IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUNOI, WAKI & NYAMU, JJ.A.)

CIVIL APPEAL NO.217 OF 2005

BETWEEN

KIM PAVEY
ROSE KABUI HINGA
YUSUF KHAN (suing as the Legal representative of the Estate of Kenneth Pavey) …….....…..…….. APPELLANTS

AND

LOISE WAMBUI NJOROGE …….....……..…… 1ST RESPONDENT
NELSON NJUNGE NJOROGE …….....…….…… 2ND RESPONDENT

(Being an appeal against the judgment and decree of the High Court of Kenya at Nairobi (Lenaola, J.) dated 18th February 205

in

H.C.C.C.NO.6211 OF 1992)
****

JUDGMENT OF THE COURT

The appellants ***Kim Pavey, Rose Kubai Hinga*** and ***Yusuf Khan*** who are legal representatives of the estate of the late ***Kenneth Pavey*** appealed to this Court on 7th September, 2005 against the judgment of the superior court (***Lenaola, J.)*** ***H.C.C.C.NO.6211 OF 1992*** dated 18th February 1992.

The respondents on the other hand are the administrators of the estate of the late ***Njoroge Kiiru*** who was the registered owner of LR 9741/2 situate near Athi River. It is common ground that the late Kenneth Pavey entered into the parcel of land in November 1997 pursuant to a sale agreement between him and the late Kiiru. In ***H.C.C.C.NO.3683 of 1985*** the late Pavey sought inter-alia an order for specific performance of the agreement of sale dated 4th November 1977 and for the respondents to execute the requisite transfer document. According to the late Pavey the subject matter of the sale agreement was a piece of land measuring 35 acres and a house. In the same suit the late Pavey had prayed for vacant possession of the identified area. The suit was dismissed by the superior court (***Shield, J.)*** on 8th November 1990.

In the suit which gave rise to this appeal namely ***H.C.C.C. 6211 of 1992*** the principal prayers sought by the respondent were:-

a) a declaration that the sale agreement entered between the late Njoroge Kiiru and the late Pavey dated 4th November 1977 is void for all purposes.

b) an order of eviction of the late Pavey and his agents and/or servants from the house erected on LR 9741/2.

c) an order by the Land Registrar to remove the caution lodged against LR 9741/2 forthwith

In answer to the above claims the late Pavey in his defence contended that by dint of the agreement for sale described above between him and the late Kiiru the late Njoroge Kiiru had sold him an unsurveyed piece of land measuring 35 acres and a dwelling house thereon forming part of the LR 9741/2 (Athi River Area) and pursuant to the said agreement the late Pavey entered that piece of land measuring 35 acres and took possession of the dwelling house from 1st November, 1977 and ever since then, he has been in continuous use and occupation of the same without interruption. In the addition to the above averments, the late Pavey set up a counterclaim in which he sought the following principal orders:-

a) The dismissal of the plaintiff's suit with costs.

b) An order for specific performance of the said agreement for sale and consequential directions for subdivision of the land; issue of separate title deed for the excised portion of 35 acres of land and the dwelling house thereon.

c) A declaration that the defendants has acquired a legal title to the said 35 acres of land and the dwelling house by virtue of his continuous and uninterrupted occupation thereof for a period of over fifteen years under the Limitation of Actions Act Cap 22.

In a judgment dated 18th February 2005 the superior court (Lenaola, J.) dismissed prayer (a) of the plaint and granted prayers (b) and (c) of the plaint as reproduced above and at the same time dismissed all the prayers set out in the counterclaim. Aggrieved by the said judgment the appellants on behalf of the late Pavey's estate appealed to this Court citing the following grounds:-

1. THAT the learned Judge erred in allowing the respondent's claim when it was overwhelmingly clear that the respondent has no sustainable claim against the appellants.

2. THAT the learned Judge erred in law and fact in determining the validity of the agreement for sale dated 4th November, 1977 regardless of the fact that this issue had been determined by the High Court and the Court of Appeal in the previous suits and was therefore res judicata and thereby acted and adjudicated when having no jurisdiction to do so.

3. THAT the learned Judge erred in law sustaining the respondent's claim based on the agreement for sale dated 4th November 1977 which was a complete departure from their previous suit wherein the respondent had pleaded that his relationship with the appellants was a tenancy arising from a landlord and tenant relationship contravention of the provisions of order VI *rule 6(1)* ***of the civil Procedure Rules.***

4. THAT the learned Judge erred in law and fact in failing to dismiss the respondent's suit despite the fact that the whole suit was based on the same matters and issues that had already been determined both by the High Court and the Court of Appeal in *High Court Suits Numbers 523 of 1985 and 3683 of 1985 and Civil Appeal Number 56 of 1991* ***which suits were between the same parties and the judgment whereof were in the knowledge of the learned Judge as the same were quoted to him.***

5. THAT the learned Judge erred in law and in fact in refusing to dismiss the respondent's suit on the basis that the respondent was stopped from raising the issues raised in his claim as the same issues ought to have been raised either in *High Court Civil Case Number 523 of 1985 or 3683 of 1985* ***and by raising them a fresh, the respondent's suit offends the provision of order II*** *rule 2(1)* ***of the Civil Procedure Rules.***

6. THAT the learned Judge erred in law in dismissing the appellant's counterclaim despite the fact

that there was overwhelming evidence to support the claim for adverse possession and had been previously adjudicated upon.

7. THAT the learned Judge erred in law in holding that a claim for adverse possession can only be commenced by way of Originating Summons despite the fact there is binding authority from this Court to the contrary.

8. THAT the learned Judge erred in law and in refusing to order specific performance when there was enough evidence to support this claim.

9. THAT the learned Judge erred in law and in fact in refusing to be bound by the principle of res judicata inspite of the fact that all the issues raised in the suit were either raised or ought to have been raised in the previous suits namely, *High Court Case Number 523 of 1985 and 3683 of 1985****.***

The appellants were represented by Mr Hira, advocate whereas the respondents were represented by Mr Kirundi, advocate.

In his submission Mr Hira submitted that the learned Judge of the superior court erred in determining the validity of the agreement for sale whereas there were previous determinations on the agreement by both the superior court and the Court of Appeal and therefore the matter was res judicata; that the Judge erred in allowing the respondents to depart from their previous position that the parties had a tenancy and landlord relationship which is what had given rise to the occupation of the land and not by virtue of the sale-agreement; that the respondent's suit should have been dismissed in its entirety because the suit had raised the same matters and issues that had already been determined by both the superior court and the Court of Appeal in ***H.C.C.C.NO.523 of 1985 and H.C.C.C.3683 of 1985 and Civil Appeal Number 56 of 1991*** which suits were between the same parties; that the respondent was estopped from raising the issues raised in his claim on the basis of the same suits as above; that appellant's counterclaim ought not to have been dismissed because there was overwhelming evidence to support the claim for adverse possession and in any event the admitted facts were that there was possession; that it was a mistake on the part of the Judge to refuse an order for specific performance in the face of enough evidence to support the claim and finally that the Judge erred in holding that a claim for adverse possession can only be commenced by way of Originating Summons.

On his part Mr Kirundi submitted that in 1985 the plaintiff in their capacity as legal representatives of the late Njoroge Kiiru filed ***H.C.C.C. 523 OF 1985*** against the late Parvey and prayed for arrears of rent due from him in respect of the house occupied by him and further prayed for vacant possession; that upon service of the summons the late Pavey filed ***H.C.C.C. 3683 of 1985*** against the respondents and prayed for specific performance on the basis he had purchased a portion of the said property and that when the two cases were consolidated the superior court (Shields, J.) dismissed the claim for arrears of rent and held that the late Pavey had taken possession of the house on the strength of the sale agreement and further declined to grant specific performance due to lack of land control board consent; that the respondents appealed against the decision of Shield's J. and the late Pavey cross appealed in the ***Court of Appeal No.56 of 1991*** following which the appeal was dismissed and the cross appeal was abandoned; that following the grant of the Land Board consent the grant was challenged in ***H.C.C.C 441 of 1991*** and ***Githinji, J***. (as he then was) quashed the consent; that the plaintiffs made entry to the portion and purported to evict the late Pavey but the entry was challenged in a criminal court; that the issue of the sale agreement was res judicata; that there was in the circumstances no adverse possession in view of the right of action taken by the respondents in 1985 because of ***section 13(2)*** of the Limitation of Actions Act and the land ceased to be in adverse possession; that the appellants never gave any evidence of possession during the actual hearing; that the land claimed had not been sufficiently identified in that there was no extract of title exhibited as required and therefore the land of the adverse possessor could not be ascertained as required under the law without an extract of title and finally that technically the appellants had not complied with order ***36 rule 3D (2)*** which requires that a claim by way of adverse possession be commenced by way of an Originating Summons whereas the appellants had only counterclaimed such possession in the defence to the counterclaim and there was ample authority to the effect that a claim for adverse possession commenced in any other way is incompetent.

We have considered submissions of counsel including the cases cited by them. In our view the central issues for determination are first whether in the circumstances the principle of res judicata is applicable, second, whether the claim of adverse possession is competent having been brought by way of a counterclaim and not by way of Originating Summons, third whether the claim of adverse possession has been factually and legally proved.

In our view the judgments of Shields, J. and Githinji, J. (as he then was) finally determined that there was a sale agreement dated 4th November, 1977 and that the appellant had taken possession on the strength of the sale agreement and finally the agreement was not specifically enforceable in the absence of the Land Board consent and hence the quashing of the subsequent consent by Justice Githinji. However in the appeal before us we do not think that we are required to revisit the determination of the two Judges as set out above or any previous determination by this Court. What we are being asked to determine is whether the appellants have acquired the title by adverse possession under the Limitation of Actions Act. We are clear that Shields, J. did not deal with the question whether or not the late Pavey had acquired title by adverse possession. His judgment says so. However, we think that the issue of the validity of the sale agreement was conclusively determined by the superior court. However since the late Pavey came into possession by virtue of the sale agreement, the sale agreement is valid for the purpose of determining how the late Pavey entered possession and when. On the issue of res judicata as regards the sale agreement and specific performance we would like to re-echo the holding in the case of ***Johnson v Johnson (1939) 3 ALL ER 654*** where the court stated:-

"According to the practice of every Court after a matter has once been put in issue and tried, and there has been a finding or a verdict upon that issue and thereafter a judgment, such finding and judgment are conclusive between the same parties on that issue and all Courts treat this as stopped."

The twin issues were in our view conclusively determined. Concerning the issue whether the claim of adverse possession was competently instituted the answer is that it was not done in accordance with ***Order 36 rule 3D(2)*** since there was no extract of title. As was held by this Court in the case of ***Titus Mutuka Kasuve v Mwaani Investments Ltd and 4 others CA No. 35 of 2002*** it was an important and integral part of the process of proving adverse possession to identify the land of an adverse possessor. An extract of title is necessary for such identification but the same was not availed to the trial court. Our holding is that the claim was not properly brought and we therefore affirm the trial Judge's holding on this. This Court had also dealt with a similar situation in the case of ***Murathe v Gakuo Gathumbi CA No. 49 of 1996*** where an adverse possessor had claimed by way of a counterclaim as is in the position currently before us. We would like to follow the same footprints. Besides, the technical point concerning the mode of commencement of the claim contrary to Order 36 the claim of adverse possession in the context of the circumstances before us, has a more basic hurdle upon which the entire appeal hinges. Thus looking at the record the appellants did not offer any evidence on adverse possession at all and therefore did not prove any adverse possession for the stipulated period of 12 years. It is only the respondents who gave evidence. Whereas as established by ***Shields, J.*** the appellant took possession in January 1977 it was necessary for him to have established that the possession was adequate and continuous and that there was dispossession of the registered owner. The appellants failed to do so yet this was the heart of their claim. Thus to prove title by adverse possession it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances – see ***R.E. Megarry & Wade – The Law of Real Property*** 4th Edition page 1014. It follows that when the respondents went to Court in ***H.C.C.C. NO.523 of 1985*** in 1985, the period of occupation was interrupted at a time it had only run eight (8) years (1977-1985). Again we think in the circumstances the late Pavey having occupied the house he cannot factually be said to have dispossessed the owner of the land. This is because dispossession means that the owner has been driven out of possession by another. This point was discussed in the case of ***Wambugu v Njuguna [1983] KLR 173*** where it was held:-

"In order to acquire by Statute of Limitation title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent with his

enjoyment of the soil for the purpose of which he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts; dispossession and discontinuous of possession. The proper way of assessing proof of title is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved he has been in possession for the requisite number of years."

In the circumstances of this case the other alternative of grounding a claim by adverse possession is discontinuance of possession. This occurs where the owner abandons his possession. No such evidence was offered by the appellants.

In the absence of the appellants having offered any evidence of possession it cannot be assumed that they were in possession for the required period of 12 years, this being a matter of evidence. There is also in the circumstances no evidence that they had dispossessed the owner of the enjoyment of the 35 acres claimed. In this connection it has not been disputed that the respondents in ***H.C.C.C. NO.583 of 1985*** which was filed eight years after the commencement of the appellants possession one of the claim's or prayers was an order for possession. This was clearly an assertion of right whose effect in our view brought to an end the appellant's right to land by adverse possession. Possession which does not cover the whole period and applies to small portions of land is not sufficient. The fact that the appellant came in possession by dint of a sale agreement is not sufficient. Evidence of possession on paper such as leases and documents of various kinds) is not sufficient – see the case of ***Radhamani v Collection 27 (Civil 1943, 949 (P.C.)***. This Court had occasion to consider the issue of interruption of possession in cases of adverse possession in the case of ***Kirutu v Kabura C.A. No.20 of 1993*** (unreported) where the Court observed:-

"The passage from Cheshire Modern Law of Real Property which Potter J.A. made reference in *Githu v Ndeete* ***is important and deserves to be read in full. It is at page 894 section VI under the rubric the methods by which time may be prevented from running and the learned Author says:-***

"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him … He must either make a peaceable and effective entry or sue for the recovery of the land. Again in the case of *Githu v Ndeete [1984] KLR 776 at page 780* ***this Court held that time ceases to run when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor."***

In the appeal before us the respondent did sue for recovery of land in 1985 in the suit described above and this action had the effect of interrupting possession after only eight years.

In conclusion the appellant's claim is not sustainable both for lack of evidence of possession which was not adduced, and in view of the fact that the requisite period of possession of twelve years was interrupted by the aforesaid suit. For these reasons we affirm and uphold Lenaola J.'s judgment dated 18th February 2008 and therefore this appeal must fail and the same is dismissed with costs to the respondents.

DATED and delivered at Nairobi this 11th day of March 2011.

P.K. TUNOI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR