



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 4 OF 2015

BETWEEN

GIDEON MWANGI CHEGE.....APPELLANT

AND

JOSEPH GACHANJA GITUTO.....RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Nyeri (Ombwayo, J.)

dated 14th October, 2011

in

H. C. ELC. No. 21 of 2011)

JUDGMENT OF THE COURT

1. The central issue in this appeal is whether, as decided by the High Court, the respondent herein, **Joseph Gachanja Gituto** (Joseph) had acquired title through adverse possession, and was entitled to be registered as the rightful owner of one and a half acres of land from **NYERI/WATUKA/1680 (plot 1680)** which was owned by the Appellant herein, **Gideon Mwangi Chege** (Gideon).

2. The underlying facts are fairly brief as they came from Joseph and Gideon who were the only witnesses in their respective cases. According to Joseph, in December 1998, he bought one acre of land for Shs.120,000 from Gideon who was the registered proprietor of **NYERI/WATUKA/1104**(plot 1104), measuring approximately 2.14 Hectares or 5.2 Acres. One year later in November 1999, Joseph bought a further half acre of the same land for Ksh. 48,000. Both transactions were made through written agreements drawn up by an Advocate. He paid the agreed purchase price and was put in possession of the portion of land pending survey, excision and formal transfer.

3. Before the transfer could be done, Gideon was involved in a family dispute before the **Mweiga Land Disputes Tribunal** (the tribunal) where his mother and two brothers claim interest in various plots, including plot 1104, which were all registered in Gideon's name. The Tribunal granted their request in the year 2000 and all the plots in Gideon's name were combined and the land was shared out among the family members. That is how the Register on plot 1104 was closed on 4th October 2001 and Gideon

ended up being registered on the same as the owner of plot 1680 measuring approximately 2.99 Hectares or 7.4 Acres. Joseph then sought from Gideon the excision and transfer of the one and a half acres which he continued to occupy and develop, but Gideon told him he was still pursuing the case with his family and could not comply. That is when Joseph went before the High Court in the year 2011 for a declaration that he had become entitled to the one and a half acres from plot 1680 after occupying and using it without let or hindrance for more than 13 years. He also sought further orders to effect the transfer.

4. In his pleadings and evidence, Gideon did not deny Joseph's claim. His contention was rather that he was not a party to the subdivision of plot 1104 which he still contended was his own by purchase from the Settlement Fund Trustees and not family land. He pleaded for patience from Joseph to wait until he finalized his court case after which he would process the transfer for him. He further testified that he had appealed the decision of the Tribunal to the Provincial Land Disputes Tribunal which rejected his appeal after which he appealed to the High Court in the year 2000. At first, the High court (Juma J.) rejected his motion for certification of the appeal as raising issues of law but Gideon applied for review and the High Court (Sergon J.) ordered for reinstatement of the motion for hearing. According to him, that appeal was still pending before the court. In another breath, Gideon pleaded that since the consent of the relevant Land Control Board was not obtained for the transaction, then he should be allowed to refund the purchase price instead.

5. In its judgment delivered on 20th June 2014, the High Court (**Ombwayo J.**) found no reason to deny Joseph his rightful claim which was not seriously disputed. It found as a fact that Joseph had taken possession of the portion of the land he claimed as soon as he purchased it in 1998; that the occupation was continuous and developments of a permanent nature were made ; and that no consent of the Land Control Board was given for the sale agreement and therefore the sale became void for all purposes. Gideon's plea that Joseph should wait until finalization of the pending case before the transfer was made was rejected on the ground that *"the cause of action in the two matters was different."*

6. The court in its final decision expressed itself as follows:

"This Court finds that L.R Nyeri/Watuka/1104 was initially owned by the defendant before the combination with the other parcels and the subdivision. However after subdivision, Nyeri/Watuka/1680 was created and registered in the name of the defendant. When this was happening the defendant had sold the plaintiff one and half acres and put him in occupation of the same. The plaintiff has done an official search and produced a search certificate and insists that he is occupying 1 ½ acres of Nyeri/Watuka/1680 which is now registered in the defendant's name, a fact that was not controverted by the defendant. Equity demands that the plaintiff be vested by the prescriptive rights acquired on the parcel of land he has adversely possessed whether it is Nyeri/Watuka/1104 or Nyeri/Watuka/1680. The Court further finds that the plaintiff is entitled to 1 ½ acres of land out of Nyeri/Watuka/1680 by way of adverse possession and should be registered as proprietor of the same."

7. Consequential orders were further granted to effect the transfer by authorizing the court registrar to sign all the transfer documents, mutation forms, partition forms and all other necessary documents; dispensing with consent of the Land Control Board for the partitioning and transfer; and dispensing with the production of the original title deed for plot 1680, production of the defendant's (Gideon's) passport sized photograph, PIN Certificate or his Identity Card which may be required for registration of the transfer.

8. Gideon was aggrieved by that decision and that is why he came before us. He was not represented by counsel nor was Joseph who was served with notice but did not appear at the hearing of the appeal. In his memorandum of appeal he listed five grounds asserting that the High Court had erred in finding that the doctrine of adverse possession applied; failing to find that this case was merely about breach of sale agreement; disregarding his assertion that plot 1104 was fraudulently interfered with; failing to appreciate that there was a pending case in respect of the land; and deciding against the weight of evidence. In his brief submissions, however, Gideon did not address those grounds of appeal but gave a history of how he purchased the land in the 1960s and solely dealt with it thereafter, and how it was interfered with by his

family without his participation. He submitted that it was wrong for the High Court to rely on the decision of the Mweiga Land Disputes Tribunal which had no right to take his land and have it shared out to other people. He wanted his original land back so that he could give Joseph his share from plot 1104. That was only possible after his pending case in the High court was finalized, he concluded.

9. As stated earlier, the kernel of this appeal is whether the doctrine of adverse possession is applicable and if so, whether it was correctly applied in this matter. On a first appeal, the appellant, of course, expects us to review thoroughly the evidence on record and come to our own conclusions on the matter, even as we allow for the fact that we did not have the advantage of seeing and hearing the witnesses and therefore the trial court was a better judge of credibility. We have done that.

10. **Order 37 Rule 3** of the **Civil Procedure Rules** upon which the Originating summons in the High Court was predicated, makes provision, *inter alia*, for a purchaser of immovable property, like Joseph, to seek determination of any question arising out of or connected with the contract of sale; while **Rule 7** which was also invoked, provides the procedure for applications made under **Section 38** of the **Limitation of Actions Act**, that is to say, a claim to have become entitled by adverse possession to registered land.

11. While Gideon substantially conceded the terms of the contract of sale between himself and Joseph, he had an obvious handicap as a layman in his elaboration of the grounds of appeal relating to the doctrine of adverse possession. Simply put, adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continues to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy, as well as his title to the land, are extinguished.

12. It is a doctrine that has found clear exposition in many previous decisions of this Court and perhaps the decision of Makhandia J (as he then was) in **Muraguri Githitho v Mathenge Thiongo [2009] eKLR** would suffice to crystallize it thus:-

“The law on adverse possession is in my view well settled. It is anchored on sections 7, 13 and 38 of the Limitation of Actions Act.

Section 7 provides interlia:-

“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 is first accrued to some person through whom he claims, to that person”.

Whereas Section 13 of the same Act is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

Finally section 38 is as follows:-

“38. (1) where a person claims to have become entitled by adverse possession to land registered under any of he Acts cited in Section 37, 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 he land or lease in place of the person then registered as proprietor of the land.”

The onus is on the person claiming adverse possession to prove, in the words of Kneller J (as he then was) in Kimani Ruchine v/s Swift, Rutherford & Co. Ltd (1980) KLR 10 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 evasion). So the plaintiffs 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 purpose or by any endeavours to interrupt it or by any recurrent consideration;” see *Wanyoike Gathure v/s Berverly* (1965) EA 514, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; See Section 9 (1) and 13 of the Limitation of Action Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (See generally paragraphs 481 and 482 on pages 251, 252 of 24 Halbury’s Laws of England (3rd Edition).

More recently, Kariuki J restated the law on the subject in the case of *Omukaisi Abulitsa v/s Albert Abulista, Kakamega HCCC No. 86 of 2005 (UR)* in these terms:-

“Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (*supra*) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. **For these propositions of law, see *Gatimu Kinguru v/s Muya Ghanghi* (1976) KLR 253, *Hosea v/s Njiru* (1974) E.A. 526, *Sospeter Wanyoike v/s Waithaka Kahiri* (1979) KLR 236, *Wanje v/s Saikwa* (No. 2) (1984) KLR 284, *Githu v/s Ndeete* (1984) KLR 778, *Nguyai v/s Ngunayu* (1984) KLR 606, *Kisee Maweu v/s Kiu Ranching* (1982-88) 1KAR 746, – “see *Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu* (NBI HCCC 33 of 2002)”. On this I would also add *Kasuve v/s Mwaani Investments Ltd & 4 others* (2004) KLR 184, *Samuel Miki Waweru v/s Jane Njeri Richu* (2007) eKLR.”**

13. Applying those principles to this case, it was conceded that Gideon was the registered proprietor of plot 1104 and it was proved that the title to that plot was closed and he was registered as the proprietor of plot 1680. It is unarguable that Joseph occupied a specific, ascertainable and determinable portion of plot 1104 on the basis of an agreement with Gideon made in December 1998. He remained in occupation of the same portion even when the title changed to plot 1680. The original occupation, however, was not adverse to the title of Gideon as it was consensual. It became adverse when the Land Control Board’s consent was not obtained within six months of the agreement and no attempt was made to dispossess

Joseph. Indeed it continued openly, peacefully and without interruption as Joseph developed the portion of land until he sought an order for transfer in his name in 2011. Furthermore, there has been no attempt by Gideon, up to date, to assert his right to the occupied portion. On the contrary, in his own admission, he has always been ready to transfer it if it was not for the rude interference by his family members. Nevertheless, the interference did not affect the rights of Joseph which continued to accrue as there was no attempt to dispossess him. We find and hold that the doctrine of adverse possession applied in this case.

14. In his application before the High Court, Joseph also invoked **Rule 3 of Order 37** (*supra*). It seems to us, therefore, that in addition to the acquisition of title through adverse possession, Joseph was also entitled to claim that a constructive trust arose under the contract in the manner expressed by this Court in the case of **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR** where the consent of the Land Control Board was not obtained to effect transfers of acknowledged sale transactions. The Court stated as follows:-

“It is our considered view that the respondent created an implied or constructive trust in favour of those persons who had paid the purchase price pending the sale of all the 240 plots. In Mwangi & another –vs – Mwangi (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under Section 126 (1) of the Registered Land Act is merely permissive and not mandatory. In Mutsonga – vs- Nyati (1984) KLR 425 and Kanyi – vs- Muthiora (1984) KLR 712, it was held that the equitable doctrines of implied, constructive and resulting trusts are applicable to registered land by virtue of Section 163 of the Registered Land Act which provides for the application of the common law of England as modified by equity.”

In Yaxley – vs- Gotts & Another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in Llyods Bank Plc – vs- Rosset, (1991) 1 AC 107,132, a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case..... Lord Denning in Hussey – vs- Palmer (1972) 3 All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution”.

15. It is our view that on both counts, Joseph was entitled to relief and we do not find any merit in this appeal. It follows that the other complaints raised by Gideon in the appeal are unnecessary to consider. At all events, he produced a decision of the High Court made on 11th December 2014 which shows that the application for admission of his appeal was dismissed on the basis that he had not filed any appeal in the first place. It follows that the litigation he alluded to as pending had come to an end and all that remains is to effect the decision of the High Court in this matter.

16. The upshot is that the appeal is dismissed. As the respondent did not appear at the hearing despite service of hearing notice, we make no order as to costs.

Dated and delivered in Nyeri this 17th day of June, 2015.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR