



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal 24 of 2004

BETWEEN

SAMWEL NYAKENOGO APPELLANT

AND

SAMWEL ORUCHO ONYARU RESPONDENT

(Appeal from the decree and order of the High Court of Kenya at Kisii (Birech, C.A.) dated 30th September, 2002

in

H.C.C.C. No. 173 of 1999 (O.S.)

JUDGMENT OF THE COURT

In an originating summons dated 2nd August and filed in the superior court at Kisii on 16th August, 1999, the respondent then as the plaintiff posed two questions; namely:

- “(a) Whether the plaintiff has acquired prescriptive rights over 1½ acres of land parcel No. West Kitutu/ Mwakibagendi/ 28.**
- “(b) Why the defendant should not transfer 1½ acres of parcel No. West Kitutu/Mwakibagendi/28 to the plaintiff herein”.**

The application was made under **Order XXIV rr 33D (1) & (2) (sic)** of the Civil Procedure Rules. (See **Order XXXVI r. 3** of the Civil Procedure Rules). It was supported by an affidavit deposed to by the plaintiff as follows:

“1. ...

2. ...

3. **That by an agreement dated 26th November, 1976, I bought a clearly demarcated 1 ½ acres of land parcel No. WEST KITUTU/MWAKIBAGENDI/28 from the late SIMIONI BOKONKO MAIRURA annexed hereto and marked S001 is a copy of the said agreement and rendition of the same in English marked S002.**

4. *That I paid the agreed purchase price of Kshs.6,400.00 in full in 1980 as born out by the agreement annexed hereto and marked S003.*
5. *That it was the term of the said agreement that I was going to have my share transferred to me and as a prerequisite on 19/1/1980 the late Simion Bogonko Mairura applied to the Land Control Board Bogetutu for consent – annexed hereto is the said consent marked S004.*
6. *That upon application to the Land Control Board, the Bogetutu Land Control Board gave it (sic) consent on 14th April, 1980 – annexed hereto and marked S005 is the letter of consent signed by the District Officer Manga as Chairman of the Land Control Board.*
7. *That I have been cultivating the entire parcel of land since 1976 up to the moment quietly and peacefully up to this moment.*
8. *That it is unfortunate that before the late Simion Bogonko could sign the relevant transfer forms, he passed away.*
9. *That one of the deceased's sons known as Samuel Nyakenugo has now obtained letters of administration in respect of his deceased fathers (sic) estate and he has categorically stated that he cannot transfer my land to me and that he even doesn't know me.*
10. *That considering that I bought the land from the deceased Simion Bogonko and that I did actually obtain consent to transfer and that I have been on the land for 23 years, I pray that this honourable court orders that I have acquired proper title to 1½ acres of land parcel NO. WEST KITUTU/MWAKIBAGENDI/28.*
11. *That I stand to lose irreparable because I have cash crops and mature trees on the land.*
12. *....”.*

The appellant/defendant file a replying affidavit to the application in the same court on 16th November, 1999. It was in the following terms:

“1. ...

2. *That I am the defendant in this matter.*
3. *That I have read and understood the supporting affidavit Samuel Orucho Onyaru who is the plaintiff in this matter.*
4. *That in reply to paragraphs 3 of the said affidavit I do verily dispute the averments of the plaintiff and further state that if at all there was a sale agreement, such a sale was done secretly and/or without the knowledge of the family.*
5. *That further to paragraph 4 above I do verily state that the averments of the plaintiff contradicts his earlier averments wherein he states that he was to receive 1¼ acres of land from the land parcel NO. WEST KITUTU/MWAKIBAGENDI/28.*
6. *That further to the foregoing I do verily state that there is no agreement as alleged or at all and what is on record and marked S001 is not, an agreement or at all.*
7. *That in reply to paragraph 5 of the supporting affidavit I do verily state that the contents are not true.*
8. *That in reply to paragraph 6 of the supporting affidavit I do state that no such consent*

was and/or could have been given and that the so called letter of consent marked S00-5 is a forgery and I produce herein an official search to support my contention. Attached hereto and marked "SN1".

9. *It is not true that the plaintiff has been cultivating the subject land since 1976.*
10. *Further to the foregoing I do state that the contents of paragraph 7 of the plaintiff's supporting affidavit are misleading and not made in good faith.*
11. *That I refute the contents of paragraph 8 of supporting (sic) same before untrue as there was no basis of signing the said relevant transfer forms.*
12. *That in reply to paragraph 9 of the supporting affidavit I do admit that I have indeed obtained letters of administration in respect of my father but I deny that the plaintiff has any right to acquire the subject land as alleged or at all.*
13. *That I deny the contents of paragraph 10 of the supporting affidavit same being lies.*
14. *That further to paragraph 13 above I do wish to state that the plaintiff's claim is contradictory as to his earlier averment where he stated that he was claiming 1¼ acres of land from the subject parcel of land.*
15. *That I deny the contents of paragraph 11 of the supporting affidavit same being misleading.*
16. *That further to the foregoing I also verily state that the exhibits of the plaintiffs are forgeries which the honourable court cannot rely on.*
17. *I have been advised by my advocate, which advice I belief (sic) to be true, that the plaintiff's application is bad in law procedurally defective and lacks in merit.*
18. *That the exhibit which is marked S00 – (sic) which is described as an agreement is not a valid agreement and it has nothing at all to show that there was a sale of land as alleged or at all.*
19. *I do swear this affidavit in opposition to the plaintiff's prayers and pray that this honourable court may dismiss his application.*
20. *...".*

After all preliminary issues had been settled in the case including the hearing and the determination of intervening applications the case was fixed for hearing and/or heard from 28th August, 2002 to 30th September, 2002 when judgment was delivered by the Commissioner of Assize (*P. K. K. A. Birech*). When the respondent testified he repeated what he had stated in the supporting affidavit. He said he was seeking a declaration that he had acquired part of parcel number *West Kitutu/Mwakibagendi/2255* comprising 1.25 acres by virtue of adverse possession. Then he referred to the agreement he entered into with the owner of the land –*Simon Bogonko Mairura*, deceased, for the purchase of that portion of the land at Kshs.6,400/= which amount he paid in instalments, and completed on 14th January, 1980. He stated that he took immediate possession of the parcel he had purchased in 1976 which at the time was comprised in *West Kitutu/Mwakibagendi/28*. That on taking possession of his said portion he planted trees on one part of it and maize on the remaining part. That after paying the last instalment the respondent was taken by the deceased to the Land Control Board at Manga Divisional Land Board where a letter of consent was obtained on 16th April, 1980. However, transfer of his portion was not effected because the deceased became sick and died

before signing transfer documents.

In the meantime, the appellant, one of the deceased's sons, applied for letters of administration intestate in respect of the deceased's estate and he was granted the requisite letters. Soon after he subdivided the land West Kitutu/ Mwakibagendi/28 into West Kitutu/Mwakibagendi/2255 and 2256. The portion the respondent claims falls under West Kitutu/Mwakibagendi/2255 currently registered in the name of the appellant. It measures 0.68 hectares. He agreed during the hearing of the case in the superior court that the consent letter from Manga Divisional Land Control Board did not indicate the measurement of the portion of the land he bought from the deceased but that soon after he was sold the portion in 1976 he was shown boundary marks of his portion and allowed by the deceased to use it. The respondent called **Benedicto Simi** (PW2) and **Joseph Mairura Bogonko** (PW3) to confirm that indeed the deceased sold the suit piece of land to the appellant. They are relatives of the parties to this appeal; and in fact PW3 is the elder son of the deceased. They testified that at the time of the sale transaction the appellant was not present. He had gone away with his mother where she had got married.

The appellant also testified but denied the existence of the agreement alleged to have been entered into between the respondent and the deceased and said that if there was any such agreement, it was a forgery. He also denied the existence of the Land Control Board consent or that if it existed at all it was also a forgery. He stated that as one of the sons of the deceased he was entitled to apply for and obtain letters of administration in respect of the deceased's estate. He agreed that when he applied for letters of administration he omitted the names of his other 2 brothers, including PW3, alleging he was the only beneficiary. The brothers had to lodge objections to the application for them to be included in the distribution of the deceased's estate. He denied that the respondent bought any land from the deceased. The Commissioner of Assize recorded the evidence adduced by the witnesses in the case and evaluated it. Then he concluded as follows:

“Parcel Number West Kitutu/Mwakibagendi/2255 measures zero decimal six eight (0.68) of an Hectare which translates into one decimal six eight (1.68) acres.

The plaintiff is interested in an area measuring one decimal two five (1.25) acres of land.

The portion of land which the plaintiff has had adverse possession of is ascertainable and he should be granted the portion he claims measuring one decimal two five (1.25) acres or in metric terms, he should get an area of land equivalent to zero decimal five zero five (0.505) Hectares in parcel Number West Kitutu/Mwakibagendi/2225.

For those reasons the plaintiff has acquired by prescription rights a portion of land measuring zero decimal five zero five (0.505) of an Hectare in parcel Number West Kitutu/Mwakibagendi/2255 and the whole land should be subdivided into two portions and the portion measuring zero decimal five zero five (0.505) of an Hectare be transferred into the name of the plaintiff.

In order to effect that order the defendant should execute all the necessary documents within two weeks from the date of this judgment failing which the Deputy Registrar of this Court is to execute all the necessary documents in his place and ensure that the plaintiff gets his parcel of land intact ...”.

This decision was not acceptable to the appellant who filed his home made memorandum of appeal with the following grounds, namely, that:

- “1. *The learned trial Judge erred in law and fact in making a finding that the respondent was entitled for transfer of part of the suit land by virtue of adverse possession when the same was not proved.*
2. *The learned trial Judge erred in law, and fact in making a finding that the respondent was entitled for (sic) transfer of part of the suit land when the same was not proved.*
3. *The learned trial Judge erred in law and fact in not making a finding that the respondent’s failure to obtain consent of the relevant land control board within the time provided by law rendered the whole transaction null and void for all purposes.*
4. *The learned trial Judge erred in law and fact in making a finding that the respondent is entitled for (sic) transfer of part of the suit land by virtue of adverse possession which the respondent failed to demonstrate that he had been in full and actual possession of the suit land.*
5. *The learned trial Judge erred in law and fact by misdirecting himself on several parts of law and fact thereby arriving at a wrong decision.*
6. *The learned trial Judge considered matters that were not pleaded before him.*
7. *The decision of and judgment of the trial Judge were against the weight of evidence on record”.*

The appeal was heard by this Court on 2nd December, 2009 when the appellant submitted that the letter of consent the respondent said he obtained was false as there were no Board minutes. He also submitted that his father did not subdivide the land to specify the portion being sold to the respondent. That during the sale transaction he was not present and that PW3, his elder brother, did not tell the court the truth. *Mr. Momanyi*, learned counsel for the respondent, supported the judgment of the superior court and said the appellant was an unreliable witness. According to him the doctrine of adverse possession was properly applied.

The case before the superior court was based on the doctrine of adverse possession and whether the consent letter obtained from Bogetutu Land Control Board by the deceased and the respondent or its effects on the sale transaction were valid or not is neither here nor there. In fact it is as a result of the delay in the application and/or issuance, of the consent letter which gave rise to the claim by adverse possession after the passage of the relevant period – see **section 6** of The Land Control Act – Chapter 302 Laws of Kenya and **section 13(1)** of Limitation of Actions Act (Cap. 22) Laws of Kenya. In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having discontinued his possession of it. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period. See *Wambugu vs. Njuguna – Civil Appeal No. 10 of 1982.*

Adverse possession means that a person is in possession in whose favour time can run. Not all people in possession can have time run in their favour. Time can run in favour of a tenant at will by virtue of **section 12** of the Limitation of Actions Act but it cannot run in favour of a licensee, therefore a licensee has no possession (*Hughes v. Griffin [1969] 1 WLR 23*). In the

case giving rise to this appeal, the deceased and the respondent entered in a sale agreement for a portion of land:

“situate uphill at Nyataro from the rising point upto the hill”.

This agreement was dated 26th November, 1976 when the respondent paid the first instalment of Kshs.1,200/=. The instalments were paid in bits until 14th January, 1980 when the last instalment of Kshs.660/= was made. However the respondent was allowed possession of the portion he bought on payment of the first instalment in November 26th 1976. Even then there was no application for the consent of Divisional Land Control Board of the area where the land West Kitutu/Mwakibagendi/28 is situated within three months as provided by the Land Control Act. The application was made on 14th April, 1980 and the consent given on 16th April, 1980. This was obviously contrary to **section 6** of the Land Control Act aforesaid and by then the respondent had acquired the position of an adverse possessor. **Section 38(1)** of the Limitation of Actions Act authorizes a person who claims to have been entitled by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. Such claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years after dispossessing the owner and adverse possession can be acquired under the Act for part of the land, **Kasuve vs. Mwaani Investments Limited & 4 Others – Civil Appeal No. 35 of 2002.** The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession, ***Githu vs. Ndeete [1984] KLR 776, emphasis provided.***

The respondent’s evidence was that as soon as he made the first instalment of the purchase price in 1976 he was shown the area sold to him and he immediately took possession of the land and planted trees and foodstuff thereon. The boundary features of the portion sold to the respondent comprised of “Ajuogi” plant. This evidence was supported by that of the appellant’s own brother (PW3). The respondent paid the last instalment on 14th January, 1980 but the application for consent was made on 14th April, 1980 which was beyond the 3 months period allowed for the making of such an application. It was immediately after the lapse of 12 years after the respondent had been in adverse possession of part of West Kitutu/Mwakibagendi/28, that he made the application to the High Court by Originating Summons on 26th August, 1999 to be registered as proprietor by adverse possession. This was well beyond the 12 year period allowed by **section 38(1)** of the Limitation of Actions Act, aforesaid. For about 19 years, the respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the respondent’s said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent’s adverse possession of the portion he bought from the deceased. We have considered the appellant’s grounds of appeal and the submissions he made but find no merit in any of them. Ultimately, we dismiss this appeal with costs and direct that the appellant shall sign the relevant documents for the subdivision of plot number **West Kitutu/Mwakibagendi/2255** in order to allow the respondent have off 1½ acre therefrom, failing which the Deputy Registrar of this Court to do so.

Dated and delivered at Kisumu this 30th day of April, 2010

P. K. TUNOI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR