**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KIAGE & OTIENO ODEK ,JJ.A.)**

**CIVIL APPEAL NO. 251 OF 2011**

**ESTHER GACHAMBI MWANGI…….…. APPELLANT**

**VERSUS**

**SAMUEL MWANGI MBIRI …….....……. RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya at Nyeri, (Makhandia, J.) dated 22nd March, 2010***

**in**

**H.C..C.A. No. 58 of 1999**

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**JUDGMENT OF THE COURT**

1. The suit property in this appeal is a portion of 0.20 acres of land parcel **Loc. 14/Kagumoini/573** and the contiguous land parcel **Loc. 14/Kagumoini/ 609**. The appellant's deceased husband James Mwangi Kinyua was the registered proprietor of land parcel **Loc. 14/Kagumoini/573** while the respondent is the registered proprietor of land parcel **Loc 14/Kagumoini/609**. The two parcels of land are separated by a road of access.
2. The contention is that the respondent unlawfully encroached and entered into a portion measuring 0.2 of an acre in land parcel **Loc. 14/Kagumoini/573** belonging to the appellant and has been cultivating and has built on the said portion of land. The appellant's claim is for the respondent to move out of the 0.2 acre portion of land in parcel **Loc.14/Kagumoini/573**.
3. On his part, the respondent contends that his land parcel **Loc. 14/Kagumoini/609** has a portion of 0.2 of an acre which has crossed the road and which portion borders land parcel **Loc. 14/Kagumoini/573**. He asserts that he is in possession and ownership of the 0.2 acre portion and denies unlawful encroachment.
4. The dispute between the parties was heard by the Mathioya Division Land Disputes Tribunal which found that there was no brace on the plot of the respondent to indicate that his land extended to the other side of the road and that the registry index map did not show a brace to join the two portions. The award of the Mathioya Division Land Disputes Tribunal filed at the Muranga Principal Magistrates court on 27th July 1998 was to the effect that "***the respondent in this appeal was a trespasser of land parcel land parcel Loc 14/Kagumoini/573 and the court should grant the appellant a permanent injunction restraining the respondent, his agents, servants from entering or trespassing into land parcel Loc 14/Kagumoini/573***."

5. Aggrieved by the award and decision of the Mathioya Divisional Land Disputes Tribunal, the respondent herein moved to the Provincial Land Disputes Appeals Committee as required under the Land Disputes Tribunal Act. His appeal to the Committee was dismissed on 26th May 1999.
6. Aggrieved by the dismissal of the appeal by the Provincial Land Dispute Appeals Committee, the respondent moved to the High Court by a memorandum of appeal dated 22nd June, 1999. The main ground of appeal was that the Provincial Appeals Committee erred in law in failing to uphold the objection that the Mathioya Divisional Land Disputes Tribunal had no jurisdiction to entertain the dispute and to order the appellant to be evicted from the portion of land he has been occupying from 1966 to the date of filing the dispute in 1998. It was submitted before the High Court that the respondent had raised limitation under **Section 13 (3)** of the **Land Disputes Tribunal Act**.
7. The learned Judge of the High Court (Makhandia, J. as he then was) upon taking into account submissions by counsel for all parties allowed the appeal and set aside the decision of the Provincial Land Disputes Appeals Committee and substituted it with an order setting aside the award of the Mathioya Division Land Disputes Tribunal for want of competence and jurisdiction.
8. The learned Judge in arriving at his decision took note of the limitation period as set out in **Section 7 of the Limitations of Actions Act** as read with **Section 13 (3) of the Land Disputes Tribunals Act**.

**Section 7** of the **Limitations of Actions Act, Cap 22** of the **Laws of Kenya** provides:

> *"**An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person"***

**Section 13 (3)** of the **Land Disputes Tribunal Act** provides:

> ***"For the avoidance of doubt, it is hereby provided that noting in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to limitation of actions ….."***

9. The learned Judge in applying the limitation provisions as contained in **Section 7** of the **Limitation of Actions Act** and **Section 13 (3)** of the **Land Disputes Tribunals Act** as well as citing the decision in ***John Kamau Kiruga –v – The Chairman of Kigumo Divisional Land Disputes Tribunal*** expressed himself as follows:

> ***"If the appellant (now respondent in this appeal) has been in occupation of his portion of land since 1966, the respondent (now appellant in this appeal) could not have sued him to recover that portion either in 1995 in the Senior Principal Magistrate's Court at Muranga (the suit that was subsequently withdrawn or terminated) or in the Mathioya Divisional Land Disputes Tribunal in 1995 as well for the simple reason that limitation aforesaid had set…. A suit for recovery of land must be brought before the expiry of 12 years. The appellant had been in occupation of the portion since 1966, a period in excess of 29 years. The Provincial Land Disputes Appeals Committee did not consider this ground of appeal at all. The failure to do so constituted an error of law which renders the decision of the Committee untenable and a nullity.***

10. The appellant in this appeal is aggrieved by the judgment of the High Court that reversed the decision of the Provincial Land Disputes Appeals Committee and set aside the award of the Mathioya Divisional Land Disputes Tribunal. The appellant lodged this appeal citing eight (8) grounds which can be compressed as follows:

a. ***The Honourable Judge erred in law in making findings of the factual issues of occupation instead of restricting itself to points of law.***

b. ***The HonourableJudge erred in law in upholding the respondent's contention of occupying the***

***disputed boundary since 10.1.1996 and ignoring the appellants contention that the trespass commenced in 1995 whereas the Provincial Disputes Appeals Committee had made adverse findings on the demeanor and character of the respondent and his witnesses. That the learned Judge erred in not finding that the dispute arose in 1995.***

c. ***That the learned Judge erred in law in failing to appreciate that the Tribunal Case was for protecting the integrity of the boundaries of land parcel Loc14/Kagumoini/573 and land parcel Loc 14/Kagumoini/609.***

d. ***That the honourable court erred in failing to compute the limitation period properly***.

11. During the hearing of the appeal, learned counsel Doughlas Ombongi held brief for Muchoki Kangata and represented the appellant while learned counsel Waiganjo Gichuki appeared for the respondent.
12. The appellant elaborated on the grounds of appeal emphasizing that the cause of action arose in 1995 and the learned judge erred in failing to appreciate this fact. It was submitted that the Mathioya Land Disputes Tribunal heard the case in 1995 and the limitation period cannot be said to have lapsed as the cause of action commenced in 1995. In support of the submission, counsel pointed out that the evidence on record shows that the respondent was asked to move out of the disputed portion in 1995 and he refused. That the limitation period should be calculated from the year 1995 when the respondent refused to move out of the land. It was submitted that the learned Judge erred in law in failure to appreciate that the dispute between the parties was a boundary dispute and not a suit for recovery of land and the 12 year limitation period should not have been invoked. Counsel submitted that the learned Judge erred in law by introducing the limitation period as an extraneous matter and making a decision thereon.
13. Counsel for the respondent opposed the appeal and submitted that the respondent has been in occupation of the 0.2 acre portion of land since 1966. That the respondent has built a homestead thereon and buried his mother and child thereon. It was submitted that if any cause of action arose in relation to ownership or recovery of the portion measuring 0.2 acres, the cause of action arose in 1966 when the respondent entered and took possession of the said portion. The respondent submitted that the appellant settled on **Loc. 14/Kagumoini/573** in 1967 and all along the appellant was aware and saw the respondent putting up his homestead on the now disputed portion of 0.2 acres. Counsel for the respondent submitted that the issue of limitation was not extraneous and was not introduced by the learned Judge. It was submitted that limitation was a ground of objection raised before the Provincial Land Disputes Appeal Committee. The respondent submitted that if as alleged by the appellant that the cause of action is in trespass, then the limitation period is 3 years and since the respondent entered the disputed land in 1966, the limitation period for trespass lapsed in 1969. Counsel submitted that the dispute between the parties herein is not a boundary dispute but ownership of the portion measuring 0.2 acres land within **Loc. 14/Kagumoini/573**. Finally, the respondent submitted that the appellant had no right of 2nd appeal to the Court of Appeal under the Land Disputes Act and urged this Court to find that the present appeal was incompetent. In support of this submission, counsel cited the Court of Appeal decision in ***Humphrey Olwisi Muranda – v- Yakobet Nechesa Wabuko Civil Appeal No. 44 of 2006***.
14. We have considered the record of appeal, the judgment by the High Court and submissions by both counsels. It was stated in ***Jabane v Olenja [1986] KLR 661*** at pg 664, thus:

> ***"This Court 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 v Kenya Bus Services (1982-88) 1 KAR 870."***

15. It is our considered view that there are two points of law relevant in this appeal. First, when did the cause of action arise in the matter and was the cause of action been extinguished by the

limitation period? Second, did the Mathioya Divisional Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee have jurisdiction to hear and determine the dispute between the parties taking into account the relevant limitation period for the cause of action?

16. As was stated in the ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd 1989 KLR 1,*** *jurisdiction is everything. Without it, a court has no power to take one more step.* ***In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution,*** Constitutional Application No. 2 of 2011; the Supreme Court noted that ***The Lillian 'S' case [1989] KLR 1]*** *establishes that "****jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament****, where the wording of legislation is clear and there is no ambiguity…"*
17. *A court of law or any Tribunal must down tools in respect of the matter before it the moment it is without jurisdiction. Applying this principle, jurisdiction wa S everything to the Mathioya Divisional Land Appeals Tribunal; if the Tribunal had no jurisdiction as a result of the Limitation of Actions Act, then it had to down its tools. Likewise, if the Mathioya Divisional Land Appeals Tribunal had no jurisdiction, its proceedings and award was a nullity and any appellate proceedings thereon is also a nullity.*
18. We now turn to the question of limitation as applied to the facts of this case to determine if the Mathioya Disputes Land Tribunal had jurisdiction to hear the dispute between the parties to this case. From the evidence on record, it is not disputed that the respondent entered and occupied the disputed 0.2 acre portion in 1966. It is our considered view that from 1966, the appellant was dispossessed of the portion measuring 0.2 acres of land in **Loc. 14/Kagumoini/573** from 1966. The evidence shows that the respondent's claim is based on the concept of adverse possession. 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.
19. From the evidence on record, it is apparent that the appellant has never had possession of the disputed portion of 0.2 acres of land. The fact that the appellant wrote to the respondent in 1995 to move out of the portion of land did not stop the limitation period which had started to run in 1966. By the time the parties to this dispute appeared before the Mathioya Divisional Land Disputes Tribunal, the number of years in which the respondent was in occupation of the 0.2 acre portion of land was 29 years. In the instant case, the respondent has used the 0.2 acre portion of land continuously, there has been no break, he has been in possession without let or hindrance; the possession and occupation has been exclusive, open, quiet, continuous, peaceful and uninterrupted. On this point, we refer to the jurisprudence developed under the doctrine of adverse possession to buttress the legal principles involved in acquiring title through operation of the limitation period. **(*See Francis Gicharu Kariri –v- Peter Njoroge Mair, Civil Appeal No. 293 of 2002; Charity Waruguru Maina –v –Maginda Ranchon, Chouhan {2006} eKLR and Presbyterian Foundation (PCEA Nakuru West) –v –Kanji Valji & another {2006} eKLR)***. In line of the authorities cited, we find that the learned Judge did not err in finding that the appellant's claim to the 0.2 acre portion of land which the respondent has been in possession and occupation since 1966 was extinguished by the limitation period. In ***Francis Gitonga Macharia – v- Muiruri Waithaka, Civil Appeal No. 110 of 1997, (unreported),*** 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 appellant was registered as proprietor of land parcel Loc 14/Kagumoini/573 way back in 1966 and the limitation period in respect of the 0.2 acre portion started to run from that year.
20. The appellant further contends that the cause of action is in trespass. The respondent entered the disputed 0.2 acre portion of land in 1966. **Section 4 (2) of the Limitation of Actions Act** provides that actions founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. If the cause of action is in trespass, then the limitation period lapsed in 1969 which is three years after the respondent entered the disputed portion. On the other hand, if the cause of action claimed by the appellant is for recovery of the 0.2 acre portion of land, then the dispute is for recovery of land and the limitation period under **Section 7** of the **Limitation of Actions Act** is 12 years. The appellant asked the respondent to move out of the disputed portion in

1995, this by itself is an admission that the dispute is for recovery/ownership of land. (**See *Republic – v- Nyeri Provincial Appeals Committee ex parte Ruth Wangari Mwangi & 11 Others, Nakuru Judicial Review No. 111 of 2011 {2012} e KLR)***.

21. We have considered the questions of fact in this matter and we are satisfied that the cause of action arose in 1966 and when the dispute was referred to the Mathioya Divisional Land Dispute Tribunal, the limitation period of either 3 years for trespass or 12 years for recovery of land had lapsed. The legal consequence is that **Section 13 (3)** of the **Land Disputes Act** came into force and the Tribunal ceased to have jurisdiction on the matter. Since the Tribunal had no jurisdiction, it follows that the award it made was a nullity and the Provincial Appeals Committee considered an award which was a nullity. The consequence is that the decision of the Provincial Land Disputes Appeals Committee was also a nullity for want of jurisdiction. The learned Judge did not err in holding that the cause of action arose in 1966 and the limitation period had lapsed.
22. The final issue of our consideration is the submission by the respondent that the present appeal was incompetent as there is no right of second appeal to the Court of Appeal under the provisions of the Land Disputes Act. We have considered the submission and we agree that this appeal is incompetent. We are guided by the decision of this court in ***Humphrey Olwisi Muranda – v- Yakobet Nechesa Wabuko, Civil Appeal No. 44 of 2006 (unreported),*** where on facts in *pari materia* to the present appeal it was stated:

> ***"The appeal to the High Court was brought pursuant to the provisions of the Land Disputes Act. The High Court, as we have said, has dismissed that appeal. There is no provision in the Act allowing an appeal from the decision of the High Court to this Court. No right of appeal is provided by the Act. We think we have no jurisdiction to hear the appeal under the Act and that being so, we must down our tools. Accordingly, the appeal before us is and has always been incompetent and we order that it be and is hereby struck out..."***

23. We are also guided by the decisions of this court in ***Nekesa – v- Wanjala, Civil Appeal No. 23 of 1985*** where it was stated that cases of a civil nature involving a dispute as to title fall outside the jurisdiction of the Land Disputes Tribunals. We also refer to the decision of this Court in ***Domica Wamuyu Kihu – v- Johana Ndura Wakaritu, Civil appeal No. 269 of 2007*** wherein this Court stated that **Section 8** of the **Land Disputes Tribunal Act** which provides for appeals from the decisions of the Tribunal and the Appeals Committee does not provide for appeals to the Court of Appeal from the decisions of the High Court in such matters.
24. The totality of our consideration of the grounds of appeal, the submissions made and the applicable law is that this appeal has no merit and is dismissed. The parties hereto being adjacent land owners, we make no order as to costs.

***Dated and delivered at Nyeri this 25th day of September 2013.***

***ALNASHIR VISRAM***

**……**

***JUDGE OF APPEAL***

***PATRICK O. KIAGE***

**…….**

***JUDGE OF APPEAL***

***OTIENO-ODEK***

**……..**

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***