IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, G.B.M. KARIUKI, MUSINGA, JJA)

CIVIL APPEAL NO. 141 OF 2009

BETWEEN

JOSEPH MACHARIA MWANGI..... APPELLANT

AND

JONAH KABIRU S/O KABUTHI..... REPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nyeri (Kasango, J.) delivered on 18th December 2008

in

HCCC NO. 91 OF 1981)

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JUDGMENT OF THE COURT

The appellant, Joseph Macharia Mwangi, was aggrieved by the judgment delivered by the Superior Court (Kasango J) on the 18th of December 2008 dismissing his suit No.91 of 1981 with costs to the respondent.

The appellant's claim in the Superior Court was coached in the Originating Summons dated 16.07.1981 as follows:

> *"(1) That the Plaintiff has acquired by adverse possession title to some three (3) acres in land parcel No.KONYU/BARICHO/4 registered in the name of the Defendant*
>
> *(2) That the Defendant do sub-divide and transfer to the Plaintiff the said three (3) acres out of Land Parcel No.KONYU/BARICHO/4 aforesaid."*

It is because Order XXXVI Rule 3(i) of the Civil Procedure Rules requires that actions for adverse possession be commenced by way of Originating Summons that the appellant went to the Superior Court by way of Originating Summons.

In the affidavit in support of the Originating Summons, the appellant averred that his father, one Mwangi Kimaru, owned land title No.KONYU/BARICHO/4 which he sold and transferred on 27.9.1962 to the respondent. Mwangi Kimaru died in 1995. The appellant's contention is that his father's intention was to

transfer two (2) acres to the respondent but the latter fraudulently or through a mistake had the entire land comprised in Title No.KONYU/BARICHO/4 which measures 2.06 hectares (or approximately a little over 5 acres) transferred to him. It was the appellant's case that he was in exclusive possession and occupation of the three (3) acres comprised in the title No.KONYA/BARICHO/4 from 1962 up to 1986 and that he had acquired title to the three acres by adverse possession by dint of Section 38 (1) of the Limitation of Actions Act, Chapter 22, of the Laws of Kenya which stipulates:

> *"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.*
>
> *(2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."*

After attempts aborted to have the dispute resolved through arbitration, the suit was eventually heard in the Superior Court. The dismissal of the appellant's claim on the 18th of December 2008 by the Superior Court provoked this appeal.

In the 4 grounds set out in the Memorandum of Appeal dated 18.6.2009, the appellant states that:

"1. The learned Judge erred in law and in fact in ignoring the appellant's evidence concerning the acreage of the land he had occupied.

2. *Although the Appellant and his witness were specific on the extent of the portion of the land he had occupied the learned Judge erred in concluding that the area was not definite and distinct and therefore uncertain.*
3. *The learned Judge ignored the fact that for the period between 1962 and 1981 the Appellant has been in exclusive possession of a portion of 3 acres out of the parcel of land KONYU/BARICHO/4 without interruption and by virtue of this he had acquired the same by adverse possession.*
4. *The Learned Judge did not evaluate the Appellant's evidence in its entirety a fact that led her to reach an erroneous conclusion."*

When the appeal came up for hearing before us on 6th February 2013, the appellant was represented by Mr. Kebuka Wachira of Kebuka Wachira & Company Advocates while the respondent was represented by Mr. Kamwenji of M.C. Kamwenji & Company, advocates.

Mr. Kebuka Wachira, in his brief presentation argued all the 4 grounds of appeal together. He submitted that the Superior Court erred in holding that there was no certainty as to the three (3) acres claimed by his client. In his submission, the trial court failed to deal with all the issues in the suit and dismissed the suit on the ground that it was not certain that the appellant was in possession of or occupied the three acres claimed.

On his part, Mr. Kamwenji, in opposition to the appeal, supported the decision of the Superior Court and pointed out that there was no evidence to prove that the appellant was in exclusive and uninterrupted possession and occupation of the three (3) acres. He referred us to the testimony of the appellant given on 29.9.2008 before Kasango J. in which the appellant is recorded as having stated, inter alia, that:

"*in 1962 when he (the Respondent) was so registered, he took occupation of the whole land. In 1962 I was cultivating something like three (3) acres ..... The three acres are still mine. I am not doing farming there because the Defendant would release his animals on my shamba. I moved out in 1986***"**.

"*..... Joseph Macharia was cultivating maize, beans, sweet potatoes.... on the suit property. After chasing me (Plaintiff) the Defendant now occupies the whole land."*

In cross examination, the appellant told the Superior Court in his testimony that:

"I do not presently know what the land is being used for by the Defendant, Rakeli used to use the suit land until 1986 when the Defendant chased me away". Advocate Kamwenji posed the question, *"if according to the Appellant, the respondent was cultivating on 2 acres, and Rakeli also was cultivating a portion of the land, can it be said that the appellant had exclusive possession and occupation of 3 acres?"*

What emerges from the evidence adduced by the parties in the Superior Court is that after the appellant's father's land (title No.KONYU/BARICHO/4) was transferred to the respondent, the latter started to cultivate it. At the same time, the appellant also cultivated a portion of it but neither built any structures on it. The appellant had his house on his grandfather's land No. KONYU/BARICHO/76 which was said to be in the neighborhood of the suit land. It is on it that the appellant buried his father when he died in 1995. The evidence shows that Rakeli Mundia, a sister of the appellant's father, who died in 2003, was the woman who took care of the appellant and the respondent when they were youthful as the appellant's mother had deserted the appellant's father in 1953. The appellant's father was said to be mentally unwell and it was as a result of that condition that he was referred to as "*stuka*".

The appellant's case is that he is entitled to be declared as the owner of the portion of three (3) acres comprised in the title No KONYU/BARICHO/4 on the basis that he has acquired under Section 38 of the Limitation of Actions Act title to the said portion by dint of adverse possession of more than 12 years, having cultivated it from 1962 to 1986.

The appeal before us is a first appeal. We are mindful of the fact that we are enjoined to duly examine the evidence adduced in the Superior Court and to make our own findings, inferences and conclusions, bearing in mind that the Superior Court had vantage position in relation to evaluation of credibility of witnesses because it saw and heard them as they testified. However, where the findings or conclusions made by the Superior Court are not supported by evidence or are at variance with the evidence, we are entitled after a careful evaluation of the evidence to make our own findings and conclusions.

We observe that the appellant relied somewhat on the fact that all the three arbitral panels that heard the dispute between the parties found in favour of the appellant. But the issue of adverse possession was never before the arbitral panels which, in any case, had no jurisdiction to deal with it as only the superior court is vested with such jurisdiction under Section 38 of the Limitation of Actions Act. The respondent on the other hand, contended that the Appellant failed to establish that the appellant was, for a period of 12 years or more, in continuous and exclusive possession of the land claimed.

We have perused the evidence adduced in the Superior Court and have duly considered the submissions made by counsel on behalf of the parties. It is salient that the respondent became the registered proprietor of the land in 1962 following sale and transfer to him by the Appellant's father.

The suit No.91 of 1981 (OS) in the Superior Court whose judgment is challenged in this appeal was instituted in 1981. The appellant testified that he cultivated about three acres of the land comprised in the Title No.Konyu/Baricho/4 while the defendant cultivated 2 acres. He started cultivation in 1962, he said, and moved out of the land in 1986 because, he added, the respondent's animals kept destroying his crops. He planted maize and potatoes and orange trees. He felt justified in using the land as it was previously his father's property which the respondent fraudulently or by mistake caused to be transferred to his own name. There was evidence also that Rakeli Wanjeri also cultivated the suit land. There was no evidence to show the particular portions of the land comprised in the title No.Konyu/Baricho/4 which each of them cultivated. There was no evidence to show whether there were hedges or other markings to delineate the portions cultivated by each party, i.e. the appellant, the respondent and Rakeli Wanjeri. The burden of adducing this evidence was on the appellant. The evidence shows that there were no boundaries delineating the "*shambas*".

The learned Judge of the Superior Court correctly observed this when she said in her judgment;

> *"when the plaintiff gave evidence, he stated that he knew that he was using a bigger portion of the suit property whilst the Defendant was using the smaller (portion) one. However, he could not be*

certain on the acreage he was using....."

"it was essential for the Plaintiff to state in evidence the exact or definite and distinct land he was claiming out of the 5 acres of the suit land ....."

The Appellant's claim is founded on the doctrine of adverse possession which is legislated in **Section 38(1)** of the **Limitation of Actions Act** (supra). The Act does not define or expound the doctrine. But the Kenya common law as supplemented by English common law expounds the meaning of the doctrine of adverse possession. The suit land, a portion of which is claimed by the appellant under the doctrine is registered under the **Registered Land Act,** Cap 300 whose **Section 163** provides.

"163. Subject to this Act and except as may be provided by any written law for the time being in force, the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges registered under this Act and interests therein, but without prejudice to the rights, liabilities and remedies of the parties under any instrument subsisting immediately before the application."

The jurisdiction of our Courts is required under **Section 3(1)(c)** of the **Judicature Act**, Cap 8, to be exercised in conformity with the common law and equitable doctrines imported under the section to the extent to which they are in consonance with our law. The section stipulates:

"3(1) The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall be exercised in conformity with-

(c) subject thereto and so far as the same do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

Section 38 of the **Limitation of Actions Act** entitles a person to be registered as the proprietor in place of the person then registered as proprietor of the land claimed under adverse possession if he establishes by evidence that he has become entitled to be so registered on account of his adverse possession of the land for 12 years or more. Such possession must be adverse to the title of the owner, and must be open, continuous and without interruption and must be with the knowledge of the registered proprietor. The right acquired under S.38 (1) of the Limitation of Actions Act is by dint of **Section 30(f)** of the **Registered Land Act**, Cap 300, an overriding interest. Section 30(f) stipulates:

"S. 30 Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."

Once adverse possession under Section 38 (1) of the Limitation of Actions Act crystallizes after 12 years, the title of the registered owner is in law extinguished.

The case of **Amos Weru Murigu v. Marata Wangari Kambi & Another Nbi. H.C.C.C. No.33 of 2002 (OS)** was correctly decided by the Superior Court which expounded the doctrine of adverse possession thus:

"where a person trespasses on the land of another with the knowledge of the latter who does not

assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejectment but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38(1) (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. For these propositions of the law, see ***GATIMU KINGURU v. MUYA GATHANGI (1976) KLR 253; HOSEA v. NJIRU [1974] E.A. 526; SOSPETER WANYOIKE v. WAITHAKA KAHIRI [1979] KLR 236; WANJE v. SAIKWA (No.2) (1984) KLR 284; GITHU v. NDEETE [1984] KLR 776; NGUYAI v. NGUNAYU (1984) KLR 606; KISEE MAWEU v. KIU RANCHING (1982-88) I KAR 746"***

The appellant did not show that he was in possession of an identifiable portion. Without such evidence, an order cannot issue in respect of an undefined portion.

Moreover, there is no evidence to show that the appellant was in exclusive, continuous and uninterrupted possession. The evidence adduced shows that the appellant and the respondent and one Rakeli Wanjeri all cultivated the land comprised in the Title No Konyu/Baricho/4 and grew subsistence crops. None of them including the appellant appears to have had exclusive, continuous and uninterrupted possession of distinct and identifiable portions.

A claimant under Section 38(1) of the **Limitation of Actions Act** must prove possession and show that it was exclusive, continuous and uninterrupted for a period of not less than twelve (12) years. Where possession is not exclusive, the doctrine of adverse possession cannot hold. Where possession is not continuous for twelve years, adverse possession cannot hold. Where possession is not adverse to the title of the owner, adverse possession cannot hold. Moving into another person's land without such person's consent and carrying out cultivation from time to time without showing that such cultivation was continuous and without interruption for 12 years may not meet the threshold under the doctrine of adverse possession. For that reason, going onto the land of another periodically to cultivate may not amount to adverse possession even where the total periods of cultivation may amount to 12 years unless it is shown that cultivation was conducted continuously from season to season and the trespasser had control of the land claimed throughout. It is important to emphasize that where possession is predicated on the fact of cultivation, it must be shown clearly that the claimant openly and continuously, from season to season, cultivated and had control of the land for 12 years or more with the knowledge of the owner but without the owner's permission or consent.

In the present appeal, the evidence shows that the respondent tacitly permitted the appellant to cultivate ostensibly because the appellant was the son of the man who had sold the land to him. He also allowed Rakeli to cultivate. The cultivation of the suit land by the appellant was not adverse to the title of the respondent. In short, the appellant was not a trespasser. He was an invitee. The possession of the land by the appellant from 1962 to 1986 when he gave up further cultivation did not amount to adverse possession in view of the respondent's tacit consent. Moreover, the portion cultivated by the appellant was not demarcated or defined nor was it shown that the appellant had exclusive possession and control of it. Title to land cannot be extinguished by adverse possession without clear evidence to establish the existence of all the ingredients that constitute adverse possession under **Section 38 (1)** of the **Limitation of Actions Act**.

After evaluating all the evidence, it is our finding and conclusion that the appellant did not adduce sufficient evidence to establish the doctrine of adverse possession under Section 38 (1) of the **Limitation of Actions Act, Cap 22**.

Accordingly, we hereby dismiss the appeal with costs to the respondent.

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

M. K. KOOME

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JUDGE OF APPEAL

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR