IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 325 of 2009

BETWEEN

KARUNTIMI RAIJI …….....…….....……APPELLANT

AND

M'MAKINYA M'ITUNGA …….....……..... RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Meru (Kasango, J.) delivered on 25th September, 2009

in

HC Civil Case No.251 of 1994)

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JUDGMENT OF THE COURT

1. The suit property is **Land Parcel No. Nyaki/Thuura/131**. The property is divided by an access road into two parts - the lower part and the upper part. Since 1954, the appellant has lived on the upper part, while the respondent lived on the lower part. During this time, the property was community or clan land. The respondent died on 14th January, 1996 and was buried on the lower part of the property. His two wives were also buried on the lower part of the suit property. Upon the death of the respondent, an order was made by the High Court (Etyang J.) on 13th March,1997 that Mr. Mwongera M'Makinya substitutes the deceased in the suit.
2. On 22nd March, 1973, the suit property comprising both the lower and upper parts was registered in the name of the appellant as a first registration under the repealed **Registered Lands Act, Cap 300 of the Laws of Kenya.** The respondent does not know how the appellant came to be the registered proprietor of the suit property encompassing both the lower and upper parts.
3. Before his death, the respondent commenced action in the High Court at Meru by way of Originating Summons seeking a declaration that he owns 9 acres out of **Parcel No. Nyaki/Thuura/131** which 9 acres comprises of the lower part of the suit property that he had occupied since 1954. The respondent based his claim on the ground that the appellant's title to the extent of the 9 acres had become extinguished under the doctrine of adverse possession.
4. The Originating Summons was defended by the appellant who contended that his title which is a

first registration, is absolute and indefeasible. That the period for calculating the 12 years required for adverse possession should be from 22nd March, 1973 when he became the registered proprietor and not from 1954 when the respondent entered and took possession of the lower part of the suit property. On this issue, the appellant cited the case of ***Francis Gitonga Macharia – v- Muiruri Waithaka Civil Appeal No. 110 of 1997*** where this Court differently constituted stated "***that limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent***."

5. After hearing of the case and submissions by counsel, the learned Judge in a judgment dated 25th September, 2009 made the following orders:
    a. *I hereby declare that the plaintiff acquired by adverse possession an absolute title to the lower side of the suit property parcel no. Nyaki/Thuura/131.*
    b. *I order that the estate of M'Mkinya M'Itunga deceased be registered as the owner of the lower part of the suit property in place of the defendant. To that end, I order that title to parcel No.Nyaki/Thuura/131 be cancelled by the Land Registrar and in so doing the need of having original title document is dispensed with. Thereafter I order that that parcel of land be sub-divided into two portions one portion being on the upper side of the access road dividing the parcel of land and the other portion being the lower side from the access road dividing that parcel of land. The upper side of that parcel shall be registered in the name of the defendant and the lower part shall be registered in favour of the estate of M'Makinya M'Itunga deceased. Thereafter, those interested in that estate of M'Makinya M'Itunga deceased can proceed under the Succession Law to make their claim*.
6. Aggrieved by the Judgment and Orders made, the appellant lodged this appeal citing seven grounds as follows:

i. ***That the learned Judge erred in law and facts by failing to take into account all relevant facts and evidence adduced by the appellant.***
ii. ***That the learned Judge erred in law and fact by failing to find that the registration of the said property land parcel no. Nyaki/Thuura/131 was a first registration.***
iii. ***The learned Judge erred in law and fact by declaring that the plaintiff acquired by adverse possession an absolute title to the lower side of the suit property parcel no. Nyaki/Thuura/131.***
iv. ***The learned Judge erred in law and fact by failing to consider the plaintiff's written submissions.***
v. ***The learned judge erred in law and fact by failing to find that Mr. Mwongera M'Itunga had no legal capacity to act on behalf of the deceased plaintiff's estate.***
vi. ***The learned Judge erred in law and fact by failing to find that the cause of action did not survive upon the demise of the plaintiff/respondent.***
vii. ***The learned Judge erred in law and fact by making a finding that the appellant held the lower part of the parcel in trust and for the deceased plaintiff.***

7. At the hearing of the appeal, learned counsel **Mr. Osoro Omwoyo** appeared for the appellant while learned counsel Mr**. C. Kariuki** appeared for the respondent.
8. Counsel for the appellant elaborated on the grounds of appeal and cited various authorities in support of his submissions. It was submitted that the appellant's title is a first registration and is indefeasible. He cited the case of ***Michael Githinji Kimotho – v- Nicholas Muratha Mugo Civil Appeal No. 53 of 199*****5** where this Court differently constituted stated that ***"the protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser".*** Counsel submitted that although both the respondent and appellant had occupied the suit property since 1954, they were either squatters or trespassers since the suit property had not been registered. That the respondent, being a trespasser since 1954, acquired no rights that could give rise to adverse possession. With respect, it is our considered view that the submission by counsel on this matter is not supported by evidence on record and we ask, if both the appellant and respondent were trespassers or squatters, can one trespasser or squatter acquire superior rights over the other? Counsel cited the case of ***Muruiki Marigi – v- Richard Murigi Muriuki & Others Civil Appeal No. 189 of 1996*** where this Court stated that "section 27 of the Registered Law Act vests in the proprietor of land absolute ownership of the land while section 28 gives the proprietor indefeasible rights."

9. The appellant urged that the learned judge erred in finding that the respondent had occupied the lower part of the suit property without interruption. He submitted that there were two civil suits between the parties in 1985 and 1990 and these suits interrupted the respondent's possession. The appellant contend that from 1973 when he became the registered proprietor, the respondent has been in occupation of the lower part of the suit property by his permission since he did not take any steps to evict him. Counsel cited the case of ***Benjamin Kamau Murima & Others – v- Gladys Njeri Civil Appeal No. 213 of 1996*** wherein it was held that "in determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the land in form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse."
10. The appellant submitted that although the respondent and his two wives were buried on the lower part of the suit property, this was by permission and an act of sympathy on his part. Counsel cited the case of ***Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka Civil Appeal No. 125 of 1997*** where it was held that "***adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes***."
11. The appellant contend that the learned Judge erred in failing to note that a claim for adverse possession is personal in nature and does not survive a deceased person under the **Law Reform Act, Cap 26** of the **Laws of Kenya**. It was urged that since the respondent had died without proving and establishing his claim to adverse possession, the claim did not survive him and was extinguished and there was nothing to pass on to his estate.
12. Finally, the appellant submitted that when the respondent died, Mr. Mwongera M'Makinya who was substituted in the suit had no letters of administration and lacked legal capacity to take over the suit in the High Court. We were urged to find that the suit was taken over by a legally incompetent person and should have been dismissed.
13. Counsel for the respondent opposed the appeal and recounted how the respondent came into possession of the lower part of the suit property in 1954; he reiterated that the first registration of the appellant was subject to the provisions of **Sections 27, 28** and **30** of the **Registered Lands Act**; that a trust need not be registered under the Act; that the circumstances of occupation by the respondent created an overriding interest and trust in relation to the lower part of the suit property. Counsel submitted that there was no permission from the appellant allowing the respondent to continue in possession of the lower part of the suit property since 1973. On the issue of survivorship of a claim to adverse possession, it was submitted **that Section 2 of the** Law Reform Act (Cap 26 of the Laws of Kenya) shows that all causes of action, save those expressly excluded, survive for the benefit of the estate of the deceased.
14. We have considered the evidence on record, oral submissions by learned counsel and the authorities cited. This is a first appeal and on the authority of ***Selle v Associated Motor Boat Company Ltd. [1968] EA 12,3*** this Court has the duty of re-evaluating the evidence, assess it and make its own conclusions without overlooking the conclusions of the trial court and also bearing in mind that unlike the trial court, we neither saw nor heard the witnesses.
15. The appellant contend that Mr. Mwongera M'Makinya who substituted the deceased as the respondent in the suit before the High Court, had no letters of administration for the estate of the deceased and the suit should have been dismissed. The learned Judge pronounced herself on the issue as follows:

> ***"It is worthy to note that when the application for substitution came before the court on 13th March 1997, the defendant's counsel did not oppose the same. Such an order having been made and not appealed against, the defendant's submission must fail. Secondly, the deceased plaintiff died in January 1996; the application for substitution was filed on 20th June 1996; that was well within the one year required by Order XXIII. The filing date of the application is the applicable guide to the court whether the substitution was made within the time provided under the Rules."***

16. We have perused the record of appeal and ascertained that on 13th March 1997, the High Court (Etyang J.) issued an order making Mr. Mwongera M'Makinya a party to the suit and legal

representative of the deceased to conduct the case in place of the respondent who was his deceased father. The order was made after hearing counsel for the appellant and respondent. No appeal was lodged against the order. It is our considered view that so long as the order made by Justice Etyang has not been set aside, Mr. Mwongera M'Makinya has the legal capacity to act as the legal representative of the deceased in this suit. We agree with the learned Judge and this ground of appeal cannot succeed.

17. The appellant contend that his title to the suit property which is a first registration is absolute and indefeasible. We agree that the appellant's title is a first registration; however, his argument is fallacious. **Sections 27, 28** and **30** of the repealed **Registered Land Act** (RLA) provide exceptions to indefeasibility of title. First, there is nothing in the **Registered Land Act** which precludes the declaration of a trust in respect of registered land even if it is a first registration. **Second,** ***Sections 27, 28*** *and* ***30*** *of the* ***Act*** make provision for exceptions: Section 28 provides that:

> ***"28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –***
>
> ***(a) …..***
>
> ***(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.***

Section 30 of the Registered Lands Act provides:

> ***30. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:***

a. **……...;**
b. **……...;**
c. **……...;**
d. **……...;**
e. ***rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;***
f. ***the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such a person and the rights are not disclosed.***

18. **One of the overriding interests under Section 30 (f)** is the right of the person in possession or actual occupation of the registered property. The evidence in this case shows that the deceased entered the suit property in 1954; he lived on the property with his two wives and a grandchild. By the time of his death in January 1996, he had planted miraa trees, bananas and other subsistence crops. He had also built a house for each of his wives and one for his grandchild. The deceased and his two wives were buried on the lower part of the land; he was buried on the land. Upon his death, the appellant destroyed the houses of the deceased; he was charged and convicted of the offence; he appealed and was unsuccessful.

19. The appellant has urged us to find that the respondent's occupation and possession of the lower part of the suit property was based on his permission. The evidence on record does not support this submission. From the evidence, it is clear that the respondent occupied the lower part of the suit property from 1954 to January 1996 when he died; this was a period of 41 years. There is no evidence that the appellant gave permission to the respondent to enter the property in 1954. When the appellant became the registered proprietor of the property on 22nd March 1973, the respondent

continued to occupy the lower part of the property for a period of over 21 years. There is a presumption of continuance that the respondent continued to live on the lower part of the land on the same terms upon which he entered in 1954, that is, without permission and consent of the appellant. There is no evidence on record that in 1973, the appellant gave permission to the respondent to continue in actual occupation and possession of the property. The presumption stated above is a rebuttable presumption of fact and the burden of proof to shift the presumption is on the appellant; he has not discharged the burden. The actual occupation and possession by the respondent is recognized and protected under Section 30 of the Registered Land Act as an overriding interest. We find that the respondent has an overriding interest over the lower part of the suit property.

20. The appellant urged that the learned Judge erred in awarding land parcel no. Nyaki/ Thuura/131 to the respondent when the said parcel was not subject to a trust; that there was no instrument creating a trust and even if the suit property was clan land, a trust could not arise because the appellant and respondent belonged to different clans. We agree; we have perused the Originating Summons in this suit. The issue of trust was not pleaded and we concur that the learned judge erred in declaring a trust over the suit property. The learned Judge considered that since 1954, land parcel no. Nyaki/Thuura/131 was occupied by the respondent and his two wives and they were all buried on the land and had constructed five houses on it. The course of action adopted by the learned Judge was not only equitable but did bring about an expeditious disposal of the long simmering dispute. The learned Judge was not oblivious of the fact that the parties to the dispute are neigbours who have lived together since 1954. The Judge in these circumstances judiciously exercised equity and as the maxim goes, fairness is equity. This court, just as the High Court is a court of law and a court of equity. It is inconceivable that a court of equity can leave a party with a genuine claim without a remedy. A court of equity ought to intervene in fairness to ensure that an applicant's possible interests are not frustrated.

21. The appellant contend that the respondent did not have an uninterrupted possession and occupation of the lower part of the suit property for 12 years. The law on adverse possession is well settled. As was stated in **James Mwangi & Others – v- Mukinye Enterprises Ltd. Nairobi Civil Case no. 3912 of 1986**, a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and an uninterrupted occupation for more than 12 years. There are two issues relevant to the claim of adverse possession in this matter. First is the date from which the 12 years should be calculated; second, did the respondent have a peaceful, uninterrupted occupation based on a claim of right and without consent of the appellant?

22. The answer to the first question is provided by the case of **Francis Gitonga Macharia – v- Muiruri Waithaka Civil Appeal No. 110 of 1997** where this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. In this case, the appellant was registered as proprietor of the suit property on 22nd March, 1973; we find that the claim for adverse possession against the appellant starts to run from this date and not 1954. For avoidance of doubt, we reiterate that the claim for overriding interest of the respondent in relation to the suit property started to run from 1954 and this overriding interest was in existence and protected under **Section 30 of the RLA** as at 22nd March, 1973 when the appellant became the registered proprietor of the suit property

23. Whether the respondent had an uninterrupted possession of the suit property is a matter of evidence. In the case of **Wambugu – v- Njuguna 1983 KLR 174,** this Court differently constituted held that:

> ***"In order for a person to acquire title by operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it, or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for purposes for which he intended to use it. The plaintiff is required to prove that he had dispossessed the defendants of the suit land or that the defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession."***

24. In the present case, evidence reveals that the appellant has never been in possession of the lower

part of the suit property; it is the respondent who has been in continuous possession of the lower part since 1954. Evidence further shows that the respondent was in occupation and possession of the lower part of the land from 22nd March, 1973 until his death on 14th January, 1996 and was buried on the land. This period is over 21 years. The twelve year period necessary for a claim in adverse possession has been established. The next issue is whether there was permission or consent granted to the respondent by the appellant. This Court in ***Francis Gicharu Kariri – v-Peter Njoroge Mairu Civil Appeal No. 293 of 2002 (Nairobi)*** approved the decision of the High Court in the case of ***Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B***, where Kneller J. held that:

> ***"The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff 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 any endeavours to interrupt it by way of recurrent consideration."***

25. We have perused the record and have failed to find testimony from any witness that the appellant granted permission to the respondent to remain on the suit property. We find that no consent or permission was granted by the appellant to the respondent to continue in possession of the lower part of the suit property. We hold that the respondent was in possession of the lower part of the suit property for over 21 years without persuasion, consent or permission of the appellant.
26. The appellant contends that the possession by the respondent was not continuous but interrupted. It is contended that the possession was interrupted in the years 1985 and 1990 by two civil suits; that in 1985, the appellant filed **Civil Suit C.M.M.C No.241 of 1985** against the respondent which was referred to arbitration; that the respondent filed at **Meru HCCC No. 257 of 1990**. The learned trial judge had this to say in relation to these two civil suits:

> ***"According to the evidence of the defendant, the award of elders was set aside. Indeed, I have perused the file which is attached to the present case file and I find that on 22nd July 1990 the elder's award was set aside by the court. The other case that the defendant referred to was Meru HCCC No. 257 of 1990. That file is also before me. I note that on 9th March 1994, the court dismissed the plaintiff's suit for having been filed out of the limitation period without leave of the court…. It is obvious that the two previous suits filed by the plaintiff had not been heard and finally determined on merit. I am of the view that the doctrine of res judicata cannot apply….. I make a finding that the plaintiff's continuous occupation of the suit property adversely to the defendant's title for more than 12 years was not interrupted by the previous suit filed by him. What the plaintiff was seeking in those suits was a confirmation of his rights of ownership in the court of law. His occupation of the suit property was open and notorious. It was to the exclusion of the defendant as far as the lower part of the suit property is concerned".***

27. The issue before us is whether the two civil suits filed in 1985 and 1990 interrupted the possession of the suit property by the respondent. The trial Judge expressed herself as follows:

> ***"It will be recalled that the deceased plaintiff was said both by Mr. Mwongera and the defendant together with their witnesses to have been in occupation of the lower part of the suit property from 1954. The deceased plaintiff in his affidavit in support of the Originating Summons said he did not know how the defendant obtained registration of his portion of land. It is also clear from the evidence that the area the deceased plaintiff occupied is clearly discernible. He occupied the lower part of the suit property which is divided by the road. I make a finding that the plaintiff's occupation of the suit property adversely to the defendant's title for more than 12 years was not interrupted by the previous suits filed by him. What the plaintiff was seeking in those suits was a confirmation of his rights of ownership in the court of law. His occupation of the suit property was open and notorious. It was to the exclusion of the defendant as far as the***

lower part of the suit property is concerned."

28. It is our considered view that in the two cases filed in 1985 and 1990, the respondent was asserting his claim to the lower part of the suit property. For adverse possession to subsist, the applicant must make a claim that the property is his as of right. In the case of **Ndatho – v- Itumo & 2 others Nairobi Civil Appeal No. 213 of 1999**, this Court stated that "mere filing of a suit for recovery of possession may not disrupt possession by the adverse possessor because disruption is a physical thing."
29. In the present case, during the tussle in the two civil suits, there is no evidence that the respondent at any time acknowledged the appellant's title or gave possession to the appellant; there has neither been possession nor resumption of possession by the appellant. We find that the respondent through the two civil suits was making a claim of right to the lower part of the suit property. The respondent's possession was without let or hindrance from the appellant. We hold that the respondent's possession of the lower part of the suit property was uninterrupted for over 21 years with effect from 22nd March, 1973. We see no reason to differ with the conclusions of the trial Judge on the issue.
30. Another issue raised by the appellant is that a claim for adverse possession does not survive a deceased person. **Section 30 (f)** of the **Registered Lands Act** and **Section 2** of the **Law Reform Act** provide an answer to the issue. **Section 30** provides that:

> ***Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:***

a. **……;**
b. **……;**
c. **……;**
d. **…….;**
e. **……...:**
f. ***rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;***

Section 30 (f) preserves rights being acquired by virtue of limitation of actions. A claim of adverse possession is a claim founded on limitations of action. We find that as of the date of registration of the appellant as proprietor of the suit property on 22nd March, 1973, the respondents claim to adverse possession existed and time started to run. This claim continued uninterrupted for over 21 years.

31. **Section 2 (1)** of the **Law Reform Act** stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of, his estate. The proviso to the sub-section indicates the causes of action that do not survive namely defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.
32. The respondents claim to adverse possession was subsisting at the date of his death and he had filed an Originating Summons before the High Court to prove and establish his claim to adverse possession. Accordingly, the submission by the appellant that a claim in adverse possession does not survive the deceased is not supported by the provisions of **Section 2 (1)** of the **Law Reform Act**. This ground of appeal cannot succeed.
33. For the various reasons stated above, the upshot is that we confirm and uphold the Judgment and Orders delivered by the learned Judge on 25th September, 2009. We find that this appeal has no merit and is dismissed with costs.

Dated and delivered at Nyeri this 13th day of June, 2013.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR