IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 102 OF 2018

BETWEEN

MOUNT ELGON-BEACH PROPERTIES LIMITED.....APPELLANT

AND

KALUME MWANONGO MWANGARO.....1ST RESPONDENT

HARRISON SHIKARI MWANONGO.....2ND RESPONDENT

(Being an appeal from the Judgment of the Environment & Land Court at Malindi (Angote, J.) delivered on 5th October, 2017

in

ELC C No. 85 OF 2015)

****

JUDGEMENT OF THE COURT

1. In their suit commenced by way of the originating summons before the High Court at Mombasa, Kalume Mwanongo Mwangaro and Harrison Shikari Mwanongo, the 1st and 2nd respondents respectively, asserted that they are entitled to be registered as owners of the property known as Land Reference No. 18664 (C.R. No. 25183) (the property) situated in Kilifi, Mombasa by virtue of adverse possession. They claimed that they have been in occupation of the property for over 12 years; that they have developed it by planting coconut trees and orchards of fruits and constructed permanent houses; that they have been conducting subsistence farming on the property; and their relatives are buried in the property.

2. In opposition to the originating summons, Mohammed Hamoud Mbarak, a manager of the appellant, the registered owner of the property, deposed in a replying affidavit that when the appellant bought the property, the respondents were not in occupation; that sometimes in 2011 some squatters who were claiming to be occupying the property for purposes of farming requested the appellant to allow them to do so; that an agreement was entered into on 17th April 2012 with the squatters who were then in occupation in which the appellant's title was acknowledged and the squatters agreed that they would *"no longer be entitled to cultivate without the express permission"* of the appellant; that the appellant agreed to compensate each one of them with Kshs.100,000 *"for the crops and the cost of farming the already tilled land and Kshs.2000 for each of the coconut trees which are 42 number"*. It was deponed further that the respondents had never occupied the property; that as at 17th April 2012 all the trespassers and/or squatters who had trespassed on the property were duly compensated. It was denied that the respondents were entitled to the relief that they claimed.

3. In his testimony before the trial court, the second respondent (PW1) stated that he entered the property with his parents in 1959 together with his brothers; that they planted coconuts and maize, built houses and buried their relatives on the property. He produced pictures to show the development on the property. He stated that he started seeing Mohammed Hamoud Mbarak on the property in 2007 when construction of a perimeter fence on the property commenced. He stated further that the issue of the land was discussed with the elders and an agreement was arrived at and *"signed with Kalume, Said Mwanongo, Fredrick Mwajima."* He maintained that he had been on the property for almost 56 years since 1959. On cross-examination, he accepted that the photographs that he produced which were taken in 2012 *"only show maize"* and two graves. He stated that his elder brother Mwajima Mwanongo who was buried on the property had planted coconut trees and cereals on the property.

4. The first respondent testified as PW2. He stated that he was born in 1933 and got into the property in 1959 when there was no one on it

and that he had lived in the property since that time cultivating coconut and maize and that his relatives are also buried in the property although some of the bodies have since been exhumed. He stated that appellant should be evicted from the property and the title issued to it should be cancelled.

5. Mohammed Hamoud Mbarak, (DW1), the appellant's manager testified that he was employed by the appellant in the year 2012 and manages the property alongside an adjacent plot namely L.R. No. 20824. He stated that the first respondent lives in the neighbouring property while the second respondent lives with his family at Kibarani, in Kilifi; that other than the workers of the appellant who are allowed, no one else farms on the property; that *"the Mwonoko's family have also been allowed to cultivate the land by the* [appellant] *especially during the rainy season"*; that there are coconut trees on the land planted by Mwanongo's family and that *"we showed them our title documents and paid them compensation for the coconut trees"*; that there are no graves on the property except at the boundary where there is an unmarked grave; and that the graves exhibited in the photographs produced by respondents are located on a different property.

6. Under cross examination, the witness stated that the appellant was issued with the title deed over the property in 1993 and has since supplied water to the property, built an office and toilets and also brought in a container which was done between 2012 and 2016; that the people who were on the property when the appellant purchased the same were paid off. He maintained that the respondents do not live on the property and that the second respondent resides in Kilifi while the first respondent resides in a neighbouring property.

7. Mwanongo Mwajuma Mwagoro (DW2) an employee of the appellant in charge of security testified that he is the eldest son of Mwajima Mwanongo and that the respondents are his relatives; that the 1st respondent is his uncle while the 2nd respondent is his father's cousin. He stated that the respondents' homes are no situated on the property; that grave depicted in the pictures that were produced are also not situated on the property. He went on to say, "*we used to live on the suit property when the [appellant] came we were paid for our trees and we retreated to where I now stay*."

8. Under cross examination, DW2 acknowledged that his relatives are buried on the property but that they did not know at the time that the property belonged to the appellant. He denied the suggestion by counsel for the respondents that he had *"sold"* his family

9. Julius Paul Dziro (DW3) a local chief testified that he is conversant with the area where the property is situated; in reference to the first respondent he stated: "*I know Mr. Kalume, the 1st defendant. He stays in my location. Kalume's homestead is on the north of Mt. Elgon's land. There is a plot in between Mt. Elgon's land and Kalume's land*." In relation to 2nd respondent, the witness stated: "*I know Harrison. He is related to Kenga Wase. He stays in Kibarani Kilifi. He visits his relatives my location.*"

10. DW3 was categorical that the respondents are not in occupation of the property and that it was the late Mwajima Mwanongo who used to cultivate the same. He stated that the appellant has put up a wall and an office on the property together with a container and a toilet as well as chain-link fence. He concluded that the respondents have their own land where they cultivate.

11. Under cross examination, DW3 stated that it is only one Issa Mwanongo (Rasta) who stays on the property and who has planted coconut trees and has a house on it; he stated further that he has known the first respondent for many years and that the second respondent lives in Kilifi and that none of the respondents live on the property.

12. After considering the evidence and the submissions the learned trial Judge stated in the impugned judgment:

> ***"The evidence before me shows that the Applicants have proved that they have continued to utilize and cultivate the suit land and buried their relatives on the suit land, since 1994 without any interruption by the Defendant.***
>
> ***Having proved on a balance of probability that they entered the suit land in 1959 and developed the land by building houses and planting of coconut trees, the Applicants, on their own behalf and on behalf of their immediate family members, own the suit land by virtue of adverse possession."***

13. Consequently, the Judge allowed the originating summons and decreed that the respondents on their own behalf and on behalf of their immediate family members, namely their children, brothers and sisters are entitled to the property by virtue of adverse possession; that the respondents should be registered as the proprietors of property on their own behalf and in trust for their immediate family members. The respondents were also awarded the costs of the suit.

14. Aggrieved, the appellant lodged the present appeal based on 19 grounds of appeal as set out in the memorandum of appeal. Learned counsel for the appellant **Mr. Nelson Ndalila** urged those grounds before us under 4 heads in his written submission and oral highlights. The first head of complaint is that the Judge granted reliefs that were not pleaded or sought or proved. It was urged that the suit before the High Court was instituted by the respondents in their individual capacity. It was not a representative action. Yet, the court declared judgment for the respondents "*on their own behalf and on behalf of their immediate family members, that is their children, brothers and sisters…*" when the so-called members of the family were not privy to the action.

15. Relying on the decision of this Court in ***Independent Electoral and Boundaries Commission & another vs. Stephen Mule & 3 others [2014] eKLR***, counsel submitted that it was not open to the court to go outside the pleadings that were before it and that it is unfathomable that the court purported to give the property to persons who were never privy to the suit.

16. The second head of complaint is that the essential ingredients of adverse possession, as pronounced by this Court in ***Kuria Kiarie & 2 others vs. Sammy Magera [2018] eKLR,*** were not proved. To start with, it was submitted that possession was not proved; that the evidence showed that both respondents do not live on the property; that considering that the property measures 14 acres (6.0 ha) the respondents should have, in the very least, demonstrated what portion of property they have purportedly been in occupation of; that the photographs that were produced as evidence of possession showed houses allegedly belonging to the respondents' brothers; that the appellant was itself in

possession of the property having fenced it off and put up structures on it; and that it was therefore erroneous for the Judge to grant the respondents the whole of the property.

17. Counsel made reference to a decision of this Court in the case of ***Lazaro Kabebe vs. Ndege Makau & another [2017] eKLR,*** for the proposition that an applicant in an action for adverse possession can only be entitled to a portion which he possessed and that the respondents in this case did not prove that they possessed any portion of the property, least of all the entire 14 acres.

18. The third head of complaint was that the Judge misapprehended the evidence; that the Judge assumed that the action before him was a representative action; that the Judge failed to take into account that the genuine squatters who had been on the property had on their own accord demolished their houses and vacated the property and were duly compensated based on an agreement negotiated and entered into in that regard.

19. The fourth and final grievance was that the court wrongly declined the appellant's invitation to visit the site; that despite the appellant's plea in that regard, the Judge failed to seize the opportunity in order to appreciate the status of the property.

20. Counsel concluded by urging that the evidence fell far short of the threshold of establishing adverse possession and that the judgment of the High Court should be set aside in its entirety.

21. **Ms. Murage** learned counsel for the respondents, also relied on written submissions which she highlighted. Regarding the complaint that the Judge granted reliefs that were not pleaded, it was submitted that the evidence clearly demonstrated that the respondents were not only representing their own interests but also those of their kin who had openly lived on the property way before 1994 when the appellant acquired title; that given the totality of the evidence, the Judge correctly found it appropriate and fair to grant the orders that captured not only the interest of the respondents but also that of their kin.

22. As to whether the essential ingredients of adverse possession were established, counsel submitted that these were established to the required standard; that the respondents established that they have been in continuous possession of the property for 12 years or more; that their possession has been open and notorious to the knowledge of but without the consent of the owner. According to counsel, the testimony of the respondents and the photographs that were produced demonstrated the occupation and utilization of the property by the respondents, their family members and their forefathers.

23. It was submitted that the evidence showed that the respondents entered the property before it was allocated and registered in the name of the appellant in 1994 and that the evidence of the chief, DW3, confirmed the presence of squatters on the property by the time the title was issued to the appellant in 1994. It was urged that it was incumbent upon the appellant to rebut the evidence of possession presented by the respondents by producing a survey report with respect to the property but it did not do so; that on the authority of ***Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR*** the burden of proof shifted to the appellant to dislodge the evidence presented by the respondents in support of the claim for adverse possession but the appellant failed to do so; that the appellant's belated attempt to do so, by making an application to this Court to adduce additional evidence was declined.

24. According to counsel, the appellant did not make any effort to get the respondents to vacate the property until April 2012 when it attempted to assert its title by attempting to pay off members of one family that was occupying and utilizing the property but that the respondents were not privy to that agreement; that by the time the appellant was fencing off the property in 2012 the statutory 12-year period had lapsed and the appellant's title was already extinguished

In that regard, the decision of this Court in ***Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] eKLR*** was cited.

25. Regarding the claim that the trial Judge declined a site visit, it was submitted that no such request or application was made before the trial court; that the issue of a site visit was marginally mentioned in the course of cross examination; that no formal application was presented to the court; that the appellant is estopped, by reason of having acknowledged that no such application had been made, from raising the matter before this Court.

26. We have considered the appeal and the submissions. The central question in this appeal is whether the ingredients of adverse possession were proved to the required standard. Other issues are whether the Judge erred in granting prayers that were not pleaded and whether a request for a site visit was made and whether the Judge wrongly declined the same. In that regard, and as this is a first appeal, we have the mandate to review the evidence and to draw our own conclusions. [See ***Selle vs. Associated Motor Boat Co Ltd [1968] EA 123.***]

27. As to whether the essential ingredients of adverse possession were approved to the required standard, this Court in the case of ***Prisca Narotso Etyanga alias Prisca Narotso Etyang'a vs. James Gitau Gachaiya suing on behalf of a Legal Representative of Elizabeth Njeri Gitau [2017] eKLR*** reaffirmed the pronouncement by the Court in ***Samuel Kihamba vs. Mary Mbaisi [2015] eKLR*** thus:

> ***"Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land. See Eliva Nyongesa Lusenaka & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur). These prerequisites are required of any claimant..."***

28. In the earlier case of ***Wambugu vs. Njuguna, [1983] KLR 172*** this Court held that in order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having discontinued his possession of it; that the Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of

possession; that the proper way of assessing proof of adverse possession will then be 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 has been in possession for the requisite period. [See also ***Wanje vs. Saikwa (No 2) [1984] KLR 284***].

29. That position was reiterated in ***Mate Gitabi vs. Jane Kabubu Muga alias Jane Kaburu Muga & 3 others [2017] eKLR*** where this Court stated that for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force and without licence or permission of the owner and with the intention to have the land.

30. In ***Kilimo Shutu & 6 others vs. Godfrey Karume [2017] eKLR***), the Court stressed that for a claim of adverse possession to succeed the party claiming ownership by adverse possession must demonstrate that the possession has been actual, exclusive, continuous, open and notorious and also hostile to the title and interest of the true owner. Possession by itself cannot therefore found a claim for adverse possession. It is when it is adverse that it can found a claim in favour of the person in adverse possession. See ***Sammy Likuyi Adiemo vs. Charles Shamwati Shisikani [2014] eKLR***.

31. In ***Kasuve vs. Mwaani Investments Limited & 4 others [2004] 1KLR*** the Court expressed that:

> ***"In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition***

32. The question therefore is whether those essentials were established in the present case. As already noted, the substance of the respondent's case was that they have lived on the property since 1959 and have cultivated coconut, maize and cassava and built houses and buried their relatives on the property. Referring to the photographs that were exhibited to his affidavit the 2nd respondent that those photographs *"only show my maize"* and *"the house of Kalume and another person"* which are temporary houses. Although he denied knowledge of payments having been made as compensation for coconut trees he stated that the issue of the property was discussed before elders at which it was agreed that Mzee Kalume (the 1st respondent) would act as the head of the family and *"an agreement was signed with Kalume, Said Mwanongo, Fredrick Mwajima."*

33. On his part, the first respondent, Kalume Mwanongo Mwangoro maintained he had never been evicted from the property since occupying it in 1959 and that it is the appellant which should be evicted and its title to the property cancelled. On being asked to identify the portion of the property they occupy, the witness stated,

> *"we are in the middle of the plot."* He maintained that his house is located inside the property and that he cultivates the same every year and that the whole family is there.

34. The appellant's manager, Mohammed Hamoud Mbarak, on the other hand maintained that the respondents are total strangers and do not live on the property contrary to their claims; He asserted that all the people who had planted coconut on the property were compensated and that the photographs that were referred to by the respondents did not relate to the property but to *"the plot that is in the north of road that divides our plot with a plot in the North."*

35. On cross-examination DW1, was emphatic that the appellant has developed the property since being issued with the title in 1993; that the appellant has supplied water to the property, built an office and toilets in a container; that in acquiring the property there were people on the same who were paid to vacate. In the words of DW1,

> *"there were four widows and repeat them off in the year 2012. We paid Kshs.2000 per coconut tree. We also paid Kshs.100,000/- per person. We also employed the family members who we pay Kshs. 10,000/- per person. We allowed them to supply all the materials that we require for developments of the land. We have documents. We also have the agreement."*

36. According to DW1 the only person on the property is one Issa Mwanongo, *"a distant uncle of the people we paid"* who he said has encroached on an area of about one and a half acres on the property where he has a house where he stays and that the appellant has allowed him to stay there; and that other than Issa's house *"there are no houses on the land"*. He stated, *"I want the court to visit the site."*

37. As seen above, Mwanongo Mwajuma Mwagoro (DW2) a nephew to the 1st respondent and an employee of the appellant in his testimony contested the testimonies of the respondents that they live on the property; he asserted that the respondents *"have their own homes" elsewhere and not on the property; that the 1st respondent's land is next to his plot No. 657 while the 2nd respondent "has his land in Kilifi"*. He maintained that the respondents had never put up houses on the property. He stated that following a family meeting at which the village elder was present he was paid Kshs. 300,000.00 by the appellant for trees.

38. The chief, Julius Paule Dziro (DW3), as already indicated, also asserted that the respondents do no live on the property. In his words, "*I know Mr. Kalume, the 1st defendant. He stays in my location. Kalume's homestead is on the north of Mt. Elgon's land. There is plot in between Mt. Elgon's land and Kalume's land. I know Harrison…. He stays in Kibarani Kilifi. He visits relatives in my location*."

39. Based on that evidence, the learned trial Judge was satisfied that the respondents had established a case for adverse possession on a balance of probabilities. The Judge expressed that the respondents had proved that they entered the property in 1959 "*and developed the land by building houses and planting of coconut trees*" and that the respondents "*on their own behalf and on behalf of their immediate family members, own the suit land by virtue of adverse possession*."

40. Was the evidence tendered sufficient to uphold the respondents claim? In our view the evidence that was presented by the respondents with was tenuous. To start with, even if we were to accept that the respondents are in occupation of the property, and there is reason to doubt that they are, the Judge does not appear to have considered that based on the certificate of title in respect of the property produced before the trial court, the property measures 6.00 ha. There was no evidence presented to show that the respondents are in exclusive possession of the entire property and neither was evidence presented as to what portion, if any, the respondents occupy. ***In Ramco Investment Limited vs. Uni-Drive Theatre Ltd [2018] eKLR*** the Court expressed that:

> "***The principles that guide the court when determining whether a claim for adverse possession against the respondent met the legal threshold or not required the appellant as the claimant for adverse possession to demonstrate existence of exclusive possession and control over the disputed portion and to have dispossessed the respondent as the undisputed legal owner***."

41. **Kuloba, J.** (as he then was) expounded extensively on the requirement for "*exclusive possession"* as an essential ingredient in maintaining a claim for adverse possession in the case of ***Gabriel Mbui vs. Mukindia Maranya [1993] eKLR***, where he stated that

> "*exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others*".

42. The evidence in this case fell short of establishing that the respondents were in exclusive possession of the entire property during the relevant period. It is not clear which part or portion of the property, if at all, the respondents allegedly occupy. Linked with the foregoing is the consideration that the Judge does not appear to have considered the contention that all the squatters who were occupying the property when the appellant acquired it appear to have been paid off and compensated for their coconut trees in order to vacate and that as a result, they demolished their houses that were hitherto on the property and left.

43. In addition, there is the complaint, which is not devoid of merit, that the court granted prayers in favour of amorphous persons referred to as the respondents *"immediate family members"* who were not privy to the suit and when no prayers in favour of that group had been sought. Who specifically are the members of the family? What portion or portions of the property do they occupy? Are they amongst those who are said to have been compensated for the coconut trees? In our view, it cannot be said, when nagging questions such as these remain unanswered, that the respondents' case was established to the required standard. In ***Sarah Jelangat Siele vs Attorney General & 3 others [2018] eKLR***, the Court stated that parties are bound by their pleadings and the issues for determination generally flow from those pleadings. It was not open to the court to go outside the pleadings to grant reliefs in favour of persons who were not before it and when there were no prayers to that effect.

44. In our judgment therefore, the respondents did not establish, to the required standard, that they had acquired the property by adverse possession. As a result, we allow the appeal and set aside the Judgment of the ELC delivered on 5th October 2017 in ELC Case No. 85 of 2015 Malindi. We substitute therefore an order dismissing the respondents originating summons dated 2nd August 2012. The appellant shall have the costs of the appeal and of the proceedings in the ELC.

Orders accordingly.

Dated and delivered at Mombasa this 25th day of July, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR