**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT GARISSA**

**ELC CIVIL APPEAL NO. 5 OF 2017**

**(Formerly Hcca No. 14 Of 2011, Embu)**

**MADHEY AHMED SHEIKH.....APPELLANT**

**VERSUS**

**MAALIM IBRAHIM MOHAMED.....RESPONDENT**

**JUDGEMENT**

(Being an Appeal from the judgement of the Senior Resident Magistrate Hon. Ingutya delivered on 30th April, 2010 in SRMCC No. 5 of 2010 (Wajir)

**BACKGROUND**

This is an appeal formerly lodged in Embu High Court as HCCA No. 14 of 2011 before being transferred to the High Court here in Garissa on 15th December, 2011.

The Appeal arises from the judgement of the Senior Resident Magistrate in Wajir Law Courts Hon. Ingutya delivered on 30th April, 2010. The respondent was the plaintiff in the Lower Court Case against one Mariam Warfa, Khadija Affey and the appellant herein as defendants seeking the following orders:

(a) An injunction to issue against the defendants, their servants, agents and/or anybody acting on their behalf restraining them from encroaching, erecting any buildings or shanties and or causing any acts of waste on land Reference Number 13607/209 Wajir.

(b) The defendants do remove themselves or they forcefully be evicted from land reference number 13607/209 Wajir.

(c) Costs of this suit.

(d) Any other relief which this honourable court may deem just and expedient to grant.

The suit was filed simultaneously with chamber summons under certificate of urgency brought under Section 3A CPA and order XXXIX CPR. The plaintiff/applicants were seeking temporary injunction orders pending hearing and determination of the suit.

After that application was placed before the duty court, it was certified urgent to be heard in the first instance in the absence of the respondents. The court also granted temporary injunction orders pending hearing and determination of the suit.

On 8th March, 2010, the defendants filed a joint statement of defence in which they denied the plaintiff's claim and put him to strict proof thereof.

During the hearing of this case, the plaintiff testified and called three witnesses. The defendants also testified in their defence and called a total of thirteen (13) witnesses.

**PLAINTIFF'S CASE**

According to the plaintiff, he is the proprietor of the suit property in which the defendants have occupied part of it. He stated that the 2nd defendant's latrine has been built on his plot. He discovered that in December. He also found out that all beacons had been removed except one. He went to the Survey Office where he paid fees and the beacons were re-established on the 1st defendant's house. She requested him

not to break her wall and house. They agreed to settle out of court. The third defendant incited others to kill him if he sets foot on the suit plot. When he took materials to the site, the third defendant caused his workers to be stoned. He reported the incident to the police who arrested him. When he was released, the 3rd defendant deposited some building materials on his plot. He produced documents of ownership as P. Exhibit No.1.

**1ST DEFENDANT'S POSITION**

The first defendant stated that she lives in a house she bought from an Agricultural Officer but she does not know if she encroached the plaintiffs plot.

**2ND DEFENDANT'S CASE**

The 2nd defendant testified that the plot she was living belongs to her. She stated that she has lived in the plot since 1993.

**3RD DEFENDANT'S CASE**

The third defendant testified on oath and stated that in 1994 while he was working as a Councillor, he went with five other colleagues to the District Commissioner and asked to be allocated a plot. He was allocated the suit property which by then was vacant. Recently, he saw the plaintiff measuring the plot. He informed him that the plot belonged to him. He said that his plot is IR No. 1612.

After the trial magistrate delivered his judgement, the third defendant/appellant was aggrieved and lodged the present appeal citing the following grounds:

**1. THAT the learned trial magistrate erred in law in finding that the respondent in this appeal was the true owner of plot No. 1612 and/or 13607/209 in dispute without due regard to the provisions of the law.**

**2. THAT the learned magistrate erred in law in disregarding the appellant's defence especially that the appellant had also been given title to the said piece of land plot Number 1612.**

**3. THAT the learned trial magistrate erred in failing to give his ruling on the authentiality of the letter of allocation whereas the same was in contention and merely gave a judgement in favour of the respondent herein without due regard to the fact that two letters of allocation had been issued against the same parcel of land to the parties herein.**

**4. THAT the learned trial magistrate erred in disregarding the appellant's defence and especially that the appellant had been in uninterrupted occupation of the parcel of land since 1994 a period of 16 years and have acquired rights over the property by adverse possession as matter of law and fact.**

**5. THAT the learned trial magistrate erred in law in failing to concisely state the issues for determination in the suit as framed and to give its decision on each of the issues in its judgement to meet the basic necessities of judgement under the law.**

**6. THAT the learned trial magistrate erred in failing to adequately consider the law relating to ownership of land and whether on the evidence before the court, the respondent had proved his case entitling the respondent to judgement given.**

**7. THAT the learned trial magistrate erred in failing to consider that the appellant has substantially developed in the subject property in making his judgement.**

**8. THAT the learned trial magistrate erred in his interpretation and/or treatment of the evidence placed before him.**

**9. THAT the lower court lacks jurisdiction to determine the case.**

**10. THAT the trial court erred in making a judgement unsupported by material before court.**

**ANALYSIS AND DECISION**

My mandate as a first appeal court is to review the evidence in order to determine whether the conclusion originally reached by the trial court should stand. In doing so I must warn myself not to interfere with the finding of fact by the learned magistrate unless it is based on no evidence at all or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principles in reaching the finding he did. In his evidence, the plaintiff stated that his land has been grabbed by the defendants. He stated that the 2nd and 3rd defendants occupy part of his land and his beacons were removed. Though plaintiff produced several documents of ownership of the suit property including a ratification of plot No. 2301 dated 30th June 1993 and another from the District Surveyor, Wajir dated 1st July, 1993. The two letters were addressed to the Commissioner of Lands confirming allocation of the suit property in favour of the plaintiff. The District Surveyor also confirmed the existence of the plot on the ground. After he was allocated the plot in 1993, there is no evidence that the plaintiff developed or occupied the same until he discovered the defendants/appellants had grabbed it in December. It is not clear which December but it can be presumed the December preceding the filing of the suit before the lower court. According to his evidence, the defendants were illegally occupying his land. That explains why he was seeking orders of eviction of the defendants.

When the plaintiff/respondent was allocated the suit property in 1993 there was no beacons certificate indicating the location and area of his property. The plaintiff did not call the Surveyor who placed the beacons initially. The minutes of the council approving the allocation of the suit property to the plaintiff was not produced.

It was imperative for the plaintiff to produce the minutes of the Plot Allocation Committee dated 24/8/92 and the full Council meeting approving such allocation to the plaintiff. Allocation of plots are done through full council meeting of the defunct County Councils as provided under the repealed Local Government Act.

The plaintiff did not also call the surveyor who replaced the beacons in the year 2010. It was imperative to call the said surveyor who could have stated whether there were buildings on the suit plot or not. In the absence of any material evidence to confirm the status of the plot on the ground at the time of making this decision and considering that the court did not visit the locus at quo, I find the evidence given by the defendants/appellants that they have occupied and done developments on the suit property for twelve (12) years and above more probable than not. The appellants have even testified that they have built permanent houses with perimeter walls and latrines on the suit property. The appellants witnesses confirmed in their evidence that they have lived with the appellants as neighbours for more than twelve (12) years. I am inclined to find and hold that the appellants have acquired the suit property by way of adverse possession pursuant to Section 38 of the Limitations of Actions Act Cap. 22 Laws of Kenya.

In the case of **Wambugu –Vs- Njuguna (983) KLR 172** the Court of Appeal stated:

> **"First, in order to acquire by the statute of limitations title of land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent which his enjoyment of the suit land for the purpose for which he intended to use it."**

Again in **Mulcathy –Vs- Cunamore Ply Ltd (1972) 2 MS WLR 464 at 475 D**, it was held as per Brown CJ that possession which caused time to run must be open not secret, peaceful, not by force; and adverse not by consent of the true owner.

Based on the evidence adduced, the plaintiff never took possession of the suit property since he was allocated in 1993 until December 2009 when he discovered that the appellants/defendants grabbed his land. In my view, the appellants/defendants have demonstrated that they had open, peaceful adverse occupation and possession of the suit property to the interest of the plaintiff/respondent for a period over 12 years between 1993 and 2009. The respondent never made any attempt to assort his ownership rights between 1993 and 2009.

In the upshot, I find that the learned magistrate erred in law and in fact in failing to consider that the plaintiff/respondent had lost his right to the suit property by being dispossessed of it and/or for having discontinued his possession of the same for more than twelve (12) years.

Consequently I allow this appeal and set aside the judgment of the learned magistrate Hon. A. Ingutya delivered on 30/04/2010 and substitute it with an order that defendants/appellant have/has acquired the suit property by way of adverse possession under Section 38 of the Law of Limitations of Action Act, Chapter 22 Laws of Kenya.

The costs of this appeal and the lower court shall be borne by each party. It is so ordered.

**Read, Delivered and Signed in the open court this 24th day of July, 2018.**

Hon. Justice E. C. Cherono

**ELC JUDGE**

**In the presence of:**

1. Mr. Nyaga

2. M/s Baqwesa holding brief for respondents.