman swore a replying affidavit on behalf of the three appellants stating that the agreements entered into by the respondents are illegal, null and void as they were entered into before a grant of letters of

administration for the estate of deceased was issued; that consent of land control board was not obtained and that the Law of Succession Act was violated. No oral evidence was adduced. The parties agreed to have the matter determined by the High Court based on the affidavits and the written submissions.

7. The undisputed facts based on the material before the High Court are that Josephine V. N. Pyman, deceased, who died on 18th February 1990, was the registered proprietor of the suit property measuring approximately 20 acres. Her children, John Pyman and Robert Pyman survived her. The appellants are the children of the Robert Pyman and therefore the grandchildren of the deceased Josephine V. N. Pyman. After the death of the deceased, her said children entered into agreements for sale to the respondents of portions of the suit property as follows:

	<i>SIZE</i>	<i>DATE</i>
a) Paul Mwololo Matevu –	0.375 Acres	7.2.1996
b) Esther Wanjiru Chege –	0.25 Acres	15.9.1993
c) Francis M. Ndambuki –	0.125 Acres	20.3.1997
<i>Originally bought from T. K. Wairimu</i>		
d) Francis Kihumba Gitahi	¼ Acres	1.2.1992
e) Anthony Mukaru Kamau	¼ Acres	4.11.1992
f) David Namasaka	¼ Acres	28.7.1993
g) Dina Nafula Namasaka	3 ½ Acres	14.7.1993
h) Daniel Mutisya Ndolo	¼ Acres	12.2.1993
i) Japheth Wekesa Manali	2 Acres	12.10.1990

8. The respondents deposed that pursuant to the respective sale agreements they took possession of their respective portions of the suit property as follows:

“Paul Mwololo Mutevu - 15th July 1992 of ¼ of an acre and on 7th February 1996 for 1/8 of an acre.

Esther Wanjiru Chege - 15th September 1993 for ¼ of an acre.

Francis Musau Ndambuki - 0.125 of an acre on 20th March 1997.

Francis Kihumba Gitahi - 1/4 of an acre on 8th February 1992.

Anthony Mukaru Kamau - two plots of ¼ acre each on 30th September 1991 and 31st January 1993 respectively.

David Namasaka – two 1/4 plots on 28th July 1993 in in 1995.

Dina Nafula Namasaka - 3.5 acres July 1993.

Daniel Mutisya Ndolo - two plots of ¼ each on 28th February 1993.

9. By the time the respondents instituted suit by way of originating summons on 21st October 2011 there is no doubt each one of them had been in occupation of the portions they claim for over 12 years.

10. The appellants did not contest those facts. What the appellants contended in defence, as already indicated, is that the sale agreements in favour of the respondents were null and void as the seller did not have letters of administration; the consent of the relevant land control board was not given; the respondents were effectively intermeddlers in the estate of the deceased; that the respondents' claims had already been rejected by the court in Succession Cause No. 26 of 1995; that the respondents' occupation was interrupted and their entry was resisted.

11. The learned Judge held that the contention that the children of the deceased did not have capacity to sell the portions of the suit property to the respondents was misplaced as the children of the deceased were beneficiaries of the estate of the deceased and that John Pyman was the previous administrator of the estate before being substituted with the appellants. The court also found as a fact that the respondents took possession upon entering in the respective agreements for sale and that they had been in occupation for over 12 years; that the sale transactions became void on account of land control board consent not having been granted; and that the appellants did not take steps to interrupt the respondents' occupation.

12. On our part, we have no doubts in our minds that the respondents entered into possession of the respective portions of the suit property that they claim on the respective dates mentioned above. Francis Musau Ndambuki, who was the last person to occupy his portion of 0.125 of an acre of the property, did so on 20th March 1997. By the time the respondents instituted the suit for adverse possession on 21st October 2011, each one of them had been in occupation of his respective portion for well over 12 years. Exhibited to each of their affidavits in support of their claims were pictures showing the developments they have undertaken on the portions they occupy. We are accordingly in agreement with the trial Judge when he said in his ruling:

“Suffice to hold that the plaintiffs had been in exclusive and an uninterrupted possession of part of the suit property upto the month of May, 2011 when a demand letter was forwarded to them by the defendants to vacate the suit property. This translates to a period of more than twelve (12) years. The plaintiffs were thus within their rights to move to court under the provisions of the Limitation of Actions Act (section 37 and 38) seeking the orders sought in the originating summons dated 1st August, 2011. ”

13. Although the appellants say that the children of the deceased did not have capacity to sell the property, what is significant is that it was on the basis of those sale agreements that the respondents were put in possession of the property. The appellants were substituted as the administrators of the estate of the deceased on 17th July 2003. Neither the appellants, nor John Pyman, the first administrator of the estate before them, took any step to evict the respondents or to assert title. The demand letter or protests to the administration could not amount to disruption of the respondents' possession. See **Githu v Ndeete** as well as **William Gatuhi Murathe v Gakuru Gathimbi Civil Appeal No. 49 of 1996.**

14. It is also common ground that the suit property is agricultural and that the consent of the local Land Control Board was not obtained. The result was that by reason of Section 6 of the Land Control Act, those transactions became void. The respondents nonetheless remained in possession of the respective portions of the suit property that they claim. We are persuaded, again on the strength of the decision of this Court in **William Gatuhi Murathe v Gakuru Gathimbi (supra)** that their possession thereafter became adverse to the estate of the deceased. See also **Samuel Nyakenogo v Samuel Orucho Onyaro, CA, Civil Appeal No. 24 of 2004.**

15. Lastly, there is the assertion by the appellants that the decision of the impugned ruling contradicted an earlier ruling of the High Court given on 15th December 2010 in Succession Cause No. 26 of 1995. The court (Mwilu, J.) was dealing with an application by the respondents for revocation of grant in favour of

the appellants on grounds that the appellants had failed to disclose that the respondents were beneficiaries of the estate of the deceased. The Judge when rejecting the respondents' application concluded:

“In the above circumstances it is evidently clear that none of the applicants herein entered into any sale agreement with the late Josephine V. N. Pyman during her lifetime. It is also evidently clear that none of them was in any way whatsoever her heir or beneficiary. It follows therefrom that none of the applicants have a valid claim against the estate of the late Josephine V. N. Pyman that emanated from any dealings with the late Josephine V. N. Pyman or as her beneficiaries as claimed. The alleged sales of parts of the property of the deceased, Josephine V. N. Pyman by her sons were improper as none of them (sons) had any Grant of Representation of her estate during the period of the alleged sales which is between 13.10.1990 and 6.2.1995.

John was appointed Administrator of the said estate on 06.07.1995 and did not bother to administer the estate or even attempt to get the Grant confirmed. Neither he nor his brother Robert had any legal authority to deal with the deceased's estate as they allegedly purported to deal. That was contrary to the provisions of the Law of Succession. The Applicants' remedy therefore lies not in these succession proceedings.”

16. The issue that was before the Judge in that matter was therefore not the validity of the agreements for sale. And even if it had been, the significance or relevance of the agreements for sale was to determine the dates on which the respondents entered into possession of the respective portions of the suit property that they claim.

17. The result of the foregoing is that the learned trial Judge was right in decreeing that the respondents had acquired title over the respective portions of the suit land that they claim. Accordingly, the appeal fails in its entirety. It is dismissed with costs to the respondents.

Order accordingly.

Dated and delivered at Eldoret this 29th day of July, 2016

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR