IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OMOLO, GITHINJI, JJ.A. & ONYANGO OTIENO, AG.

J.A.)

CIVIL APPEAL NO. 27 OF 2002

BETWEEN

MBUGUA NJUGUNA..…….…….. APPELLANT

AND

ELIJAH MBURU WANYOIKE & ANOTHER…..…….. RESPONDENTS

(Appeal from a judgment of the High Court of Kenya atNairobi (Justice Khamoni) dated 3rd March, 2000
in
H.C.C.C. NO. 2694 OF 1993)
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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (Khamoni J) dismissing the appellant's claim, by way of adverse possession, to land (4 acres) from title No. Gatamaiyu/Gachoiri/460 comprising of 11.4 acres. The appellants filed the suit in the superior court by originating summons, as required by the law, on 4th June, 1993. The reliefs sought were orders that:

> ***"1. It be declared and decreed that plaintiff Mbugua Njuguna has by adverse possession acquired title to 4 acres out of all that piece of land presently known as and comprised in Title No. Gatamaiyu/Gachoiri/460 and all sub -divisions thereof.***
>
> ***2. The defendants are registered as owners of the said piece of land as trustees for the benefit of the plaintiff.***
>
> ***3. The said piece of land be subdivided and a portion of 4 acres thereof and there out presently occupied by in possession (sic) of the plaintiff excised (sic) there from and registered in the name of the plaintiff".***

The copy of the title of land title No. Gatumaiyu/Gachoiri/460 show that the land is approximately 11.4 acres and that Thimba Ngekenya (the second defendant in the suit) was registered as proprietor on 21st October, 1958. Entry No. 2 of the register shows that Mbogua Njuguna Gichuhi (plaintiff in the suit – appellant) lodged a caution on 11th July, 1983 claiming to be a licensee but by entry No. 3 dated 20th July, 1990 the caution was removed. By entry No. 4, made on 12th April, 1993, the suit land was

registered in the names of Elijah Mburu Wanyoike – first defendant in the suit (first respondent) as proprietor of 8.4 acres and Silas Thimba Ngekenya as proprietor of 3.0 acres. That was the state of the register at the time of filing the suit.

The appellant filed an application for an interlocutory injunction on the same date that he filed the suit. By the application he sought an order to restrain the two defendants from selling, charging, disposing of or in any manner whatsoever alienating the suit land or any part thereof pending the hearing and final disposal of the suit or until further orders of the court.

The application for injunction was on 28th June, 1993 fixed for hearing on 21st July, 1993 and an order for maintenance of status quo given. On 21st July, 1993, the application was adjourned to 7th October, 1993. An order for maintenance of status quo was again made. On 7th October, 1993 the application was adjourned to 13th October, 1993 and Coudrey J made an order that:

"Interim orders extended until further orders".

The application was ultimately heard on 7th March, 1994 and the order of injunction granted as prayed. That notwithstanding, the suit land was partitioned into two parcels Nos. Gatamaiyu/Gachoire/1099 comprising of 3.40 HA which was registered in the name of Elijah Mburu Wanyoike – first defendant - on 16th December, 1993. The second parcel No. Gatamaiyu/Gachoire/1100 measuring 1.21 HA was registered in the name of Silas Mburu Thimba Ngekenya – 2nd defendant on 16th December, 1993. That sub-division and registration was done long before the hearing of the suit commenced on 27th May, 1998. Needless to say, the suit was determined on 3rd March, 2000.

The originating summons was supported by a short affidavit of the plaintiff. In addition, the plaintiff gave evidence but did not call any witnesses. His evidence in brief was as follows.

The suit land though registered in the name of Silas Thimba Ngekenya belonged to him and his step brother Mbugua Ngekenya who owned 4 acres. In or about the year 1958 both brothers asked the appellant to look after the land. At that time Silas Thimba Ngekenya was living in Kericho while Mbugua Ngekenya was living in Uplands. In October, 1964, Mbogua wanted money to take his son Solomon for some course. Mbogua then sold his 4 acres comprised in the title to the appellant for a total of Shs.1,000/= which the appellant paid to Mbogua. Mbogua then showed the appellant the boundary of the 4 acres which was marked with trees in the presence of Silas Thimba Ngekenya. That was on 11th November, 1964. Later the appellant planted 20,000 tea bushes on the portion he bought, the last lot having been planted in 1978. Both Mbogua and Silas Thimba Ngekenya did not claim the land from appellant until 1973 when Silas Thimba Ngekenya filed suit against appellant which suit he did not pursue.

The first defendant filed a replying affidavit sworn on 16th July, 1993.He also gave evidence. His case, in brief, is that he purchased 8.4 acres for Shs.650,000/= from Silas Thimba Ngekenya on 13th April, 1993 without knowing the plaintiff's claim to the land and is therefore a purchaser for valuable consideration without notice of any prior claim.

The second defendant filed a replying affidavit sworn on 5th October, 1993. He deponed in the affidavit, inter alia, that the plaintiff entered into the suit land first in 1957 but the 2nd defendant evicted him; that the plaintiff returned to the land in 1963 to cut down trees sold to him by Mbogua Ngekenya, deponent's step brother, after which he was chased away; that the plaintiff returned to the land in 1967; that he had filed several suits against the plaintiff to have him removed namely, H.C.C.C. NO. 4030/1973; D.M.C.C. NO. 63/1977; H.C.C.C. NO. 2552/1982 and that the plaintiffs claim to the land by adverse possession has been extinguished by the numerous attempts to evict the plaintiff. The second defendant died in July, 1998 and his widow Wangari Thimba was made a party to the suit in his place on 2nd March, 1999. (But two ladies attended the hearing of the suit).

Mr. Muhoro, the advocate who appeared for them claimed that both were widows of the deceased, the 2nd defendant. Mr. Muhoro called Mary Wangechi Thimba as a witness. Mary Wangechi Thimba

testified, inter alia, that she got married in 1966; that the suit land which was registered in the name of her husband originally belonged to Ngekenya – father of her husband; that Ngekenya had three wives; that Mbogua Ngekenya was son of one of the three wives of Ngekenya; that the land was family land; that Mbogua Ngekenya owned a portion of the suit land which he sold to Mbogua Njuguna (plaintiff); that the plaintiff planted tea bushes on that land in about 1980 and that her husband sold 8.4 acres to Elijah Mburu Wanyoike.

The appellant's claim against the respondents was based on adverse possession. By ***section 7*** of the Limitation of Actions Act, an action may not be brought to recover land after end of 12 years from the date on which the right of action accrued to him. By ***Section 17***, of the same Act, at the expiry of that period of 12 years, the title of the person who ought to have brought an action to recover land is extinguished – subject to ***Section 18*** which deals with equitable interests. By ***Section 38(1)***, a person who claims to have been entitled by adverse possession to land may apply to the High Court for an order that he be registered as proprietor of the land in place of the registered proprietor. By ***Section 30(f)*** of the Registered Land Act, all registered land is subject, inter alia, to rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and such right is an overriding interest. A title by adverse possession can be acquired under the Limitations of Actions Act to part of the parcel of land to which the owner holds title – see **Githu v. Ndeete** [1984] KLR 776 at page 780 paragraph 25.

The main issue at the trial as between the appellant and the registered proprietor (2nd defendant) was whether the appellant was in continuous, uninterrupted and exclusive possession of the 4 acres claimed, and, if so, whether he was in possession as licensee or as adverse possessor. The appellant contended that he was in continuous possession of 4 acres as an adverse possessor from 11th November, 1964 when he was shown the boundaries of the four acres and had not been dispossessed as at the time of filing the suit. On the other hand, 2nd respondent contended that the appellant was in possession of the land with the permission of Mbogua Ngekenya and Silas Thimba Ngekenya until 1993. Mr. Muhoro for the 2nd respondent submitted before us that the appellants possession was consensual and adverse possession, if any, could only have started in 1983 as his application for registration of a caution made in 1983 indicated his interest in the land as that of a licensee. Mr. Muhoro submitted, therefore, that by 4th June, 1993 when the originating summons was filed the appellant had been in adverse possession of the suit land for 10 years.

The learned Judge relied heavily on the fact that in an application for registration of the caution made in 1983 the appellant had shown that his interest in the land was that of a licensee and on the fact that the caution was registered on 11th July, 1983 on the basis that appellant was a licensee. The learned Judge found the appellant's application for registration of a caution as legally binding upon him and concluded thus:

> ***"In short since by 11 th July, 1983 the plaintiff was on the suit land as a licensee with consent of the registered proprietor, then even if that date is taken as the date on which the period of 12 years pr escription stated running (which from the facts here cannot be), then by the date this suit was filed on 3 rd June, 1993 the period of 12 years had not matured and therefore this suit would have been incompetent whether the prescription period started runni ng from 11 th July, 1983 or from a date thereafter".***

The appellant complains in the first ground of appeal that the finding that the appellant was occupying the land as a licensee is against the weight of evidence.

With due respect to the learned trial Judge, we do not think that the use of the word "licensee" in the application for registration for a caution was decisive of the character of the appellant's possession before 23rd June, 1983. There was no evidence that it was the appellant who wrote that word in the form or that he understood the meaning of the word. He was not cross-examined as to what the word means. The word "licensee" is a legal term and a layman may not know its technical meaning. Moreover, the word "licensee" does not appear in the appellant's statutory declaration in which the appellant declared as follows:

1. "That I have planted tea plantation 5,000 .. 1970 which cost me Shs.5,000.

2. That the present value of the tea plantation is Shs.50,000/=.

3. That I have been using the said land sinc e 1964 over 12 years ago.

4. That the registered owner of Gatamaiyu/Gachoire/460 Mr.

Thimba Ngekenya gave me the consent to use the said land."

Those averments particularly No. 1, 2,3 do not depict the appellant as a "licensee" but a person with a substantial interest in the land having developed and occupied the land for over 12 years.

There was uncontroverted evidence that appellant has been in continuous, uninterrupted and exclusive possession of the whole land from 1958 and was still in possession in 1993 when he filed the suit. That is a period of over 30 years. He confessed that his first entry into the land in 1958 was with the consent of the two brothers. His claim was only to 4 acres which, according to him, he has exclusively occupied and developed since 1964 after Mbogua Ngekenya sold the 4 acres to him which sale became null and void. The 2nd defendant (deceased) did not in his replying affidavit sworn on 5.10.93 deny that his step brother in fact sold 4 acres from the land to the appellant but he deponed that Mbugua Ngekenya had in fact sold trees in the land to the appellant in 1964. Mary Wangechi Thimba, the widow of the 2nd defendant (deceased) admitted that the land registered in the name of her deceased husband was family land and that Mbogua Ngekenya owned a portion of it which he sold to the appellant and that the appellant planted tea in the land in 1980.The first respondent also admitted that when he bought the land the appellant was cultivating about 2-3 acres and that there was mature tea which must have been there for several years.If what the 2nd defendant (deceased) deponed in his affidavit that he had made numerous attempts to evict the appellant since 1963 is true, then it follows that the appellant has not occupied the land all through with the consent of the second defendant. Further, if what Mary Wangechi Thimba says is true that her husband used to stop appellant from planting tea on the land but the appellant claimed the land as his and that he threatened to cut 2nd defendant with a panga then that is evidence that appellant was in adverse possession of the land at least from 1980.

The learned trial Judge considered at length whether the deceased was registered as trustee for Mbogua Ngekenya in respect of the 4 acres and whether in fact there was a valid sale of the four acres to the appellant in view of the provisions of the Land Control Act. In our view, all that, with respect, was irrelevant to the issue whether or not the appellant had acquired the 4 acres of land by adverse possession. The appellant was not claiming the land through a contract of sale. All he was saying was that he was put in exclusive possession of the 4 acres through a contract of sale which was not specifically performed and since then his possession of the 4 acres was adverse to the right of the registered owner.

The provisions of the Land Control Act apply where there is a claim of title to agricultural land based on an agreement being a transaction or dealing in land and not where the claim is based on the operation of the law such as by adverse possession and where an abortive sale of agricultural land due to non compliance with land control law, the limitation period for purposes of adverse possession begins to run on the day the claimant is put in possession and not the last day when the application for consent of the Land Control Board should have been made – see ***Public Trustee v Wanduru*** [1984] KLR 314. Applying that authority to this case, the period of 12 years begun to run on 11th November, 1964 when appellant was shown the boundaries of the 4 acres and thereby put in exclusive possession of the four acres.

There was sufficient evidence in this case that the appellant was in adverse possession of the 4 acres from 11th November, 1964. Time ceases to run under the Limitation of Actions Act either when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor – see ***Githu v. Ndeete*** (supra) at page 780 paras. 1 – 5. In this case, there was no concrete or sufficient evidence that the 2nd defendant (deceased) asserted his rights to the 4 acres or dispossessed the appellant. In this case, the learned trial Judge recognized that the evidence relating to the legal proceedings was defficient when he observed that:-

"At the time of writing this judgment I have the feeling that the case for the second defendant was not handled with sufficient keenness as it is apparent that some evidence which may have been useful was not brought out. I have just stated that although Mary Wangechi Thimba stated in her evidence that there were attempts by her deceased husband to stop the plaintiff from continuing to work on the suit piece of land, that lady was not asked to e laborate and nothing was produced. Case numbers were mentioned in pleadings but I have heard nothing about them. I have also indicated my difficulty in reconciling Mary Wangechi Thimba's inconsistent statement."

The learned trial Judge was persuaded that there was no interim injunction in existence by 16.12.93 when the land was partitioned. That is not the correct state of the record for it is clear that on 7th October, 1993, Couldrey J., extended the interim orders until further orders. Those orders were operational until further orders were given on 7th March, 1994. Further, it is not correct as the learned Judge found that there was no evidence defining the exact part of the suit land the 4 acres lie.The appellant testified that the boundary of the 4 acres is marked by trees and that he has planted 20,000 tea bushes on the portion of 4 acres. The first respondent agrees that the tea was partly on what now parcel No. Gatamaiyu/Gachoire/1099 and partly on parcel No. Gatamiyu/Gachoire/1100. The portion of the 4 acres is identifiable and is definite as to area and time.

Lastly, the learned Judge was of the view that an order that the appellant was entitled to 4 acres by adverse possession would create problems in executing it "especially where the original parcel of land No.460 has been partitioned into portions with two different numbers 1099 and 1100."

When the suit was filed the two respondents had been registered as tenants in common in unequal shares vide the entry dated 12th April, 1993 of land Title No.Gatamaiyu/Gachoire/460. The suit land was partitioned on 16th December, 1993 when this suit was pending and when an order of injunction restraining alienation was subsisting. All the interim orders of injunction had been made in the presence of the respective advocates for the parties. The first respondent who caused the land to be sub-divided was aware of the interim orders of injunction for he stated on cross-examination by Mr. Akhaabi for appellant that:

"When this suit was filed the land wa s still 460. I caused it to be sub -divided after that. I was aware that there was an order to preserve that property as at June 1993. True I went ahead to have it sub -divided but I did that on the advice of my advocate."

Apparently, the respondents caused the suit land to be partitioned when litigation was pending in the superior court and in breach of the order of injunction in order to impede the course of justice by making it more difficult to enforce the orders the superior court could have made if it had allowed the appellant's claim. The respondent's action was illegal and had the superior court allowed the appellant's claim, it had jurisdiction to enforce the order of injunction by revoking the partitions and restoring the register of the suit land to the state prevailing at the time the suit was filed in order to give efficacy to its orders.

For the foregoing reasons, we are satisfied that the appellant proved that he was entitled to 4 acres out of the suit land by adverse possession. We would allow the appeal, set aside the decree of the superior court and substitute therefore the following orders:

1. The partition of land parcel No. Gatamaiyu/Gachoire/460 into two parcels namely, Gatamaiyu/Gachoire/1099 and Gatamaiyu/Gachoire/1100 registered on 16th December 1993 be and is hereby revoked.

2. The register of land title No. Gatamaiyu/Gachoire/460 as it existed before 16th December, 1993 including entry No. 4 dated 12th April, 1993 is restored.

3. The appellants suit is allowed and the orders sought in the Originating Summons granted with costs in the superior court and in this Court to the appellant.

Dated and delivered at Nairobi this 20th day of February, 2004.

R. S. C. OMOLO

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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