



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 317 OF 2009

BETWEEN

JOHN OMONDI NALLO (The administrator

of the Estate of the late Jared Nallo Otieno).....APPELLANT

- VERSUS -

FRANCIS ALIARO MAPESA.....1ST RESPONDENT

PATRICK ACHERO WAMBOKA.....2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kakamega, (Kariuki, J.) dated 30th October, 2009

in

HCC NO. 143 OF 1999)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (G.B.M. Kariuki, J (as he then was) declaring the respondents herein as owners of twenty acres (20) of land from land title **No. S. Wanga/Eshikalame/1072** (suit land) registered in the name of Jared Nallo by virtue of adverse possession and ordering a transfer of the said portion to the respondents.

[2] By an originating summons (O.S) dated 8th September, 1999, and brought mainly under sections 37 and 38 of the Limitation of Actions Act and section 28 and 30 (f) of the Registered Land Act (now repealed) the respondents claimed against Jared Nallo (*deceased*) that they were entitled to twenty acres from the suit land by adverse possession.

[3] The originating summons was supported by the affidavits of the 1st and 2nd respondents respectively. The 1st respondent deponed in the supporting affidavit, amongst other things, that, in 1961, his father **Wamboka Nambaka** sold a portion of two acres to the appellant from the suit land which in total measures thirty (30) acres; that the appellant hived off another portion measuring eight (8) acres and added it to the 2 acres making a total of 10 acres; that his father and the 2nd respondent retained 20 acres but the appellant fraudulently got himself registered as the proprietor of the whole land of 30 acres in 1966; that the respondents have had exclusive possession of 20 acres before and after it was registered in the name of the appellant; that the respondents have erected homes and have developed the land by cultivating and growing crops and trees and that the respondents have had open quiet and undisturbed occupation and use for a period of over twelve (12) years.

The 2nd respondent in his affidavit supported the facts stated by the 1st respondent and stated that he and his father have had exclusive, continuous peaceful and uninterrupted occupation and use of 20 acres of the suit land for over 20 years.

[4] Jared Nallo denied the claim in his replying affidavit and stated that, he at first bought eight (8) acres from the respondents' father and

later two other portions measuring approximately six (6) acres from him; that subsequently he bought other portions from six of his neighbours (whom he named), that all the portions were consolidated to form the suit land measuring 30 acres; that he occupies the whole land and the respondents do not occupy the disputed portion; that the respondents filed a suit - Kakamega Principal Magistrate's Court, Civil Suit No. 80 of 1997 in which they claimed that, he, Jared Nallo occupied the whole land which suit was dismissed and that therefore the suit was *res judicata*.

We state at the outset that Jared Nallo died on 6th April, 2008 after the trial was concluded and the present appellant was appointed his legal representative on 22nd January, 2009 after the judgment was delivered.

[5] The 1st respondent's evidence at the trial was briefly as follows:

The suit land originally belonged to his grandfather but had no title. His grandfather had six sons including his father Mapesa Nambaka and Wamboka Nambaka. His father inherited the land from his grandfather which measured approximately 30 acres. All his uncles (his father's brothers) had died except his father and Wamboka Namaka. His father however died in 2002.

By an agreement of sale dated 7th August, 1961 which he produced as exhibit, Wamboka Nambaka sold 8 acres to Jared Nallo but the latter started using 10 acres instead of 8 acres. The sale of 8 acres to Jared Nallo was registered in his name as shown in the minute 23/63(d) of South Wanga Local Executive Committee meeting held on 16th May, 1963 which states:

“Mr. Nallo purchased a parcel of land measuring eight (8) acres from Mr. Wamboka Nambaka in Uraya Village (Umrebwa) Shikalame Sub/Location at a consideration of Kshs.1,900/= which he paid in full. The witness is the village elder, Rafael Ndirire”.

After the sale Jared Nallo started using the 10 acres and his father the 20 acres. He and the respondent have continuously used the portion of 20 acres. His sons who are married, have houses on the suit land. There are three houses on the land and he and the 2nd respondent have never been stopped from using the land. His father and the entire family who have died have been buried on the suit land. It is in 1997 that he came to know that Jared Nallo who was a District Officer, was the proprietor of the whole land.

In his evidence in cross-examination, he testified that he does not know whether his cousins who are deceased, Wambongo Waniole, his uncle Muganda Nambaka, Jeremiah Waniole - a relative and Wesonga Waniole sold land to Jared Nallo.

[6] The 2nd respondent in his brief evidence at the trial stated, amongst other things, that the suit property which comprised of 30 acres belonged to his grandfather; that his father, Wamboka Nambaka sold 8 acres to Jared Nallo who however started using 10 acres leaving 20 acres to the family; that he has a wife and 8 children and own houses on the land; that he grows millet, cassava, bananas and maize crops on the land, that he has lived on the land throughout his life and has never been stopped from using the land.

In cross-examination, he stated that his grandfather had seven sons (who he named); that his father died in 2003 and Mapesa Nambaka, Paul Nambaka, Paulina Nambaka and Wanga Nambaka are buried on the land, and that it was easy for Jared Nallo who was working as a District Officer and later with the Lands Department to transfer the whole land to his name.

[7] The respondents called two witnesses - Henry Nambaka (a relative and neighbour) and John Khasolo Njeremani – a neighbour. The two witnesses gave similar evidence that Jared Nallo bought only 8 acres which were recorded in the minutes of the meeting of the South Wanga Local Council Executive Committee; that the respondents live on the remaining portion; that the respondents have built houses on their portion and that the respondents' parents are buried on the land.

[8] The evidence of Jared Nallo was briefly that, he bought seven parcels of land which were consolidated in title No. S/Wanga/Shikalame/1072; that he bought three portions from Wamboka Nambaka through agreements dated 7th August, 1961; 15th March, 1964; 14th March, 1966; one portion from Wambongo Waniore by agreement dated 24th May, 1964; one portion from Mungunda Wambaka by agreement dated 9th August, 1964; portion from Jeremiah Waniore by agreement dated 5th September, 1963; a portion from Wesonga Waniore by agreement dated 8th May, 1964 and one portion from Mapesa Nambaka by agreement dated 11th July, 1965. He produced eight agreements as exhibits.

He further testified that the respondents were living with their parents in the portions of land that he bought, that at the time of the trial the 1st respondent was living in land title No. S/Wanga/Shikalame/1089 registered in his name and the 2nd respondent in land title No. S/Wanga/Shikalame/1068 registered in the name of Wamboka Nambaka; that he has been using and cultivating the land since 1961; that the respondents do not live on the land and their parents are not buried on the land and that Wamboka Nambaka and the two respondents sued him in Civil Suit No. 80 of 1997 which was dismissed.

However, he stated in his evidence on cross-examination:

“The 2nd plaintiff does not live on the land but does cultivate the land. The 1st plaintiff has permanent houses on the land. One morning I woke up and found that the 1st plaintiff has houses on the land. He also cultivated the land. They grow cassava, sweet potatoes and other crops”.

[9] Jared Nallo called three witnesses namely; Emmanuel Odhiambo Odipo (grandson); Thomas Opondo - Deputy District Surveyor who produced Registry Index Map relating to the suit and Mark Owaga, an Executive Officer at Kakamega Law Courts who produced the court file relating to suit No. 80 of 1997 showing that the suit was struck out on 12th May, 1999 by Tanui, J.

The first defence witness Emmanuel Odhiambo Odipo testified that in 2003, the 1st respondent and others entered the suit land and built grass thatched houses as a result of which they were charged with the offence of trespass in Criminal Case No. 790/2003.

Under cross-examination, he stated in part:

“The plaintiffs are now using the land No.1072, they have three houses on the land. Today, they have planted food crops like cassava, maize etc but they have not planted trees”.

[10] Upon analysing the evidence, the learned trial judge made several findings including that:

- (i) The applicant’s father was living on the land before 1961 when he sold the eight acres out of 30 acres to the respondent and that the respondents and their families continued to occupy the 20 acres until he died in 2001 or 2003;
- (ii) In 1966 when the land was registered, and from then on the applicants and their father were in adverse possession;
- (iii) The complaint in 1997 by Jared Nallo against the respondents could not interrupt the time for adverse possession as it did not in law amount to an assertion of his title nor was the suit *res judicata*.
- (iv) The charge over property in 1969 which was discharged in 1983 did not interrupt the time and break the continuity of adverse possession because it did not amount to an assertion of title to land;
- (v) The evidence has established on the balance of probabilities that, the respondents were prior to the institution of the suit in adverse possession to the title of Jared Nallo to the extent of 20 acres which they occupy which adverse possession crystallized before the institution of the suit.

The learned judge proceeded to enter judgment for the respondents with costs and ordered that the respondents and Jared Nallo be registered as tenants - the respondents holding jointly 20 acres and the latter 10 acres.

[11] The memorandum of appeal which contains four grounds of appeal erroneously names the respondents herein as the appellants and the appellant as the respondent. The two supplementary records of appeal have since corrected the error and John Omondi Nallo, the administrator of the estate of Jared Nallo Otieno is now the proper appellant.

[12] It is expedient to consider the 3rd ground of appeal first. The appellant states that the learned judge erred in law and in fact by delivering the judgment after the demise of the defendant.

Mr. Kiboi, the learned counsel for the appellant submitted that the judgment was delivered before substitution of the deceased defendant. He did not say anything more.

On his part, Mr. Simiyu, learned counsel for the respondents submitted that the death of a party to a suit before judgment is delivered but after the party has testified in the suit is not fatal; that Jared Nallo was represented by a counsel who was issued with a notice for delivery of the judgment; that counsel never informed the court of the death; that the death did not cause the suit to abate and that the defendant did not suffer any prejudice.

[13] As mentioned before, Jared Nallo gave evidence and called three witnesses. The trial was concluded on 20th December, 2007. The respective counsel were directed to file written submissions and attend court for delivery on judgment on 5th May, 2008.

The firm of Chemitei & Company Advocates who represented Jared Nallo filed written submissions. The defendant died on 6th of April, 2008. The judgment was delivered on 30th October, 2008 and on 25th November, 2008, the firm of Chemitei & Company Advocates filed an application for the appointment of the present appellant as a legal representative of Jared Nallo. The application was allowed by consent on 22nd January, 2009. The present appeal was filed by Ms Chemitei & Company Advocates on behalf of the legal representative.

[14] As provided by Rule 1 of Order XXIII, Civil Procedure Rules, which was in place at the time the judgment was delivered, (*now order 24 rule 1 of Civil Procedure Rules, 2010*), the death of a party to a suit does not cause the suit to abate if the cause of action survives or continues.

There is no doubt that the cause of action survived the death of the deceased defendant as it related to title to land. The judgment delivered determined title to property and thus it was a judgment in *rem*. Moreover, the deceased had no further role to play after the conclusion of the trial. What remained was a judicial function of pronouncing the judgment. The estate of the deceased could be represented at the delivery of the judgment by a legal representative of the deceased or by a counsel instructed by the estate.

The counsel for Jared Nallo did not apply for leave to cease acting and indeed continued to act for the legal representative including filing the present appeal. It is reasonable to infer in the circumstances that counsel was acting for the estate at the time of the pronouncement of judgment. Moreover, no prejudice has been alleged.

In the circumstances, the death of Jared Nallo did not render the court incompetent to pronounce the judgment and the judgment so pronounced was valid.

[15] The remaining three grounds of appeal are respectively, that the learned Judge failed to take into account that fraud was not proved; failing to examine the evidence in a balanced manner and particularly failing to examine the defence evidence, and in failing to appreciate the totality of the evidence.

[16] The principles which guide an appellate court in an appeal dependent on the appreciation and evaluation of evidence by a trial court were stated by the predecessor of this Court in **Peters v Sunday Post Limited [1958] EA 424** and later summarized by **Sir Clement De Lestang V.P** on behalf of the Court in **Selle v Associated Motor Boat Co. Ltd [1968] EA 123**. At page 126 it is stated thus;

“An appeal to this Court from a trial by the High Court is by way of a re-trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

In **Peters v Sunday Post** (*supra*) the Court at P. 429 para. F –1 cited a passage in the speech of **Viscount Simon, L. C** in **Watt v Thomas [1947] A.C 484** at page 485 partly as follows;-

“If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.”

[17] As regards the issue of fraud, it is true that the respondent stated in the supporting affidavits that though their father retained 20 acres, Jared Nallo fraudulently and improperly caused himself to be registered as the proprietor of the whole land. However, the respondents’ case as pleaded is that they were entitled to 20 acres by adverse possession.

Their case was not that the title of Jared Nallo relating to 20 acres should be cancelled on the ground of fraud. Rather, their case was that Jared Nallo’s title to 20 acres was extinguished by the operation of the law. It is also true that parties gave substantial evidence relating to the sale of land between **Wamboka Nambaka** and **Jared Nallo**. The learned Judge had this to say about that evidence.

“Most of the evidence by both parties drifted from the core issues, namely, adverse possession and dealt at length with the origin of the land and its alleged purchase by respondent.”

The learned Judge further stated:

“The issue for determination is whether the applicants have been in adverse possession to the title of the respondent in respect of the 20 acres comprised in title No. S. Wanga/Eshikalame/1072.”

Indeed, the learned Judge did not inquire into whether Jared Nallo purchased 8 or all the 30 acres.

The issue of fraud was irrelevant to the statutory claim of entitlement to land by adverse possession under the provisions of the Limitation of Actions Act. It would have been a departure from the statutory claim had the learned Judge embarked on the analysis of evidence relating to the purchase of the land and registration of title in the name of Jared Nallo. Thus, this ground of appeal has no merit.

[18] Regarding the other grounds of appeal, Mr Kiboi submitted that the respondents did not prove the ingredients of adverse possession, that the trial Judge shifted the burden of proof; that the Judge was biased against Jared Nallo, that the trial Judge failed to consider the defence evidence that the surveyor’s report dated 3rd May, 2000 showed that Jared Nallo was in physical possession of the entire land.

On his part Mr Simiyu submitted, amongst other things, that the Judge weighed all evidence and considered the demeanor of the witnesses; the Judge had the benefit of hearing and seeing witness and the court should not interfere with his findings; the surveyor’s report shows that Jared Nallo was not in occupation of the whole land and was not conclusive.

[19] The learned Judge stated in the Judgment that he had watched the demeanor of the witness and said;

“The applicants and their families have lived on the 20 acre portion from before 1961. The evidence shows that the respondent was registered as proprietor of the suit land on 28th November, 1966. The evidence before me shows that the applicants’ father was on the land before 1961 when he sold eight of his 30 acres to the respondent and that the respondents’ father and the applicants and their families continued to occupy the 20 acres portion comprised in the said title until he died in the year 2002 or 2003. I watched the respondent give evidence.

Although he was old and frail, I got the vivid impression that he was not telling the truth. He was reluctant to answer leading questions which appeared to prejudice his defence. He alleged that the applicants were not in occupation of the suit land only to concede later that the 1st applicant was not only in occupation but had built houses on it and lived there as his home. He also conceded having in 1997 complained to the police that the 1st applicant was trespassing on the land. It is my finding that the

evidence of the applicants is to be preferred to that of the respondent which I reject as not true.”

The learned Judge continued to say:-

“In this case there was neither res judicata nor interruption of time, adverse possession continued in favour of the applicants and their later father who, however did not join in the suit. It started in 1966 when the respondent became the registered proprietor. He knew the applicants and their father were on the land. He did not give them permission to be on the land. He did not also protest. He did not evict them nor did he assert his title to the land. The applicants occupied the land adversely to his title.”

[20] The appellant relied on the report of the John Ogasa Mongeri, the Kakamega District Surveyor dated 2nd May, 2000. Early in the proceedings, Jared Nallo had filed an application dated 10th December, 1999, asking the court to visit the locus quo upon which visit the court should dismiss the suit but, instead, the court ordered the District Surveyor to visit the suit land and report whether or not the respondents were living in the suit land and of the area of their occupation.

After the report dated 2nd May, 2000 was filed, counsel for Jared Nallo informed the court that one of the parties was not present when the District Surveyor went to the land. The court on 18th May, 2000 ordered the District Surveyor to revisit the land and carry out his investigations in the presence of all the parties.

A second report dated 11th July 2000 contained in the further supplementary record filed on 23rd October, 2015 was filed by the same District Surveyor and read to the parties. On 25th October, 2001, the court directed partly as follows:-

“As that report is still on the court record let the parties now decide on how to proceed.”

The hearing of the O.S started on 4th June, 2007, more than 5 years later. The parties in their evidence did not refer to the District Surveyor’s report nor did the District Surveyor give evidence on the contents of the report. The trial Judge did not refer to it. The report states in the relevant part that Jared Nallo stays in the land and the respondents do not stay therein; that the land is being farmed by three parties and that there is no clear demarcation which suggests that the land is shared into two parts.

In the interest of justice, the respective submissions on the surveyors report shall be treated as referring to the second report dated 11th July, 2000.

[21] On 21st October, 2004, the learned Judge gave directions relating to the O.S. The O.S was to be treated as a plaint and the respective replying affidavit as statements of defence. The court further directed that the suit be heard by way of *viva voce* evidence.

There was no direction given regarding the surveyor’s report which dealt with seriously contested factual issues. In our view, the surveyor’s report was superseded by the subsequent direction that the suit be heard by *viva voce* evidence. If Jared Nallo intended to rely on the surveyor’s report, he should have called the surveyor as a witness in which case the surveyor would have been subjected to cross-examination on his report.

Moreover, such a surveyor’s report is not one of the class of documents under the Evidence Act whose contents are presumed to be true.

In the circumstances, the surveyor’s report which was prepared in respect of an interlocutory application for dismissal of the O.S had no evidentiary value in the ensuing trial of the suit.

[22] Turning to the evidence, the respondents’ case was that Jared Nallo took possession of only 10 acres (8 that he had bought and 2 extra acres) and that the respondents and their parents remained in possession of the remainder of 20 acres peacefully, openly, exclusively, continuously and uninterrupted for more than 12 years preceding the filing of the suit. The respondents claimed that their respective parents and relatives are buried in the land.

The 2nd respondent testified that the measurements of the portion that Jared Nallo bought were estimated by paces and not by a surveyor. **Henry Nambaka** an old man aged 74 years and a neighbour and John Khasolo Njeremani also a neighbour and aged 58 years entirely supported the respondents’ case including the evidence that the sale of the 8 acres that Jared Nallo bought was minuted and approved by South Wanga Local Council Executive Committee. The minutes which were produced, supported the evidence of the respondents and their two witnesses.

On the other hand, Jared Nallo’s case was that he bought portions of land comprising of 30 acres from seven persons; that the several portions were consolidated and registered as title No. South/Wanga/Shikalame/1072 on 28th November, 1966; that he took possession of the whole land which he has been utilising; and that it is in 2003 that the 1st respondent trespassed on that land. He denied that the respondents’ parents are buried in the land, or that the respondents lived on the suit land.

Emmanuel Odhiambo Odipo, the grandson of Jared Nallo testified that he had lived with Jared Nallo in the land since 1958 and that it is in 2003 that the 1st respondent trespassed on the land.

Jared Nallo however admitted that the respondents were living on the land with their parents when he bought the land; that the 1st respondent lives on the land, has permanent houses on the land, and, also cultivates the land. He also admitted that the 2nd respondent cultivates the land

but denied that he lives on the land.

[23] The learned Judge exhaustively considered all the evidence and made a finding that Jared Nallo was not a credible witness and preferred the evidence of the respondents. The finding of the learned Judge on the contentious facts was partly based on the credibility of the witnesses whom he saw and heard. An appellate court would not interfere with those findings of fact that are based on the credibility of witness unless no reasonable tribunal could have arrived at those findings. The credibility of Jared Nallo that he took possession of the entire 30 acres upon purchase was eroded by his own evidence which demonstrated that he caused only the portion bought from Wamboka Nambaka to be registered with South Wanga Local Council Executive Committee and not the other six portions allegedly bought from other members of the family. There is no reason why the finding of the learned Judge on credibility of witnesses should not be given great weight.

On our own reconsideration of the evidence, we are satisfied that the learned Judge reached the correct decision on the facts, and that there are no grounds such as misdirection or nondirection for interfering with those findings.

[24] The issue of res judicata was not pursued in the appeal. However, it is clear from the Ruling of Tanui, J dated 12th May, 1999 in HCC No. 50 of 1997 that the respondents and another amended the plaint in that suit to claim the suit land by adverse possession under section 38 of the Limitation of Actions Act. The Ruling shows that the claim was struck out as incompetent on the basis that it should have been brought by an originating Summons. It is thus clear that the claim of the suit land by adverse possession was not heard and finally determined on the merit and a plea of res judicata does not lie.

[25] Lastly, the appellant’s counsel submitted that the institution of the Mumias SRM’s Criminal case No. 790 of 2003 against the 1st respondent interrupted the adverse possession. It is true that the 1st respondent was in that case charged with the offence of trespassing on the suit land on 23rd August, 2003. That criminal case was stayed by the High Court on the application of the 1st respondent. The criminal case having been filed after the institution of the O.S had no effect on the respondents claim to land by adverse possession.

[26] For the foregoing reasons, the appeal has no merit and is hereby dismissed with costs to the respondents.

Orders accordingly.

Dated and Delivered at Kisumu this 24th day of May, 2018.

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