



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 89 OF 2009

EUNICE KARIMI KIBUNJA.....APPELLANT

VERSUS

MWIRIGI M'RINGERA KIBUNJA.....RESPONDENT

(Being an Appeal from the judgment/decree of the High Court of Kenya at Meru (Emukule, J.) dated 13th February, 2009

in

H.C.C.C. NO. 126 OF 1992)

JUDGMENT OF THE COURT

1. On 14th February, 1992, the appellant, Eunice Karimi Kibunja (**Eunice**), filed a suit at the High Court in Meru by way of an originating summons against the respondent Mwirigi M'Ringera Kibunja (**Mwirigi**). The suit was brought under the provisions of **Section 38** of the **Limitation of Actions Act Cap 22** and **Order 36 rule 3D** of the old **Civil Procedure Rules**. The originating summons was subsequently amended on 5th March, 1998 and the appellant sought for the determination of the following questions and issuance of the orders:

1. A declaration that Eunice Karimi Kibunja the appellant herein, has become entitled by adverse possession to 5 acres out of a parcel of land ABOTHUGUCHI/GITHONGO/494, measuring 5.872 or thereabout registered in the name of Mwirigi M'Ringera.

1(a) A declaration that Eunice Karimi Kibunja the applicant herein has become entitled by adverse possession to 5 acres out of parcels of land ABOTHUGUCHI/GITHONGO/1825, 1826 and 1827 which numbers originated from ABOTHUGUCHI/GITHONGO/494, measuring 5.872 or thereabout registered in the name of MWIRIGI M'RINGERA.

2. An order that the said applicant be registered as the sole proprietor of the said 5 acres of the said parcel of Land Reference No. ABOTHUGUCHI/GITHONGO/949, in place of MWIRIGI M'RINGERA.

2 (a) An order that the said applicant be registered as the sole proprietor of the 5 acres of the said parcels of Land Reference Numbers ABOTHUGUCHI/GITHONGO/1825, 1826 and 1827

which originally was ABOTHUGUCHI/GITHONGO/494, but the respondent sub-divided to defeat the course of action in this suit.

3. Such other or further orders as may meet just ends of justice in the case.

2. The background facts leading to this suit are largely not in dispute. When the trial of this suit began in January, 2001, Eunice told the trial Judge that she was 60 years old, by the time of this appeal that is twelve years later, she is probably aged about 72 years. Eunice is a daughter of an elder, Kibunja, who died in or about 1948. The elder Kibunja had two wives, Eunice's mother who had no male children and the grandmother of Mwirigi who had sons. The suit land was appropriately 14 acres. Eunice testified and her evidence was supported by 3 witnesses who were mainly elderly men from her clan; Wilson Kirimanyi (P.W.2), M'Thuranira M'Muthuri (P.W.3) and M'Mbijiwe M'Rimberia (P.W.4). she stated that she never got married and lived throughout her life on the suit land. During land consolidation, which happened between 1957 and 1960, she was actively involved in getting the land registered in the name of Mwirigi who is her nephew (son of her step-brother), by following up the process of registration and paying for the adjudication fees. She did this for two principal reasons. Firstly, under the Meru customs, a woman, especially a daughter could not get registered as proprietor of clan land. Secondly, her mother had no son, and her step-brother that is Mwirigi's father was already registered as proprietor of another parcel in Githongo.

3. Eunice opted and registered the suit land in the name of Mwirigi who was by then a minor aged about 5 years. Eunice continued with occupation and developed a portion of the suit land. She built a permanent and semi permanent houses, planted coffee and other food crops. Sometimes in 1970's, Eunice was desirous to have a title issued in respect of the portion she and her mother occupied. They called clan elders to a meeting and the elders apportioned to her 5 acres that is the portion which was to go to her mother's house. The house of her step mother that was represented by **Mwirigi** was given 9 ½ acres a portion he was occupying and the share meant for his father's house. This is how the two parties occupied the suit land until Mwirigi refused or neglected to give Eunice the title to her portion, and she filed the suit in the High Court.

4. After the suit was filed, it was struck out by **Kuloba J.** on the 4th March, 1993 on the grounds that it was barred by the Limitation of Actions Act. That order was nonetheless, set aside by the Court of Appeal and the suit was re-instated for hearing on its merit. The suit was amended as in the process, Mwirigi subdivided the suit premises into three parcels. The hearing took a fairly long time to conclude as the matter was heard by three different Judges with the fourth Judge writing the Judgment. Eunice and her 3 witnesses gave evidence in support of her claim while Mwirigi gave evidence in defence, but did not call any other witness.

5. According to Mwirigi, he admits the suit land was registered in his name in 1963 when he was still a minor aged about 5 years. He contended that Eunice was married to one Stephen M'Ringera but was divorced in 1965 because she had no children. Eunice moved to the suit land and lived with her mother as a licensee. By then, Eunice was employed at Githongo Hospital as an attendant and she managed to buy her own parcels of land Number **ABOTHUGUCHI/GITHONGO/1547** and **KIBIRICHIA/NTIMBIRI/181**, which she sold. Mwirigi contended that he had no objection with his aunt living on the portion of land but was opposed to her acquiring the title as she was likely to sell the land. He claimed that he has never asked Eunice to vacate the suit premises. This is however, contrasted by his deposition sworn on 5th March, 1992 where he deposes as follows;

(7) "THAT the plaintiff has her own parcels of land and she has all along refused to vacate my said land in spite of several requests from the family and clan elders.

(8) THAT the truth of the matter is that the plaintiff has refused to vacate my land and she occupies a very small portion as my licensee."

6. The Judges who heard and finalized the matter left the station and the parties agreed that the matter should proceed from where they had left it. It thereafter fell upon **Emukule J.** to write the judgment. The

learned Judge analyzed the evidence, and submissions , and the law regarding the claim of adverse possession and he had the following to say in conclusion:

“In light of the view expressed above, that the relevant provisions of the Law of Succession Act promote the concept that ancestral land remains in the family, an auntie or daughter who returns to her parents upon the failure of the marriage, or otherwise remains unmarried is entitled to no more than a life interest to the land she actually lives on, and depends upon during her lifetime. Upon her re-marrying or demise, the ancestral land reverts to members of the family.

In summary therefore, and in light of both the law and the authorities, and the evidence adduced, and reasons given above, the applicant is neither in adverse possession as against the respondent nor is the applicant a licensee nor even a tenant at will i.e. a tenancy under which the tenant is in possession, and which is determinable at the will of either the landlord or tenant. The applicant as an aunt of the respondent has a life interest in the suit land ABOTHUGUCHI/GITHONGO/1825, 1827 inclusive (formerly Abothuguchi/Githongo/494), to the extent of the area she has built the house and made other developments, planted permanent crops and regularly cultivates and harvests other crops for her daily livelihood. That being the case, I would in the interests of justice allow the applicant's amended Originating Summons dated 5th March, 1998 in terms of prayer 3 thereof but claim it in terms of prayers 1(a) and 2(a) thereof.....”

7. Eunice was aggrieved by the above judgment and filed this appeal raising 5 grounds as follows: -

That the learned Judge erred in law and in fact in finding that the appellant was not in adverse possession.

That the learned Judge erred in law and in fact in accepting the Respondent's case when the same contradicted the Respondent's affidavits and supported the Appellant's case.

That the learned Judge erred in law and in fact in that he failed to consider or sufficiently consider the Appellant's case and in the process misunderstood the same.

The judgment of the learned Judge is against the weight of evidence.

The learned Judge's decision/judgment is against the law and the facts placed before him by the parties.

8. During the hearing, Mr. Rimita, learned counsel for the appellant submitted that it was common ground that Eunice was always in occupation and in possession of the suit land to date. She is claiming the 5 acres which she has always occupied with her mother. The elders determined in the 1970's that she should get title for the portion she was occupying on behalf of her mother's house but unfortunately the mother died immediately thereafter before she could follow the matter further. It is also common ground that Mwirigi was a minor when the land was registered in his name, therefore the circumstances under which it was registered as such were relevant. Such circumstances included the prejudices held against women at the time. Mr. Rimita also pointed out several inconsistencies in the defence evidence by Mwirigi, in particular the replying affidavit where he deposed that Eunice was requested to move out of the land whereas, in his oral evidence he told the Court in his defence that he has never interfered with her occupation or asked her to vacate the premises. At the same time, Mwirigi contended that Eunice was a licensee of a small portion but contradicted this by stating that she was occupying 7 acres.

9. Mr. Rimita's view was that, if these contradictions were considered by the learned Judge while considering the evidence, he would have found on a balance of probabilities that Eunice had proved her claim of adverse possession. She was in occupation that was uninterrupted, peaceful and was clearly without permission of the registered owner. Lastly, Mr. Rimita urged us to consider the aspect of gender discrimination beginning with registration of title in favour of a minor child because women were not

recognized as proprietors of clan land. He appreciated the learned Judge lamented the backwardness of these customs, but he immediately reneged and relied on non existing law that preserves ancestry land, which is obviously against the spirit and letter of the Constitution that outlaws discrimination on the basis of sex.

10. On the part of the respondent, Mr. Muthomi, supported the judgment and submitted that Eunice did not prove her claim of adverse possession. There was no evidence that she had a peaceful occupation that was open and without the consent of the registered owner. His client was the first registered owner of the suit land, his title was indefeasible. Eunice occupied the suit land in 1965, when she was chased away by her husband and was allowed by Mwirigi's father to live on the suit land. When Mwirigi became of age, he consented to her continued occupation. Thus, he argued Eunice was not an intruder and as occupation was with permission, she cannot lay a claim based on adverse possession. Counsel referred to a persuasive case of ***Mbira v Gachuhi 2002 1 EA Page 138*** by Kuloba J. where he stated:

“Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser; Jones V. Chapman 294 803 – F followed.”

According to Mr. Muthomi, Eunice was a member of the family, the suit land was ancestral land and the principles of adverse possession could not apply. Moreover, the respondent is not opposed to the appellant's continued occupation of the land, as she is not married and she had no children, save that he was opposed to her being issued with title as she was likely to sell it the same way she sold her two parcels of land.

11. This is a first appeal, and that being so, we are mandated to re-evaluate and analyse the evidence and arrive at our own independent conclusion save for the usual caution that we never heard or saw the witnesses and give due allowance for that. See the case of ***Selle v Associated Motor Boat Company (1968) EA 123*** at Page 126.

“.....this court must consider the evidence, evaluate 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.....”

12. The first question we have to address is whether the appellant established her claim of adverse possession. What constitutes adverse possession is provided for under **Limitation of Actions Act Cap 22** of the **Laws of Kenya** in particular **Section 7** of the **Act** provides that an action for recovery of land cannot be brought after expiry of 12 years from the date on which the cause of action arose. **Section 17** provides that after 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.

13. There is also a long line of authorities by this court established over a long period of time that define the principle of adverse possession. See the case of;- ***Kasuve v Mwaani Investments Ltd. & 4 Others (2004) KLR 184*** at page 188:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See Wanje v Saikwa [1984] KLR 284.”

14. In this case before us, there was no dispute that Eunice was in possession, indeed according to her, and her witnesses she always lived on the suit land with her parents since she was not married but according to the respondent, she returned to the land in 1965 after she was divorced by one Stephen

M'Ringera, due to lack of children. Whichever the case, whether she was married or not, by the time she filed this case, she was in exclusive possession of the suit land, this was also openly and as of right and without any interruption for a period of over 12 years. She was also in open occupation and as of right because she participated and paid for the adjudication fees for the suit land to be registered in the name of the respondent then a minor in 1963. She continued in occupation without interruption, developed the suit land and the members of the clan deliberated on her case and decided that she should be given 5 acres. Unfortunately the determination by clan elders had no legal force and Eunice had to pursue her claim in Court.

15. Although the respondent's counsel maintained that Eunice was a licensee, we are disinclined to belabor this point as the learned Judge discounted that notion in his judgment when he opined in part of the judgment;-

***“An aunt, uncle, nephew, niece or other relatives who has lived, built, planted permanent commercial crops and harvests crops on ancestral land as described above, does not fit to quality in any of a description of a licensee as analyzed above.*”**

Thus far, we agree with the learned Judge that Eunice could not be regarded as a Licensee. We however part company with the learned Judge when he goes on to point out that Eunice cannot be in adverse possession. The logical argument about a licensee is because for instance, Eunice was a child of the original owners, she occupied the land as a child, later on the land changed hands and she actively participated in securing the land by registering it in the name of the respondent. The land ceased to be her father's and she continued to occupy it as of right, she did not require permission from the registered owner. We do not see how the learned Judge was able to draw the dichotomy here to exclude Eunice's claim from the category of claims under adverse possession. The Judge clearly misapprehended the fact that land changed ownership from the appellant's father to a step-brother's son.

16. The other serious misapprehension that we have come across is when the Judge drew an analogy with this case and the provisions of the Law of Succession and pointed out in a portion of the judgment;-

***“.....the relevant provisions of the law of Succession Act promote the concept that ancestral land remains in the family an auntie or daughter who return to her parents upon the failure of the marriage, or otherwise remains unmarried is entitled to no more than a life interest to the land she actually lives on, and depends upon (sic) during her lifetime. Upon her re-marring or demise, the ancestral land reverts to members of the family.”*”**

Clearly, this is a serious misdirection as we do not know what Law of Succession the learned Judge was relying on. The **Law of Succession Act Cap 160** does not make any distinction between a male or female child; or even their marital status. A child is described as such, their gender or marital status notwithstanding. Perhaps the learned Judge was referring to Section 35 (5) which makes provision for the distribution of the estate of a deceased to his widow. Upon re marriage of a widow, the estate which the widow held a life interest devolves upon the children. Eunice was not claiming as a widow, and this was not a claim under the inheritance law.

17. Had the learned Judge addressed himself to these three aspects, perhaps he would have arrived at the same conclusion as we have, that the appellant proved her claim adverse to the **registered owner**. First, that there was no dispute Eunice was in continuous, uninterrupted possession of the suit land as of right without permission of Mwirigi; secondly, the Law of Succession did not distinguish a male or female child or their marital status, lastly in the yester years, customary practices did not favour women for registration of ancestral land, thus it was necessary to examine the circumstances under which Eunice caused the title to land be registered in Mwirigi's name. If those circumstances were considered, the trial Judge would have discerned the intention was for Mwirigi to hold the title in trust of Eunice.

18. In conclusion we wish to borrow a quote from one anonymous legal commentator posted by Law Africa publication as **“Hot from the Bench”**

“The lack of relish (Apaloo, J.A.), the heartaches, sympathy and pious hopes, (Tunoi, Shah and Bosire, J.J.A.), of our Judges will continue forming the background tapestry to cases of adverse possession in Kenya. The principle of adverse possession will be further tortured and twisted in search of the ever-elusive equity in land title and distribution. In the process, one wonders whether like a phoenix rising from the ashes, equity will resurrect its principles and become the Supreme arbiter of land disputes in Kenya.”

19. We think we have said enough to demonstrate this appeal should be allowed. The appeal is allowed, the orders of Emukule J. dated 13th February, 2009, are set aside and the appellant’s claim in the amended Originating Summons are allowed.

As we do not desire to set these litigants any more against each other, we order each party to bear their own costs of this appeal.

Dated and delivered at Nyeri this 29th day of May, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR