



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 122 of 2001

SAMUEL MIKI WAWERU APPELLANT

AND

JANE NJERI RICHU RESPONDENT

(Appeal from the decree of the High Court of Kenya

at Nairobi (Aganyanya J) dated 18th August, 2000 in H.C.C.C. NO. 139 OF 1999 (O.S.)

JUDGMENT OF THE COURT

The appellant *SAMUEL MIKI WAWERU* is aggrieved by the decision of the superior court (Aganyanya J) dated 18th August, 2000 whereby the superior court entered judgment for the respondent herein for a declaration that she had acquired by adverse possession an absolute title to a portion of one acre from land title No. Komothai/igi/229 and further ordered the appellant to transfer the one acre to the respondent.

The appellant is a nephew to *MIKI KABIRU* the original registered proprietor of land title No. Komothai/igi/229 comprising of 3.9 acres. Miki Kabiru died on 22nd April, 1997. He had no wife nor children. Upon his death, the appellant as his nephew filed *Nairobi High Court Succession Cause No. 1511 of 1997*. He was given a Grant of Letters of Administration which grant was confirmed on 8th June, 1998. He was registered as the heir to the land on 25th August, 1998.

On 27th January, 1999 the respondent filed an Originating Summons claiming to be entitled to one acre from the land by adverse possession. The basis of her claim is best explained in paragraphs 4, 5, 6, 7, 8 and 10 of the affidavit to support the originating motion thus:

“4. THAT sometime in 1967 the above deceased person allowed me to cultivate part of the suit premises with a view to purchasing the same and even planted 390 coffee trees on the said land.

5. THAT on the 15th April, 1969 we entered into a formal written agreement for the purchase of one acre from the said piece of land the purchase price being Kshs.4,160 which I paid to him.

6. ***THAT after one month of the said purchase, we brought a surveyor who came and demarcated the boundaries of the one acre piece and the traditional boundary markings placed then, are still in place to date.***
7. ***THAT at the time of the purchase, the registered owner of the land did not have Title Deed to the land and therefore the Transfer could not be effected immediately.***
8. ***THAT I nevertheless settled on the land and built a semi permanent house and granary and continued cultivating the same to date.***
9.
10. ***THAT the respondent herein came and settled on the land in 1981 and occupied the remaining portion while leaving me to my portion and all the three of us continued to occupy the land with nobody interfering with my quiet possession of my one acre”.***

The appellant’s case was partly stated at paragraphs 4 and 5 of his replying affidavit sworn on 10th February, 1999 thus:

“4. That para. 4 of her affidavit is not true. Her husband Mr. Richu (deceased) had leased the portion of the land reference No. Komothai/igi/229 from my uncle Miki Kabiru for a term of 30 years from 1963. I was informed by my uncle Miki Kabiru sometime in 1978 and 1993, before his death which I verily believed to be true that he consented to put Mr. Richu into possession and plant coffee which is a long term crop so that the lessee could make a profit during the 30 years.

5. The plaintiff admits in paragraph 4 that she was granted consent to cultivate the land. It is not true that she began cultivating 1967. Her husband was given consent to enter into possession in 1963”.

The respondent in a further affidavit denied that the land had been leased to her (her husband) for 30 years and reiterated that the land was sold to her for valuable consideration. However, she admitted in her evidence that her husband had been given the land to cultivate in 1963 and that she and her husband cultivated the land but her husband died in 1967. She nevertheless continued cultivating the land and in 1969, she offered to purchase it. The offer was accepted and an agreement of sale entered into after which she paid the purchase price of Shs.4,160/= on 15th April, 1969 and planted coffee.

The respondent had annexed to the originating summons the proceedings and decision of an Assistant Chief and his elders which shows that the dispute was heard by the Assistant Chief and elders and on 19th November, 1998 found in favour of the respondent that she had bought the land in 1969 for Shs.4,160/= though she had not paid for all the items asked by the vendor. The appellant issued a Notice to the respondent to vacate the land on the day of Elders’ decision (i.e. 19th November, 1998).

The trial judge found that both the sale agreement and the alleged lease became null and void after the expiry of the respective six months for lack of consent of Land Control Board under the Land Control Act and proceeded to decide the dispute solely on the basis of the claim of adverse possession. The trial judge was satisfied that the respondent had established a claim to the land by adverse possession saying in part:

“The applicant lived on the suit land from 1970 after the expiry of the 6 months period within which Land Board Consent could have been obtained until 1997 when the deceased died. That is a period of 27 years. Thus occupation or possession was with full knowledge of the deceased, open, notorious and uninterrupted.

If the cultivation was on and off basis or for short seasons, the position would have been different. But the continuous cultivation which involved planting of long lasting crops like coffee and erecting thereon a residential house went beyond a mere licence and gave the applicant the position of an

adverse possessor”.

Those findings of the superior court are the basis of this appeal. It is contended that the learned judge erred in finding that respondent had proved adverse possession mainly for two reasons. First, the respondent was admittedly in possession of the land with the permission of the registered owner, and secondly, such possession was not exclusive as the respondent was not physically living on the land.

It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in *Jandu vs. Kilpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of *Sisto Wambugu vs. Kamau Njuguna* (1982 – 88) 1 KAR 217 relied on by Mr. Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from date of the termination of the contract.

It is important to bear in mind that in *Sisto Wambugu* (supra) the court was dealing with the nature of a purchaser’s possession under a general contract of sale of land and not under a controlled transaction within the ambit of the Land Control Act (Cap 301). However, the application of the Land Control Act to the transaction was raised in that case as appears from the respective judgments of Hancox JA (as he then was) and Kneller JA (as he then was) but was not considered by Hancox JA (see pages 219, 1st paragraph and page 220, 1st paragraph). The application of the Land Control Act was however considered and answered by Kneller JA at page 228 4th paragraph, thus:

“The parties did not have the consent of the relevant Land Control Board to this sale but there was no material on which this issue could be answered and, in indeed it was not one that was pleaded or was the basis of any submission in the High Court”.

In the instant case, Mrs. Wanyaga, who appeared for the respondent at the trial submitted in the superior court that possession became adverse in 1969 when the sale became void for lack of Land Control Board consent. The trial judge in the passage of his judgment that we have quoted above agreed that adverse possession started after the expiry of the 6 months period within which period the Land Control Board consent would have been obtained.

It is not in contention in this case that the Land Control Act applied to the alleged lease or sale of the portion of land claimed by the respondent or that the consent of the Land Control Board was neither applied for within the stipulated period nor granted. It follows therefore, and Mr. Gitonga concedes, that, the alleged sale or lease became void for all purposes as provided by **Section 6 (1)** of the Land Control Act with the consequences stipulated in **Section 22** of the Land Control Act. Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner.

In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under **Section 6 (1)** of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.

The respondent admitted that she and her deceased husband were in possession with the permission of the original owner from 1963 to 1967. She asserted possessory right as a purchaser from 1969. For the reasons we have already stated, both the alleged sale and lease became void for lack of the consent of the Land Control Board and the continued possession of land by the respondent henceforth was not with the permission of the original owner. It was adverse possession.

The respondent has for many years been continuously openly and of right using a clearly demarcated portion of the land on which she has planted coffee, a permanent cash crop, built a semi – permanent house and granary without interruption.

On analysis, we are satisfied that the learned judge reached the correct decision on both facts and law.

In the result, the appeal has no merit. It is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 2nd day of February, 2007.

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