



**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**

**Civil Appeal 64 of 2004**

**NG'ATI FARMERS CO-OPERATIVE SOCIETY LTD.....APPELLANT**

**AND**

**COUNCILLOR JOHN LEDIDI & 15 OTHERS.....RESPONDENTS**

**(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Rimita, J) dated  
12<sup>th</sup> May 2000**

**in**

**HCCC NO. 89 OF 1996)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal concerns three large pieces of land known as Land Reference Numbers **NAROK/MAIELLA ESTATE** Nos. 2662, 1380 and 8398/2 situate South West of Naivasha Town in Nakuru District containing by measurement 16338 acres or thereabouts, hereinafter referred to as “the suit land,” and is brought by the plaintiff, now the appellant, from the judgment of the High Court of Kenya at Nakuru (Rimita, J) given on 12<sup>th</sup> May 2000 whereby the learned Judge dismissed the appellant’s suit and allowed the defendants’, now the respondents’ counter-claim and declared, *inter alia*, that the respondents have acquired title to the 2581 acres being a portion of L.R. No. Narok/Maiella Estate No. 2662 and 1626 acres being a portion of Narok/Maiella Estate No. 1380 by reason of having been in adverse possession thereof. The learned Judge also ordered that a permanent injunction be issued to restrain the appellant from evicting the respondents from those portions of the suit land, and; a further order that the appellant do transfer those portions to the respondents.

It is imperative to set out the history and facts of the somewhat protracted case which gave rise to this appeal. On the evidence on record there is no dispute as to who is the registered proprietor of the suit land. It is the appellant, **Ng’ati Farmers Co-operative Society Limited**, and is registered under the provisions of the Co-operative Societies Act Cap 490 of the Laws of Kenya. It purchased the suit land immediately after independence in or about 1964 from a white settler’s company known as Maiella Limited, but, the Title Deeds were transferred into the appellant’s name in July 1974. It is apparent that the appellant did not immediately on purchase settle its 579 members on the suit land, the main obstacle being the presence on the suit land of the 17 respondents and 3,000 other people commonly referred to as the Maasai. It is the respondents’ case that they were born on the suit land and that their members had occupied it since time immemorial and that when the appellant purchased the land it found them living on portions of it. They claim that they have always been in occupation and are still in occupation of some portions of the suit land. It is admitted by the appellant that the Maasai are in occupation of some

portions of the land and that they had jointly built thereon five primary schools and a secondary school. However, the appellant contends that the occupation by the Masaai was pursuant to a written agreement entered into in 1979 allowing the Masaai to graze and to use dipping facilities for their cattle at an annual fee of shs. 3,700/-. But, the learned Judge dismissed the agreement as a design conjured to evict the respondents and that whatever its worth its terms including payment of annual fees were never observed.

On the question of the nature of the respondents' occupation, the learned Judge who had visited the suit land for fact finding and to ascertain the credibility of the respondents' evidence stated in his judgment that:

**“This court visited the land in dispute and saw the disputed areas. The boundaries appeared clear. The area occupied by the Masaai had old settlements and I was able to see an old school among other developments. Apart from some portions the Masaai are cultivating the land rather than use it for grazing purposes.”**

The appellant avers in a plaint dated 14<sup>th</sup> February, 1996 that the respondents were only to use the land for grazing. They were not to start forest fires or to construct manyattas, cut trees, burn charcoal or invite other Masaais onto the suit land. Due to alleged blatant breach of these conditions by the respondents, the appellant in or about 1970 gave the respondents notice to vacate the suit land. However, the respondents refused to vacate and instead surveyors hired by the appellant to sub-divide the land into parcels for allotment to its members encountered resistance and survey marks and beacons were destroyed. Instead of vacating, the respondents surprisingly, claimed ownership of the suit land, the appellant averred.

Besides the respondents generally traversing the allegations in the plaint, the respondents filed a written statement of defence; and also, counterclaimed for a declaration that they had acquired title to the suit land by adverse possession and/or prescription.

The learned Judge found firstly, that the Masaai had encroached onto the suit land before it was bought by the appellant necessitating the then white settlers and the Masaai establishing a home-made temporary boundaries over which the latter were not to cross; secondly, that when the appellant bought the land, it did not know the correct boundaries and assumed that what the Masaai occupied belonged to them.

The learned Judge concluded:

**“I think their possession of the said distinct portions of land was adverse. The plaintiff's claim is therefore time barred and cannot succeed. There is a counter-claim. The application must have been by way of originating summons but since their claim is in answer to the plaintiff's claim, I think it should succeed.**

**The plaintiff's claim fails. The defendants' counter-claim succeeds and it is allowed.”**

The main ground of appeal canvassed before us by Mr Kahiga, for the appellant, is that the learned Judge misdirected himself on the essential legal ingredients necessary to prove a claim for adverse possession and hence arrived at a wrong conclusion in holding that the respondents had proved their counterclaim based on adverse possession.

We will deal first with the issue of evidence. As this is a first appeal we will be guided by the principle enunciated by the predecessor of this Court in SELLE V ASSOC. MOTOR BOAT CO. [1968] E.A. 123 at P. 126.

**“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 should 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 in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A 270)**

The above was cited with approval by this Court's recent decision in **JIVANJI V SANYO ELECTRICAL COMPANY LTD [2003] KLR 425 at p.431**

Our independent assessment and analysis of the entire evidence on record shows that there had been absence of possession of the portion of the suit land by the true owner, the white settlers, before 1964 through abandonment in favour of the Maasai. There is further evidence that the adverse possessors, have been in actual possession of the said portions of the suit land for over twenty (20) years. Possession in law, follows the right to possess. See **KYNOCH LTD. VS ROURLANDS [1912] 1 Ch. 527; and also, LITTLEDALE V LIVERPOOL COLLEGE [1900] 1 Ch 19,21** in which Lindhoy MR put in these words:-

**“In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it....”**

His Lordship continued:-

**“The same point was made by Bramwell LJ in Leigh v Jack (1879) 5 Ex D 264, 272, where he said referring to the Statute of Limitations:‘Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession.’ If this is the right way to approach the problem, the question becomes ‘Has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period?’ rather than ‘Has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?’ It certainly makes it easier to understand the authorities if one adopts the first formulation.”**

On the question of dispossession, His Lordship said:

**“The next question, therefore, is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner ‘acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it’.”**

Considering the evidence adduced before the trial court, we are persuaded that the original owner had been dispossessed and we would adopt the passages we have cited above.

The respondents in our view, having proved on the balance of probability that the appellant being the title holder of the portion of the suit land had been dispossessed and had discontinued its possession of the said land for more than the statutory period, then, it must follow that the respondents have proved that their possession amounts to adverse possession which requires:

**(i) that the owner has been in possession but is now out of possession (either because he has been dispossessed, or because he has simply discontinued possession);**

and

**(ii) that the land has been taken into the possession of some person in whose favour the limitation period can run.**

See **WAMBUGU V NJUGUNA [1983] KLR 172**, Land Law: Cases and Materials R.H. Mandsley, 4<sup>th</sup> Edition Page 155 and **BENJAMEN KAMAU MURIMA & 3 OTHERS V GLADYS NJERI** Civil

Appeal No. 213 Of 1996 (Nai) (unreported).

The respondents had also established that they had no colour of right to be on the portion of the suit land other than through their entry and occupation which was openly and without permission or agreement of the appellant, the true owner thereof. In the circumstances, obviously, their occupation amounted to an act which is inconsistent with the peaceful and quiet enjoyment of the true owner or the appellant for the purposes for which it intended to use it. All these acts persisted for a period well above the statutory period since the adverse possession began; and also, that throughout the entire period which tolled, there was no interruption of the above possession, see Mbira v Gachuhi [2002] I EA 137.

In the circumstances, we think that the learned trial Judge was right when he held that the respondents had acquired title to the portions of the suit land which they now occupy, by adverse possession and in granting the orders that he did. We, therefore, find no merit in the main ground of appeal and we reject it.

Mr. Kahiga has also submitted that the learned Judge erred in failing to strike out the counterclaim for being incompetent in that it was brought in contravention of order XXXVI rule 3D of the Civil Procedure Rules which mandates that claim for title by adverse possession is to be mandatorily sought by way of an originating summons and that this procedure having been breached the claim cannot succeed. For these reasons, Mr. Kahiga contended, it was wrong for the learned Judge to have given reliefs, which were not properly pleaded. He relied on the decisions of Kenyenga vs Ombori [2001] KLR 203 and Bwana v Saidi & 2 Others [1991] KLR 454. The learned Judge did consider the procedure by which this suit was instituted and stated:

**“There is a counterclaim. The claim must have been by way originating summons but since their claim is in answer to the plaintiff’s claim, I think it should succeed”.**

Under order 36 rule 10 there is jurisdiction to convert a case which has been incorrectly brought by an originating summons so as to be continued as a normal suit. That would occur when it turns out that it turns out that the suit raises issues of pure law, complex and controversial issues as to the facts. This is shown very clearly by the following two quotations from the judgement of Sir Eric Law JA in Kibutiri v Kibutiri [1983] 1 KCA 38.

The procedure by way of originating summons is intended

**“To enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question.”**

This was said In re Giles No (2) (1890) 43 Ch D 391, a decision cited with approval by this Court’s predecessor in Kulsumbai v Abdulhussein [ 1957] EA 699

**“When it becomes obvious that the issues raise complex and contentious question of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit. The instant summons is very much in point; it occupied 7 full hearing days, spread over 3 years many witnesses were called and exhibits produced, and the hearing was followed by a long “judgment”( which should have been an order) the effect of which was to dissolve the partnership entirely (which was not a relief claimed in the summons) and to partition the land on which the firm carried on its farming activities amongst the plaintiffs and the defendant.”**

Also, in the case of Wakf Commissioners v Mohamed Bin Umeya & Another [1984], Civil Appeal No 83 of 1983, the predecessor of this Court upheld an objection by the appellant that a complicated dispute as to the execution of a Wakf by the trustees, with bitter allegations made by the members of the Mosque of Mwijabi of maladministration, excessive management charges and failure to distribute the proceeds of certain investments, was appropriate for a court action in the usual way, and could not be resolved on an originating summons.

The suit which gave rise to this appeal raised complex and contentious issues of both law and fact. It took

many days spread over 4 years to hear it. Many witness were called to testify and several exhibits were produced. Above all, the suit property is not less than 16,000 acres and there are over 3,600 settlers in occupation. The suit could not, obviously, be resolved on an originating summons.

We have anxiously considered the authorities cited by Mr. Kahiga in urging us to fault the procedure adopted by the respondents in mounting the counter-claim, but we are satisfied that it was not fatal to the claim. In reaching this conclusion we are guided by the decision of the predecessor of this Court in **Boyes vs Gathure [1969] E.A 385** in which it was held that the issue of the wrong procedure did not invalidate the proceedings because it did not go to the jurisdiction of the court and no prejudice was caused to the appellant.

For these reasons, it is our view that the learned Judge was right in his judgment.

Accordingly, this appeal is dismissed with costs to the respondents.

**Dated and delivered at Nairobi this 23rd day of July, 2009.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**