



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, OMOLO, TUNOI, LAKHA & BOSIRE, JJ.A.)

CIVIL APPEAL NO. 304 OF 1997

BETWEEN

SAMUEL NDUNGU GITUAPPELLANT

AND

DANSON NDUNGU 1ST RESPONDENT

MATHEW NGICHABE SISENDA..... 2ND RESPONDENT

MARY MWAYITSI SISENDA..... 3RD RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kakamega

(Hon. Justice B. Tanui) dated 11th July, 1997

in

H.C.C.C. NO. 110 OF 1988 (O.S.))

JUDGMENT OF THE COURT

This appeal concerns the parcel of land No. **Bungoma/Kiminini/302** (the suit property) and is brought by the unsuccessful second defendant from the judgment of the superior court at Kakamega (Tanui, J.) given on 11 July 1997 whereby he declared the plaintiff had acquired the title to the suit property by way of adverse possession and granted all incidental and other reliefs as prayed in the Originating Summons dated 14th March, 1988 .

The history and facts of the case may be briefly stated. The plaintiff claimed that the suit property was allocated to him on *24th September 1965* . He paid **Shs.567/=** and the suit property was registered in the name of the first defendant. The first defendant's right to the suit property was extinguished on *15 December 1977* and thereafter he held the land in trust for him. He said that the transfer by the first

defendant to the second defendant on 19 October 1987 by way of a gift was fraudulent and unlawful and the transfer by the second defendant to the third and fourth defendants on 28 December 1987 was also fraudulent and unlawful.

According to the second defendant, until 19 October 1987 the suit property was registered in the name of **Settlement Fund Trustees**, that in August 1965 the suit property was allocated to him and as he had no approval to hold land, he requested it to be in the name of the first defendant, that the plaintiff had not repaid the loan until he paid it in 1987, that the suit property was registered in the name of the first defendant on 14 October 1987 and that the same was transferred to the second defendant on 19 October 1987, that the same was once again transferred to the third and fourth defendants on 28 December 1987, that the SFT is not subject to Limitation of Actions Act, Cap 22. Judge took place on 22 May 1996, 16 July 1996 and 24 September 1996 when five witnesses gave evidence including the plaintiff and four witnesses for the defendants including the three defendants. He reserved judgment which he did not deliver until 11 July 1997. He held, inter alia, that-

"I therefore do not believe that he (i.e. the plaintiff) was allocated the plot (i.e. the suit property) as he claimed. The truth would appear to be that the second defendant was the one who was allocated the plot No. 302

It is true that the first defendant was first registered as the owner of the plot (i.e. the suit property) on 3 July 1987. Until that date the land was in the name of the Settlement Fund Trustees."

Finally, the learned judge made a critical conclusion in his judgment when he said:-

*"The plaintiff's claim that he had been in exclusive possession of the said parcel of land was therefore not challenged. Earlier on it had been stated that there could not be adverse possession against SFT but the decision in the case of **ELIUD NYONGESA LUSENAKA AND ANOTHER VS. NATHAN WEKESA OMOCHA CIVIL APPEAL NO. 134 OF 1993** the Court of Appeal decided otherwise. In the circumstances I would hold that the plaintiff after 12 years of his exclusive possession of the suit property acquired title to it and the SFT thereafter became his trustee. I reject the claim by the second defendant that the plaintiff was his licensee as he had no interest on the land in question."*

In our judgment, the heart of this appeal lies in the central question as to whether the **Limitations of Actions CAP 22** which gives rise to a claim for adverse possession after expiry of the prescribed period in a case where the property is under the ownership of SFT. The consideration of this matter although difficult is not free from authority. In **BONIFACE OREDO VS. WABOMBA MUKILE CIVIL APPEAL NO. 170 OF 1989** (unreported) delivered in 1992, this Court held that the interest of SFT in the suit is not extinguishable under the **Limitation of Actions Act, CAP 22** of the Laws of Kenya. This matter was explained in detail by Gicheru, J.A. in his judgment when he stated:-

*"Concerning the interest of the Settlement Fund Trustees in the suit plot, **Section 37 of the Limitation of Actions Act, Chapter 22** of the Laws of Kenya where relevant is in the following terms:*

37. This Act applies to land registered under the Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except that - (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act".

Evidently, the appellant was not the registered proprietor of the suit plot. That plot was and still is charged to the Settlement Fund Trustees on account of a 10 years development loan advanced to

the appellant on acceptance of the plot on 9th November, 1965 which has not been repaid. Clearly they have an interest in this plot. That interest is taken care of by the provision of the section set out above since **Section 175 of the Agriculture Act, Chapter 318 of the Laws of Kenya** provides that: -

"175. Notwithstanding anything to the contrary contained in any law relating to limitation, no suit, application or proceeding by the Settlement Fund Trustees shall be rejected or dismissed on the ground only that the suit, application or proceeding is barred by limitation under any such law."

*According to these provisions, the interest of the Settlement Fund Trustees in the suit plot is not extinguishable under the **Limitations** of Actions Act, Chapter 22 of the Laws of Kenya. It was not therefore necessary to join them in the proceedings before the superior court."*

On the other hand, in **ELIUD NYONGESA LUSENAKA AND ANOTHER VS. NATHAN WEKESA OMOCHA CIVIL APPEAL NO. 134 OF 1993** delivered in 1994, the Court decided otherwise.

On this state of authorities, the existence of two conflicting decisions of the Court, in our judgment, raises questions of considerable difficulty which can only be resolved by application of first principles. As was said by this Court in **TRUST BANK LTD. VS. EROS CHEMISTS LTD. & ANOTHER CIVIL APPEAL NO. 133 OF 1999** (unreported) -

"It is, we think, beyond dispute that since the establishment of this Court in 1977 it ceased to hold the position of an intermediate appellate court but became a final Court of Appeal for the sovereign State of Kenya. Its position is analogous to that of the House of Lords. The decisions of the House of Lords upon question of law are normally considered by the House to be binding upon itself, but because too rigid adherence to precedence may lead to injustice in a particular case and unduly restrict the proper development of the law the House will depart from a previous decision when it appears right to do so. So should this Court. For these reasons we are satisfied that as a matter of judicial policy this Court, as the final Court of Appeal for Kenya, while it will normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so."

The next question is whether the decision of this Court in the **Eliud Nyongesa** case was a wrong decision. It is immaterial if the earlier decision had been by a majority (which it was as it was delivered under **rule 32(3)** of the Rules of this Court). We have carefully studied the decision and it appears to us that **Section 37** of the Limitations of Actions Act (CAP. 22) was not considered in this Court in the subsequent case of **Eliud Nyongesa**. Secondly, the **Nyongesa case** itself does not deal with **section 37** of the Limitation of Actions Act itself but confines itself to a consideration of **section 41** of the Limitations Act. In our judgment, therefore, without any hesitation, the decision in the **Nyongesa case** is wrong and we prefer the earlier decision in **Boniface Oredo** as containing a more comprehensive and full analysis of the legal position obtaining on this point.

The final consideration on this issue is whether, having come to the conclusion that this Court is free to depart from its own decision and that the Court's decision in the **Nyongesa case** was wrong, should this Court now give a decision contrary to that given by this Court in **Boniface Oredo**? We have found this matter of the greatest difficulty. The subsequent decision, with respect, is erroneous and surely this Court is not bound to perpetuate an error. It is a recent one and has not acquired the respect and following attributable to age. Moreover, it is unlikely that property rights have been acquired on the basis of the subsequent decision and indeed it is the duty of this Court to rectify an erroneous decision. With considerable hesitancy we have come to the conclusion that this Court should declare, as we hereby do, that the decision of this Court in the **Nyongesa case** is wrong.

That being so since the decision relied upon by the learned judge was erroneous, it follows that this appeal should be allowed, as it hereby is, with costs. The whole of the decree of the superior court given on 11 July 1997 is hereby set aside and substituted by a decree in the following terms:-

(a)The plaintiff's Originating Summons filed in the superior court dated 14 March, 1988 is dismissed with costs.

(b)The transfers of the suit property to and from the defendants are valid and lawful.

The appellant shall have the costs of this appeal and in the Court below paid by the plaintiff.

Dated and delivered at Nairobi this 13th day of July, 2001.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR