IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KWACH, TUNOI & SHAH JJ A)

CIVIL APPLICATION NO NAI 231 OF 1999

NJUGUNA NDATHO..............................APPELLANT

AND

MAASAI ITUMO ....RESPONDENT

MATEO ....RESPONDENT

NGULI KYALO.....................................RESPONDENT

(Appeal from the Judgment and decree of the High Court at Nakuru (Rimita J) dated 5th May, 1998)

JUDGMENT OF THE COURT

The appellant, *Njuguna Ndatho,* is registered as proprietor of two parcels of land known as LR/Subukia/10474 and LR/Subukia/6718 situate at Subukia in Nakuru District in the Rift Valley Province. Parcel No. 10474 was granted unto one Thomas Frederick John Thomson on 28th day of May, 1960. Thomson died and his estate transferred the said title to Kuria Kinyajui, Gitau Githumbi and Njuguna Ndatho as tenants in common in equal shares on 22nd August, 1973. Parcel No. 6718 aforementioned was transferred to the same three gentlemen on 22nd August, 1973. From the certificates of title in the record of this appeal it is not clear when the **a**ppellant became the sole proprietor of the said two parcels of land but according to the appellant he became the sole proprietor thereof on 2nd December, 1986. When the three of them entered the parcels of land in question on 1st April, 1973 they found the three respondents Maasai Itumo, Mateo and Nguli Kyalo on the land. According to the appellant the respondents were found to be occupying some 20 acres out of the 556 acres of the land. We will refer to the said 20 acres as “the suit land” hereinafter. The fact that the respondents were occupying 20 out of 556 acres came out in evidence. The plaint which was filed in the superior court on 16th November, 1988 did not disclose this fact. It was by this plaint that the appellant sought, legally for the first time, eviction of the respondents from the suit land. The appellant’s evidence in the Superior Court goes as follows:

> “They have entered my land. They were found there in June, 1973. My land is 556 acres. The defendants were occupying about 20 acres of the land. The surveyor found that. The surveyor brought a report to court. I asked the overseer to tell the defendants to move out. He was one Mbugua. He is now deceased. I sent him by word of mouth and also wrote letters to them.
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> I later sent Karanja Njoroge. He was employed in 1977. I sent him to ask them to move out. We have ten copies of letters sent to the defendants. (Letters produced in a bundle of 10 and marked exhibit 2(1)(x)).

> The first letter was written on 1st June, 1973. The last notice was written in 1978. The three were saying that they were on their land. They said that they were disturbing them for nothing. They insisted that they were on Kalenjin Enterprise land."

It becomes clear, therefore, that according to the appellant himself the respondents were in occupation of suit land since June, 1973. There is nothing to suggest that the respondents' occupation of the suit land was not known to the appellant. It is clear that the possession was adverse to the interests of the appellant.

However, the appellant's sequence of events is somewhat awry. He wrote, allegedly, ten letters in five years telling the respondents to quit and vacate the suit land. He did not however send a surveyor until 4th January 1996 and that, too, was as a result of an order of the Superior Court issued on 20th September, 1995. The surveyor, Eliakam Washington Olweny (PW3) concluded that the respondents were occupying the land belonging to the appellant and had built three separate homes on the two parcels of land. It appears that the three respondents were allocated land on a parcel of land belonging to Kalenjin Enterprises, which parcel is adjacent to the appellant's parcels of land. Whatever the position may be there is no doubt that the respondents were occupying the appellant's land. Robert Bundotich (PW4) confirmed that the respondents entered the wrong parcel of land.

It is not clear, from the evidence, whether or not the respondents received ten letters from the appellants asking them to vacate the suit land. They admit receiving only one letter, but it is not clear which one. The position is that except for writing letters the appellant did nothing for 10 years. By a letter dated 24th November, 1983 the Assistant Chief of Subukia West Sub-Location called upon the appellant to sort out the "tug" between his farm and Simboiyon Farm. This letter does not refer to the respondents.

Eventually the appellant referred the matter to the office of the District Officer, Mbogoini Division, Subukia. On 18th September, 1987 the District Officer ruled that the three respondents should vacate the suit land. The proceedings before the said District Officer were totally misconceived. He had no jurisdiction to adjudicate on the issue. The respondents did not appear before him. He requested his District Officer to write to a magistrate's court for issuance of an eviction order. The appellant was obviously saying that he made attempts to obtain possession of the suit land from the respondent.

For the defence of adverse possession to succeed, the possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor. These requirements are fulfilled in relation to the possession of and by the respondents. The learned judge found as follows:

> "According to the plaintiff the occupation by the defendants was interrupted because he sent PW 2 Johana Karanja to ask the defendants to move out. Karanja also delivered notices to the defendants to quit. According to Karanja, the defendants did not comply. At times they said that they, did not wish to see him or that they did not want to be disturbed.
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> Be it as it may, there is no evidence that the defendant at any time during the tussle acknowledged the plaintiff's title or gave possession to the plaintiff. I do not think that it was enough for the plaintiff or his agent PW2 Karanja to go and request the defendants to move out as the land did not belong to them. There was no resumption of possession by the plaintiff since the land was occupied by the defendants. Letters by the chief to the defendants in my view, did not change the position. The *ex-parte* hearing before the Local DO had no legal standing. The matter had not been referred to him by the Court. He was snubbed by the defendants. His findings did not change the position in law."

Mr.Kahiga who appeared for the appellant took issue with the learned judge's findings. It is for us a matter of lament that neither counsel served us properly. Neither of them referred to any authorities on the important issue as regards when the time stops running. In other words when does the possession cease to be adverse? This court in the case of *Wambugu vs Njuguna* [1983] KLR 172 referred to the case of *Wallis Cayton Bay Holiday Camp Ltd vs Shell Mex and BP Ltd* [1975] QB 94 with approval and cited the

following passage therefrom:

> "The next question, therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh vs Jack (1879) 5 Ex D 264 said at 273, that to defeat a title by dispossessing the former owner 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it."

In this case it is quite obvious that the possession of the respondents since 1973 was open, uninterrupted and adverse to the title of the appellant. Yet the appellant took no active step to evict the respondents lawfully. Mere writing of letters does not, in our view, interfere with the possession of the respondents. He moreover took wrong steps. He caused the respondents to be charged with the offence of trespass after the expiry of the twelve year period. The respondents were acquitted. He went to a wrong forum thereafter - namely the District Officer. By then the twelve year period, by any reckoning had run out. That being the case the respondents were perfectly entitled to invoke the defence of time-bar when the appellant sued them for vacant possession. The appellant's title to the suit land stood extinguished. The respondents quite ligitimately used these factors in their defence. The earlier steps taken by the appellant did not interrupt the possession of the respondents.

The position in Kenya as regards when the time would stop running against an adverse possessor has been amply set out. In the case of *William Gatuhi Murathe vs. Gakuru Gathimbi* (Civil Appeal No. 49 of 1996) (unreported) this Court followed the decision in the case of *Joseph Gahumi Kiritu vs Lawrence Munyambu Kabura* (Civil Appeal No. 20 of 1993) (unreported) which reviewed previous judgments of this Court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to land by adverse possession. We would set out the following excerpt from the judgment of Kwach JA in *Kiritu vs Kabura* (supra).

> "The passage from Cheshire's Modern Law of Real property to which Potter JA made reference in *Githua v Ndeete* is important and deserves to be read in full. It is at page 894 Section VI under the rubric the methods by which time may be prevented from running and the learned author says-
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> > "Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.'
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> I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in *Githu v Ndeete*, and which has solid backing in the passage I have read from *Cheshire*. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in *Muthoni v Wanduru* does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. An on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."

The situation as pertinent to Kenyan conditions as regards the methods by which time may be prevented from running is aptly summed up in the *Kiritu* case and followed in the *Murathe* case (supra). It is here that we would wish to add that we can but have a pious hope that advocates would in future prepare their cases properly and be of assistance to the Court. Simply throwing the record at the Court and saying that the trial judge was wrong in what he decided is not at all helpful.

It is quite clear therefore that the initial steps taken by the appellant did not stop the time from running. The later steps to which we have referred were taken more than 12 years after the twelve year period had run out and in any event were wrong steps.

The question that next arises is; were the respondents entitled to invoke the doctrine of adverse possession to claim title to the suit land by way of a counter-claim in the suit? The learned judge, despite the provisions of order XXXVI rule 3D of the Civil Procedure Rules, thought that they could so counter-claim. He did not see any injustice caused to the appellant in the circumstances. This Court has on several occasions held that title by adverse possession is to be sought by way of an originating summons under order XXXVI rule 3D of the Civil Procedure Rules. The claim for title by virtue of adverse possession by way of a cross-claim in a suit was in this case misconceived.

The sum total of all that we have said is that this appeal is allowed to the extent that orders made on the cross-claim (counter-claim) are set aside. However the defence of limitation succeeds and the appellant's suit in the High Court stands dismissed with costs. The respondents may take such action to obtain title as they may be advised. In all the circumstances we make no order as to the costs of this appeal and the order for costs in the Superior Court in favour of the respondents on the counter-claim is set aside. These then are our orders.

Dated and delivered at Nakuru this 18th day of October, 2002

R.O KWACH

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL