IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO, (P), MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 24 OF 2019

BETWEEN

ABDULKHALL MOHAMED

ABDULKHALIK MAZURUI.....1ST APPELLANT

FATUMA SALEH ABED

AHMED ABDUSHEIKH.....2ND APPELLANT

THE COUNTY GOVERNMENT

OF MOMBASA.....RD APPELLANT

AND

JOSIAH KAFUTA J. MTILA.....1ST RESPONDENT

THE REGISTRAR OF TITLES

MOMBASA DISTRICT.....2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya

at Mombasa (Omollo, J.) delivered on 7th February, 2018 in ELC Civil Appli. No.237 of 2014(O.S.)

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JUDGMENT OF THE COURT

This appeal turns on the single question whether the 1st respondent established, on a preponderance of evidence, his claim to Parcel No. 3981/VI/MN by adverse possession. Or asked differently, whether the 1st respondent proved that he had been in exclusive possession of the suit land openly and as of right without interruption for a period of 12 years, either after dispossessing the 1st and 2nd appellants or after the 1st and 2nd appellants discontinued their possession of the suit land on their own volition.

According to the 1st respondent he took possession of the suit land way back in 1970 when it was uninhabited and was all bushes; and that he extensively developed it by erecting a residential house. On it he also ran a grocery retail business. He explained that later on, by a letter dated 19th August, 1992 he applied to the Town Clerk of Mombasa for allotment of the suit land without success. Subsequently, however he learnt that the suit land had been allocated by the 3rd appellant jointly to William Nduva Makau and Beatrice Njoki Githii in whose favour the title was issued on 1st July, 1996; and that thereafter, the suit land was further transferred by the two to the 1st and 2nd appellants on 22nd October, 1998.

The 1st respondent maintained that, as the two transfers were effected, he remained in occupation of the suit land; that by the time he went to court to enforce his right over the suit land he had been on it for over 40 years, extinguishing the 1st and 2nd appellants' title; that throughout

that period the 1st and 2nd appellants had neither set foot on the suit land nor issued him with notice to vacate it; that the only notice he received was from the Town Clerk of Mombasa issued on 24th June, 2014 and later an enforcement notice dated 8th August, 2014, both requiring him to demolish the structure on the land on alleged violation of certain building conditions; that upon the lapse of the said notices, no action was taken by the 3rd appellant despite non-compliance with the said notices; and that he continued being in possession of the land.

Based on the above set of circumstances, the 1st respondent moved the Environment and Land Court (ELC) by an Originating Summons anchored on the provisions of **Section 38 (1)** of the Limitation of Actions Act, seeking his registration as the proprietor of the suit land in place of the 1st and 2nd appellants, claiming entitlement by prescription.

In turn, the 1st and 2nd appellants contended that the 1st respondent was not entitled to the suit land as he was merely a trespasser who had been consistently warned to vacate the premises but refused to do so; and that as a result of this, his possession of the suit land did not in any way dispossess them of their title.

Upon considering the evidence before her, which was by way of affidavit, Omollo, J. in a judgment dated 7th February, 2018 found in favour of the 1st respondent, stating that he had proved to have been in occupation of the land much before the land was transferred to William Nduva Makau and Beatrice Njoki Githii in 1996; that by the time the action was brought in 2014, he had been on the land for over 18 years; that from the evidence, the 1st and 2nd appellants had been dispossessed of the suit land as explained in **Wambugu vs. Njuguna** [1983] KLR 173. With that conclusion, the Judge declared that the 1st respondent was entitled to the suit land. She directed the 2nd respondent to register the 1st respondent as the proprietor of the suit land. Though not apparent from the pleadings how this arose, but the learned Judge also declared that the 1st respondent would be entitled to receive compensation for compulsory acquisition of the suit land by the State.

It is that decision that has given rise to this appeal wherein the 1st and 2nd appellants have raised 5 grounds, whose combined effect was that the learned Judge erred in finding that the 1st respondent had established his claim.

Before us, Mr. Kenga, learned counsel for the 1st and 2nd appellants, highlighted the broad ground stating that the 1st respondent did not demonstrate firstly, that 1st and 2nd appellants had knowledge of his occupation of the land; and secondly, that his possession was with the intention of dispossessing them of their title. Counsel insisted that it was essential for the 1st respondent to demonstrate that 1st and 2nd appellants were aware of the fact that he was in possession, to make his possession open and without their consent; that the 1st respondent having admitted that he did not know them or their interest on the suit land, it was enough, on that score for the Judge to dismiss the claim.

Mr. Lumatete, learned counsel for the 3rd appellant, supported the appeal on more or less similar grounds as those advanced by the 1st and 2nd appellants. Counsel submitted that, like the 1st and 2nd appellants, the 3rd appellant only became aware of the 1st respondent's possession in 2014; that as such, time for the alleged adverse possession could only be computed from that date. It is instructive to note that the 2nd respondent never participated in the ELC or in this appeal.

On the other hand, Mr. Matara, learned counsel for the 1st respondent, urged us to dismiss the appeal for lack of merit; and that the 1st respondent had proved his case before the trial court to the required standard.

Our role as the first appellate court, as set out in the *locus classicus* case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** [1968] E.A. 123, involves reconsideration of the oral or affidavit evidence presented to the trial court and drawing our own conclusion, from that evidence.

Under **Section 7** as read with **Section 13** of the Limitation of Actions Act, the owner of a property loses the right to claim the property after it is occupied continuously without interruption by an adverse possessor for a period of 12 years. Conversely, under **Section 38(1),** after a period of 12 years of adverse possession, the adverse possessor is entitled to apply to the court to be declared the owner of the land.

The burden of proving adverse possession lay with the 1st respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1st and 2nd appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in **R. vs. Oxfordshire County Council ex p. Sunningwell Parish Council** [2000] 1AC 335 at 350, **'not by force, nor stealth, nor the licence of the owner'.** See also **Kimani Ruchine vs. Swift Rutherford & Co.Ltd** [1980] KLR on this point.

A claim of adverse possession can only be maintained against a registered owner, as set out in **Chevron (K) Ltd vs. Harrison Charo Wa Shutu** [2016] eKLR, and time as envisioned under **Section 7** of the Limitation of Actions Act, can only run against a registered owner. Here time started to run when the suit property was transferred, first to William Nduva Makau and Beatrice Njoki Githii and continued uninterrupted when the 1st and 2nd appellants acquired the property on 22nd October, 1998. One of the important lessons to be drawn from the Court of Appeal's decision in **Githu vs. Ndeete** (1984) KLR 776 is that;

> **"The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession"**.

We reiterate that the original title was issued to William Nduva Makau and Beatrice Njoki Githii in 1996. The 1st respondent's uncontroverted evidence was that, he occupied the land in 1970, so that at the time it was purchased by William Nduva Makau and Beatrice Njoki Githii and certificate of lease issued, he had been in occupation for nearly 26 years. This remained the position even as the property changed hands to the 1st and 2nd appellants in 1998. But in this case the relevant time that counts for purposes of the 1st respondent's claim to the land is the period between 1996 when the title was issued for the first time and 2014 when the originating summons was taken out. With

respect the learned Judge properly computed that period to be 18 years.

Possession by the 1st respondent for a period of 12 years, from the foregoing was demonstrated. However, possession alone, as we have explained earlier, is not enough. The 1st respondent was, in addition duty bound to show, by evidence that his possession was adverse to the 1st and 2nd appellants' title, that is, that it was *nec vi, nec clam, nec precario*.

The appellants' argument that they were not aware of the 1st respondent's occupation of the suit land when they purchased it in 1998 gets a direct answer from this Court's decisions in **Kimani Ruchine v Swift Rutherford & Co.Ltd** and **Wambugu vs. Njuguna** *(supra)* where, in the former it was stated that;

> **"The plaintiffs have to prove that they have used this land which they claim, as of right: *nec vi, nec clam, nec precario* ….. So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation".**

A similar sentiment was expressed in **Wambugu vs. Njuguna** *(supra)* thus;

> **"… if the owner has little present use of the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title."**

From the 1st respondent's letter of 19th August, 1992 to the 3rd appellant, it is evident that he announced his presence on the land, explaining how he had lived on it since 1970 and expressing the desire to be allocated the land so that he could have the freedom to construct on it permanent structures. According to him, when he did not receive any response, he proceeded to develop the land and has put up a permanent home on it. It is safe in the circumstances to conclude that, when the 3rd appellant was transferring the property to William Nduva Makau and Beatrice Njoki Githii, it was aware that the land was not vacant, as borne out by all the above. Strangely, in 2014 the 3rd appellant purported to give the 1st respondent notice to pull down the structure erected on the suit land. It was incumbent upon the William Nduva Makau and Beatrice Njoki Githii, as well as the 1st and 2nd appellants to ascertain the status of the property they were to purchase before committing themselves. Due diligence is a more critical aspect of any land transaction in Kenya today, than ever before.

> **"Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it."**

See **Mweu vs. Kiu Ranching & Farming Co-operative Society Ltd.** [1985] KLR 430.

On the authority of **Kimani Ruchine vs. Swift Rutherford & Co.Ltd** *(supra)*, we come to the conclusion on this point that the 1st and 2nd appellants had constructive knowledge of the 1st respondent's occupation of the suit land.

Our next consideration is whether the 1st and 2nd appellants were dispossessed of their title by the 1st respondent. It must be clarified that dispossession did not depend on the latter's knowledge of the 1st and 2nd appellants' identity as the registered owners. Rather, what was essential was his intention as the dispossessor to appropriate and use the suit land as his own to the exclusion of all others, including the registered owners.

By erecting a residential house and carrying out his business within the suit land, as though it belonged to him for all those years, we are satisfied, like the learned Judge, that the 1st respondent's possession was adverse to the 1st and 2nd appellants' title, who were clearly dispossessed, from what we have said.

We are satisfied, therefore that the learned Judge properly directed herself on the law, and in her application of the facts to the law. In the circumstances we are unable to agree with appellants that she committed an error in granting the 1st respondent's originating summons.

That should be enough to dispose of the main issue in this appeal. However, in a sentence we would like to deal with a procedural objection raised by the 1st respondent, that the record of appeal was not certified by the appellants contrary to **Rule 87(5)** of this Court's Rules. We confirm that the record we have was certified by the 1st and 2nd appellants' advocates who, by **Rule 22**, are entitled to appear on their behalf.

Accordingly, the appeal lacks merit and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR