IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 28 OF 2014

BETWEEN

TITUS KIGORO MUNYI ……..…..…… APPELLANT

AND

PETER MBURU KIMANI ….…….…… RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Kerugoya

(Olao, J.) dated 8th August, 2013

in

H.C. E.L.C. No. 63 of 2013)

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JUDGMENT OF THE COURT

1. Titus Kigoro Munyi, the appellant, filed an Originating Summons dated 27th February, 2010, claiming adverse possession against the respondent in relation to ***Land Parcel No. Mbeti/Gachoka/473,*** *(hereinafter referred to as the suit property)*. He sought orders that the respondent's title to the suit property be extinguished by virtue of adverse possession and the suit property be registered in his favour as the proprietor.

2. The facts upon which the claim for adverse possession is made is that the appellant entered the suit property in 1970 before the process of land adjudication and demarcation started; that the suit property belonged to the Kamuvia Clan of the Mbeere tribe and the property was sold to the appellant by three members of the said clan namely, Kiriamburi Thigari, Hezron Kiriamburi and Kiriamburi Kiriari. In the year 1975, the suit property was registered in the joint names of the respondent, Peter Mburu Kimani, and Tabitha Muthoni. The said Tabitha Muthoni is since deceased. When the suit property was registered in the joint names of the Respondent and Tabitha Muthoni, the appellant was still living on the parcel. In the Originating Summons, the appellant deposes that he has lived on the suit property for over 40 years and for the said 40 years he had never seen the respondent or Tabitha Muthoni; that he has been cultivating the property and has made extensive developments thereon; that eight houses stand on the property and he

has buried two of his children on the land. It is the appellant's contention that the respondent has never occupied nor lived on the suit property. Based on the aforementioned facts, the appellant claims title to the suit property by way of adverse possession.

3. The respondent in opposing the claim to adverse possession filed a replying affidavit. In the affidavit, it is deposed that the respondent and his deceased sister, Tabitha Muthoni, bought the suit property in 1974 for Kshs. 43,000/= and were registered as proprietors thereof on 14th November, 1975. That a dispute arose between the vendor and members of his clan and a restriction was entered against the suit property until the dispute was resolved in the year 1978. On 11th July, 1978, a title deed was issued in the joint names of the respondent and his deceased sister. The respondent deposed that the appellant was never a party to the dispute and the title deed issued to the respondent is a first registration. It is the respondent's averment that at the time of registration and issuance of the title deed, there was no one in physical possession and occupation of the suit property. By virtue of the restriction entered by the Registrar on the suit property, computation of time for purposes of adverse possession could not run until the restriction was removed and the title deed issued. The respondent stated that Tabitha Muthoni died on 21st December, 1981, and grant of letters of administration to her estate were confirmed on 8th June, 2010; the respondent contended that time for adverse possession did not run from 21st December, 1981, until 8th June, 2010 when the grant of letters of administration were confirmed; it is the respondent's case that time cannot run against a deceased person.

4. To counter the submission that the appellant has been in possession of the suit property since 1970, the respondent deposed that upon the death of Tabitha Muthoni in 1981, he continued visiting the suit property and there was no one in physical occupation. It was not until the year 2005 when he visited the property and found that the appellant had erected a temporary house on the land; he chased the appellant without any resistance. In the year 2007, the appellant again invaded the land and the respondent warned him of dire consequences if he did not vacate; that the appellant requested for time to vacate. On 25th May, 2010, the appellant and the respondent and three (3) elders appeared before the Area Assistant Chief where the issue was discussed, resolved and agreed that the appellant would vacate on or before 30th August, 2010 after harvesting his crops. The suit property is 43.23 acres and the respondent is not aware of any grave thereon. It is the respondent's case that the appellant had not proved adverse possession over the suit property.

5. Upon hearing oral evidence in the matter, the High Court (Olao, J.) dismissed the appellant's claim for adverse possession prompting the instant appeal. In dismissing the claim, the learned Judge summarized the issues for determination and the evidence on record as follows:-

"Going by the evidence on both sides, this being a claim for adverse possession, the plaintiff has to show the following:

1. ***That he has been in continuous and uninterrupted possession of the land for 12 years or more.***

2. ***That such possession has been open and notorious to the knowledge of the owner.***

3. ***That such possession was without the permission of the owner.***

4. ***That the plaintiff has asserted a hostile title to the owner of the property.***

In his evidence in chief, the plaintiff said he first met the defendant in 2010, he stated thus-

"I first saw Mburu on 25th May, 2010, for the first time when he was with the chief and they came to my home claiming the land was his. I told him that the land was mine and that I had already filed this case in March the same year."

The plaintiff repeated the above during cross-examination by Mr. Gathogo when he said:

"I first saw Mburu on 25th May, 2010, after I had filed this case."

The defendant himself said he first saw the plaintiff on the land in 2004. Either way, it is clear from the above that the earliest that the defendant had knowledge of the plaintiff's occupation of the land was in 2004 (as per the defendant) or 2010 (as per the plaintiff). To entitle the plaintiff to an order in adverse possession, the same must, as I have stated above, be open, notorious and to the knowledge of the registered owner (<u>Kimani Ruchine & another – v- Swift Rutherford & co. Ltd. & Another,</u> (1980 KLR 10). Clearly, therefore, and going by the plaintiff's own testimony, the defendant only came to know about his (plaintiff's) possession of the property in 2010 and therefore, the entry of the plaintiff on the property in 1970 when he says the Kamuvia Clan gave him the land was certainly not with the knowledge of the defendant and therefore the limitation period cannot be computed from 1970. And if the period is computed from 2004 or 2010, the 12 years had not been extinguished by the time this claim was filed in March 2010. It cannot therefore be correct for the plaintiff's counsel to submit that the defendant's title was extinguished twelve years from 1978. The plaintiff's possession of the land from 1970 is not in dispute. But it was not with the knowledge of the defendant and by the plaintiff's own admission; the defendant only became aware of that possession in 2010. Indeed it was soon after that discovery that the defendant immediately asserted his right to the property culminating in criminal charges against the plaintiff for forceful detainer in Siakago Court Criminal Case No. 727 which resulted in the plaintiff's conviction. Ultimately therefore, upon considering all the evidence in this case, I am not satisfied that the plaintiff has proved his case on a balance of probabilities and I accordingly dismiss his Originating Summons with costs".

6. Aggrieved by the decision of the trial court, the appellant lodged the present appeal citing 15 grounds that can be compressed and summarized as follows:-

i. ***The learned Judge erred in law and facts in not finding that the appellant had proved his case on a balance of probabilities;***

ii. ***The learned Judge erred in law and fact in not finding that the appellant and his family had been in open, continuous uninterrupted and exclusive occupation, possession and use of the suit property for a period exceeding 12 years as a mater of fact since 1970 and the appellant and his family continue to occupy the said land to date and the said occupation is adverse to the respondent;***

iii. ***The learned Judge erred in failing to find that the respondent's title to the suit property had been extinguished by virtue of adverse possession;***

iv. ***The learned Judge erred in not finding that the time from which to compute adverse possession is 14th November, 1975 when the suit property was registered in the name of the respondent;***

v. ***The learned Judge erred in law and fact in computing adverse possession from either the year 2004 or 2010 and in not finding that the appellant's possession since 1970 was not in dispute and was adverse to the respondent's title to the suit property;***

vi. ***The learned Judge erred in law and fact in presuming a tenancy in common as between the respondent and his late sister Tabitha Muthoni and in finding that the respondent and the late Tabitha Muthoni's estate were each entitled to half (1/2) share of the suit property;***

vii. ***The learned Judge erred in law and fact in not finding that the proprietorship of the suit property between the respondent and her late sister having been a joint tenancy, the same cannot be subject to succession proceedings in respect of the estate of Tabitha Muthoni as the respondent in law automatically became the sole proprietor;***

viii. ***The learned Judge erred in law and fact in not finding that right from the year 1975 or 1978 when the respondent purchased the suit property and had it registered in his name, the appellant had been in open, notorious and adverse occupation and possession of the suit property with the knowledge of the registered owners and that the appellant had been in occupation of the suit property even prior to registration of the said land and issuance of the title deed.***

7. At the hearing of this appeal, learned counsel ***Messrs Okwaro Muyodi*** appeared for the appellant while ***Messrs Gathoga Wairegi*** appeared for the respondent. Both counsel filed written submissions and made oral highlights at the hearing.

8. Counsel for the appellant reiterated the grounds of appeal emphasizing that there was overwhelming evidence on record to prove that the appellant had been in possession of the suit property since the year 1970. It was submitted that the appellant was put in possession by PW1, Mriamburi Thigari, who testified that he knew the appellant and that they are from different clans. PW1 testified that he, together with Hezron Kiriamburi and Kiriamburi Kiriari gave the suit property to the appellant and they later sold the parcel to the appellant for Kshs. 56,000/= before land demarcation was done; that the appellant is still living on the suit property. Counsel submitted that both PW2, James Mugo Muturi, and PW3, Florence Kivara Kombo, testified that they knew the appellant and he had been living on the suit property.

9. Counsel for the appellant submitted that the key issue in the appeal is whether the appellant's occupation of the suit property was adverse and whether adverse possession was proved by the evidence on record. It was submitted that the respondent testified he used to visit the suit property since 1982 and he came to know of the appellant's adverse possession in 2010. Counsel submitted that this allegation was meant to defeat the computation of time; he submitted that the title deed to the suit property was given to the respondent on 11th July, 1978 and this is the time from which adverse possession should be computed; that computing adversity from 1978, twelve years lapsed in 1990 and thus adverse possession was proved.

10. On the issue as to whether the estate of Tabitha Muthoni should have been enjoined in the suit, counsel for the appellant submitted that the suit property was registered in the joint names of the respondent and Tabitha Muthoni; the register did not indicate that the two proprietors held the property as tenants in common and the presumption is that a joint tenancy with the right of survivorship was created. The appellant submitted that upon the death of Tabitha, the entire suit property became the sole property of the respondent by virtue of joint tenancy and the doctrine of *jus acrescendi* (right of survivorship); that due to the right of survivorship, there was no need to enjoin the estate of Tabitha Muthoni as she no longer had proprietorship interest in the suit property. Counsel cited the case of ***Kasuve – v- Mwami Investment Ltd., (2004) KLR 184*** in support of the submission.

11. Counsel for the respondent in opposing the appeal, submitted that the appellant's own testimony shows that he entered the suit property not as a trespasser but as a licensee; that for adverse possession to take place, the person must enter the suit property as a trespasser; that in the instant case, the appellant testified he was put into possession by PW1 and he later allegedly bought the suit property from PW1. It was submitted that this evidence demonstrates that the appellant entered the suit property by consent of PW1 as a licensee and a claim for adverse possession cannot be sustained; it was submitted that the appellant never intended to enter the suit property as a person asserting a claim for adverse possession/trespasser but entered as a licensee.

12. Counsel submitted that the learned Judge correctly established from the evidence on record that the time for computing adverse possession was either the year 2004 or 2010; the appellant both in examination in chief and cross-examination maintained that the first time he saw the respondent was on 25th May, 2010. It was submitted that going by this testimony, possession of the suit property by the appellant came to the knowledge of the respondent in 2010. It was submitted that at the time the appellant entered the suit property, he was either a licensee or an owner pursuant to an alleged sale and the issue of adverse possession cannot arise. It was submitted that there was no evidence that the respondent knew the presence or occupation of the appellant till the year 2004. On the issue of joint tenancy or tenancy in common, it was submitted that events subsequent to the death of Tabitha Muthoni demonstrate that it was

the intention of the respondent and Tabitha when they bought the suit property that they were tenants in common with equal share. Counsel submitted that upon the death of Tabitha, her share of the suit property has been distributed to nine (9) beneficiaries of her estate; that the appellant should not have instituted the Originating Summons without enjoining the estate of Tabitha Muthoni; that this Court should note that the beneficiaries of the estate of Tabitha Muthoni are persons who stand to be affected by any order or judgment of this Court yet they have never been enjoined in this suit right from the High Court to this appeal. This court was urged to dismiss the appeal.

13. Counsel for the appellant in reply to the respondent's submission stated that the appellant was never a licensee of the respondent and the administrators of the estate of Tabitha Muthoni held the suit property in trust for the appellant. It was stated that the administrator of the estate of Tabitha Muthoni was a witness before the trial court and thus the beneficiaries are deemed to be aware of the existence of this suit though they are not parties thereto.

14. We have considered the written and oral submissions by counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. (See ***Selle -v- Associated Motor Boat Co. [1968] EA 123*; *Jabane – v- Olenja, [1986] KLR 661, 664.*** This Court stated in ***Jabane – v- Olenja, [1986] KLR 661***, 664, that it will not lightly differ from the findings of fact of a trial Judge and will only interfere with them if they are based on no evidence ***(***See ***Ephantus Mwangi -v- Duncan Mwangi Wambugu, (1982-88) 1 KAR 278 and Mwanasokoni -v- Kenya Bus Services, (1982-88) 1 KAR 870.***

15. The key issue in this appeal is whether adverse possession of the suit property by the appellant was proved. The appellant submitted that he entered the property in the year 1970 and has been living thereon openly, in notoriety and without interruption. The respondent asserts that on various occasions he visited the property and the appellant was not in occupation until the year 2004 when he chased him away and again in 2007 when he found the appellant in occupation and threatened him with dire consequences. The respondent asserts that there has never been adverse possession by the appellant for the requisite 12 years. This Court in ***Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)*** approved the decision of the High Court in the case of ***Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B***, where Kneller J. held that:

"The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration".

16. Counsel for the respondent submitted that there was no adverse possession by the appellant since he entered the suit property as a licensee. The trial Judge held that there was no dispute that the appellant had been in occupation of the suit property since 1970 to date. To the trial court, the critical issue was whether the respondent had knowledge of possession/occupation of the suit property by the appellant. The trial Judge held that the respondent did not have knowledge of possession of the suit property by the appellant until the year 2004 or 2010. The court observed that computation of time for adverse possession could only start when there is actual or constructive knowledge by the registered proprietor that a third party claiming adversity is in possession of the suit property. In the instant case, the trial Judge held that the year 2004 or 2010 was the year of actual knowledge by the respondent that the appellant was in possession of the suit property. In computing adverse possession from either 2004 or 2010, the trial court found that the 12 years required for adverse possession had not lapsed. The issue in this appeal is whether the trial court erred in computing adversity from 2004 or 2010. This begs the question from which date should time begin to run in support of the claim for adverse possession by the appellant?

17. It is the appellant's contention that time for adversity should be computed from the year 1975 when the respondents name was entered in the register as the registered proprietor or from 1978 when the title deed was issued in the respondent's name. It is well settled that in adverse possession, the maxim is *nec vi, nec clam, nec precario*. In ***James Mwangi & Others – v- Mukinye Enterprises Ltd., -High Court***

Civil Case No. 3912 of 1986, it was stated that a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years.

18. The appellant in his testimony stated he entered the suit property in the year 1970 by consent of PW1. In the case of ***Benjamin Kamau Murima & Others – v- Gladys Njeri, - Civil Appeal No. 213 of 1996,*** it was held that

"In determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the land in form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse".

19. In ***Wellis' Cayton Bay Holiday Camp Ltd. –v- Shell Mex & BP Ltd., (1975) QB 94***, it was stated that when the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use of it and so leaves it unoccupied, he does not lose his title to it simply because some other person enters it and uses it. The reason is not because the user does not amount to actual possession, rather the user is to be ascribed to the license of permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it, and the owner by not turning him off impliedly gives permission; acts done under license or permitted by the owner do not amount to adverse possession.

20. We note that PW1 who put the appellant in possession/occupation of the suit property has never been the registered proprietor of the property. In ***Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, -Civil Appeal No. 125 of 1997*** it was held that:-

"***Adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes***".

In ***Wambugu – v- Njuguna, (1983) KLR 172 at holding 4***, this Court held:

"***Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined".***

21. Having been put in possession by PW1, the appellant further testified that he continued in possession of the suit property having purchased the same from PW1 for Kshs. 56,000/=. Our interpretation of this evidence is that the appellant's continued possession of the suit property was pursuant to the sale agreement with PW1 as a *bona fide* purchaser for value. The continued entry and possession by the appellant was with permission of PW1 *qua* vendor. We re-iterate that PW1 was never registered as proprietor of the suit property; the land was under demarcation and adjudication and PW1 had no title that could enable him sell or alienate the property to the appellant.

22. We observe and note that in the case of ***Public Trustee – v- Wanduru, (1984) KLR 314 at 319,*** Madan, J.A stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. However, in the instant case, can it be said that adverse possession by the appellant should run from when PW1 allegedly sold him the suit property? We note that PW1 has never been registered as a proprietor of the suit property.

23. As regards the respondent, when the appellant entered into occupation of the suit property in the year 1970 or when the alleged sale agreement with PW1 was entered into, the respondent was not the registered proprietor of the suit property until 1978. In the case of ***Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997*** this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity

cannot run against a person who has no interest in the property. However, it must be noted that under ***Section 7*** of the ***Limitation of Actions Act***, the law relating to prescription affects not only present holders of the title but their predecessors. ***(***See ***Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111).***

24. A critical legal issue in this appeal is from which date or year should time for the adverse claim be computed? The appellant contends that his occupation of the suit property has been open and with notoriety since 1970 and time should be computed from 1978 when the respondent was registered as proprietor of the suit property. The trial court held that time was to be computed from either 2004 or 2010 being the year when the respondent came to have knowledge that the appellant was in possession of the suit property.

25. The legal question is whether the adverse, open and notorious possession of the suit property should be to the knowledge of the whole world or must it be confined to the actual or constructive knowledge of the registered proprietor? In ***Ithongo – v- Thindiu, (1981) KLR 197,*** Law JA citing the case of ***Rains – v- Buxton (1980) 14 Ch D 537*** stated that a right to land is extinguished, in the absence of fraud, after the statutory period, although the owner is unaware that adverse possession has been taken. At page 206 it is stated that ignorance on the part of the owner whether of his right or of the infringement of his right does not prevent the operation of the statute. In ***Maweu –v- Liu Ranching & Farming Cooperative Society Ltd., 1985 KLR 430 at 434***, it is stated that any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. In ***Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B***, Kneller J. held that in adverse possession:

"The plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation…".

26. Guided by the dicta as stated by Kneller J. herein above and as adopted by this Court in ***Francis Gicharu Kariri – v- Peter Njoroge Mairu, - Civil Appeal No. 293 of 2002 (Nairobi),*** we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court.

27. We concur with the dicta by Kneller J in ***Kimani Ruchire –v– Swift Rutherfords & Co. Ltd.,*** *(supra)* and hold that the trial court did not err in finding that time for adverse possession should be computed from 2004 or 2010 and not from 1978. From the testimony of the appellant, from the year 1970 and for the 40 years he had been in possession of the suit property *(and specifically between 1978 till 25th May, 2010),* he had never seen the respondent. From this evidence, we find no error on the part of the trial court in drawing the inference that the respondent had no actual knowledge that the appellant was in possession of the suit property prior to 25th May, 2010.

28. On the issue of the appellant's equitable rights over the suit property, the trial court established that the appellant had been in possession of the suit property since 1970. The evidence on record shows that the respondent became the registered proprietor of the suit property in 1978.The dicta in ***Mwangi & Another –v – Mwangi,*** (***1986) KLR 328***, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. ***Section 18*** of the ***Limitation of Actions Act*** provides that subject to ***Section 20(1)*** of the ***Limitations of Actions Act***, the Act applies to equitable interests in land. In the instant case, the appellant's case before the trial court was based on adverse possession. The issue of equitable rights or overriding interest was neither pleaded nor canvassed. This Court being an appellate court and has no original jurisdiction to determine whether the appellant has any equitable right or overriding interest in the suit property. Consequently, we decline to make any order relating to equitable rights or overriding interest because the issue was neither pleaded nor canvassed and considered by the trial court.

29. In totality we find that the appellant's claim for adverse possession for a period of 12 years was not proved. We have considered the other grounds of appeal specifically the issue of joint and or tenancy in common and find that they are immaterial to the extent that they do not affect the computation of time for adverse possession and do not go to the *ratio decidendi* of the trial court's decision. We hold that the time for computing the claim for adverse possession in the instant case is 2010 when the appellant testified he first saw the respondent.

30. The upshot is that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nyeri this 24th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR