Kasongo & another v Ochieng & 2 others (Civil Appeal 123 of 2017)
[2022] KECA 145 (KLR) (11 February 2022) (Judgment)

Neutral citation: [2022] KECA 145 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 123 OF 2017

F TUIYOTT, PO KIAGE & M NGUGI, JJA

FEBRUARY 11, 2022

BETWEEN

ALEX ODERO KASONGO ..... 1ST APPELLANT

AGNES W. WAGANDA ..... 2ND APPELLANT

AND

DAMON ODERO OCHIENG ..... 1ST RESPONDENT

DANIEL ODHIAMBO OCHIENG ..... 2ND RESPONDENT

LEONORA OPUNDO OCHIENG ..... 3RD RESPONDENT

(Being an Appeal from the judgment and order of the High Court of Kenya at Kisii (Okong'o, J.) dated 21st June, 2016 in Civil Case No. 100 of 2011 (O.S))

JUDGMENT

1. **JUDGMENT OF TUIYOTT JA.**

   This appeal arises from proceedings commenced as originating summons dated 26th May 2011. In those proceedings, the respondents here lodged a claim for adverse possession pursuant to section 38 of the *Limitations of Actions Act* over land parcels described as South Sakwa/Kogelo/196 & 197 (hereinafter the suit properties). At the time of presenting the suit, one Joel Elijah Dolfus Nyaseme (Nyaseme) was the owner of the suit properties and therefore the initial defendant.

2. The history of controversy in this matter can be traced back to when Janet Aloo Okech and Gudo Odero owned Sakwa/Kogelo/196 and Sakwa/Kogelo/ 197, respectively. Both are now demised. Gudo Odero was a paternal uncle to the 1st and 2nd respondent. The case presented at trial was that the two were born, brought up on and have been cultivating and using the suit properties. The 3rd respondent, identified as a sister in law to Gudo Odero, has her homestead on 197 and cultivates a portion of it.

A theme of the respondent's case was that their presence in and use of the suit properties was granted to them by the late Gudo Odero.

3. Later, Nyaseme became the owner of the suit properties through a forced sale by Kenya Commercial Bank Limited as chargee on the basis of a charge given by Gudo and Janet. At trial, as they still do now, the respondents maintained that they were in use and occupation of the suit properties without the interference and/or permission of Nyaseme notwithstanding that he had purchased the suit properties on 27th August 1980. It is the case of the respondents that it was not until 2011, 21 years after the purchase, that Nyaseme asked them to desist from using the suit properties. He then sold the properties to the appellants herein. Aggrieved by the turn of events, and claiming rights over the suit properties, the respondents approached the court for redress.

4. Nyaseme is now deceased. The respondents then amended the originating summons to substitute Nyaseme with the appellants who are the new registered owners of the suit properties.

5. The appellants opposed the claim for adverse possession. It was their defence that before they purchased the suit properties from Nyaseme, they carried out due diligence which included a visit on the farm. The visit revealed that other than the 3rd respondent, neither of the other two were in occupation. As for the 3rd respondent, they were informed that she had been in occupation for 32 years. They averred that the process of obtaining title to the suit properties was conducted procedurally and after all encumbrances on the respective titles had been discharged and the various consents obtained. It was also their case, and this would be an alternative plea, that the respondents entered the suit properties as invitees and not in adversity to the titles.

6. The hearing of the summons was by way of viva voce evidence. As will be apparent shortly, the success or failure of this appeal turns on that evidence and the court will be reassessing that evidence as is helpful in resolving the matter at hand.

7. In a judgement dated 21st June 2016 and delivered on 27th June 2016, the trial Judge understood the main dispute to be whether the respondents who claim to have been in occupation of the suit properties before they were sold by Kenya Commercial Bank to Nyaseme continued in occupation and if so, whether their occupation was adverse to the proprietary interest of Nyaseme and subsequently to that of the appellants who purchased the suit properties from Nyaseme. The court's answer to this core issue affirmed for the 1st respondent as regards 2.1 ha in 197. The court concluded that Nyaseme never took possession of the suit properties after the same were registered in his name and he never interrupted the 1st respondent's occupation until 2011 when he wanted to sell the suit properties to the appellants. The court found that from 1980 when Nyaseme purchased the suit properties to 2011 when he sold to the appellants, there had been uninterrupted occupation and use by the 1st respondent of the smaller portion. The court also considered whether the respondents had dispossessed Nyaseme of the entire suit properties before the transfer to the appellants and declined to find in favour of the respondents on this. The court found that Nyaseme was dispossessed of only a portion measuring 2.1 ha of 197. The court held that the respondents' claim only succeeded in respect to that portion and ordered subdivision within 90 days and transfer of 2.1 ha to the 1st respondent.

8. Aggrieved by the decision, the appellants filed the present appeal citing 6 grounds as follows:

    1. That the learned trial judge erred in Law in declaring that the appellant's right to recover a portion measuring 2.1 hectare of all that parcel of land known as LR No. South Sakwa/Kogelo/197 is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya.

2. That the learned trial judge erred in law in entering judgement for Respondents against the appellants that L.R. No. South Sakwa/Kogelo/197 shall be sub-divided by the appellants within 90 days from the date of judgement and a portion thereof measuring 2.1 hectares shall be transferred and registered in the name of the 1st Respondent.

3. That the learned trial judge erred in law in directing that in the event that the appellants fail to carry out the sub-division of LR No. South Sakwa/ Kogelo/197 and portion thereof measuring 2.1 hectares being transferred and registered in the name of the 1st Respondent, the Respondent shall be at liberty to undertake the exercise and in that regard, the deputy registrar of the ELC court shall be at liberty to execute all documents as may be necessary to effect the transfer

4. That the learned trial court erred in law in granting a relief that part of LR No. South Sakwa/Kogelo/197 measuring 2.1 hectares be sub-divided which relief was never prayed for by the respondents

5. That the learned trial judge erred in law in failing to evaluate the evidence as a whole in arriving at its conclusions and findings

6. That the learned trial court erred in law in declaring that the Respondents had dispossessed the appellants of part of parcel L.R. No. South Sakwa/ Kogelo/197

9. The law on this matter, as correctly submitted by the appellants is that, for purposes of reckoning the 12-year period, time starts to run from the time the claimant dispossesses the true owner or from the time the true owner discontinues his possession of the land (see the decision in *Mwatando Mwagambo Wasanga vs Ngaruko Mwangombe & 10 Others* in Environment and Land Court Malindi Cause No. 238 of 2013 (OS)). Therefore, the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or discontinued his possession. In this assessment the court must consider two questions; whether the owner has been dispossessed openly or willingly and; whether the claimant has been in uninterrupted possession of the land for 12 years with an intention to own it.

10. Even from a common sense stand point, consensual possession cannot be adverse otherwise even a lease or license to use land could potentially give rise to a claim for adverse possession. Consent can either be expressed or non-verbalised. For the latter proposition, the appellants lean on the decision in *John Baraza Ojiambo vs Veronica Auma Ojiambo & 3 Others* [2013] eKLR where the court discussed the issue of non-verbalised consent in the context of family relations, a not uncommon feature in the Kenyan setting. The Court observed;

> "……But would failure to verbalise his consent be construed as absence of consent given his relationship with the respondents? Would he in reality evict his own father, step mother and step brothers merely to prevent time running against him under the Limitation of Actions Act? In those premises would the respondents' claim to the suit land by adverse possession lie? The learned Judge of the High Court did not interrogate these issues exhaustively and we do not know how he would have resolved them if he had done so. On our part however we have our doubts whether the respondents demonstrated the prerequisites for a claim to the suit land by adverse possession."

11. An argument by the appellants is that a claim for adverse possession cannot run against them since they purchased the suit properties in 2011 and were registered as proprietors on 17th March 2011. To this end they refer to the following passage from the decision in Court of Appeal at Nyeri Civil Appeal No.28 of 2014: *Titus Kigoro Munyi vs Peter Mburu Kimani* [2015] eKLR;

> " ....In the case of Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997 this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property."

12. Either deliberately or by genuine omission, counsel for the appellants left out the following portion of the paragraph cited;

> " .....However, it must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors. (See Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111)."

13. I have no hesitation in accepting that the law in this regard is as affirmed by the Court of Appeal in *Githu v Ndeete* [1984] KLR where the appellant Judges held that "the mere change of ownership of land which is occupied by another under adverse possession does not interrupt such adverse possession". To hold otherwise would mean that the right of an adverse possessor can be defeated by the registered owner simply effecting a change of ownership.

14. Let me examine the evidence at trial against these settled positions of the law. In doing so I give regard to the role of a first appeal court as restated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA as follows:

> " .....An appeal to this court from 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 conclusion, though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance to this respect in particular this court is not bound necessarily on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistence with the evidence in the case generally."

15. The entire appeal revolves around parcel 197. The 1st respondent, testifying at trial as PW1, was 56 years old at the date he gave evidence on 21st May 2014. He stated that he was born on the suit properties and he and other members of the family have been farming on them. Specific to his claim, he told Court that he had cultivated plot 197 for over 40 years and had a sugar plantation on it. In support of this contention, he produced an outgrowers sugarcane agreement between him and South Nyanza Sugar Co. Ltd over plot 197. Also to buttress this were copies of job completion certificates from the sugar company in his name and which were in completion of jobs on plot 197. As well in his favour was a debit advice and delivery notes for delivered sugar cane, all in respect to plot 197. These documents were for dates in the years 1989, 1991, 1993 and 1994.

16. This strong evidence of possession of plot 197 received corroboration from an unlikely quarter, the defence witnesses. The 1st appellant (DW1) told Court that he was introduced to the 1st respondent

by Nyaseme. This was in August 2010, before he and his wife formally purchased the suit properties from Nyaseme through the agreement of 17th March 2011. He visited the property then and again in November 2010. Of plot 197 he testified;

> "Plot No.197 also had sugarcane plantation. I was not told of the owner of sugarcane on plot No.197.....On plot No.197 there was a building that was owned by Magadline Akeyo"

17. As to who would be the owner of that sugarcane, an answer is to be found in this candid testimony of Magdalina Akeyo Gundo (DW2);

> " Damon Odero Ochieng and I have been cultivating his parcel of land ....Joel Nyaseme has never objected to the 1st Plaintiff's cultivation of the disputed property,....The 1st defendant platned(sic) sugarcane on the land in the year 2011.Over the years it is the 1st plaintiff who has been cultivating the land."

18. The undisputed evidence is that Nyaseme bought plot 197 as a purchaser in a forced sale and was registered as the owner on 27th august 1980. The evidence, by no less than the witness for the defence, is that Nyaseme never cultivated plot 197. In the totality of the evidence the following conclusion by the trial Court cannot be faulted;

> " From the foregoing, it is my finding that as at time the suit properties were sold and registered in the name of the Nyaseme on 27th August 1980, the Plaintiff was in occupation of a portion of Plot No. 197 measuring 2.1 ha. It is not disputed that Nyaseme did not take possession of the suit properties after the same were registered in his name. He also did not interrupt the 1st Plaintiff's occupation of Plot No. 197 until the year 2011 when he wanted to sell the suit properties to the defendants. Its follows therefore that from the year 1980 when Nyaseme acquired the suit properties and the year 2011 when he sold the same to the defendants, the 1st Plaintiff had uninterrupted occupation and use of the portion of Plot No. 197 measuring 2.1 ha. I have no doubt that Nyaseme was aware of the 1st Plaintiff's occupation of Plot No. 197. According to the evidence of DW 2, when Nyaseme wanted to sell the suit properties and visited the same with the 1st Defendant in the year 2011, he "summoned all those who were occupying his land". Among those who were summoned was the 1st Plaintiff. DW 1 also stated that he was told by Nyaseme that the 1st Plaintiff was his ("Nyaseme's") caretaker.....In the circumstances, I am satisfied that Nyaseme was aware of the 1st Plaintiff's adverse possession of a portion of Plot No. 197....
>
> ....In this case, the 1st Plaintiff continued to cultivate sugar cane on a portion of Plot No. 197 measuring 2.1 hectares after Nyaseme had acquired title to the said parcel of land. This act in my view amounted to dispossession of Nyaseme of the said portion of Plot No. 197. From the evidence on record, Nyaseme's dispossession continued for a period of over 20 years until the year 2011 when he sold the suit properties to the defendants. It is my finding that as at 3rd August, 2011 when Nyaseme transferred the suit properties to the defendants, the 1st Plaintiff had acquired title over a portion of plot No. 197 measuring 2.1 ha by adverse possession."

19. The further evidence is that this was the state of affairs when the two appellants bought plot 197. As the 1st respondent had already ousted Nyaseme's possession of a portion of plot 197, the mere purchase by, and change of ownership of the land to the appellants, could not reverse the ouster nor disrupt the existing adversity *(Githu supra)*.

20. I turn to another aspect of the appeal. The Judge found that the 1st respondent was entitled to only 2.1 ha and not the whole parcel which measures 4.06 ha, and drawing from the evidence, the trial Court would have sufficient basis to return that verdict. The appellants, however, argue that the trial Court could not enter judgment for part of the land when the 1st respondent had pleaded for the whole parcel. I think there is no merit in this proposition. While a party cannot get more than what he pleads, the converse is true as long as what is awarded is in tandem with what is expressly pleaded. The trial Court found for less and not more than what the 1st respondent bespoke and as it was for a portion of plot 197, it was consistent with what was pleaded.

21. Ultimately this entire appeal is for dismissal and I would dismiss it with costs.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I am in in full agreement with the judgment of my learned brother Tuiyott, JA and have nothing useful to add thereto.

As Mumbi Ngugi, JA is also agreed, the appeal shall be disposed of as proposed by Tuiyott, JA.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

JUDGMENT OF MUMBI NGUGI JA

I have read in draft the judgment of Tuiyott JA and the orders proposed therein. I am in full agreement with the findings and conclusions reached and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022.

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR