



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, OUKO & KANTAI, J.J.A)**

**CIVIL APPEAL NO. 161 OF 2012**

**BETWEEN**

**JOHNSON NEHONDO .....APPELLANT**

**AND**

**CHRISTOPHER NASHISAKO..... 1ST RESPONDENT**

**FREDRICK NAMATSI .....2ND RESPONENT**

(An appeal from the Judgment and Decree of the High Court of Kenya at

Kakamega (Chitambwe, J) dated 30th September, 2010 In **H.C.C.C. NO. 335 OF 1988 (OS)**)

**JUDGMENT OF THE COURT**

Like most disputes involving land, this appeal is an example of a protracted litigation that no doubt has drained the three families involved in terms of money, energy and time. The dispute can be traced to a sale agreement entered into in 1975 between Aggrey Nyapola and the 1st respondent, Christopher Nashisako, (Christopher), in which the former sold to the latter land parcel No. WANGA/LUBINU/1191, measuring 5 acres, (the suit land) which was a sub-division of original parcel No. WANGAILUBINU/585, measuring 17.5 acres.

This sale immediately sparked controversy. First, the vendor alleged that he had only sold three and not five acres. This led Christopher to register a caution against the land title on 7th August, 1974 claiming purchaser's interest. At the same time, the vendor filed in the Resident Magistrate's Court at Kakamega R.M.C.C. No. 36 of 1975 claiming two acres from the land sold to Christopher. The suit was dismissed. An appeal to the High Court in HCCA No. 72 of 1975 was similarly dismissed.

One of the vendor's sons, James Amabia Nyapola also instituted an action against his father, Aggrey Nyapola and Christopher in Kakamega RMCC No. 100 of 1984 claiming ownership of the suit property. This suit was also dismissed.

In 1987, Christopher sold the suit property to Fredrick Namatsi, the 2nd respondent, fermenting further controversy over the ownership of the suit property. The new purchaser, the 2nd respondent, sought vacant possession by instituting, Kakamega RMCC No. 576 of 1988 to evict another son of the vendor, Johnson Nehondo Nyapola, the appellant herein, who in turn brought an originating summons against Christopher and the 2nd respondent claiming ownership of the suit property through adverse possession. It is this action that has given rise to the present appeal. It would appear that the

application for eviction was not pursued because of the claim by the appellant.

After receiving evidence from both sides of the dispute, the trial Judge (Chitambwe, J.) in a judgment rendered on 30th September, 2010 held that although there had been suits involving some of the parties in the originating summons and relating to the same subject matter as that in the originating summons, the High Court (G.B.M. Kariuki, J., as he then was) had found on a notice of preliminary objection that the originating summons was not *res judicata* those other suits. The learned Judge found on the merit of the suit that the plaintiff in the originating summons, who is the appellant herein, failed to demonstrate that he had been in quiet possession of the suit property for a period of twelve (12) years. He said;

**"I have no reason to doubt the averments in the plaint in PMCC No. 576 of 1988 that the plaintiff herein went to the suit land in 1987. His claim for adverse possession can only run from 1987 when he took possession of a portion of the suit land. This being the case and the current suit having been filed in 1988, I do find that the plaintiff has not established that he has been actual possession of the suit land for over 12 years before he filed this suit."**

With that, the learned Judge concluded, on the basis of that finding, that the appellant was not entitled to be registered as the proprietor of the suit property as an adverse possessor. The action was dismissed with costs, prompting this appeal, raising nine (9) grounds which were condensed and argued by Mr. Akwala, learned counsel for the appellant in three clusters.

First, it was submitted that the learned Judge erred in dismissing the case against the weight of overwhelming evidence that the appellant had been in quiet possession of the suit property since birth in 1956 up to the present day; that at the time Christopher transferred the suit property to the 2nd respondent in 1987 the former's interest on it had been extinguished; that the appellant has all along lived on and worked the suit land openly, exclusively, continuously, uninterrupted and peacefully; and that both Christopher and the 2nd respondent had never been to the suit land.

Secondly, it was argued that, after correctly finding that Christopher and the 2nd respondents have never taken possession of the suit land and that the originating summons was not *res judicata*, the learned Judge erred in relying on those earlier suits to dismiss the originating summons. Finally, it is the appellant's case that the learned Judge based his reasons for dismissing the appellant's case on conjecture, speculation and insinuations and failed to analyse the issues before him.

Mr. Ombito, learned counsel representing the respondents, support the decision of the Judge. In his view, the appellant had failed to present evidence to support the claim for adverse possession. For instance, he submitted, the appellant's occupation of the suit property has never been quiet; that there have been law suits and a restriction placed in the register challenging its ownership between 1975 and 1988; that while these were happening the appellant was an adult but failed to stake his claim of ownership in any of those suits.

This is a first appeal and our duty as directed in **Selle & Another Vs. Associated Motor Boat Company Ltd.** [1968] EA 123, is to re-evaluate the evidence on record in order to arrive at our own independent conclusion. As we do so, we bear in mind that we did not see or hear the witnesses to be able to assess their demeanour.

In terms of **sections 7 and 17** of the Limitation of Actions Act, after the end of twelve years from the date on which the right of action accrued no action can be brought to recover land and the title of the registered proprietor will be extinguished. The two sections provide as follows;

**"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.**

.....

**17. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action), the title of that person to the land is extinguished."**

The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the leading case of **Wambugu Vs. Njuguna** [1983] KLR 172 this Court summarized the law on adverse possessions in its holding as follows:-

**"Held:-**

**1. The general principle is that until the contrary is proved, possession in law follows the right to possess.**

**2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.....**

**3. The Limitation of Actions Act, on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.**

**4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.....**

**5. The rule on "permissive possession" is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.....**

**6. Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour.....time cannot run in favour of a licensee. A licensee therefore has no adverse possession (*Hughes v. Griffin* [1969] 1 WLR 23.)"**

Apart from the above, the following principles also apply when considering an application under **section 7** of the Limitation of Actions Act.

i) For the registered owner of land to be dispossessed, the party claiming ownership by adverse possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. See **Ngati Farmers Co-operative Society Limited V. Councilor John Ledidi & 15 others**, Nkr CA No. 94 of 2004.

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

iii) Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. See **Githu V. Ndeete** [1984] KLR 776. Running of time will not be interrupted by sending a notice or letter from the true owner

to the claimant.

iv) Exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. See **Powell V. McFarlane** [1977] 38 P & Cr. 452.

Arising from these principles, we must consider the following two questions;

- i) Whether Christopher was dispossessed or discontinued his possession of the suit property; and
- ii) Whether the appellant's possession was exclusive, continuous, uninterrupted and peaceful for twelve years.

The answers to these questions will be supplied by the evidence presented before the High Court, to which we now turn.

The appellant's case advanced by himself and two witnesses was that he was born in 1956 on the suit property which belonged to his father, Aggrey Nyapola and has known no other home but the suit property. He has developments on the land which include houses, trees, subsistence crops and a fish pond; that his father had three wives; that before the sub-division the suit property was known as WANGA/LUBINU/585 measuring 17½ acres. He stated that the original was sub-divided into 3, but gave only Nos: 1190 and 1191 (the suit land). The former was retained by his father while 3 acres from No. 1191 (the suit land), was in 1969 allocated to his mother. But shortly in 1975, she left the appellant's father and got married elsewhere. It was not until 1984 when Christopher was selling the suit land to the 2nd respondent that he (the appellant) learnt that his father had disposed of it to Christopher. He maintained, in this connection, that he was not aware of the court actions that had been brought over the suit land.

It would appear from the extracts of the register submitted as evidence that in 1977 a portion of the second parcel No. 1190 (measuring 3.5 acres) out of the sub-division was sold and transferred to the 2nd respondent on 21st July, 1977 by Christopher at a consideration of Kshs. 3,500/=.

In his testimony Christopher maintained that when he purchased the suit land from the appellant's father, it was still part of the original parcel. A dispute arose as to the actual size of the land purchased. This forced Christopher to register a caution against the title in 1974 to forestall any further dealings.

In 1975, that caution was withdrawn and the title was closed upon sub-division division into Nos. 1190 and 1191. The law suits alluded to at the beginning of this judgment then ensued. Later, Christopher sold the suit land to the 2nd respondent. The 2<sup>nd</sup> respondent on the other hand confirmed that the appellant lives and uses the suit land.

It is not in dispute that the appellant was born on the suit land in 1956. Parcel No. EAST WANGA/LUBINU/585 was created in 1966 and registered in the name of Aggrey Nyapola, the appellant's father. Parcel No. 1191 measuring five acres was created in 1975 yet the appellant claimed before the trial court that it was given to his mother in 1969. In 1972 the mother left Aggrey Nyapola and was re-married elsewhere. As these events took place, the suit property was not in existence. It could not have been available to be allocated to the appellant's mother. As a matter of fact, as early as 1974 there was already a dispute regarding the size of the parcel Christopher had purchased from the appellant's father. In the suit filed in 1984 by the appellant's brother, James, against their father, Aggrey Nyapola and Christopher, being Kakamega RMCC No. 100 of 1984, James claimed that the suit land was gifted to him by their father but when he, (James) returned from Uganda he found it had been sold.

We pause here to ask, whose land was parcel No. 1191? Was it Aggrey Nyapola's estranged wife, Sarah Nyapola's or did it belong to James? It was even suggested by one of the appellant's witnesses that Aggrey Nyapola gifted the suit land to the appellant. Considering the suit brought by James in Kakamega RMCC. No. 100 of 1984, E.M. Githinji, SRM, as he then was, easily found that;

**".....This suit is clearly a conspiracy between the plaintiff and 1st defendant to defraud the 2nd defendant of the land but the plaintiff's claim is misconceived."**

The 1st and 2nd defendants referred to in the above passage were James Amabia Nyapola and Christopher, respectively. Aggrey Nyapola, according to the appellant, died in 1999, that is ten years after the suit giving rise to this appeal was filed. Twenty four (24) years before his death he had transferred the suit land to Christopher. Prior to that period, the appellant grew up to be an adult on the land. His occupation was with the permission of his father, who was the registered owner and as long as his father was living, he could not inherit from him or claim title by virtue of statute of limitation. He has not claimed that the father was registered as his or the family's trustee. His father, therefore, as the registered owner of the property, had the absolute and indefeasible right over it and the freedom to dispose of it. This Court said as follows in Muriuki Marigi V. Richard Marigi Muriuki & 2 others Nyeri C.A. No. 189 of 1996.

**"The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will."**

The appellant's father exercised his right over his parcel of land, transferred it and gave Christopher a good title. It is not in doubt that as Aggrey Nyapola sold the suit property to Christopher, the appellant was on the land as were all his (Nyapola's) family members. In such transactions, it is an implied term that the vendor covenants to give vacant possession.

A situation where after sale and transfer by the registered owner of land, members of his family turn around to claim title by adverse possession on account of the period of time they have lived on the land would indeed lead to an absurdity.

Christopher and by extension, the 2nd respondent did not lose their right to the suit land by dispossession. There was no evidence of any acts by the appellant over and above those which were on the land when it was sold, that would suggest dispossession. The appellant's presence on the land before it was transferred constituted '*permissive possession*' which is incapable of being adverse. In any case, after the transfer, Christopher and the 2nd respondent continued to assert their rights by instituting legal proceedings to get vacant possession. Aggrey Nyapola never challenged the sale. What he challenged was the size of the portion Christopher, was entitled to in terms of the sale agreement.

In his judgment regarding this Aganyanya, J. (as he then was) in Kakamega H.C. Civil Appeal No. 72 of 1985 said;

**"Appellant did not allege fraud in his claim against the respondent in the suit subject to this appeal (sic) but contents (sic) that he sold the respondent only 3 acres and not 5 as appears on the title. What does a reasonable court make of this? Would the appellant have any reasonable probability of success even if the case were allowed to precede to hearing? I highly doubt.**

**The case subject to this appeal, apart from being '*res judicata*' was misconceived and was rightly dismissed by the learned Senior Resident Magistrate. I cannot interfere with the lower court's decision and this appeal has no merit. I dismiss it with costs."**

As far as the suit land (No. 1191) is concerned, the appellant has not persuaded us that the learned trial Judge erred in finding that his claim to title by virtue of the statute of limitation was not proved. However, contrary to the finding by the learned trial Judge that the originating summons was not *res judicata*, we think the observation by Githinji, SRM and Aganyanya, J. respectively that these suits are a conspiracy by family members to renegotiate the sale transaction and that the successive suits instituted by members of the family are aimed at achieving this objective hence *res judicata*. Family members

sought to reclaim the suit property and wore different masks each time they appeared on the stage but each time they would be unmasked by the court.

Like the learned Judge, we are seeking an answer to the question; is the appellant's claim related to the suit land (No. 1191) or No. 1190? We noted earlier that apart from the 5 acres comprised in No. 1191 transferred by Christopher, on 21st July, 1977 at a consideration of Kshs. 3,500/= Aggrey Nyapola also sold to the 2nd respondent 3.5 acres of a sub-division of parcel No. 1190 subsequently registered as parcel No. 1239. This happened 10 years before Christopher transferred the suit land to the 2nd respondent. The 2nd respondent now holds 8.5 acres of the 17.5 acres of the original parcel No. 585.

Could this be the source of the dispute? We do not know the answer.

We find no merit in this appeal which we hereby dismiss with costs.

**Dated and delivered at Kisumu this 23<sup>rd</sup> day of April 2015.**

**D.K.MARAGA**

**JUDGE OF APPEAL**

**W.OUKO**

**JUDGE OF APPEAL**

**S. Ole KANTAI**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**