IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE, JJ.A.)

KISUMU CIVIL APPEAL NO. 76 OF 2016

BETWEEN

THOMAS MUKA MAULO.....1ST APPELLANT

WALTER WASHINGTON BARASA NYONGESA.....2ND APPELLANT

VERSUS

ROBERT OUMA ODUORI.....RESPONDENT

(An Appeal from the Judgment and Orders of the High Court of Kenya at Busia (S. M. Kibunja, J.) delivered on 18th June 2015

in

H.C.C.C. No. 154 of 2013)

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JUDGMENT OF THE COURT

1. This is an appeal by Thomas Muka Maulo and Walter Washington Barasa Nyongesa (the appellants) against the judgment and decree of the Environment and Land Court (ELC) at Busia, (Kibunja J.) dated and delivered on 18th June, 2015, where the learned Judge found in favour of Robert Ouma Oduori (the respondent) and made orders declaring the respondent as the lawful proprietor of **Land Parcel No. BUKHAYO/ MATAYOS/3116** (the suit property) under the doctrine of adverse possession and that he ought to be registered as the sole proprietor of the same.

2. The genesis of this appeal is that vide Originating Summons dated 25th November, 2011 and amended on 16th January, 2012 the respondent sought a declaration of entitlement by adverse possession to Land Parcel No. BUKHAYO/MATAYOS/3116 which originally belonged to the 1st appellant, who is also the 2nd appellant's father. The respondent was said to be the 1st appellant's brother. Although this was disputed by the appellants, it is evident from the record that even if the two were not blood brothers, they were close kinsmen.

3. According to the respondent, he entered the suit property with permission from the 1st appellant in 1970 and marked the extent of the land given to him by marking a boundary. He also established his homestead and planted food crops such as bananas and cassava. He lived thereon with his 10 children and 13 grandchildren and when his mother died, she was buried on the suit property.

4. The respondent testified that in the year 2003, the 1st appellant subdivided parcel number 2431 into 3 parcels namely Nos. 3115, 3116 and 3117. He said that the 1st appellant kept parcel number 3115 for himself and 3116 for the respondent and sold Land parcel No.3117. He testified that they both applied for consents from the Land Control Board and produced as exhibit before court copies of applications duly signed by both parties.

5. He contended that he had lived on the suit property continuously and without interruption for 41 years, that is from 1970 to November 2011 when he found out that the property had been registered in the 2nd appellants name and thus filed suit. He also relied on the testimonies of two witnesses who further attested to his averments. It was also the respondent's case that the appellant's right to the suit property had been extinguished in his favour by virtue of **section 37** and **38(1)** of the Limitation of Actions Act hence he had acquired the same by adverse possession.

6. The claim was opposed vide the appellant's replying affidavit sworn on 23rd February, 2012 where the 2nd appellant averred that he was the registered owner of the suit property having received it as a gift from his father in 2011. He stated that the respondent did not reside on

the whole portion of the suit property but illegally occupied a small portion of it.

7. He contended that the respondent was a squatter who invaded the suit property when the 1st appellant was living in Uganda. He averred that the respondent should claim land from his father, that is from L.R No. BUKHAYO/MATAYOS/624 as he was an heir apparent. He also deposed that the respondent did not plant any trees on the property and all the trees thereon were planted by his father, the 1st appellant herein.

8. The 2nd appellant testified that the 1st appellant went to work in Uganda in 1966 and in 1971 came back to register his land, which then became Parcel number 943. After that he returned to Uganda only to come back later in 1974 to find the father of the respondent, one Pascal Oduori had settled on his land. According to the 1st appellant, he asked the respondent's father to vacate but he refused to do so. The 1st appellant thereafter showed the respondents' father, who had two wives, the area to use as he looks to settle elsewhere. That Pascal lived there until 1997 when he moved to parcel number 624 with his 2nd wife.

9. As at the time the matter came up for hearing, the 1st appellant was too old to testify and had donated that role to the 2nd appellant vide a power of attorney. The 2nd appellant testified that in 2003, his father sent the respondents father to ask the respondent to vacate but he refused. He additionally testified that it was the 1st appellant that allowed the respondent to bury his mother on the suit property.

10. After considering the evidence adduced before the court, the learned trial Judge appreciated the now settled principles applicable in a claim for adverse possession as enunciated in this Court's decision in the case of **William Gatuhi Murathe vs Gakuru Gathimbi (1998) eKLR.** The learned Judge held that by 1987 the respondent had been in occupation and possession of the suit land for over 12 years and had acquired rights of an adverse possessor of the land and therefore the 1st appellant had lost the right to recover that portion by dint of section 7 of the Limitation of Action Act, Chapter 22 of the Laws of Kenya.

11. The learned Judge expressed himself as follows:-

> ***"That the Plaintiff's occupation of the suit land between 1970 to 1975 was under license from the 1st Defendant. During that period the Plaintiff did not dispossess the 1st Defendant and his possession was not adverse.***
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> ***That upon the Plaintiff declining to give vacant possession of the suit land in 1975 as required of him by the 1st Defendant, his continued occupation and possession of the suit land became adverse to the title of the 1st Defendant, who was the registered proprietor, at the expiry off 12 years.***
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> ***That by 1987, the Plaintiff had been in occupation and possession of the suit land for over 12 years and acquired rights of an adverse possessor of the land. That the 1st Defendant lost the right to recover that portion of the land by the application of Section 7 of the Limitation of Action Act."***

12. Aggrieved by the above findings of the trial court, the appellant proffered the instant appeal which is premised on a prolix seventeen (17) grounds which can however be encapsulated as:- the learned Judge erred in fact and law by finding that: the respondent had established a claim for adverse possession; that the 2nd appellants' right to the suit land had been extinguished under section 7 of the Limitation of Actions Act; and by ordering that the respondent be registered as the proprietor of the suit land.

13. The appeal was canvassed through written submissions in line with the Covid -19 Protocol court directions.

14. In a bid to demonstrate why the appeal should be allowed, learned counsel for the appellant submitted that according to the evidence adduced before the High Court the respondent's father never intended to enter the suit property as an adverse possessor/ trespasser but entered as a person in distress seeking refuge and got permission to continue in occupation from the 1st appellant when he returned. It was further submitted that time started to run after the demand by the 1st appellant to the respondent to move out at the beginning of November 2011 after which he immediately filed the suit at the ELC, which period is less than a month.

15. Counsel relied on this Court's decision in **Wambugu v. Njuguna (1983) KLR 172** where it was held that:-

> ***"Where a claimant is in exclusive possession of the land with leave and permission of the registered owner, time starts to run for adverse possession at the time the license is determined. Prior to the determination of the license the occupation is not adverse but with permission. This is because the occupation can only be either with permission or adverse, the two concepts cannot co-exist".***

16. He further cited **Jandu v. Kirpal (1975) EA 225** where it was held:-

> ***"Possession does not become adverse before the end of the period for which permission to occupy has been given" and* Samuel Kihamba v. Mary Mbaisi Civil Appeal No. 27 of 2013** where it was held ***"It is therefore inevitable to state that the Court must take extreme caution in the determination of the consent given by an owner of land to a relative and be able to determine when such consent was withdrawn. This determination is a matter of fact and we are persuaded by the analysis of the judge in the case of Mwambonje (supra) that the burden of proof is on the claimant.***
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> ***The person invoking the doctrine of adverse possession must prove that his occupation was adverse to the owner of the suit land. He must prove that the occupation was without the consent of the owner, he may also have to prove that the consent was later withdrawn but he, nonetheless, continued to occupy the land in excess of 12 years after the withdrawal of the consent."***

17. Counsel submitted that the respondent and 1st appellant are not brothers but were clansmen. That the claim that they were related was prejudicial to the appellants as it was fully adopted by the High Court as the judgment read, "*the 1st defendant is the elder brother to the plaintiff and father to the 2nd defendant herein. The parties therefore know each other very well due to their close relationship.*

18. He submitted that the respondent forged documents as exhibits to the effect that 1st appellant gifted him the suit property. More specifically, the respondent forged the application for consent dated 20th January 2003. That the application for consent was not in the lands registry on 20th January 2003 as it came into existence three weeks after the closure of BUKHAYO/MATAYOS/2431. He also submitted that the unregistered transfer of land was drawn by the respondent instead of the 1st appellant and that the Certificate of compliance drawn on 20th January 2003 issued by the physical planner refers to have been received from "Busia County" yet counties were established by the Constitution of Kenya in 2010.

19. He argued that in view of the forgoing, the Court do re-evaluate the evidence and make a transparent decision.

20. Challenging the appeal, counsel for the respondent submitted that the respondent had proved possession of the suit land for a period of over 12 years when the 2nd appellant admitted on cross examination that they did not plant the crops that the court saw on the suit land upon visitation nor did they build the houses that were on the land. That the respondent had proved that he had dispossessed the appellants from use of the suit land for a period of over 12 years.

21. Counsel argued that in a suit for adverse possession, the applicant must prove that his occupation or possession of the land was non – permissive or non – consensual from the title holder and the possession has been open, notorious, exclusive and without any interruption from the title holder.

22. Urging us to dismiss the appeal, counsel urged that from the record of appeal the respondent resisted attempts by the 1st appellant to vacate the suit land. That the respondent's occupation was not by license or consensual but by adverse possession as against the interest of the appellants.

23. This being a first appeal, the duty of this Court is as was stated in the case of **Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where this Court pronounced itself as follows: -

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212."***

24. Having re-analysed and considered afresh the evidence adduced before the ELC, the record of appeal in its entirety and parties' submissions and the law, particularly as enunciated in the authorities cited to us, we discern the issue for determination to be: *Whether the learned judge erred in fact and law by finding that the respondent was entitled to be declared the registered proprietor of the suit property under the doctrine of adverse possession.*

25. The principle of adverse possession is succinctly set out in **Wambugu vs Njuguna** *(supra)*, where this Court expressed itself as follows:-

> ***"In order to acquire by the statute of limitations title to 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 are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it."***
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> **…**
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> ***"The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."***

26. Further, the query as to whether the respondent was in adverse possession of the suit property is a matter of evidence as was held in **Mbira v. Gachuhi (2002) 1 EALR 137** where this Court stated that:-

> ***"… a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption…"***

In the instant case, it is evident from the record of appeal that the licence ended in 1974 when the 1st appellant returned from Uganda. We hold the view that the gravamen of this appeal is the determination of the point when the 1st appellant withdrew his consent or licence to occupy the land from the respondent. This is so because it is not in doubt that initially, the respondent moved to that property with the 1st appellant's permission.

27. In the cited case of **Samuel Kihamba v. Mary Mbaisi Civil Appeal No. 27 of 2013** the Court held:-

> ***"It is therefore inevitable to state that the Court must take extreme caution in the determination of the consent given by an owner of land to a relative and be able to determine when such consent was withdraw.***

28. We have considered the evidence adduced in this respect with deep circumspection. In the instant case the initial permission was withdrawn in 1974 as confirmed by the testimony of the 2nd appellant and pleadings of both appellants, where they confirmed that the respondent's stay on the suit property has always been without their consent.

29. As was held in the **Mbira case** *(Supra)* it was upon the respondent to prove that he had used the subject land as of right. Accordingly, the respondent herein appearing before the trial Court was obligated to not only show his uninterrupted possession, but also that the appellant had knowledge (or the means of knowing,) actual or constructive, of the possession or occupation. Additionally, the possession ought to have been continuous. It must not have been broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration (See also: **Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.).**

30. It is common ground that the suit property was registered in the 1st appellant's name. It is also common ground that the respondent entered the suit property sometime in 1970 or thereabouts with the permission of the 1st Appellant who came back in 1974 from Uganda and asked the respondent to vacate the suit land but he refused. The 2nd appellant's statement on clause 6 reveals that, ***"the applicant's occupation and use of a portion of this land has always been under protest and without the consent of the family***". Further, it is common ground that the respondent built a house on the suit property where he lived with his family, cultivated the land, reared animals and buried his mother and continued living on the property until the time of filing suit in the year 2011.

31. Although the appellant extensively submits that the respondent's occupation of the suit premises was as a licensee, the record of appeal reveals that the replying affidavit of the 2nd appellant and the testimony of the appellants herein was that after 1974 the respondent continued to live on the suit property without the consent of the appellants.

32. In his examination – in – chief, the 2nd appellant testified as follows; "*He returned in 1974 and Pascal Oduori father to the Plaintiff had settled on the land. When he asked Pascal why he had settled there, Pascal stated that he had nowhere else to settle as he had sold his land. He was asked to vacate but he never did so… ."* He further testified during cross-examination that *"After the 2003 transactions my father asked Pascal to ask his son to vacate from the land in view of the new subdivision but instead of vacating, the plaintiff said the portion he was occupying was his and he was claiming it."*

33. It is perhaps worth noting that these people were immediate neighbours. The appellants saw the respondent everyday as he went about his daily activities on the disputed land. The respondent even buried his late mother on that property. This occupation was therefore open and it was hostile as the respondent had refused to vacate the land since 1974 when he was asked to leave. The appellants did not adduce evidence to the effect that the respondent was a licensee to rebut the assertion that the respondent's occupation was hostile and or adverse to the appellants' title.

34. A site visit by the Court revealed that the respondent had exclusive possession of the whole suit parcel and had erected 11 houses, a burial site on the land with mature trees and fruit trees growing on the land. The appellants in their testimony confirmed that they did not plant those trees themselves. This emanates from the 2nd appellants' own evidence.

35. The subdivision of the property in 2003 did not affect the respondent's claim under adverse possession because by that time, he had already been in adverse possession for almost 30 years. Time did not start running in 2011 when the suit was filed but in1974 when the respondent was asked to vacate the property but he continued occupation.

36. We are therefore satisfied that there is no reason to disturb the findings by the trial Judge that, ***"****In this case it is quite obvious that possession by the plaintiff (respondent) since 1974 was open, uninterrupted and adverse to the title of the defendant."* We are in agreement with that holding by the learned Judge.

37. We have said enough to demonstrate that this appeal lacks merit. In the circumstances, we dismiss it. As the parties are close relatives, we order that each party bears its own costs of this appeal.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR