



IN THE COURT OF KENYA

AT NAIROBI

CORAM: VISRAM, AZANGALALA & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 144 OF 2006

BETWEEN

RUTH WANGARI MUIGAI.....APPELLANT

AND

EDWARD NJUGUNA MWANGI.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Hon. Mr. Justice P.J Ransley) dated and delivered on 12th October, 2005 in H.C.C.C NO. 1112 OF 2002)

JUDGMENT OF THE COURT

The appellant, **Ruth Wangari Muigai**, is aggrieved by the decision of the High Court (**Ransley J.**) dated 12th October, 2005 whereby the High Court entered judgment for the respondent, **Edward Njuguna Mwangi**, for a declaration that he had acquired, by adverse possession, title number **Loc 16 Kimandi – Wanyaga/T.36** (“the suit land”) and further ordered that the respondent be registered as the absolute proprietor of the same.

The original owner of the suit land was **Muigai Kanyua**, the husband of the appellant who is now deceased. We shall refer to him hereafter as “*the deceased*.” Upon his demise, the appellant became the registered proprietor of the suit land on transmission after obtaining a Grant of Representation to his estate.

On 2nd July, 2002 the respondent filed an Originating Summons claiming to be entitled to the suit land by adverse possession. The basis of his claim is best explained in paragraphs 2, 3, 4, 5 and 7 of the affidavit in support of the originating summons expressed as follows:-

“2. THAT I bought the parcel of land known as TITLE NO.LOC. 16/KIMANDI – WANYAGA/T.36 in 1974 (the plot) from the Respondent’s late husband

MUIGAI KANYUA then the registered owner at a price of Kshs.15,000/= Annexed hereto marked ENM 1 is a copy of the register.

3. ***THAT I took possession immediately and built a semi-permanent house and planted tea bushes.***
4. ***THAT I have been in continuous uninterrupted occupation of the entire plot to date.***
5. ***THAT at no time did the late MUIGAI KANYUA ask me to vacate the plot***
6. ***.....***
7. ***THAT in the year 2000 I learnt that the Defendant/Respondent had transferred the plot from her late husband's name into her name"***

The appellant's case was stated in paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of her replying affidavit sworn on 19th July, 2002 thus:

"3. THAT by virtue of being a beneficiary as the widow of the late Muigai Kanyua I was bequeathed all that parcel of land known as LR No. Loc 16/Kimandi – Wanyaga/T 36. I am the registered owner of the said parcel of land.

4. ***THAT I know the plaintiff herein. The said plaintiff attended the burial of my late husband. During the ceremony it was announced that anyone with a claim against my late husband to voice it immediately. No one raised any claim including the said plaintiff nor did he raise objection when I applied for letters of Administration.***
5. ***THAT following the decision made by Gatanga Land Disputes Tribunal whose minutes are annexed to the plaintiff's affidavit and marked "ENM 2 and 3", I obtained leave and applied for an order of certiorari in Miscellaneous Civil Application No. 592 of 2001....***
6. ***THAT though the Plaintiff was duly served with the said application in which I had outlined my claim in the suit premises the plaintiff did not object to my application, nor attend the proceedings when this matter was set down for hearing.....***
7. ***THAT I am advised by my Advocates which advise I verily believe to be true that if the Plaintiff had any claim against the suit premises, he would have filed a replying affidavit to the said application.***
8. ***THAT I am also further advised by my advocates, which advice I verily believe to be true that the fact that I was registered as proprietor of the suit premises before the plaintiff made his claim for adverse possession or at all the Plaintiff [s] claim was thus determined. That his term (sic) to claim adverse possession began running a fresh against myself as the new owner, the day I was registered as the proprietor and therefore this application is early in time.***
9. ***THAT it is not true that the plaintiff was in occupation of the suit premises uninterrupted.***
10. ***THAT I am the legal and registered owner of the suit premises and the plaintiff is a trespasser."***

On 20th September, 2002, the appellant lodged a notice of motion in the Originating Summons in which she sought the striking out of the respondent's Originating Summons on the ground that it was *res judicata*, alternatively that it disclosed no cause of action. The basis for the notice of motion were that there had been, between the parties, the Land Disputes Tribunal Case whose award had been adopted by the Chief Magistrate's Court and which award and adoption were quashed by the High Court and further that since her registration as proprietor of the said land, twelve years had not lapsed and therefore the adverse possession claim had no basis.

The respondent opposed the said notice of motion by his affidavit filed in reply thereto in which he deponed that whereas the award of the Land Disputes Tribunal and the proceedings in the Chief Magistrate's Court were quashed by the High Court, he still was in adverse possession of the suit land since 1974 and that the appellant was registered as proprietor of the suit land subject to the then existing overriding interests.

This record does not have the result of the notice of motion dated 15th August, 2002. However, as the respondent succeeded on his Originating

Summons, we assume that the appellant's Notice of Motion was refused.

At the trial, the respondent and his witnesses, who were four in number, testified that the respondent indeed purchased the suit land from the deceased and took possession thereof in the year 1974. The respondent admitted that he stopped living on the suit land in 1976 when he left it in his brother's possession who took care of it on his behalf. The respondent also testified that he put up a house and planted tea bushes thereon.

The appellant denied the respondent's claim at the trial. She testified that the respondent only planted the tea bushes after the demise of her husband in 1996 and that he had not been in possession since 1974 as he had alleged. She even claimed that she had been cultivating the suit land a few years prior to the demise of her husband but that the suit land had been vacant for the period immediately preceding the death of her husband. She denied that the respondent ever built a house on the suit land.

Her only witness, **Samuel Muchiri, (DW2)** whilst agreeing with the appellant that the respondent planted tea bushes after the demise of her husband, gave a conflicting date when the tea bushes were planted. DW2 also, in his testimony, introduced a dispute between the church and the respondent over a building which he claimed was put up by the respondent on a portion of the land which the church claimed. DW 2's testimony was therefore in consonance with that of the respondent that he had indeed built a house on the suit land.

The trial Judge found that the respondent had purchased the suit land from the deceased in 1974 at the purchase price of Kshs.1500/= which he paid in full and had planted tea bushes thereon which were tended by his brother from 1976 when he (the respondent) moved elsewhere. The trial judge further found that the respondent had put up a house on the suit land. He was therefore satisfied that the respondent had established a claim to the land by adverse possession. In his own words:

"I find that the plaintiff purchased the plot from the deceased in 1974 at a price of Kshs.1500/= which was paid in full.

That he planted the bushes which in 1976 were thereafter tended by his brother. That sometime later he put up a house which is the subject matter of the dispute with the church referred to above.

That having bought the plot and paid for the same in full the plaintiff was in adverse possession of the plot from then on and had acquired a title by way of adverse possession after 12 years (see WAMBUGU VS NJUGUNA KLR [1983] 172

In the result I find for the plaintiff and grant the relief prayed for with costs.

Those findings are the basis of this appeal. It is contended, in the main, that the learned judge erred in finding that the respondent had proved adverse possession when, according to the appellant, adverse possession had not been demonstrated and that the factors the learned judge considered, as establishing adverse possession, were erroneous.

Mr. Nyaanga, learned counsel for the appellant, in canvassing the appeal before us, contended that there was no evidence to support a claim of adverse possession. The respondent, according to Mr. Nyaanga,

was a purchaser of the suit land and took possession thereof with the consent of the deceased who was then the registered proprietor. It was also learned counsel's submission that the respondent paid the purchase price by instalments and it was not demonstrated when the last instalment was paid.

In those premises, according to Mr. Nyaanga, an adverse possession claim could not succeed. In his view, the only claim the respondent could have made was that of specific performance.

With regard to the period of possession, learned counsel submitted that the requisite period of twelve years had not lapsed as the respondent had left the suit land in 1976 only 2 years after the purchase. In learned counsel's view, no evidence was adduced to establish constructive possession.

In response to those submissions, Ms Gitau, learned counsel for the respondent contended that the transaction involved close relatives who, by evidence, demonstrated that the entire purchase price was paid and the respondent took possession of the suit land and commenced developments thereon. He developed a tea crop and constructed a house thereon. Learned counsel further submitted that the transaction involved agricultural land and was therefore subject to the provisions of the Land Control Act (Cap 302 Laws of Kenya) which made it mandatory for the transaction to receive the approval of the relevant Land Control Board for validation. The consent of the Land Control Board, according to learned counsel, was neither applied for nor obtained thus rendering the transaction between the respondent and the deceased null and void. Having failed to obtain the approval of the Land Control Board, the continued possession of the suit land by the respondent, according to counsel, became adverse. For this proposition learned counsel invoked our decision in the case of **Sammy Likuyi Adiema -v- Charles Shamwati Shisikoni [2014] e KLR**.

We have carefully considered the record, the grounds of appeal, the submissions of counsel, the authorities cited to us and the law. This being a first appeal, we will be guided by the principles enunciated by the predecessor of this Court in **Selle -v- Associated Motor Boat Co. [1968] EA 123**. There, it was stated, at page 126, as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it had neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or possibilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v- Ali Mohamed Shalan [1955], 22 EACA 270)” See also **Jivanji -v- Sanyo Electrical Company Ltd. [2003] KLR 425 at page 431**.

In the case of **Ngati Farmers Cooperative Society Ltd. -v- Ledidi & 15 Others [2009] KLR 331**, this Court considered matters which a claimant is required to establish to demonstrate a claim for adverse possession. The Court cited, with approval, the words of **Lindhoy MR**, on adverse possession, in the cases of **Kynoch Ltd. -v- Rour Lands [1912] 1 Ch. 527**; and

Littledale -v- Liverpool College [1900] 1 Ch.19, 21 as follows:-

“In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it.....”

His Lordship continued:

“The same point was made by Bramwell J in Leigh -v- Jack [1879] 5 ED 264, 272, where he said referring to the Statute of Limitations:

“Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. If this is the right way to approach the problem, the question becomes „Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?? rather than „Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?.....”

On the question of dispossession, His Lordship said:

“The next question, therefore, is what constitutes dispossession of the proprietor. Bramwell J in Leigh -v- Jack said at 273, that to defeat a title by dispossessing the former owner?s acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it..”

It is also trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the true owner or, subject to certain conditions, his claim is pursuant to an agreement of sale or lease or otherwise with the consent of the true owner. Further, as it was correctly held in **Jandu v Kilpal [1975] EA 225**, possession does not become adverse before the end of the period for which permission to occupy has been given. As stated in the case of **Sisto Wambugu v Kamau Njuguna [1982-88] 1KAR 217**, a purchaser of land under a contract of sale, who is in possession of the land with the permission of the vendor pending completion, cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract of sale, until the contract of sale has been repudiated or rescinded by the parties in which case adverse possession starts from the date of the termination of the contract. We hasten to add that the **Sisto Wambugu** case (supra) related to possession by a purchaser pursuant to a general contract of sale and not a contract which was

pursuant to a controlled transaction within the ambit of the Land Control Act (Cap 302 Law of Kenya) as the issue was neither pleaded nor canvassed by the parties. The same position obtained in **Mungania v Imanyara [1985] KLR 1** which was relied upon by the appellant. See also **Sammy Likuyi Adiema -v- Shamwati shisikani [2014] e KLR**.

In the instant case **Mr. Gichigi Burugu**, who appeared for the respondent at the trial, submitted, in the High Court, that the respondent’s possession of the suit land became adverse ***“six months after the agreement by virtue of the agreement becoming null and void for want of Land Board consent under section 6 of the Land Control Act (Cap 302)”***. Mr. Gitau, learned counsel for the respondent, has reiterated the same submission before us.

It is not in contention, in this case, that the Land Control Act applied to the agreement of sale between the deceased and the respondent or that the consent of the Land Control Board was neither applied for within the prescribed period, or at all, nor obtained. It follows therefore that the sale agreement between the respondent and the deceased became void for all purposes as provided by section 6(1) of the Land Control Act with the consequence stipulated in section 22 of the same Act. Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or permission of the true owner as learned counsel for the appellant contended. The possession was an independent one and was adverse to the title of the true owner.

We reiterate that where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of land by the vendor, or lessor pending completion and the transaction thereafter becomes void by virtue of the provisions of section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.

In this case the original possession of the suit land by the respondent was with the consent of the true owner, but when the transaction became void for lack of the Land Control Board consent, the continued possession of the suit land by the respondent henceforth was not with the permission of the owner. It was

clearly adverse. This was not the position in the case of **Wanje v Saikua No. 2 [1984] KLR 284**, upon which the appellant placed reliance. There, the court found that the appellants, for the most part, were in possession of the subject land with the permission of the true owner and when permission was withdrawn the appellants remained in possession for less than twelve years before action was commenced which is not the position in our case.

The learned judge of the High Court accepted the evidence of the respondent and his witnesses that he took possession of the suit land in 1974 and planted tea bushes thereon. The trial judge also accepted the evidence of the respondent and his witnesses that he later put up a house on the suit land. We have considered the material which was placed before the trial judge by the parties and are unable to fault him on those findings. **Virginia Mukami Njoro** testified as PW 1. She was the respondent's mother and told the court that the respondent purchased the suit land in 1974 took "**possession a long time ago**" and that he planted tea bushes and built a house thereon.

Mwangi Njoro (PW 2) testified that the respondent purchased the suit land in 1974 when it was vacant and after the purchase, he "**planted tea and built a house about 1976**". **Samson Gachiri** (PW 4) testified, *inter alia*, that the respondent entered into the land in 1974. The respondent himself testified as PW 5. He was categorical that he purchased the suit piece of land in 1974 and took possession then. He then planted tea bushes and built a house thereon. He freely admitted that he lived on the suit land upto 1976 when he left it in the possession of his brother who looked after the land.

The respondent's case was not, in our view, answered by the appellant. Although she acknowledged that the respondent took possession of the suit land, she gave the date of taking possession as after the demise of her husband, which was in 1996. She also claimed that she was utilizing the suit land prior to the demise of her husband. The learned judge of the High Court did not believe her. We think it was for good reason. We say so, because she was economical with the truth. She, for instance, denied being related to the respondent in her evidence in court which sharply contradicted what she stated before the Land Disputes Tribunal that she was the wife of the respondent's cousin. She also, at the beginning of her testimony at the trial, stated that "**I have not planted in this piece of land,**" only shortly thereafter to alter her testimony that "**before my husband died I was cultivating the suit premises for three years but not after he died**" and then continued "**that before my husband died it (land) was vacant**". She also stated that the respondent planted tea bushes when her husband died which was 1996 only shortly thereafter to state that she discovered the tea "**was planted in 2000**".

Given the appellant's testimony we think the learned trial Judge cannot be faulted in his assessment of her as untruthful. In his own words:

"Having heard the evidence and seen the witnesses and have no hesitation in saying that the defendant's story was a pack of lies"

We must take account of the learned judge's findings on the demeanor of the appellant unless such findings were *perverse* or were inconsistent with the evidence in the case generally. See the cases of **Selle & Another v**

Associated Motor Branch Company Ltd. & Another (supra) and Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 88] 1 KLR 278.

We find no *perverse* finding and agree that the learned Judge's impression of the appellant was consistent with the evidence before him.

Our conclusion is that the respondent has, for many years, continuously, openly and of right, without interruption, been using the suit land on which he has planted tea bushes, a permanent cash crop, and built a house thereon. It does not matter that the appellant was registered as proprietor of the suit land on 17th September, 1998. By that time the 12 year period of limitation had run out and the title of the deceased had been extinguished. The appellant did nothing to interrupt the respondent's acquisition of prescriptive title even after she became the registered proprietor on transmission. She took the title subject to the right

of the respondent in adverse possession. In our view, even if the appellant had attempted to dispossess the respondent, the latter had a perfect defence under the provisions of section 7 of the Limitation of Actions Act which reads:-

“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”

There is also section 28 (b) of the Registered Land Act Cap 300 Laws of Kenya (now repealed) which treats a proprietor such as the appellant as a trustee for the respondent. During and after her registration as proprietor, she held and now holds the title of the suit land subject to the *“rights acquired or in the process of being acquired by virtue of any written land relating to the limitation of actions or by prescription.”* (see section 30 of the Registered Land Act).

On analysis we are satisfied that the learned judge reached the correct decision on both facts and law. It did not and does not matter that the respondent is not physically on the suit land but his house is there which is utilized by his brother as he tends the respondent’s tea bushes on the suit land. The learned judge did not mention constructive possession and we think for good reason because the property on the suit land belongs to the respondent which renders the issue of constructive possession irrelevant.

The upshot of our above consideration is that we find no merit in this appeal.

It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3rd DAY OF July 2015.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

REGISTRAR