IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL No. 110 of 2016

BETWEEN

RICHARD WEFWAFWA SONGOI .....APPELLANT

AND

BEN MUNYIFWA SONGOI ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya in Environment and Land Court in Bungoma, (A. Omollo, J.) dated 3rd December 2014 and delivered on 19th March 2015

in

Bungoma ELC Case No. 68 of 1997)

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JUDGMENT OF THE COURT

1. This appeal is founded on the issue of *res judicata* and the application of the concept of adverse possession. The parties to this suit are brothers. At all material times, the suit property namely, Land Parcel No. Kimilili/Kamkuuywa/660 was registered in the name of the respondent.

2. By a plaint dated 11th February 1992, a suit was filed against the respondent by the appellant seeking an order for transfer of Land Parcel No. Kimilili/Kamkuywa/660 "the suit property" to the appellant. The suit was filed in 1992 in the Principal Magistrate's Court in Bungoma as PMCC No. 149 of 1992. By a judgment dated 12th January 1995, the trial magistrate held that the appellant was the rightful owner of the suit property and that the same should be transferred to him.

3. Aggrieved by the judgment, the respondent lodged an appeal to the High Court being Bungoma HCCA No. 79 of 1995. The learned judge (C.O. On'gudi, J.) in a Judgment dated 12th June 1997 set aside the judgment of the trial court and held that the magistrate did not have jurisdiction to determine the matter where parties were claiming beneficial interest in the suit property. The judge held that the suit should have been filed by way of Originating Summons in the High Court.

4. Prompted by the decision of the judge, the appellant filed a fresh suit in the High Court being Bungoma HCCC No. 68 of 1997. In the suit, filed by way of Originating Summons, the appellant claimed ownership of the suit property by way of adverse possession. Upon hearing the parties, two issues were identified for determination by the judge namely:

(a) Whether the suit was *res judicata.*

(b) Whether the appellant's occupation of the suit property was adverse to the respondent.

5. In dismissing the appellant's Originating Summons, the learned judge (Omollo J.) in a judgement dated 3rd December 2014 expressed herself as follows:

[14] ….. In the first line of his judgment, the learned trial magistrate stated: "In this case, Case No. 149 of 1992 was consolidated with Case No. 207 of 1992. The reasons are that the parties had sued each other differently in different files but over the same piece

of land."

[15] The defendant appealed that judgment vide Bungoma HCCA No. 79 of 1995 which appeal succeeded. The judgment on appeal was produced as DExh 3. The plaintiff was aware about the appeal but said it had not been finalized. I think he is not being truthful that he did not know that appeal was finalized as subsequently after, he filed this suit the same year (1997) when the judgment was delivered. In that judgment, the learned judge set aside the lower court's decision on the basis that the lower court had no jurisdiction to try the matter before it. The question therefore is whether the matter in issue in the former suit is similar to the matters in issue in the present case.

[16] ….. When I read the two judgments produced as Exhibit D2 and D3 it is without a doubt that the subject matter and the parties are the same. I also form an opinion that the claim was also the same – the plaintiff claiming that the suit land belonged to his father and he had been living on it for over twelve years. Further the matter was heard and decided on merit. The plaintiff did not mention anything in submission on the subject of res judicata. I am satisfied by the submissions of the respondent and therefore hold that the present suit is res judicata. This would have settled this matter but I choose to give my determination on all matters in issue.…

[19] …. In my interpretation…the plaintiff occupied the suit land on the assumption that it was given to him by his late father and not that the occupation was adverse to the interests of the defendant. His claim in my view should have been on a constructive trust i.e. that the defendant's registration was in trust for him. The issue of trust was not pleaded neither did the parties allude to it in evidence. This court cannot make a finding on it in the circumstances….

[21] In conclusion, taking the facts and legal principles guiding a claim in adverse possession, I find the plaintiff's claim fails the test. I therefore find the plaintiff's case without merit and is res judicata….. In this matter, the plaintiff will need money as he relocates. I therefore order each party to bear their respective costs. The plaintiff is hereby directed to give vacant possession of L.R. No. Kimilili/Kamkuywa/660 within 90 days from the date of delivery of the judgment. In default the defendant is at liberty to use lawful means to obtain vacant possession of the suit land.

6. Aggrieved by the judgment of the learned judge, the appellant has proffered the instant appeal citing the following grounds:

(i) The judge erred in law in holding that the suit was *res judicata.*

(ii) The judge erred in holding that the appellant had not acquired the suit property by adverse possession.

(iii) The judge erred in computing time when adverse possession starts to run against the proprietor.

(iv) The judge erred in failing to appreciate that the respondent gave conflicting evidence.

(v) That the judgment delivered is against the evidence on record.

7. At the hearing of this appeal, learned counsel Mr. Washington Athunga appeared for the appellant. Learned counsel Mr. Obwoge Onsongo holding brief for Mr. J. S. Khakhula & Co. Advocates appeared for the respondent. Both parties had filed written submissions.

APPELLANT'S SUBMISSIONS

8. The appellant rehashed the contents of the impugned judgment of the learned judge. It was submitted that the judge erred in finding that the suit was *res judicata*. That the decree in Bungoma High Court Civil Appeal No. 79 of 1995 was very clear that the judgment of the magistrate court was set aside because the magistrate had no jurisdiction. The fact that the decision of the magistrate's court was dismissed for want of jurisdiction means that *res judicata* did not apply.

9. On the issue of adverse possession, it was submitted the learned judge erred in finding that the appellant had not acquired the suit property by way of adverse possession. That the judge erred in delivering a judgment without reference to the Originating Summons which was on record. That in the Originating Summons, the issue of the respondent holding title to the suit property in trust for the appellant was pleaded. That the evidence on record shows that the appellant was given the suit land by his late father Zakaria Songoi who had bought it from one Henry Mukhebi Wabomba in the 1970s. That the appellant constructed his home on the suit property in the 1980s.

10. On computation of time, it was urged that the learned judge erred in computing time for adverse possession from 1980 when the appellant entered the suit property and further erred in finding that the appellant's possession was interrupted in 1992. That the judge erred as the appellant had been using the land since 1970s. That the appellant's use of the land since 1970 was adverse to the respondent's title. That the judge ought to have computed time from 1970 and upon expiry of 12 years, the respondent's title to the suit property had been extinguished.

11. The appellant submitted that the respondent never gave him permission to use the land. That the respondent's assertion that he permitted the appellant to live with him in the 1970's, as he was a minor, amounts to conflicting evidence. That from the totality of the evidence on record, the judge ignored the appellant's continuous use, occupation and possession of the suit property from 1970 to date. That the respondent has never been in possession of the suit property. For the foregoing reasons, the appellant urged us to allow the instant appeal.

RESPONDENT'S SUBMISSIONS

12. The respondent in his submissions urged that the judge did not err in holding that the suit was *res judicata*. In any event, it was submitted that the impugned judgment was not founded on *res judicata* but also on the fact that the appellant did not prove adverse

possession of the suit property. It was submitted that from 1965, the appellant, the respondent and their mother had their home on Land Parcel No. 663; that the appellant was not given possession of the suit property by his father. That it was the respondent who allowed the appellant to build his hut on the property. The respondent concluded by submitting that the judge properly evaluated the evidence on record.

ANALYSIS and DETERMINATION

13. We have considered the grounds of appeal as well as submissions by counsel and the authorities cited. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co., [1968] EA 123,** it was expressed thus:

> *"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**)."*

14. In our considered view, there are two issues for determination in this matter. First is whether the learned judge erred in finding that the appellant's suit was *res judicata*. Second is whether the judge erred in finding that the appellant had not proved adverse possession to the suit property.

15. On *res judicata,* the Supreme Court in **Communications Commission of Kenya & 5 others - v- Royal Media Services Limited & 5 others [2014] eKLR** expressed itself as follows on the issue of *res judicata*:

> ***[317]** The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings….*
>
> ***[319]**There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title **Karia and Another v. The Attorney General and Others**, [2005] 1 EA 83, 89. (Emphasis supplied)*

16. In this appeal, the record shows that the appellant filed suit against the respondent before the Principal Magistrate's Court in Bungoma in PMCC No. 149 of 1992. By a judgment dated 12th January 1995, the trial magistrate held that the appellant was the rightful owner of the suit property and that the same should be transferred to him. On appeal in Bungoma HCCA No. 79 of 1995, the learned judge set aside the judgment of the magistrate's court on the basis that the magistrate did not have jurisdiction to determine the matter.

17. In the impugned judgment the subject of the instant appeal, the learned judge held that the suit filed by the appellant before the High Court vide the Originating Summons was *res judicata* because a similar suit had been filed in Bungoma as PMCC No. 149 of 1992. That the Bungoma PMCC and the Bungoma HCCA No. 79 of 1995 were determined on merit.

18. With due respect, we disagree with the learned judge. The suit before the Bungoma Magistrate Court was not determined by a competent court. When the High Court in Bungoma Civil Appeal No. 79 of 1995 held that the magistrate's court had no jurisdiction, the entire proceedings before the magistrate's court became null and void. It is as if no suit had been filed before the magistrate's court and thus there are no two suits for the doctrine of *res judicata* to apply. In addition, for *res judicata* to apply, the case must have been determined by a competent court. The Bungoma magistrate's court was held not to be a competent court that could hear and determine the dispute between the parties. The first condition for res judicata to apply as stated by the Supreme Court in **Communications Commission of Kenya & 5 others - v- Royal Media Services Limited & 5 others, [2014] eKLR** is thus not fulfilled. We find that the learned judge erred in holding that the appellant's suit was *res judicata* in the circumstances.

19. On adverse possession, we have re-evaluated the testimony of the parties. The appellant testified that the suit property was given to him by his late father Mr. Zakaria Songoi. His father had two parcels of land namely Parcel No. 663 and the suit property. In 1970, the father called his sons to share the land amongst them. The appellant was given the suit property and he has been using the land since them. In 1980 he built his house on the suit property. Their father died on 9th October 1976. That at the time of his father's death, they were all living on Parcel No. 663. That Parcel No. 663 was given to the respondent - it was 12 acres. That in 1992, he filed a case against the respondent before the Bungoma Principal Magistrate's court in Civil Case No. 49 of 1992. That during hearing before the magistrate, Mr. Mukhebi Wabomba testified that he had sold the suit land to the respondent in 1965. That he came to learn that the title deed of the suit property was in the name of the respondent. The appellant urged the learned judge to order that the suit property be registered in his name as he had lived on the property for over 12 years.

20. In support of the appellant, PW2 Daniel Wasike Songoi testified that he was half-brother to the appellant. He knew the appellant was given the suit property by their deceased father. The respondent was given parcel No. 663 and 664. The Land Parcel No. 664 was bought by their deceased father Zakaria Songoi. That it was not true the respondent bought Land Parcel No. 660.

21. PW3 Salome Nangekha Makokha testified that she was a sister to both the appellant and respondent. That during their childhood, they lived on Parcel No. 663. That in 1970, their father gave the suit property to the appellant and parcel No. 663 to the respondent.

22. In controverting the appellant's case, the respondent testified that he bought the suit property from Mukhebi Wabomba in 1965. That he purchased the same in exchange for head of 5 cattle. That on 24th November 1965, together with Mr. Mukhebi Wabomba they went to Bungoma Land Office and a transfer of the suit property was entered in his name. That he went to work in Mombasa and upon his return in 1984 he found that the appellant had built on his land. That the appellant told him he was on the land temporarily as he awaited to go to his share of land comprised in Parcel No. 700.

23. The learned judge in evaluating the evidence on record expressed that time stopped running in favour of the appellant in 1992 when the respondent took out proceedings before the magistrate's court to claim the suit property. That because time had been interrupted when the suit was filed, a claim for adverse possession cannot lie. The learned judge held that the appellant occupied the suit land on the assumption that it was given to him by his father and not on the basis that the occupation was adverse to the interest of the respondent. The learned judge wondered how the appellant could claim adverse possession yet in the same breath challenge the respondent's title. The judge in answering this question cited dicta from the case of **Haro Yonda Juaje –v- Sadaka Dzengo Mbauro & Kenya Commercial Bank, (2014) eKLR** where it was stated:

> *"One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and that the registered owner has never been in possession of such land."*

24. On our part, we note that the appellant's claim to the suit property is founded on the assertion that he was given the land by his father in 1970. All the appellant's witnesses testified that he was given the suit property by his father.

25. Conversely, the respondent testified that he bought the suit property in 1965 from one Mukhebi Wabomba. The evidence on record vide the Green Card of the suit property shows that the Parcel was transferred to the respondent on 24th November 1965 from Mukhebi Wabomba. The respondent was issued with a title deed on 10th August 1987.

26. The factual and legal issue is; what proprietary interest did Zakaria Songoi have in the suit property to enable him gift it to the appellant? In 1970, the suit property was already registered in the name of the respondent after having been transferred by Mr. Mukhebi Wabomba. If at all the late Zakaria Songoi had purchased the suit property from Mr. Wabomba, why was it registered in the respondent's name in 1965? Why did Mr. Wabomba testify that he had sold the parcel to the respondent?

27. In our considered view, there is no evidence on record to show that the late Zakaria Songoi had any proprietary interest in the suit property that he could gift to the appellant.

28. The next issue for our consideration is the occupation of the property by the appellant. It is not in dispute that to date, the appellant is in occupation of the suit property. The legal issue is whether the appellant's occupation has been adverse to the respondent who is the registered proprietor of the parcel.

29. The respondent was registered proprietor of the suit property on 24th November 1965. On this date, the father to the appellant was alive. The appellant constructed his house on the parcel in 1980. In the testimony of the respondent, the appellant constructed his house on a temporary basis awaiting to go to his share in Land Parcel No. 700. According to the appellant, he has been using the land by ploughing it since 1970 when he was gifted by his father and he constructed his house thereon in 1980.

30. The law and requirements for adverse possession was reiterated in the case of **Mbira –v- Gachuhi, (2002) IEALR 137** where it was held 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 statutory prescribed period without interruption…."*

31. In the instant matter, the appellant entered Parcel No. 660 albeit on permission or gifting by his late father in 1970. We have held that the appellant's father had no proprietary interest in the suit property that he could gift the appellant to use.

32. Nevertheless, from the testimony of the appellant as corroborated by the evidence of PW1, PW2 and PW3, the appellant began ploughing the suit property in 1970 and built his house thereon in 1980. For this reason, we find that on balance of probabilities, the learned judge erred in computing the time for adverse possession from 1980 as there is evidence on record that the appellant was using the suit property from 1970.

33. The next issue is whether the appellant's possession and occupation of the suit property was adverse to the respondent's title and proprietary interest. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of **S. M. Kenni alias Tamanna Sabeb – v- Mst Bibi Sakina AIR 1964 SC 1254; and Parsimi – v- Sukhi, 1993 4 SCC 375).**

34. In the instant matter, the appellant contends that the respondent has never been in possession of the suit property. In a claim for adverse possession, the non-use of the property by the owner even for a long period of time will not affect his title. The position will only be altered when another person takes possession of the property and asserts a right over it.

35. In **Alfred Welimo -v- Mulaa Sumba Barasa, CA No 186 of 2011**, this Court expressed itself thus:

> *"It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to*

use it; for as Robert Megarry aptly observed in his Megarry's manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land…."

36. For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.

37. In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was *nec vi, nec clam, nec precario*. (See ***Kimani Ruchine -v- Swift, Rutherfords Co. Ltd. [1980] KLR 1500*** *and* ***Karnataka Board of Wakf -v- Governemnt of India & Others [2004] 10 SCC 779).***

38. In this appeal, the learned judge held that the appellant's occupation of the suit property was interrupted in 1992 when he filed suit before the Bungoma Principal Magistrate's Court.

39. In **Wambugu –v- Njuguna, (1983) KLR 173,** this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is 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 or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:

(a) on what date he came into possession.

(b) what was the nature of his possession?

(c) whether the fact of his possession was known to the other party.

(d) for how long his possession has continued and

(e) that the possession was open and undisturbed for the requisite 12 years.

41. In the instant matter, when the appellant started ploughing the suit property in 1970, he did not do so with the intention of dispossessing the respondent. He was not even aware that the respondent was the registered proprietor of the property. The appellant testified that upon the death of his father in 1976, the respondent wrote him a letter stating that the suit property was his. From this letter, the respondent had brought to the attention of the appellant that his occupation and claim of ownership of the suit property was disputed. On record, from the testimony of PW4 Simon Simiyu Songoi, it was stated that in 1992, a clan meeting was held in attempt to resolve the dispute between the parties. We find that the clan meeting was a challenge to the appellant's peaceful and uninterrupted possession of the suit property. The clan meeting was further evidence that the respondent did not acquiesce to the appellant's possession of the suit property.

42. The appellant testified he started using the suit property when he was given by his father. In the same vein, the appellant claims title to the parcel by way of adverse possession. The appellant's claim is founded on title by way of gift from his father. He prevaricates and lays claim to the land parcel by way of adverse possession against the respondent. The pleas of title and a claim for adverse possession are mutually inconsistent and exclusive.

43. Comparatively, the Supreme Court of India in **Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639** faced with an inconsistent claim of title by agreement and adverse possession stated that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to the appellant. That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor and that the latter had acquiesced to his illegal possession during the entire period of 12 years.

44. Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant's claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970.

45. In our considered view, there is no evidence on record to prove that the appellant entered the suit property with intention to dispossess the respondent as the registered proprietor of the suit property. The appellant had no knowledge that the respondent was the registered proprietor. There is evidence on record that from the death of the appellant's father in 1976, the respondent intimated to the appellant that the suit property was his (respondent's) land. It follows that when the appellant built his house in 1980 on the suit property, he was well aware that his entry and occupation of the suit property was under challenge by the respondent. Between 1970, 1976 and 1980, twelve years had not lapsed for the appellant's claim of adverse possession to succeed. The clan meeting in 1992 further interrupted the appellant's unchallenged occupation of the suit property. Between 1992 and 1997 when the instant suit was filed, twelve years had not lapsed. It is instructive to note that PW3, Salome Nangekha Makokha, in cross examination testified that the respondent tried to evict the appellant from the suit property.

46. From the evidence on record, we find that the appellant's occupation of the suit property was always under constant challenge by the respondent. The fact that the appellant had occupied the suit property for a period in excess of 12 years does not *per se* prove adverse possession.

47. The record shows that the appellant's occupation of the suit property was constantly under challenge by the respondent. This was done expressly in writing in 1976; again in 1984 when the appellant informed the respondent he had built on the parcel temporarily; again during the clan meeting in 1992 and finally vide the suit filed before the learned judge in 1992. We further note that the appellant's entry into the suit property was by permission from a person who had no proprietary interest in the parcel.

48. In the instant matter, the appellant's entry into the suit property was by permission. Whether that the permission was lawful or authorized is immaterial. Having entered the suit property on permission, the appellant cannot be allowed to turn around and state that that entry was by way of adverse possession. We thus find that the learned judge did not err in finding that the appellant's claim for adverse possession was not proved.

49. The upshot is that this appeal has no merit and is hereby dismissed with costs.

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.