IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 17 OF 2016

BETWEEN

FRANCIS S. KAKAI.....APPELLANT

AND

NANDABEL WA KAPURU FRED.....RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Bungoma **(S. Mukunya, J.),** dated 9th December, 2015*

in High Court Civil Suit No. 71 of 2009)

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JUDGMENT OF THE COURT

[1] By an Originating Summons dated 22nd September 2009 filed in the High Court, the appellant **Francis S. Kakai** sought determination of questions that may be paraphrased as follows:

Whether the appellant had been in open continuous, peaceful, exclusive and adverse possession of the whole parcel of land comprised in Title No. NDIVISI/NDIVISI/988 (herein suit property); whether the appellant is entitled to be registered as proprietor of the suit property in accordance with the provisions of sections 7, 17 & 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya; whether the respondent **Nandabel Wa Kapuru Fred** should be ordered to transfer the suit property to the appellant; whether in default of the respondent executing the relevant documents to vest the suit property in the appellant's names, the executive officer or any other duly appointed officer of the court should do so on his behalf; whether the respondent's title in the suit property has been extinguished by the operation of law; whether the costs of the summons should be borne by the respondents; and whether the costs of the application should be borne by the respondent.

[2] In his affidavit sworn in support of the summons, the appellant contended that the suit property measuring 4.2 acres was registered in the name of the respondent, who had inherited it from his mother the late **Norah Kapuru** through transmission; that the suit property actually belonged to the appellant's father one **Timotheo Chekei Murumba** who had bought the suit property in 1964 from the late Norah Kapuru at a consideration of Kshs. 900.00; that although the transaction was not reduced into writing, the village elder wrote a report to the sub-chief over the same; that the appellant and his family took physical possession of the suit property after his late father allocated the suit property to him as an inheritance.

[3] The appellant maintained that as a result of the purchase, the late Norah Kapuru and her family, which included the respondent, moved out of the suit property; that the appellant has been in exclusive possession of the suit property since 1964 till the time the suit was filed in the High Court; that over the years he had put up various structures and planted crops; and that his peaceful occupation was interrupted when the respondent went to court in a bid to evict his son, **Martin Murumba Kakai** who was then occupying the suit property.

[4] In response, to the summons the respondent filed a replying affidavit in which he denied the claim that his late mother Norah Kapuru sold the suit property to the appellant's late father. He elucidated that the suit property was originally registered in his late mother's name on 16/07/1963; that upon her demise he petitioned for letters of administration via Succession Cause No. 85 of 2005 in Bungoma and obtained a confirmation of grant on 12th July 2017; that during the aforementioned process, the appellant never raised any objection; that after his late mother's demise, the appellant never raised any claims to the suit property during the traditional meeting commonly known as *"lufu"* which provides a forum for laying any claims concerning a deceased person's property.

[5] In addition, the respondent also refuted the claim that the appellant was in physical occupation of the suit property since 1964. He exhibited documents showing that he sought the court's intervention through a Plaint dated 17th March 2009, seeking to have the appellant's son who was the one on the suit property evicted as he had trespassed on it sometime in the year 2006.

[6] Upon considering the evidence before him, the learned Judge of the Environment and Land Court (Mukunya J.), found that the appellant failed to prove the alleged sale between his late father and the respondent's late mother, or that he was in physical occupation of the suit property; that the appellant provided no reason as to why he never raised any issue concerning the suit property during the *"lufu"* ceremony, nor raised any objection during the Succession proceedings filed by the respondent. In addition, the learned judge noted that there was no caution placed on the suit property. As a result, the learned Judge held that he was unable to answer the appellant's first question concerning his alleged adverse possession in the affirmative. It followed that all other questions were answered in the negative, and the Originating Summons dismissed with costs to the respondent.

[7] That decision is what has triggered the current appeal, which is predicated on six grounds, which fault the learned Judge: in holding that the appellant was not entitled to the suit property through adverse possession; in failing to analyse the evidence and holding that the appellant failed to prove that he had exclusive use and occupation of the suit property; and in failing to take into account the concept of *nec vi, nec clam, nec precario*.

[8] The hearing of the appeal proceeded by way of oral submissions, **Mr Murunga George** appearing for the appellant while **Mr Omundi Bw'onchiri** appeared for the respondent.

[9] Learned Counsel for the appellant submitted that the appellant's evidence of occupation of the suit property was supported by **Sarah Wanyama Manyonge** (Sarah) who testified that she has been a neighbour to the appellant and that the appellant started living on the land since 1970; that the reason why the appellant never raised any objection to the succession proceedings was that he was not aware of the same; and that he was entitled to own the suit property through adverse possession because he had been in occupation for 43 years; that the right crystalized against the respondent's mother's title and therefore the respondent was merely a registered trustee on behalf of the appellant who was already in occupation of the suit property; that the respondent was never in occupation of the suit property; and that the mere fact that the appellant had not lodged an objection to the succession proceedings does not vitiate the claim.

[10] In opposing the appeal, learned counsel for the respondent submitted that the appellant failed to prove his case. He pointed out that the appellant did not produce the sale agreement to the court, nor demonstrate that the transaction actually took place; and that the appellant's suit was an afterthought only lodged to forestall the claim for eviction of his son that had been filed by the respondent. Further that the appellant did not register any customary claim to the suit property following the death of the respondent's mother. Counsel therefore urged the Court to dismiss the appeal as it lacked merit.

[11] It was not disputed that the suit property was originally registered in the name of the late Norah Kapuru, and that the suit property was transferred to the respondent by way of transmission, and is currently registered in his name. What was in issue, is whether the appellant's late father bought the suit property from the respondent's late mother, and whether the appellant has been in open, continuous, peaceful and exclusive occupation of the suit property since 1964, such that he is entitled to ownership of the suit property through adverse possession.

[12] This being a first appeal we reiterate our role as stated by this Court in ***Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR;***

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

[13] It is prudent to appreciate the law governing adverse possession before tackling the issues at hand. The same was well elucidated by this Court in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR;**

> ***"The law on adverse possession is well settled and is anchored on Sections 7, 13, 17 and 38 of the Limitation of Actions Act (the Act). Section 7 thereof provides, inter alia, that:- "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person". (Emphasis added)***
>
> ***So when does the cause of action accrue" Section 13 provides that:***
>
> ***"(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession...." (Emphasis added)***
>
> ***Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished."***

[14] The first issue was whether the appellant's claim that his late father bought the suit property from the respondent's mother was specifically proven. The appellant relied on the evidence of Sarah who testified that they had been neighbours since 1970. However, there was no evidence regarding where the appellant and Sarah were neigbours. Neither Sarah nor the appellant produced any evidence to show that she was the registered proprietor or at least in occupation of the property neighbouring the suit property. Further, during cross-examination, Sarah clearly stated that she did not know the number of the suit property, which implies that she did not know the specific property in contention. Moreover, Sarah testified that the appellant's father was buried 3.5 kilometres away from her home. That is not consistent with Sarah's contention that she was a neighbour. Sarah's evidence was therefore, not satisfactory and the court was right in not

relying on her evidence.

[15] The learned Judge was not impressed by the witness, and was clear that:

> ***"The applicant's witness Sarah Nanyama Manyonge knew nothing else other than the applicant was a neighbour and that she started seeing him on the suit land in 1970. She did not know the title number of the suit land. She also had no clue when and how the land was bought by the applicant's father."***

[16] We find that the appellant failed to provide any evidence in support of the alleged sale transaction between his late father and the respondent's late mother. We take cognisance of the fact that the sale is alleged to have taken place sometime in 1964. At that time the **Law of Contract Act, Cap 23** that commenced on 1st January 1961 was the one in force. **Section 3(3)** of this **Act**, was deleted and substituted through Act No. 2 of 2002. Before that amendment, **section 3(3)** of that Act provided that:

> **(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**
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> **(a) the contract upon which the suit is founded—**
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> **(i) is in writing;**
>
> **(ii) is signed by all the parties thereto; and**
>
> **(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

[17] That provision, reflects the law which was applicable at the time the appellant's father allegedly bought the land. In order for the appellant to succeed in his claim, he had to adduce evidence to confirm that there was indeed an agreement in writing, for sale of land between his late father and the respondent's late mother, and that the agreement was not only signed, but also the signatures of the appellant's father and mother were attested to by witnesses. No such evidence was adduced and therefore even assuming that there was an agreement for sale of the suit property, the same was not enforceable for failure to comply with the law then in force.

[18] There was also need to adduce evidence to show that if indeed there was such a sale transaction, the relevant Land Control Board Consent was obtained. Moreover, even assuming that we are to give the appellant the benefit of doubt in regard to the failure to raise an objection, in the succession proceedings, as the appellant explained that he was not aware of the existence of the proceedings, the fact that the appellant failed to lodge his claim during the customary "lufu" ceremony which he confirmed to have attended has not been explained at all, and this omission is telling.

[19] We concur with the finding of the learned Judge that there was no proof of the alleged sale between the appellant's father and the respondent's mother, Norah Kaburu. The respondent having established that he is the current registered owner of the suit property, the appellant's claim, anchored on the alleged sale of the suit property to his father, must fail.

[20] The second issue was whether the appellant's claim of occupation of the suit property since 1964 was specifically proven, and whether he has acquired the suit property through adverse possession. As already observed the appellant's evidence regarding the agreement upon which he alleged his father gave him possession of the suit property was not established. The appellant failed to prove that he was in continuous and open occupation of the suit property for a period of at least 12 years. In fact, the only proof available on this, is when the respondent filed a suit against the appellant's son, claiming that he had occupied the suit property almost three years prior to the filing of the suit for eviction. Therefore, as far as the court was concerned the respondent was aware of the occupancy for only three years as per the time the appellant filed suit, which falls short of the required time by 9 years. Further, the occupation by the appellant's son was contested and interrupted.

[21] We reiterate the finding made by this Court in a similar situation in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango** *(*supra*);*

> ***"In addition, no evidence was ever proffered to show that the appellant had been aware of the trespassers during the last 12 years. If anything, both sides to the dispute contend that confrontations over the occupation of the land occurred in the period between the years 2010 -2012. Considering that the suit was filed in 2014, in the absence of evidence proving otherwise, then the 1st appellant can only be construed to have had knowledge of the occupation for only 2 years. We hold the view that having failed to prove his continuous occupation of the land for 12 years, and that such occupation was within the 1st appellant's knowledge, the respondent cannot succeed in obtaining title under the doctrine of adverse possession, the respondent has failed to satisfy the ingredients of adverse possession."***

[22] The third and final issue was whether the appellant is entitled to ownership of the suit property by adverse possession. From the foregoing, it is clear that the appellant did not satisfy any of the limbs required for him to be awarded ownership of the suit property through adverse possession.

[23] We are satisfied that the respondent is the registered owner of the suit property and that the appellant failed to establish any rights over the suit property. We cannot fault the learned Judge for dismissing the appellant's originating summons as there was no evidence upon which the learned Judge could find in favour of the appellant. Courts are obliged to safeguard the interests of all parties before it. Therefore, a court cannot take away an individual's rights to property on unsubstantiated claims.

[24] We find no merit in this appeal. The inevitable conclusion is that the appeal is dismissed with costs.

Dated and delivered at Kisumu this 19th day of June, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

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.