



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: GICHERU & TUNOI JJ.A & BOSIRE AG. J.A)

CIVIL APPEAL NO. 150 OF 1996

BETWEEN

SAMSON GITHUA KIBOI APPELLANT

AND

HANNAH WAMAITHA NJIHIA

WANJIRU NJIHIA RESPONDENTS

(Appeal from the ruling of the High Court of Kenya at
Nairobi dated 15th May, 1996 (Justice Sheikh-Amin))

in

H.C.C.C. No. 97 of 1994

JUDGMENT OF THE COURT

This is a second appeal against the judgment of the Ag. Resident Magistrate, at Thika, in Thika Senior Resident Magistrate's Court Civil suit No.41 of 1991 in which the magistrate held, and was upheld on first appeal to the superior court, that the appellant was a trespasser on part of a parcel of land known as Loc.1/Kirwara/523, and should therefore, quit and deliver vacant possession of it to the respondents or else he be evicted. He, also, declined to consider the appellant's alternative defence, which also formed the basis of his counterclaim, for a declaration under S.38 of The Limitation of Actions Act, Cap 22 Laws of Kenya (the Act), that he had acquired the land by adverse possession, on the ground that he lacked the jurisdiction to consider it.

The original suit which eventually gave rise to this appeal was based on trespass to land. The respondents, as the plaintiffs in the suit, claimed that the appellant had settled on land known as Loc.1/Kirwara/525 and erected several temporary structures thereon without their consent. The appellant, on the other hand, filed a written statement of defence in which he averred that he bought the land in or about 1964 at the price of Kshs.400/= per acre from one Njihia Ngamau, the original owner of the land, who subsequently died before he could transfer the land to him. In the alternative, he averred that he had lived on and worked the disputed land for a long time that he had acquired prescriptive rights over it by virtue of the provisions of the Act.

The appellant's complaint both before the superior court, on first appeal, and before us, was, substantially, that the trial court, improperly, declined to consider his alternative defence. It was urged before us on his

behalf by his counsel, Mr Ngunjiri, on the main, that a careful reading of Section 159 of The Registered Land Act, together with S.38, of The Limitation of Actions Act will show that a subordinate court of the first class has the jurisdiction to consider the defence of adverse possession if raised in any civil suit involving land.

The appellant's case as pleaded was that he was claiming the whole of the suit parcel of land which is about 7 acres. However, in his evidence in court during the trial of the suit he stated, inter alia, that he was basically claiming only one acre of it. His case was that he had originally bargained to pay and actually paid Kshs.2000/= to Njihia Ngamau for 5 acres of the land. Later on, however, Njihia Ngamau changed his mind, sold four of the five acres to third parties at a price of Kshs.20,000/= per acre, and refused to refund to him the price he had paid for the same arguing that land prices had gone up. The appellant did not complain about it and was content to have one acre for the Kshs.2000/= he had paid.

The issue that arose in the course of the hearing of this appeal is whether, in view of the pleaded price of one acre of the suit land, this court has the jurisdiction to entertain the appeal. S.79(E) of The Civil Procedure Act, Cap 21 Laws of Kenya, provides as follows:-

"No second appeal from a decree passed in appeal by the High Court shall lie in any suit when the amount or value of the subject-matter does not exceed ten thousand shillings unless special leave has been first obtained from the court before whom the appeal is to be heard."

When we asked Mr Ngunjiri to comment on the above provision, his response was simple and short, namely that the price of Kshs.400/= per acre which the appellant paid was as at the date of sale. Since then land prices had increased tremendously with the result that the value of the disputed land to be applied should not be Kshs.400/= but the value of it as at the date of the suit.

We have no evidence with regard to the value of the land as at the date of the suit. Even if we had such evidence, considering that the appellant's statement of defence was not appropriately amended in that regard this court is obliged to take the figure pleaded as the value of the land. Otherwise there is the obvious danger of taking a value which would take the matter outside the pecuniary jurisdiction of the trial court.

In view of the foregoing, the appellant was obliged to seek and obtain leave of this court under S.79E, above, before lodging this appeal. We have no evidence that he did so. Consequently, the section being worded in mandatory terms, this appeal is incompetent and is struck out with costs to the respondents.

Dated and delivered at Nairobi this 11th day of December, 1996.

J.E. GICHERU

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

S.E.O. BOSIRE

.....

AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR