



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: VISRAM, SICHALE & KANTAI, J.J.A)**

**CIVIL APPEAL NO. 161 OF 2013**

**BETWEEN**

**WAMBUI GIKWA.....APPELLANT**

**AND**

**PAUL KIMANI MURABA.....RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Machakos (Dulu, J.) dated 9<sup>th</sup> May, 2013*

*in*

*H. C. C. No. 223 of 2008)*

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**JUDGMENT OF THE COURT**

1. The crux of the matter before us revolves around the ownership of a parcel of land described as L.R No. Ngong/Ngong/6138 (hereinafter referred to as the suit land). The appellant's claim is that of a registered proprietor, while the respondent's claim is based on adverse possession. As the first appellate court we are cognizant of our primary role to reassess and re-evaluate the evidence tendered before the trial court and reach our own conclusions bearing in mind we neither saw nor heard the witnesses. See ***Musera -vs- Mwechelesi & Another (2007) KLR 159.***

2. We can discern from the record that the suit land originally belonged to one Samuel Seno. He sold the same to the appellant. Apparently, upon the demise of the said Samuel Seno one of his wives, namely Monica Wairimu, also deceased, sold the suit land again to the respondent's father, Kimani Muraba. Thereafter, the respondent and his parents moved onto the suit land in the year 1982. Since then the respondent maintains that he has been in continuous and uninterrupted occupation of the suit land for a period of over 12 years; his parents and sister had been buried thereon. The appellant on the other hand, argued that the respondent and his family trespassed on the suit land. She maintained that she had issued several notices to the respondent and his family to vacate once the title to the suit land was issued in her favour in the year 1993. Consequently, in the year 1999, she lodged a claim at the Kajiado Land Disputes Tribunal (herein after referred to as the Tribunal) against the respondent's father. The Tribunal dismissed that claim. However, on appeal the Tribunal's decision was overturned by the Rift valley Provincial Land Disputes Tribunal (herein after referred to as the Appeal Tribunal) and the respondent and his family were ordered to vacate the suit land. The decision of the Appeal Tribunal was adopted as a judgment of the court by the Chief Magistrate's Court at Nakuru. We understand that the Appeal Tribunal's decision was

quashed by the High Court on the ground that the proceedings were a nullity, having been instituted against the respondent's father, who had already passed away in the year 1989.

3. Be that as it may, on 19<sup>th</sup> August, 2008 the appellant obtained the authority of the area District Officer to evict the respondent and his family. The looming eviction prompted the respondent to file suit in the High Court and obtain temporary injunction prohibiting eviction pending determination of the suit. The respondent in his suit sought *inter alia* a declaration that he was entitled to the suit land through adverse possession and transfer of title in his favour. The appellant obviously opposed the suit maintaining that her rights over the suit land had not been extinguished.

4. Upon considering the evidence before it, the High Court vide a judgment dated 9<sup>th</sup> May, 2013 allowed the respondent's suit. It is that decision that is the subject of the appeal and cross appeal before us. The appellant in the appeal faults the trial Judge for finding that the respondent had proved adverse possession while the respondent in his cross appeal faults the trial Judge for holding that time in respect of adverse possession could only begin to run as far as he was concerned when he had attained the age of majority.

5. Mr. E. Obok, learned counsel for the appellant, submitted that the appellant's registration was a first registration, hence it could not be defeated or extinguished. In his view, the fact that the appellant had purchased the suit land, the same was not subsequently available for sale, and that the respondent could not get a better title to such land. Placing reliance on the case of *J. A. Pye (Oxford) Ltd. & Others -vs- Graham & Another [2002] UKHL 30* he also submitted that the respondent had not demonstrated an intention to dispossess the appellant of the suit land. Mr. Obok argued that notwithstanding the fact that the Tribunal proceedings were rendered invalid, the same amounted to interruption of the respondent's possession. Further, the appellant had on several occasions tried to evict the respondent, hence the respondent's occupation of the suit land had been interrupted, negating his claim for adverse possession. He urged the Court to allow the appeal.

6. Mr. K. Ndirangu, learned counsel for the respondent, in opposing the appeal, argued that the trial Judge properly applied the principles of adverse possession, except for the time when actual adverse possession commenced in this case. In support of the cross-appeal, he submitted that time with regard to adverse possession could run in favour of a minor. Buttressing this line of argument, Mr. Ndirangu submitted that **section 41** of the **Law of Succession Act** allows a minor to hold property through a trustee while **Article 40** of the Constitution allows every person to hold property. Further, **Article 27 (4)** of the Constitution prohibits discrimination on account of age. He also cited *Rachappa Totappa -vs-Madivalawa Rachappa (1944) 46 BOMLR 683* and *Chinnaiah Kownder -vs- Kattayya Kownder (1977) 2 MLJ 382*.

7. According to Mr. Ndirangu, the mere filing of a suit does not interrupt occupation. In order for suit to interrupt occupation, it has firstly to be filed against the adverse possessor; secondly, result in an order restoring possession to the registered owner and thirdly, such an order should be executed. He also relied on *Kasuve -vs- Mwaani Investments Ltd. & Others (2004) 1 EA 83*, *Mawji -vs- Hasham & Another (2010) 2 EA 296* & *Wambugu -vs- Njuguna (1983) KLR 172*.

8. We have considered the record, submissions by counsel and the law. As appreciated by this Court in *Mawji -vs- Hasham & Another (supra)*, adverse possession operates against ownership wherein adverse possession extinguishes the rights of a registered owner over the parcel of land in question. It is trite that the burden is upon the person claiming adverse possession to prove the same on a balance of probability.

9. This Court in *Mtana Lewa -vs- Kahindi Ngala Mwangandi [2015] eKLR* expressed;

***“Before one can claim title to land by adverse possession and apart from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, nec vi, nec clam, nec precario, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner.”***

It was also restated in *Kim Pavey & 2 Others -vs- Loise Wambui Njoroge & Another [2011] eKLR*;

***“Whereas as established by Shields, J. the appellant took possession in January 1977 it was necessary for him to have established that the possession was adequate and continuous and that there was dispossession of the registered owner. The appellants failed to do so yet this was the heart of their claim. 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.”***

10. It is not in dispute that the respondent entered onto the suit land with his parents in 1982 and continued in possession even at the time of filing suit in the year 2008. It is also not in dispute that the respondent made extensive developments thereon and utilized the suit land to the exclusion of the appellant. In our view, the appeal turns on whether the said possession by the respondent was for a continuous and uninterrupted period of 12 years.

11. It is imperative to note that the respondent’s claim to the suit land is not through the estate of his late father but in his own right. According to the respondent, time begun running when he entered onto the suit land in the year 1982. From the record, it is clear that in 1982 the respondent was only 4 years old. Could time have begun to run from then in his favour? It is our considered view that because the respondent was a minor he lacked legal capacity to hold title to land. As such time could not run in his favour as long as he was a minor. Therefore, we concur with the following findings by the trial court,

***“The plaintiff (respondent in this appeal) claims to have been residing on the land since 1982..... In my view, the period when the plaintiff was a minor cannot be counted in the adverse possession..... The adverse possession if at all could only come into effect in 1996 when he became an adult. The time therefore started running in 1996....”***

12. The question that then arises is whether the tribunal proceedings commenced in the year 1999 by the appellant to regain possession of the suit land interrupted the respondent’s possession. In *Kirutu -vs- Kabura - Civil Appeal No. 20 of 1993 (unreported)* this Court observed:-

***“The passage from Cheshire Modern Law of Real Property which Potter J.A. made reference in Githu -vs- Ndeete is important and deserves to be read in full. It is at page 894 section VI under the rubric the methods by which time may be prevented from running and the learned Author says:-***

***“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. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him ... He must either make a peaceable and effective entry or sue for the recovery of the land. Again in the case of Githu v Ndeete [1984] KLR 776 at page 780 this Court held that time ceases to run when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor.”***

In that regard the trial court held that since the tribunal proceedings had been quashed by the High Court they had no effect on the respondent’s possession. We, however, are of a different view. We understand the law to be that time stops running in favour of an adverse possessor either when the title holder asserts his right to the land in question or when the adverse possessor admits the title holder’s right. As set out in *Kirutu -vs- Kabura (supra)* assertion of a title holder’s right can be through the institution of legal proceedings to regain possession. Whether or not the title holder succeeds in such proceedings is another matter altogether. The fact that such proceedings are instituted and prosecuted is in our view, a clear indication of the title holder exerting his right to the land interrupting possession of the adverse possessor. In this case the respondent attained the age of majority in the year 1996 hence time begun to run in his favour then. However, his possession was interrupted in 1999 when the appellant instituted the tribunal proceedings. Consequently, by the time the respondent had filed his suit in 2008, claiming title through adverse possession, he had not been in continuous and uninterrupted possession of the suit land for a

period of 12 years.

13. The totality of the foregoing is that we find that the appeal has merit and is hereby allowed. We set aside the judgment of the High Court dated 9<sup>th</sup> May, 2013 and substitute the same with an order dismissing the respondent's suit with costs. We also find that the cross-appeal lacks merit and we dismiss the same. The appellants shall have costs for both the appeal and cross appeal.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of December, 2016.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**