



REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NYERI

(CORAM: O'KUBASU, AGANYANYA & NYAMU, J.J.A.)

CIVIL APPEAL NO.265 OF 2005

BETWEEN

JOHNSON KINYUA ..... APPELLANT

AND

SIMON GITURA RUMURI ..... RESPONDENT

*(An appeal from judgment and decree of the high Court of Kenya at Meru (Sitati, J.) dated 28<sup>th</sup> May 2005*

*in*

*MERU H.C.C.C.NO. 28 of 2003)*

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JUDGMENT OF THE COURT

By an Originating Summons the respondent commenced a suit against the appellant in the superior court claiming adverse possession of the land parcel *Nyaki/Giaki/Kihurine/299* registered in the name of the appellant. The land measures 12 acres approximately but the respondent admits to have occupied a portion measuring 8 acres only.

After hearing the summons the superior court, *(Sitati, J.)* held:-

***“In the result and for reasons that I have given, I find and hold that the applicant is entitled by adverse possession of (sic) L.R. Nyaki/Giaki/Kiburine/229 and that the appellant should be registered as the sole proprietor of the said land in place of the defendant herein Johnson Kinyua Njiraini.”***

Aggrieved by the said judgment the appellant lodged a memorandum of appeal in this court on 29<sup>th</sup> September, 2005 setting out the following grounds of appeal:-

- 1. The learned judge erred in law and FACT in failing to find that the ingredient of adverse possession were not proved on balance of probabilities.***
- 2. The learned judge failed to find that the provision of civil procedure on commencing the action were not complied with.***
- 3. The court failed to analyse the evidence on record both for the plaintiff side and defence side to find***

*that the claim was not proved on a balance of probabilities.*

**4. The learned judge erred in fact and law in that she failed to find that the respondent failed to prove that he was in exclusive possession of suit land which was 15 or so acres for a continuous and uninterrupted period of over 12 years in view of the fact that there were other occupants who were evicted and respondent admission that he was not using or occupying the entire land.**

**5. The learned judge erred in fact and law in not finding that the time could not run in absence of appellant knowledge of respondent adverse possession of the land.**

**6. The learned judge erred in fact and law in not finding that if the respondent was in occupation at the time appellant sued other trespasser, he could have been sued.**

**7. The learned judge ignored credible defence of the appellant which demonstrated that claim of adverse possession could not stand.**

The appellant and the respondent were represented by learned counsel, **Mr Charles Kariuki** and **Mr Murayo Mwenda** respectively.

At the hearing of the appeal, Mr Kariuki indicated to the Court that he had abandoned ground 6 and combined grounds 1, 3, 4 and 5 and submitted on them as one and proceeded to argue grounds 2 and 7 separately.

As regards ground 2, counsel submitted that the superior court should not have found for the respondent since a certified copy of an extract of title to the disputed parcel of land as per **Order 36 rule 3A** now renamed **Order 37 rule 7(2)** had not been annexed to the supporting affidavit in support of the Originating Summons. Mr Kariuki further submitted that it is the green-card which should have been annexed.

On grounds 1,3,4 and 5 Mr Kariuki, referred to the evidence given by the respondent in the superior court to the effect that he occupied the land in 1972 and did not know the owner until 2002 and for this reason the possession was not with the knowledge of the registered owner and that knowledge was a vital ingredient of adverse possession and in addition he submitted that the respondent could not acquire title by adverse possession on his own behalf and on behalf his grown up “boys” who were adults and lived with him on an 8 acre portion of the land in dispute. In making the submission Mr Kariuki was referring to the respondent’s evidence in chief where the respondent referred to his grown-up sons:

***“I have constructed six houses on the land for me and my sons. I have six circumcised boys: one young boy and a girl. Two of the boys are married with children and they live on the same land with their families.”***

Mr Kariuki submitted that the respondent’s possession was secret and not open as required under **section 38** of the Limitation of Actions Act. He further submitted that the respondent was also not in exclusive possession since the registered parcel was 15 acres and he had admitted having occupied and used 8 acres only. For this reason he submitted that the superior court had erred in ordering the transfer of the entire land and that in his view the Court should only have excised the part occupied as was done by this Court in the case of ***Titus Kasuve v Masani Investments Ltd C.A. 35 of 2002 NRB.***

Regarding ground 7, counsel contended that the evidence of the appellant was disregarded by the court since in 1980 the appellant had sued the two people who were in possession at that time and since the respondent was not one of them, he could not have been in possession since 1972.

In his submissions, Mr Mwenda, learned counsel for the respondent, stated that as the subject land was registered under the Registered Land Act and a certificate of search was annexed to the affidavit in support of the Originating Summons this complied with the law as the certificate is itself evidence of title.

Concerning proof of adverse possession Mr Mwenda, submitted that as the suit claiming adverse possession was filed in 2003 and the respondent had taken possession in 1972 the length of possession

was 31 years which was a very long period and well beyond the prescribed period of 12 years; that the respondent had a homestead and had in addition put up substantial development on the land including planting mango trees and other plants; that since the evidence of the possession was visible to anyone who cared to visit the land, possession was therefore open; that the appellant filed other suits in respect of the land in 2002 after the expiry of 12 years and that the suits were commenced not against the respondent but against other neighbouring occupiers and the suit did not relate to the disputed land at all hence the institution of the suits in 1980 against strangers, could not stop the time running; that it was only after losing the suits against third parties that the appellant turned his eyes to the disputed land; that the disputed land had established boundaries with the neighbouring parcels and was thereof clearly identifiable; that the respondent's witness PW2 had testified that he did not know the appellant nor was he aware of the appellant's ownership of any land or the size of his land; that respondent's counsel readily conceded that an adverse possessor can only claim what he occupied and finally touching on the need for knowledge of occupation by the registered owner of the land, counsel submitted that the requirement was met by either actual or constructive knowledge and in the circumstances the appellant had the means to know of the respondent's possession because firstly the development by the respondent was visible to all and secondly, he had the means to know because he had for example claimed the adjoining parcels and had the services of a surveyor and consequently he had constructive knowledge of the adverse possession.

On our part, we have weighed the submissions made on behalf of the parties. Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus **section 36(2)** of the Registered Land Act provides:-

***“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”***

Concerning the same point **section 37(2)** of the Registered Land Act states:-

***“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”***

In our view reference to certified extracts in **Order 37** refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration we think a search certificate meets the requirements of the relevant law.

On whether or not there was evidence of adverse possession, in our view the evidence of such possession was overwhelming. For instance **Mr Stanley Kirianyama Gaicho** (PW3), a neighbor of the respondent testified:-

***“He has buried his mother in the same parcel of land and he lives there with his two wives. The plaintiff has planted trees such as mango, grevilla, avocado and he also plants seasonal crops. The plaintiff's entire family lives on the land. I do not remember any time since 1972 when he has been removed from the land.”***

With regard to the extent of adverse possession, we think that possession of 8 acres of land for a period exceeding twelve years has been clearly established and that the respondent was in exclusive possession of the piece of land openly and as of right during all this time. With respect, this is all that a claimant is required to establish. In the face of the nature of the possession as described above including dwelling houses and permanent plants and the visible burial ground of the respondents parents in the disputed land, we think it is quite evident to us that the respondent used the land which he claims as of right: ***nec vi, nec clam, nec precario (no force, no secrecy, no evasion)***. It follows from the foregoing the appellant is deemed to have had either actual knowledge of the possession or had the means of knowing of the possession or occupation but did nothing about it by way of asserting the right of ownership (constructive knowledge). It is also not in dispute that the possession was never interrupted and was continuous for the

entire period as prescribed. We are therefore satisfied that the superior court had properly addressed the issue of the fact of possession and also the applicable law.

Touching on the important issue of the extent of possession, the evidence on record points to exclusive use of 8 acres only and in view of the gracious concession by Mr Mwenda learned counsel for the respondent, which concession we think is properly grounded in law, we wish to affirm that a claimant would not be entitled to more than the parcel he had exclusive control of and in this case it is eight acres only. With respect, we think that nothing turns on the respondents “grown-up boys” argument concerning their occupation, because they were not direct parties to the claim for adverse possession as contemplated by **section 38** of the Limitation of Actions Act. Apparently the use of the term “boys” when referring to grown-ups has a humorous cultural origin of some communities where as long as reference is by the parents, children never grow whether circumcised or uncircumcised!

All in all, we think that the appellant is successful in part and only as regards the eight acres whose exclusive possession was proved. We hereby set aside the judgment of the superior court and substitute thereof the order that, the respondent is only entitled to eight (8) acres and for this reason we order that parcel Nyaki/Giaki/Kiburine/299 be excised and that eight acres be registered in favour of the respondent and the remaining portion remains in the name of the appellant. We think this is just and an illustration that equity follows the law. In the circumstances as both parties are successful in part we make no order as to costs.

It is so ordered.

***Dated at Nyeri this 8<sup>th</sup> day of July 2011.***

**E.O. O’KUBASU**

.....  
**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**