



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: WAKI, NAMBUYE & KIAGE, JJA)
CIVIL APPEAL NO. 235 OF 2014

BETWEEN

RAMCO INVESTMENT LIMITED.....APPELLANT

VERSUS

UNI-DRIVE THEATRE LIMITED.....RESPONDENT

*(Appeal against the Judgment and Decree of the High Court
of Kenya at Nairobi (Nyamweya, J.) Dated 30th January, 2014*

in

H.C.C.ELC. NO. 106 OF 2009)

JUDGEMENT OF THE COURT

This is a first appeal arising from the Judgment of **P. Nyamweya, J.** dated the 30th day of January, 2014, dismissing the appellant's claim for adverse possession.

The background to the appeal is that in 1985, the appellant acquired a piece of land known as L.R. No. 2019/10515, in Nairobi. It was adjoining the respondent's piece of land known as L.R. No. 10341, with a wall erected by the respondent in 1962 separating the two parcels of land. The disputed portion measures 0.1249 hectares, and used by the appellant as a play ground and rubbish dump before the suit was filed. By virtue of such use, the appellant claimed to have been in the enjoyment of exclusive, continuous and uninterrupted possession from 1985, until the respondent served them with a letter dated the 23rd day of January, 2009, informing them that they had unlawfully encroached and trespassed upon the said suit portion.

The appellant was aggrieved, and filed an originating summons (OS) dated the 13th day of March, 2009, seeking orders for a declaration that the respondent's title to the suit portion had been extinguished through adverse possession and that consequently, the appellant should be registered as the proprietor of the suit portion in the place of the respondent, his assigns and or successors in title thereof; that a

permanent injunction do issue restraining the respondent by itself, its agents, employees, nominees and/or representatives from interfering, wasting, damaging or in any other manner dealing with the suit portion.

The OS was supported by the affidavit of **Kantilal Shah**, a Director of the appellant and a further affidavit of **Kirit Patel** deposed on the 21st day of November, 2009. There was also oral evidence tendered through two witnesses. In summary, the appellant contended that the respondent's title to the suit portion had been extinguished by adverse possession as the appellant had enjoyed quiet, undisturbed, open, and peaceful occupation since 1985 after it took possession of its own parcel of land inclusive of the disputed portion; and made substantial improvements thereon, by landscaping the entire area, building a drainage system together with a children's play area, mounted an electric fence on the stone walls, and also created a dump site. On that account the appellant claimed it was entitled to the orders sought in the OS.

The OS was resisted through a replying affidavit of **Nilesh Patel** deposed and filed on the 25th day of March, 2009 together with oral testimony from six witnesses. In summary, the respondent contended that it is the owner of the property known as land reference number 10341 adjoining the appellants' property; that in or about the year 1962 it built a wall protecting its land excluding the disputed portion part of its land so as not to interfere with the mains, service pipes, telephone wires and electric mains situated on the disputed portion in compliance with conditions 6 & 7 of its Grant of title; that when the appellant acquired its property in 1985, its boundary was an open space through which members of the public passed and accessed the appellant's land without its permission, causing security concerns to both the directors of the appellant and the occupants of its property as a result of which the Directors of the appellant approached and requested the Directors of the respondent one of whom was DW5 to allow the appellant to construct two walls adjoining the wall already constructed by the respondent in 1962 to prevent the public from accessing the appellants' property through the disputed portion in order to address the security concerns mentioned above and to which request the respondent acceded.

The trial concluded with a visit to the *locus in quo* by the trial Judge with the participation of the respective parties, followed by the evaluation and analyzing of the record as a result of which the Judge identified three issues for determination. Considering those issues in the light of the record the Judge made findings thereon, *inter alia*, that the appellant's occupation of the disputed portion was open and continuous but it was not adverse to the respondent's title as it was not exclusive and was also consensual. The appellant was therefore not entitled to the relief sought in the OS and on that account dismissed the appellant's claim with costs to the respondent, triggering the appeal under review.

The appellant raised nine (9) grounds of appeal, which were subsequently compressed into three in the appellant's written submissions dated the 4th day of October, 2016 and filed in court on the 5th day of October, 2016. It is the appellant's complaints that the learned Judge erred and misdirected herself both in law and in fact in holding that:

(a) The respondent maintained a presence on the suit portion through a third party, the Kenya Power and Lighting Company.

(b) The initial occupation by the appellant was based on friendship between the directors of the appellant and that this amounted to occupation by consent; and lastly,

(c) Erred in finding that the appellant had failed to prove its case on a balance of probability.

In support of ground (a), the appellant relied on **Wambugu versus Njuguna [1983] KLR 172** for the assertion that as the party claiming ownership by adverse possession it had proved dispossession and or discontinuance of possession of the suit portion by the respondent but which proof the Judge erroneously failed to uphold and instead, made an erroneous finding that the respondent was never dispossessed of the suit portion contrary to the overwhelming evidence adduced before him.

The appellant continued to urge that the testimony adduced through DW2 was explicit that the disputed portion was meant for exclusive use as a wayleave which position had not been controverted by either

party. According to the appellant, it followed that any use other than the intended use carried out thereon without the consent of the respondent ought to have been construed as adverse to the respondent's intended use; that contrary to the Judge's finding in favour of the respondent, the appellant had adduced evidence to demonstrate that it had been utilizing the suit portion as a play ground and a garbage disposal site since 1985, a position confirmed during the site visit. Time therefore started running in its favour when it put the disputed portion into use other than the use the respondent had intended it for without the respondent's consent.

To buttress the above submission, the appellant relied **Mbira versus Gachuhi [2002] 1EA 137**, in which the Court set out the various conditions that a person claiming title by adverse possession has to prove in order to succeed.

Turning to ground (b), the appellant submitted that the learned Judge misapprehended the principles of a valid consent by a corporate body, by finding that in the instant appeal, it was not necessary for the alleged consent by a director of the respondent to the Director of the appellant to occupy the suit portion, to be in a formal agreement and that any form of mandate or permission suffices, including acts founded on amity and good neighbourliness.

To buttress the above submission, counsel relied on **Jandu versus Kirpal [1975] EA 225** for the proposition that consent vitiates a claim for adverse possession, save that we were urged to distinguish the circumstances obtaining in this appeal with those obtaining in the **Jandu versus Kirpal and another case** (supra) because according to the appellant, the Judge erred when she held that consent entered into by the respondents' and appellants' Directors in their personal capacities without being subsequently sanctioned by the respective company resolutions were valid and binding on the respective corporate entities. In so holding, argued appellant, the Judge misapprehended principles on corporate law. Further, that the Judge also failed to differentiate between consent to build the wall on the disputed portion, with the consent to exclusively possess and use the portion as a play ground and garbage disposal area, which in the appellant's view, were two distinct activities. In the appellant's view, the consent to construct the wall could not be used in the circumstances, to defeat the appellant's adverse possession claim through the unsanctioned use of the disputed portion as a children's play ground and dumpsite.

In opposition to the appeal, the respondent relied on **Kirugi & Another versus Kabiya & 3 others [1987] KLR 347** on burden of proof which is always on the plaintiff. **Gabriel Mbui versus Mukindia Maranya eKLR** for the holding that the burden of proving title by adverse possession rests upon the person so asserting. On the basis of the above propositions, the respondent urged us to find that the Judge was right when she held that the appellant did not prove its case on a balance of probability.

Turning to the issue as to whether the Judge misdirected herself when she held that the respondent maintained a presence on the suit portion through a third party; KP&LC, the respondent relied on **Haisbury's Laws of England 5th Edition (Volume 68)** for the proposition that an owner who occupies land is deemed to be in possession of it, but where such an owner has allowed a 3rd party to use the land without creating any kind of tenancy, then the owner is deemed to be equally in possession. On the basis of the above proposition, the respondent urged us to affirm the Judges' holding that both the appellant and KP&LC were in occupation of the disputed portion with permission from the respondent which in the respondents' view, was sufficient demonstration that the respondent as the party that gave permission to KP&LC and the appellant for the said occupation was in fact in occupation through the appellant and KPL&C as 3rd parties.

To buttress the above submissions, the respondent relied on **Wambugu versus Njuguna [1983] KLR**. The case of **Gabriel Mbui versus Mukindia Maranya** (supra) was also relied on for the principle that (i) an owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession where a person comes in and drives the owner out of the land; (ii) that the term "**dispossession**" imports ouster i.e, a driving out of possession against the will of the person in actual possession; (iii) that there is no driving out where the transfer of possession was voluntary, and not against the will of the person in possession but in accordance with the owners' wishes and active consent; (iv) that there must be some element of force coupled with some positive and unequivocal acts on the part of the person dispossessing

the owner which can be referred to only as an intent from the dispossessor of obtaining exclusive control over the property to the exclusion of the owner; (v) that the fact that nothing is done to improve or work on a piece of land is not evidence that a person had abandoned the possession or that he had otherwise been eliminated from the land and deprived of his ownership; (vi) that if a person does use his land either by himself or by some person claiming through him, he does not thereby necessarily discontinue possession of it, nor does that fact bring about the discontinuance of his possession.

In line with the above principles, the respondent urged us to find that, the initial purpose for setting aside the disputed portion was for use as a wayleave. It therefore followed that, the appellant's use of the suit portion for purposes of dumping waste and a children's play ground for the occupants of its own property could not in any way be construed as adverse possession as the wayleave granted to KP&LC was still in effect, a position, which according to the respondent was confirmed by the unchallenged testimony of DW2 in the first instance that the suit portion was exclusively used as a wayleave; and the site visit by the trial Judge with the participation of the respective parties which confirmed the presence of electricity poles, transformers, drainages and other utilities on the suit portion.

The respondent urged us to be guided by the persuasive holding in **Leigh versus Jack [1879] 5EX.D.264** for the proposition that in order to defeat a title through dispossession, the activities of the dispossessor must be inconsistent with those the title holder intended to use the land for. The respondent also relied on the persuasive proposition in **Wallis Gayton Bay Holiday Camp Limited versus Shellmex and B.P. Ltd [1974] 3.W.L.R 387** that when the true owner of the land intends to use it for a particular purpose(s) in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, such an owner does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose or for some seasonal purpose. On that account, the respondent urged us to find assertions that the appellant's act of creating a playing ground for children and a dump site for the occupants of its plot over the disputed property, did not substantially affect the original purpose for which the disputed portion was set aside namely to be used as a wayleave, which activities co-existed with those introduced by the appellant.

Turning to the issue of consensual use and or occupation by the appellant, the respondent relied on **Jandu versus Kirpal and another (supra)** for the proposition that if an occupier carries out activities on land with the express or implied consent of the owner, the land is occupied on behalf of the owner; **Mbira versus Gachuhi (supra)** for the proposition that possession and use of land for the requisite statutory period did not in themselves give rise to a claim for adverse possession because in order for such possession to be adverse, there has to be demonstration that such possession or occupation was inconsistent with and in denial of the title of the true owner of the premises; and **Virginia Wanjiku Mwangi versus David Mwangi Jotham Kamau [2013] eKLR** wherein, the Court found that the claimant had not satisfied the requirements of a claim for adverse possession as the claimant had been given permission by the owner to be in such possession. On that account, the respondent reiterated its earlier submissions that the Judge arrived at the correct conclusion on this issue, the same having been founded on the unchallenged testimonies of DW4, 5 and 6.

This is a first appeal. Our mandate as was restated by the court in **PIL Kenya Ltd Vs. Oppong [2009] KLR 442** is as follows:

“It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that.”

We have considered the record in the light of the rival submissions and case law set out above. In our view, two issues fall for our determination namely-

- (1) Whether the appellants alleged possession of the suit property was exclusive; and
- (2) Whether it was consensual.

With regard to issue number 1, the evidence of both PW1 and PW2, was to the effect that they were aware of the presence of electricity poles and transformers on the disputed portion, but were not aware as to who constructed and or maintained them. They assumed the transformers must have been built by KP&LC. DW1, who described himself as an electrical engineer on the other hand testified that he had been maintaining the electrical poles and the transformer (s) erected on the boundary wall separating the appellant's property from that of the respondent; DW2, a wayleave officer employed by KP&LC corroborated the testimony of DW1 that there were high tension power lines on the wayleave corridor, and that the respondent complied with the requirements with regard to the wayleave by leaving a distance of 5 meters from his boundary. The evidence of DW1 and DW2 highlighted above when considered in the light of that of PW1 and PW2, sufficiently ousts the appellant's complaint that the trial Judge failed to correctly evaluate the evidence adduced and misapprehended the principles of adverse possession, when she found that the respondent maintained its presence on the disputed portion through the poles and transformer(s) erected thereon by KP&LC with its (respondent's) permission.

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. As held by the Judge in the impugned judgment, the moment the appellant's witnesses conceded that they found the electricity poles and transformers already erected on the disputed portion; that these had all along been in use and were still in use as at the time the appellant initiated the OS and that it was not the appellant who authorized the erection and the continued maintenance of those electricity poles and transformer(s), the respondent's assertion that it is the one that authorized such presence stood unchallenged. The conduct of the respondent in this regard, falls within the ambit of the proposition in **Wambugu versus Njuguna** (supra) that if the owner has little present use of the land, much may be done on it by other persons without demonstrating a possession inconsistent with the owner's title.

In the light of the above, it is our view that, the Judge cannot be faulted when she made observations thus:-

“The defendant brought evidence of its use and maintenance of electricity poles on the disputed portion of land and the existence of the electricity supply lines that pass through the portion of land pursuant to the conditions of its title to the land.”

On the basis of the above, it is our finding that the appellant never dispossessed the respondent from the disputed portion as the respondent maintained its possession of the portion through KP&LC, through whom, the respondent continued to exercise and enjoy its proprietary rights.

As for the implication of condition 16 of the Grant on the respective parties' competing interests, our consideration of the record does not reveal anything that can fault the Judges' holding that the said condition obligated the respondent as the owner of the disputed portion not to erect any buildings on the disputed portion so as not to interfere with the laying and maintenance of the power lines and other utilities undisputably mentioned as existing on the disputed portion. The trial Judge cannot also be faulted for holding that the respondent in obedience to the said condition never erected any buildings thereon and that KP&LC's egress and ingress thereon was with the permission of the respondent. That finding was in line with the persuasive proposition in **Wallis Cayton Bay Holidays Camp Ltd versus Shell Mex and BP Ltd** (supra) that when a true owner of the land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose.

Turning to the second issue as to whether the use of the disputed property was consensual, the position in law as expounded by case law highlighted above is that, a person who occupies another person's land with that other persons' consent cannot be said to be in adverse possession. It therefore follows that in order for the appellant to succeed in faulting the findings of the Judge on this issue, it was obligated to demonstrate that it entered the suit land more or less as a trespasser as opposed to an entry with the consent of the owner. When finding against the appellant on this issue, the Judge relied on the testimony

of DW5, and as corroborated by the testimony of DW6 to the effect that the Directors of both entities were on friendly terms, and that it was on the basis of that mutual friendship that the appellant was allowed use of the disputed portion solely for purposes of addressing security concerns raised by the appellant over the safety of the occupants of its property by reason of members of the public accessing the appellant's property through the disputed portion. That is why she made the following observations in her Judgment:

“Consent by an owner of land to another to occupy the land does not have to be in a formal agreements and any form of mandate or permission can suffice including acts founded on amity and good neighbourliness....”

It was also common ground that the Judge heard witnesses of the respective parties who tendered evidence before her and was therefore in a position to form an impression of their demeanor. That is why she made observations thereon as follows:-

“From the evidence of DW4, DW5 and DW6, it was evident that DW4 was not only a former Director of the plaintiff but also a good family friend with the defendant's Director. The initial occupation by the plaintiff was therefore based on this friendship and was to that extent consensual.”

Nowhere in the appellant's submission has the issue of long friendship between the Directors of the two entities been challenged as having been nonexistent. All that the appellant said was that, in order for the verbal arrangement to hold, it ought to have been sanctioned by the respective companies' resolutions none of which were tendered. In the absence of evidence of existence of such resolutions having been resorted to by the respective companies, the Judge had no alternative but to fall back on the demeanor of witnesses to provide a solution. She believed those of the respondent as truthful as opposed to those of the appellant. We are enjoined by law not to interfere with that observation as in law, it is the trial Judge who heard and saw the said witnesses testify who is in a better position to gauge their demeanor. An appellate court can only interfere if it is satisfied that there was a misapprehension of the facts or the law with regard to the impression so found. None has been demonstrated herein. See **Selle versus Associated Motor Boat [1968] EA 123.**

The upshot of the totality of the above assessment is that we find no merit in this appeal. It is accordingly dismissed with costs to the respondent both on appeal and in the High Court.

Dated and Delivered at Nairobi this 18th day of May, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar