IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 78 OF 2016

BETWEEN

ELPHAS COSMAS NYAMBAKA.....APPELLANT

AND

CHARLES ANGUCHO SUCHIA.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Bungoma

***(S. Mukunya, J.) dated 27th July, 2016* in HCCC No. 123 of 2010)**

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JUDGMENT OF THE COURT

This appeal arises from the judgment and decree of the High Court, **(S. Mukunya, J.)** dated 27th July, 2016 allowing the respondent's suit with costs. He decreed that the respondent be registered as the owner of land parcel No. **Bungoma/Naitiri/506** comprising 2.02 Ha having acquired it by adverse possession from the appellant.

The respondent's case in the High Court was that on 24th August, 1991 he entered into an agreement for sale with the appellant in which he bought 5 acres of land for a consideration of Kshs.160, 000. The parcel of land was to be hived out of Plot No. 103. The entire purchase price was duly paid. The appellant then subdivided plot No. 103 into Bungoma/Naitiri 505 comprising of 27 acres, Bungoma/Naitiri 506 comprising 5 acres hereinafter, *"the suit land"* and Bungoma/Naitiri/507 comprising 5 acres. The respondent averred that immediately after the purchase of the suit land he took possession of the same and built thereon a house, planted eucalyptus trees, cultivated maize and bananas and fenced the same to demarcate it from the other parcels of land. Since then he had been in continuous and uninterrupted occupation and use of the suit land. However, the appellant had refused to effect the transfer of the suit land to him.

On the basis of the foregoing uncontested facts, the respondent took out an originating summons (O.S) dated 18th November, 2010 seeking:-

a) That he be declared to have become entitled by Adverse Possession of over 12 years to the suit land.

b) That he be registered as the sole proprietor of the suit land in place of the appellant.

c) That costs of the O.S be provided for.

The appellant filed a replying affidavit to the O.S in which he deposed that the O.S was based on falsehoods, that he was the absolute owner of the suit land, he never entered into any sale agreement with the respondent with regard to the suit land in 1991 and that the respondent had not been in continuous and uninterrupted occupation of the suit land since 1991, nor had he built on the same.

The O.S was subsequently set down for hearing by way of *viva voce* evidence. The respondent called two witnesses namely **Chesastim Kitui Watila** and **Gerald Nabwana** in support of his case. On the other hand, the appellant testified in person without calling any other witness.

In his testimony, the respondent reiterated what we have already set out hereinabove. As for Chesastim Kitui Watila, (PW2) he testified that he started seeing the respondent on the suit land in 1991. He also saw him build a house and had been cultivating the suit land since and had

even planted Cyprus trees. Gerald Nabwana (PW3) on the other hand testified that the respondent bought the suit land from the appellant in 1991 and he was a witness to the agreement. That the respondent had on an occasion gone to him and complained that though he had bought the suit land, the appellant had refused to transfer it to him.

The appellant in his testimony did not dispute those facts save that the respondent had never taken possession of the suit land and that it was in fact occupied by third parties. He testified that when the respondent purchased the suit land, they never obtained the Land Control Board consent because the respondent wanted the suit land transferred and registered in the name of one, **Doris Anindo** which he was opposed to. He stated that when he subdivided plot 103 he registered the suit land in his name and never transferred the same to the respondent. The respondent then lodged a claim with Tongaren Land Dispute Tribunal No. 11 of 2007 and was awarded the suit land. However, the award was set aside by the Bungoma High Court on 13th October, 2010. On that account he wanted the suit dismissed with costs.

The learned Judge in his considered judgment determined that the respondent was entitled to the suit land by way of adverse possession as there was no dispute regarding the agreement for sale of the suit land between the appellant and the respondent and the payment of the purchase price thereof. The learned judge observed that the suit land being agricultural land, consent had to be obtained within six months from the date of the agreement. However, consent was not obtained and by February 1992 the sale became void. Relying on the case of ***Samuel Mulei Waweru v Jane Njeri Richu (2007) eKLR,*** *the learned Judge observed that is when the occupation of the suit land by the respondent* started on its road to adverse possession. That the setting aside of the tribunal award by the High Court had no effect on the respondent's suit because the suit and or notice was not filed by the appellant as the registered owner of the suit land but rather by the respondent, the adverse possessor. The learned Judge went on to hold that the respondent had been on the suit land for a period in excess of 12 years and his occupation was thus adverse to the interests of the appellant and his occupation had not been interrupted by any notice from the appellant. He further held that the 1991 agreement having been made way before the subdivision, there was no difficulty in coming to the conclusion that the appellant had always had in mind that the suit land belonged to the respondent. On the basis of the foregoing, he held that the respondent was entitled to be registered as the owner of the suit land comprising of 2.02 hectares having acquired it by adverse possession.

Dissatisfied with the judgment and decree, the appellant filed the present appeal on grounds *inter alia* that the learned Judge erred in law by finding that the pleadings used by the respondent to institute this suit were proper when the O.S and the supporting affidavit thereto were drawn by his advocate who had no valid practicing certificate at the time; when he failed to hear the appellant's witnesses; when he failed to establish the genesis of the dispute and held that the same was for adverse possession; when he entertained the suit when the same issue had already been canvassed and quashed by the High Court; and when he failed to consider the pleadings filed by the appellant.

At the plenary hearing of the appeal, **Mr. Athung'a,** learned counsel holding brief for **Mr. Khakula,** appeared for the appellant while **Mr. Makokha,** learned counsel was there for the respondent. Counsel relied on their written submissions without highlighting them.

The appellant abandoned ground one and condensed the remaining six grounds into three broad thematic areas, to wit; legal representation, mistrial and adverse possession. Counsel pointed out that in June 2016 when the respondent was represented by **Ms Nanzushi**, she was unqualified to act as a lawyer, since the Law Society of Kenya had described her as inactive in the years 2014, 2015 and 2016 respectively and had therefore contravened Section 9 (d) of the Advocates Act when she purported to act for the respondent by drawing his pleadings and representing him at the hearing. That her participation in the proceedings therefore vitiated the same and no judgment should have been founded on those pleadings in the respondent's favour. He argued further that the trial court conducted the proceedings in a biased manner when it heard two witnesses of the respondent who had not recorded statements and closed the respondent case but failed to hear defence witnesses. To counsel and the appellant, this amounted to a mistrial. Lastly, it was argued that when PW2 stated that the respondent had complained to him about the transfer, it was proof that the respondent did not enjoy a quiet, peaceful and continuous possession of the suit land. Accordingly, adverse possession had not been proved. On that basis, counsel urged us to allow the appeal with costs.

Opposing the appeal, the respondent submitted that the issue of legal representation was never raised in the High Court to enable the court address the same and could not therefore be raised in this appeal. Relying on Section 109 of the Evidence Act he argued that there was no mistrial whatsoever as both parties testified and were cross examined. Whereas the respondent called two witnesses to testify, the appellant chose to testify in person and not to call any other witnesses. That at no point did the appellant seek to call any witnesses and the trial court declined. Finally, relying on the cases of **Mbira v Gachuhi (2002) 1 EALR 137** and **Wambugu v Njuguna (1983) KLR 172** the respondent submitted that he entered the suit land in 1991 through sale and by the time he was issued with a notice to vacate he had been in in open, continuous and uninterrupted occupation of the suit land for a period in excess of twenty years and was thus entitled to the same by way of adverse possession. On that basis he pleaded with us to dismiss the appeal.

This being a first appeal, it is our duty to re-evaluate the evidence tendered before the trial court and come up with our own findings and conclusions. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR the court restated this requirement thus:-**

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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 wherein the Court of Appeal held, inter alia,** ***that: - "On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

We have carefully and anxiously considered the record of appeal, the grounds thereof, the judgment of the High Court, the rival written submissions and the law. We shall adopt as issues for determination in this appeal the three broad thematic areas flagged by the appellant in his submissions, to wit; legal representation, mistrial and adverse possession.

On the question of legal representation we note that the appellant has purported to tender fresh evidence in support of his assertion that the

respondent ought not to have been represented by Ms Nanzushi in the proceedings as she was an unqualified person. That evidence is a communication from the Law Society of Kenya confirming that Ms Nansushi during the period in question she was unqualified advocate. To the appellant that fact vitiated the proceedings and no judgment should have been founded on the same. The respondent countered that submission by stating that the issue was never raised before the trial court to enable it address the same. It was thus an afterthought.

From the record, we note that the appellant was represented by **Messrs. Were & Co. Advocates** whereas the respondent appeared through **Messrs. Lucy Nanzushi & Co. Advocates**. Throughout the proceedings the issue of Nanzushi's status as an advocate was never raised to enable the court to interrogate it which is unfortunate as we do not have the High Court's input on that question. Much as it is a matter of law which can be raised at any stage of proceedings, it is nonetheless desirable that such an issue be raised at the earliest possible time. We note though that the communication from the Law Society of Kenya on Nanzushi's status as an advocate is a strange document that was never produced before the trial court. It is neither signed nor authenticated. The introduction of that document in this appeal is in any event tantamount to adduction of fresh evidence without leave of this Court as required and indeed is in contravention of rule 29(1) of this Court's rules. That being the position, we shall pay no regard to it as it is of no evidential value. Stripped off that documentary support the appellant's assertion is rendered bare and remains just that, mere allegation. In any event, faced with a similar scenario, the Supreme Court in the case of **National Bank of Kenya Ltd v Anaj Warehousing Ltd [2015] eKLR** rendered itself thus:-

> **"While securing the rights of a client whose agreement has been formalized by an advocate not holding a current practicing certificate we would clarify that such advocate's obligations under the law remain unaffected. Such advocates remain liable in any applicable criminal and civil proceedings, as well as any disciplinary proceedings to which he or she may be subject…"**

On the basis of the foregoing, this ground of appeal is obviously devoid of merit and is rejected. The appellant's sanctions with regard to Ms Nanzushi's participation in the proceedings though unqualified lie in criminal, civil or even other disciplinary proceedings against her but cannot be the basis to impugn the judgment.

As regards mistrial, the Court of Appeal of Uganda in **Matsiko v Uganda (1999) 1 EA 184** held that a violation of an appellant's constitutional rights during the trial constituted a mistrial and that a mistrial has the same meaning as miscarriage of justice. The appellant contended that the court closed his case before all his witnesses had testified. From the record, the respondent testified and was cross examined by the appellant's advocates. The respondent thereafter called his two witnesses who were similarly cross examined by the appellant's advocates. Respondent thereafter, closed his case upon. The appellant thereafter testified and was cross examined by the respondent's advocates. The appellant then closed his case and the matter was fixed for delivery of judgment on 25th July, 2016. There is no evidence on record to suggest that the appellant sought time to call other witnesses and the court declined to do so. He freely and voluntarily closed his case and cannot fault that which was of his own making. There was no violation of any of the appellant's constitutional rights as would lead to a mistrial. No single witness was shut out from giving evidence on behalf of the appellant. The appellant had a right to call witnesses in support of his case which he chose not to exercise. He only has himself to blame.

Furthermore the record clearly shows that the respondent's witnesses had recorded statements dated 21st May, 2015, which statements were duly served upon the appellant's then advocates and which during the hearing were adopted by the witnesses as their evidence. Omitting the statements from the record of appeal does not change the fact that the statements were before the court. The two grounds of appeal in this regard are similarly devoid of merit and must fail therefor.

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of 12 years or more. The process spirals into action fundamentally by default or inaction on the part of the registered owner of the parcel of land. The essential requirements being that the possession of the adverse possessor is neither by force or secrecy nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the registered owner.

Section 7 of the Limitation of Actions Act provides that:

> **"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."**

The learned Judge held that the agreement for sale was voided when the parties failed to obtain consent of the land control board within six months of the agreement and that adverse possession was set in motion from that time which was in the year 2004. That is the position in law.

In the case of **Mbira v Gachuhi [2002] 1 EALR 137** the court stated as follows:-

> **"…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 nonconsensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption…"**

The said principle was further elaborately set out in the case of **Wambugu v Njuguna [1983] KLR 172** where this Court held that:-

> **"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 disposed 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"**

And that:-

> **"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."**

Based on the above and the evidence on record, it is clear that the respondent entered the suit land in 1991 through sale. This fact is even admitted by the appellant when he stated in his evidence thus "*in the year 1991, the plaintiff agreed to buy part of LR. No. 103 at a purchase price of Kshs. 160,000 we drew an agreement dated 24th day of August 1991. I receive the entire purchase price."* PW2 and PW3 in their testimonies were categorical that the respondent entered the land in 1991 and built a house, planted trees and has since stayed on the suit land. It is instructive to note that when the case was pending before the court, the appellant's then advocates **Mwangi Wahome & Co. Advocates** dispatched a letter dated 19th January, 2011 which partially read in these terms:-

> "*This means that your continued occupation of the said land is illegal and that you should vacate the same forthwith."*

It is therefore clear that at the time the notice aforesaid was issued to the respondent he had been in continuous and open occupation of the suit land for a period in excess of 20. The appellant's interest in the suit land had therefore been extinguished. We cannot therefore fault the learned Judge for holding that the respondent was entitled to be registered as the proprietor of the suit land on account of adverse possession.

We think we have said enough to show that the appeal is devoid of merit with the consequence that we dismiss it with costs to the respondent.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.