REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, O'KUBASU & DEVERELL, JJ.A.)

CIVIL APPEAL 293 OF 2002

BETWEEN

FRANCIS GICHARU KARIRI …… APPELLANT

AND

PETER NJOROGE MAIRU...……..……RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Owuor, J. –as she then was) delivered on 17th October, 1990.

The suit was commenced by way of Originating Summons in which the plaintiff, Mairu Wangaru sought the following declarations:-

> ***"1) A declaration that as at 17th of November, 1979 he had by adverse possession become entitled to a portion of land comprised in and known as Gatamaiyu/Kagwe/46 measuring 1.5 acres against the then registered proprietor Kiiru Kariri and that the said Kiiru had no lawful and/or transferable interest as of the above date.***
>
> ***2) A declaration that Gacharu Kariri and Geoffrey Mathu Kariri the Defendants were registered as owners of land reference Gatamaiyu/Kagwe/780 and 781 respectively, being sub-divisions of L.R. Gatamaiyo/Kagwe/46 up to 17th November, 1979 as trustees of the plaintiff.***
>
> ***3) That the land reference numbers Gatamaiyu/Kagwe/780 and 781 be subdivided and 1.5 acres thereof be transferred to the plaintiff.***
>
> ***4) A permanent injunction in favour of the plaintiff".***

The originating summons was filed in the High Court on 12th January 1987 but previous to the filing of the originating summons there had been proceedings in respect of the suit premises between the plaintiff and the original proprietor and in whose name the original title had been issued. That original proprietor was one, **Kiiru s/o Kariri**. Those proceedings had been started in 1978 vide **High Court Civil Case No. 3193 of 1975** in which the plaintiff therein sought an order of specific performance to compel Kiiru s/o Kariri to transfer the suit premises to him. Unfortunately, Kiiru died on or about 17th November, 1979 before the suit had been heard and nobody had been appointed as his legal representative.

The originating summons was then heard in the superior court by way of both affidavit and oral evidence. The learned Judge considered the evidence before her and came to the conclusion that the plaintiff had acquired title to the portion claimed by way of adverse possession. In concluding her judgment, the learned Judge said:-

> ***"From the very strong evidence most of (it) uncontradicted I have reached the conclusion and do find that by the time Kariri died in 1979 the plaintiff was in exclusive and open possession of the suit premises. The portion he so occupied was clearly defined. He had been in such possession as far back as from 1960. His interest as in the many authorities quoted had matured and he had acquired title."***

In the originating summons filed in the High Court, the plaintiff set out to prove that he had acquired title to the suit land measuring about 1½ acres by adverse possession. The plaintiff called the following witnesses:- **Mburu Gichanga (PW2), Mathu Wangaku (PW3), James Mbugua Mathu (PW4)** and **Stephen Wanyoike (PW5)**. The defendant called a similar number of witnesses to counter the plaintiff's claim. The main issue in the originating summons is ably captured from the judgment of the learned Judge when she said:-

> ***"The main issue in this case is when did the plaintiff acquire possession of the suit premises and thereafter was he in possession for twelve years uninterrupted and without right before the death of the rightful owner Kariri. Plaintiff and his five witnesses have categorically testified that the plaintiff took possession of the land in pursuance of verbal sale in 1960 when all these people came from Emergency village. According to the plaintiff he was supposed to pay for the land by instalments.There was some suggestion by the defence that the plaintiff merely gave Kariri soap because he was a cripple but this was not pursued in detail. It would not have held water either in view of the agreement Exh.1 and the plaintiff's own evidence that he used to give 100/= every now and then till he had completed the full purchase price. Exh.1 the agreement is a valid document as far as the plaintiff is concerned and formalized the sale by way of Exh.1 the agreement dated 4th September, 1964 in Kikuyu."***

Being dissatisfied by that judgment the defendant now filed this appeal citing the following grounds of appeal:-

> ***"1. The judgment is against the weight of evidence. 2. The trial Judge erred in believing the evidence of the respondent's father and his witnesses which was contradictory and unworthy of belief.***
>
> ***3. The trial Judge erred in holding that the respondent's father had uninterrupted possession of the suit premises.***
>
> ***4. The Judge erred in holding that the suit premises were a clearly defined portion well demarcated and identified and ascertainable.***
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> ***5. The trial Judge erred in holding that time started to run out against the deceased Kiiru Kariri from 1960 and that the plaintiff's interest had matured by 1972.***
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> ***6. The trial Judge erred in holding that by the time the deceased Kiiru Kariri died in 1979, the plaintiff was in exclusive and open possession of the suit premises and that the potion he so occupied was defined and that he had been in such possession as far back as from 1960.***
>
> ***7. The trial Judge erred in not reviewing the detailed evidence in support of the appellant's case and thus she occasioned a miscarriage of justice."***

When the appeal came up for hearing on 17th October, 2005, Mr. Kinuthia, for the appellant, dealt with

the issue of evidence first (***being grounds 1 and 2 of the Memorandum of Appeal***). He submitted that the issue of tea was never considered and that the superior court did not give reasons why it preferred the evidence of the respondent rather than that of the appellant. He also referred to the evidence relating to an attempt to bury a body on the suit land which was thwarted by the appellant.

Mr. Kinuthia's second plank of submissions combined all the remaining five grounds, in which he contended that the main issue was adverse possession which, in his view, was not proved. He therefore asked us to allow this appeal.

Mr. Akhaabi, for the respondent, submitted that the father of the respondent entered into an agreement with one Kiriri to purchase 1½ acres out of Gatamaiyu/Kagwe 146 and that the old man entered the land in 1960. Mr. Akhaabi went on to submit that there was no interruption for the next twelve years which, in his view, meant the appellant lost his right to recover the said portion of land. He pointed out that the respondent's father planted tea on the said possession.

This being a first appeal, it is our duty to re-evaluate the evidence and make our own conclusions remembering that we have neither seen nor heard the witnesses hence due allowance must be made for this. (See ***Selle v. Associated Motor Boat Company Ltd*** ***[1968] E.A. 123 at p. 126 and Williamson Diamonds Ltd. v. Brown [1970] E.A.1.***)

We have carefully considered both the affidavit and oral evidence presented before the superior court and it is clear that what the plaintiff set out to prove in the originating summons was adverse possession. This was not a complex matter since the facts could easily be found from the affidavit evidence. The superior court, however, allowed oral evidence to be adduced. The main issue was whether the plaintiff proved adverse possession. In ***Kimani Ruchire v. Swift Rutherford & Co. Ltd***. **[1980] KLR. 10 at pg 16 Letter B, Kneller J** (as he then was) said:-

> ***"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 persuasion). 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 purposes or any endeavours to interrupt it or by way of recurrent consideration."***

We have considered the submissions by learned counsel appearing for the parties herein and in our view, the suit in the superior court was decided upon the evidence both by way of affidavit and oral. As already stated, each side called several witnesses. The learned Judge considered all that was said before her, assessed the credibility of the witnesses and in the end preferred the plaintiff's version. This was a case decided on the facts, as what was to be proved (or disproved) was that the plaintiff had acquired title by adverse possession – that he had been in continuous possession of a defined portion of the suit land for a period of over twelve years. In the celebrated case of ***Peters v. Sunday Post*** **[1958] E.A. 424 and p. 429 E Sir Kenneth O'Connor P**. said:-

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."***

In dealing with circumstances in which this Court may interfere with factual findings of the High Court, this Court cited the foregoing with approval in ***Kiruga v. Kiruga & Another*** **[1988] KLR 348** and went on to emphasize and hold as follows:-

> ***"2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.***

3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed."

In view of the foregoing, we are satisfied that the learned Judge carefully considered the evidence before her and having evaluated the same came to the right conclusion that the plaintiff had proved adverse possession. We have, on our part, reevaluated the evidence, assessed the same and making our own conclusion (and remembering that we did not have the benefit of seeing and hearing the witnesses), we have come to the same conclusion, as did the learned Judge, that the plaintiff had proved adverse possession. Consequently, we are of the opinion that this appeal lacks merit and the same is dismissed with costs.

Dated and delivered at Nairobi this 18th day of November, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR