IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MURGOR, JJA.)

CIVIL APPEAL NO. 128 OF 2015

BETWEEN

DOUGLAS MBUGUA MUNGAI.....APPELLANT

AND

HARRISON MUNYI.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (J.B. Ojwang, J.) dated 25th March, 2009

in

H.C.C.C. NO. 2146 OF 1998)

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JUDGMENT OF THE COURT

On 25th March, 2009, **J. B. Ojwang, J. (**now Supreme Court Judge) determined two consolidated suits filed in the year 1998 in respect of a parcel of land known as **Dagoretti/Riruta/s.15**, measuring approximately 0.0931 Hectares (about 0.23 of an Acre) **(the suit land**). The first was an Originating Summons **(OS)** taken out by the respondent **(Harrison)** on 14th September 1998 seeking a declaration that he had acquired good Title to the suit land through adverse possession. The other was a plaint filed by the appellant **(Douglas)** contending that ***Harrison*** was a trespasser on the suit land and seeking possession, a permanent injunction and damages for trespass. The OS was treated as the plaint and the plaint was treated as the defence and counterclaim. ***Douglas*** has since the filing of the appeal died and was replaced by his daughters, ***Sheila Njeri Mungai*** and ***Fiona Njeri Mungai***, but we shall henceforth maintain ***Douglas*** as the appellant.

Harrison called three witnesses to prove that he had been allowed on the suit land as a caretaker by the mother of Douglas, ***Beatrice Njeri***, in 1985 and that he had been in continuous occupation, cultivating and living thereon, up to 1998, a period of 13 years, when he was rudely evicted by the Provincial Administration at the instance of ***Douglas***. ***Douglas*** on his part called five witnesses to prove that the suit land belonged to his mother until she died in 1993 and he obtained a grant of representation as the only child of his mother. The suit land was then transmitted to him on 6th August 1996 when the Title Deed was issued in his favour. He then took steps to evict ***Harrison*** who had refused to vacate the land despite requests to do so.

After hearing the parties and their witnesses, the learned Judge made findings of fact, which are largely not in dispute, as follows:-

> ***"(i) The original proprietress of the suit premises, Beatrice Njeri Mungai is the one who bright the plaintiff from Karatina Nyeri District, to care for her property at Riruta Satellite in Nairobi, and this was in 1985.***
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> ***(ii) Beatrice Njeri Mungai, of her own free will, allowed the plaintiff to cultivate the suit premises and to use it for kitchen gardening.***
>
> ***(iii) It emerges from the consistent evidence of PW1, PW2 and PW3 that the plaintiff had dug a water bore-hole on the suit premises sometimes between 1985 and 1989.***
>
> ***(iv) Beatrice Njeri Mungai died in 1993, leaving only one heir, namely the defendant.***
>
> ***(v) The defendant, after visiting the suit land in the 1970's did not return there until 1998, and he did not know if anyone was in***

occupation.

(vi) The defendant pursued and accomplished the succession process, by taking out letters of administration and having the suit land registered in his name in 1996.

(vii) The defence witnesses in this case roused the defendant's interest I the suit land, so he visited it in 1998 and found the plaintiff in occupation.

(viii) The defendant's entreaties with the plaintiff to vacate the suit land were unsuccessful, and the plaintiff filed suit for title by adverse possession, while the defendant moved swiftly, acting in cooperation with his witnesses herein and with the provincial administration and the Police, to force the plaintiff out of the land.

(ix) The plaintiff's house was demolished, and he later reconstructed it, but it was again demolished, and h was evicted in 1999."

As regards the issue of whether ***Harrison*** had fulfilled the conditions for the operation of the doctrine of adverse possession, the learned Judge examined the law and held, correctly in our view, as follows:

"As already noted in the Court's consideration of relevant authority, a party cannot benefit from a claim of adverse possession unless he or she has hale the suit property in a manner that is hostile to and which challenges the claim of the true owner; he or she must show sustained, exclusive possession and occupation of the suit land for an unbroken period of twelve years; he or she must show dominion over the suit land, running together with the intention to possess, animus possidendi.

From the authorities already considered, notably Joseph Kashau Ololkhuo & others v. Ngati Farmers Co-operative Society, Samuel Miki Waweru v. Jane Njeri Richur; and Mutison v. Mutiso, it is quite evident that the plaintiff, having been admitted into the suit land by the proprietress, and there having been no contest between the plaintiff and her over ownership of the same, could not, in law, come to hold a position adverse to her. It follows that between 1985 and 1993 when Beatrice Njeri Mungai was the owner of the suit and, the plaintiff could not claim adverse possession against her."

Strangely, however, the learned Judge held that ***Harrison*** had acquired an overriding interest in the suit land, as against ***Douglas***, under ***section 30(f)*** of the **Registered Land Act (RLA) (**now repealed). He reasoned as follows:

"From the evidence, there is no doubt that the plaintiff was in occupation of the suit land in 1993; he had a water bore-hole, which he had constructed earlier, and he was using it to produce water on a commercial scale and for kitchen-garden irrigation; he had his house on the suit land and, in the course of time, he lived on the land together with his family. The plaintiff had attended the burial ceremony of the proprietress at Langata Cemetery, and he had come to learn that she had only one child, the defendant herein, who was destined to be the heir. But the Plaintiff returned to his house at the suit premises, and remained there in robust occupation and possession, for years. Clearly, the plaintiff was moved by animus possidendi, and quite consistently with his evidence, he reared the suit premises as his home.

Such was, in law, the beginning of the process of acquisition by adverse possession. But in 1996, the defendant got himself registered as the proprietor of the suit land. So there were two claimants: the occupant, and the title-holder. The title-holder (the defendant) did not contest the plaintiff's occupancy in 1996, or 1997, but he did so in 1998 when he visited the suit remises for the first time, and then filed civil suit No. 2146 of 1998 against the plaintiff, seeking eviction. The defendant went further and certainly contrary to law and civilized process, consorted with neighbours and delinquent officials and police officers, to demolish the plaintiff's home and to evict him twice, in 1999.

It was DW1's evidence that after the plaintiff was evicted and his dwelling destroyed, he later returned and constructed an even better house. This shows his intent to resist unlawful incursions on his claim to the suit land.

The plaintiff's stand is protected by law. Even though, quite clearly, the plaintiff had not fulfilled the time requirement for the application of adverse possession, as against the defendant he constituted a legal phenomenon to be taken into account, as the defendant registered the suit land in the defendant's name. In law, the plaintiff's interest at the suit premises constituted an overriding interest, in terms of the Registered Land Act (Cap. 300, Laws of Kenya), Section 30(f)."

The court held that ***Harrison*** had acquired good title and that his eviction was illegal. The suit land was decreed in his favour and he was awarded damages.

It is those findings which provoked the appeal before us. An order for stay of execution was granted by this Court on 22nd October 2010 pending the hearing and determination of the appeal.

Nine grounds are set out in the memorandum of appeal but in written submissions, which were orally highlighted, learned counsel for the appellant **Mr. Geoffrey Nyakundi,** instructed by Kaplan & Stratton, Advocates, urged them in three tranches:-

(i). Grounds 1, 2, 3 & 4: Whether the respondent satisfied the conditions necessary to acquire Title through adverse possession, and whether the appellant was entitled to assert his title to the property.

(ii). Grounds 5, 8, &9: Whether the trial court was bound by the parties' pleadings.

(iii). Grounds 6 & 7: Whether the trial court exercised its discretion judiciously after failing to consider the appellant's evidence and submissions, and instead making findings unsupported by evidence.

On the first ground, counsel faulted the trial court for holding in one breath that the respondent had not acquired any rights through adverse possession between 1985 and 1998, and in the same breath, that he had acquired rights by adverse possession between 1993 and 1998. According to counsel, such holding was contrary to the authorities cited before the court, since the respondent had not occupied the suit land for more than five years before the appellant lawfully asserted his rights to it. Counsel submitted that the appellant could only acquire rights under adverse possession as provided under ***sections 7, 13, 17***, and ***38*** of the **Limitations of Actions Act** whose combined effect is to extinguish the title of the proprietor in favour of an adverse possessor at the expiry of 12 years. As the appellant in this case made effective re-entry into the land before expiry of 12 years, submitted counsel, there was no basis for any finding in favour of the respondent. The manner of re-entry was also lawful and the trial court erred in holding otherwise. The cases of ***Joseph Kashau Ololkuo & 6 others v. Ngati Farmers Co-operative Society Ltd [2011]eKLR***; ***Mtana Lewa .v Kahindi Ngala Mwagandi [2015] eKLR***; ***Sophia Thimu Wamucii and 6 others v. Josphine KeruGichangi [2009] eKLR***; ***Mwangi Githu v Livingstone Ndeete [1980] eKLR*** and **K.J. Rustomji** on ***"Law of limitation and Adverse possession"***, were cited in aid of those submissions.

On the 2nd ground, counsel submitted that the trial court had ignored the respective pleadings of the parties and instead framed its own issue as to *'the legality or otherwise of the respondent's eviction from the suit property'*. The court also invoked ***section 30(f)*** of the RLA as an issue. But none of the two issues had anything to do with the pleadings. So too the final orders made in the consolidated suit. Counsel relied on the cases of ***Nairobi City Council v. Thabiti Enterprises Limited [1997] eKLR***; ***Dakianga Distributors (K) Ltd v. Kenya Seed Company Limited [2015] eKLR***; ***Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v. Adam Vassiliadis [1986] UGCA 6***; and ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR***; all confining judicial decisions to pleaded issues. Referring to the ***Githu case*** (supra) which the trial court applied, counsel submitted that the trial court misunderstood the import of the authority which, in his view, was about whether or not change of ownership interrupts adverse possession, and was correctly decided on its facts.

Finally on the 3rd ground, counsel attacked the manner in which the trial court exercised its discretion. In his view, the trial court fully agreed with the appellant that adverse possession, as pleaded by the respondent, had not been proved, but in an inexplicable about-turn, the court found against the appellant. Counsel attacked as speculative, the finding that it was the appellant who was responsible for the respondent's eviction when the evidence showed otherwise. He urged us to be guided by such cases as ***Selle v Associated Motor Boat Company Ltd [1968] EA 12*** to re-appraise the evidence, reconsider it and arrive at our own decision thereon in favour of the appellant.

In response, learned counsel for the respondent, **Mr. Njiru Boniface**, filed written submissions which were briefly orally highlighted at the plenary hearing of the appeal. He agreed with the decision of the trial court particularly emphasizing that the court heard and saw the witnesses and made an express finding that the appellant's witnesses were lying. That finding, according to counsel, was not appealable since the trial court is best placed to assess the demeanour and credibility of witnesses. The case of ***Kanwal Sohar v. Spencer & 3 Others [2012] EWCA Civ 1064*** was cited *in extenso* in support of that submission.

Finally, counsel attacked the conduct of the appellant in using his influence to coax the Provincial Administration to forcefully evict the respondent from the suit land without any court order. In his view, such conduct was not only criminal under ***section 90*** of the **Penal Code** as held in the case of ***Gusii Mwalimu Investment Co. Ltd & 2 others v. Mwalimu Hotel Kisii Ltd [1996] eKLR***, but also uncivilized. The trial court was therefore right to penalize the appellant in damages.

We have considered the appeal fully in the manner of a retrial in order to reach our own conclusions in the matter. See ***Rule 29(1)(a)*** of the ***Court of Appeal Rules***. We are aware that as the first appellate Court, we must accord due respect to, and not lightly differ from, the findings of the trial court which had the added advantage of seeing and hearing the witnesses. Nevertheless, this Court has stated time and again that it will interfere with such findings if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching them. See ***Jabane v. Olenja [1986] KLR 661***. In the case of ***Mary Njoki v. John Kinyanjui Mutheru & Others 1985 eKLR,*** **Madan, JA** adopted ***Watt v. Thomas [1947] AC 484*** where the court stated:-

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide."***

In our view, the one issue that will determine this appeal is whether the trial court was right in invoking the provisions of ***section (30)(f)*** of the RLA to defeat the appellant's title to the suit land. And the straight answer is that the trial court acted in error, on two levels.

Firstly, there was no pleading by the respondent that he had acquired an overriding interest over the Title held by the appellant since 1996, and if so the nature of the overriding interest. The Title Deed issued to the appellant gave him the rights stated under ***section 28*** of the RLA which provided as follows:-

> "***28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -***
>
> ***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***
>
> ***(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:***

> ***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."*** [Emphasis added].

Section 30 which is mentioned in that provision catalogues eight overriding interests which may not be noted in the register but will nevertheless affect the title. One of them is in ***section 30(f)*** which provides:

> ***"30.Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-***
>
> ***(f) rights acquired or in the process of being acquired, by virtue of any written law relating to the limitation of actions or by prescription."***

The appellant submitted, correctly in our view, that a party who relies on ***section 30*** to affect the rights of a registered proprietor, ought to plead such case and provide requisite proof for it. But there was no such pleading in this case and the parties were not invited to make submissions on the issue. The trial court raised and decided on it *suo motu*. With respect, there was no jurisdiction to do so.

It is trite law that in civil proceedings, issues are raised by way of pleadings and, as a rule, the court can only lawfully determine issues that are specifically pleaded and proved before it. The court cannot base its decision on an un-pleaded issue. See ***Gandy v. Caspair Air Charters Ltd. (1956) 23 EACA 139***. In the case of ***Charles C. Sande v. Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992, (UR)*** this Court stated:-

> ***"We would endorse the well-established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallise the issues which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are."***

And finally on pleadings, this Court has applied the decision of the Supreme Court in Malawi in the case of ***Malawi Railways Ltd v. Nyasulu [1998] MWSC 3***, in which the learned Judges quoted with approval from an article by **Sir Jack Jacob** entitled **"The Present Importance of Pleadings."** published in [1960] Current Legal problems, at P174 where the author stated thus:

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….***
>
> ***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*** [Emphasis added].

Secondly, the application of ***section 30(f)*** in this case was plainly wrong.

The trial court was goaded into applying the section by a passage in the decision of this court in the case of ***Githu v. Ndeete [1984] KLR***, where the Court stated:-

> ***"Mr Gaturu attacked this part of the judgment on three grounds. Firstly, he submitted that change of ownership interrupts adverse possession, and that accordingly time did not begin to run against the appellant until he was registered as proprietor of the land in 1966. The answer to this submission is that immediately before the appellant became the registered proprietor in 1966 the respondents were in the course of acquiring rights under section 7 of the Limitation of Actions Act, cap 22, and by virtue of section 30 (f) of the Registered Land Act, cap 300, those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters."***[Emphasis added].

The issue in the ***Githu case*** was whether the mere change of ownership of land that is occupied by another person under adverse possession would interrupt such person's adverse possession. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under ***Section 7*** of the **Limitation of Actions Act,** those rights are overriding interests by virtue of ***section 30(f)*** of the RLA, to which the new registered purchaser's title will be subject. The same view was followed by the Court in the case of ***Kairu v. Gacheru [1986-1989] E.A*** where it was held that:

> ***"The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 Limitation of Actions Act)."***

Apaloo, JA contextualized the issue in the leading judgment of the Court when he stated as follows:

> ***"If the period the respondent was in adverse possession against Mwangi were to be excluded and the period of limitation reckoned only when the appellant became registered proprietor, an owner of land whose title was in danger of being lost by prescription can better his lot by the simple device of alienating the land just a day before the 12 year period had run out. But it is elementary that a grantor of land cannot grant better title than he has. The appellant took Mwangi's title subject to the rights of a prior purchaser in adverse possession. That the law relating to prescription affects not only present holders of title but their predecessors in title is shown by Section 7 Limitation of Actions Act."***

The ***Githu case*** and the ***Kairu case*** would have been perfectly applicable if the respondent here was in adverse possession of the suit land between the years 1985 and 1993 when the original owner died. Twelve years had not expired by then. But the change of ownership to the appellant would not have affected the running of time since the respondent would have continued to show his *animus possident*i up to the time the appellant asserted his rights in 1998. By 1997 the respondent would have been entitled to seek registration of the suit land in his name. For obvious reasons, however, this was not the case here.

The obvious reason was the finding (reproduced earlier) made by the trial court that the respondent was not in adverse possession of the suit land from 1985 to 1993. The finding was well reasoned and supported on authority. How then could the principle of overriding interest apply to the respondent when the ownership of the suit land changed hands in 1996?

The consequence of the finding made by the trial court was that the respondent had not proved his case, as pleaded, that he was in adverse possession of the suit land between 1985 and 1993 when Beatrice Njeri Mungai was the owner of the suit land. He could not therefore seek the further order that the title be cancelled and transferred into his name. That should have been the end of the respondent's case and the beginning of the appellant's case who was seeking the following orders:

> ***"a. Possession of the Land known as Title No. Dagoretti/Riruta/S.15 and all buildings and/or structures thereon;***
>
> ***b. An injunction to restrain the Defendant whether by himself or by his servants or agents or otherwise howsoever from entering or crossing the said Land and all buildings and/or structures thereon;***
>
> ***c. Damages for Trespass.***
>
> ***d. Costs.***
>
> ***e. Interest on (a), (c), and (d) above at court rates.***
>
> ***f. Such other or further relief that this Honourable Court may deem fit and just to grant."***

Those orders were not considered owing to the conclusions made in respect of the respondents' case. We think the order for possession and injunction were well merited. There was no proof of any damages for trespass and so none can be granted.

The upshot is that this appeal is meritorious and is allowed. The decision of the High Court made on 25th March, 2009 is hereby set aside. We substitute therefor an order dismissing the suit filed by the respondent, and granting to the appellant Orders (a) and (b) above. The appellant shall have the costs of the appeal.

We so order.

Dated and delivered at Nairobi this 30th day of August, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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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