



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, BOSIRE & OWUOR, J.J.A)

CIVIL APPEAL NO. 124 OF 2000

BETWEEN

1. GEORGE MWANGI KARANJA

2. PETER NDEGWA KAMONDEAPPELLANTS

AND

NELIUS WAIRIMU KIUNJURIRESPONDENT

(Appeal from the judgment of the High Court of Kenya at

Nairobi (Justice Mbito) dated 1st November, 1996

in

H.C.C.C. NO.3945 OF 1989

JUDGMENT OF THE COURT

This is an appeal from the decree of the superior court given on 1st November, 1996, by Mbito J., in its Civil Case No.3945 of 1989. The suit was commenced by plaint, by Nelius Wairimu Kiunjiri, the respondent in the appeal, and therein she named George Mwangi Karanja and Peter Ndegwa Kamonde, the appellants, as defendants. The respondent's claim in that suit was basically for an order that she had become entitled by adverse possession to parcels of land known as LOC.10/Kahuti/2664 and LOC.10/Kahuti/2665.

Order IV rule 1 of the Civil Procedure Rules enacts that every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed. The respondent's suit was based on the provisions of section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya and applications made pursuant to that provision must be made as provided under Order 36 rule 3D(1) of the aforesaid rules, which provides that:

"An application under section 38 of the Limitation of Actions Act shall be made by Originating Summons."

The respondent's suit having not been commenced in that manner it follows that it was made in contravention of the clear provisions of the law and was therefore incompetent. Whatever was done

pursuant to the suit was a nullity. This fact was drawn to the attention of the learned trial Judge in written submissions which were submitted to him on behalf of the appellants, but nowhere in his judgment has he made any mention of the fact that notwithstanding submissions made to us by Mr. Kamwendwa for the respondent that we invoke inherent jurisdiction to cure the defect this being a jurisdictional matter there is nothing we can possibly do to rectify the defect. The defect goes to the root of the matter and renders all that was done a nullity.

The order that therefore commends itself to us is that we allow the appeal, set aside the judgment and decree given on 1st November, 1996, and substitute therefor, an order striking out the suit as incompetent, but we make no order as to the costs of the suit and of the appeal.

Dated and delivered at Nairobi this 9th day of May, 2001.

J.E. GICHERU

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR