



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MWILU & KANTAI, J.J.A)**

**CIVIL APPEAL NO 52 OF 2012**

**BETWEEN**

**PATRICK MAGU MWANGI KIMUNYU.....APPELLANT**

**AND**

**JORETH LIMITED.....RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nairobi (Muchelule, J.) dated 24<sup>th</sup> January 2012 In H.C.C.C. No 59 of 2010)***

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**JUDGMENT OF THE COURT**

1. The appellant, Patrick Magu Mwangi Kimunyu, took out an originating summons in the High Court in which he claimed the right to be registered as proprietor of the property known as Plot No 290, Thome Farmers No 5 Limited, and now known as LR No 13330/41 (hereinafter called “the suit property”). In that summons, he sought the following orders that:

- a. ***He be declared to have acquired title by adverse possession to the suit premises and;***
- b. ***The registration of the respondent as proprietor of the suit property, and any other person deriving title from the appellant be cancelled forthwith and the Land Registrar do rectify the register to enter the name of the appellant as the registered proprietor of the suit property in place of the respondent or anyone deriving title from the respondent.***

2. The appellant swore an affidavit in support of the application in which he averred that: he is a registered proprietor of one share in the entity known as Thome Farmers No 5 Limited, having been so registered on 11<sup>th</sup> August 1995; that he acquired the share on 7<sup>th</sup> August 1995 from one Joseph Gichohi Gichuhi and Leah Wanjiku Karanja for Kshs 640,000.00; that Thome Farmers No 5 Limited had allocated the suit premises, then known as Plot 290, to the sellers, and after the sale of their share, the appellant entered into possession of the suit property; that he built his home on the suit property, begun to farm and generally used the plot for over 15 years. At the time of filing of the summons in February 2010, he claimed to have been in open and uninterrupted possession of the suit property for a period of over fifteen years. The appellant therefore urged that he had acquired title to the suit property by way of adverse possession, and that any claim by the respondents or anyone else had been extinguished.

3. Joreth Limited, the respondent herein, is the registered owner of the properties known as LR No 4290/3/1 and 4921/3/1 which were amalgamated to LR No 13330 and sold to Thome Farmers No 5 Limited. Thome Farmers subdivided the plots and allocated to its shareholders. Plot 290 which the appellant claims is a plot that arose from the subdivision, but it is unclear whether the subdivisions were ever registered.

4. The respondent on its part alleged that it filed suit in 1992, to wit HCCC No 6206 of 1992 against people it considered trespassers on the parcel of land. This suit was against all the trespassers and later on, Thome Farmers No 5 Limited was enjoined as a party. The respondent's position was that since the appellant had taken possession of the property subsequent to a sale agreement and the passing of valuable consideration, there was therefore no adverse possession. As such, according to the respondent, the appellant was in open and permissive possession of the property, and not adverse possession.

5. During hearing of the summons, the appellant gave oral testimony and reiterated the averments in his affidavits. During cross examination, he confirmed that once he had bought his share of Thome Farmers No 5 Limited, he was allowed by the sellers to occupy the property.

After consideration of the summons, the testimony of the appellant and the rival submissions of the parties, Muchelule, J., rendered himself thus:

***“the plaintiff’s possession was with the permission of the sellers and, through them, of Thome Farmers No 5 Ltd. He did not have any dealing with the defendant over the plot or at all. But it is clear that the claim is against the Defendant through Thome Farmers No 5 Limited and the sellers. The Defendant’s counsel correctly submitted that since the Plaintiff took possession of the suit plot following purchase, and therefore with the permission of the sellers, such possession cannot confer a claim for adverse possession.”***

The learned judge therefore found that the claim had no merit and dismissed it with costs.

6. The appellant was aggrieved with that finding of the trial judge and now approaches this court in this appeal in which he asks us to re-evaluate the judgment and make a finding in his favour. Mr. Kingara, learned counsel for the appellant faulted the trial court's finding that the appellant had claimed through Thome Farmers No 5 Limited, after having been given permission to occupy the property by them. He also faulted the trial court's finding that the occupation of the property was by way of a licence from the respondent as there was no evidence adduced to suggest that was the position. In the face of the affidavit evidence and the oral evidence of the appellant, counsel urged that the judge erred in finding that the possession of the appellant was based on the permissive authority of the respondent.

7. Mr. Kingara submitted further that the trial court erred by treating the submissions of the respondent as evidence. The respondent did not oppose the summons; it did not file a replying affidavit and called no evidence to rebut the appellant's evidence which was to the effect that he had bought the suit property and that he had been in uninterrupted possession.

Counsel added that Thome Farmers No 5 Limited could not transfer a licence, and so possession of the property was certainly without the permission of the respondent because first, there was no dispute that the respondent was the registered proprietor, and secondly, there was uncontroverted evidence that the appellant had taken possession in 1995 and was in open uninterrupted possession of the suit property and had even constructed a house thereon, and thirdly the trial judge did not make a finding that the appellant was not in possession for the entire duration of 15 years.

8. The appeal was opposed by Mr Koech learned counsel for the respondent. He disagreed with the assertion that the summons was unopposed since the respondent had filed grounds of opposition in the High Court and had also participated in the trial by cross-examining the appellant. The evidence that arose out of the cross-examination was that there was permissive possession arising out of the fact that Thome Farmers No 5 Limited bought the suit property from the appellant and there was a resolution of the directors to that effect, who later allowed the appellant to occupy the premises. This was the position

until 1992 when the respondent filed suit asserting its right to the property, submitted counsel.

9. In this first appeal, our duty is, in the words of this Court in *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR (Civil Appeal 110 of 2011),

***“[In] a first appeal, we are required to re evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”*** See also

***Selle & Another v Associated Motor Board Company Ltd And Others [1968] 1 EA 123,***

where the Court of Appeal for Eastern Africa set out the principles to be considered when determining an appeal from the High Court as follows:

***“An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally.”***

10. In the discharge of that duty as afore-stated, we have briefly set out the evidence that was led before the trial court.

What is clear from the averments of both parties is that the respondent herein was to transfer a parcel of land, from which arose the suit property to Thome Farmers No. 5 Limited. This was a land buying company that would then subdivide the land into half acre parcels and allocate them to its shareholders. The appellant purchased a share in Thome Farmers and so acquired with it interest in the suit property. It is undisputed that the appellant has been in occupation of the property since 1995, and based on this fact, claims to have acquired the property by way of adverse possession.

11. As the appellant’s claim was based on adverse possession, the provisions of the Limitation of Actions Act apply. Section 7 of the Act provides that:

***“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.”***

Section 17 of the same Act provides that:

***“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.”***

Section 38 (1) gives the right to a person claiming to be entitled to land by way of adverse possession to apply for such an order by providing:

***“Where a person claims to have become entitled by adverse possession to land ..., he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”***

12. To succeed in a summons for adverse possession, it must be shown that there was open, continuous and uninterrupted possession for a period of at least twelve years. In *Ndatho v Itumo & 2 Others* [2002] 2 KLR 637, this Court held that in order to succeed in a summons for adverse possession:

***“the possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor.”***

In the much earlier case of Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another [1977] eKLR Kneller J correctly held that:

***“The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec plecario (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 purposes or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v Beverly***[1965] EA 514, 518, 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 sections 9(1) and 13 of the Limitation of Actions 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 (eg if the area is flooded) then dispossession for that period cannot occur (see generally paragraphs 481 and 482 on pages 251, 252, of 24Halsbury’s Laws of England (3rd Edn)).***

***The plaintiffs have to show exclusive uninterrupted possession of the land without fraud for twelve years (see sections 7 and 17 of the Limitation of Actions Act) before the date of the filing of the plaint, which was 15th September 1971.***

***Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because these are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it. The resources or status of the claimants is not a factor in the correct approach to deciding what constitutes a sufficient degree of sole possession and user. The standard is an objective one and related to the nature and situation of the land.***

***Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time; see, generally, West Bank Estates Ltd v Arthur*** [1966] 3 WLR 750.”

That decision was approved by this Court in Francis Gicharu Kariri v Peter Njoroge Mairu [2005] eKLR (Civil Appeal No 293 of 2002) and recently in Titus Kigoro Munyi v Peter

Mburu Kimani [2015] eKLR (Civil Appeal No. 28 of 2014).

13. In this matter, it is the appellant’s contention that he entered onto the property in 1995 and thus that was when his possession, adverse to the respondent’s title, commenced. The respondent on the other hand contended that the appellant could only have taken possession of the property in 2002, after a suit surrounding the larger portion of land from which the suit property was excised was determined by way of consent. On this issue, we are assisted by the case of Mawji v Hasham and another consolidated with Greenfield Investment Ltd and Another [2010] 2 EA 296 where it was held that:

***“for the possessor to succeed, he must first establish factual possession, and that he, the possessor has the requisite intention.”***

In Joseph Mutafari Situma v Nicholas Makhanu Cherongo [2007] eKLR (Civil Appeal 351 of 2002):

***“For his claim to succeed he must not only prove exclusive physical possession of an identifiable portion of the suit land ... (animal possidendi) to the exclusion of the world at large including the respondent”***

14. It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. See **Samuel Miki Waweru v Jane Njeri Richu Civil Appeal No 122 of 2001 (unreported)**.

It is apparent that the appellant was in possession of the suit property without the consent of the respondent. His possession of the property was pursuant to a sale agreement between him and another third party who had previously been shareholders of Thome Farmers No 5 Limited. As this was the case, there was no way that the respondent could have given the appellant a licence to occupy the property. Therefore the possession of the property was indeed adverse to the title of the respondent herein, and we so find.

15. This leads to the question whether or not the possession was continuous and uninterrupted. In the respondents view the possession was interrupted by virtue of a suit filed in the High Court which was eventually settled by way of consent in 2002. The question that arises therefore is whether time was running before the suit was compromised.

In **Ndatho v Itumo (supra)** the Court considered the question by analysing various previous pronouncements on the issue:

***“The position in Kenya as regards when the time would stop running against an adverse possessor has been amply set out. In the case of William Gatuhi Murathe vs. Gakuru Gathimbi (Civil Appeal No. 49 of 1996) (unreported) this Court followed the decision in the case of Joseph Gahumi Kiritu vs. Lawrence Munyambu Kabura (Civil Appeal No. 20 of 1993) (unreported) which reviewed previous judgments of this Court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to land by adverse possession. We would set out the following excerpt from the judgment of Kwach, J.A. in Kiritu vs. Kabura (supra).***

*“The passage from Cheshire’s Modern Law of Real property to which Potter JA made reference in Githua v Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says-*

*“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.’*

***I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya.”***

16. The testimony of the appellant glaringly points to the fact that the appellant did not know of the suit that had been filed by the respondent; he was not a party to it, and there was no evidence tendered in court

as to the disposition of that suit.

This was not an assertion of the respondent's rights to the suit property as against the appellant and ultimately, did not amount to an interruption of the possession of the appellant.

17. As the appellant has shown that he was in continuous and uninterrupted possession of the suit property for a period of over twelve years, he is entitled to the orders that he sought in his summons before the High Court. The appeal should be and is hereby allowed, the judgment of the High Court should be and is hereby set aside. The appellant shall have the costs here and in the Superior Court.

It is so ordered.

**Delivered at Nairobi** this 9<sup>th</sup> day of October, 2015.

**W. KARANJA**

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**JUDGE OF APPEAL**

**P. M. MWILU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**