IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI (PCA), WAKI & KIAGE, JJA)

CIVIL APPEAL NO. 95 OF 2014

BETWEEN

RUTH WANGARI KANYAGIA .....APPELLANT

AND

JOSEPHINE MUTHONI KINYANJUI .....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Sitati, J.) dated 19th March, 2010

in

H. C. C. C. No. 636 of 2006)

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JUDGMENT OF THE COURT

1. The ogre of **'adverse possession'** continues to trouble landowners who on acquiring title to their land feel they have the protection of the law henceforth, only for the land or a portion of it to be given out to a squatter due to effluxion of time. In some quarters around the world the doctrine has been severely criticized and reforms called for. Three examples will suffice to illustrate this:

2. There were murmurs of discontent expressed in the celebrated United Kingdom case of ***J. A. Pye (Oxford) Ltd & Another vs The United Kingdom, European Court of Human Rights, Grand Chamber Application No. 44302 of 2002*** which was originally filed before the High Court in England (**Neuberger, J)** but went through a succession of five different appellate jurisdictions up to the Grand Chamber of the European Court of Human Rights over a period of nine years. Neuberger J. stated in part, as follows:

> ***"..it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years. To say that in such circumstances the owner who has sat on his rights should therefore be deprived of his land appears to me to be illogical and disproportionate. Illogical because the only reason that the owner can be said to have sat on his rights is because of the existence of the 12 year limitation period in the first place;… I believe that the result is disproportionate because, particularly in a climate of increasing awareness of human rights including the right to enjoy one's own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter with no compensation whatsoever."***

Eventually the United Kingdom, through the ***Land Registration Act 2002,*** ameliorated the harshness of the doctrine by making it harder for a squatter who is in possession of registered land to obtain a title to it against the wishes of the proprietor. Provisions were made in the Act for notification to the land owner, of the intention by the squatter to apply the doctrine, two years before the limitation period sets in.

3. There were dissenting voices from India too expressed by the Supreme Court in the case of ***State of Haryana vs Mukesh Kumar & Others [2012] AIR SCW 276*** that the doctrine was "*irrational, illogical and wholly disproportionate"*. **Bhandari, J.** stated in part, thus:

> "***We inherited this law of adverse possession from the British. The Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in law in the larger public interest …..Adverse possession allows a trespasser - a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the Judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible…"***

4. Not too long ago in the United States of America, an organization called "EAPNOW" (End Adverse Possession Now) sought reform of the doctrine describing it, in part, as:

> ***"…most outdated, unnecessary and unfair law... Unchanged in Washington Since the 1890's, adverse possession allows anyone to legally take land from another for free provided they meet certain requirements… the bill would help eliminate the practice of legalized land theft known as adverse possession…… Washington is no longer in the wild-wild-west …Adverse possession laws have already been changed in Colorado & New York, making it much harder for squatters and thieves to take land for free… much like laws of slavery, dowry and other laws that society has found to be repugnant, the justification for having adverse possession no longer applies today."***

5. Back home, in the case of ***Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR***, a landowner sought to challenge the doctrine contending that it was an arbitrary and unconstitutional limitation of the right to property. The High Court (**O. A. Angote, J.)** rejected that contention and was upheld by this Court **(Makhandia, Ouko and M'Inoti, JJA**). In three well researched, analytical, separate but concurring judgments, the three Judges of appeal found that:-

> ***a) "..most countries do maintain the doctrine of adverse possession and courts continue to recognize the public policy value of extinguishing title to registered property after a certain period. Limitation of actions mechanisms such as adverse possession play an important role in the enforcement of one of the fundamental legal principles of the judicial system, which is that at some point, litigation must come to an end. It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce. Limitation of time for land claims as with claims of any other nature exist for three main reasons which are: (i) A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent); (ii) A defendant might have lost evidence over time to disprove a stale claim; and (iii)Long dormant claims have more cruelty than justice in them (Halsbury's Laws of England, 4th Edition.)*** *Per Makhandia, JA.*
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> ***b) "..by the time the requirements for the application for a declaration that one has acquired title by adverse possession is satisfied, the true owner of the land will have been subjected to a due process of the law. It therefore follows, from the foregoing that the Limitation of Actions Act does in fact provide protection of the right to property by the application of specific rules that ensure due process before title can be lost to a third party. The process leading to acquisition of land by adverse possession is, accordingly not arbitrary and does not contravene Article 40(2) (a) of the Constitution.."*** *Per Ouko, JA.*

c) "Article 40 (of the Constitution), which guarantees the right to property, is part of the Bill of Rights. It is not one of the rights, which under Article 25 cannot be limited. In appropriate circumstances therefore, the right to property may be legitimately limited in terms of Article 24 of the Constitution, so long as the requirements of that provision are satisfied. To determine the constitutionality of limitation of the right to property through adverse possession therefore requires testing the doctrine of adverse possession as legislated in the Limitation of Actions Act against the criteria provided in Article 24 of the Constitution…. I would have no problem in finding that the limitation to the right to property by adverse possession is provided by law, that law being the Limitation of Actions Act….. Bearing in mind the prevalence of laws on limitation of actions and adverse possession, both in commonwealth and civil law jurisdictions, though with clear variations and differences, I would find the limitation to the right to property through the doctrine of adverse possession to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." *Per M?Inoti, JA*

6. We are in agreement with those findings. We may observe, however, that despite the unanimity of the decision, Ouko, JA , in *obiter dicta* lamented thus:

"… the previous justification that a squatter has a right of invading private land (as opposed to public land) if the paper owner "abandons" it and the squatter occupies it for a period of 12 years is no longer plausible. To begin with, it is a criminal offence under Section 155 for a person to unlawfully occupy a public land. Secondly in terms of Section 107, the Government can compulsorily acquire private land and compensate the paper owner. Why should a stranger be permitted to invade private land regardless of the law of trespass specifically Section 3 of the Trespass Act, and even after that be rewarded with it for free after 12 years. Today, pursuant to economic and social rights contained in the Bill of Rights, squatters and the landless are sufficiently catered for in Part IX of the Land Act, which provides for the establishment of Settlement Schemes to facilitate access to land, shelter and livelihood; Settlement Programs to provide for access to land to squatters, displaced persons; establish Land Settlement Fund to be applied in the provision of access to land for squatters and displaced persons.

For those reasons I find no justification to encourage acquisition of title through adverse possession. It is not lost on me that there are other philosophical bases for the doctrine of adverse possession, such as what I have identified earlier and described as utilitarian theory, rewarding productive use of land over extended non-use; considering non-use of land to be wasteful, and reducing stale claims. It is equally erroneous to think of adverse possession as a means by which the landless (squatters) acquire land. Adverse possession can be claimed in the cities, in the affluent settlement where there is overlap of boundaries. Adverse possession in such situations will be used to settle any likely boundary disputes where the elements expressed by nec vi, nec clam, nec precario are pursued."

And with that the learned Judge suggested reforms *a la* United Kingdom; increase of the period of limitation; and reasonable compensation to the land owner who loses land through adverse possession.

7. So, what is the existing state of the law on adverse possession that we must apply in the appeal before us?

8. We think, after examination of numerous decisions including ***Gatimu Kinguru v/s Muya Gathangi (1976) KLR 253, Hosea v/s Njiru (1974) E.A. 526, Sospeter Wanyoike v/s Waithaka Kahiri (1979) KLR 236, Wanje v/s Saikwa (No. 2) (1984) KLR 284, Githu v/s Ndeete (1984) KLR 778, Nguyai v/s Ngunayu (1984) KLR 606, Kisee Maweu v/s Kiu Ranching (1982-88) 1KAR 746, Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002), Kasuve v/s Mwaani Investments Ltd & 4 Others (2004) KLR 184, Samuel Miki Waweru v/s Jane Njeri Richu (2007) eKLR, Muraguri Githitho v Mathenge Thiongo [2009] eKLR,*** and others that were cited before us, that the law is settled and is anchored on ***Sections 7***, ***13, 17*** and ***38*** of the **Limitation of Actions Act.**

9. ***Section 7*** provides *inter alia*:-

> ***"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person".***

Section 13 is in these terms:

> ***"(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession....."***

Section 17 further provides that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

Finally ***Section 38*** states:-

> ***"38. (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."***

10. As was stated by this Court in the case of ***Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:***

> ***"The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land."***

11. The onus is on the person or persons claiming adverse possession:-

> ***".. to prove that they have used this land which they claim as of right:*** *Nec vi, nec clam, nec precario (No force, no secrecy, no evasion).* ***So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.***
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> and **Kneller J** (as he then was) in ***Kimani Ruchine v/s Swift***, ***Rutherford & Co. Ltd (1980) KLR 10***.

12. Do the facts of the case before us sit well with that law? We are bound to re-appraise those facts by dint of ***Rule 29 (1) (a)*** of this Court's Rules in order to draw our own inferences thereon, even as we defer to the findings of fact by the trial court. As there was no *viva voce* hearing but only affidavit evidence, the trial court had no special advantage of seeing and hearing the witnesses and we are at liberty therefore to differ with those findings where they are not supported by the evidence on record or are otherwise bad in law.

13. The appellant is **Ruth Wangari Kanyagia** (Ruth) who was represented before us by learned counsel **Mr. Onyore Mose**, instructed by the firm of King'oo-Wanjau & Company, Advocates. Ruth has never been married and has no children. But in 1969 she managed to buy a piece of land in Ngong known as ***Ngong/Ngong/1842*** (plot 1842) measuring about 4.8 Hectares. Before then, her parents as well as seven younger sisters and one brother were landless and lived in temporary shacks working as coffee pickers in a Kiambu plantation. Out of love for her parents and siblings, Ruth decided to give shelter to them in her land as they worked to acquire their own property. She first brought in the parents in 1970 and showed them a place to build temporary structures and cultivate. Two years later, she invited her sisters and showed them different areas to cultivate and construct temporary shelters. Also invited was her only

brother Stephen Kinyanjui Kanyagia (Stephen) who was married to **Josephine Muthoni Kinyanjui** (Josephine), the respondent before us. The sisters swore affidavits to support these facts.

14. In 1984, Ruth sold 0.81 Hectares to one Wilson Kinyanjui and the transaction was approved by the Land Control Board whereupon plot 1842 was subdivided into ***plots 6563*** and ***6564***, the latter being transferred to Wilson, and Ruth retaining plot 6563. The parents died in the 1990s and her brother Stephen died in 1988. In both cases Ruth allowed their burial and pointed out the grave sites on plot 6563. Before he died, Stephen had approached Ruth in 1986 with a request to purchase one acre of the land for Sh.15,000 and initially Ruth agreed and took a sum of Sh.8000 from Stephen. There was no written agreement to confirm such transaction and it never went beyond acceptance of the deposit.

15. Upon the death of Stephen, Josephine approached Ruth with a request that she completes the purchase commenced by her late husband by paying the balance of Sh.7000. Ruth declined that request explaining that if she sold to her brother, all her sisters would also make the same request and it would be unjust to favour the brother only. She allowed the entire family to continue the temporary occupation and in the course of time some managed to buy their own lands. But in 2004, she discovered that the daughter of Josephine, one Esther Njoki, had registered a caution against the Title claiming a beneficiary's interest. Josephine also installed electricity in the temporary structure without Ruth's permission. Josephine's 3 cows were also deliberately let loose to feed on Ruth's crops, and Josephine's children started using abusive language against Ruth. She sensed hostility and reported the matter to the area Chief who, with the assistance of elders, decided that the property belonged to Ruth and she should be accorded respect by Josephine and her children. That was in March 2006. In April 2006, Ruth instructed a lawyer to give notice to Josephine and her family to vacate the land by August 2006, which notice was served.

16. Josephine shot back by taking out an Originating Summons on 20th June, 2006 under ***Order 36 Rule 3D*** of the ***Civil Procedure Rules*** and ***Section 38*** of the ***Limitations of Actions Act*** seeking a declaration that she had acquired one Acre of plot 6563 through adverse possession and a further order for registration as the absolute owner in place of Ruth. A subsequent attempt to amend that pleading to include a plea for specific performance of the sale agreement made between Ruth and Stephen was allowed but the amended pleading was never filed. Only the issue of adverse possession was thus considered by the trial court. In other interlocutory proceedings, both parties agreed to maintain the status quo until the dispute was determined.

17. In support of the claim for adverse possession, Josephine swore an affidavit as follows:

> ***"7. That I have been in actual and uninterrupted occupation of the subject one acre portion out of the suit land L. R. No. Ngong/Ngong/6563 since 1972 to date.***
>
> ***8. That the defendant is the registered proprietor of the suit land. Annexed hereto and marked 'JMK2' is a certified copy of the extract of the land register for L. R. No. Ngong/Ngong/6563.***
>
> ***9. That I have been in continuous, open and uninterrupted possession and occupation of the suit land since 1972 to date.***
>
> ***10. That I have never sought the defendant's permission and/or consent to occupy the subject land.***
>
> ***11. That the defendant has never been in possession of the one acre portion of the suit land that I now occupy with my family.***
>
> ***12. That the defendant has never requested me to vacate the land or even attempted to occupy the same save on 29th April, 2006 when the defendant through her advocates sent me a notice requesting that I should vacate the land.***
>
> ***13. That I have made substantial improvements and developments on the said land***

including putting up a family graveyard. Annexed hereto and marked 'JMK3' are photographs of the graves of my deceased husband and son.

14. That I do not know and do not have any other home or land on which I can settle."

That was the only evidence in support of her case on adverse possession.

18. It was rebutted by Ruth's affidavit in reply basically conceding the long occupation by Josephine but insisting that the initial occupation as well as all subsequent activities on the land including burials were all done with her consent and permission until Josephine and her children displayed hostility in 2004. On this Ruth was supported by three of her sisters who swore supporting affidavits. We may sample one of them from **Felista Wanjiru Kanyagia**:-

"4. That the respondent invited us to move into her land and construct temporary shelters as we were living in Coffee Plantations picking tea of the owner of the plantation and we did not have land of our own.

5. That though my brother the late Stephen Kinyanjui was left behind, his wife the plaintiff/applicant herein moved to the respondent's land with us in 1972 and her husband joined her later.

6. That the respondent's sole intention was to ensure that we did not suffer, as we were landless.

7. That the respondent only gave us temporary occupation as licencees and everyone including the applicant knew that and no one has ever behaved in a manner suggestive of claiming ownership of the said land and I am surprised that the applicant claims ownership of one acre of this land.

8. That today I still occupy as a licencee the portion the respondent gave me, which is less than an acre.

9. That in or about the year 1986 my late brother approached the respondent to sell to him the one acre that he occupied and the respondent declined to sell it to him arguing that if she sold it to him she would have to consider selling to each and everyone the portions they occupied and she did not want to sell any more land as she had already sold two acres.

10. That all the relatives of my siblings including my parents are buried on the suit land with the respondent's consent. Indeed she physically points out the location where the grave should be dug."

19. The foregoing was the evidence open for evaluation by the trial judge **(Sitati, J).** She arrived at the following finding:-

"I have now considered the pleadings and the circumstances of this case. I have also considered the law which is that a claim for adverse possession is only possible where the claimant has been in exclusive possession of the land openly as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner of his own volition. The findings I have made here are that the defendant herein dispossessed herself of the one acre of land upon which the plaintiff and her family have lived since 1986 or thereabouts. The plaintiff has occupied that one acre openly and as of right and without interruption for a period of over 12 years."

The declaration and orders sought by Josephine were granted.

20. Twelve grounds of appeal were filed to challenge that finding and the ensuing orders but Mr. Onyore

urged them as two grounds in written submissions. The main ground was based on the elements of adverse possession; that is to say, *"actual, open, exclusive and hostile possession"*, which counsel contended had not been proved. It was eminently evident, in his view, that Josephine, as well as her late husband, acknowledged absolute ownership of the land by Ruth otherwise they would not have sought permission to buy a portion of it. All that she managed to establish was mere long occupation and not hostility or exclusivity. Hostility, he submitted, was only displayed in 2004 at which point Ruth took action to evict Josephine and her family. But the trial court failed to consider all that evidence. On the second ground, which is really an extension of the first, counsel contended that there was an error in not finding that the occupation of the one acre was subject to Ruth's interest. In his view, there was nothing adverse about an occupation that was at the invitation and pleasure of the land owner. There was no forceful entry or hostility exhibited during the occupation and therefore the period or longevity of occupation was immaterial.

21. For his part, learned counsel for Josephine, **Ms Kibugi** who was instructed by M/s Kiai Nuthu & Company Advocates, emphasized in written submissions that after the sale agreement fell through, Josephine continued to occupy the one acre openly, as of right and without interruption for a period in excess of 12 years. She openly grew subsistence crops and buried her husband there. All these were hostile acts but she was not interrupted. She had in effect dispossessed the land owner and the trial Judge was right in making the finding that Ruth had dispossessed herself of the one acre. According to counsel, the onus was on Ruth to prove that there was interruption but she did not do so.

22. We have given anxious consideration to the pleadings, the affidavit evidence on record, the law and submissions of counsel. In the end we have come to the conclusion that this appeal is meritorious and ought to be allowed. Earlier in this judgment, we adumbrated the law on adverse possession which is largely settled unless Parliament heeds the call made in *obiter dicta* by Ouko, JA in the ***Mtana Lewa case (supra)***. It is a common law doctrine which we may restate through the Indian experience, thus:

> ***"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."*** (Emphasis added). See the Supreme Court decision in ***Karnataka Board of Wakf vs Government of India & Others (2004) 10 SCC 779.***

23. There is no denying, and it is indeed conceded, that Josephine occupied a portion of plot 1832 in 1972 and continued to do so after subdivision of the plot to create plot 6563. However, there is ample evidence to show that the original entry and the continued occupation of the portion of land was made with the consent and permission of Ruth. There were even requests for sale made by Josephine and her late husband which were rejected thus affirming Ruth's Title and authority over the land. It is clear to us that there was no non-permissive, hostile or adverse use of the property. This is a crucial element in determining whether adverse possession was complete. For the right of action to recover land does not accrue unless the land is in adverse possession. That is ***Section 13*** of the **Limitation of Actions Act.** It is not enough therefore to show that Josephine occupied the land for more than 12 years if that occupation was with the permission of Ruth. We have on record affidavit evidence on the consensual occupation which Josephine, as the party who had the onus of proof, did not endeavour to challenge by cross examining the deponents of the affidavits rebutting her assertions. Her assertion that she *„never sought the defendant?s permission and/or consent to occupy the subject land?* rings hollow in the face of such evidence. When Josephine and her children displayed hostility in 2004 Ruth reacted soon after by seeking their eviction. Sadly, all that evidence was neither examined nor evaluated by the trial court and in our view it was a non-direction. There was thus no basis for the finding that Ruth *"dispossessed herself of the one acre"*.

24. For those reasons, we allow the appeal and set aside the decree and orders issued by the High Court. We substitute therefor an order that the Originating Summons dated and filed on 20th June, 2006 be and is hereby dismissed with costs. The respondent shall also have the costs of this appeal.

Dated and delivered at Nairobi this 17th day of February, 2017.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR