



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, SICHALE & J. MOHAMMED, J.J.A)

NYERI CIVIL APPEAL NO. 83 OF 2016

BETWEEN

JOSEPH KITHINJI M'ERINGO.....1ST APPELLANT

PETER NKUBITU M'ERINGO.....2ND APPELLANT

AND

CHRISTINE N. MBITI.....RESPONDENT

(An appeal from the Judgment and Decree of the Land and Environment Court of Kenya at Nyeri (Ombwayo, J.) delivered on 10th March, 2016 in E.L.C. No. 140 of 2008 (OS))

JUDGMENT OF THE COURT

The genesis of this appeal can be traced back to the Magistrates Court at Nanyuki, where Joseph and Peter M'eringo, the appellants who are brothers sued Christine Mbiti, the respondent and her husband, who is no longer a party in this appeal. The appellants sued in their capacity as the registered owners of a parcel of land known as L.R 2787/1289 measuring 0.2410 Ha (the suit property) located within Nanyuki Municipality. They claimed that the respondent and her husband had illegally occupied the suit property and erected structures thereon which amounted to trespass. They prayed, in the main, for an order of eviction against the trespassers. The trial Magistrate allowed the claim, entered judgment in favour of the appellants, and proceeded to issue an order of eviction against the respondent and her husband.

Aggrieved, the respondent appealed to the High Court and among her grievances was that the trial Magistrate did not have jurisdiction to entertain the suit by dint of **Section 159** of the **Registered Land Act**. Seron, J held that the trial Magistrate did not have jurisdiction to hear and determine the dispute. In the end, he allowed the appeal, set aside the judgment and decree of the trial Magistrate and struck out the suit for being incompetent.

Emboldened, the respondent filed an originating summons dated 21st October 2008 that is subject of this appeal under **Section 38** of the **Statute of Limitations Act** and **Order XXXVI Rule 3D & 7** of the **Civil Procedure Rules** seeking the following principal orders;

- a) THAT the ownership of the land parcel number L.R No. 2787/1289 now vests in the plaintiff by virtue of the fact that she has been in continuous and uninterrupted occupation of the whole said parcel for over twelve years by virtue of Section 13 and 38 of the Limitations of Actions Act.***
- b) THAT the Defendants forthwith transfer the said land to the plaintiff.***
- c) THAT a perpetual injunction issues (sic) restraining the defendants, their personal representatives, success assigns from interfering with the Plaintiff's quiet enjoyment of the ownership and possession thereof.***

The application was supported by an affidavit deposed to by the respondent stating that she bought the suit property from one Mary Jelagat Muttai (Jelagat) on or about 7th December 1992 at a consideration of Kshs. 400,000 and was given vacant possession on the same date. She claimed that Jelagat had been allocated the plot by the Plot Allocation Committee on 14th September, 1992 under reference number NMC/CONF/OP/5/29.

The respondent contended that for over twelve years, she had exclusive, continuous and uninterrupted possession and occupation of the suit property, planted various types of trees and had been paying yearly rates and rents to Nanyuki Municipal Council (Council) prior to putting up permanent structures thereon which she sought and obtained approval for from the Council.

Her quiet enjoyment was interrupted on 5th March 2005 when she received a letter from the appellants who alleged that she and her husband were trespassers and demanded that they remove all their structures and vacate the suit property. The respondent subsequently conducted a search at the lands office and was bewildered to find that the suit property, she previously knew as UNSURVEYED PLOT NO. 22 NANYUKI MUNICIPALITY had been registered to the appellants as LR. No. 2787/1289. The respondent concluded that since no complaint had been made to the police or the provincial administration for the alleged trespass, the ownership of the suit property vests in her by virtue of adverse possession.

In response, the appellants filed a replying affidavit sworn by the 1st appellant. He deposed that via a sale agreement dated 8th March 1996, the appellants purchased the suit property from Simon Billy Ngangu (Simon) at a consideration of Kshs. 200,000. Immediately after signing the sale agreement, the appellants visited the physical location of the suit property and established that it was unoccupied save for a temporary structure that had been erected by Simon. Pursuant to the sale, the suit property was transferred into the joint names of the appellants in 2001.

He deposed that the appellants visited the property annually to ascertain its status whilst paying rates to the Council. Some time in 2004, the appellants discovered that the respondent and her husband had trespassed and settled on the suit property. They promptly instructed their advocates to issue them with a formal demand to vacate dated 20th December 2004. The respondent ignored the initial demand prompting the advocates to write a second dated 5th March 2005 which did nothing to change the status quo.

The deponent asserted that the respondent was not entitled to the relief sought because she had not lived on the suit property for more than twelve years. Also, her allegation that she had purchased the property from Jelagat meant that she had occupied the suit property as a licensee. He urged the court to dismiss the application with costs.

After considering the submissions of counsel, hearing the testimonies and evidence adduced, the learned Ombwayo, J delivered a judgement in favour of the respondent. He found that the respondent had satisfied the court as being entitled to the land by adverse possession. The property therefore vested in the respondent by virtue of **Sections 13 and 38 of the Limitation of Actions Act**. He further issued a perpetual injunction restraining the appellants, their personal representatives, successors and assigns from interfering with the respondent's quiet enjoyment of the ownership and possession of the suit property.

It is against that judgment and decree that the appellants appeal to us, on six grounds, condensed as, the learned Judge erred in law and fact by;

- a) Holding that the respondent's occupation was adverse yet it was that of a licensee.
- b) Holding that the time for adverse possession started to run from 1992 yet the suit property was still un-alienated government land, which led to his erroneous computation of time as relates the accrual of the claim.
- c) Failing to consider that due to the respondent's challenge to the validity of the title, she could not sustain a claim of adverse possession.

The firm of **J.M Mwangi & Company Advocates** are on record for the appellant, while the firm of **Gori Ombongi & Company Advocates** are on record for the respondent. Both filed written submissions which we shall briefly summarize.

It was submitted on behalf of the appellants that the respondent's entry into the suit property was as a licensee therefore her occupation could not be termed as adverse. Further, in her own words, the respondent testified that she was not a trespasser and this negated her claim for adverse possession which demands that an occupier must wrongfully dispossess the true owner.

Furthermore, since the respondent had challenged the validity of the title in her defence and counterclaim at the Magistrate's Court, she was precluded from advancing the adverse possession claim.

It was contended that the learned Judge fell into error by holding that time began to run from 1992 yet the suit property was still un-alienated government land. Such a claim could not stand by virtue of **Section 41 of Limitation of Actions Act**. Time could only run from when the appellants became registered owners of the suit property on 13th July 2001. Additionally, there was contradictory evidence by the respondent about when she started residing on the suit property. Accordingly, the learned Judge could not with certainty establish when the time for adverse possession began to run.

In response, it was submitted that the respondent was never a licensee of Jelagat and in any case her claim was against the appellants. Her open, continued and uninterrupted possession on the suit land already existed when Simon was the registered owner before the same was transferred to the appellants. The appellants' claim that the suit property was un-alienated in 1992 was rejected due to the fact that the lease issued to Simon was for a term of 99 years from 1st June 1992. Therefore, the claim on adverse possession started running from 1992 as the learned Judge appropriately held. Further, the respondent gave cogent evidence on her occupation and continuous stay on the suit property since 1992 and the appellants did not adduce evidence to contradict it. The change of ownership in 2001 did not affect the claim on adverse possession on the suit property.

We have carefully considered the submissions and the entire record of appeal whilst being cognisant of our role as a first appellate Court, which is to re-evaluate and re-assess the evidence and arrive at our own independent conclusions. We exercise this role whilst keeping in mind that we have not had the advantage of hearing and observing the witnesses, as was the case with the learned Judge. Therefore, we shall make due allowance for that limitation. See **SELLE VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] E.A 123**.

The sole issue for consideration is whether or not the learned Judge erred in holding that the respondent had established her entitlement as an adverse possessor and was therefore entitled to be registered as the owner of the suit property. The ethical dilemma presented by the principle

of adverse possession is not lost on us: How the law permits a trespasser to morph into the owner of land, by mere advance of time, by entering into a property without the owner's permission and at no consideration and defeating his title.

This has been well articulated by this Court in **DAVID MUNENE WAMWATI & 4 OTHERS VS THE REGISTERED TRUSTEES OF THE ANGLICAN CHURCH OF KENYA & ANOTHER** (Nyeri Civil Appeal No. 36 of 2015 (unreported)).

Due to the punitive nature of adverse possession against a land owner, a claim based on it cannot be affirmed unless certain elements are proven by the adverse possessor. This ensures that registered land owners will not arbitrarily lose their properties which they have worked hard for and sacrificed to acquire. Every limitation of actions, including adverse possession, does come with certain exceptions and extensions to ensure justice and fairness as far as possible. See the dicta of Ouko, JA in **MTANA LEWA VS. KAHINDI NGALA MWAGANDI [2015] eKLR**. This Court pronounced itself on the elements to be considered in an adverse possession application in **MATE GITABI VS. JANE KABUBU MUGA & OTHERS** (Nyeri Civil Appeal No. 43 of 2015 (unreported)) as follows;

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario. See also ELIVA NYOGESA LUSENAKA & ANOTHER vs. NATHAN WEKESA OMACHA – Kisumu Civil Appeal No. 134 of 1993 and KASUVE vs. MWAANI INVESTMENTS LTD & 4 OTHERS [2004] KLR 184 at page 188 where this Court stated as follows;

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’ See also Wanje v Saikwa [1984] KLR 284.’”

Therefore, the law is clear that in order for a claim of adverse possession to succeed, the applicant must demonstrate that the occupation was continuous, open and uninterrupted for a period of twelve years. In this appeal, it is the respondent's case that she moved into the suit property in 1992 after purchasing it from Jelagat. She testified that in her occupation of the suit property for more than twelve years, she had planted trees, cultivated, kept cattle, had constructed a house and made other developments thereon. She admitted that there was a modern structure at the time she moved into the suit property but the same was unoccupied.

In support of her case, the respondent called Michael Jeremy Gatuguta who had moved into an adjacent piece of land in June 1992. Testifying as PW1, he stated that the respondent moved into the suit property, around December 1992. He even distinctly remembered her borrowing a *jembe* from him. He averred that there were four houses on the suit property comprising of two residential homes, a house for the workers and a chicken house all belonging to the respondent.

In attempted rebuttal, the 1st appellant attested that when they bought the suit property in 1996, it was vacant and there was a thicket. He then claimed that, over the years, he visited the suit property several times and did not find anybody on the land until 2004 when he instructed his advocates to issue the respondent with demand letters and subsequently filed a suit being **Nanyuki SRMCC No. 39 of 2005**. Joseph Githingu Wakaba, a land broker, testified as DW2, that the 1st appellant was shown the suit property in 1996 and the same was vacant. He claimed that he noticed a house thereon in 2004 and informed the 1st appellant of the same.

On the evidence of occupation, the learned Judge held that appellants and their witness were not consistent in their evidence on the date the respondent entered the suit land. On the other hand the respondent and her witness were consistent and forthright and he therefore found that on a balance of probabilities, she had entered the suit property in 1992. We concur with the learned Judge, defer to his findings on witness credibility and find that the appellants did not provide cogent evidence to rebut that of the respondent. Further, we note that the 1st appellant only discovered of the presence of the respondent upon information relayed to him by DW1, as per the testimony given. This in our opinion casts a shadow of doubt as to whether the appellants were truthful in the claim that they visited the suit property regularly. We hold that on a balance of probabilities, the respondent proved that she was in actual occupation and possession of the suit property since 1992, cultivated on it and built structures thereon. We are satisfied that on evidence the respondent did dispossess the appellants. We accept the position stated in Halsbury's Laws of England, 3rd Edn. Vol 24 at page 252;

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by a person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

The appellants claim that the respondent's entry into the suit property was as a licensee as she had bought the property from Jelagat and hence had permission to occupy and therefore cannot claim adverse possession. The learned Judge however held that Jelagat was not the land owner and hence could not give permission to the respondent hence the entry was non- permissive. We concur with this holding. Since the appellant's title has not been judicially revoked, and it is superior to a letter of allotment, by law Jelagat was not the registered land owner at the start of the respondent's occupation. Nor was she an agent of the appellants and therefore had no capacity to give consent. Therefore, the respondent's occupation was without permission.

On the issue of whether the respondent's challenge of the validity of the title in her defence and counterclaim precludes her from advancing the adverse possession claim, we think not. Her questioning of the validity of the title is wholly immaterial and does not derogate from her adverse possession of it.

Finally, the appellants contended that the learned Judge further erred by holding that the time on the claim began to run from 1992 yet the suit property was still un-alienated government land and the same was transferred into their joint names in 2001.

The issue of the land being un-alienated at 1992 is debunked by the title itself which clearly states that the 99 year lease was from 1st June

1992. Since the land was already registered in the name of Simon, the same was adversely possessed since 1992 when the respondent occupied it. A mere transfer of ownership of title does not defeat ownership by prescription.

It is trite that the rights of an adverse possessor are equitable rights which are binding on the land. See **MWANGI & ANOTHER V MWANGI, (1986) KLR 328**. It is therefore our considered view that by the time the appellants purchased the property, it was already burdened with the presence of an adverse possessor and the onus was on them to evict the said possessor before the maturity of the statutorily required timeline of twelve years. We restate what this Court held in the case of **KAIRU V. GACHERU [1986-1989] E.A.**;

“The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 Limitation of Actions Act).”

In the end we find that the respondent established that she had been in open, continuous and uninterrupted possession of the suit property for the requisite twelve years from 1992 to 2004, when the appellants issued her with a demand letter and eventually in 2005 when the appellant filed the impugned suit at the Magistrate’s Court.

Being of that mind, we find that this appeal is devoid of merit and is accordingly dismissed.

Each party shall bear its own costs.

Dated and delivered in Nairobi this 5th day of March, 2021.

P. O. KIAGE

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR