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

Civil Appeal 188 of 2002

STEPHEN KAGUKU MARIBA …….....…….....……...……. APPELLANT

AND

KIBE MARIBA (Legal Representative of the Estate of

Margaret Magiri - Deceased) …….....….....…. 1ST RESPONDENT

PUBLIC TRUSTEE - THE ESTATE OF DANIEL

WAINAINA GACHOKA (Deceased) .....… 2ND RESPONDENT

(*An appeal from the judgment of the High Court of Kenya at Nairobi (Ransley, Comm. of Assize) dated 23.01.2002* inH.C.C.S. NO.1554 OF 1989)

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JUDGMENT OF THE COURT

This is an appeal by the 2nd defendant, now the appellant, from the judgment and decree of the superior court *(Hon. Ransley, Comm. of Assize)* given on 23rd January, 2002, whereby the learned Comm. of Assize entered judgment for the plaintiff, the 1st respondent, declaring him, *inter alia*, to have obtained title to half share of the suit land known as Kiganjo/Kiganjo/110 by adverse possession.

The facts in the case may be stated thus. Before the advent of land adjudication and registration in Kiganjo the original owner of the suit land was one **GACHOKA KAGUKU** who had several sons, among them **MBIRI GACHOKA** and **DANIEL GACHOKA**. It is the plaintiff's case that *Mbiri Gachoka* died in or about 1935 and his wife *Margaret Magiri* and her children, including the 1st respondent *Kibe Mariba*, were then absorbed into *Daniel Gachoka's* household after Margaret was inherited as a wife. It is also the plaintiff's case that on registration the land belonging to *Mbiri Gachoka* and inherited from **GACHOKA KAGUKU** was incorporated in the suit land i.e **Kiganjo/Kiganjo/110** and registered in the name of **DANIEL GACHOKA** to hold the same in trust for Margaret and all her children.

It is on record that Margaret first sued **DANIEL GACHOKA** over the suit land in HCCC 1046 of 1979 but the latter died soon thereafter on 27th March, 1982 before the suit was heard and determined. The suit was subsequently on 10th June, 1983 marked as having abated under **Order XXIII Rule 4** of the Civil Procedure Rules. The suit the subject matter of this appeal was filed in 1989 but, also, Margaret died

during its pendency and her son ***Kibe Mariba*** was substituted as her personal representative. The 2nd defendant and the Public Trustee have been sued on behalf of the estate of Daniel Gachoka.

The plaintiff avers that she together with her three sons and two daughters have been in exclusive occupation of approximately one half of the suit land and plot No. 31 Kiganjo Market openly without force and as of right since 1935.

The plaintiff, therefore, claimed in the plaint, *inter alia*: -

"***(a) A declaration that Daniel Wainaina Gachoka (deceased) holds the suit land namely Kiganjo/Kiganjo/ 110 in trust for Margaret and her children.***

(b) An order directing the defendants to effect legal transfer of the suit land to the plaintiff.

and

(c) Alternatively an order that the Plaintiff has obtained a title to half share in Kiganjo/Kiganjo/110 and the whole of plot 31 Kiganjo Market by adverse possession."

The Public Trustee and the 2nd defendant filed separate written statements of defence but in essence they traversed seriatim all the allegations made by the plaintiff in his plaint especially that the plaintiff and other children of *Mbiri Gachoka* were entitled to inherit any portion of the suit land or that they have been in occupation of the suit land at all.

Evidence was led before the superior court by both sides and the learned Judge in a reserved judgment held: -

"***I accept that on the death of Margaret's husband she was absorbed into the family of Daniel Wainaina Gachoka and that they all lived together as one family. When land demarcation took place in 1962 title to the land was given to Daniel Wainaina Gachoka. This, however, did not mean that Margaret's family were dispossessed or become tenants on the land. They continued to live there as part of communal family. However, it is clear that the 2nd Defendant since his father's death had been opposed to the occupation by the Plaintiff of the land and as he said, in his view they took the land by force in 1978 after his father's death.***

I do not find any evidence of a tenancy as alleged in para 5 of the plaint but hold that the Plaintiff's occupation of the land has been adverse to the Defendant's (sic) title and therefore grant prayer so far as Kiganjo/Kiganjo/110 is concerned."

Being dissatisfied with the decision of the learned Judge the 2nd defendant has now preferred this appeal the main thrust of the attack being; firstly, that there was no basis for the Hon. Comm. of Assize to hold that the plaintiff and his siblings had acquired a portion of the suit land by way of adverse possession while there was no evidence to support that proposition and contrary to the established legal principles governing the acquisition of title to land by way of adverse possession; secondly, that the superior court erred in holding *Margaret Magiri* as having been absorbed in *Daniel Gachoka's* household in the absence of any credible evidence; and thirdly, that there was no evidence of trust over the suit land in favour of Margaret and her children.

As a first appellate court, it is our duty to treat the evidence and material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this. ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] EA 123.*** With this principle in mind we will now deal with the appeal.

Again, probably, in our view, the best approach to the pertinent issues in the appeal is first to find out

how the disputing parties live on the suit land.

Following a report commissioned by the superior court before the trial began the following salient facts were accepted by both parties as correct: -

i) Both the children of Margaret Magiri and Daniel Gachoka occupy the suit land but there are no fixed boundaries between their respective portions.

ii) Both parties – Margaret's and Daniel Gachoka's households, – occupy almost equal portions of the suit land.

iii) ***Both parties have been treating the suit land as a family property*****.**

Further to the above indisputable facts, it is also manifestly clear from the evidence that *Kibe Mariba*, the 1st respondent who was aged 60 years when he testified, had been together with his mother, brothers and sisters on half of the suit land uninterrupted since 1962 and his entire family had known no other piece of land.

There is credible evidence, also, that *Margaret Magiri* had been "inherited" or absorbed into the family of *Daniel Gachoka* as a wife; and, as the learned Comm. of Assize found, her children became the children of *Daniel Gachoka* and since *Daniel Gachoka* had another wife and children, we think that the learned Comm. of Assize correctly held that on his demise the two households were entitled to inherit the suit land in equal proportions.

In the result, the second and third grounds of appeal have no merit and we reject them.

Mr. Kigotho for the 2nd defendant has further submitted in the main that the claim by way of adverse possession not having been brought by an originating summons as is mandatorily required by **Order XXXVI rule 3D** of the Civil Procedure Rules ought not to have been allowed and to buttress his submission he referred us to the decision in ***JOHN NDUNGU NGETHER V. PATRICK MURIMA & ANOTHER*** Nairobi C.C. No.143 of 1998 (unreported) in which this Court held:-

"***But, perhaps more importantly, the claim by way of adverse possession not having been brought by way of an originating summons----- it cannot succeed".***

However, this Court in ***MUCHERU V. MUCHERU [2000]2 EA 455*** said that the procedure by originating summons is intended to enable simple matters to be dealt with in a quick and summary manner. In saying so, it relied on the decisions in ***BHARI V KHAN [1965] EA 94, KIBUTIRI V KIBUTIRI [1982-88] 1 KAR 60*** and ***KENYA COMMERCIAL BANK V JAMES OSEBE [1982-88] 1 KAR 48.*** The Court also referred to the judgment of Sir Ralph Windham C.J. in ***SALEHMOHAMED MOHAMED VPH SALDANHA 3, KENYA SUPREME COURT (MOMBASA)*** Civil case Number 243 of 1953 (UR), where the scope and general purpose of procedure by way of originating summons were being considered. His Lordship said:-

"***Such procedure is primarily designed for the summary and "ad hoc" determination of points of law or construction or of certain questions of fact, or for the obtaining of specific directions of the court, such as trustees, administrators, or (as here) the court's own execution officers. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible and be heard in chambers unless adjourned by a judge into court***"

While it is true that the suit was commenced by plaint instead of by the procedure of Originating Summons, we do not consider the error to be fatal in view of the provisions of Order XXXVI r 10 of the Civil Procedure Rules. That provision requires the trial court in an appropriate case, to continue proceedings commenced by Originating Summons as though the same had been begun by Plaint.

The dispute between the parties also involved plot No.31 Kiganjo Market. It appears from the record

that the Hon. Commissioner of Assize heard evidence on the suit land and wrote the judgment now the subject of the appeal. However, he directed the parties to produce further evidence on the title after which he would make further orders. The hearing concerning the dispute over the market plot commenced on 17th April, 2003 and judgment was delivered on 14th May, 2003. The Plaintiff's claim over the market plot was dismissed and we have not been shown whether or not the plaintiff preferred an appeal. We think that since the market plot is not the subject of the appeal now before us we should say nothing more on it.

In our view, the course adopted by the learned Hon. Commissioner of Assize in dividing the hearing of the suit into two portions and thereafter taking evidence on each issue and writing separate judgments thereof is quite unnecessary and amounts to wasting precious judicial time. We deprecate it. We are, however, satisfied that the procedure did not cause any discernible prejudice to the defendants.

All in all the learned Honourable Commissioner of Assize reached a correct decision on the evidence presented before him and he cannot be faulted.

Accordingly and, for the reasons above stated, the appeal is dismissed with costs.

DATED and DELIVERED at NAIROBI this 2ND day of FEBRUARY 2007.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

……..

JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR