



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 83 OF 2018

BETWEEN

ELIJAH O. L. OPAR.....APPELLANT

AND

TOBIAS ODHIAMBO ABACH.....RESPONDENT

(Appeal from the judgment and decree of the Environment and Land Court

of Kenya at Migori (Ongondo, J.) dated 12th April, 2018 in ELC NO. 436 OF 2017 (O.S.)

JUDGMENT OF THE COURT

This appeal is a challenge by **Elijah Opar (Opar)** against the decision of the Environment and Land Court (ELC) (Ongondo, J.) by which his title to some 2.2 hectares of land reference No. **West Kasipul/Kodera Karabach/255** of which he was the registered owner had been extinguished and that the respondent **Tobias Odhiambo Abach (Abach)** had acquired the same by prescription and was to be registered as owner thereof.

That judgment was the culmination of a suit initially commenced by way of an originating summons at the High Court at Kisii by Abach, before it was transferred to the ELC, by which he prayed for orders;

“2. THAT this Honourable Court be pleased to declare that the plaintiff/applicant has the rights of possession, prescription and occupation of the whole of that land measuring approximately 2.2 Ha. within land reference Number West Kasipul/Kodera Karabach/255.

3. THAT the Honourable Court be pleased to declare that the plaintiff/applicant is entitled to an order under section 38 of the Limitations of Actions Act, and to be registered as the proprietor of that whole land measuring approximately 2.2 Ha. within land reference West Kasipul/Kodera Karabach/255 in place of the defendant/respondent free from all encumbrances;

4. THAT the costs of this suit plus interest thereon at the court rates be granted to the plaintiff/applicant.”

In the grounds, supporting affidavit, witness statement and testimony in court when the matter proceeded by way of *viva voce* evidence, Abach maintained that he had been in peaceful open possession of the subject land and adversely to Opar’s title thereto for an uninterrupted period of over 12 years, and was therefore entitled to it by prescription. He testified that he had been in possession and cultivation of the land since it was given to him by his late grandfather one **Jacob Odera Odienyi** in 1978.

He tilled the land with his mother **Rosaline Owiti Abach (PW2)** uninterrupted until year 2010 when Opar appeared on the scene, claimed to be the registered owner and demanded that they vacate. PW 2 testified to like effect as well.

In his replying affidavit, which the court below treated as his defence to Abach’s claim, Opar swore, which he maintained in his court testimony, that he bought the land from one **Ngodhe Odera** on 13th June, 1969, and became registered as proprietor thereof on 2nd March, 1981, and that he took possession and cultivated it from 1990 up to and including 2005, when he stopped. He kept visiting the land, however, and in 2007 he found that Abach had entered into a portion of it in trespass, and started cultivating it without lawful cause or basis. He

complained to the area chief and the District Office who ordered Abach to stop the trespass, which he complied with, and never returned to the land since the year 2009. To him, therefore, Abach's occupation was between 2007 and 2009 only, per the witness statement, or from 2005, per court testimony, and therefore adverse possession did not lie. His witness **Charles Ochoro Rabach**, a cousin, stated that he used to chase Abach from Opar's land having been requested by the latter to take care of it in 1995, but Abach chased him away. According to him, Abach came to the land in 2009. That is the same year that this witness stopped working as a tailor in Kisii where he had been in the employment of 'an Indian' since 1966.

As we have stated, the learned Judge found in favour of Abach provoking this appeal in which Opar contends that the learned Judge erred or misdirected himself in various respects which can be summarised as;

- *finding that Abach had proved a case for adverse possession when his claim was that of an owner who purchased from his grandfather whilst still a minor;*
- *finding adverse possession proved yet its ingredients were not satisfied;*
- *arriving at a wrong conclusion that Abach was in possession by cultivating yet it is his parents who cultivated;*
- *finding for Abach yet at the time of filing suit he had been dispossessed;*
- *arriving at conclusions against the weight of evidence.*

The grounds of appeal all revolve around the question of whether Abach did prove, on a balance of probabilities, the ingredients of adverse possession and the parties zeroed on the same in their written submissions as highlighted before us by learned counsel. **Mr. Que**, who held brief for **Mr. Wasuna** for Opar faulted the learned Judge for not making a finding as to when Abach took possession of the subject land and also failing to resolve who exactly was tilling the land in 1990 as each party claimed to have been doing so. Without a specific finding as to when Abach took possession, in counsel's view, the Judge was not entitled to find, as he did, that Abach's possession "became adverse in the year 2002."

On his part **Mr. Nyambati**, learned counsel for Abach was in full support of the learned Judge's decision and contended that time started running, for purposes of adverse possession, in 1990 when Abach took possession of the land. He did so openly, without violence and without the true owner's permission. Nothing happened to interrupt that possession by cultivation and so the learned Judge was right to find that the possession became adverse in 2002. There was no evidence availed by Opar to support his claim that he was in possession in 1990. Counsel cited in aid this Court's decision of **TITUS NYACHIEO -vs- MARTIN OKIOMA NYAUMA & 3 OTHERS [2015] eKLR**.

We have considered those rival submissions and the cases cited before us *vis-a-vis* the judgment and the entire record. As a first appellate court it is our bounden duty to subject the entire evidence to a fresh and exhaustive re-evaluation and re-appraisal and to make our own inferences of fact. See **Rule 29(a)** of the **Court of Appeal Rules**. We pay deference to the trial court's findings of fact cognizant that he had the added advantage of having seen and heard the witnesses as they testified, while we are limited to a consideration of the cold letter of the record. This is not to say that we are bound by those findings as we are entitled to depart therefrom if they are based on no evidence or there has been a misapprehension of the evidence. See **SELLE -vs- ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] EA 123; PETERSON SUNDAY POST LIMITED [1958] EA 424; PIL KENYA LIMITED -vs- OPPONG [2009] KLR 442**.

What we need to determine is whether Abach did tender before the trial court evidence sufficient to prove on a balance of probabilities that he had entered upon the subject land openly, peacefully, without the permission of Opar, and had continued in such possession for an uninterrupted period of at least 12 years thereby dispossessing Opar and extinguishing his right and title thereto. These are the ingredients of adverse possession as have been restated in a long line of authorities including **WAMBUGU -vs- NJUGUNA [1983] KLR 172; NG'ATI FARMERS CO-OPERATIVE SOCIETY LIMITED -vs- LEDIDI & 15 OTHERS [2009] KLR 331; TITUS NYACHIEO -vs- MARTIN NYAMITI & 3 OTHERS (Supra) and MTANA LEWA -vs- KAHINDI NGALA NWAGANDI [2015] eKLR**, in which last case this Court, sitting at Malindi, comprehensively treated of the contents and discontents of the doctrine.

From the record, it is not in dispute that Abach and his mother did have possession of the subject land since 1990. Even though they did not reside on it, they had control of it. They were tilling it and growing sugarcane, maize and other subsistence crops. Both his mother (PW2) and himself were categorical in testimony that his possession of the land had been uninterrupted for some two decades when in 2010 Opar appeared and on the strength of the title he held, stopped him from using the land.

There was evidence tendered by Opar that in 2009 he found Abach tilling the land. He then instructed Nyatundo & Company Advocates who wrote to Abach stating that Opar had bought the land from Abach's father in 1978 and was the registered owner, but now Abach had trespassed onto it and started cultivating sugarcane and some other crops without his consent as the true owner.

In his testimony, Opar stated that he bought the land in 1969 and that he cultivated it until the year 2005 when he stopped. In cross-examination he admitted to not having built any structure on the land, to having no photo to show occupation of the land and further that he stayed far away from the land. He did not know who his neighbours at the land were. Opar's witness (PW2) who is his cousin stated that Opar requested him to take care of the land in 1995 but Abach became violent on the land and chased him away.

Whereas, admittedly, the evidence tendered does contain certain inconsistencies, we think that, taken in totality, there can be no doubt that Abach did establish that quite irrespective of whether he was sold the land by his grandfather or not, he and his mother were in possession of the same from at least the year 1990. The possession took the form of tilling and tending the land. See **KIMANI RUCHINE -vs- SWIFT RUTHERFORD COMPANY LIMITED & ANOTHER [1976 - 80] KLR 1500**. Thus it was that in 1995 PW2 did find him on the land. He did not have the permission of Opar to be there and Opar clearly was aware of his presence but took no steps to repulse or eject him until long after the statutory period of 12 years stipulated in **section 38** of the **Law of Limitations Act** had elapsed.

That being the case, we are satisfied on a balance of probabilities, as was the learned Judge who heard the contending testimonies of the witnesses, that Abach did establish his claims in adverse possession. He clearly had dispossessed Opar and extinguished his title entitling him to the orders he sought in the originating summons.

For those reasons we find this appeal to be devoid of merit and order it dismissed with each party bearing his own costs.

DATED and delivered at Kisumu this 3rd day of October, 2019.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

OTIENO ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.