IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 87 OF 2019

BETWEEN

JOHN OLORASHAR ole NGIRU .....APPELLANT

AND

OCHORA BIRUNDU .....1ST RESPONDENT

JAMES OGACHI .....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Kisii (J.M. Mutungi, J.) dated 27th July 2018

in

ELC Case No. 195 of 2013)

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JUDGMENT OF THE COURT

In a plaint filed at the Environment and Land Court **("ELC")** at Kisii the respondent **Ochora Birundu** and **James Ogachi**, sued the appellant, **John Olorashar ole Ngiru,** in a dispute over ownership of a parcel of land title **Transmara/Moita/148 ("the suit land")**. They claimed that they had purchased the suit land and were registered as proprietors of the same but that the appellant had wrongfully taken possession and trespassed on the same in or about 2006 and they prayed for an order that they possess the suit land and they be paid mesne profits at the rate of Kshs.10,000 per acre per annum from January, 2006.

The appellant filed a statement of defence where he admitted that the suit land was registered in favour of the respondents. He conceded that the suit land was hitherto part of parcel number 27, Moita Adjudication Section which, after demarcation, was registered in his name; that while he served time in jail the respondents colluded with land adjudication officers who colluded and defrauded him of his land; that he had physical occupation of the land since 1997; the appellant reserved in the defence the right to invoke the doctrine of adverse possession; at paragraph 12 of the defence:

> ***"In view of the contents of paragraph 11 hereof, the Defendant contends that the plaintiffs rights and/or interests, over and in respect of the suit land, stands extinguished. Consequently, over the plaintiff's rights and/or interests over the suit land are now time barred, under the provisions of the Limitation of Actions Act, Chapter 22, Laws of Kenya."***

Questions were raised in the defence whether the respondent's rights over the suit land were barred by laws of limitation; whether the registration of the respondents as proprietors of the suit land was subject to **Section 28** of the **Land Registration Act, No. 3 of 2012**; whether the suit disclosed a reasonable cause of action and whether the respondents were non-suited. It was thus prayed that the suit be struck out or be dismissed. There was no counter-claim.

The suit was heard by **Mutungi, J.,** who in a Judgement delivered on 27th July, 2018 allowed the suit ordering the appellant to vacate and deliver vacant possession of the suit land to the respondents within 30 days of being served with the decree; that in default the appellant be evicted and the Judge awarded the respondents general damages Kshs.100,000 for trespass.

Those orders aggrieved the appellant who has filed this appeal through Memorandum of Appeal drawn for him by his lawyers, **O.M. Otieno & Company Advocates** where five grounds of appeal are taken, but the last ground is abandoned in written submissions filed for the appellant. The Judge is faulted for failing to properly review and evaluate the evidence; that the Judge erred in law in failing to find that the

respondents' suit was statutorily time barred; that the Judge erred in law in awarding general damages, and finally, that the Judge erred in law in arriving at the determination culminating in decreeing the eviction of the appellant from the suit land.

This is a first appeal from the Judgment of the High Court in first instance and it is our duty to review and re-evaluate the record and to subject the whole evidence to a fresh and exhaustive scrutiny and make our own conclusions but must remember that we had no opportunity of seeing and hearing witnesses – See **Peters v Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Conner, sitting in the predecessor of this Court, had this to say of the duty of a first appellate court:

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."***

The proceedings before the trial Judge were brief. The 2nd respondent testified on his own behalf and on behalf of the 1st appellant that they purchased the suit land from one **Nanosokon Melompuki** in 1986 and were issued with a title deed in 2003. Further, that upon purchase of the suit land they took possession of it and started using it. He produced into evidence the title deed for the property and a Certificate of Official Search for the same and further testified that in 2005 they leased the land to a third party but the following year the appellant started threatening and chasing out tenants who were paying rent Kshs.10,000 per acre per year. Further, that the appellant, invaded the suit land and occupied it.

The respondents called **Daniel Arusat Korei** as a witness. He was son to Narosokon Melompuki who had sold the suit land to the respondents. According to him his father's land had been subdivided into three – **L.R. No. Transmara/Moita/126** was registered in his father's name; **L.R. No. Transmara/Moita/27** was sold to one Bosire and **L.R. No. Trasmara/Moita/148** belonged to the respondents. According to the witness the appellant's land was L.R. No. Transmara/Moita/66 but that in the year 2005, during a period of inter-community clashes, the appellant had invaded the respondents' land and occupied it. He denied that the appellant had occupied the suit land for over 30 years. That closed the case for the respondents.

The appellant who called one witness, testified that he owned the suit land that had been allocated to him by Moita Group Ranch; that he had occupied the same with his family from 1985 but that a search at Registry of Lands at Kilgoris had established that the suit land had been registered in the respondents' names. He alleged that the title in favour of the respondents was fraudulent but admitted that he had not taken any legal action to challenge the title.

James Luchiri Mayoye, the Demarcation Officer, Transmara, was called by the appellant as his witness. He produced the Demarcation Register for Transmara Sub-County which showed that L.R. No. Transmara/Moita/148 was a subdivision from L.R. No. Transmara/Moita/26. The register showed that the suit land was allocated to the respondents.

The trial Judge considered that evidence by both parties and found in favour of the respondents.

When the appeal came up for hearing before us on 7th December, 2020 through the "Go-to-Meeting" platform due to the COVID-19 pandemic, the appellant was represented by learned counsel **Mr. O.M. Otieno** while the respondents were represented by learned counsel **Mr. Lemard Ndemo Ombachi**. Both parties had filed written submissions; the respondents had filed – list of authorities and both counsel relied entirely on the submissions and the said authorities and did not find it necessary to highlight the same.

We have carefully considered those submissions, the authorities and the record and, having done so, this is how we propose to determine the matter.

There are only two issues that we find call for our consideration – whether the Judge reached the correct conclusion that the respondents were rightful owners of the suit land and whether the award of general damages was justified.

It is not difficult to answer those questions.

The respondents produced before the trial Judge a copy of the title deed in respect of Title No. Transmara/Moita/148. That parcel of land measuring 8.71 ha was registered in favour of the respondents on 26th June, 2003 and title issued the same day. The respondents, in addition, produced a Certificate of Official Search dated 12th April, 2013 showing that the said suit land was registered in their favour with no encumbrances. Another official search dated 13th September, 2013 showed that Title No. Transmara/Moita/66 was registered in favour of the appellant.

Section 26 of the **Land Registration Act No. 3 of 2012** is to the following effect:

> ***"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission 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—***
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> ***(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.***
>
> ***(2) A certified copy of any registered instrument, signed by the***

Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

As we have seen the appellant appeared to raise a defence of adverse possession and issues of limitation under the Limitation of Actions Act but those defences remained bare and without any footing at all. The appellant did not file any suit to raise those issues and did not file a counter-claim in the suit. The respondents were able to show that they purchased the parcel of land before demarcation took place in the relevant area in Transmara and when demarcation was undertaken they were registered as owners of the suit land, having bought it from PW2's father. In those circumstances the Judge reached the correct conclusion that the suit land belonged to the respondents.

On the award of Kshs.100,000 as general damages it was established on evidence that the appellant had invaded the suit land, chased away tenants and occupied the same. This was trespass, and, as correctly held by the Judge, it was actionable per se, without proof of damage. The respondents testified that they leased the suit land to tenants at Kshs.10,000 per acre per annum but they did not produce any evidence to support that claim. In the face of the admission by the appellant that he had occupied the land the Judge was entitled to award some damages for trespass. He found the sum of Kshs.100,000 general damages to be an appropriate award. The only issue here would be whether this was too high – this Court in the case of **Bhutt v Khan [1982-1988] KLR 1** held that an appellate court is not to interfere with the award of quantum of damages unless it is shown that the trial court proceeded on wrong principles or that it misapprehended the evidence in some material particular so as to arrive at a wrong figure of damages or that the damages awarded are too high or too low so as to represent an entirely erroneous estimate.

The trial Judge considered that the respondents had suffered loss and damage resulting from being deprived of the use of their land and made the said award. We have not seen any misdirection by the Judge and we uphold the said award.

This appeal has no merit and we dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 5th day of February, 2021.

R.N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

……..

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR