



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 48 OF 2008

BETWEEN

KENYA COMMERCIAL BANK

(Suing as the Administrator of the Estate of

PAUL NJOROGE MUCHENE) APPELLANT

AND

SERAH NJERI MUCHENE

(Sued on behalf and as the administratrix of the

Estate of PERMINUS MUCHENE MWANGI)..... RESPONDENT

(Being an appeal from Judgment and decree of the High Court of Kenya at Nairobi (Mugo, J.) dated 22nd March, 2003

in

H.C.C.C. NO. 993 OF 2003 (OS))

JUDGMENT OF THE COURT

[1] Paul Njoroge Muchene (deceased) died on 5th May, 1977. A grant of letters of administration of his estate was issued to Kenya Commercial Bank Ltd, on 10th April 1979, in High Court Succession Cause No. 99 of 1979. On 26th September, 2008, Kenya Commercial Bank Ltd (suing as the administrator of the estate of Paul Njoroge Muchene (deceased)) filed a suit in the High Court against Serah Njeri Muchene on behalf of the estate of the deceased estate. The said suit was instituted by way of an originating summons that was seeking determination of the following questions:

1. Whether or not Land Parcel No. Kabete/Lower Kabete/566 was bought in or around 1962 by Paul Njoroge Muchene (deceased) and Perminus Muchene Mwangi (deceased) jointly from one Stephen Ngige in the ratio of 2.62 to 4 acres.

2. Whether or not the said Perminus Muchene Mwangi (deceased) had the whole of the land registered in his name on 22.6.1962 at the expense of Paul Njoroge Muchene's (deceased's) rights over 2.62 acres thereof.
3. Whether or not Paul Njoroge Muchene (now deceased) and his family have been in the uninterrupted possession and occupation of the said portion of 2.62 acres of L.R. No. Kabete/Lower Kabete/566 from 1962 to date.
4. Whether or not the said occupation and possession by Paul Njoroge Muchene (now deceased) and his family is adverse within the meaning of **section 38** of the Limitation of Actions Act.
5. Whether or not the register pertaining to L.R. Kabete/Lower Kabete/566 should not be rectified in view of the foregoing.
6. Whether or not the defendant should be ordered to meet the costs of these proceedings.

[2] The aforesaid suit was supported by an affidavit of one Lawrence Muchene Njoroge, the son of Paul Njoroge sworn on 25th September, 2005. Lawrence deposed that according to information he gathered from his late father, in 1962, his late father, Paul Njoroge Muchene together with Perminus Muchene Mwangi who also died in the year 2001, acquired through purchase a parcel of land known as Kabete/Lower Kabete/566 (suit premises) which is approximately 6.62 acres. He contended the land was occupied in the ratio of: - Paul Njoroge Muchene 2.62 acres, Perminus Muchene Mwangi 4 acres from the time it was acquired.

[3] The land was registered in the name of Perminus Muchene Mwangi but the late Paul Njoroge Muchene took possession of a portion measuring 2.62 acres in the same year. The family of Paul Njoroge was in occupation of the said portion of 2.62 acres within LR No. Kabete/Lower Kabete 566 from 1962, even after Paul Njoroge died in 1979. They continued in occupation until sometimes on or about July, 2003 when the widow of the late Perminus Muchene (respondent) requested the family of John Njoroge to vacate the suit land. That is what precipitated the appellant to file a suit in the High Court. It is further deposed on behalf of the appellant that the occupation by John's family of the suit land was open and peaceful. Subsequently, the entire parcel of land was transferred to Serah Njeri Muchene on 24th March, 2003 as the administratrix of the estate of Perminus Muchene Mwangi. According to the evidence in support of the appellant's claim, the transfer affected the interests of the family of John Njoroge as Serah Njeri purported to issue them with a verbal notice to vacate the said land or be evicted forcefully by 1st October, 2003.

[4] It is for that reason the appellant filed suit which was accompanied by an interlocutory application that sought an equitable relief, by way of an injunction to restrain the respondent from interfering with their peaceful occupation of the suit land until the determination of the suit. The interim orders were granted. The respondent defended the suit by filing a replying affidavit sworn by Serah Njeri Muchene on 31st October, 2008. She claimed that being the administratrix of her late husband, Perminus Muchene Mwangi's estate who passed away on 23rd March 2001, she caused the transfer by way of transmission of the property known as Kabete/Lower Kabete 566 to her name and a title was issued on 24th March, 2003 as of right. She claimed the allegations made in support of the suit and on behalf of the estate of Paul Njoroge Muchene were unfounded. She went on to state that the suit property was not jointly purchased with John Njoroge as there was no agreement that the property was purchased jointly nor was it to be shared at the ratio of 4 acres to 2.62 acres between Perminus Muchene and John Njoroge.

[5] Serah Njeri went on to state that in 1961, her late husband purchased the suit land from Stephen Githu Wainaina for Kshs.12,500/= and as he did not have the entire purchase prize, she borrowed some money from her late father to assist in the purchase of the land. The late Paul Njoroge Muchene was related to Serah Njeri's husband as an uncle. She stated that Paul requested her husband to allow him to use a portion of the suit property for grazing. That is how Paul Njoroge and his family started occupying the suit land through farming but she denied that John Njoroge's family acquired any prescriptive rights as

their occupation was as mere licencees which licence was granted by her husband which did not entitle them to claim ownership by way of adverse possession. The respondent also filed grounds of opposition and other supporting affidavits by other witnesses.

[6] Directions were given to the effect that the suit be heard by way of affidavit evidence and parties were at liberty to cross examine the deponents. Parties were further granted leave to file more affidavit evidence in support of their respective positions. Pursuant to the order on directions, on the part of the appellant, Lawrence Muchene Njoroge filed a further affidavit sworn on 6th November, 2003 wherein he reiterated the same position that the suit land was bought by his late father. Peter Wagoma's affidavit was sworn on 30th October, 2003. He stated that he knew the suit land was bought by the late Perminus Muchene Mwangi and late Paul Njoroge Muchene in 1962. The land was sold by one Ngige who wanted to proceed with further education and needed money. He was aware the deceased contributed money towards the purchase price and the land was shared according to the ratio of the amount of money which each party contributed.

[7] Josephine Njoki Mwangi also swore an affidavit in support of the appellant's case on 30th December, 2003. She claimed that she knew both Paul Njoroge and Perminus Muchene who were relatives and that the two bought the suit land jointly in 1962 and their families carried out farming activities on the suit land. When the late Paul Njoroge fell sick, Josephine said she was called at his sick bed and in her presence Paul Njoroge requested Perminus Muchene to transfer his portion of land to him but this never happened. James Njuguna Njoroge also a resident in Lower Kabete attested to the fact that she knew the families of these warring parties who bought the suit land jointly and the two families were using it respectively. Peninah Wambui Muchene also swore an affidavit to the effect that she knew both parties bought the suit land in 1962. Indeed, according to her, it is Perminus Muchene who was called to buy the land but he did not have the entire purchase price. That is when he requested his uncle Paul Njoroge to provide the balance. This deponent claimed that she was present when the beacons were placed demarcating the land in the respective portions.

[8] On the part of the respondent, Stephen Ngige Wainana swore an affidavit that gave a chronology of how the suit land was bought from him at a price of Kshs. 12,500/=. The sale of the suit property was facilitated by a person he called Maruri who paid the purchase price in instalments and requested the land to be registered in the name of Perminus Muchene Mwangi. Another affidavit was sworn by Bernard Njoroge who stated that he knew the suit land belonged to his late brother who occupied the land from the 60's and he used to visit him and at no time did he tell him the land was purchased jointly with the late Paul Njoroge Muchene. He confirmed the late Paul Njoroge Muchene only used the suit property for grazing purposes with the permission of Perminus Muchene Mwangi. Peris Njeri Macharia swore an affidavit stating in the main that the late Perminus Muchene was her brother; he bought the suit land with the assistance of the father-in-law but the late Paul Njoroge Muchene requested Perminus to allow him the use a portion of the suit land for grazing purposes and that is how he came to occupy the deceased land although the family of the late Paul Njoroge never put a dwelling house thereon.

[9] This is the evidence that was heard by Mugo, J. After evaluating the same, the learned judge dismissed the appellant's suit on the grounds that the evidence adduced by the plaintiff was insufficient to support a claim of adverse possession. The following constitutes the key findings by the learned Judge which we reproduce verbatim so as to put this dispute in perspective;-

“I find that the evidence adduced herein by the plaintiff is insufficient to support their claim of adverse possession in that the exact date of taking possession has not been established. The purchase of the property by the deceased plaintiff has also not been proven on a balance of probabilities and all evidence adduced to that effect is mere hearsay. No agreement has been adduced and no witness account has been given in relation thereto. In any event, prove (sic) of sale would only be useful if the claimants were seeking a declaration of a trust or presumed trust which is not the case here. Possession of over a long time is not disputed but there is strong doubt if such possession has been adverse at all. Adverse possession legally defined, is

„An occupation inconsistent with the right of the of the owner; the possession of those against

whom a right of action has accrued to the true owner and without lawful title.? [See P.G. Osborn's law Dictionary 5th Edition].

Adverse possession could be presumed from the suit filed in 1976 by the deceased plaintiff whose outcome, as previously noted has not been made known to this Court. It is not clear to me how such adverse possession can be presumed against the defendant who became registered as proprietor to the suit premises on 24th March 2003, when no trust is presumed as against her deceased husband. The present claim for adverse possession is directed at the defendant as the registered owner. The law as restated in the leading cases of Gathure vs. Beverly [1965] EA 514, and Kamau vs. Kamau [1984] KLR 539 is that a period of prescription cannot begin to run against a title shown in a certificate of title prior to the date of the grant of the certificate and such period begins to run from the date of registration of each and every transfer effected upon the land. It is possible to have a claim in adverse possession even where the initial entry into the land is engineered by an agreement for sale as is clear from the case of Sospeter Wanyoike vs. Waithaka Kahiri [1979] KLR 236. However, no claim in adverse possession can exist against the defendant herein prior to the lapse of 12 years from the 24th March 2003. This suit having been filed six months after her assuming ownership of the suit premises is grossly premature. Coupled with my other findings on the facts as presented by the various testimonies recorded herein, I am of the considered view that the plaintiff has not proved its case against the defendant on the balance of probabilities, and that none of the questions sought to be determined herein can be determined in favour of the plaintiff. In particular, I find that the evidence adduced herein is insufficient to satisfy this Court that the requirements of Section 143 of the Registered Land Act have been fulfilled to warrant the cancellation of the defendant's title and the rectification of the register. In my final conclusion, I find that this suit fails. I have no option but to dismiss the same which I hereby do, with costs to the defendant.”

[10] It is the foregoing judgment that has provoked this appeal which is predicated on some 5 grounds of appeal, to wit:-

1. The learned Judge erred in fact in holding that the plaintiff had not adduced sufficient evidence on the exact date of taking possession to support the claim for adverse possession.
2. The learned Judge erred in law and in fact in ignoring the findings of Hancox J. in his ruling of 8th December 1976 as regards adverse possession of the suit premises between the two deceased parties.
3. The learned Judge erred in law and in fact in failing to appreciate that the suit was filed against the defendant in her capacity as the Administratrix of the estate of the late Perminus Muchene Mwangi and on her own behalf.
4. The learned Judge erred in fact and in law in holding that the outcome of the previous case (in which suit she found that adverse possession could be presumed) could not be known yet the outcome of that suit was clearly indicated in the Supplementary Affidavit of Lawrence Njoroge Muchene sworn on 5th November, 2003 and filed in court on 6th November, 2003.
5. The learned Judge erred in law and in fact in coming to the judgment she came to contrary to the evidence tendered and the law.

[11] This appeal came up for hearing on 2nd March, 2016 when Mr. Victor Githinji learned counsel appearing for the respondent applied for an adjournment on the grounds that he was unable to prepare written submissions as earlier ordered because he had been unable to contact his client. He sought an extension of time saying that he has now gained contact with his client. The court adjourned the matter and allowed the respondent's counsel a further 14 days within which to file written submissions. The appeal was fixed for hearing on 4th October, 2016 and although Mr. Victor Githinji learned counsel for

the respondent was duly served with the hearing notice on 30th June 2016, he nonetheless did not attend court on the hearing date nor did he file written submissions. When the appeal was called out for hearing on 4th October, 2016, the hearing proceeded under **Rule 102 (2)** of the Court of Appeal Rules. Mr. Nthiga learned counsel for the appellant relied on his written submissions and a list of the authorities and urged us to allow the appeal with costs.

[12] This is a first appeal and that being so, we have a duty to re-evaluate the evidence relied on by the trial court and arrive at our own independent conclusion. In the case of *Ephantus Mwangi & Geoffrey Nguyo Ngatia -vs- Duncan Mwangi Wambugu, (1982-1988) 1 KAR 278*, this Court held that it would hesitate before reversing the decision of a trial Judge on findings of facts. It will only do so if, first, it appears that the Judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that the Judge's impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the Judge is shown demonstrably to have acted on wrong principles. See also the case of *Peters -vs- Sunday Post, [1958] E.A. 424* where at p. 429, Sir Kenneth O'Connor P, said:-

“It is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion.”

[13] Upon going through the evidence, and submissions by counsel for the appellant, the entire record of appeal including the judgment by the trial court, the issues we discern that fall for our determination are twofold: that is whether the family of the Paul Njoroge Muchene (deceased) was in uninterrupted possession and occupation of the portion of 2.62 acres of LR No. Kabete/Lower Kabete/566 from 1962 within the meaning of the provisions of **section 38** of the Limitation of Actions Act and whether the registration of title of the suit land in favour of Serah Njeri Muchene on 24th March, 2003 extinguished the appellant's claim over the suit land under the principles of adverse possession.

[14] As aforesaid, the appellant's claim is based on adverse possession which is a principle of law that is predicated under section 38 of the Limitation of Actions Act, the material part of which provides as follows:-

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

[15] The evidence before the trial court was given on the part of the appellant by a total of 5 witnesses who swore affidavits and some were cross examined regarding their depositions. All the witnesses on the part of the appellant testified to the effect that the late Paul Njoroge Muchene contributed to the purchase price of the suit land although the entire land was registered in the name of Perminus Muchene Mwangi. On the other hand, the respondent's four witnesses including the person who purported to have sold the property testified that the suit was bought by the respondent's husband. From this evidence, we agree with the learned trial Judge, this evidence may not have proved sufficiently on a balance of probability that the land was purchased jointly as claimed or the exact contribution made by Paul Njoroge. Where we however part company with the trial Judge, is in regard to the occupation of the suit premises by the family of the appellant. The evidence is clear the appellant's family was in occupation of the suit land for many years and the trial Judge held so; thus the thin line that should have been determined was whether the said occupation was open, uninterrupted and hostile or adverse to the rights of the registered owner.

[16] The key feature of the respondent's evidence and indeed even the findings by the learned trial Judge was to the effect that Perminus Muchene purchased the suit property with money borrowed from his father-in-law, but he granted his uncle Paul Njoroge a license to graze his cows on a portion of the said land. The learned Judge found in the analysis of the evidence as follows:-

“ there is no dispute as to the claimant's possession and use of the suit land from 1960's. Indeed such possession and use is admitted by the defendant who however says that the same was by way of a licence given by the “deceased defendant” on condition that no construction should be undertaken thereon”

“...After considering the facts and reviewing the evidence I formed the view that the visit (to the suit premises) would not be necessary since the possession and use of the suit premises by the deceased plaintiffs estate is not disputed. Neither is the acreage said to be in their possession and use”

In further analysis of the evidence, the Judge went on to state;

“ Curiously DW1 the registered proprietor Sarah Njeri Muchene contradicts herself on the issue of the plaintiffs' possession. She said in her oral testimony that her deceased husband never allowed the deceased plaintiff to cultivate on the land and that her having said he had done so in her replying affidavit of 28th November 2003 was not true. She later under re-examination said that indeed her husband did allow the deceased plaintiff to graze on the land..”

[17] Having established the appellant's family proved on a balance of probabilities that they were in occupation of the suit land from the 60's and also the fact that the respondent contradicted herself when she said her late husband never allowed Paul Njoroge to cultivate, the learned Judge clearly fell in error when in her final conclusion, held the appellant could not prove the time when they took possession. As demonstrated by the above excerpts of the evidence, the late Paul Njoroge took possession of the suit land in the 60's, and even after he died in May 1977, his family continued in occupation until sometimes in July 2003, when the respondent was registered as proprietor following the death of her husband and issued a verbal notice to the appellant's family to vacate the suit land. In our view, although the evidence cannot pin point exactly what Paul Njoroge contributed towards the purchase price of the suit land, what hangs in the air is, there was some consideration that led him to take possession of a substantial portion of the suit land, i.e. 2.62 acres and to remain in such occupation continuously for almost four decades without interruption. Clearly that quiet, uninterrupted occupation, even after the death of Paul, in 1977, (Perminus died nearly 13 years later, and he did not evict Paul's family) in our opinion, ousts the respondent's claim that the occupation was based on a license.

[18] Occupation of a parcel of land is a matter of fact. The burden therefore rested upon the appellant who asserted in the affirmative that their family was in occupation of the suit land to prove that fact. From the above excerpts taken from a portion of the judgment by the trial court, the evidence clearly confirms that the appellant's family was in occupation of a portion measuring 2.62 acres of the suit premises through cultivation or grazing on the same. The evidence further reveals that the said occupation and possession of the suit land was also continuous and uninterrupted since the land was acquired in the 1960's to 2003 when the suit was filed. The suit was filed because the respondent gave the appellant a notice requiring them to vacate from the suit land.

[19] According to our understanding, occupation of land for that number of years through grazing or cultivation was occupation nonetheless. As long as it was open, uninterrupted and notorious, it became adverse to the interests of the registered owner and a change of ownership did not affect the appellant's claim. There was no evidence of discontinuance or ouster of the family of the appellant from the suit land. Possession also does not only mean building structures and dwelling houses. Cultivation or grazing of a defined portion of the suit land by the family of the appellant removed that portion from use and control by the respondent. From the factual analysis of the undisputed evidence of possession and use of determined portion of the suit land, we are satisfied the trial Judge erred in her finding that that there was

insufficient evidence to support a claim for adverse possession. The late Perminus Muchene Njoroge did nothing about the occupation of the suit land by the appellant's family throughout his life even though it was against his wish he died on 23rd March, 2001. His widow, the respondent herein applied for letters of administration which was issued on 26th June, 2002 by the Resident Magistrates Court in Kiambu. Using that grant, the respondent was registered as the proprietor of the suit land on 14th March, 2003.

[20] This was registration under the repealed **Registered Land Act (Cap 300)**.

We hasten to point out that as the suit land was not vacant, when such registration was effected, this registration falls squarely under the proviso to **Section 30** of the said Act that provides instances that constitutes overriding interests regarding a registered title as follows:-

“Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –

(a)

(f) Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

By virtue of the appellants' possession of a portion of the suit land for so many years, the family of Paul Njoroge gained statutory rights which continued to bind the respondent as a new owner. See the case of *Mwangi & Another v Mwangi (1986) KLR 328*.

[21] We hope the above answers the issue of whether registration of the respondent as proprietor of the suit land on the 24th March 2003, disqualified the appellant from claiming the suit land by way of adverse possession. This is important because the learned Judge held it was not clear how adverse possession could be presumed against the respondent, who had just acquired proprietorship of the suit property. The pleadings clearly show the question that fell for determination was regarding the title of Perminus Muchene and indeed the respondent was sued as administratrix of the estate of Perminus. The claim dated to 1960's when the family of the appellant took possession of the suit land and remained in occupation until 2003. Looking at past decisions of this Court, we are reinforced in our finding that, adverse possession is not affected by change of ownership or registration of a new owner.

[22] In the case of *Githu v Ndeete [1984]* KLR page 776 Madan, Law & Potter JJA had the following to say about change of ownership in a claim of adverse possession;-

1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.

2. Where the person in possession has already begun and is in the course of acquiring rights under Section 7 of the Limitation of Actions Act (Cap 22) and by virtue of section 30 (f) of the Registered Land Act (Cap 300), those rights are overriding interests to which the new registered purchaser's title will be subject.

3. Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.

4. A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land to which the owner holds title.

[23] In our own conclusion drawn from the evidence that was before the trial court, Paul Njoroge Muchene was in occupation of an identified portion of the suit land measuring 2.62 acres. He was not a trespasser or a licensee but a beneficial owner who had made some contribution, the extent of such contribution whether monetary or in kind is not quite ascertainable from the evidence. Whatever it was, the occupation of the suit land by Paul Njoroge was adverse to the interests of the respondent and to her late husband. There is no way the appellant's family could be issued with a verbal notice to vacate the suit land. We find they were justified to file their claim for adverse possession.

[24] In the upshot, we find the appellant's claim was proved on a balance of probability. Occupation by the estate of Paul Njoroge Muchene of the defined portion of the suit premises was adverse to the rights of the respondent. We therefore find merit in this appeal which we allow. We order that the judgment of the High Court dated 27th March, 2006 be and is hereby set aside. We substitute with an order allowing the originating summons dated 29th September, 2003. Accordingly, the appellant is hereby declared the lawful owner of 2.62 acres which they occupy on LR No. Kabete/Lower Kabete/566. The respondent is ordered to effect the necessary transfer within 6 (six) months from the date of this judgment and in the event of failure to do so, the Deputy Registrar shall effect the same. The appellant shall bear the costs of the transfer and related costs. As the respondent did not participate at the hearing of this appeal, we order that each party bears its own costs of the appeal and of the suit in the High Court.

Dated and delivered at Nairobi this 2nd day of December, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR