REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 351 of 2002

JOSEPH MUTAFARI SITUMA …… APPELLANT

AND

NICHOLAS MAKHANU CHERONGO ……..…….……. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya Bungoma (Ong'undi J) dated 26th March, 1996 In H.C.C.C. NO. 156 OF 1995)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Ongundi J) dated 26th March, 1996 dismissing the appellant's claim to land title No. Bungoma/Kamukuywa/298 by adverse possession.

By an originating summons dated 11th April, 1988, the Estate of DISMAS MATAFARI SITUMA and the appellant – JOSEPH MATAFARI SITUMA sought orders that:

"*1. The said Joseph Matafari Situma be declared entitled by adverse possession of twelve years to all that piece of land or parcel of land containing 11.4 hectares or thereabout registered in the land Title Registry as L.R. No. BUNGOMA/KAMUKUYWA/298 situated at Bungoma.*

2. The said Joseph Matafari Situma be registered as the sole proprietor absolutely of the said piece or parcel of land in addition to his half share in place of the Settlement Fund Trustees who hold the same parcel of land on behalf of the defendant".

The originating summons was supported bya short affidavit of the appellant in which he deposed, among other things, that he is the administrator of the Estate of Dismas Matafari Situma (deceased) pursuant to Temporary Grant of Letters of Administration issued on 23rd December, 1987; that the deceased died on 31st May, 1979; that by an agreement of sale dated 12th March, 1979, the deceased purchased the suit land from the respondent and paid the full purchase price; that the respondent had refused to sign the requisite documents to effect the transfer of the suit land; that the appellant and the entire family of the deceased had resided on the suit land peacefully for a period of 17 years; that he and the estate of the deceased are entitled to the land by adverse possession and that the land should be registered in his name on his own behalf and on behalf of the estate of the deceased. The respondent opposed the application and filed a short replying affidavit deposing, *inter alia*, that Joseph Matafari Situma was a stranger to whatever transaction which took place between him and the deceased; that it is not true that plaintiff's

have been in occupation of the suit land since 1971 and that the suit against him does not disclose a cause of action.

The appellant gave brief evidence at the trial. His evidence show that deceased had three wives and 12 children, that he is the eldest son of the deceased; that deceased bought the suit land at a consideration of Shs.3,600/=; that the appellant started living on the land since 1971 and has planted coffee and bananas and has two semi-permanent houses on the land; that the respondent started interfering with the land in 1984 and that he wanted respondent to transfer the land so that he could pay the loan.

According to the respondent's evidence at the trial, he agreed to sell 19 acres out of the 28 acres to the deceased after which the deceased paid Shs.1,200/= only and failed to pay the balance. By a letter dated 6th February, 1976 – the respondent's advocates informed the deceased that the respondent had cancelled the agreement and thereafter asked the deceased to vacate the land but the deceased failed.

The superior court made the following findings of fact:

"***The plaintiff's father moved into the land in 1971. By April 1972, the Senior Settlement Officer had written to have him evicted. His peaceful occupation was interrupted. Time began to run from April 1972. It did not take long and on 6th February, 1976, a letter from P. N. GADHER ADVOCATE, informed the plaintiff's father the defendant had cancelled the sale as he had defaulted in completing the purchase price. Again, the peaceful occupation from 1972 was interrupted. Time began to run again in 1976. Similarly by 1976, the plaintiff's occupation was not peaceful due to what Kneller J called "recurrent consideration" i.e. unsettled instalments of the purchase price.***

In 1984 the peaceful occupation of plaintiff was again interrupted. That is only 8 years from 1976. His time under the doctrine again began to run in 1984. In 1988, this suit was filed. From the chronology of events it is clear the plaintiff never enjoyed a continuous peaceful possession of the suit land for a clear 12 years. He held on amid threats of eviction and non – payment of the purchase price".

The trial judge ultimately found that the appellant's father held on to the land forcefully and by evasion.

The grounds of appeal attack those findings. Mr. Otieno, learned counsel for the appellant, contended that the two letters and the acts of interference referred by the learned judge do not amount to assertion of right in law as there was no effective entry into the land or institution of a suit. On his part, Mr. Mwebi, learned counsel for the respondent submitted that there was no continuous and peaceful possession for 12 years, that the appellant was occupying the land by force after the two letters and that it was a sensible step to write the letters instead of moving into the land and causing a breach of peace.

According to the appellant, his deceased father agreed to purchase the suit land from the respondent in 1972. He produced as evidence a copy of sale agreement in the superior court. The sale agreement is dated 12th March, 1971. The agreed purchase price was Shs.3,600/=. The respondent acknowledged receipt of Shs.1,200/= on the date of the agreement and the balance of purchase price was to be paid by three instalments. The last instalment was payable on or before 30th March, 1972. The sale agreement expressly provided that the sale was subject to the consent of Settlement Fund Trustees and Land Control Board. Lastly, the agreement stipulates that the land to be sold was 19 acres.

The trial Judge made a finding that the parties failed to appear before the Settlement Fund Trustees and Bungoma Land Control Board and as a result the consent of the two bodies was not obtained with the consequence that the contract became void and unenforceable.

By ***section 8*** of Land Control Act, the application for consent of the Land Control Board is required to be made within 6 months of the making of the agreement subject to the jurisdiction of the High Court to extend the period. Upon the failure by the deceased and the respondent to make an application for

consent of the land Control Board within six months the agreement for sale of the land became void for all purposes by virtue of ***section 6 (1)*** of the Land Control Act.

In ***Samuel Miki Waweru v Jane Njeri Richu*** – *Civil Appeal No. 122 of 2001* (unreported), this Court held in part:

"***In our view, where a purchaser of land or a lessee of land in 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 law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void".***

In this case, the agreement for sale became void six months from date of the agreement – that is on or about 11th September, 1971 and the limitation period for purposes of adverse possession began to run on or about 12th September, 1971.

The respondent admitted at the trial that he gave possession of the suit land to the deceased in 1971 and that by the time the suit was filed, the family of the deceased was still in possession of the land. The issue is whether the estate of the deceased and the appellant has acquired the suit land by adverse possession.

It seems from the originating summons that although the appellant was representing the estate of Dismas Matafari Situma he was also laying a claim to half share of the suit land by adverse possession. The two claims have to be considered separately. What constitutes adverse possession is a question of fact and degree and depends on all the circumstances of the case.

Dealing with the claim by the estate first, we are satisfied that Dismas Matafari Situma was in adverse possession of the land which was the subject of the agreement of sale from about 12th June, 1971 to 31st May, 1979 when he died, a period of nearly 8 years. That period is however, less than the stipulated minimum statutory period of 12 years. By ***Section 9 (2)*** of the Limitation of Actions Act, the right of action to recover the land of deceased accrued to the appellant on the death of the deceased. It follows, therefore, that Dismas Matafari Situma had not acquired the land by adverse possession by the time of his death, hence his estate, is not entitled to the land by adverse possession. Moreover, the estate which was a party in the suit in the superior court has not been made a party to the appeal.

The appellant personal claim is fraught with difficulties both evidentiary and legal. For his claim to succeed he must not only prove exclusive physical possession of an identifiable portion of the suit land independent of possession by his deceased father but also requisite intention (*animal possidendi*) to the exclusion the world at large including the respondent (see ***JAPYE (Oxford) Ltd vs. GRAHAM*** [2003] 1 AC 419).

The appellant's oral evidence and the affidavit evidence was very sketchy. The appellant's possession of the suit land falls under two categories, namely, the possession before the death of his father and the possession after the death of his father. For the period before the death of his father, it is clear from the evidence that his deceased father settled his family on the suit land after entering into an agreement of sale with the respondent. Admittedly, it is after the death of his father in 1979 that the appellant came to know that his father had entered into a sale agreement with the respondent. It was his evidence that, it is in 1984 that the respondent started laying the claim to the suit land. The evidence shows that the deceased had three wives and several children.

Although the appellant stated in the superior court that he had planted coffee, banana trees and that he built two semi-permanent houses, there was no evidence that deceased had sub-divided the land and allocated each member of his family a specific share of the suit land. Indeed, it seems that before the death of his father, the land was communally occupied by the members of the deceased's family who believed that the land legally belonged to the deceased. In the circumstances, we are of the view that the appellant did not have independent possession of the land from that of his father and that the appellant's possession of the land was through his father in his capacity as his son. Moreover, the appellant did not

demonstrate that he had the requisite intention to possess the land to the exclusion of all persons including the respondent during that period.

There is no doubt, however, that the appellant's possession of the land after the death of his father was adverse possession in its ordinary meaning, that is, possession inconsistent with the title of the respondent. (See ***JAPYE (Oxford) Ltd v Graham***) (supra). Unfortunately, the possession of the land by the respondent from 1st June, 1979 to 11th April, 1988 when the suit was filed is for nearly 9 years which is 3 years less than the stipulated 12 years statutory minimum.

From the foregoing findings, we have come to the conclusion that the appellant did not prove his claim to the land by adverse possession to the required degree.

That finding notwithstanding, we feel bound to say something about the legal basis of the decision of the superior court. We have quoted above an excerpt of the decision of the superior court where the superior court found in essence that the various letters written to the deceased, interrupted the running of time for purposes of adverse possession. Mr. Otieno relied on ***Githu v Ndeete*** [1984] KLR 776 where this Court held, among other things, that the giving of notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under Limitation of Actions Act. That statement of law is supported by English decisions. In ***MEGARRY & WADE, THE LAW OF REAL PROPERTY***, 6th Ed. the authors state at paragraph 21 – 018 at page 1309, thus:

"***Once factual possession has been established, it will not be terminated merely because the true owner sends a letter to the squatter requiring him to vacate the premises. Time will continue to run in favour of the squatter unless and until he vacates the premises or acknowledges the true owner's title".***

In ***Mount Carmel Investments Ltd vs. Peter Thurlow Ltd*** [1988] 1 WLR 1078; the English Court of Appeal was dealing with adverse possession under ***section 15 (1)*** of the English Limitation Act 1980 which section is in substance identical to ***section 7*** of the Limitations Actions Act (Cap 22) which bars actions to recover land after expiry of 12 years from the date the right of action accrued.

In that case, the Court said at page 1084 paragraph B:

"*We do not accept that in a case where one person is in possession of property and another is not the mere* ***sending and receipt of a letter by which delivery up of possession is demanded, can have the effect in law for limitation purposes that the recipient of the letter ceases to be in possession and the sender of the letter acquires possession".***

The Court justified that finding at page 1085, paragraph H and page 1086 paragraph A, thus:

"***On Mr. Newman's argument time starts to run afresh by making a demand for possession. That is in flat contradiction to the long-recognized position and statutory scheme where a squatter is in possession of another's land. Unless the squatter vacates or gives a written acknowledgment to the owner, the owner has to issue his writ within the prescribed time limit. Otherwise, he is barred because by section 15 (1) he is barred from bringing an action to recover land after the expiration of the 12 year period".***

That being the correct position in law the learned Judge, with respect, erred in finding that the letters sent to the deceased interrupted the running of time and that time began to run afresh after making a demand for possession.

Nevertheless, we have already found that the appellant failed to prove adverse possession for the requisite statutory period. We are however, of the view that, we should not make an order for costs in the circumstances of this case.

In the result, we dismiss the appeal with no orders as to costs.

Dated and delivered at Nairobi this 31st day of July, 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 true copy of the original.

DEPUTY REGISTRAR