IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, GATEMBU & J. MOHAMMED, JJ.A)

KISUMU CIVIL APPEAL NO. 136 OF 2017

BETWEEN

RICHARD NALWELISIE MASINDE,

FELIX NYONGESA MASINDE And EVANS KAKAI

(Suing as the legal representatives of the estate of

GEORGE MASINDE MURUNGA (deceased)).....**APPELLANTS**

AND

BARASA NYONGESA MAMATI.....**RESPONDENT**

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma

(S.N Mukunya, J.) delivered on 10th March 2017

in

H.C.C. Suit No. 41 of 2008)

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JUDGMENT OF THE COURT

1. A brief background of the case is that, the initial owner of **Land Parcel Number EAST BUKUSU/SOUTH NALONDO/661,** (the suit property), was the late Nyongesa Mamati Mikhwende who was a relative to (Barasa Nyongesa Mamati) the respondent herein. Following the death of Nyongesa Mamati, the respondent moved to court in 2006, vide Bungoma High Court **Succession Cause No. 13 of 2006** wherein he listed the suit property as part of the Nyongesa Mamati's free estate. He obtained the Grant of letters of administration and had himself registered as the owner of the land.

2. According to the appellants however, their late father, one George Masinde Murunga, had purchased the suit property from the respondent's father way back in 1967 and he had put up a home and planted many crops thereon including sugarcane contracted to Nzoia Sugar Company. They said that their father and his family had occupied the said property openly, exclusively, continuously and adversely since 1967.

3. Based on those facts, the appellants' father filed Originating Summons motion dated 28th July, 2008 in Bungoma **H.C.C. Suit No. 41 of 2008,** claiming ownership of the suit property, by virtue of adverse possession. He unfortunately met his death before the conclusion of the suit and was subsequently substituted by his three (3) sons, Richard Nalwelisie Masinde, Felix Nyongesa Masinde and Evans Kakai, the appellants herein.

4. Following the death of their father, the appellants filed an amended Originating Summons on 26th May, 2014 in which they claimed, on behalf of their late father's estate, the entire suit property by virtue of adverse possession. In the said Originating summons, they sought the determination of *inter alia* the following issues:-

"1) Whether or not the Applicants herein have been in occupation of land parcel number EAST BUKUSU/ SOUTH

NALONDO/661 measuring 3.6 Hectares openly, continuously and peacefully for a period exceeding 12 years.

2) Whether or not the Respondent's title over the said parcel of land has been extinguished by operation of law.

3) Whether or not the court should order the Applicants to be registered as the proprietors of the suit land parcel number EAST BUKUSU/SOUTH NALONDO/661 in place of the Respondent herein.

4) Whether or not the Applicants have become entitled to land parcel number EAST BUKUSU/SOUTH NALONDO/ 661 by the concept of adverse possession."

5. In their joint affidavit in support of the Amended Originating Summons, the appellants deposed that in 1967 their late father, purchased the suit property from one Nyongesa Mamati Mikhwende (deceased). It was deposed that their late father also purchased Land Parcel number EAST BUKUSU/SOUTH NALONDO/662, which was adjacent to the suit property from Nyongesa Mamati Mikhwende's brother, one Barasa Mikhwende.

6. It was their contention that their late father had extensively developed the suit property and put up a four-bedroomed permanent house, four semi-permanent houses for themselves and their families, one barn, pit latrines and a live fence. Further, that he also used the land for farming.

7. The Respondent challenged the motion vide a replying affidavit dated 3rd October, 2008 in which he denied the appellants' claim stating that the property was never sold to the deceased in 1967 as alleged by the appellants. That the initial registration as per the title of registration was done in 1972 in the original owner's name. Further, that it was peculiar that the appellants' late father never challenged such registration before the adjudication committee during registration. He contended that he was the administrator of the estate of Barasa Mikhwende, the initial owner's brother, who was his grandfather, hence his registration as the only beneficiary.

8. He opposed the appellants' claim of adverse possession deposing that the deceased had neither been in occupation of the suit property for a period of 12 years or at all nor had he developed the suit property; that the deceased had been in occupation of Land Parcel number EAST BUKUSU/SOUTH NALONDO/662 and not the suit property. He averred that the boundary between the two properties was not obvious as there was no distinct boundary between them.

9. The learned trial Judge considered the pleadings, evidence and rival submissions as presented before him. Ultimately, by a judgment dated and delivered on 10th March, 2017, the appellants' suit was dismissed with costs to the respondent, hence provoking this appeal. While dismissing the matter, the learned Judge pronounced that he had no jurisdiction to entertain the matter as the same should have been determined by a succession court, and that the appellants ought to have pursued their claim in the succession cause. The appellants were therefore left without recourse as their claim was not determined.

10. Aggrieved, the appellants have challenged the said decision before this Court relying on sixteen (16) grounds as appears on the face of the Memorandum of Appeal dated 18th December, 2017. The appellants have complained, *inter alia*, that the learned Judge erred in fact and law: by finding that the ownership of the land had been determined in Bungoma High Court Succession Cause No. 13 of 2006; by finding that the suit was a succession matter when the same was clearly a matter of adverse possession; by finding that the suit was parallel to Bungoma High Court Succession Cause No. 13 of 2006 yet the parties in the suits were different; by holding that the appellants could ventilate the question of adverse possession in a succession matter in respect of the respondent's father; by holding that there was no evidence of adverse possession without considering the appellants' evidence on record; by holding that granting orders in favour of the appellants in the suit before him would probably amount to a parallel and contradictory order to the orders granted in Bungoma High Court Succession Cause No. 13 of 2006 on the issue of ownership of the suit property; by holding that the suit property did not exist prior to 1972 when it was registered; and by determining an issue of *res judicata* which was not before him.

11. Both parties filed submissions expounding on their rival positions. During the plenary hearing, the appeal was canvassed through written submissions.

12. Urging the Court to allow the appeal, counsel for the appellant submitted that the learned Judge misdirected himself in finding that the issue of ownership of the suit property had been determined in Bungoma High Court Succession Cause No. 13 of 2006. He contended that the said succession matter was between the respondent and his siblings as to distribution of their father's estate hence it was a succession suit distinct from the land suit before the trial court. He argued that the appellants could therefore not make a claim of adverse possession within the succession suit; that since they were not dependants, they had no direct claim to the suit property which was being distributed as part of the estate.

13. Counsel submitted that the trial court erred in finding that it could not interfere with the decision as it lacked jurisdiction to deal with the matter which had already been concluded by another court. He contended, that since the instant suit related to land, it was not possible for the issue of the ownership of the suit property to have been dispensed with in the aforementioned succession case. Citing **Article 162(2)(b)** of the Constitution and **section 3** of the Environment and Land Court Act he contended that the trial court indeed had the jurisdiction to conclusively adjudicate over the issue of ownership in respect to the suit property.

14. Counsel maintained that the trial court erred in delving into the issue of jurisdiction, yet it was not raised by either party. He contended that the trial court misdirected itself in finding that it had no jurisdiction to grant orders challenging the orders granted in the succession suit, yet it granted orders in favour of the respondent. Placing reliance on **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd (1989) KLR 1** he argued that if indeed the trial court did not have jurisdiction, it ought to have downed its tools in that very instant and ought not to have pronounced itself on the issues before it.

15. He further submitted that the trial court erred in finding that granting orders in favour of the appellants would amount to granting a parallel and contradictory order to those granted in Bungoma High Court Succession Cause No. 13 of 2006. He maintained that the two were distinct suits seeking distinct orders; the instant suit sought ownership through adverse possession and the other suit dealt with succession from the original owner.

16. Relying on **section 7** of the Limitation of Actions Act and **Wambugu v. Njuguna (1983) KLR 172**, counsel urged that the principles governing the issue of adverse possession are clearly provided for in law. He submitted that the learned trial Judge in determining the case before him was not properly guided by those principles. He challenged the learned Judge's finding that the appellants failed to demonstrate sufficient use of the suit property. He maintained that the learned Judge misapprehended the evidence before him hence erroneously finding that the appellants' sugarcane contracted to Nzoia Sugar Company on the suit property for a consecutive 30 years did not amount to sufficient use of the land so as to give rise to a claim of adverse possession. Further, that the trial Court's finding that the initial owner of the suit property was not dispossessed of the land through the said use was equally wrong.

17. Counsel urged that learned Judge misdirected himself by failing to consider that the appellants' factual evidence of adverse possession stood unchallenged by the respondent hence causing an injustice to the appellants. He maintained that the appellants herein had been in possession of the property for (40) years and had grown the sugar plantations on the suit property for 30 consecutive years. Hence, this fact was sufficient to establish a claim of adverse possession. He further argued that the trial Judge's finding that the suit property did not exist in 1967 as it was registered in 1972 was wrong as it was absurd that the existence of the suit property was dependant on its registration. He urged the Court to allow the appeal.

18. On his part, learned counsel for the respondent filed his submissions on 19th June, 2020. Opposing the appeal, counsel restated the law on adverse possession as espoused in sections **7, 17** and **37** of the Limitation of actions Act and in this Court's decision in **Wanyancha Gibiti & 3 others vs Waigoge Nyahiri Sinda** [2015] eKLR. Counsel submitted that the appellants had failed to prove that they were in possession of the suit property and that by the time they moved to the High Court claiming adverse possession, the registered proprietor had already asserted his rights and made an effective entry into the suit property.

19. Counsel contended that the appellants had failed to prove that their father had bought the suit property in 1967 as no sale agreement was produced in court. Counsel went on to urge that the learned Judge was not wrong in saying that the matter should have been canvassed in Succession Cause NO.13 of 2006, and further that the learned Judge's finding that adverse possession had not been established could not be faulted. Counsel concluded by reiterating that the appeal lacks merit and urged for it's dismissal.

20. This being a first appeal, this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions bearing in mind and giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it. In addition, this Court ought not review the findings of the trial Court simply because it would have reached different conclusions if it were hearing the matter for the first time. (See: **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** and **Peters v Sunday Post Limited [1958] EA 424**).

21. Having considered the record, submissions by counsel as summarised above and the law, the two main issues for the determination by this Court are:

i. Whether the learned Judge had jurisdiction to hear and determine the Appellants Originating Summons.

ii. Whether the learned Judge erred in finding that in light of the decision in Bungoma High Court Succession Cause No. 13 of 2006, the issue of ownership of the suit property had already been dispensed with therefore extinguishing the appellant's claim.

22. In the impugned judgment, the learned Judge seemed to say on the one hand that he had no jurisdiction to determine the matter because in his view it was a succession matter. In a part of the judgment, he actually opined that the appellants should have applied to re-open the succession cause so that they could lodge their claim within the succession matter. On the other hand, the learned Judge appears to have continued to analyse the evidence before him and made some conclusive findings even though he was categorical that he could not answer the questions raised in the Originating Summons as can be seen from his pronouncement below:

> **"I am unable to answer the questions raised in the Originating Summons in the affirmative. If I were to do that there would be two parallel orders granting the ownership of East Bukusu/South Nalondo/661 to two different people in view of the High Court Succession Cause No.13 of 2006. This would not be in the interests of justice and it would lead to abuse of the court process".**

23. We have some difficulty is supporting this position. We say so because by the time the appellants were filing their claim, the suit property was already in the respondent's name. It was therefore no longer part of the deceased's estate and it was outside the purview of the Law of Succession Act. Secondly, even under the Law of Succession Act, where a dispute arises over ownership of land in the cause of distribution of the deceased's estate to the beneficiaries, the distribution of such property is stayed pending determination of ownership through Originating Summons under Order 36 of the Civil Procedure Act. (See Rule 41(3) of the Law of Succession Act).

24. Evidently, and in the context of the present case, the court sitting as a probate court has no jurisdiction to determine the question of ownership of land where such is in dispute. In this case, even assuming that the appellants had lodged their claim in the succession cause, the claim would still have been referred to the Land and Environment Court which is the court seized of jurisdiction to hear and determine disputes related to land ownership. The learned Judge did therefore fall into error when he divested himself of jurisdiction to hear the matter. Our first issue for determination is therefore in the affirmative.

25. The other issue that perturbs us is that even after finding that he had no jurisdiction over the matter, the learned Judge proceeded to consider some aspects of the evidence and made some conclusive findings which were adverse to the appellants herein. As pronounced in the *locus classicus* case of **Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd** *(supra)*, where a court finds it lacks jurisdiction to hear a matter, it must down its tools and not move even one step further.

26. The learned Judge had only two options in this matter. Either find he had jurisdiction and hear the matter and render a judgment on merit, or having found that he lacked jurisdiction, end the matter at that without delving into the merits of the case. He took a middle ground position which has left the appellants with no remedy. They could not move the court to reopen the case as the land had already been transferred to the respondent, and the learned Judge did not determine their claim one way or another.

27. For the foregoing reasons, we are persuaded that this appeal has merit. We allow it and set aside the impugned judgement and order that the suit be and is hereby remitted to the Environment and Land Court for hearing afresh. We order that each party bears its costs of this appeal and before the Environment and Land Court.

Dated and delivered at Nairobi this 23rd day of October, 2020.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR