



**IN THE COURT OF APPEAL AT**

**NAIROBI**

**( G.B.M KARIUKI,GATEMU,& MURGOR,JJ.A**

**CIVIL APPEAL 278 OF 2004**

**BETWEEN**

**ALEX NJONJO KARU .....1ST APPELLANT**

**JACKSON NGUGI NGOCHI ..... 2ND APPELLANT**

**FRANCIS KINYANJUI NGOCI .....3RD APPELLANT**

**JASON MUHUNGI NGOCHI .....4TH APPELLANT**

**AND**

**JOHN KAMAU GITUNGO ..... RESPONDENT**

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Rawal, J) delivered on 15th May, 2003 in

**HIGH COURT CIVIL CASE NO. 3973 OF 1994)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. This judgment relates to the appeal against the decision of the High Court given on 15th May 2003 upholding the respondent's claim for title to land by adverse possession.

**Background**

2. The subject matter of the dispute in this appeal is the land known as Title Number Loc. 1.Thuita/667 (the property) measuring approximately 1.9 acres situated in Muranga County.

3. The respondent's case before the High Court was that John Kamau Gitungo (Gitungo) occupied the property on 4th October 1965 under an arrangement with Karu Gathii, deceased (Gathii) whereby in exchange of a parcel of land that was to be acquired for him, Gathii, as the then registered owner was to transfer the property to Gitungo. According to Gitungo, he kept his part of the bargain and purchased a property for Gathii located elsewhere and known as Title Number Loc. 4 Ngararia/678. However, Gathii who was ailing from cancer, died before transferring the property to him.

4. Gitungo commenced suit in November 1994 in the High Court against the 1st appellant, Alex Njonjo Karu (the 1st defendant in the High Court) who is the son and personal representative of the estate of Gathii. Gitungo's claim in that suit was that he acquired the

property by prescription having been in occupation and exclusive possession of the same for over 12 years. Gitungo therefore sought an order of the court to be registered as owner of the property. Gitungo died during the pendency of the suit in the High Court. His name was by an order of the court given on 23rd July 1999 substituted with that of his wife Beth Wanjiku Kamau who should therefore be named as the respondent in this appeal.

5. The 2nd to 4th appellants (2nd to 4th defendants in the High Court) to whom Alex Njonjo Karu had in the meanwhile transferred the property were subsequently joined in the suit and restrained from dealing with it pending determination of the suit in the High Court.

6. The 1st appellant's case before the High Court on the other hand was that Gitungo is a trespasser on the property; that Gitungo's land known as Loc 1/Thuita/385 adjoins the property; that upon the death of Gathii, Gitungo uprooted the common boundary between his said property and the property so as to appear as though no boundary ever existed; that upon the death of his father he applied and obtained letters of administration on the strength of which he transferred the property to 2nd to 4th appellants as the persons entitled to it. The 1st appellant denied the existence of the exchange arrangement between his father Gathii and Gitungo under which Gitungo claimed that Gathii was to transfer the property to him.

7. According to the 2nd to 4th appellants, the property was registered in the name of Gathii in trust for their father; that upon the death of Gathii and upon the letters of administration being granted to the 1st appellant, the property was rightly transferred to them; that the claim by Gitungo has no basis and that if Gitungo ever occupied the property he did so by removing boundaries and fraudulently merging the property with his adjacent property known as Loc 1/Thuita/385.

8. After conducting a hearing, the High Court (K.H. Rawal J, as she then was) was satisfied that Gitungo's claim for adverse possession was proved on a balance of probabilities. Accordingly, in a judgment delivered on 15th May 2003 the High Court held that Gitungo was entitled to be registered as proprietor of the property under section 38 of the Limitation of Actions Act chapter 22 of the laws of Kenya having openly and peacefully been in adverse occupation of the property for a period of over 12 years; that Gathii's title to the property was extinguished under section 17 of the said statute and that the appellants should execute a transfer and do all acts necessary to convey the title to the property to Gitungo.

9. Being aggrieved by the decision of the High Court the appellants have set out complaints in their memorandum of appeal that: the learned judge misapprehended the evidence and made a wrong decision; that the judge erred in failing to appreciate that the alleged land exchange agreement made between Gitungo and Gathii in 1965 was not governed by the Land Control Act chapter 302 of the Laws of Kenya as that statute commenced later on 12th December 1967; that the judge erred in holding that Gitungo's possession of the land was adverse and that Gathii's title was extinguished; that the judge erred in holding that the 1st appellant could not pass title to the 2nd to 4th appellants; that the judge erred in dismissing the appellants' contention that Gitungo fraudulently removed boundaries to the property to merge it with its adjoining property and that the learned judge erred in allowing Gitungo's suit.

### **Submissions by counsel**

10. Mr. Kangatta, learned counsel for the appellants, submitted that the assertion by Gitungo that he occupied the property with the agreement of Gathii and that there was a land exchange agreement was contested; that assuming for a moment that such agreement existed, the learned judge erred in applying the provisions of section 6 the Land Control Act as a basis for declaring the continued occupation of the property by Gitungo adverse; that at the time of alleged land exchange agreement on 4th October 1965, the Land Control Act had not come into existence; that that statute came into effect on 12th December 1967, which is almost two years after the alleged exchange agreement; that Gathii died on 15th July 1967 prior to the statute coming into effect and adverse possession could not therefore have taken effect.

11. According to counsel for the appellants, if possession by Gitungo was not adverse at the time

of Gathii's death, then it could not have become adverse against Gathii's estate; that going by the finding of the High Court therefore, the continued possession of the property by Gitungo would have been by agreement of Gathii, in which case, time could not begin to run against the estate of the Gathii.

12. According to Mr. Kangatta, the learned judge erred in her findings; that it is a "fantastic coincidence" that Gitungo would claim to have taken possession on 4th October 1965 which also happens to be the date when the title to the property was first registered; that it is inconceivable that the parties would have been entering into a land exchange agreement involving a parcel of land that was by then non-existent as it is clear from the evidence that the land register for Title Number Loc. 4 Ngararia/678 that was to be exchanged was opened on 8th November 1966; that the finding by the learned judge that an oral land exchange agreement existed was therefore not properly founded and is erroneous; that the impression given from the evidence of Gitungo was that he was allowed to occupy the property and then he started looking for parcels with which to exchange.

13. Counsel also faulted the judge for taking the position that the contention by the appellants that Gitungo had interfered with the boundary between the property and his adjacent property had not been proved when in fact the interference was admitted; he submitted that the judge ignored the testimony by Gitungo's wife, Beth Wanjiku Kamau Gitungo, that they removed the boundary between the two plots sometime between 1965 and 1967.

14. Counsel for the respondent, Mr. Kenneth Wilson, submitted that it was established before the High Court that Gitungo and Gathii entered into a land exchange agreement in 1965; that the existence of that agreement was confirmed by the evidence of Gitungo's wife; that on that basis Gitungo took possession of the property and continued in possession until his demise; that there was evidence that until 1993, when the 1st appellant filed the succession cause in respect of the estate of Gathii, no issue over Gitungo's entitlement to the property had arisen.

15. Regarding the application of the Land Control Act, Mr. Wilson submitted that prior to the commencement of that statute on 12th December 1967, under Legal Notice No. 516 of 1961 consent over land transactions was required within three months of the transaction; that transition provisions namely the Kenya (Land Control) (Transitional Provisions) Regulations, 1963 were in place when the land exchange agreement was entered into; that it is common ground that consent was never sought or obtained in relation to the land exchange agreement between Gitungo and Gathii.

16. Citing the decision of this Court in **Muchanga Investments Ltd vs. Safaris Unlimited (Africa) Limited and others Nairobi Civil Appeal No. 25 of 2002** counsel submitted that a party who takes possession of land through agreement, which is nullified by the absence of consent, possession becomes adverse and time begins to run when the agreement is nullified. With that, Mr. Wilson urged us to dismiss the appeal.

17. In his brief reply, Mr. Kangatta submitted that under the legal regime on land control that was in place in 1965, there was no provision that is equivalent to the present section 6 of the Land Control Act which declares transactions void unless the consent of the relevant land control board is given within the stipulated time frame; that there were no similar provisions in the regulations and the basis on which the High Court declared Gitungo's possession of the property adverse is unsupported.

### **Determination**

18. Our duty as the first appellate court is well articulated in many decisions of this Court including **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212** where the Court stated that:

**"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to**

**rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.**

19. **We have reviewed and re-evaluated the evidence**, considered the submissions by learned counsel and the authorities cited. Although the appellants framed 11 grounds of appeal, the critical issues for our consideration that are interlinked are two. First, whether the learned judge erred in finding as a fact that a land exchange agreement existed between Gitungo and Gathii? In other words, was there evidence to support that finding? Second, whether the holding by the learned judge that occupation became adverse, as the land exchange agreement did not materialize within the period stipulated for obtaining the land control board consent, is correct.

20. In that regard it is necessary to reproduce at length what the learned judge of the High Court had to say:

**The issue now to be determined by me is whether the initial agreement of exchange of the parcels by the deceased Karu and the late plaintiff shall make his occupation adverse. Mr. Kihara contended that it would, because the exchange did not materialize in transfer within stipulated period of obtaining the consent from the Land Control Board. Thus the occupation after the lapse of stipulated period of six months became adverse in law and in fact. I would tend to agree with his submissions, simply because the purported transfer became null and void after the lapse of statutory period as aforesaid. Thereafter the occupation was not with permission or agreement or grant. Thus after the expiry of 12 years of adverse possession after the stipulated period of six months the title of the deceased Karu in land became extinguished. If that is so, then the estate was holding the subject land as against the claim of the plaintiff which crystallised at the least by April 1978 (taking April, 1966 as the date when six months statutory time expired).**

**Thus the 1st Defendant as an administrator of the estate of the deceased Karu could not pass the title to the 2nd, 3rd and 4th Defendants who were described as beneficiaries of the estate. The estate had no right of title although the same was in the name of the deceased. In law it was holding for the plaintiff who acquired the subject-matter by way of adverse possession long before the succession cause was filed. Thus the claim of 2nd, 3rd and 4th Defendants having acquired a valid title of the subject-land vide succession cause cannot upheld.**

21. Regarding the finding on the existence of the land exchange agreement, there is the affidavit of Gitungo sworn in support of the Originating Summons in which he deposed that Gathii encroached on his land and destroyed coffee on the basis of which he was liable to compensate Gitungo; that that precipitated negotiations on compensation which resulted into an agreement that Gathii would exchange his land, namely the property with land that Gitungo would acquire for him elsewhere; that Gitungo honored his part of the agreement and purchased Title Number Loc. 4 Ngararia/678 for Gathii on which Gathii settled; that Gathii died before transferring the property to him. Gitungo testified before Aganyanya J. He was cross-examined. His evidence was not shaken.

22. When the hearing commenced de novo before Rawal J after the joinder of the 2nd to 4th appellants in the suit, the evidence tendered on behalf of the respondent was consistent. Gitungo's wife Beth Wanjiku Kamau Gitungo stated that she was privy to that exchange arrangement and was also involved, consistently with the belief and assertion of claim to the property, in the removal of the boundary between the property and their adjacent land sometime between 1965 and 1967. When the evidence tendered on behalf of the respondent is considered alongside the fact that it was not until Gathii died and succession proceedings commenced by the 1st appellant in 1994 that a claim to the property was made on behalf of the estate of Gathii, make the case that the finding by the learned judge of the High Court is well founded. During the period between 1965 and 1994 no attempt was made to dispossess Gitungo of the property or to otherwise assert a claim to it on behalf of either Gathii or on behalf of Ngochi the father of the 2nd to 4th appellants.

23.The appellants' evidence on the other hand was that Gathii was registered as owner of the property in trust for the father of the 2nd to 4th appellants; that following the succession cause in the Magistrates court at Thika in respect of the estate of Gathii, the 2nd to 4th appellants were registered as owners of the property; that Gitungo had the opportunity to prove his objections in the succession cause but did avail himself of the opportunity to do so; that if Gitungo ever occupied the property he did so by wrongfully removing boundaries between the property and his adjacent property.

24.We are satisfied that the learned judge was right in finding, as we do, that a land exchange arrangement had in fact been made between Gitungo and Gathii. Indeed the assertion by the 1st appellant that such exchange arrangement existed between Gathii and Ngochi, the father of the 2nd to 4th respondents, as opposed to Gitungo lends credence to the concept of land exchange. It is not inconceivable that an agreement was made under the terms of which Gitungo was to take immediate possession of the property registered in the name of Gathii in consideration of a promise that he (Gitungo) would procure alternative land for Gathii. We are therefore satisfied that the finding by the learned trial judge that there existed a land exchange agreement between Gitungo and Gathii which is supported by evidence.

25.Turning to the question whether the claim for adverse possession was established and the effect of the absence of consent to the land exchange agreement, this Court expressed itself on the law on adverse possession in Wambugu v Njuguna [2013] KLR 173 in the following terms:

**“In order to acquire by Statute of Limitation title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent with his enjoyment of the soil for the purpose of which he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuous of possession. The proper way of assessing proof of title is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved he has been in possession for the requisite number of years.”**

26.We think that the learned trial judge was right in taking the view and holding that all the elements of adverse possession were met in this case.

27.Regarding the application of the Land Control Act we agree with counsel for the appellants that at the time of the land exchange agreement in 1965 the Land Control Act Chapter 302 of the Laws of Kenya was not operational as it came into effect on 12th December 1967. However, land transactions involving agricultural land required consent and the Kenya (Land Control)(Transitional Provisions) Regulations, 1963 (LN 457/63) made under The Kenya Order in Council 1963 provided for the manner of obtaining such consent.

28.Section 215 to 222 of Part 3 of the since repealed Constitution of Kenya 1963 contained provisions regarding “Control over transactions in Agricultural Land.” The definition of agricultural land included section 215(1)(a) that provided:

“215 (1) In this Part of this Chapter:

‘Agricultural land’ means

(a) All lands in a Region that is not within the jurisdiction of any municipality or township or of any trading centre or market established under any law; and

(b) ...” Section 218(1) provided:

“218 (1) No person shall be a party to any of the following transactions, that is to say:

(a) The sale, lease, charge, mortgage, exchange, partition or any other disposal of or dealing with any estate, interest or right in or over agricultural land situated within an area to which this Part of this Chapter for the time being applies in pursuance of section 216 of this Constitution; or

(b) ... or

(c) ...,

Unless the consent to such transaction of the Divisional Board in whose area of jurisdiction the land in question is situated (or which has jurisdiction by virtue of a law made under S.

221 (1)(b) of this Constitution) has been given in accordance with the provisions of this Part of this Chapter; and every land transaction in respect of which such consent has not been given shall be absolutely void for all purposes.

(2) Any agreement to be a party to any land transaction shall be absolutely void for all purposes:

(a) at the expiration of 3 months after the making of the agreement if the application for consent has

not been made within that time to the appropriate Divisional Board; or

(b) ...” (emphasis ours)

29. Section 5(2) of the Land Control (Special Areas) Ordinance, No. 28 of 1959 which was repealed by L.N 147/61, The Land Control (Special Areas) Regulations, 1961, The Kenya (Land Control) (Transitional Provisions) Regulations 1963, (LN

457/63) that revoked LN 147/61 and Regulation 2(1) of the Kenya (Land Control) (Transitional Provisions) Regulations 1963 are also relevant in that regard.

30. Prior to the enactment of the Land Control Act, 1967, consent for any transaction dealing with agricultural land was required under Part 3 Chapter XI of the Constitution of Kenya 1963 (now repealed) to which we have referred, and the Kenya (Land Control) (Transitional Provisions) Regulations 1963. An application was to be made within three months of the making of the agreement with respect to the controlled transaction. If no such application was made or the relevant Divisional Board refused consent, then that agreement was null and void for all purposes. In this case it is common ground that consent was never sought or obtained. Accordingly, although the learned judge erred in referring to the Land Control Act that was not operational during the relevant period, the learned judge was undoubtedly right in the decision that she reached.

31. The circumstances in this case are not unlike a situation where a licensee takes possession of land under a licence that is determined. As this Court held in **Wambo v Njuguna [1983] KLR 172**, prior to the determination of the licence the occupation is not adverse but with permission. The court in that case held that:

**“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”**

32.The learned trial judge was also right in holding that the succession proceedings and the transfer of the property to the 2nd to 4th appellants could not defeat the claim for adverse possession. That holding was consistent with the decision of this Court in of **Githu v Ndeete [1984] KLR 776** where it was held that:

**“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”**

33.For those reasons, the appeal fails and it is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 3rd day of October, 2014.**

**G. B. M. KARIUKI**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**