



IN THE COURT OF APPEAL

AT NYERI

(CORAM; WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 25 OF 2015

BETWEEN

NAHASHON MURIITHI JEREMIAH..... APPELLANT

AND

NELSON MWANGI KINGURU (BEING SUED AS THE LEGAL REPRESENTATIVE OF

THE ESTATE OF THE LATE ESTHER WANJIRU KINUMBI..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Kerugoya (Olao, J) dated 4th May 2015 IN E.L.C. NO. 818 OF 2013 (OS))

JUDGMENT OF THE COURT

By an originating summons dated 3rd December 2013 and filed before the High Court at Kerugoya, **Nahashon Muriithi Jeremiah** (the appellant) sought the following orders against **Nelson Mwangi Kinguru** (the respondent);

- “1. A declaration that the plaintiff has acquired title to the whole land parcel No. Mwerua/Kagioni/687 by way of adverse possession.*
- 2. The registration of the plaintiff as the absolute proprietor of land parcel No. Mwerua/Kagioni/687.*
- 3. The costs of this suit with interest”.*

The application was premised on the grounds appearing on its face as;

- “(a) The plaintiff has been in exclusive occupation of the suit land for over 60 years.*
- b. The plaintiff has extensively developed the suit land peacefully and without any interruption over the years.*
- c. The defendant is the legal representative of the estate comprising of the suit land.*

- d. ***The title to the suit land has been extinguished in favour of the plaintiff upon expiry of 12 years of peace (sic) and un-interrupted occupation thereof by the plaintiff.***”

It was also supported by the appellant’s affidavit sworn on 3rd December 2013 in which he averred that he took exclusive occupation of the entire land parcel immediately after its demarcation and consolidation whereupon it was registered in the name of one **Mbirui Kinumbi** (deceased) and had extensively developed the same and planted coffee and trees over 60 years of his occupation thereof. He stated that the said **Mbirui Kinumbi** died a bachelor and he, the appellant, buried him on the land. One **Esther Wanjiru Kinumbi** succeeded her brother **Mbirui Kinumbi** and got registered as proprietor of the land before herself dying to be succeeded by the respondent, who is her son. He asserted that despite the changes in ownership, he continued in exclusive possession and cultivation of the land. He therefore asserted ownership by virtue of adverse possession.

The respondent resisted that suit by way of a replying affidavit sworn on 6th February 2014. He denied the appellant’s claim of exclusive possession and averred that his late uncle **Mbirui Kinumbi** always utilized his land during his life time and even leased it on 23rd October 1981 to one **Samuel Ngare** for a period of 3 years. He also exhibited a copy of the title deed to the land showing he had been registered as the proprietor of the land on 18th October 2013 by transmission from his late mother. He asserted that the appellant neither built a house nor lived on the disputed property so that the claim for adverse possession was futile and trifling.

The matter was heard before **Olao J**, by way of *viva voce* evidence. The appellant testified on his own behalf as did the respondent who also called one **Joseph Mwangi Kabiru** (DW2). The parties in testimony repeated their respective assertions while DW2’s testimony was that the respondent’s mother Esther, used to lease the subject land to his uncle called **Samuel Ngare**. He also stated that the appellant owns an adjacent piece of land and also confirmed that there are no houses or livestock on the suit land.

At the end of the testimony the learned Judge rendered a judgment on 4th May 2015 in which he found the appellant’s claim unmeritorious and dismissed it with costs. That dismissal provoked the present appeal in which the appellant contends that the learned Judge erred by;

- a. **Failing to appreciate that the respondent has not been sued in his personal capacity but as his mother’s legal representative.**
- b. **Computing time on the basis of the respondent’s short stint as registered proprietor.**
- c. **Applying wrong principles of law in determining the claim on adverse possession.**

At the hearing of this appeal both parties acted in person and made submissions along the lines of their respective affidavits and testimonies before the learned Judge.

As a first appellate Court we have considered the submissions as well as subjected the entire evidence to a fresh and exhaustive analysis and appraisal so as to make our own independent inferences and conclusions while mindful that we have not, unlike the learned Judge, had the advantage of hearing and observing the witnesses as they testified. See, **Rule 29(1)** of the **Court of Appeal Rules, SELLE –VS- ASSOCIATED MOTOR BOARD CO. LTD** [1968] EA 123. We therefore pay some deference to the learned Judge’s findings unless they be based on no evidence, a misapprehension of the evidence or are plainly wrong leading to missjustice. See **SUMARIA & ANOR –VS- ALLIED INDUSTRIES LTD** [2007] 2 KLR 1.

The only issue we have to determine herein is whether the learned Judge erred in finding and holding that the appellant had not made out a case to warrant a declaration that he was entitled to land parcel No. **MWERUA/KAGIONI/687** by prescription or adverse possession. It is trite law that for a person to succeed in such a claim he needs to establish that he, who at first had no right to the property of another, has extinguished the owner’s title by entering upon the said land openly, without force, and without the

owner's permission and remaining upon the land exclusively and adversely to the owner's right for a period of at least twelve years.

See **MBUI –VS- MARANYI** [1993] KLR 726 for a thorough and exhaustive treatment on the elements of adverse possession.

A critical and foundational point the appellant needed to prove in order to succeed was possession of the land in question. The appellant was however unable to satisfy the learned Judge on this score. Nor are we satisfied from a consideration of the record. Quite contrary to the appellant's allegation that he has been in occupation of the subject land since 1952, there was ample evidence including from himself, that it was not so. The learned Judge analyzed the evidence tendered before him, and properly so in our view, thus;

“If indeed the plaintiff was living on the suit land with his family as alleged, nothing would have been easier than for him to produce evidence such as photographs of his home as proof. That is why this court is inclined to believe the defendant's evidence when he said; ‘the plaintiff has lied. There is no house there and neither did he bury his parents there as alleged. He lives on his land No. MWERUA/KAGIONI/199 which is adjacent to my land. He has never been in occupation of my land.’”

The respondent in fact asserted, and the appellant had to admit in cross-examination, that far from living on the subject land, the appellant is the registered proprietor of an adjacent piece of land **MWERUA/KAGIONI/199** which is in fact larger than the respondent's piece of land. This, added to the fact that DW2 testified without contest that ***“Esther [the respondent's mother] used to lease it [the subject land] to my uncle Samuel Ngare. My mother also used to cultivate it,”*** all go to show that the appellant was unable to prove actual, exclusive and continuous possession. In deed, when he cross-examined DW2, what came out is that the respondent's mother used to work on the land and there are no houses or livestock on it, thereby giving the lie to the appellant's claim on possession or occupation.

That ought to suffice to dispose of this appeal but it is plain also that even had the appellant succeeded in showing that he had possession, the same would not have amounted to adverse possession for the simple reason that, on his own showing, if such possession had existed, it was with the permission of the original owner **Mbirui Kinumbi**. In answer to the learned Judge's question as to why he wanted to be given the subject land while he had his own adjacent thereto, the appellant stated;

“Because Mbirui Kinumbi gave me the land and when he died in 1983 I continued living and cultivating that land. I even lived there when he was alive. Mbirui Kinumbi is an uncle to the defendant. Even when Mbirui Kinumbi was alive, I have been living and working on that land.”

The law has always been that if the possession is with the licence or permission of the owner, it cannot be productive of title against him in favour of the possessor. It is enough for us to restate what was said in **JANDU –VS- KIRPAL** [1975] EA 225, at p. 234;

“The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title and that he excluded him from enjoyment of the property. According to English cases, there must be something amounting to ouster of the person against whom adverse possession is claimed.”

See also **STASSO PROPERTIES LTD –VS- MANJI & OTHERS** [1991] KLR 167.

Having failed in those critical respects, the appellant's suit before the court below was doomed to fail and the learned Judge did not err in dismissing it. By the same token this appeal is devoid of merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 28th day of October, 2015.

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR