



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: KOOME, M'INOTI & OTIENO - ODEK, J.J.A.)**

**CIVIL APPEAL NO. 220 OF 2010**

**BETWEEN**

**WAKARIA MBOI NJARAMWE .....1<sup>ST</sup> APPELLANT**

**NICHOLAS BUNDI MBOI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LOISE KAGUU MUNGE ..... RESPONDENT**

*(Appeal against the Judgment of the High Court of Kenya at Nyeri (Makhandia, J.) delivered on 25<sup>th</sup> January, 2010*

*in*

H.C.C.C. No. 151 of 2001 (O.S.)

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**JUDGMENT OF THE COURT**

1. By an Originating Summons dated 23<sup>rd</sup> August 2001, filed at the High Court at Nyeri, the Appellants who were Plaintiffs sought a declaration that:
  - a. ***The plaintiffs have acquired title by adverse possession to a portion of 0.95Ha (2.5 acres) on LR No. Mutira/Kirunda/390 situated within Kirinyaga District.***
  - b. ***That the said portion of 0.95Ha (2.5 acres) be excised from LR No. Mutira/Kirunda/390 and be registered in the name of the plaintiffs in trust for themselves and other members of the family in place of the defendant.***
2. The affidavit in support of the Originating Summons was deponed to by Wakaria Mboi Njaramwe, the 1<sup>st</sup> appellant. It is not disputed that the suit land that is LR No. Mutira/Kirunda/390 registered in the name of John Muriithi Kiragu (now deceased) who was substituted in this suit by Loice Kaguu Munge as the respondent. The property is about 5.0 acres in total and the appellants claim is based on adverse possession. As per the averments contained in the Originating Summons and supporting affidavit, the appellants allege that they entered the suit property in 1996 and have since lived thereon. That the appellants have built their homes on the land and together they occupy approximately 2.5 acres of the land. That they have planted over 800 coffee trees on the

- land. In her testimony, Wakara Mboi Njaramwe (PW1) stated that the year 1996 appearing in the Originating Summons was a typographical error.
3. Loise Kaguu Munge, the respondent, stated in her replying affidavit that the deceased John Muriithi Kiragu is the registered proprietor of the suit property and he purchased it in 1975 from Mr. Muchiri Mweya. The deceased was registered as the proprietor of the suit land 1977; that when he purchased the property, there was nobody in occupation and there were only 200 coffee stems. The respondent states that the appellants entered the suit property in 1978 when the deceased gave his uncle Mr. Mboi Njaramwe and his family, one acre of land to build a semi permanent homestead and utilize the coffee stems in that portion. That the said Mboi Njaramwe and his family, who are the appellants herein, were landless and they occupied the land with the knowledge and consent of the deceased.
  4. The learned Judge upon hearing *viva voce* evidence observed that the appellants were in occupation of the suit property by consent of the deceased/respondent and dismissed the claim for adverse possession. Aggrieved by the decision of the learned Judge, this appeal was lodged citing eight grounds that:
    - i. ***The learned Judge erred in law and fact in holding and finding that the appellants had entered, utilized and occupied the suit land with the consent of the deceased defendant when the appellants had occupied the same long before the deceased defendant became the registered owner of the same.***
    - ii. ***The learned Judge erred in law and fact in not holding and finding that the appellants' continuous occupation and possession of the suit land for a period in excess of 39 years was hostile to the title of the substituted defendant and her deceased husband.***
    - iii. ***The learned Judge erred in law and fact in holding that the plaintiffs' occupation of the portion of the premises was on the basis of a license from the deceased defendant when this is not supported by the totality of the evidence on record.***
    - iv. ***The learned Judge erred in law and fact in finding and holding that the appellants entered the suit land in 1986 or when the land had already been transferred to the deceased defendant while the substituted defendant admitted in evidence that when she was getting married in 1974, she found the appellants and the first appellant's husband already in occupation of the portion of the suit property.***
    - v. ***The learned Judge erred in law and in fact in holding that the appellants entered into a portion of the suit land at the invitation of the deceased after they were chased from where they were residing as squatters when the substituted defendant never alluded to this in her evidence and the evidence of DW 2 was not credible.***
    - vi. ***The learned Judge erred in law and fact in finding and holding that the time for purposes of adverse possession started running in March 1999 when the appellants were asked to move out of the suit property.***
    - vii. ***That the learned Judge erred in law and fact in not finding and holding that the appellants' continuous occupation and possession of a portion of the suit land was adverse to the title of the deceased defendant.***
    - viii. ***That the learned Judge erred in law and fact in attaching unwarranted weight to the evidence of DW 2 and disregarding the vital evidence of the appellant.***
  5. At the hearing of the appeal, learned counsel Mr. Wahome Gikonyo appeared for the appellants while learned counsel Mr. J. Ndara appeared for the respondent.
  6. Counsel for the appellant elaborated on the grounds of appeal. It was submitted that the primary question is when the appellant's entered the suit property and whether the entry was with the consent of the deceased respondent. It was submitted that the appellants entered the suit property

- in 1969 well before the deceased respondent became the registered proprietor of the suit property; that having entered the suit property in 1969, they continued to occupy and possess the portion of 2.5 acres openly and without interruption. Counsel relied on the testimony of Wakaria Mboi Njarainirwe (PW 1) who testified that they entered the land about 39 years ago; she has sired 6 children on the land, she constructed a house on the property and her three sons have also constructed houses on the property; that she cultivates the land and has planted trees and bananas and has 100 stems of coffee; that she entered the land courtesy of her husband who was buying it; that no attempt has ever been made to evict her from the land. She testified that they entered the land without the consent of the deceased defendant/respondent. That they entered the land on permission of Mr. Muchiri Mwega who was selling the land to her husband.
7. Nicholas Bundi Mboi(PW2), testified and clarified that there are 800 stems of coffee on the land and they moved onto the suit premises before he started school when he was about 5 years old having been born in 1966; that they settled on the land in 1977. He stated that he has a wooden house on the land and the defendant has never attempted to evict them from the suit property.
  8. Counsel for the respondent in opposing the appeal relied on the testimony of Mrs Loise Kaguu (DW 1). The respondent's case is that the appellants entered the suit property by consent of the deceased respondent and no adverse possession can be claimed. DW1 testified that she was the wife to the deceased proprietor of the suit property and she resides on the property. That the appellants entered the land in 1978 on the consent of the deceased registered proprietor; that the consent was given when the appellants had been evicted from the land of Mr. Kagai. That she occupies 4 out of the 5 acres. That her deceased husband bought the land from Mr. Muchiri Mwega and the appellants occupy a portion of the land and have built houses on the land. In cross-examination, DW1 stated that the appellant's entered the land in 1978.
  9. Stephen Muriithi Kaguya (DW2) testified that the deceased started to buy the land from Mr. Muchiri Mwega in 1969 and completed the purchase in 1975 and was registered as proprietor in 1977. That the appellants came to the land in 1978 on invitation and consent of the deceased when they were evicted by Mr. Nahashon Chiuri Kagai on whose land they were staying.
  10. We have considered the rival submissions by learned counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in ***Selle v Associated Motor Boat Co. [1968] EA 123***, thus:

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).*”**

11. This Court further stated in ***Jabane – v- Olenja [1986] KLR 664***, thus:

***“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”*”**

12. The key issue in this appeal is when the appellants entered the suit property and whether the entry was by consent of the deceased registered proprietor. The evidence of PW1 and PW2 as read with the testimony of DW 1 and DW 2 sheds light on these issues.
13. For the appellants, Wakaria Mboi Njarainirwe gave evidence that they entered the land about 39

- years ago, this would make the entry to be in 1970; PW 2, Nicholas Bundi Mboi, testified that they settled on the land in 1977. In the affidavit sworn by Wakaria Mboi Njaramwe in support of the Originating Summons, she deposes that she has lived on the land for more than 36 years. The affidavit is sworn on 24<sup>th</sup> August 2001 and this would make the entry to the suit property to be in 1965. It is apparent that PW1 gave conflicting dates of entry to the suit property as 1970 and 1965. PW 2 testified that the year of entry was 1977.
14. For the respondents, Loice Kaguu, testified that the appellants entered the land in 1978; she also testified in contradiction during cross-examination that when she got married in 1974, the appellants were already in occupation of a portion of the suit property. Stephen Muriithi Kaguya also testified that the appellants came to the land in 1978; he testified that the deceased registered proprietor gave consent to the appellants to enter the suit property; he testified in contradiction during cross examination that it was the clan that gave consent to the appellants to enter the suit property. The testimony of the appellants as read with that of the respondent reveals that there is no consensus relating to the year upon which the appellants entered the suit property.
15. The testimonies of Loice Kaguu and Stephen Muriithi Kaguya, in chief, were consistent to the effect that the appellants entered the suit property in 1978. During cross-examination, Loice Kaguu in contradiction to her evidence in chief stated that when she was married in 1974, she found the appellants in occupation of the suit property. From the evidence on record, there is conflicting dates or years of entry as given by PW1 and PW 2, they have given the years 1970, 1965 and 1977. Taking in totality the evidence of both the appellants and the respondent's, on a balance of probability, the evidence leads to the inference that the appellants entered the suit property not later than 1978 and have continued to be in occupation and possession of a portion thereof.
16. In the case of *Francis Gitonga Macharia – v- Muiruri Waithaka Civil Appeal No. 110 of 1997*, 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 the present case, the deceased respondent was registered as proprietor of the property in 1977; we find that in law, the claim for adverse possession against the respondent can only start to run from the date of registration and not earlier. In the instant case, what is the factual date or year when the appellants entered the suit property?
17. The appellants contend that they have had an uninterrupted possession and occupation of 2.5 acres of the suit property for over 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. In this case, there is no dispute that the appellants had a peaceful, uninterrupted occupation and possession of the suit property; the issue in contention is whether the possession was by consent of the deceased respondent who became the registered proprietor in 1977.
18. In the present case, did the appellants enter the suit property with the consent of the deceased respondent? In *Wambugu – v- Njuguna (1983) KLR 172 at holding 4*, this Court held:

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

19. In *Samuel Miki –v – Jane Njeri Richu CA No. 122 of 2001 (unreported)*, this court said:

***“It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in provisions of an agreement of sale or lease or otherwise.”***

20. The appellants' submission is that they entered the suit property as purchasers with the consent of Mr. Muchiri Mwega. That the land was being purchased from Mr. Mwega and in proof thereof, exhibits dated 1986 acknowledging receipt of payment of purchase price for the land and coffee were tendered in

evidence. Evidence was given against the appellants by DW 2 that it was the clan that made a decision that they occupy the suit property and hence the entry was by consent.

21. In the case of Sisto Wambugu – v- Kamau Njuguna {1982-88} 1 KLR 217, it was stated that:

***“A purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay claim of a licence or possession of such land only after the period of validity of the contract unless and until the contract of sale has first been repudiated as required by the parties in which case, adverse possession starts from the date of termination of the contract.”***

22. From the evidence on record, DW1 and DW 2 both testify that the appellants entered the suit property with the consent of the deceased respondent in 1978. In contrast, PW1 and PW 2 testified that they entered the land in their capacity as purchasers of the land and with the consent of a Mr. Muchiri Mwega. No sale agreement was produced in evidence; the date and year of purported sale was not stated; the only testimony is an exhibit showing acknowledgement of receipt of money towards the purchase price dated 1986. The acknowledgment is from Mr. Muchiri Mwega who was not the registered proprietor of the suit property as at 1986. Nonetheless there is on record two affidavits sworn by Mr. Muchiri Mwega and Mr. Mboi Njaramwe in the Nairobi Resident Magistrate’s Court Civil Case No. 1807 of 1975 which shed some light on this.

23. The record shows that the suit property had been transferred to and registered in the name of the deceased respondent in 1977. The issue at hand is was Mr. Muchiri Mwega attempting to sell the property to the appellants in 1986 or was the sale made earlier? The answer to this question is found in the affidavits sworn in the Nairobi Resident Magistrate’s Court Case No. 1807 of 1975; which we shall refer to later in the judgment.

24. The next is to evaluate what evidence is on record to support the contention that the appellants entered the suit property with the consent of the registered proprietor. DW 1 and DW 2 both testified that the appellants used to live on the land of one Chiuri wa Kagai and that they had been evicted therefrom and had nowhere to go; that upon their eviction, the deceased registered proprietor consented to the appellants entering the suit land. The year upon which the alleged eviction took place is not stated. DW 2 further testified that the clan had permitted the appellants to enter the suit property. The year when the clan made this decision is not indicated and no supportive or corroborative evidence was adduced. On this issue, the evidence on record indicates that the suit property was purchased by the deceased respondent and it was not clan or ancestral land. Even if we were to believe (which we do not) that the clan gave permission to the appellants to enter the suit property, we hold that since the suit property was not clan or ancestral land and as such the clan had no legal capacity to direct or give consent to a third party (such as the appellants) to enter and occupy the property. We find that if any such consent or direction was given by the clan, the same had no legal effect.

25. We now turn to the question whether the appellants had entered the suit property prior to 1978. DW1 and DW 2 in their testimony gave the year 1978 as the year when the appellants entered the suit property with the consent of the registered proprietor. Does the evidence on record support this submission? DW 1 testified that when she got married in 1974, she found the appellants on the land. The original proprietor of the suit land was Mr. Muchiri Mwega. In 1975, the deceased respondent who is now the registered proprietor filed suit against Mr. Muchiri Mwega at Nairobi in RMCC No. 1807 of 1975 seeking specific performance and transfer of the suit property to his name. Summonses were served upon Mr. Muchiri Mwega by way of substituted service in the form of advertisement in the daily newspapers. No appearance was entered and an order was made transferring the suit property from Mr. Muchiri Mwega to the deceased respondent. In a sworn affidavit filed in the Nairobi Resident Magistrate’s Court in RMCC No. 1807 of 1975, Mr. Muchiri Mwega deposes that he was selling the land to Mr. Mboi Njaramwe (deceased appellant) and he allowed the appellants to move into the land. Mr. Mboi Njaramwe (now deceased) also deposed in an affidavit filed in RMCC No. 1807 of 1975 that he was in occupation of the suit property. In his affidavit, Mr. Mboi Njaramwe deposes that at the time he was buying the land from Mr. Muchiri Mwega, the now deceased registered proprietor Mr. Joseph Muriithi Kiragu was in

secondary school and he was paying his school fees as he was his nephew.

26. These two affidavits filed in the Resident Magistrate's Court reveals that as at 1975, the appellants were in occupation and possession of the suit property. We find that in 1977 when the deceased respondent was registered as proprietor of the suit land, the appellants were already in possession. This fact is corroborated by the testimony of DW 1 who stated that when she got married in 1974, the appellants were in occupation. It is our finding that in 1977, the deceased respondent was registered as proprietor of the suit property with the appellants in occupation of a portion thereof. The appellants occupation was by a claim of purchasers interest and this is confirmed by the affidavit sworn by Mr. Muchiri Mwega who was the original registered proprietor. We find that the appellants entry into the suit property was not by consent of the deceased registered proprietor. The appellants were already in possession of the suit property in 1977 and when the deceased respondent was registered as proprietor, the time for adverse possession began to run. We find that the appellants have been in possession and occupation of a portion of the suit property for an uninterrupted period of 12 years from the time the deceased was registered as proprietor in 1977. We find that the appellants possession was *nec vi, nec clam and nec precario*. The appellants have proved the claim to adverse possession against the deceased registered proprietor.

27. The totality of our evaluation of the evidence and the law relevant in this matter is that the appellants have proved adverse possession and the appeal is hereby allowed. The judgment and orders made by the learned Judge dated 25<sup>th</sup> January 2010 be and is hereby set aside and we substitute in its place and grant the Orders prayed for in the Originating Summons dated 23<sup>rd</sup> August 2001. The costs of this appeal and in the High Court shall be paid by the respondent.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of July, 2013.***

***MARTHA KOOME***

.....

***JUDGE OF APPEAL***

***KATHURIMA M'INOTI***

.....

***JUDGE OF APPEAL***

***OTIENO - ODEK***

.....

***JUDGE OF APPEAL***

***I certify that this is a***

***true copy of the original.***

**DEPUTY REGISTRAR**