**REPUBLIC OF KENYA**
**IN THE COURT OF APPEAL OF KENYA**
**AT NYERI**

**Civil Appeal 325 of 2003**

**TERESA WACHUKA GACHIRA .....APPELLANT**

**AND**

**JOSEPH MWANGI GACHIRA .....RESPONDENT**

***(Appeal from the judgment and decree of the High Court of Kenya at Nyeri (Juma, J.) dated 9th May, 2001***

**in**

**H.C.C.C. NO. 49 OF 1992)**

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**JUDGMENT OF THE COURT**

The appellant, *Teresa Wachuka Gachira* (Teresa) is the stepmother of the respondent, *Joseph Mwangi Gachira* (Joseph). She was the second wife of *Gachira Muriuki Mwangi* (*"the deceased"*), the father of Joseph with his first wife, who died intestate in 1987. In issue between them is a parcel of land in Othaya, LR. No. Othaya/Kihugiru/11 (*"the disputed land")* measuring approximately 3.8 hectares or 9.4 acres.

In a suit filed by Joseph against Teresa about 17 years ago in February, 1992, Joseph asserted that he was the sole registered owner of the disputed land since 1958. He had constructed a house thereon in which his mother resided and had allowed Teresa to occupy one of the rooms in that house as a licencee. He subsequently revoked the licence and asked Teresa to move out but she refused, hence the suit in which he sought a court order for eviction and general damages for trespass.

Teresa shot back in her defence contending that the disputed land was registered in the name of Joseph as a trustee for the heirs of the estate of the deceased, and that she was lawfully in occupation of it as the legal wife of the deceased since 1967. The deceased had two wives each of whom had seven children and therefore the wives and children had a beneficial interest in the disputed land. At any rate, she contended, she had occupied the disputed land since her marriage in 1967 and had therefore acquired prescriptive rights. She was not a licencee. Teresa went further and counterclaimed the termination of the trust in respect of the property and subdivision into two equal portions one of which should be transferred to her forthwith. In the alternative she claimed half portion of the land for herself on the basis of adverse possession. The main prayers made in the counterclaim are as follows: -

*"i) An order that the plaintiff holds Title Number OTHAYA/KIHUGIRU/11 in trust for the defendant and that the defendant is entitled to one half portion thereof.*

*ii) An order for dissolution of the trust and for the subdivision and transfer of one half portion of the parcel of land to the defendant.*

iii) *ALTERNTIVELY an order that the defendant is entitled to be registered as proprietor of one half portion of title number OTHAYA/KIHUGIRU/11 by virtue of being in adverse possessio*n in terms of section 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya."

Before the suit was heard, Teresa ceased occupation and left the premises which had necessitated the institution of the suit and therefore Joseph found no reason to proceed with the suit. He withdrew his claim save for costs of the suit. That left the counterclaim which Teresa sought to prove. She testified and called two witnesses, while Joseph testified and called no witness. The learned trial Judge (Juma, J) assessed the evidence and in the end found that Teresa had not proved her case on a balance of probabilities. The counterclaim was dismissed and costs were awarded to Joseph.

It is against that decision that this appeal was filed. As it is a first appeal we must carefully reappraise the evidence on record and make our own conclusions on it, always being mindful that the trial court had the added advantage of seeing and hearing the witnesses, and allowing for such advantage, particularly in assessing the credibility of the witnesses. - See **Peters v Sunday Post Ltd [1959] EA 424** and **Selle & Another vs. Associated Motor Boat Company Ltd & others [1968] EA 123**.

In dismissing the appellant's counterclaim, the learned Judge stated in part as follows: -

"**The issue for determination in this case is whether the plaintiff was registered as proprietor of the suit land in trust for the defendant and his mother, the co-wife of the defendant.**

**It is not in dispute that the plaintiff is the registered owner of the suitland. The onus is on the defendant to prove on the balance of probability that he was so registered in trust for her and her co-wife.**

**The Green Card, Exhibit 2 for the suitland indicates that the plaintiff was registered as proprietor in September 1958, 9 years before the defendant was married to the plaintiff's father. Assuming there was a trust, the defendant could not be said to be one of those people contemplated to be the beneficiaries of the trust.**

**The defendant's case is that the suitland belongs to the defendant's husband and so the plaintiff was registered as a trustee for the deceased's beneficiaries. For this proposition to succeed the defendant has to prove that indeed the suitland belonged to her late husband."**

The learned Judge then analysed the evidence tendered on behalf of Teresa through ***Joshua Kimita Kahiga*** (DW2) and ***Joseph Gachuru Magondu*** (DW3) both of whom testified that the land was bought by the deceased but Joseph was registered as the owner because the deceased was a Mau Mau warrior and feared that the land would be confiscated if it was registered in his name. The two witnesses explained the conduct of the deceased as a practice adopted at the time of the emergency in 1956 when land consolidation and demarcation took place in Central Province, to ensure that those who were involved in Mau Mau activities did not lose their land and therefore none of them opted to be registered. Joseph Magondu, however, confessed under cross-examination that he was registered as proprietor of his own land in 1958 despite having been in the forest and having been detained in Manyani throughout the process of land consolidation. Joseph Kahiga also confessed that he only came out of detention long after the process of land consolidation and registration was over and could not therefore explain why Joseph was the registered owner of the disputed land. The learned Judge disbelieved the evidence of the two witnesses on the issue of ownership. He also examined the evidence of Teresa that one of her daughters who had died was buried on the disputed land; that her husband, the deceased was buried on the disputed land; and that the deceased and his family were in occupation of the disputed land. According to Teresa, all that was proof of ownership of the land. In that regard the learned Judge stated thus:-

"**Reliance was placed on the fact that the defendant's child and the defendant's husband were**

**buried on the suit land. D.W.2 Joshua Kahiga stated that one could never be buried in uninhabited land according to Kikuyu custom. The defendant's husband had not built on plot no. 10 and as such the defendant's child and husband could not be buried there. The only place available was (sic) sufficient evidence that the defendant's husband lived most of his life in Kisumu where he had business and rental property. Indeed most of the defendant's children were born in Kisumu as admitted by the defendant. The defendant's husband also died in Kisumu but was brought to the suitland for burial.**

**On the evidence adduced I am satisfied that the defendant has failed to prove the onus (sic) placed upon her. I therefore dismiss her counterclaim with costs to the plaintiff."**

Seven grounds of appeal were laid out to challenge the judgment of the superior court, but they were argued globally by learned counsel for the appellant Mr. Kebuka Wachira. He submitted that the counterclaim raised two issues of "*Trust*" and "*adverse possession*" which were not mutually exclusive and ought to have been considered by the superior court but were not. He faulted the learned Judge for ignoring, or failing to assess sufficiently or at all, the evidence tendered by Teresa which established that Joseph was holding the disputed land in trust for her and the deceased's family. He submitted that there was credible evidence from two old men who knew about the origin of the land, i.e DW2 and DW3, and there was no reason to disbelieve them; that there was credible evidence from Teresa herself that after her marriage to the deceased she joined her co-wife in occupation of the disputed land and planted tea and other crops until the respondent made it impossible for her to continue staying on the land after the suit was filed; and that the evidence tendered by the respondent in rebuttal of the counterclaim was weak and scanty as he never explained how he could acquire land at the age of six years, if, according to DW3 it was bought in 1941. The disputed land was therefore, in Mr. Wachira's view held in trust by the respondent.

On the issue of "*Trust*", Mr. Duncan Mindo, learned counsel for the respondent, submitted that it was not maintainable and the counterclaim was therefore a non-starter. That is because in her own pleadings, the appellant admits that the respondent was the first registered proprietor of the disputed land but avers that he held it in trust for the deceased, who was the actual owner, and consequently in trust for the deceased's family. She then prays for judgment on the basis that the disputed land was held in trust for her, which trust ought to be dissolved and half the property shared out to her. On both counts, Mr. Mindo submitted, the appellant could not have succeeded in the claim since the estate of the deceased was not enjoined in the suit and she had no legal capacity to speak for the estate since no grant of letters of administration had been issued. If the estate of the deceased laid any claims on the disputed land, only then would she register her interest in the matter.

On the other hand, the appellant could not maintain that the registration of the land in the respondent's name in 1958 was in trust for her when her existence in the family registered in 1967 upon her marriage to the deceased. She had to prove that the land was held in trust for her since 1967, and the nature and extent of the trust, before the prayers sought in the counterclaim can be granted. Mr. Mindo then referred to the evidence of DW2 and DW3 which was meant to show that the property was held in trust for the deceased and not the appellant. It was through those witnesses, he submitted, that the myth about land not being registered in the names of Mau Mau fighters was destroyed as one of the witnesses was himself a registered owner. That evidence in his view, fortified the respondent's evidence that he was rightfully registered as the owner of the land in 1958 when he was aged 30 years. The respondent swore that he was capable of buying it, and did in fact buy it, from one Muturi, since he was a teacher earning a salary at the time. The deceased, according to the evidence, had his own piece of land registered in his name as **Othaya/Kihugiru/10** without the risk of confiscation and he never interfered with the legal ownership of the disputed land from 1958 until his death in 1987. He owned a business and other property in Njoro and in Kisumu where he stayed with the appellant until his death. In these circumstances, Mr. Mindo submitted, there was no credible evidence of trust either for the deceased or the appellant. In the circumstances the respondent was entitled to the protection provided under ***Sections 27 and 28*** of the Registered Land Act unless the proviso to ***Section 30*** of the Act was shown to apply which was not the case in this suit, concluded Mr. Mindo.

We have anxiously considered the issue of "*trust"* in the light of the pleadings and the evidence on record and we respectfully agree with Mr. Mindo that the claim is not maintainable. In one breath the appellant pleads for the estate of the deceased and calls two witnesses in support of the trust on behalf of the estate. She had no legal capacity to agitate such claim on behalf of the deceased's estate. At any rate the two witnesses were not believed by the superior court and we have no reason to fault the learned Judge on the assessment of their evidence. In another breath the appellant pleads for herself and in the end prays that the disputed land be shared out to her. Obviously, she could not lay any claim to the land on the basis of 'trust' as at the time when it was registered because her arrival on the scene was 9 years after the registration. On both counts, therefore, the counterclaim which was based on trust was a non-starter and was properly rejected. That ground of appeal fails.

The only basis on which the appellant could claim interest for herself in the disputed land was through adverse possession which was the second issue urged by Mr. Wachira and which we now examine since little was said about it by the superior court. Mr. Wachira submitted, and he was right on this, that there was no impediment in urging a claim to land on the basis of "trust" as well as "adverse possession". The decision of this Court in **Muthuita v Muthuita (1982 – 88) 1 KAR 42** which approved the decision of Madan J (as he then was ) in **Gatimu Kinguru v Muya Gathangi (1976) KLR 253,** makes the point clear that in this country the two may well go hand in hand. The issues must nevertheless be properly pleaded and adequately proved on a balance of probabilities.

The pleading put forward by the appellant in her counterclaim was in paragraph 12 in these words:

"**12. Alternatively the defendant claims she has become entitled to be registered as the owner of one half portion by reason of prescription. "**

The agreed issue that was placed before the Court for adjudication on the basis of that pleading was also framed as followed:

"**Has the defendant acquired prescriptive rights to a portion of the suitland and thereby extinguished the plaintiffs title to that portion? If so, is she entitled to be registered as proprietor of that portion?"**

There was no mention about adverse possession in the pleadings. Nor was there a prayer for declaration of any prescriptive rights. We do not intend to embark on any discourse on prescriptive rights but, as far as we are aware, prescription is a common law principle which is not legislated for in this country. By definition in English Law, it is the acquisition of rights by use or enjoyment during the time and in a manner fixed by law. The rights so acquired however are not founded on the ground that possession over a given period gave an indefeasible right, but on the assumption, where possession or enjoyment had been carried back as far as living memory would do so, that a grant had once existed which had since been lost. – see ***Nigel Gravells*** on "***Land Law***". As applied to the customary law of this country in relation to land, natural justice was imported to found an interest in land where there was proof of abandonment by the original proprietor and of uninterrupted occupation, and/or continuation for sufficiently long period of time by the person asserting a claim by prescription. - See "***Land Law In East Africa***" by K.M. Maini. There is no evidence on record that the appellant was in possession of the disputed land for any period of time before the property rights on the disputed land were determined through registration in 1958. The appellant's rights would otherwise have been protected under ***Section 30*** of the Registered Land Act, which provides in relevant part:

"**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....."**

(The emphasis is added.)

In view of the pleadings made in this suit and the state of the law on prescription, the claim cannot lie, and we so find.

There is nevertheless a prayer based on "*adverse possession"* although there is no pleading anchoring it. Adverse possession is statutorily provided for in this country. Ordinarily such claim would be pleaded under ***Section 7*** of the Limitation of Actions Act, Cap 22, which provides:

"**An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if its first accrued to some person through whom he claims, to that person."**

The following provisions of Section 13 of the same Act also apply:

"**(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and ...."**

***Section 38*** of the Act, which is referred to in the prayer made by the appellant also provides as follows:

"**38. (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."**

The mandatory procedure for invoking that section is in ***Order 36 r 3D*** of the Civil Procedure Rules and ordinarily the failure to follow that procedure is fatal to the suit. That is because under ***rule 10*** an originating summons may be continued as if the cause had begun by filing a plaint, but the converse is not acceptable – see **E. vs. E. [1970 ] EA** 604. In this case however, adverse possession was made in a counterclaim, a procedure which was adopted and received acceptance in the ***Gatimu Kinguru case*** (supra). Whatever the procedure, the onus is on the person claiming adverse possession to prove, in the words of Kneller J. (as he then was) in **Kimani Ruchine v Swift, Rutherford & Co. Ltd [1980] KLR 10** that:

"**the plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v Beverly [1965] EA 514, 518, 519, per Miles J.**

**No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; see sections 9(1) and 13 of the Limitation of Actions Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (see generally paragraphs 481 and 482 on pages 251, 252, of 24 Halbury's Laws of England (3rd Edn.)."**

The appellant's evidence tending to establish adverse possession was that she occupied the disputed land in 1967 and has worked on it until she left in 1992 after the suit was filed. She had even buried her daughter and husband on the land. Her two witnesses, however, DW2 and DW3, were brief and did not focus on possession of the land by the appellant "**nec vi, nec clam, nec precario"** or at all. They testified on the origin of the land and, according to them, it was purchased by the deceased. As stated earlier, the

superior court reviewed the appellant's evidence and that of her two witnesses. He also considered the respondent's evidence that the appellant and the deceased were residing in Kisumu since 1967 where they bought property and established a business; that the appellant bore her children there; that the appellant had no house on the disputed land and was only allowed by the respondent to occupy a room in a house built by the respondent for his mother; that the burial of the appellants' daughter and the burial of the deceased were consented to by the respondent and were necessitated by lack of a house on the deceased's land, plot 10; that the burials as confirmed by the appellant's witnesses, accorded with customary rites prohibiting burials in uninhabited place; and that there had been no attempt by the appellant to lay any claim on the disputed land until the suit for eviction was filed against her.

We have considered the evidence on record ourselves and we are satisfied that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor. The burials made in the disputed land have been sufficiently explained in the evidence on both sides, and do not therefore tilt the balance in the appellant's favour. The contention that the appellant was a licencee in a room which was the subject matter of the suit was also not displaced. It is our finding on the issue that the appellant cannot claim title to herself as pleaded on the basis that she was in adverse possession of the disputed land. That ground of appeal also fails.

We are informed by counsel that there is another suit in the superior court relating to the estate of the deceased. In those circumstances, we steer clear of any final determination concerning the rights, if any, of the deceased's estate in the disputed land.

The upshot is that the appeal is not meritorious and we order that it be and is hereby dismissed. We make no order as to costs this being a family matter.

***Dated and delivered at Nyeri this 10th of July, 2009***

**S.E.O. BOSIRE**

**.....**

**JUDGE OF APPEAL**

**P.N. WAKI**

**.....**

**JUDGE OF APPEAL**

**J.G. NYAMU**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**