IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: SICHALE, ODEK & KANTAI, JJ.A)

CIVIL APPEAL NO. 267 OF 2007

BETWEEN

EDWIN G. K. THIONGO ………………………………..................................…. 1ST APPELLANT

WAWERU HOLDINGS LIMITED ……………….................................……….... 2ND APPELLANT

AND

GICHURU KINUTHIA …………………………..................................………. 1ST RESPONDENT

PATTERSON NJOROGE …………………………..................................…… 2ND RESPONDENT

JOHN NGETHE GICHURU ……………………..................................………..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiemo, J) dated 14th September, 2006

in

H.C.C.C. NO. 568 OF 2002*)*

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JUDGMENT OF THE COURT

The suit, the subject matter of this appeal was commenced by the filing of a plaint dated 27th March, 2002 in H.C.C. No. 568/2002 by the appellant, the then 1st plaintiff. In the plaint the 2nd appellant was named as the 2nd plaintiff whilst the 1st, 2nd and 3rd respondents were the 1st, 2nd and 3rd defendants respectively.

In the plaint, the appellant averred that in or about March 1990, he purchased LR NO. Dagoretti/Thogoto/836 (the suit land) from one **MWATHI KINUTHIA** (the vendor); that in or about 1994 he subdivided the suit land into two parcels namely Dagoretti/Thogoto/1191 and Dagoretti/Thogoto/1192 and transferred the latter to one **PATRICK WAWERU KINUTHIA** (now

deceased); that in or about August 2001, the deceased's parcel was transferred to the second appellant herein vide Nairobi High Court Succession Cause No. 2041 of 2000 and that since 1990 the respondents have unlawfully occupied the suit land. He sought an order *inter lia*, to have the respondents evicted from LR No. Dagoretti/Thogoto/1191 and Dagoretti/Thogoto/1192.

The respondents filed a defence and counter-claim dated 5th July, 2002. They averred that the 1st appellant had been their neighbor for over 43 years and was aware of the respondents' occupation of the suit land; that the vendor did not have exclusive title to the suit land as he held the land in trust for the respondents, a matter within the 1st appellant's knowledge and that the purported transfer of the suit land by the vendor to the 1st appellant was tainted with fraud.

The matter came up for hearing before Osiemo, J who in a judgment dated and delivered on 14th September, 2006 found in favour of the respondents.

The appellants were dissatisfied with the outcome of the trial and hence this appeal. In their memorandum of appeal dated 18th December, 2007 the appellants listed the following grounds of appeal:

1. ***The learned judge erred in law and in fact in finding that the plaintiff's title had been fraudulently obtained.***

2. ***The learned judge erred in law and in fact in purporting to set aside/revoke the order of court in Succession Cause Nos. 2041/2000 and Succession Cause Nos. 28 of 1991.***

3. ***The learned judge erred in law and in fact in failing to find that the 1st appellant was an innocent purchaser for value without notice.***

4. ***The learned judge erred in law and in fact in finding that the late Mwathi Kinuthia held land parcel No. Dagoreti/Thogoto/836 in trust for Gichuru Kinuthia and that such alleged trust bound the 1st appellant as a purchaser.***

5. ***The learned judge erred in law and in fact in finding that the respondents/defendants had established a claimed for adverse possession against the plaintiffs/appellants who were registered as owners in 1990 and 1994 and the suit instituted in year 2002.***

6. ***The learned judge erred in dismissing the plaintiff's suit with costs.***

During the plenary hearing before us on 17th September, 2015, Mr. Kimani learned counsel for the appellants urged us to find that the learned trial judge erred in finding that the sale/purchase of land between the vendor and the 1st appellant was flawed and fraudulent. Counsel submitted that the vendor did not hold the land in trust for the respondents; that in succession cause No. 28 of 1991 the arbitrators' award was adopted as the judgment of the court on 16th June, 1998 and which award has not been challenged to-date; that the effect of Osiemo J's, judgment is tantamount to setting aside the award; and that in Nairobi H.C.C.C.C. No. 490 of 1993 the 1st respondent had sued the vendor and the 1st appellant seeking an order for the declaration of a trust and the fate of that suit is unknown. He concluded his submissions by reiterating that although the learned judge found that the respondents were entitled to the suit land by adverse possession, there had been no claim for this and neither was the suit filed by a way of an originating summons. He postulated that the period of 12 years could only run from the dates the 1st and 2nd appellant were registered as owners which was on 17th May, 1990 and 25th April, 1994 respectively and that the suit having being filed on 3rd April, 2002, the period of 12 years had not run. The learned counsel cited several authorities. In his proposition on the manner in which a claim for adverse possession is brought to court he relied on the following authorities:

1. ***Wilson Kenyenga -vs- Joel Ombori* Civil Appeal No. 96 of 1998 .**

2. ***Lali Swaleh & Others -vs- Stephen Mathenge Wachira & Others*** ***Civil Appeal No. 132 of 1993.***

In opposing the appeal, Mr. Ogosso learned counsel for the respondents submitted that the vendor had acquired the suit land fraudulently; that the suit land was family land and this fact was within the knowledge of the 1st appellant who is the respondents' neighbour.

This is a first appeal before us. The position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our own conclusion whilst bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses **(**see **Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123).** In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings he did see **Jabane vs Olenja [1986] KLR 661.**

The fact of the purchase of the suit land by the 1st appellant from the vendor is not in dispute. The respondents' position, however, is that the vendor did not have the exclusive right to sell the suit land to the 1st appellant as according to them this was family land and the registration in favour of the vendor was in trust for them. The other argument advanced by the respondents was that since they had lived on the suit land for a period exceeding 43 years, they had acquired the suit land by adverse possession.

We have considered the record of appeal, memorandum of appeal, the grounds thereof, the rival submissions of counsel and the law.

It would appear that there have been several cases in court over the suit land. In Nairobi H.C.C.C. No. 490 of 1993, the 1st respondent is named as the plaintiff whilst Mwanthi Kinuthia (the vendor), Edward Gichuru (the appellant herein), Ms Waithera and the District Land Registrar are named as the 1st, 2nd, 3rd and 4th defendants respectively. Mr. Kimani submitted before us that the fate of this case is unknown. Mr. Ogosso for the respondents did not enlighten this Court on the fate of that case. The above notwithstanding, we note that this is one of the cases pitting the 1st respondent as against the 1st appellant, the vendor and two others. Then there is **Succession Cause No. 28 of 1991, in the Estate of Milka Mbaria.** This matter was by consent of the parties referred ***"… to arbitration before the District Officer Kikuyu"*** on 5th October 1994 by Aluoch J. The elders arbitrated upon the dispute under the chairmanship of J. K. Ole Kikua, the then District Officer, Kikuyu. In the dispute before the elders, Gichuru Kinuthia the 1st respondent herein was named as the "applicant/petitioner" whilst Mrs. Leah Waithera Kinuthia and the vendor were named as the defendants. The elders resolution was that:

> ***"In view of the above, the plaintiff should have (1/2) share of plot No. Dagoretti/Thogoto/T. 384 and the other share (1/2) remains with Leah Waithira Kinuthia. Plot No. Dagoretti/Thogoto/836 remains with Edwin Gichuru Thiongo having bought it from Mwathi Kinuthia the latter being the heir. The remaining plot Dagoretti/Thogoto/835 should similarly remain with the defendant which is part of her share."***

On 16th June, 1998 the matter was before Aganyanya, J who made an order adopting the award of the elders. He stated:

> ***"By consent the arbitrator's award filed in court on 27th March, 1995 and read in court on 10th July, 1995 be and is hereby confirmed as a judgment of the court. There be no order as to costs."***

Mr. Kimani for the appellants urged us to find that the said elders award arising out of the succession cause was not challenged and that the trial judge's finding flew in the face of the findings in the succession case. We agree. The elders arbitrated upon the matter and came to the finding that the 1st

respondent was to remain with 1 share of plot No. Dagoretti/Thogoto/T/384 and the other ½ share was to remain with Leah Waithira, one of the wife's of the deceased. As for Plot No. Dagoretti/Thogoto/836, this was to remain in the name of the appellant who had purchased from the vendor, whom the elders acknowledged was an heir and entitled to the plot he sold to the 1st appellant, whilst Plot No. Dagoretti/Thogoto/835 was to vest in Leah Waithira Kinuthia. This being the case and as the elders award having been adopted as the judgment of the court, and which judgment still stands to-date, it was wrong for Osiemo, J to vary the award by making orders that were contrary to the award in the succession cause. The registration of the 1st appellant as the proprietor of the suit land, in our view was not flawed as stated by the judge in his judgment.

The other ground of appeal was that the learned judge erred in finding that the respondents had acquired the suit land by adverse possession. In his judgment Osiemo, J stated:

> ***"The defendants have been in possession of the portion they are occupying for well over 40 years continuous and uninterrupted and they have asked this court in the counter claim to make a declaration that they have acquired proprietorship of that portion under their occupation by adverse possession.***
>
> ***I agree and declare that the defendants have acquired ownership of the portion of the suit land which has been under their occupation for over 40 years by adverse possession and the same should be registered in their names jointly and order that the register be rectified accordingly."***

The appellants attacked the manner in which the claim for adverse possession was made. They faulted the respondents for filing a counter-claim as opposed to an originating summons.

In **<u>Wilson Kenyenga vs Joel Ombori</u>** (supra) this Court held:

> ***"Order 36 Rule 3D of the Civil Procedure Rules specifically stipulates as to the manner such claims are brought to court. Such claims for adverse possession are brought by way of originating summons. This is mandatory provision and it has been repeatedly held by this Court that failure to comply with this mandatory provision makes a suit incontestably bad in law."***

Similarly in **<u>Lali Swaleh Lali & Others vs Stephen Mathenge Wachira & Others</u>** (supra) this Court reiterated that under O.XXXVI, ***"………… it is mandatory under Rule 3D(1) ……….. that an application by a person claiming to have become entitled to land by adverse possession under Section 38 of the Limitation of Actions Act, Chapter 22 of the laws of Kenya must be made by originating summons. There is no discretion in the matter and whether or not the issues involved in such an application are intricate, there is no choice in the matter."***

The respondent's claim to the suit land was made by way of a counter-claim as opposed to an originating summon. In our view, we find that the learned judge of the High Court erred in failing to find that a claim for adverse possession must be made by way of an originating summons and not by way of a counter-claim as was the case before him.

The manner of moving the court aside, the other issue is whether the respondents were entitled to the suit land by adverse possession? In **<u>Kweyu</u> <u>Vs</u> <u>Omutut</u> [1990] KLR 709** this Court (Gicheru JA stated as page 716:-

> ***"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be***

adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on *de facto* ***use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously."***

As can be discerned from the record, the vendor and the respondents were step brothers and the suit land belonged to their father, the late Mbaria Gachoka. The vendor and the respondents lived on the suit land and the court in entering judgment in favour of the respondents noted that the respondents had lived on the land for a period of over 40 years. However, the elders award which we have stated was adopted as the judgment of the court, gave the vendor plot No. Dagoretti/Thogoto/836. This is the plot that the vendor sold to the 1st appellant and who subdivided it into two. The 1st appellant and the predecessor of the 2nd appellant were registered as owners of plots No. Dagoretti/Thogoto/1191 and Dagoretti/Thogoto/1192 on 17th May, 1990 and 25th April, 1995 respectively. The suit, the subject of this appeal was filed on 3rd April, 2002, before the expiry of 12 years. In our considered view, the learned judge erred in finding that the respondents had acquired the land under the doctrine of adverse possession on the basis that they had been on the land for over 40 years. The occupation by the respondents of the suit land before the registration of the suit land in favour of the 1st and 2nd appellants was not adverse, as they lived on this land by virtue of being the children of the late Mbaria Gachoka. Their claim to the 1st and 2nd appellants land did not span for the period of over 40 years that they had been on the land as the 1st appellant became a registered owner on 17th May, 1990. The period of limitation could only run from that date and as stated above, this suit was filed on 3rd April, 2002 before the expiry of the 12 years. We find that the learned judge erred in finding that the respondent had acquired the suit land by adverse possession.

We believe we have said enough to show that this appeal is for allowing. Accordingly, we allow the appeal and set aside the judgment of the learned judge dated 14th September, 2006. The respondents to vacate land parcels Dagoretti/Thogoto/1191 and Dagoretti/Thogoto/1192 within 6 months from today's date. Given the nature of the case, we direct that each of the parties shall bear his/her own costs.

Dated and delivered at Nairobi this 30th day of October, 2015.

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

…………………….

JUDGE OF APPEAL

S. ole KANTAI

……………..........…..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR