**Hosea v Njiru and others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 26 June 1974

**Case Number:** 963/1970 (15/75)

**Before:** Simpson J

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*[1] Limitation of Actions – Land – Adverse possession – Established by payment of purchase price by*

*purchaser in possession.*

*[2] Limitation of Actions – Minority – No extension where right of action accrued first to person not*

*under disability – Limitation of Actions Act* (*Cap.* 22), *s.* 22 (*K*.).

*[3] Limitation of Actions – Land – Registered Land – Owner holds in trust for person who has*

*prescribed ownership – Limitation of Actions Act* (*Cap.* 22), *s.* 37 (*K.*).

*[4] Land – Registered – Overriding interests – Adverse possession for purpose of prescription an*

*overriding interest.*

*[5] Land – Registered – Prescription – Registered owner holds as trustee for possessor – Limitation of*

*Actions Act* (*Cap.* 22), *s.* 37 (*K.*).

**Judgment**

**Simpson J:** This is a dispute regarding the ownership of a plot of land of 14.06 acres situated in the Mutira/Kaguyu area of Kirinyaga District. The plaintiff claims that his father purchased the land in 1920 from its previous owner Ndegwa Kabiru and he and his father have been in occupation ever since. There are two defendants, Njiru Gitari, a nephew of Ndegwa Kabiru who denies the sale to the plaintiff’s father and the plaintiff’s subsequent continuous occupation and Peter Kamata Njoka who claims to have bought the land from the first defendant and to be the person Peter Njoka named in the land register as registered proprietor of the land in dispute namely Mutira/Kaguyu/645. The plaintiff says the Peter Njoka named in the register is a fictitious person. The plaintiff claims a declaration that “he is beneficially entitled and is the registered owner” of the plot in dispute and an order directing the second defendant to execute a transfer in his favour. The foregoing is a very brief resume of the dispute. I shall proceed first to consider the facts and thereafter the law on which the plaintiff relies. I have not the least doubt that the plaintiff and before him his father have been in occupation of the land since the year 1920 or at latest 1922. Witnesses to the purchase of the land by the plaintiff’s father were not altogether clear as to the details. Nevertheless I preferred their evidence to that of the first defendant who said the land had merely been given to the plaintiff and his father to cultivate and the owner of the land had been recompensed by frequent gifts. Oral evidence of this sale was supported by a document dated 2 February 1957 and signed inter alios by the first defendant. It is written in the Kikuyu language and the agreed translation reads: “So as to renew the agreement on sale of land which was sold to me by Ndegwa son of Kabiru; we have agreed with Baragu son of Kabiru together with their son Njiru Gitaari that I shall add Shs. 600/- to Shs. 1,460 plus 70 goats (seventy). Today Baragu together with Njiru their son have taken Shs. 200/- leaving Shs. 500/-.” There follow receipts for Shs. 125/- dated 23 March 1957, 2 bulls valued at Shs. 200/- and cash Shs. 110/- dated 5 May 1957, and Shs. 65/- dated 22 April 1957. The plaintiff supported by two witnesses said the object of this “renewal” as it was called was to add to the land sold one acre out of the total of 14.06 acres on which Ndegwa Kabiru had been living until his death. There were several discrepancies in this evidence which gave rise to doubts in my mind. The explanation of the first defendant was that the agreement was renewed because the vendor had failed to account to his clan for the proceeds of the sale. I was not at all impressed by the first defendant as a witness but I believe the truth is to be found in a combination of the two versions. If the object of the agreement had been merely to add one acre of land to the area already purchased and in the occupation of the plaintiff this would have been reflected in the agreement. Shs. 700/- is a disproportionate amount for one acre. Renewal, I think, implies confirmation of the sale. The first defendant in one of his many inconsistent statements said this finalised the sale of the plot. I think this must have been the intention of this agreement. Also supporting the sale of the land to the plaintiff is a document which has been referred to as the “redemption” document. It appears that in the process of consolidation and demarcation, it was common practice to allow or to encourage the redemption by a clan of land which had been sold by it to a person outside the clan. The plaintiff belongs to the Agachiku/Mbari ya Ichamumu while the defendant’s clan is the Agachiku/Mbari ya Gitayi. The “redemption” document which is dated 23 June (no year is shown but it is probably 1958) is in manuscript signed by the Recorder of the Mutira Unit Committee, one of the until committees set up under the Native Land Tenure Rules 1956 (L.N. 452) whose duty it was to prepare a record of existing rights in respect of each unit. The record was then signed by the appropriate District Officer, and published to enable objections to be made. Any objections were referred to the unit committee for determination. The document reads: “Case between Hoseah M. Ndegwa and Njiru Gitari has been heard by the Mutira U/C and the defendant Njiru Gitari agreed to the claim which was raised by the plaintiff (Hoseah) of 70 goats, 2 bulls and Shs. 1,966/- for a shamba which he (Njiru Gitari) had sold to the plaintiff. The plaintiff has coffee, oranges and etc. in the shamba in dispute, and the defendant had arranged no specific time for redeeming his shamba from Hoseah, and that Hoseah should harvest his oranges etc. and no claim should be raised as trespass until the defendant. ? Sgd. Recorder (Mutira U/C)” Also appearing on the document is the following addition: “Parties concerned and local elders should be able to value crops in the deal. Mutual agreement will then facilitate the sale. Sgd. 18/7” This “redemption” document was a decision of the Unit Committee but as I understand it a decision by consent of the parties. Njiru Gitari (the first defendant) had agreed to Hoseah’s (the plaintiff’s) claim for the refund of the full purchase price paid by him, and his father. It can be inferred that Hoseah’s claim arose from an agreement on his part to the redemption of the land by the first defendant. The allocation of the land to the first defendant should have been conditional upon the refund of the purchase price and payment of compensation. The date for redemption, however, was left open. The relevant file in the land registry contains two records of existing rights in the land in dispute. In the first which is dated 17 September 1958, the Committee of Mutira Location in conjunction with the elders of the plaintiff’s clan declared that the plaintiff and his son were entitled to ownership. This has been cancelled. The cancellation is neither signed nor dated. The second appears to be dated 29 December 1958. The same committee in conjunction with the elders of the defendant’s clan declared Peter Njoka to be the person entitled to ownership. There is no person of that name in the defendant’s clan. Indeed in 1967 the Land Registry was unable to trace this Peter Njoka. There is no satisfactory evidence of what transpired at that time apart from that of the plaintiff himself which is consistent with the contents of the “redemption” document. He said that he signed the first record of existing rights without any objection by the first defendant. Later he was called before the Land Unit Committee, he said, because the first defendant wanted to refund all the plaintiff had paid and to reclaim the land. The committee, he said, decided that all he had paid should be refunded to him and that he should be compensated for his coffee and other trees. Although no part of the purchase price or of the compensation, which was later assessed by an Assistant Agricultural Officer at Shs. 25,620/-, was paid to the plaintiff, the land was registered in the name of Peter Njoka as proprietor on 21 November 1959. The first defendant claimed to have offered the plaintiff Shs. 3,000/- in part payment which was refused. The plaintiff was not cross-examined on this. I do not believe the first defendant. The first defendant said he sold the land to Yusufu Wandonyo for Shs. 5,000/-, Wandonyo having agreed to pay the compensation due to the plaintiff. Wandonyo confirmed this and admitted he had paid no compensation. He produced a notebook containing an agreement written in Kikuyu and signed by the first defendant and himself. It is dated 1 February 1959. The land he said was subsequently at his request registered in the name of Peter Njoka. At that time Wandonyo had five sons of his own, two without land, Peter Njoka was his younger brother’s son and a minor. It is to be observed also that this written agreement is dated two months after the record of existing rights naming Peter Njoka as the person entitled to ownership of the land. There is no satisfactory explanation of the registration of Peter Njoka as proprietor. It gives rise to the suspicion that the first defendant was attempting to evade his obligations to refund the purchase price and pay compensation to the plaintiff. I would not, however, be justified in making a finding that the second defendant, although he obviously knew nothing about these transactions, is not the Peter Njoka named in the register. The decision of the Unit Committee was a strange one and one wonders how it came to be approved by the D.O. The only provisions (if such it can be called) made for enforcing payment was the statement that no action for trespass would be taken against the plaintiff until full payment had been made. An action for criminal trespass was instituted in the name of Peter Njoka as complainant in April 1970. It was adjourned and this suit was filed on 5 August 1970. Mr. Mitra for the plaintiff conceded that this being a first registration rectification under the provisions of s. 143 of the Registered Land Act (Cap. 300) has no application. He relies mainly on s. 38 (1) of the Limitation of Actions Act (Cap. 22) which by virtue of s. 37 applies to land registered under the Registered Land Act. It reads as follows: “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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 land or lease in place of the person then registered as proprietor of the land.” An order made under that subsection is distinguishable from rectification under s. 143. Such an order can affect a first registration. The plaintiff has been in possession of the land as purchaser since 22 June 1957, the date on which the last payment was made under his “renewal” agreement with the first defendant and others dated 2 February 1957. The plaintiff therefore at the date on which this suit was filed had been in possession of the land as purchaser for more than 12 years. The second defendant was registered as proprietor on 21 November 1959. Under s. 28 of the Registered Land Act, his rights acquired on first registration are unless the contrary is expressed in the register (which it is not) subject to “such liabilities, rights and interests as affect the same and are declared by s. 30 of this Act not to require noting on the register”. The material part of s. 30 reads as follows: “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register– . . . (*f*) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription . . . Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit.” Is the land subject to any such overriding interest in right of the plaintiff? It is necessary to look first at s. 7 of the Limitation of Actions Act which provides: “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 first accrued to some person through whom he claims, to that person.” In *Bridges v. Mees*, [1957] 1 Ch. 475, it was held that on payment of the purchase price by a purchaser in possession of land sold to him his possession of the land became adverse to that of the vendor. This decision was based on legislation closely corresponding to the relevant Kenyan Act. In that case the vendor was the registered owner throughout the 12 years. In the instant case, although the vendor was never registered and the person to whom he claims to have sold the land was registered for part of the period only, the defendants deny the purchase by the plaintiff and his rights to possession of the land. Mr. Ndegwa for the defendants submitted that prior to registration customary law applied, that the land could not be alienated without the consent of the clan and there is no prescription under customary law. Customary law, however, was not pleaded nor was any evidence of custom led. The first defendant as was his uncle before him is the leader of his clan. There is no evidence that the sale to the plaintiff was without such consent. I can see no reason to hold on these grounds that there could be no adverse possession before registration. Although an agreement to redeem can be inferred from the “redemption” document it is not an acknowledgement by the plaintiff of the title of the first defendant. The date on which a right of action accrued is not therefore affected by it. The possession of the plaintiff is not referable to the decision of the Unit Committee because the land was never redeemed by the first defendant. The plaintiff continued to possess as purchaser. His possession became adverse on 22 June 1957, the date on which the last payment of the purchase price was made. A right of action accrued to the first defendant on that date. The second defendant claims through the first defendant, and his right of action accordingly accrues on the same date. The fact that he was a minor at that time is immaterial. S. 22 of the Limitation of Actions Act extends the period of limitation when the person to whom the right accrues is under a disability such as minority but the first proviso is applicable: “Provided that– (i) this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims.” On the date of registration a right was in process of being acquired by the plaintiff by virtue of his adverse possession. S. 17 of the Limitation of Actions Act reads: “17. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.” S. 18 is inapplicable. The title of the first defendant would have been extinguished by virtue of that section on 23 June 1969 were it not for the provisions of s. 37 which so far as material read as follows: “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 . . .” Thus from 23 June 1969 the second defendant has held the land in trust for the plaintiff. The plaintiff is entitled to a declaration to that effect. The plaintiff in addition seeks an order under s. 38 (1) of the Act. I think he is entitled to it. It was submitted by counsel for the defendants that the first defendant should not have been sued. On the contrary it was he who sold the land to Wandonyo and arranged registration in the name of the second defendant knowing that it had not yet been redeemed from the plaintiff. He was a necessary party. There will be judgment for the plaintiff against the defendants as follows: (*a*) A declaration that the second defendant holds the land in trust for the plaintiff; (*b*) A declaration that the plaintiff is entitled to an order under s. 38 registering him as proprietor in place of the second defendant; (*c*) An order directing the second defendant to execute a transfer of the plot in favour of the plaintiff; and (*d*) An order against the defendants jointly and severally for costs of and incidental to this suit. Liberty to plaintiff to apply for getting order in proper form. *Judgment accordingly.* For the plaintiff:

*RK Mitra* (instructed by *JK Winayak & Co*, Nairobi)

For the defendants:

*K Mwaura* (instructed by *AH Malik & Co*, Nairobi)