



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

NAIROBI CIVIL APPEAL NO 359 OF 2014

BETWEEN

DIOCESE OF NGONG TRUSTEES (REGISTERED) APPELLANT

AND

LOISE NONGAI KINDIRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Osiero, J.) dated 5th day of March 2009

in

CIVIL CASE NO. 1562 OF 1995)

JUDGMENT OF THE COURT

By virtue of the powers vested in him by His Most Gracious Majesty King George the Fifth, the Governor and Commander-In-Chief of the Colony of Kenya, Sir Edward William Macleay Grigg (1925–1930) granted to Magadi Soda Company PLC (the company) in 1924, 100 acres of a parcel of land known as **LR NO 4521** situate on the South-East of Ngong Township at a consideration of the sum of Kshs 600 by way of stand premium for a term of 99 years from 1st November 1924 to 1st November, 2023.

It would appear that at some point in time the company found no immediate use for the land hence its decision in 1958 to surrender 90 acres to Olkejuado County Council on behalf of the Government (Colony), retaining 10 acres now known as LR 4521/2 (the suit property) which it intended to use as a camp for the maintenance of the main road to Magadi, between Mbagathi River and the Ngong Hills. After this road was tarmacked it was not necessary to retain the road maintenance gang camp permanently on the suit property.

Being vacant the suit property attracted the attention of many of the local populace, including Ben Kindi, who was also known as, Kilelu ole Togi, the husband of the respondent, as well as the local diocese of the Catholic Church, through its trustees, the appellant. While the local people simply invaded the suit property, the latter was more formal. On 17th February, 1982 its Bishop, Rt. Rev. C. Davies addressed a

letter to the Managing Director, of the company asking if the company would consider granting it the suit property, which incidentally was next to the church land, for the purpose of expansion of the church, putting up a maternity nursing home and a school. On 12th October, 1984 the Financial Controller of the company, responded that the question of title to the suit property having been resolved, the company was prepared to donate, as a gift the suit property upon payment of legal and other costs that would be necessary for the transfer.

On 4th December 1986 the company finally transferred the suit property to the appellant as a gift. To this day, apparently because of the respondent's occupation of the suit property, the appellant has never set foot on the suit property despite the fact that many donors had offered to contribute funds for the project it had proposed for the land. The appellant's attempts to occupy the suit land was resisted by the respondent.

It is common ground that the respondent and her husband occupied the suit property in 1963. The husband was tragically killed by an elephant in 1974 and buried on the suit property. But even before his death the deceased had resisted attempts to eject him and his family from the suit property contending that it had been allocated to him by the Kiserian Land Apportionment Committee. As early as 1965 the company had made a decision to remove all the squatters from the suit property. While the rest willingly moved out, the respondent and her late husband insisted they were on their land and had nowhere else to move to.

Consequently on 22nd May, 1995 the appellant instituted an action for the eviction of the respondent, a declaration that it is the rightful owner of the suit property, an order of permanent injunction to restrain the respondent from interfering with the suit property and a mandatory order of injunction directing the respondent to remove from the suit property all illegal structures, *mesne profit*, general damages and costs of the suit.

The respondent, for her part responded by filing a defence and a counter-claim in which she denied being a trespasser and maintained that she was on the suit property as a beneficial owner; that having been in possession of the suit property since 1963 continuously and openly, she had become entitled to it by prescription. Consequently she prayed that she be declared to have become entitled to be registered as the owner of the suit property.

The hearing before Gacheche, J. in which a total of 10 witnesses testified, lasted between 1995 and 2009, some 14 years. Eventually for reasons that are not apparent on the record, it fell upon Osiemo, J to write the judgment on the evidence recorded by Gacheche, J.

Having correctly stated the applicable law and supporting his decision with decided cases, the learned Judge found, on the evidence that the respondent and her late husband entered the suit property in 1963, and that by the time the company transferred it to the appellant in 1986, the former's title had been extinguished by operation of the statute of limitation. Accordingly, the learned Judge dismissed with costs the appellant's suit and in the same vein allowed the respondent's counter-claim. In the result, he ordered that the respondent be registered as the sole proprietor of the suit property in place of the appellant.

That decision has now been challenged before us by the appellant who has urged us to find that the learned Judge erred in entertaining an action not properly presented and further that the respondent failed to present evidence upon which the learned Judge could reasonably find that the appellant's title had been extinguished. The appellant through counsel filed submissions in which only those two questions were canvassed.

Regarding the first question, the appellant submitted that by virtue of the provisions of **order 37 rule 7** of the Civil Procedure Rules an application under section 38 of the Limitation of Actions Act could only be brought by originating summons; and that under **order 7 rule 3**, only reliefs that can be obtained in a plaint are available in a counter-claim. Since the relief asking that the respondent be registered as the proprietor of the suit property could only be pursued by originating summons and not a plaint the counter-claim was incompetent and unsustainable. For this proposition learned counsel relied on a long line of

authorities including **Kanda v Kanda** Civil Appeal No 219 of 2003, **John Ndungu Ngethe V Patrick Murima** Civil Appeal No 143 of 1998, **Lali Swaleh Lali V Stephen Mathenge Wachira** , Civil Appeal No 132 of 1993.

Turning to the second question, learned counsel submitted that the conditions to be satisfied before one can be declared an owner of land by prescription were not met by the respondent. For instance, counsel argued that the respondent was not in exclusive possession of the suit property because, by her own admission, she had leased it to third parties; and that her husband and herself had been put into possession by the company hence their possession was not adverse; and that by acknowledging that the company owned the suit property, the respondent's possession was interrupted.

The appeal was opposed by the respondent, who through submissions filed by her counsel urged us to find that the learned Judge properly directed himself on both issues raised in this appeal. That the courts have settled the procedural issue of how an adverse possessor can approach the court with a claim under the Limitation of Actions Act; that on the authorities of **Githurai Ting'ang'a Co. Ltd V Moki Savings & Cooperative Society** Civil Appeal No 8 of 2000, **Teresia Wacuka Gachira V Joseph Mwangi Gachira** Civil Appeal No 325 of 2003, **Kise Maweu V Kiu Ranching & Cooperative Society**, (1982-88) 1KLR 746, and the recent decision of this Court in **Gulam Miriam Noordin V Julius Charo Karisa** Civil Appeal No 26 of 2015, among several others, the procedural question has firmly been settled that a claim of adverse possession can be made first and foremost by originating summons, by a plaint, in the defence or even in the counter-claim.

By the provisions of **Rule 29 (1)** of the Court of Appeal Rules and the authority of **Selle & Ano. vs. Associated Motor Boat Company Ltd & Others** [1968] EA 123, 126, we, as Judges considering an appeal from the High Court are expected to re-appraise the evidence on which that court arrived at its impugned decision, draw inferences of fact, for us to arrive at our own independent conclusion, but bearing in mind that we lacked the advantage of the trial court where the witnesses testified.

Simple things first. The procedural objection over the manner the claim was presented is a simple question because the authorities relied on by the appellant, insisting that a claim to land by adverse possession must only be commenced by originating summons do not hold today and the authorities in question have since been departed from. The three decisions were decided in 1993, 1998 and 2003. Had learned counsel cared, like learned counsel for the respondent, to explore the development of the law in this area, he would, no doubt have not raised the objection, as the recent trend has clearly departed from the position espoused in the authorities he cited. The position today, represented by the decisions cited by learned counsel for the respondent, can be summarized as follows.

In **Boyes v Gathure** (1969) EA 385 it was emphasized that commencing proceedings by a wrong procedure did not invalidate the proceedings as it did not go to the jurisdiction of the court and the opposite party did not stand to suffer any prejudice. The Court in **Mariba vs. Mariba** (2007) 1 EA 175, confirmed that it was not fatal to bring a claim for adverse possession by a plaint as opposed to an originating summons. Similarly, an adverse possessor could do so by a counter-claim as was held in **Kise Maweu & others** (supra). Even raising it in the defence is permissible. See **Gulam Miriam (Supra)**.

That answer should dispose of the first ground.

Turning to the more substantive question, it is not denied that the respondent and her late husband entered upon the suit property in 1963. As at the time the suit to recover the suit property was brought, the respondent had been living on the suit property for 32 years. The appellant has, however maintained that it did not lose proprietorship of the suit property merely on account of the respondent's prolonged occupation because throughout that period she acknowledged the company as the true owner as reflected in the correspondence exchanged over the matter; that the respondent's late husband together with others, without the company's authority occupied the suit property; and that the manner he and the respondent dealt with the suit property left no doubt that they did not consider themselves its owners.

From the *ratio decidendi* of the numerous decisions of the courts in this field of land law, it is now firmly laid down that, irrespective of the length of occupation of land by an adverse possessor, the true owner is not divested of its ownership, unless the long occupation, which should not be less than 12 years, is coupled with adverse acts which would lead the true owner to the conclusion that his rights over the land are no more. The acts must be more than just mere adverse claim or denial of the owner's title. The party claiming to hold adversely must prove that the possession was in denial of the owner's title, that he excluded him from the enjoyment of the property, something amounting to ouster, or what the authorities call dispossession of the owner.

For possession to ripen into a prescriptive title, the occupation must not be clandestine, violent or permissive. It must be open, peaceable and as of right before it can cause time to run in favour of the possessor.

Time will cease to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right to the land is admitted by the person claiming adverse possession. Assertion of right is done when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to the adverse possessor to quit the land does not amount to assertion of the right for the purpose of stopping the running of time. It is also trite learning that mere change of ownership of land from the original owner against whom time had began to run to a new owner does not stop time from running.

Enough said on the applicable law. We turn to consider the question whether there was evidence to warrant the learned Judge's conclusion that the appellant's title to the suit property was extinguished by the respondent's claim of possessory right.

Apart from surrendering 90 acres in 1958 to the Council, the company's intention to use the remaining 10 acres of the suit property appeared to have been abandoned only after a short period after establishment of a road maintenance camp. Being vacant it became an immediate attraction to the landless, like the respondent and the church and even those who were not quite landless. There was evidence that the respondent's late husband owned a parcel of land adjacent to the suit property being NGONG/NGONG/538; and that as early as 1958 there was a boundary dispute. The church itself owned 20 acres next to the suit property.

It is further on record that the respondent and her family finally entered the suit property in 1963 ostensibly with the permission of the Kiserian Land Apportionment Committee, with the full knowledge that it belonged to the company, although believing the company had no use for it. As early as March 1965 this fact having been brought to the attention of the company, it wrote to the District Commissioner, Kajiado, copied to the Land Consolidating Officer, Kajiado describing the occupation by the respondent and others a mistake and requesting that those on the suit property be removed together with the buildings they had illegally erected on it forthwith. The latter was the first to respond, confirming that indeed the parcel of land allocated to the respondent's late husband by the Ngong Land Demarcation Committee was the one between the company parcel and the main Magadi Road, but because the respondent's late husband **“was hungry for land,.....just went in there before he knew where the vacant land was and built a house in the middle of the company's plot.”** He blamed the company for not maintaining a boundary around their parcel and leaving it idle for long thereby attracting and encouraging encroachment by the local people. It further confirmed that even before the area was declared an adjudication section the local people were already occupying the company parcel of land by cultivating it.

The District Officer, for his part wrote a letter to the respondent's husband, in Kiswahili, directing him to immediately remove the illegal structures on the suit property and stating that he was not entitled to any compensation for the destruction of his property by the company when it was establishing the road maintenance camp on the suit property.

The District Commissioner, on whose direction the District Officer had addressed the respondent's husband, sent another letter to the company conveying the action his office had taken with regard to the illegal occupation of the suit property and reiterated that should the respondent's husband fail to vacate, he would be prosecuted under the Trespass Act.

It appears to us that no action, either by the then provincial administration or the company, was taken to restore the suit property to the company. Instead we see incessant efforts by the respondent's late husband during this period seeking from the Land Registrar, Kajiado the transfer by the company to him of the suit property. After his death in 1974, his widow, the respondent continued demanding that it be transferred to her for her benefit and in trust for her 11 children.

The last paragraph of a letter dated 23rd February, 1970 from the office manager, Magadi Soda Company to the Clerk, Olkejuado County Council, is important. He wrote;

“ In the meantime.....we are glad to be able to say that we are now in a position to relinquish the land at Kiserian to the Government and this will obviously lead to the desired legal allocation of the plot to Mr. Kindi who has been occupying it since 1963.”

The importance of this passage is two-fold, confirming the date of the respondent's occupation of the suit property and the intention and willingness of the company to surrender the suit property to the respondent's late husband.

On 12th July, 1974 as we have already pointed out the respondent's husband was viciously attacked and killed by an elephant. Ten years after his death, in February, 1984 the appellant applied to be allocated the suit property for the purpose explained earlier. At that time the company appeared to change tune on its earlier intention to let the respondent stay on. In a surprise turn of events, in 1986 it ignored the fact that the respondent and her husband had been on the suit property since 1963, 32 years prior to the appellant's application, their unceasing quest to have the suit property formally transferred to them, and proceeded to transfer it instead to the appellant.

The respondent's possession, spanning 53 years today, has been with the full knowledge of the appellant, exercised with the *animus possidendi* of the appellant.

It has been exclusive, open, notorious, peaceable, continuous (uninterrupted) and without force. As lawyers of the old used to say in Latin, *nec vi, nec clam, nec precario*. In 1986 when the company purported to transfer the suit property to the appellant, the respondent had been in possession for a period of 23 years, far in excess of the 12 year statutory period.

The facts presented at the trial, from our own gleaning of the record, and from the acts done and activities carried out on the suit property by the respondent, there was clear ouster of the appellant from the suit property. The respondent and the husband settled on the suit property as their own. They constructed their dwellings, some of which were permanent, grew subsistence crops which they irrigated using water from a nearby river, fenced it with kei apple trees which were mature at the time of the hearing and leased part of the suit property to third parties. But of great significance is the fact that, with the full knowledge and participation of the appellant, the remains of the late Kindi, the respondent's husband was interred on the suit land. The burial ceremony was conducted by a father from the local Catholic Church of the appellant.

A few years later the grave was cemented. It is not usual for a stranger to engage in such activities on someone's private land. The respondent and her husband treated the suit property as their own, hence they could do all these things, which were, no doubt, hostile to the appellant's title without seeking permission from either the appellant or the company. This, in our opinion, was unmistakable ouster of the appellant and the company before them.

As Stamp L.J of the English Court of Appeal stated in **Wallis's Cayton Bay Holiday Camp V Shell Mex & B.P. Ltd** [1974] 3ALL E.R 575, cited with approval in **Jandu V Kirpal and Another (1975)** E.A 225 at P.237, once a wrongdoer was in possession, a claim by the rightful owner unaccompanied by the taking of possession did not operate to interrupt time from running in favour of the wrongdoer. Put differently by this Court,

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when

the owner takes legal proceedings or makes an effective entry into the land... He must therefore make a peaceable and effective entry, or sue for recovery of the land.”

See **Njuguna Ndatho vs. Masai Itumo & 2 others**, Civil Appeal No. 231 of 1999.

The letters exchanged between the company, the appellant, the respondent and the former provincial administration; the threats of eviction, amounted to nothing without the company or the appellant making an effective entry. The appellant waited for two decades to do what its predecessor in title should have done earlier, to institute an action which, by the provisions of **section 7** of the Limitation of Actions Act had long been barred from bringing. Indeed as the company transferred the suit property to the appellant, the former’s title had been extinguished. The company had been dispossessed in 1975, twelve years after the respondent commenced acts on the suit property which were hostile to the company's title. In 1980 the company abandoned its camp on the suit property and effectively discontinued its possession.

By section 38 of the Limitation of Actions Act the respondent was entitled to apply to the High Court through a counter-claim to be registered as the owner of the suit property. The learned Judge evaluated the evidence and came to the correct conclusion that the respondent’s possessory claim was proved on a preponderance of evidence.

The two grounds argued before us fail as the appeal lacks merit and it is accordingly dismissed with costs.

Dated and delivered at Nairobi this 4th Day of November, 2016.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR