IN THE COURT OF APPEAL

AT ELDORET

(CORAM: NAMBUYE, KARANJA & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 110 OF 2019

BETWEEN

ROBINSON KIPLAGAT TUWEI.....APPELLANT

AND

FELIX KIPCHOGE LIMO LANGAT.....RESPONDENT

(Appeal from the Judgment and Decree of the Environment & Land Court

at Eldoret (Odeny, J.) dated 19th September 2018

in

ELCC No. 215 of 2017(OS))

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JUDGMENT OF THE COURT

We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of ***rule 86*** of the ***Court of Appeal Rules***. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal.

This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See ***Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR)*** and ***Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR***. In the latter case, this Court lamented:

> *"We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."*

The 18 grounds of appeal presented by ***the appellant, Robinson Kiplagat Tuwei*** against the judgment of the ***Environment and Land Court*** at ***Eldoret (Odeny, J.)*** dated 19th September 2018 raise only two issues, namely whether the learned judge erred in finding that ***the respondent, Felix Kipchoge Limo Langat*** was in adverse possession of 1.214 hectares of the property known as ***Mogobich/Cheptilik/Block 1(Kipsebwo)/225 (the suit property)*** and whether, in a case founded on adverse possession, the learned judge was entitled to determine it on the basis of a constructive trust.

The background to the appeal is as follows. On 31st May 2017, the respondent took out an Originating Summons in the Environment and Land Court at Eldoret, primarily under ***Order 37 rule 7*** of the ***Civil procedure Rules*** and ***sections 7, 17,*** and ***38*** of the ***Limitation of Actions Act***. He requested the court to determine six questions, framed as follows:

> *(i) Whether the respondent has been in open, continuous and uninterrupted occupation of 1.214 hectares of the suit property?*

(ii) Whether the respondent's occupation has been without the appellant's consent?

(iii) Whether the appellant's title is valid since the title of Salome Cheptalam Mutai, who transferred the suit property to the appellant, had already been extinguished by adverse possession?

(iv) Whether the respondent is entitled to be registered as proprietor of the suit property?

(v) Whether the appellant should execute the requisite instruments of transfer and in default whether the Deputy Registrar should execute the same; and

(vi) Who should meet the costs of the suit.

In the affidavit in support of the summons, the respondent deposed that at all material times ***Salome Cheptalam Mutai (Cheptalam)*** was the registered owner of the suit property and that on various dates, he entered into 7 agreements with the said Cheptalam for the purchase of various portions of the suit property on agreed consideration. The respondent further averred that after each transaction, he took possession of the concerned portion of the suit property, constructed and started growing tea and keeping dairy cows, all of which he did openly, without secrecy or consent and uninterrupted for a period of over 12 years. However, on 24th May 2017 after the lapse of the limitation period, the appellant destroyed his property in a bid to evict him from the suit property.

The appellant opposed the summons vide a replying affidavit sworn on 29th June 2017. He admitted that at the material time the suit property was registered in the name of Cheptalam, his late mother who died on 24th May 2014, but added that the suit property was lawfully transferred and registered in his name on 17th December 2012, after which he took possession, built a house and continued tending to the tea bushes that were already on the land. He added that Cheptalam was buried on the suit property without any objection from the respondent. He denied that Cheptalam sold the suit property to the respondent, or that the respondent ever took possession of the same. He contended that the agreements for sale that the respondent relied upon were fake and fraudulent, pointing out what he considered defects in them. Lastly the appellant pleaded that the respondent attempted to build a house in the suit property only in 2014, but he refused to allow him to take possession of the suit property. He maintained that it was him, rather than the respondent, who was in possession of the suit property.

The learned judge took *viva voce* evidence, with the respondent testifying and calling three witnesses in support of his case. One of the respondent's witnesses was a one time farm manager who signed some of the agreements on behalf of the respondent, another, a witness to one of the agreements, and the last, a neighbour who stated that he planted tea bushes on 0.8 acres of the suit property on behalf of the respondent. On his part the appellant also testified and called four witnesses, one being a manager from ***Nandi Tea Estate*** who testified that the respondent had tea on the suit property which he was supplying to the Estate, and two brothers of the appellant who testified that it was the appellant who was in occupation of the suit premises and the last, a neighbour, who similarly testified that it was the appellant rather than the respondent who was on the suit premises.

In the judgment, the subject of this appeal, the learned judge held that the respondent entered into valid agreements for sale with Cheptalam; that he paid in full the agreed purchase price; that although the transactions required and did not obtain consent of the ***Land Control Board***, the doctrine of constructive trust was applicable because the respondent was in possession; that by the time Cheptalam transferred the suit property to the appellant, she held the same in constructive trust to the respondent; and that for purposes of adverse possession, time started running when the respondent paid the purchase price and took possession and therefore by the time Cheptalam transferred the suit property to the appellant, her title was extinguished by adverse possession or by constructive trust. The learned judge ultimately concluded as follows:

> *"Lastly on the issue of whether the plaintiff has proved adverse possession, from the evidence on record, it is clear that the plaintiff bought the land and has been in open, quiet, uninterrupted possession and without the consent of the defendant, of the suit land until 2017 when the defendant tried to eject him. This was after more than 12 years."*

The appellant was aggrieved and filed this first appeal. Relying on his written submissions which his counsel highlighted virtually, the appellant submitted, on the issue of constructive trust, that the leaned judge erred by relying on a constructive trust whilst as framed, the respondent's case was founded on adverse possession. He added that the issue of constructive trust was neither pleaded nor addressed by the parties and that the learned judge erred by determining the case and basing the judgment on an unpleaded matter.

He further submitted that there were no valid agreements for sale between the respondent and Cheptalam and that the respondent did not adduce evidence of payment of the purchase price. He relied on ***Twalib Hatayan & Anor v. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*** and submitted that in the circumstances of the case there was no constructive trust.

Regarding adverse possession, the appellant submitted that the respondent did not prove possession of the suit property either for 12 continuous years or at all. He contended that from the evidence that was adduced, it was he, the appellant, who was in possession of the suit property, having lived on it since he was born. He argued that the respondent could not have been in possession, otherwise Cheptalam would not have been buried on the suit property when she died in 2014. The appellant relied on the decisions in ***Wilson Kazungu Katana & 101 Others v. Salim Abdalla Barkshwein & Another [2015] eKLR*** for the proposition that to succeed in a claim for adverse possession, the claimant must prove dispossession of the owner and occupation for a period of 12 years or more.

The appellant further argued, on the authority of ***Wambugu v. Njuguna [1983] KLR 172***, that even assuming the respondent was in possession of the suit property, which he denied, a person in occupation of land pursuant to an agreement for sale cannot be said to be in adverse possession. It was the appellant's submission that from the date of some of the agreements, by the time the respondent filed the summons for adverse possession, twelve years had not elapsed and therefore the learned judge erred in holding that the respondent was in adverse possession of the suit property. He also contended that the respondent, who was claiming a portion of the suit property, did not adduce evidence, including a sketch plan, to show the exact part of the suit property that he was occupying. The appellant relied on ***Wines &***

Spirits Kenya Ltd & Another v. George Mwachiru Mwango [2018] eKLR and submitted that the burden was on the appellant to prove adverse possession, which he failed to do.

The respondent opposed the appeal, similarly relying on written submissions highlighted virtually by his counsel. On the constructive trust, he submitted that even if the issue was not pleaded, the trial court was entitled to base its decision on constructive trust because the parties left the issue to the court to decide. He relied on ***Odd Jobs v. Mubea [1974] EA 476*** and ***Maingi Mutisya Nzioka v. Mbuki Kisavi [2014] eKLR*** in support of that proposition. He added that the respondent adduced evidence of the sale of part of the suit property and possession, from which the learned judge was entitled to find a constructive trust. He cited the judgment in ***Macharia Mwangi & 87 Others v. Davidson Mwangi Kagiri [2014] eKLR*** in support of the submission.

As regards adverse possession, it was the respondent's contention that he adduced sufficient evidence to show that he was in adverse possession of 2.1 acres of the suit property. He maintained that the evidence he adduced showed that after entering into the agreements for sale with Cheptalam, he paid the purchase price and on each occasion the portions in question were surveyed and he took possession. The respondent cited ***Mwangi Githu v. Livingstone Ndeete [1980] eKLR*** and submitted that a party may obtain title by adverse possession if he is in occupation of an identifiable part of a property and that cultivation and fencing constitute acts of possession. In his view it was not necessary to present a sketch map to show the area he was in occupation of because it was clearly identifiable on the ground.

The respondent further added that even the Nandi Tea Estate manager confirmed that the respondent was a registered tea farmer for the same land as the appellant which further confirmed his occupation of part of the suit property. He relied on ***Titus Mutuku Kasuve v. Mwaani Investments Ltd & 4 Others [2004] eKLR*** and ***Alfeen Mehdimohammed v. Basil Feroz Mohamed & 233 Others [2006] eKLR*** and submitted that the transfer of the suit property from Cheptalam to the appellant did not interrupt his adverse possession. He added that his rights as an adverse possessor were overriding interests duly protected under the repealed ***Registered Land Act, Cap 300*** and the ***Registration of Land Act, 2012*** and that the registration of the appellant was subject to those rights. It was his view that the appellant did not peacefully retake possession of the suit property as contemplated in law.

Regarding his claim for the entire suit property in his pleadings, the respondent maintained that the court was at liberty to award him a lesser portion which he was in actual possession of, namely 2.1 acres. While conceding that the adverse possession period for the last one acre that he allegedly purchased on 8th August 2005 had not expired when he filed the summons, the respondent nevertheless maintained that he was entitled to that one acre by the doctrine of constructive trust, which the trial court applied.

As we have already stated this is a first appeal in which our duty is to revisit afresh the evidence that was adduced before the trial court, analyse and evaluate it, and come to our own conclusion, but always making room for the fact that we do not have the advantage of the trial court of seeing and hearing the witnesses as they testified.(See ***Seascapes Ltd vs. Development Finance Company of Kenya Ltd (2009) KLR, 384)***.

Starting with the question whether the learned judge erred by determining the case on the basis of a constructive trust, there cannot be any doubt that the respondent's originating summons and the depositions in support thereof, as well as the appellant's replying affidavit, were all limited to determination of the six adverse possession questions that we have already set out in this judgement.

The summons was never amended to introduce issues of constructive trust and none of the parties, in their submissions before the trial court, which were written and are on record, addressed the issue of constructive trust. With respect, the learned judge literally plucked the issue of constructive trust from thin air. From the evidence on record, the submissions of the parties and the judgment of the trial court, we have no hesitation in stating that the parties did not address and leave the question of constructive trust to the determination of the court. The learned judge was obliged to restrict herself to determination of the case that the parties presented, which was strictly on adverse possession.

This Court has reiterated time and again that a court should avoid the temptation to determine issues that the parties have not placed before it for determination. Thus for example, in ***Kenya Ports Authority v. Kuston (K) Ltd (2009) 2EA 212,*** the Court stated:

> *"[T]he 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."*

Earlier, in ***Baber Alibhai Mwaji v. Sultan Hashim Lalji & Another [2010] eKLR,*** the Court explained:

> *"A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination."*

We agree with those views and find merit in the first ground of appeal.

Turning to the question of adverse possession, it is to be noted that in the originating summons the respondent's claim was that he was ***"in open, continuous and uninterrupted <u>occupation of 1.214 Hectares</u> of the parcel of land known as Mogobich/Cheptililik/Block 1 (Kipsebwo)/225"*** and that he was entitled to be registered "***as proprietor of 1.214 Hectares"*** comprised in the said parcel. The undisputed evidence on record, in particular the title deed to the suit property that was produced in evidence, shows that the entire parcel of land measures in area 1.214 Hectares. Thus, it is very clear that in the originating summons the respondent was staking claim to the entire suit property.

In the evidence that the respondent and his witnesses adduced, his claim suddenly changed from the contention that he was in occupation of 1.214 Hectares of the suit property, to one that he was in occupation of only a part of the suit property. In ***James Mwangi & Others v. Mukinye Enterprises Ltd, HCCC No. 3912 of 1986*** it was explained that a person relying on adverse possession must prove clear possession of land, lack of consent of the owner, and peaceful occupation of more than 12 years before action. And in ***Kimani Ruchine v. Swift, Rutherfords Co. Ltd. [1980] KLR 1500, Kneller, JA*** stated that in a claim founded on adverse possession, there must be definite evidence as

to area and time.

What is striking in this appeal is the inconsistency between the respondent's pleadings and the evidence that he adduced, as well as the total lack of clarity of the specific part of the suit property that he claimed to have occupied *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion). Having started by claiming the entire suit property, it was incumbent for the respondent to show with certainty the actual area of the suit property that he was claiming, once he abandoned the claim to the entire suit property as pleaded. In **Kasuve v. Mwaani Investments Ltd & Others (2004)1 EA,** a claim for adverse possession failed due to uncertainty, the Court stating as follows:

> *"Further, the portions which the Appellant was claiming were not clearly demarcated. There was no concrete evidence that the appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres, hence the claim for adverse possession would fail through uncertainty."*

To succeed, a person claiming to be entitled to be registered owner of a parcel of land by adverse possession must adduce cogent evidence. A property owner is not to be deprived of their property unless in the clearest of cases. In ***Peter Njau Kairu v. Stephen Ndung'u Njenga & Another C.A. 57of 1997,*** this Court stated the principle as follows:

> *"In order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary."*

We would add, not only of possession, but also of the specific area that the adverse possessor claims to be in possession of.

The uncertainty in the respondent's claim was compounded by his own evidence that he had purportedly purchased and taken possession, on 8th June 2005, of one acre of the land he was claiming, yet simple computation of time indicates that 12 years had not elapsed by the time he filed the claim for adverse possession. The learned judge did not address the glaring evidence that the respondent, by his own evidence, was not in occupation of a large chunk of the land he was claiming for a period of 12 years.

Having carefully considered the evidence on record, the grounds of appeal, and the judgment of the trial court, we are satisfied that the learned judge erred by introducing and relying on a constructive trust which was neither pleaded nor addressed by the parties, and further by holding that the respondent had proved that he was in adverse possession of the suit property. The evidence that the respondent adduced was not cogent and its contradictory and weak quality is not cured by the advantage that the judge had of hearing and seeing the witnesses at the trial. Accordingly, we allow this appeal and award costs to the appellant. It is so ordered.

Dated and delivered at Nairobi this 6th day of November, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTAR