



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KWACH, TUNOI & PALL, JJ.A.)

CIVIL APPEAL NO. 19 OF 1997

BETWEEN

HARRISON MBARIA MBOGO

STEPHEN MUTUGI MWENJA.....APPELLANTS

AND

MBUTU NGUNGI.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi

(Justice S.E.O. Bosire) delivered on the 18th day of May, 1993

in

H.C.C.C. NO. 516 OF 1988 (O.S.)

JUDGMENT OF THE COURT

By Originating Summons taken out under the provisions of section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya as read with Order XXXVI rule 3D of the Civil Procedure Rules, the plaintiff now the respondent in this appeal, claimed a declaration that he has become entitled by adverse possession to be registered as sole proprietor of all that piece or parcel of land known as Mutira/Kianjege/195, the suit land, in place of the presently registered owners, the defendants and now the appellants in this appeal.

There is no dispute to the facts giving rise to the suit. They are as follows. The first appellant, then a minor, was registered as the proprietor of the suit land sometimes in 1959. That was a first registration.

In 1961, his father entered into a sale agreement with the respondent whereby the latter agreed to buy and the former to sell the suit land at an agreed consideration. The respondent took possession of the suit land pending requisite consent from the appropriate Land Control Board. Such consent was required to be obtained within three months after the agreement of sale. The parties applied for but were refused consent on the ground that the suit land was registered in the name of a minor. It would appear that the intended transaction provoked the Land Registrar to enter a restriction prohibiting any dealing with the suit land until after the first appellant attained the age of majority. The respondent, however, remained in effective possession of the suit land.

In 1978, the respondent brought action against the first appellant alleging trespass and sought orders for evicting him and others from the suit land as well as an injunction prohibiting their return. It is common knowledge that that suit was dismissed for non-appearance.

In January, 1988, secretly and without the knowledge of the respondent the first appellant who had by then become of age entered into a sale agreement with the second appellant for the latter to purchase a portion of the suit land. This time round the sale was successful. The suit land was subdivided into two portions, namely Mutira/Kianjege/431 and Mutira/Kianjege/432. The first appellant retained the latter parcel while the second respondent purchased the former.

As agreed by the parties to the proceedings before the learned judge (Bosire, J. as he then was), in the final analysis, the only issue for determination was whether the respondent was in adverse possession of the suit land. The learned judge held without hesitation, and in our view correctly so, that the first appellant's father in entering into a sale agreement respecting the suit land with the respondent was not qualified to do so. The first appellant was then a minor and under a disability on account of his minority age. His father could not be said with any degree of certainty that he was acting either as the first appellant's agent or guardian of the nature described under section 114 of the Registered Land Act. So it must follow that at the date of the sale of the suit land to the respondent, the first appellant lacked the capacity to pass title to any person.

When did the first appellant's disability end" It was agreed by the parties that he was born in or about 1959. It would follow therefore that under the Age of Majority Act Cap. 33 Laws of Kenya he attained the age of 18 years in or about 1977 and his disability then on account of minority age ceased. In absence of any definite date of birth, the learned judge treated 31st December, 1977 as the effective date and, in our view, the selection of that effective date cannot be faulted.

The right of action by the first appellant to recover the suit land did not, however, start running until six years later which period expired on 31st December, 1983. See Section 22 of the Limitation of Actions Act. In his judgment delivered pursuant to written submissions by counsel for both parties the learned judge held that the first appellant's title to the suit land was extinguished by 1st January, 1984. It is worthy of note that he never at any time brought action to recover possession of the suit land from the respondent who had been in adverse possession since 1961. The learned judge observed that the action brought by the respondent against the first appellant in 1978 did not in any manner interrupt the limitation period. In the result, the learned judge concluded that the respondent had established his entitlement to the suit land by way of adverse possession and the first appellant could not, therefore, pass any title in respect thereof to himself or to the second appellant.

Against that decision of the learned judge, the appellants have appealed to this Court putting forward four grounds of appeal. At the hearing of this appeal on 6th October, 1997, Counsel for the appellants, Mr. Kimwere, abandoned all other grounds of appeal save the 1st and 2nd grounds of appeal which averred that the learned judge erred in holding that the respondent had been in adverse possession of

the whole suit land while he held only a portion of it; and, that the learned Judge ought to have found that the occupation of the suit land by the respondent was interrupted by the action filed by the respondent in 1978.

Counsel for the respondent, Mr. Muhoro's answer to the foregoing submission was simply that the factual situation of the matter before the learned judge merited the decision he gave.

We will first deal with Mr. Kimwere's second limb of submissions. There is uncontroverted evidence that the first appellant has not at any time since he attained the age of majority brought action to recover the suit land from the respondent. Apparently he appeared satisfied with or acquiesced in the respondent's occupation which took effect from 1961. Limitation is a defence by a person in possession of land adversely to the owner's rights. It is the owner of the land who is obliged to take reasonable steps to re-enter his land. This he can do by use of peaceful means or by instituting action to exert his rights over the land. The first appellant did not resort to any of these means. Accordingly, we think that the learned judge was right when he held that time was not interrupted by the action brought by the respondent in 1978. Moreover, a purchaser who brings action, as in this case, does not acknowledge the title of the vendor but asserts his own (purchaser's) right over the land.

The suit land was one entity until 13th February, 1988 when the first appellant procured surveyors to sub-divide it into two parcels. The respondent, as can be ascertained from the affidavit evidence and the agreed facts laid before the learned judge, had been in possession of the whole suit land in continuous and uninterrupted occupation since 1961. Any occupation by the appellants and developments allegedly made on part of the suit land were effected, as deponed to by the second appellant in his affidavit sworn on 8th June, 1989, only after the sub-division and not otherwise. The first limb of Mr. Kimwere's submission is without merit and must fail.

In the circumstances, we are of the opinion that the learned judge was right when he held that the respondent had acquired title to the whole suit land, Mutira/Kianjege/195 and now Mutira/Kianjege/431 and Mutira/Kianjege/432, by adverse possession and in granting the prayers sought in the Originating Summons in respect thereof. We can, therefore find no merit in the appellants' appeal which is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 14th day of October, 1997.

R.O. KWACH

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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