REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELCA NO. 4 OF 2018

STEPHEN MWANGI.....APPELLANT

VS

PETER M'RINGINE.....RESPONDENT

JUDGMENT

1. This is an Appeal dated 8/2/18 from the judgment of Hon. S. Abuya Senior Resident Magistrate in CMCC No. 85 of 1989 delivered on 6/12/2017. The appeal is on the following grounds; -

a. The learned trial magistrate erred in law and fact in giving judgement in favor of the Plaintiffs (Respondent) when the case was not proved on a balance of probability.

b. The learned trial magistrate erred in law and fact in failing to appreciate that the Appellant herein lived in the said land for more than 40 years and has nowhere to go.

c. The learned trial magistrate erred in law and fact that the said land is family land but only registered the Plaintiff (Respondent) name in trust for the family.

d. The learned trial magistrate erred in law and fact in failing to give the Appellant time to vacate the said land as required by law.

e. The learned trial magistrate averred in land and fact in failing to consider the evidence of the Appellant and his witness. `

2. On the 13/3/89 the Respondent (then Plaintiff) filed suit before the trial Court against the Appellant (Defendant) for orders that; -

a. An order to evict the 1st and 2nd defendant from plot No.74 Timau settlement Scheme.

b. Costs of and incidental to his suit

c. Any further and better relief which this honorable Court may deem fit and just to grant.

3. After hearing the matter, the Honorable Magistrate made the following orders; -

a. That the Defendants herein are hereby ordered to vacate the parcel of land known as plot No.74 Timau settlement scheme within 60 days on the service of this judgement and/or decree and in default the Plaintiff is at liberty to apply formally for an order of eviction which eviction will be done on the defendants' costs.

b. The Plaintiff is awarded the cost of the suit.

4. The matter proceeded before the Trial Court viva voce with the Plaintiff testifying for the Plaintiff's case and 2 witnesses for the defence case.

5. The Respondent's case before the trial Court was that in 1964, he was allocated parcel No. Timau settlement Scheme/74 ("suit land") by Settlement Fund Trustees (SFT). He purchased it on a loan advanced by the settlement Fund Trustees which he repaid fully. He was later on 12/4/1990 issued with a title deed to the suit land as a sole proprietor. It was his testimony that when he was allocated the farm he was still in school. His father, M' Ringine M'Anampiu had passed away and was left under the care of his grandfather. That it was a requirement by Settlement Fund Trustees that allottees should occupy the land upon allotment. He therefore requested his grandfather settle and care for the suit land. He claimed that when his grandfather went onto that land, he realized it was expansive with no other homes nearby. His

grandfather found it wise to invite his brother M' Miungi M'Kiriga (1st Defendant) to keep him company on the suit land. By then the Appellant who was the son of 1st Defendant was in prison between 1970 and 1982 and upon release the Respondent allowed him to join his parents who were living on that land with a view to rehabilitate him. However, in 1987, the Appellant and his wife started to harass the Respondent's family. The Respondent was then forced to ask the Appellant and his father to vacate his land and move back to the Appellant's father's ancestral land at Murathankari being parcel no. LR. No. Nyaki/Murathankari/7 but they resisted precipitating the filing of the lower Court suit. Shortly thereafter the 1st Defendant died and the Respondent obtained orders to restrain the Appellant from burying their remains on the suit land. Earlier on around 1980 or thereabouts the Appellant's mother Gatiria died and was buried in a public cemetery. In support of his claim the Respondent produced a title deed issued to the suit land dated 12/4/1990 in his name as a sole proprietor, 42 receipts being payment for the land, 24 copies of statements from the Settlement Fund Trustee and certificate of outright purchase dated the 2/10/1984.

6. The Appellant's case was that he and the Plaintiff are cousins and that the Plaintiff was taken care of by the 1st Defendant when the Respondent's father died**.** He claimed that the suit land was allocated to the Respondent to hold in trust for their family and they have lived on the suit land since he was a minor. He claims that his father assisted the Respondent to settle the loan from the Settlement Fund Trustees. That the Respondent started objecting to their continued stay on the suit land when the Appellant became of age and ready to have his own family. That since he always knew the suit land to be home, he lodged a complaint with the elders who made a resolution through a letter dated 16/6/2014. He affirms that he still lives on the suit land and even if his sisters came back from the matrimonial homes, they would come to the suit land. He claimed that his siblings worked on the land for many years tending pyrethrum crop which they used the proceeds to pay for the loan from SFT as well as school fees for the Respondent and they should be compensated.

7.DW2 explained that he is a neighbor to the suit land and that they obtained their lands from the Settlement Fund Trustee through loans. That the initial occupants of the suit land were the Appellant's father and grandfather of the Respondent. That at that time the Appellant was working and he helped the Respondent to repay the loan.

8. Further the DW2 reiterated the testimony of DW1 and claimed that the suit land was allocated to their grandfather and their father but had no documents in support. He claimed that the Appellants mother, Respondents grandparents are buried on the suit land. He stated that he did not attend the burial of the Appellants mother as he was at his home at Igembe but he heard that she was buried on the land. He stated that the Appellant's father was not buried on the land. He also did not know where the Appellant's wife was buried. He stated that the Respondent's grandfather arrived on the land first followed by the Appellant's father who joined him later.

9. In addition, DW2 stated that the Appellant and his sisters were allotted the work of planting pyrethrum and were being deducted 50%. That the Respondent came back to the suit land after completing school and found the Appellant's family living there. That the Appellant's mother died and was buried there. That most people used the pyrethrum to pay for the loans but some paid in cash though he didn't know how the Respondent made payments, neither did he know where the Respondent worked. He confirmed that the Appellants father was not buried on the suit land.

10. The trial Court then proceeded to make a finding that the Respondent held indefeasible title in line with Section 26 (i) and there was no evidence of any fraud misrepresentation and or illegal actions by the Respondent in the process of acquiring the said title and in the premises it allowed the respondent's claim as prayed.

11. The appeal was canvased through written submissions which I have read and considered.

12. The Appellants submitted that the Court failed to consider the beneficial interests of the Appellant and his family. He contends that though he was unrepresented in the trial Court he proved that he had become entitled to 2 acres out of the suit land by way of Adverse Possession in which he had openly and continuously occupied and used together with his family since the 1960's therefore being way in excess of 12 years. The Appellant claimed to have tendered evidence at the trial Court that he has dwelling houses, miraa plants various trees and seasonal crops on the land. He claims that the Respondent has acknowledged and admitted that the Appellants have been in occupation of the suit land. He contends that the suit land was registered in the name of the Respondent as a representative of the family to hold in trust for them. Maintaining that the Respondent was a mere allottee of the land as a Maumau Survivor on behalf of his parents through SFT. That the land was to be shared with the other survivors which included the Appellant and his parents.

13. The Respondent in opposition submitted that he placed before the trial Court uncontested evidence in respect to his proprietorship as the sole registered owner of the suit land. He produced documentary evidence in support of how he acquired the suit land. That the Appellant entered the suit land with his permission and that of his late grandfather as he required someone to be in occupation of the suit land while he was completing his studies therefore, they were mere licensees on the suit land. That he later terminated their license and required them to leave but failed to hence forcing him to file the present case.

Determination

14. This is a first appeal and in the circumstances this Court has a duty to analyze and re-evaluate the evidence adduced in the superior Court and to reconsider it to find out if it warranted the decision reached. As was stated in **Selle & Another v. Associated Motor Boat Co. Ltd. [1968] 123 at p 126:**

> "An appeal to this Court from the trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that 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. In particular this Court in not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally **(Abdul Hamid Saif v. Ali Mohamed Sholan[1955] 22 EACA 270**)."

15. Subject to the caution in Selle's case, an appellate Court will be slow to interfere with the findings of fact made by the trial Court unless those findings are based on no evidence, or on a misapprehension of the evidence, or the Learned Magistrate is shown demonstrably to have acted on wrong principles in reaching the findings. In line with those principles, the Court has considered the matter fully and has formed the following view of it.

16. By way of background the case in the lower Court was filed on the 13/3/1989 by the Respondent against M'Minungu M'Kirigia (Appellant's father) and the Appellant seeking orders for eviction from the suit land namely TIMAU/SETTLEMENT SCHEME/74. It is commonly acknowledged from the evidence on record that the parties are related. The Father of the Appellant and the grandfather of the Respondent namely M'Anampiu M'Kirigia were blood brothers with the Appellant's father M'Minungu M'Kirigia, who was the 1st Defendant in the lower Court. The father of the Respondent one Michael M'Ringine M'Anampiu is said to have died during the Mau Mau freedom struggle in the forest. The Appellant and the Respondent therefore are cousins. After the death of the Respondent's father he was raised up by his grandfather M'Anampiu M'Kirigia. It is not in dispute that in 1963/64 the Respondent was allocated land by the Settlement Fund Trustees (SFT) and since he was still schooling, he requested his grandfather M'Anampiu M'Kirigia to move onto the land and take care of it to meet the conditions of allotment by SFT that required the allottees to take possession of the land. Evidence has been led that his grandfather found the land expansive and lonely and asked his brother, the Appellant's father to join him on the land, which he did with his family.

17. The Court has observed that the Appellant then 2nd Defendant and his father did not enter appearance nor file a statement of defence within the prescribed time or at all prompting the Respondent to file a request for judgement in default on the 18/4/89. On the 9/5/89, interlocutory judgement was entered against the then Defendants as prayed and the matter directed to be fixed for formal proof.

18. The 1st Defendant died in 27/3/97 and there is no evidence of substitution by either party. The Respondent obtained an injunction from 27/3/1997 restraining the Appellant from interring the remains of his father on the suit land. On the 1/2/16 the Respondents counsel on record Mr. Wilson Mburugu informed the Court that the 1st Defendant passed away and were keen to proceed with the 2nd Defendant. Effectively the suit against the 1st Defendant was deemed to have abated and or was abandoned. The 2nd Defendant (Appellant proceeded with the case without filing any pleadings except a witness statement dated the 28/7/17 which on close look was even not filed in Court. There is neither a receipt nor a Court stamp on the documents to denote that it was filed. At the hearing the Appellant was allowed to testify and even called one witness namely Isaac Kirangari who despite not filing any witness statement was allowed to testify on trial. The totality of this is that the Appellant's right to be heard as enshrined in Article 50 of the Constitution was adhered to. Courts being mandated to do substantive justice under Article 159 of the said Constitution, I find no fault in the manner the Learned Magistrate proceeded in allowing both the Appellant and his witness to testify. This is because the Appellant was representing himself.

19. Back to the issues raised in the Memorandum of Appeal. I have taken the liberty to reduce them into the following germane issues; Whether the Appellant proved a case of Adverse Possession or such prescriptive rights; whether the Appellant established trust or family interest on the suit land; Whether the learned Magistrate failed to considered the evidence of the Appellant; whether the learned trial magistrate failed to give the Appellant time to vacate the suit land;

Whether the Appellant proved a case of Adverse Possession or such prescriptive rights

20. As explained above the Appellant did not filed any pleadings in defense of the Plaintiffs claim. His defense therefore as I can glean from his witness statement as well as his evidence in the trial Court is that the suit land was family land which was allotted to the Respondent to hold in trust for the family, him included. The Appellant did not file any counterclaim to register whatever claim he had in the suit land. Curiously, the Appellant has submitted in his submissions that indeed he led evidence on trial in relation to a claim under Adverse Possession having been on the suit land in excess of 12 years, making developments such buildings dwelling houses, planting trees, subsistence crops on 2 acres of the suit land. I say curiously because there is no such evidence on record. This piece of evidence was not tendered in evidence at all. I have perused both the statement of the Appellant and his testimony given in evidence at the trial Court and is devoid of such evidence. This is new evidence being sneaked in at the Submissions stage and is not helpful to the Appellant. With due respect to the Counsel of the Appellant this kind of submission borders on misleading the Court. Counsel bears a duty of responsibility to his client as well as the Court. I say no more on this other than to state that it is contemptible. Submissions are neither pleadings nor evidence. It is the summary of a party's case.

21. Be that as it may even if the claim was to be entertained (which is not), a claim for adverse possession isasubstantive claim that must be specifically pleaded in the prescribed manner under the Limitation of Actions Act Section 37 and 38. The Appellant did not lead any evidence to found Adverse Possession. He never filed any defense nor counterclaim. The Respondent has led evidence on record that the Appellant's father entered the land through the permission of his grandfather, the caretaker of the land. That when the Appellant returned from prison, he allowed him to settle on the land for purposes of rehabilitating him. That when he stirred trouble for his family in 1987, he withdrew his permission /license and required them to vacate the land. They did not heed, leading to the filing of the case in 1989. It is trite law that an occupier of land with the permission of the owner is a licensee and cannot found a cause of action for Adverse Possession.

22. Section 38 of the Limitations of Actions Act states as follows;

> "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"

The Respondent only became registered as owner of the land in 1990 and therefore even if adverse was to be sought time did not start running in favour of the Appellant until 1990.

23. Prior to 1990, the land still belonged to the SFT. It is trite law that the law of limitation does not apply to land owned by the Government of Kenya such as that held by SFT.

24. This claim being introduced late in the day without any leave of the Court is therefore struck out. It is incompetently before the Court.

Whether the Appellant established trust or family interest on the suit land;

25. The Appellant is also alleging that the suit land was encumbered by a customary trust. The two claims of Adverse Possession and customary trust are founded on totally different concepts of law that cannot be ventilated concurrently in one suit in respect to the same parcel of land, unless in the alternative prayers. None of the claims were pleaded in the lower Court and therefore not anchored in pleadings.

26. It is trite that pleadings bind parties. The place of pleadings in our legal system cannot be overemphasized. It is such pleadings that the Court interalia determines whether it has jurisdiction or not.

27. In the case of **Isack M'Inanga Kieba Vs Isaaya Theuri M'Lintari & Isack Ntongai M'Lintari SCOK Petition 10 of 2015,** the Supreme Court held as follows;

> "Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in ***Kiarie v. Kinuthia,*** that what is essential is the nature of the holding of the land and intention of the parties. If the said holding were for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are: the land in question was before registration, family, clan or group land; the claimant belongs to such family, clan, or group; the relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; the claim is directed against the registered proprietor who is a member of the family, clan or group". (emphasis mine).

28. The issue of customary trust is also not supported by evidence because the suit land was not ancestral land but purchased land, the claim by the Appellant that their father assisted the Respondent to pay the loan from the scheme was not supported by any documentary evidence whilst the Respondent produced several receipts in evidence of payment he made towards the loan, the title to the suit land is registered in the name of the Respondent as a sole proprietor. In the premises I find that the issue of trust was not proved against the respondent. I find no reason to interfere with the finding of the trial Court.

29. In respect to issue No 3 aforesaid on perusal of the impugned judgement, I have come to the conclusion that the learned trial Magistrate after considering the material and the evidence placed before him, came to the right determination in this suit. I see no valid ground to find him in error.

30. The Appellant was given 60 days within which to vacate from the suit land, the Appellants had already been issued with notices to vacate in 1987 but remained adamant. The Appellant and his family have their ancestral land elsewhere which he alluded to in his evidence when he lamented when he stated that the Respondent should answer why he buried his mother as he would have buried her "in our land at Mulathankari". The notice period is reasonable. In any event any party executing a judgement by way of eviction has to adhere to the provisions of the Land Act, 2012 by giving the requisite notice. This is also testament that the Appellant is aware deep down in his heart that he has not proved any claim against the Respondent.

31. The appeal is not merited. It is dismissed with costs.

32. The Appellant shall pay the costs in this appeal and that of the lower Court case.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In the presence of;

C/A Mutwiri

Maheli holding brief for Mburugu for Respondent