



IN THE COURT OF APPEAL

AT ELDORET

CORAM: E.M. GITHINJI, H. OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 95 OF 2015

BETWEEN

SIMIYU TIMOTHEO KHANGASI.....APPELLANT

AND

JEPHETHER WEKHUYI MASINDE.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Bungoma (Ann Omollo, J) dated the 7th July, 2015

in

Bungoma ELC No. 176 of 2013 (Formerly HCC No. 73 of 2004)

JUDGEMENT OF THE COURT

BACKGROUND

1. This is a first appeal from the decision of Honourable ***Justice Ann Omollo*** sitting at Bungoma Environment and Land Court in ***ELC Case No. 176 of 2013 (Formerly HCC No. 73 of 2004)***.
2. The background to the case is that the respondent, ***Jepthether Wekhuyi Masinde*** bought all that land known as Ndivisi/Makuselwa/328 measuring approximately 3.54 Hectares (**the suit property**) from the appellant, ***Simiyu Timotheo Khangasi*** in 1976 for Kshs. 12,000/-. The appellant had charged the suit property to Agricultural Finance Corporation Limited (AFC) who held the Title Deed as security and after the respondent paid the full purchase price, with Kshs. 2,129.80/- going towards settlement of the loan balance with A.F.C. Limited, the Title Deed was released to him with the consent of the appellant. Thereafter, the appellant signed the transfer documents and both parties went before the Kimilili Land Control Board on 6th May, 1976 for hearing of the application for consent to transfer. Subsequently, the transfer in favour of the respondent and Discharge of Charge were simultaneously registered on 21st May, 1976.
3. The appellant vacated the suit property with the intention of buying another parcel of land elsewhere. However, shortly thereafter, since he was unable to get another parcel of land, he returned and asked to refund the respondent the purchase price and take back the suit property. The respondent rejected this proposal and informed the appellant that he would be willing to sell him back the suit property on new terms. In the meantime, the respondent allowed the appellant to occupy a small portion of the suit property.
4. In 1984, the appellant approached the respondent and proposed to purchase the suit property back from him for Kshs. 48,000/- which he proposed to pay in two installments of Kshs. 25,000/- in 1985 and the balance of Kshs. 23,000/- on 19th February, 1986. The respondent accepted this offer; the agreement was entered into whereby the respondent allowed the appellant to stay on three acres on the suit property. However, the appellant did not make any payments as agreed.
5. In 1996, the appellant instituted a case before the ***Kimilili District Land Disputes Tribunal (No. 33 of 1996)***. Before the Tribunal, the appellant acknowledged that he had sold the suit property to the respondent in 1976 but he later changed his mind and requested to refund the respondent when he was unable to get another parcel of land elsewhere as he had intended. The respondent did not accept the proposal and instead indicated that he would sell the suit property back to the appellant at the prevailing rate. The appellant claimed that in that same year he had deposited Kshs. 50,000/- with his lawyer and asked the respondent to collect the cash but the respondent refused to do so. It was the

respondent's claim that he was called by the lawyer to collect the money but he declined as that was not the prevailing market value for the suit property. The Tribunal directed the appellant to re-purchase the suit property from the respondent for Kshs. 40,000/- per acre totaling to Kshs. 380,000/-.

6. Aggrieved by this decision, the appellant appealed to the Western Provincial Land Appeals Tribunal (Appeal Case No. 49 of 1996). Upon hearing the parties, the Western Provincial Land Appeals Tribunal determined that the respondent was the rightful owner of the suit property. After an application was filed by the respondent, the award of the Appeals Tribunal dated 4th July, 2002 was adopted as a judgement of the Court in Bungoma Chief Magistrate's Court, Civil Case No. 33 of 2002 on 17th September, 2002.

7. On 15th February, 2004, the respondent instituted Bungoma Chief Magistrate's Court, Civil Case No. 73 of 2004 against the appellant herein, claiming that the latter trespassed on the suit property and sought eviction orders. The matter was transferred to the Environment and Land Court as Environment and Land Court Case No. 176 of 2013. The learned Judge heard and determined the matter and delivered judgment in favour of the respondent. Aggrieved by that decision, the appellant filed this appeal.

8. The appellant filed a Memorandum of Appeal on 15th September, 2015 on grounds that the learned Judge erred in law and fact in failing to find that the respondent had not proved his case; in failing to find that the claim was statute barred; in failing to find that the respondent's claim was *res judicata*; in failing to find that the appellant had proved fraud against the respondent; and in misapplying the provisions of **section 25 of the Land Registration Act**. It was the appellant's claim that the judgment delivered on 7th July, 2015 contravenes the provisions of **Order 21 Rule 1, 3, 4, 5 & 6 of the Civil Procedure Rules**.

SUBMISSIONS BY COUNSEL

9. When the appeal was heard before us, both parties were represented by counsel. Learned counsel, **Mr. Bw'onchiri** represented the appellant while **Mr. George Muringo** represented the respondent. **Mr. Bw'onchiri** relied on his written submissions and list of authorities and briefly orally highlighted his submissions. Counsel submitted that the suit before the trial court was filed out of time; that the suit was filed 28 years after the cause of action arose and therefore contravened Section 7 of the Limitation of Actions Act; that the impugned judgment contravened the provisions of Order 21 of the Civil Procedure Rules as it was not delivered within 60 days; and that the judgment was not properly framed. Counsel urged us to allow the appeal with costs.

10. **Mr. Muringo**, submitted that the claim before the High Court was not *res judicata*; that the Divisional Land Tribunal and the Tribunal did not have the jurisdiction to determine the issue of eviction; that the rules clearly state that for the doctrine of *res judicata* to apply, there must be a decision by a tribunal of competent jurisdiction; that the learned Judge explained the reason for the delay in delivering the judgment as she had been transferred and that there was no prejudice or violation of the rules; that the respondent is the registered owner of the suit property while the appellant was a licensee; and that the respondent's right to evict the appellant crystallized when the Appeals Tribunal confirmed that the suit property was vested in the respondent when the appellant refused to pay the agreed amount to the respondent. Counsel urged us to dismiss the suit with costs.

DETERMINATION

11. We have considered the record, the submissions by counsel, the authorities cited and the law. This is a first appeal. Our mandate is to re-evaluate and re-analyze the evidence adduced in the High Court. In Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others [2016] eKLR this Court stated:

“In our consideration and determination of this appeal, we remind ourselves that there are issues of fact and points of law that have been urged before us. This Court, as an appellate court, will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judge has misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he/she should have taken into consideration and in doing so arrived at a wrong conclusion.”

12. The issues for determination are as follows: -

(i) Whether the suit was *res judicata*;

(ii) Whether the suit was time barred by statute and whether the Respondent established his case on a balance of probabilities;

(iii) Whether there was misapplication of **section 25** read together with **section 28(h) of the Land Registration Act, No. 3 of 2012**;

(iv) Whether there was breach of **Order 21 Rule 1, 3, 4, 5 & 6 of the Civil Procedure Rules, 2010**

13. On the question whether the suit was *res judicata*, the suit before the Environment and Land Court (ELC) Case No. 176 of 2013 (Formerly HCC No. 73 of 2004), was *res judicata*. On this issue, counsel for the appellant submitted that there were previous civil proceedings pursuant to the Land Disputes Tribunal Act, Cap 303 of 1990 on the same issues before the ELC and that the previous civil proceedings culminated in the issue of a decree which is still in place. On the other hand, **Mr. Muringo**, counsel for the respondent contended that the appellant had not demonstrated the previous civil proceedings satisfied the requirements of **section 57 of the Civil Procedure Act** to establish *res judicata*. Relying on the case of Kenya Hotel Properties Limited v. Willisden Investments Limited & 6 Others (2013) eKLR, **Mr. Muringo** submitted that the District Land Disputes Tribunal (LDT) and the Provincial Land Appeals Tribunal did not have jurisdiction to determine an issue of eviction and that the law clearly states that there must be a decision by a tribunal of competent

jurisdiction for *res judicata* to apply.

14. **Black's Law Dictionary, Ninth Edition**, defines the term *res judicata* as follows:-

“(i) An issue that has been definitively settled by judicial decision;

(ii) An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been –but was not– raised in the first suit.”

15. This Court has found that the principle behind the doctrine of *res judicata* is to protect litigants from being vexed in endless litigation as a matter of public interest and to prevent abuse of the Court process. See **Timotheo Makenge v Manunga Ngochi CA (NRB) Civil Appeal No. 25 of 1978, Ukay Estate Ltd & Another v Shah Hirji Manek Ltd & 2 others [2006] eKLR (Nairobi Civil Appeal No. 243 of 2001) and Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR (Nyeri Civil Appeal No. 29 of 2015)**

16. **Section 7 of the Civil Procedure Act** provides for the doctrine as follows:-

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by court.”

17. Further, the said section stipulates the guidelines that are required to determine whether a matter is *res judicata*, that is, that in both the former and subsequent suits the matter in issue must have been directly and substantially in issue, the parties must have been the same, the subject matter must have been the same and the previous suit must have been tried, heard and finally determined by a competent Court.

18. Having studied the record and looked at the submissions, it is evident that there were previous civil proceedings instituted, tried and determined pursuant to the provisions of the ***Land Disputes Tribunal Act, Cap 303 of the Laws of Kenya (now repealed)***. In this regard, the appellant first instituted claim **No. 33 of 1996** before the **Webuye District Land Disputes Tribunal** claiming ownership of the suit property. After the tribunal issued its decision in favour of the respondent, the appellant unsuccessfully appealed to the **Western Provincial Land Appeals Tribunal (No. 49 of 1996)**. Later, in 2002, the respondent filed **CMCC 33 of 2002** before the Bungoma Chief Magistrates Court applying for adoption of the award of the Appeals Tribunal as judgment of the Court, which was so adopted. Aggrieved, the appellant filed **High Court Civil Appeal No. 67 of 2002** which is still pending before the High Court. Subsequently, in 2004, the respondent instituted **ELC Case No. 176 of 2013 (Formerly HCC No. 73 of 2004)**, which led to the present appeal.

19. Applying the aforementioned guidelines to the present case, we find that the matter before the ELC and was not *res judicata* because the Land Dispute Tribunal (LDT) lacked the jurisdiction to deal with the appellant's claim of ownership of the land. This is clearly deduced from **section 3 of the Land Disputes Tribunal Act (repealed)** which limited the jurisdiction of the LDTs established thereunder as follows:-

“3(1) subject to this Act, all cases of a civil nature involving a dispute as to:-

(a) The division of, or the determination of boundaries to land, including land held on in common,

(b) A claim to occupy, or work land or

(c) Trespass to land.”

shall be heard and determined by a Tribunal established under Section 4.”

20. Indeed, it has been settled by this Court that the Land Dispute Tribunals did not have the jurisdiction to deal with claims for ownership of land and title. Besides, **Section 159 of the Registered Land Act** (now repealed) (which was in operation at the time when the appellant instituted the claim before the LDT) clearly stipulated that such a dispute could only be tried by the High Court. See **Jonathan Amunavi vs. The Chairman Sabatia Land Disputes Tribunal & Another (Kisumu Civil Appeal No. 256 of 2002), Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR (Eldoret Civil Appeal 82 of 2006)**.

21. When dealing with a similar issue, this Court in the above cited case of **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others** observed that:-

“Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity. See Macfoy v. United Africa Co. Ltd 1961 3 All ER 1169; Re Continental Credit Finance Ltd [2003] 2 EA 399; Owners of Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited (1989) KLR 1.” (Emphasis added)

Accordingly, in the circumstances of this case, we find that the civil proceedings arising from claim **No. 33 of 1996** before the **Webuye District Land Disputes Tribunal** were null and void for want of jurisdiction.

22. On the question whether the matter was time barred and whether the Respondent established his case on a balance of probabilities, **Mr. Bw'Onchiri** submitted that contrary to **section 7 of the Limitation of Actions Act** which stipulates that such a claim should be filed within 12 years, the suit was filed out of time in that the respondent was registered as proprietor of the suit property on 21/05/1976 yet filed the suit on 15/02/2004, about 28 years later. Further, relying on the Court of Appeal of Uganda case of **IGA v Makerere University, Civil Appeal No. 51 of 1971**, counsel pointed out that there was no mention of the date when the alleged trespasser came onto the land in the Plaintiff as required by law. However, **Mr. Murunga** pointed out that after the completion of the sale in 1976, the respondent allowed the appellant to use a portion of the suit property on humanitarian grounds.

23. It is clear that the Plaintiff filed by the respondent was for eviction. For a claim for eviction, as submitted by **Mr. Bw'Onchiri, Section 7 of the Limitation of Actions Act** provides that the claim must be filed within 12 years. We have looked at the plaintiff as well as the proceedings and found that indeed, as submitted by **Mr. Bw'Onchiri**, the plaintiff does not indicate the date when the alleged trespass began, from which date it would be established whether the suit for trespass was statute barred.

24. When faced with a similar scenario where the appellant was unable to confirm the actual date of trespass, this Court in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR, Malindi Civil Appeal 17 of 2016** observed as follows:-

“It is apparent from this evidence that the appellant was unable to confirm the actual date of trespass yet it was from that date that it would be established whether or not the appellant’s claim to recover the suit premises was statute-barred. A registered owner of land by the provisions of section 7 of the Limitation of Actions Act may not bring an action-

...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.

At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See Littledale v Liverpool College (1900)1 Ch.19, 21.”

25. From the above, the guidelines for the test to establish adverse possession which must be considered have been clearly depicted. Needless to say, it is the burden of the person claiming to be entitled to the land by adverse possession to prove. In the instant appeal, although the defences of limitation as well as adverse possession were pleaded by the appellant, the learned judge did not address them. Her reasoning for this was clearly articulated in the judgement as follows:-

“The defendant contest (sic) this land on the basis that they have lived on this land for over 12 years. The defendant did not counterclaim for adverse possession yet he was ably represented by counsel. The law provides that parties are bound by their pleadings (see Chumo Arap Songok versus David K. Rotich) [2006] eKLR. In the absence of a counterclaim, there is no plausible reason why the Defendant should remain on the land. The defendant’s case is worsened by the fact that as far back as 1984, the plaintiff agreed to sell the land back to him but he failed to honour the terms of that agreement”

26. In this respect, we find that the learned judge misdirected herself in that it was established by this Court as far back as 1997 that a court can uphold a claim for adverse possession that is only pleaded in the defence. This Court, in **Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015**, where the claim of adverse possession was raised in the defence, relying on the case of **Wabala v Okumu [1997] LLR 609 (CAK)** observed that:-

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

27. As such, we shall consider and determine the twin issues of limitation and adverse possession concurrently as it is not merely the time limitation of 12 years that would determine whether the respondent’s claim for eviction was valid. In this regard, the questions to be addressed are whether the appellant had been in possession of the suit property for over 12 years as at the time the suit to evict him was instituted in 2004 and whether his possession was adverse to that of the respondent. Important to note, a claim for adverse possession must fail if it is demonstrated that possession was with the owner’s permission or where the owner’s title is acknowledged by the adverse possessor. See the **Guliam case** (supra).

28. Taking these principles into consideration, we shall analyze the evidence regarding possession of the suit property over the span of 28 years since the respondent was registered as owner on 21st May, 1976. The respondent testified that the appellant moved out of the land upon completion of the sale in 1976 but shortly thereafter he returned claiming that he had not obtained alternative land elsewhere. He therefore allowed the appellant to stay on a small portion of the suit property at the appellant’s request between 1976 and 1984. It was his claim that after an agreement was made between himself and the appellant in 1984 for sale of the property for Kshs. 48,000/-, he allowed the appellant to stay on 3 acres pending payment of the balance of the purchase price which was to be paid in two installments of Kshs. 25,000/- in 1985

and the second installment of 23,000/- on 19th February, 1986. It was the respondent's further claim that he began using the suit property in 1977 and that he used the suit property until 2011, after the death of the appellant.

29. It is our considered view that the balance of probabilities will shift towards the respondent with respect to the claim for adverse possession. This is because both the appellant and the appellant's widow acknowledged the owner's title by virtue of the 1984 Agreement. Secondly, both the appellant's son and widow gave conflicting evidence about the respondent's use of the suit property. Moreover, the cases initiated by the appellant before the Land Dispute Tribunal and the Provincial Appeals Tribunal as well as the appeal against the adoption of the award indicate that the appellant's possession of the suit property was not adverse to that of the respondent.

30. Accordingly, applying the guidelines highlighted above, we find that there was insufficient evidence to support adverse possession as there was no proof of continuous peaceful possession of a period exceeding 12 years without the permission of the respondent nor proof that the appellant had dispossessed the respondent from the suit property at any time in the 28 year period.

31. Having carefully considered the record before us, we find no basis to interfere with the finding of the ELC on the claim for fraud. The appellant had alleged that the respondent had obtained the title to the suit property by forging the Land Control Board letter of consent. It is clear that the learned judge looked at the documents on the record from which she rightly deduced that the letter of consent is usually issued by the Land Control Board and not the purchaser. In this respect, she referred to the Land Control Board Minute No. 155/76 which showed that the consent was granted by the board. Additionally, the learned judge observed that due to the appellant's admission that the application for consent was lodged on 1st April, 1976 an inference is drawn that he signed the application for consent. We find that there was no evidence adduced to prove fraud on the part of the respondent.

32. On the question whether there was misapplication of *section 25* read together with *section 28(h) of the Land Registration Act, No. 3 of 2012*, we find that the Learned Judge's interpretation and application of *section 25* read together with *section 28(h) of the Land Registration Act, No. 3 of 2012* was proper.

33. On the question whether there was breach of *Order 21 Rule 1, 3, 4, 5 & 6 of the Civil Procedure Rules, 2010*, **Mr. Bw'Onchiri** argued that the impugned judgement did not comply with the given provisions in that there was delay in its delivery and that the learned judge did not identify and address issues therein. In this regard, we find that indeed there was delay in delivery of the judgment and that the learned Judge did not indicate the reason for this delay. However, it is clear that as submitted by **Mr. Murunga**, the learned judge had gone to Mombasa on transfer. Therefore, there was a legitimate reason for the delay and we also note that the delay in delivery of the judgment did not occasion a failure of justice. In **Manchester Outfitters Suiting Division Ltd & another v Standard Chartered Financial Services Ltd & another [2002] eKLR Civil Appeal No 88 of 2000** this Court, guided by the decision of **Akiwumi, JA** in **Elizabeth Barangaza -v- Tyson Habenga, Civil Appeal No 285 of 1997** (unreported) found that:

“the vice in a delayed judgment is not the mere fact of delay but when the delay involved is not satisfactorily explained or it occasions failure of justice...”

We find that the learned Judge complied with the requirement of framing and determining issues as indicated.

34. In the result, we find no merit in this appeal and we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Eldoret this 28th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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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

DEPUTY REGISTRAR