REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

E.L.C APPEAL CASE NO.6 OF 2017

SAULI MAUNDU MUTUA ..... APPELLANT

VERSUS

MARY MUNGUTI ..... 1ST RESPONDENT

KASYOKI MARY.....2ND RESPONDENT

J U D G E M E N T

1.This is an appeal from the judgement of the Learned Senior Resident Magistrate in Makueni civil case No.113 of 2013 delivered on 01st December, 2015.

2. In his plaint dated 3rd July, 2013 and filed in court on even date, the Appellant who was the Plaintiff in the aforementioned case sought the following orders against the Respondents (the defendants in the suit): -

(i) An order declaring the defendants trespassers on the land parcel No.Kalawa/Kathulumbi/225.

(ii) A declaration that the plaintiff is the sole and exclusive owner of land parcel No.Kalawa/Kathulumbi/225.

(iii) Costs of this suit.

(iv) Any other relief that this honourable court may deem fit and just to grant.

3. The Respondents filed their defence on the 14th August, 2013 the same being dated 12th August, 2013. They denied the Appellant's claim.

4. Upon conclusion of the trial at the Subordinate Court, the Learned Senior Resident Magistrate in his judgment found in favour of the Respondent and proceeded to dismiss the Appellant's suit with costs to the Respondents. Aggrieved by the judgment of the Learned Senior Resident Magistrate, the Appellant filed this appeal where he raised the following grounds: -

1. That the learned trial magistrate erred in law and facts and misdirected himself when he made a finding of adverse possession in favour of the respondents, a claim that was not before the court for determination and that was not part of the pleadings before the court.

2. The learned trial magistrate erred in law and fact when he failed to consider the plaintiff's submissions at all in his judgment and thus occasioned a miscarriage of justice.

3. The learned trial magistrate erred in law and fact when he dismissed the appellant's case being one of a registered owner of land as against that of the illegal occupier of land.

4. The learned trial magistrate erred in law and fact when he made the finding that there was no attempt to evict the respondents from the suit land since their illegal occupation thereof yet there was sufficient documentary evidence to prove otherwise and thus occasioned a miscarriage of justice.

5. The learned magistrate erred in law and fact when he made a finding and/or implied to make a finding that occupation of land could confur ownership of land even in the face of a registered owner of land and as such occasioned a miscarriage of justice.

5. The Appellant prays for:-

1. That the judgment of this trial court dismissing the appellants case delivered on 01/12/2015 be quashed and/or set aside.

2. That this court do find in favor of the appellant in terms of the plaint filed in the subordinate court herein.

3. That costs be provided for.

6. It is only the Appellant who filed his submissions which I have carefully read.

7. This being a first appeal, this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ***(see Seller vs. Associated Motor Board Co. Ltd [1968] EA 123 at page 126 letter H and Williamson Diamonds Ltd v Brown [1970] EA 1 at pages 15 and 16 letters i to c).***

8. In his evidence before the Subordinate Court, the Appellant who was PW 1 told the Court that he was the owner of plot No.Kalawa/Kathulumbi/225 which he acquired upon being issued with a grant in respect of the estate of Thomas Mutisya Kasango in Nairobi High Court succession cause No.2753 of 2005. He produced a copy of title deed that bears his name, a copy of certificate of official search, a copy of green card whose entries number 7 and 8 show that land parcel No.Kalawa/Kathulumbi/225 was his as P.Exhibit Nos.1, 2 and 3 respectively. He also produced the certificate of confirmation of grant as P.Exhibit No.4.

9. The Appellant further told the court that his father, Dick Mutua Nduto, bought the land from Thomas Mutisya Kasango who in turn had bought the land in question from Paul Ngewa. The latter was registered as the owner on 02nd December, 1969. He went on to say that the Respondents entered into his farm in February, 2009. That one Mr. Munguti Ndolo who was the father and grandfather of the 1st and the 2nd Respondents had initially entered into the farm. He did not say when the entry by Munguti Ndolo took place. He said that Munguti received a notice dated 24th July, 1971 to vacate the land by 31st August, 1971. The notice was from Thomas M. Kasango through chief J. N. Musuu. That Munguti vacated the farm leaving one Esther and her daughter Mary (1st Respondent). That when Esther passed on in 2009, she was buried in the farm inspite of his objection. The Appellant produced the notice which is written in Kamba language and it's translation as P.Exhibit No.5(a) and (b).

10. The Appellant accused the Respondents of ruining his farm by cutting down trees and also leasing it out to other parties.

11. He termed the search certificate dated 07th November, 2013 showing Paul Ngewa as the registered owner of the land as a forgery.

12. In his evidence in cross-examination, the Appellant told the trial court that the parents of the Respondents were given notice in 1971 before he was born. He said that he has never used the farm and that the Defendant's mother was buried in the land in 2010. He pointed out that the Defendant's family did not vacate the land when they were served with the notice. That he first saw the land in question in 2009. That despite his father having bought the land in 1975, the latter had never used it.

13. The Appellant called Nyamai Kanyenye (PW2), and Musake Waita (PW3) as his witnesses.

14. Nyamai Kanyenye's (PW2) evidence in chief was that he gave Munguti Ndolo plot No.225 that belonged to Ngewa. That Ngewa appealed to the adjudication officers and won the objection against him (PW2). That at no time did Munguti ever claim the land. That on losing the land, he asked Munguti to vacate the land in question. That Munguti left for Nthungu but his wife refused to accompany him. According to him, Munguti's family cannot claim the land.

15. Nyamai's (PW2) evidence in cross-examination was that he lost the land that he had given to Munguti. He also told the trial court that Munguti's wife remained in the land when Munguti left for Nthungu.

16. Museke Waita's (PW3) evidence in chief before the trial court was that plot No.225 belongs to Mr. Dick Mutua Nduto who entered into the farm in 1971. That Dick bought the land from Kasango whom he knew. That Munguti Ndolo lives on Dick's land and he was given the land to use temporarily. That he later migrated to Kyase but his wife Esther and daughter, Mercy Munguti (1st Respondent) declined to go with him. That when Esther died, she was buried in the land.

17. His evidence in re-examination was that Esther Nthemba had been his neighbour since 1971. That she was buried in the land even though its owners did not want her to be buried there.

18. On the other hand, the 2nd Respondent who testified on behalf of himself as well as the 1st Respondent told the trial court that half a century has passed since his parents settled on LR No.Kalawa/Kathulumbi/225. That he inherited the land from his grandparents and that there was no claim over the land for the past seven years. That on 23/03/2009 at about 4:30 pm three (3) unknown men went to their home. One of the men introduced himself as the son of the man who bought the land in early 1970's. He was accompanied by the chairman of the market and pastor who served APC church in early 1970's. The men asked his grandmother to share the land but she retorted that they were grabbers. They had no title deed or land certificate. That on 25/03/2002 at 8:00 am when he and his grandmother went to report about the three men, they found a big meeting in the chief's office. The three men were present in the meeting. That when the 1st Respondent requested the three men to step out so that he could report, the chief insisted that they had a title deed to the Respondent's land. The chief asked the Respondents to go back on 11/05/2009 after conducting a search. That he conducted a search on 07/ 05/2009 which shows Sauli Maundu Mutua as the owner of the land. That on 04/05/2010 he obtained a permit to bury her. That while the case was going on, the Appellant did not produce any title deed in court. That the Appellant only took a title deed issued on 17/12/2012 to his (1st Respondent's) home.

19. The 1st Respondent's evidence in cross-examination before the trial court was that Munguti and Esther ought to have been registered as the owners and that their names are not in the title documents. He said that the Appellant obtained the title deed vide succession cause No.2753 of 2005 at the High Court in Nairobi.

20. In his judgment, the Learned Senior Resident magistrate held that;

> *"It is clear from the evidence adduced that the defendants and their departed ancestors have occupied the disputed land for close to half a century. They cannot be said to be trespassers more so the defendants who were born on the said land.*
>
> *Even if the defendants have not secured their interests over the land by way of registration they have had uninterrupted occupation and have acquired recognizable interest through the doctrine of adverse possession."*

21. In his written submissions before me, the Appellant's Counsel submitted that it is trite law that parties are bound by their own pleadings. The Counsel relied on the case. **The Independent Electoral and Boundaries Commission & Another vs. Mutinda Mule and 3 Others [2014] eKLR** which cited with approval a Malawi Supreme Court decision in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3** in which the court quoted, with approval, from an article by Sir Jack Jacob entitled ***"The present importance of pleadings" [1960] current legal problems at page 174;***

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….*
>
> *In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*

The Counsel went on to add that this was echoed in the case of **Philmark Systems Co. Ltd vs. Endemore Enterprises [2018] eKLR** which quoted the **Uganda case of Libyan Arab Uganda Bank for Foreign Trade and Development & Another vs. Adam Vassilidis [1986] UG CA6** where the Uganda Court of Appeal (Judgment of Odoki JA as he then was) cited with approval the dictum of **Lord Denning in Jones vs. National Coal Board [1957]2 OB 55** as follows: -

> *"in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."*

22. Arising from the above, the Counsel submitted that with regard to the finding of adverse possession by the trial court, the onus lay on the person claiming title by adverse possession to plead and further to prove the essential elements before the order could be granted in their favour. That the Respondents did not at any point either during the proceedings in their pleading raise a defence or a counterclaim of adverse possession and, therefore, the finding of adverse possession by the trial court was in error.

23. The Counsel further submitted that the trial court failed to show in its judgement how it arrived at a decision on adverse possession which was a clear violation of **Order 21 Rule 4 of the Civil Procedure Rules** which states: -

> *"Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."*

24. The Counsel submitted that the trial court veered away from the points and facts raised by the parties and proceeded to adjudicate on foreign issues. It was also the Counsel's submissions that the trial court did not have jurisdiction to deal with a matter regarding adverse possession as clearly stipulated under **Section 38 of the Limitation of Actions Act** which provides that: -

> *"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 the land or lease in place of the person then registered as proprietor of the land."*

That it is crystal clear that only a superior court and specifically the Environment and Land Court that can entertain a suit regarding adverse possession and therefore it is right to conclude that the orders given by the trial court are null and void *ab initio.*

25. Regarding the defence filed by the Respondents where they claim that the Appellant acquired his title deed fraudulently, the Counsel pointed out that the allegations are not pleaded in the defence. That the provisions of Section 107 of the Evidence Act unequivocally state that he who asserts must prove. The counsel cited the case of **Koinange 413 vs. Koinange [1968] KLR 23** where it was held;

> *"Allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the*

usual standard in civil proceedings, that is on the balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do."

The Counsel pointed out that the Respondents did not in any way whatsoever present to the trial court facts that could prove their assertions were truthful. The Counsel added that Order 2 Rule 4 of the Civil Procedure Rules requires parties to state a very explicit case of fraud or illegality, or rather facts suggesting fraud or illegality, and/mere statement of fraud or illegality had been committed, is not compliance with the aforesaid rule.

26. The Counsel also submitted that from the reading of the impugned judgement, it is clear that the trial court did not consider the bulk of the Appellants evidence that was submitted for determination.

27. Regarding the court's finding that no attempts to evict the Respondents had been made, the Counsel cited the letter dated 24/07/1971 (P.Exhibit No.5(a) & (b) which required one Ndolo Munguti and his wife to vacate the suitland. That a similar letter dated 14/01/1975 (P.Exhibit No.7(a) and (b) was also written.

28. Regarding the trial court's finding that occupation of land could confer ownership where the same has a registered owner, the Counsel cited **Section 26(1) of the Land Registration Act** which provides that;

"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmissions by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The Counsel added that the Appellant produced a title deed and search certificate and asserted that if the Respondents were in occupation of the land, they were only doing so with the permissions of the Appellant. With due respect to the Counsel, I wish to point out that occupation of a registered land can confer ownership, if the occupation is open, hostile and uninterrupted. For the party in occupation the procedure to acquire ownership is provided for under Section 38 of the Limitations of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules.

29. Having read the submissions by the Counsel for the Appellant and the evidence before the trial court, I would agree with the Appellant's Counsel that at no point did the Respondents during the proceedings and in their pleadings raise a defence, or counter claim of adverse possession. As such, the finding of adverse possession by the trial court was in error. Assuming that there was a valid defence or counterclaim for adverse possession before the trial court, the trial court would still have been caught up by the provisions of Section 38 of the Limitation of Actions Act since it would have no jurisdiction to deal with the matter.

30. The parties before the trial court as well as the trial court were bound by the pleadings that they filed. It was not therefore open for the trial court to consider adverse possession and make a finding on it in its judgement.

31. I further agree with the Appellant's Counsel that had the trial court considered the evidence and the submissions, it would have come to the conclusion that the Appellant was the registered owner of land parcel number Kalawa/Kathulumbi/225 as can be seen from the title deed, certificate of official search and green card produced in evidence as P.Exhibit Nos.1, 2 and 3 respectively. His evidence remained unchallenged.

32. Arising from the foregoing, my finding is that the learned Senior Resident Magistrate erred in law and in fact in arriving at the decision that he made on the 1st December, 2015. The appeal has merits. I, therefore, proceed to set aside the judgment of the Learned Senior Resident Magistrate and Substitute with an order allowing the Appellants suit in terms of prayers (i), (ii) and (iii) of the plaint dated 03rd July, 2013. The Appellant shall also have the costs of this appeal.

Signed, dated and delivered at Makueni this 09th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Ms. Kyalo for the Appellant

J. M. Tamata for the Respondent – Absent

C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

09/07/2019.