



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & MARAGA, J.J.A)

CIVIL APPEAL NO. 46 OF 2013

BETWEEN

RICHARD MUGO KIAMBO APPELLANT

AND

JAMES MURIUKI KIAMBO RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Olao, J.)

dated 31st July, 2013)

in

H.C. E.L.C No. 31 of 2012)

JUDGMENT OF THE COURT

1. By his Originating Summons filed in the High Court of Kenya at Kerugoya, the appellant sought the following orders:-

- ***A declaration that the plaintiff (appellant) has acquired title by adverse possession to a portion of 0.30 Ha from L.R Baragwi/Thumaita/1067 situated within Kirinyaga District.***
- ***The portion of 0.30 Ha be exercised from L.R Baragwi/Thumaita/1067 and be registered in the name of the plaintiff in place of the defendant (respondent).***

2. The appellant is the respondent's younger brother. It was the appellant's case at the trial court that he had acquired title to a portion measuring 0.3 of a hectare of Title No. Baragwi/Thumaita/1067(the suit land) by way of adverse possession. He had been in occupation of the said portion since 1980; he had been in continuous and interrupted occupation of the portion for more than 18 years. The appellant testified that their mother, Rahab, also lived on the suit land. He stated that he had developed the said portion by planting 837 tea bushes and erecting a permanent house worth Kshs. 1.2 Million. He testified that he got married to his wife in the year 1989 and has lived on the said portion with his family; when he was working out of town his wife and children continued living on the said portion. He stated that he built a permanent house on the said portion in the year 2004 and that prior to that he and his family were living

in a semi-permanent house. He testified that their mother, Rahab, suffered from a stroke in the year 2006; and that he and his wife took care of her until she passed away in the year 2007. After the death of their mother, the respondent began picking the appellant's tea without his authority. Subsequently, on 12th May, 2007 the respondent gave him 3 days' notice to vacate the suit land. According to the appellant, the suit land was transferred to the respondent by their father, Joseph Kiambo Karuigi, to hold it in trust for the family.

3. The respondent denied that the appellant was entitled to any portion of the suit land. He testified that he is a preacher at A.C.K Diocese Kirinyaga. Their father was a prosecutor by profession and he retired in the year 1972 and went to live in Meru. His father was the registered owner of Baragwi/Thumaita/253 measuring 6 ½ acres (family land); their father lived on the family land with his three wives and children. In the year 1976 their father used the said parcel to secure a loan he had obtained from Kenya Commercial Bank. He was not able to repay the loan. Their father sold a portion measuring 4 acres of the family land to offset the said loan to one Mugambi. Thereafter, he sold the remaining portion of 2 ½ acres to the said Mugambi and moved with his family to Meru. The appellant and respondent's mother refused to go to Meru and instead went to live with her brother in Mwea.

4. When the family land was sold, the respondent was staying in the school where he was teaching. In the year 1977, the respondent purchased a portion of 2 ½ acres of the family land from the said Mugambi for a consideration of Kshs. 30,000/=. The portion purchased by the respondent was described as Baragwi/Thumaita/725, the suit land. In the year 1982, he started educating his siblings and invited them to stay on the suit land as they pursued their education. Subsequently, the respondent invited his mother, Rahab, to come and live on the suit land in the year 1988; he gave her 1087 tea bushes for her sustenance. The respondent testified that the appellant came into the suit land in the year 1988 and lived in the same house with their mother. The appellant got married in the year 1989 and moved out of the suit land and rented a room at a Shopping Centre known as Kamugunda. In the year 1990 the respondent subdivided Baragwi/Thumaita/725 into two, Baragwi/Thumaita/1067 (suit land) and Baragwi/Thumaita/1068. Baragwi/Thumaita/1068 was used as security for a mortgage facility. The respondent and their mother lived on the suit land.

5. In the year 1999, their mother fell ill and the appellant moved back into the suit property to look after her because the respondent was then teaching at Kerugoya Boys School. In the same year the appellant and their mother demanded that the respondent transfer a portion of 1 acre of the suit land to them. The respondent refused to do so and informed his father about the demand. He testified that their father gave the appellant and their mother a parcel of land in Meru measuring 3 acres. The parcel is described as Karunga/Ndagani/4267; the said parcel is registered in the joint names of the appellant and their mother. The respondent testified that his brothers instituted a claim in respect of the suit land in the Land Disputes Tribunal; the Tribunal issued an award in favour of the respondent's brothers. The award was subsequently set aside by the High Court in Civil Appeal No. 13 of 2000.

6. Their mother passed away in 2007 and the appellant began picking the tea the respondent had given her. He testified that the appellant cut down his coffee trees and planted napier grass without his consent. He maintained that the appellant built the permanent house in the year 2005 when the suit at the High Court was still pending. He confirmed that after the death of their mother he asked the appellant to move out of the suit land.

7. According to the respondent, the appellant entered the suit land in the year 1999 under the pretext of taking care of their ailing mother; he forcefully put up a temporary structure. He maintained that the appellant had only occupied the suit land for a period of 7 years.

8. Convinced that the appellant had not proved his case, the trial court dismissed the suit vide a judgment dated 31st July, 2013. It is against that decision that the appellant has filed this appeal based on the following grounds:-

- ***The learned Judge erred in law and fact in holding and finding that the appellant had entered, utilized and occupied the suit land with the consent of the respondent when the appellant had***

entered and occupied the same long before the respondent became the registered owner.

- *The learned Judge erred in law and fact in not holding and finding that the appellant's continuous occupation and possession of the suit land for a period in excess of 18 years was hostile to the title of the respondent.*
- *The learned Judge erred in law and fact in finding and holding that the appellant was living in the house of the respondent until 2004 when it was clear from the evidence that the appellant married in the year 1989 and was living in a semi-permanent house.*
- *The learned Judge erred in law and in fact in finding and holding that the appellant entered into a portion of the suit land at the invitation of the respondent, when the respondent's evidence suggested otherwise.*
- *The learned Judge erred in law and fact in finding and holding that the time for purposes of adverse possession started running in the year 2007 when the consent was withdrawn by the respondent when there was no evidence on record to that effect.*
- *The learned Judge erred in law and fact in finding and holding that the extract of the register was not attached and produced when in his judgment he confirms the said document was produced as an exhibit.*
- *The learned Judge erred in law and fact in finding and holding that the appellant's continuous occupation and possession of a portion of the suit land measuring 0.30Ha was not adverse to the title of the respondent.*
- *The learned Judge erred in law and in fact in attaching more weight to the evidence of the respondent and disregarding the vital evidence of the appellant and thus not finding that he had been in adverse possession.*

9. Mr. Ndana, learned counsel for the appellant, relied on the appellant's written submissions filed before this Court on 18th March, 2014 and also made oral submissions. It was submitted that the issue for determination was, whether the continuous occupation and possession of the suit land by the appellant was with the consent of the respondent. It was argued that the evidence clearly indicated that the appellant entered into the suit land in the year 1980 and was living in a semi -permanent house until the year 2004 when he constructed a permanent house. The appellant testified that their parents were living on the suit land; the respondent in his evidence admitted that the suit land was transferred to him by their father. There was ample evidence that the appellant had planted napier grass, bananas, tea bushes and trees on the portion he utilizes. According to Mr. Ndana, the evidence indicates that the appellant had lived on the suit land for a long time.

10. Mr. Ndana argued that since the suit land belonged to their father, only he was capable of giving his consent to the appellant to occupy the same. Even after the suit land was registered in the respondent's name, the appellant continued to occupy the same as of right and did not require the respondent's permission. He argued that it was not in dispute that the appellant and his siblings had filed a claim against the respondent at the Land Dispute Tribunal; the same was evident of the fact that the appellant's occupation of the suit land was hostile.

11. Mr. Ndana submitted that the occupation of the suit land by the appellant was not with the consent of the respondent. This is because the respondent testified that the appellant, his mother and siblings demanded for a portion of 1 acre of the suit land; he refused to give into their demands; consequently the appellant, his siblings filed a claim in the year 1999 at the Land Dispute Tribunal. Based on the outlined circumstances there was no way the respondent would have given his consent to the appellant to occupy the suit land. He argued that the appellant's occupation was continuous and adverse to the title of the respondent. He further argued that the learned Judge erred in holding that the appellant had not produced a certified extract of the title of the suit land. He submitted that from the record it was clear that the

appellant had produced the green card of the title to the suit land as an exhibit. He urged us to allow the appeal.

12. Mr. Munene, learned counsel for the respondent, in opposing the appeal, submitted that the parties' father sold the suit land and the respondent purchased the same from one Mugambi. According to him, the appellant did not adduce any evidence to establish the doctrine of adverse possession. He maintained if there was any hostility in respect of the appellant's occupation, it started in the year 2003 and the suit was filed in the year 2007; the requisite time to establish adverse possession had not lapsed. There was no proof that the appellant was in a continuous and uninterrupted occupation of the suit land for a period of 12 years. He argued that in the year 1980 the appellant was 13 years old and could not have built a semi-permanent house on the suit land. According to Mr. Munene, the appellant did not produce a certified extract of the title, thereby offending the mandatory provisions of the current **Order 47** of the **Civil Procedure Rules**. He urged us to dismiss the appeal.

13. This being the first appellate court, it is tasked with the duty to analyze and re-evaluate the evidence tendered by the parties in the trial court as decided in the case of **Selle –vs- Associated Motor Boat Company (1968) E.A. 123** at page 126, where the Court of Appeal held,

“... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect...”

See **Jivanji –vs- Sanyo Electrical Company Ltd. (2003) KLR 425**.

14. We are of the view that we should first consider the issue of certified extract of the title of the suit property. **Order XXXVI rule 7** of the former **Civil Procedure Rule** (now **Order 37 rule 7** of the current **Civil Procedure Rules**) provided in :-

“7 (1) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(2) The Summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.....”

On this issue the learned Judge (Oloa, J.) expressed himself as follows:-

“Although the plaintiff's supporting affidavit in paragraph 3 talks of a certified copy of the register as being marked R.M.K. 1, what was annexed and marked as R.M.K. 1 was in fact a certificate of official search... That alone would be enough to dispose this suit although counsels did not address me on it”

15. We are of the considered view that even if the appellant annexed a copy of search to the affidavit in support of the Originating Summons that would not warrant the dismissal of the suit. This is because firstly, of the overriding objective of the court which places an obligation on the court to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes without undue regard to technicalities. See this Court's decision in **Caltex Oil Limited -vs- Evanson Wanjihia- Civil Application No. Nai 190 of 2009**. Secondly, we cannot help but note that from the record the appellant produced the green card for the suit land.

16. Adverse possession is provided for in the **Limitation of Actions Act**, Chapter 22, laws of Kenya. **Section 7** of that Act provides that an action for recovery of land cannot be brought until after the expiry of 12 years from the date on which the cause of action arose; **Section 17** provides that after the expiry of the 12 years period for a person to bring an action to recover land, the title of that person in the land is extinguished; and **Section 38(1)** of the Act provides that a person who claims to be entitled by adverse possession to land may apply to the High Court for an order that he be registered as proprietor of the land in place of the registered owner. The issue that arises for our consideration is whether the appellant had

proved he was entitled to a portion of 0.3 of a hectare of the suit land.

17. The trial court correctly held that:-

“For a plaintiff to prove that he is entitled to an order that he has acquired the land by adverse possession, he must show:-

(a) He has been in continuous and uninterrupted possession of the land for 12 years or more.

(b) Such possession must be open and notorious to the knowledge of the owner.

(c) Such possession must be without the permission of the owner.

(d) The plaintiff must assert a hostile title to that of the owner of the property.”

The learned Judge’s observations are a reiteration of this Court’s decision in **Kasuve -vs- Mwaani Investments Ltd. & 4 others (2004) 1 KLR 184** at pg. 188, where this Court held,

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

See also **Wanje vs. Saikwa(1984) KLR 284.**

18. It is not in dispute that the appellant was in occupation of the suit land when he instituted the suit at the High Court. The issue is when did the appellant’s occupation of the suit land begin? There are two versions as to when the appellant started occupying the suit land. The appellant gave evidence that he begun occupying the suit land in the year 1980. On the other hand the respondent contended that the appellant lived with him from the year 1988 and moved out in the year 1989 when he got married; that he returned to the suit land in the year 1999 when their mother fell ill. The trial court believed the respondent’s version.

19. We have considered the evidence on record and we are inclined to believe the appellant’s version that he has been in occupation of the suit land in the year 1980. We say so because firstly, the respondent’s evidence on this fact is contradictory. In his examination in chief, the respondent testified that the appellant lived on the suit land in the year 1988 and left in 1989 when he got married. While on cross examination he stated that the appellant left the suit land in the year 1993 and returned in 1999 to take care of their mother. Further, the respondent gave evidence that he purchased the suit land from one Mugambi and in another breath he said that his father transferred the suit land to him. This brings into question the respondent’s credibility. Secondly, the appellant’s evidence on this aspect was consistent.

20. Having found as above the next issue for consideration is whether the appellant’s occupation was with the consent of the respondent. The respondent alleged that the appellant occupied the suit land with his consent; that he invited the appellant to the suit land in the year 1999 to take care of their mother. On the other hand, the appellant maintained that his occupation was adverse to the respondent’s title. Based on the evidence we are inclined to believe that the appellant’s occupation of the suit land was not with the consent of the respondent. This is clearly evident by the fact that the respondent testified that in the year 1999 the appellant and their mother asked him to transfer to the appellant 1 acre of the suit land and he declined to do so. Further, the respondent also testified that the appellant and his other siblings in the same year filed a claim in the Land Dispute Tribunal seeking a portion of the suit land. From those set of circumstances we do not believe that the respondent could give his consent to the appellant to occupy the suit land when he was aware that his brother wanted a portion thereof to be transferred to him.

21. We also find that the appellant proved that he committed acts inconsistent with the respondent’s rights and enjoyment of the suit land. The appellant gave evidence that he had planted tea bushes, napier

grass and bananas. He also gave evidence that he had built a permanent house thereon. In Wanje -vs- Saikwa (Supra) this Court approved the finding of Madan, J. (as he then was) in Gatimu Kinguru -vs- Muya Gathangi (1976-80) 1 KLR at pg. 325,

“The defendant did acts which were inconsistent with the enjoyment of the soil by the person entitled i.e. the plaintiff, for the purposes for which he had a right to use it. Planting a boundary of tufts of nappier grass is the best evidence of adverse possession like fencing off and cultivation of land even without fencing off has been held sufficient to prove adverse possession.”

22. Further, there is no evidence that the respondent has asserted his right over the said portion or dispossessed the appellant of the same. The fact that the respondent issued a 3 days’ notice to vacate to the appellant was not proof that he had asserted his rights over the property. In Githu -vs- Ndete (1984) KLR 776, Potter, J.A, at pg. 780 held,

“in my view the giving of notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitations of Actions Act.”

We find that the appellant did establish that he was entitled to a portion of 0.30 of a hectare of the suit land by virtue of adverse possession.

23. The upshot of the foregoing is that we find that the appeal herein has merit. Accordingly, we set aside the judgment of the High Court dated 31st July, 2013 and enter judgment in favour of the appellant as prayed in the Originating Summons. We also award the appellant costs both in the High Court and in this appeal.

Dated and delivered at Nyeri this 6th day of May, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR