



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL 215 OF 2004**  
**BETWEEN**

DAVID MWANGI GICHUKI ..... APPELLANT

AND

MAINA MUGAMBI ..... RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Nyeri (Okwengu, J) dated 5<sup>th</sup> December, 2003*

in

H.C.C.C. No. 207 of 1993)

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of Okwengu, J. dated and delivered at Nyeri on 5<sup>th</sup> December 2003 in which the learned Judge decided in favour of the respondent, **MAINA MUGAMBI** who was the plaintiff in the suit filed in the superior court.

The origin of the dispute herein can be traced to a plaint dated 26<sup>th</sup> May, 1993 filed in **Civil Case No. 207 of 1993** in the High Court of Kenya at Nyeri in which the respondent sued the appellant (as the defendant) seeking the following orders:-

- “(A) That the transfer of land parcel KIINE/NYANGIO/469 dated 27-5-71 to the defendant vide succession cause number 35 of 1970 was unlawful and of no effect.***
- (B) Rectification of the register under section 143 (1) of the Registered Land Act Cap 300 Laws of Kenya so as to delete the name of the defendant from the register of land parcel KIINE/NYANGIO/469.***
- (C) That the Defendant his family, agents and servants be evicted from the suit land KIINE/NYANGIO/469.***
- (D) That the Defendant do pay mesne profits for non-user of the land parcel KIINE/NYANGIO/469 w.e.f. 7.1.93 until final determination of the suit at the rate of K.sh.9000/- p.a.***
- (E) Costs of the suit***
- (F) Any other or better relief as this honourable court may deem fit to grant.”***

In his defence dated 24<sup>th</sup> August 1993 the appellant denied the respondent's claim and went on to assert that as the registered proprietor of the land in dispute (Kiine/Nyangio/469) his rights were indefeasible under the provision of the Registered Land Act. The hearing of the suit in the superior court commenced on 21<sup>st</sup> October, 2003 before Okwengu, J who recorded the evidence by the parties. Their lawyers opted to put in written submissions.

It was the respondent's case that his paternal uncle the late Kiama Muirithio was the registered owner of the suit land (Kiine/Nyangio/469) having been so registered during the land consolidation process in 1960. Following the death of Kiama Muirithio, a brother of the respondent, one Mbogo Mugambi (also known as Muiga Muirithio) was the one occupying the suit land until the appellant chased him away in 1990 claiming that the suit land had been given to him by the court. Upon checking at the Lands Office the respondent found that the appellant had indeed been registered as the proprietor of the suit land pursuant to an order issued in Kerugoya District Magistrate's court succession case No. 35 of 1970. The respondent produced copies of proceedings in the succession case No. 35 of 1970 which showed that the appellant had inherited the suit land claiming to be a nephew of the deceased Kiama Muirithio. The respondent testified that the late Kiama Muirithio did not have any wife or children and hence his lawful beneficiaries were the respondent and his brothers. The matter was reported to the police for investigations into how the appellant came to be registered proprietor of the suit land pursuant to a succession case. As a result of these investigations the appellant was charged in Criminal Case No. 942 of 1991 in the Senior Resident Magistrate's Court at Kerugoya. Certified copies of proceedings and judgment in the said criminal case were produced in evidence showing that the appellant was tried and convicted for obtaining land registration by false pretences contrary to **section 320** of the Penal Code. He was accordingly sentenced. His appeal to the High Court was dismissed.

In his defence the appellant averred that as the respondent's suit was founded on fraud it was time barred under the provisions of the Limitation of Actions Act. The appellant further contended that as he had been in continuous and uninterrupted occupation of the suit land since 1969 he had acquired ownership under the Limitation of Actions Act.

In support of his defence the appellant testified that he started living on the suit land in 1969 after he bought it from Muiga Muirithio who claimed he had authority to sell the suit land. He went on to testify that he paid the agreed purchase price of Kshs.7,800/- which transaction was witnessed by brothers of Muiga Muirithio. The appellant claimed that it was Muiga Muirithio who gave him the land in the succession cause, and that the respondent was aware of his (appellant's) presence on the suit land when he put up a house in 1969 and planted bananas.

The learned Judge of the superior court, after considering the evidence placed before her together with legal submissions, came to the conclusion that the appellant had acquired title to the suit land through fraudulent registration. She concluded her judgment thus:-

***“The upshot of the above is that I give judgment for the plaintiff and make the following orders:-***

- (1) *That the transfer of the suit land to the Defendant vide succession cause No. 35 1970 having been obtained by fraud, the Register (sic) of lands is hereby directed under section 143 (1) of the Registered Land Act Cap 300 to cancel the registration and delete the Defendant's name from the register.*
- (2) *That the Defendant, his family, servants and agents shall vacate the suit premises within 60 days from the date of service of this order, failing which an eviction order to issue.*
- (3) *That the Defendant shall pay mesne profits to the plaintiff at the rate of Kshs.1,000/= annually from the date of filing suit.*

*The Defendant shall also pay costs of this suit orders accordingly.”*

It is the foregoing that provoked this appeal which came up for hearing before us on 13<sup>th</sup> May, 2010 when Mr. G.M. Muhoro appeared for the appellant while Mr. P.M. Muchira appeared for the respondent.

In his submissions, Mr. Muhoro took us through his seven grounds of appeal by stating that the appellant had bought the suit land and there was a written agreement between him and the brother of the respondent. Mr. Muhoro went on to submit that there was a succession case in which the appellant was declared the heir to the original owner. Mr. Muhoro conceded that the appellant was indeed convicted for fraud but the appellant's position was that he was in occupation of the suit land so that by the time the respondent filed the suit it was 22 years after the fraud. It was Mr. Muhoro's contention that time never stopped running even during the prosecution of the fraud case. The foregoing covers the first four grounds of appeal.

As regards grounds 5 to 7, Mr. Muhoro argued that the appellant went into the suit land as a purchaser and when the court nullified the agreement he continued in occupation hence acquiring ownership by adverse possession. On his part Mr. Muchira supported the learned Judge's findings and went on to submit that the appellant could not have acquired title by adverse possession since he had fraudulently registered himself as the proprietor of the suit land. For that reason, so submitted Mr. Muchira, the appellant could not acquire adverse possession against himself. In the end Mr. Muchira asked us to dismiss this appeal with costs.

We are alive to our duty on a first appeal as stated by Sir Clement De Lestang VP in **SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A. 123** at p. 126.

***“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 would 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan [1955], 22 E.A.C.A. 270).”***

Applying the foregoing to what is before us it can be said that in the present appeal the facts are straightforward and not seriously disputed. The suit property was originally registered in the name of Kiama Muirithio since 1960. When

Muirithio died the appellant presented himself as a nephew of the deceased proprietor of the deceased during the succession cause No. 35 of 1970 and the court ordered that the appellant be registered as the proprietor. That registration of the appellant was found to be fraudulent. He was tried and convicted of obtaining registration by false pretences contrary to **section 320** of the Penal Code. There was an appeal against that conviction but the appeal was dismissed. Hence the conviction stands. It was submitted by Mr. Muhoro that the appellant moved to the suit land as a purchaser and that he paid Kshs.7,800/- as the agreed purchase price. But during the hearing of Succession Case No. 35 of 1970 the appellant in his evidence did not say that he was a purchaser. In his evidence the appellant testified as follows:-

***“I am the son of the sister of the deceased. The deceased is therefore my uncle.”***

That evidence was of course false. The appellant was not the nephew of the deceased proprietor of the suit land. His registration pursuant to the succession cause No. 35 of 1970 was declared fraudulent. He was accordingly convicted and sentenced. In the course of her judgment the learned Judge said:-

***“The Defendant was not a relative to the deceased and therefore had no right to inherit the property of the deceased. It is clear that the devolution to the Defendant was obtained through false representation as a result of which the Defendant was tried and convicted in Kerugoya Criminal Case No. 942 of 1991 of obtaining land Registration by fraud contrary to section 320 of the Penal Code.”***

We respectfully agree with that finding.

It was argued on behalf of the appellant that he had acquired ownership of the suit land by adverse possession in that time started to run from 1969. That in our view is a mischievous argument in view of proved fraud committed by the appellant. Surely, the appellant cannot be allowed to benefit from his criminal conduct for which he was convicted by a court of law. In our view, time started to run when fraud was discovered and hence it cannot be argued that the respondent's suit was time barred.

On the question of rectification of the registration of the appellant, the learned Judge in the course of her judgment said:-

***“Section 143 (1) of the Registered Land Act empowers the court to order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. The registration of the Defendant as proprietor of the suit land having been obtained through fraud, and not being a first registration is an appropriate situation in which this court should exercise the powers conferred by section 143 (1) of the Registered Land Act by directing the cancellation of the registration. It follows that the Defendant and his family, servants or agents have no right to the suit land and an order should therefore issue for their eviction.”***

We are in entire agreement with the construction of that provision of the law and all we can add is that the appellant having obtained registration by fraudulent means, should not expect to reap any benefit from his criminal activities.

We have considered the submissions by Mr. Muhoro for the appellant and Mr. Muchira for the respondent and are grateful for their assistance. We hope we have sufficiently dealt with various aspects raised in this appeal and having considered the judgment of the learned Judge we are of the firm view that she was right in her conclusions. We therefore

find no merit in this appeal and order that the same be and is hereby dismissed with costs.

*Dated and delivered at Nyeri this 24<sup>th</sup> day of June, 2010.*

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**