IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:OMOLO, GITHINJI JJ A & ONYANGO-OTIENO AG JA)

CIVIL APPEAL NO. 35 OF 2002

BETWEEN

TITUS MUTUKU KASUVE..... APPELLANT

AND

1. **MWAANI INVESTMENTS LIMITED**
2. **MWAANI ENTERPRISES LIMITED**
3. **GEORGE MATATA NDOLO**
4. **ROSE NDOLO**
5. **SILA MUSYIMI NDOLO..... RESPONDENTS**

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Mr Justice Osiemo) dated 6th day of September, 2001 in Miscellaneous Application No 108 of 2001 (OS))

JUDGMENT OF THE COURT

This is an appeal from the judgment of the Superior Court (Osiemo, J) by which the appellant's claim to two portions of land measuring 40 acres and 20 acres respectively by way of adverse possession was dismissed with costs and appellant ordered to vacate the suit lands within six months of the date of the judgment.

The appellant's suit was brought by way of originating summons as required by law and was filed in the Superior Court on 7th February, 2001. The originating summons was mainly founded on section 38 of the Limitation of Actions Act. The appellant sought several reliefs including declarations but the relevant questions that the appellant asked the Court to determine included (in appellant's own words):

"1. Whether the plaintiff's occupation of LR No 1756 and LR 1757 now partly registered on LR No 1756/7; LR 1757/8 and LR 1757/5 since 1984 amounts to adverse possession.

2. Whether or not the plaintiff has been in occupation and in possession of the suit premises for a period of over 12 years uninterrupted by defendants.

3. Whether the sub-division of the said parcels of land is valid and further whether the said new titles subsequently issued to the defendants are valid.

4. Whether or not the plaintiff has acquired registrable interest in the portion of land measuring fourty (40) and a further twenty (20) acres by way of adverse possession.

5. Whether or not plaintiffs claim for adverse possession has been extinguished by transfer by 3rd, 4th and 5th defendants of the parcels of land known as LR No 1756/ 7; LR 1756/8 and LR No 1757/5 to the 1st and 2nd defendants.

6. Whether or not the plaintiff is entitled to a peaceful use and enjoyment of the said portion of land measuring fourty (40) and extra (20) acres included in the parcels of land registered as LR No 1756/7; LR No 1756/8 and LR No 1757/5".

The originating summons was supported by the affidavit of the appellant and documents annexed as exhibits. Mr John Ngugi – a director of the first respondent filed a replying affidavit on behalf of the first respondent while Mr Benjamin Kipronoh filed a replying affidavit on behalf of the second respondent. The third respondent George Matata Ndolo also filed a replying affidavit. No oral testimony was given in the trial as the parties, by a consent order made on 3rd April, 2001, agreed that the suit do proceed by way of affidavits.

Since the appellant did not give oral evidence at the trial we reproduce here below paragraphs 2, 3, 4, 5 and 6 of the appellants affidavit which formed the basis of his claim to the land by adverse possession:

"2. That in March 1984 I purchased forty (sic) (40) acres of land at an agreed price of Kshs 160,000/= from the late Josiah Salvinus Kaumbulu and a company known as Kiou Hill Ranching Farm Ltd whose major shareholder and director was the late Salvinus Kaumbulu and a further twenty (20) acres in September, 1992 and paid the total purchase price and before a formal agreement could be drawn, the late Josiah Salvinus Kaumbulu died (annexed hereto are the payment receipts marked "TMK 1".)

3. That the land which was sold to me was stated to be part of LR No 1756 and 1757 then registered in the name of the late Major General Musyimi L Ndolo who was alive then and which had been sold to the late Salvinus Kaumbulu by the said Major General Musyimi L Ndolo.

4. That since March, 1984 other people and I have been in occupation and possession of the said forty (sic) and twenty acres uninterrupted by any one and most of them have made the following developments:

(a) I have in my case fenced the entire forty (sic) (40) and a further twenty acres of land with barbed wire and wooden posts.

(b) I have planted indigenous trees.

(c) I have planted exotic trees.

(d) I have planted various vegetables and fruits.

(e) I have planted beans, maize and other crops.

(f) I have always cultivated both parcels of land uninterrupted.

5. That from 1984 I have lived as a neighbour of the family of the late Major General J Ndolo and in particular the 3rd and 4th defendants herein and have been in possession and occupation openly and further that as a result of Court orders issued under HCCC No 504 of 1988 I bought 20 more acres from the said Kaumbulu family which I request this Honourable Court to order the Registrar of Titles to register in my name.

6. That at no material time has my peaceful use and enjoyment of the forty (sic) (40) or the extra twenty (20) acres been interrupted or interfered with by the defendants collectively or severally nor by other person claiming under the defendants indeed by the family of the late Major General Joseph M L Ndolo or the administrator or administratrix of the estate".

Documents produced in the Superior Court show that Major General Joseph Musyimi Ndolo (hereinafter referred to as Ndolo) died on 6th April, 1984 while the late Josiah Salvinus Kaumbulu (referred to hereinafter as Kaumbulu) died on 18th August, 1990. Ndolo died testate leaving a will in which his wife Elizabeth Kamene Ndolo was named as the executratrix. A succession cause No 106 of 1985 was filed in the High Court in 1985 in respect of his estate which gave rise to Civil Appeal No 128 of 1995. The vesting orders annexed to the appellant's affidavit show that Ndolo owned Mwani Ranch comprising of LR No 1756 measuring 1826 hectares (4313 acres) and LR No 1757 measuring 1840 hectares (4548 acres) - total 9009, (according to the vesting order) acres excluding land set aside as road reserves. The Court of Appeal ultimately distributed the estate on 10th May, 1996 among the three houses giving Elizabeth Kamene Ndolo 40% of the ranch; Rose M Ndolo and Matata Ndolo 30% of the ranch and Justin Kasimu Ndolo and Silas Ndolo 30% of the ranch.

The ranch was accordingly sub-divided and new certificates of title issued on 4th October, 1996 as follows; LR No 1757/6 – Elizabeth Kamene Ndolo – 1296 hectares; Joseph Musyimi Lele Ndolo – LR No 1756/7 – 404 hectares; Rose M Ndolo and George Matata Ndolo – LR No 1757/5 – 533 hectares.

It appears from the affidavit of Benjamin Kipronoh aforesaid that there was another sub-division being LR No 1756/8 registered in the name of the second respondent.

The documents also show that Kaumbulu died intestate and grant of letters of administration was given to his widow Bertha May Kaumbulu and son Jerome Mwathi Kaumbulu which grant was confirmed on 16th April, 1991. Section 38(1) of the Limitation of Actions Act chapter 22 Laws of Kenya authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa* (No 2) [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see *Githu v Ndeete* [1984] KLR 776).

The appellant claims that he is entitled to two portions of land measuring 40 acres and 20 acres respectively by adverse possession. His claim to the twenty acre portion presents no difficulty and it is convenient to deal with it first. Mr Kamau Karori, learned counsel for the 3rd, 4th and 5th respondents submitted that the claim to 20 acres by adverse possession is misplaced as 12 years had not elapsed since the agreement for the sale of the twenty acres was entered into on 10th September, 1992. It is clear from paragraph 2 of the affidavit of the appellant sworn on 5th February, 2001 to support the originating summons that he claims to have bought the twenty acres in 1992. He annexed a sale agreement made on 10th September, 1992 between him and Jerome Mwathi Kaumbulu – one of the two administrators of the estate of Kaumbulu. That sale agreement shows, among other things, that the 20 acres were to be excised from parcels Nos 1756 and 1757 and boundaries marked before the appellant could take possession.

According to the sale agreement the purchase price was Shs 160,000/= out of which a deposit of Shs 60,000/= had been paid and the balance was to be paid by monthly instalments of Shs 20,000/= with effect from 1st October, 1992. The sale agreement further shows that the sale was subject to the consent of the Land Control Board. The appellant does not say in his affidavit that the 20 acres were in fact excised from the rest of the land and boundaries fixed or that he was put in possession of the twenty acres.

The registered owner of the two parcels of land was the late Ndolo who had died in 1985 a year after the alleged agreement and his estate had not been distributed by 10th September, 1992. It is thus improbable that the twenty acres were excised and boundaries fixed before the suit was filed. More importantly, by

7th February, 2001 when the originating summons was filed, only eight months had elapsed since the date of the alleged sale agreement. It follows that if the appellant was put in possession of the twenty acres after the execution of the sale agreement then he had not been in possession of the 20 acres for 12 years by the time he filed the originating summons. His claim to twenty acres by adverse possession was therefore premature and unmaintainable.

The learned trial judge rejected the appellant's claim to the land by adverse possession for several reasons, the main reason being that the appellant had entered into the land through an agreement of sale and therefore with the permission of the other people who are not the respondents. The learned judge said in part:

"In this case the applicant state that he derived his occupation from person who he considered the true owners of the said land. And even assuming that his claim of adverse possession was against the late Major General Ndolo who was then registered as proprietor, the same would have been founded on agreement. That being the case then as per the aforesaid authority, it follows that the applicant's occupation of the suit land he claims possession of it with permission)."

The learned judge found among other things, that the appellant's claim would have failed for uncertainity as the appellant had not shown that the portions he was claiming were clearly demarcated and the title of each; that the appellant should have made his claim in the Succession Cause No 106 of 1985 and that it was too late to make a claim against the estate when the Court of Appeal had already distributed the estate.

The appellant appeals from the decision of the Superior Court on several grounds. In our view, grounds Nos 6, 9 and 10 which we quote below correctly summarize the substance of the appeal thus:

"6. The learned judge erred in holding that the appellant ought to have filed claim within the Succession Cause No 106 of 1988 yet the provisions relating to claim of adverse possession are provided for in the Civil Procedure Act and Limitation of Actions Act and not the Law of Succession Act.

9. The learned judge erred in finding that the appellants claim for adverse possession was based on agreement when no facts were before him to hold.

10. The learned judge erred in finding that the appellant had not specifically identified the parcel of land that was claiming."

We have given due consideration to the submissions by the respective counsels. The appellant claims to have purchased fourty acres at an agreed price of Shs 160,000/= from the late Kaumbulu and a company called Kiou Hill Ranching Farm Ltd. The appellant further deposes that the land which was sold to him was then registered in the name of Ndolo who had sold the land to Kaumbulu. There was nothing to prove that Ndolo had infact sold land title LR Nos 1756 and 1757 to Kaumbulu or to Kiou Hill Ranching Farm Ltd. George Matata Ndolo (3rd respondent) deposes in the replying affidavit that the late Kaumbulu was not a purchaser but a lessee. He annexed a lease dated 20th February, 1982 which shows that Ndolo leased land titles LR Nos 1756 and 1757 to Kaumbulu for 8 years at an annual rent of Shs 100,000/=. He further deposes that upon the death of Kaumbulu the administrators of his estate did not claim that land parcels No 1756 and 1757 belonged to his estate. The documents relating to High Court Succession Cause No 1269/90 which concerned the estate of Kaumbulu indeed show that land titles Nos LR 1756 and 1757 were not included as part of his estate.

Further, there is no evidence that the administrators of the estate of Kaumbulu have laid any claim to the two parcels of land. It is thus clear that Kaumbulu had no registrable interest in land title LR No 1756 and 1757 which he could have sold to the appellant. It is not therefore factually correct to say that the appellant entered into the suit land through a sale agreement. The appellant annexed a receipt dated 21st March, 1984 as evidence that he had bought fourty acres. That receipt does not however support his claim for it shows that the receipt was for Shs 160,000/= issued by Kiou Hill Ranching Farm Ltd being payment for twenty (20) acres. John Ngugi deposes in his replying affidavit that Kaumbulu was a tenant of the suit

premises and that the appellant was a servant or agent of Kaumbulu. Mr Kamau Karori submitted that the fact that Kaumbulu entered into the land as a lessee and that the appellant was his servant were never rebutted by the appellant. That is correct. The appellant did not file a replying affidavit to rebut John Ngugi's affidavit evidence. Since there is no credible evidence of sale of land to Kaumbulu by the late Ndolo the affidavit of George Matata Ndolo and John Ngugi that Kaumbulu took possession of the land in pursuance of a lease agreement is more probable than the affidavit evidence of the appellant that he entered into the land through a sale agreement.

Indeed, Miss Chelengat for the appellant agreed with that in her replying submission for she said in part:

"Even after the expiry of the lease the appellant continued occupying the land and is still in occupation. The lease was for 8 years from 1982."

The appellant is claiming possession through Kaumbulu. The 8 years lease would have expired on or about 20th January, 1990. If the appellant continued in possession thereafter then by 7th February, 2001 when he filed the suit he would have been in adverse possession for 11 years since the lease expired which is less than the 12 years statutory minimum.

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3 D(2) of order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons. In this case, the appellant did not annex the certified extracts of land title LR Nos 1756 and 1757 before the sub-division or even after the sub-division. What he annexed were copies of certificates of titles for the sub-divisions LR Nos 1757/5; 1757/6 and 1756/7 all issued on 4th October, 1996. He did not annex any document of title relating to LR No 1756/8. Mr George Matata Ndolo deposes in paragraph 25 of the affidavit sworn on 29th March, 2001 that the suit properties are already charged to banks and that the rights of the banks have been registered against the titles.

The burden was on the appellant to produce the certified extracts of title in respect of the suit properties. In the absence of the extracts of title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted. Moreover, the appellant did not prove the location of the distinct portion of the land he is claiming or its acreage. He does not say whether the portion he is claiming was comprised in the original title LR No 1756 or LR No 1757. He does not further say whether the portion of the land he is claiming is comprised in now LR No 1757/5, 1757/6, 1756/7 or 1756/ 8. Evidently, two original titles LR Nos 1756 and 1757 comprising of Mwani Ranch and even the four sub-divisions are expansive and it is difficult to locate the portion claimed by the appellant. There is no evidence that the alleged fourty acres were surveyed, demarcated and excised from the expansive ranch. In paragraph 4 of the supporting affidavit the appellant deposes that he and other people have been in possession of the fourty and twenty acres thereby implying that he is not in exclusive possession of the land he claims.

In the circumstances, there was no concrete evidence that appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres.

It is true as the documents show that the estate of the late Ndolo was distributed to the beneficiaries by the Court of Appeal in 1996. The dispute had been pending in Court since 1985 when succession cause no 106 of 1985 was filed. The appellant claims to have been in adverse possession of the suit lands since 1984. The vesting order shows that the decision of the Superior Court was given on 15th October, 1993. By then the 12 years had not expired. The appellant is right that he could not have made a claim for adverse possession in the succession cause as it was premature. Neverthless, the suit for adverse possession of the land was not filed against the estate of the late Ndolo. The suit is against two companies and three beneficiaries. The appellant deposes in paragraph 9 of the supporting affidavit, in part thus:

"and further I have discovered for the first time that the 2nd and 3rd defendants had excised out LR No 1756/8 out LR No 1756 and caused the same to be registered in joint names of the defendants and further proceeded to transfer their title to the 1st and 2nd defendant companies in which they hold all the shares

and are directors with the purpose to defeat my claim and are further proceeding to change the title".

The appellant did not produce any documents to show that the first and 2nd respondents are registered in respect of any of the four sub-divisions and the averments above remain unsubstantiated. Hence the appellant did not establish any cause of action against the first and second respondents. The 3rd, 4th and 5th respondents are beneficiaries of the estate of Ndolo who got the land through a judgment of the Court. They are not the administrators of the estate. Elizabeth Kamene Ndolo who got the bigger share of the ranch and who was the excutratrix of the estate of Ndolo was not made a defendant.

In our view, the proper defendant to the plaintiff's claim should have been the estate of Ndolo through the executratrix of the will and not the beneficiaries. The appellant filed the suit after the estate left the hands of the excutratrix and after the administration of the estate had been wound up. In our view, the suit to recover land by adverse possession was not maintainable against some of the beneficiaries of the estate of Ndolo.

For the foregoing reasons, the appeal has no merit and it is dismissed with costs both in this Court and in the Superior Court.

Dated and delivered at Nairobi this 12th day of March, 2004.

R. S.C.OMOLO

.....

JUDGE OF APPEAL

E. M. GITHINJI

.....

JUDGE OF APPEAL

J. W.ONYANGO OTIENO

.....

AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR