



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 105 OF 2015

JANE JEPTOO SAWE.....APPELLANT

VERSUS

ESTATE OF SYSVESTER

KIMAGUT SANG Represented by

JENNIFER CHEBET SANG.....RESPONDENT

(An Appeal from the Judgment and Decree of the

High Court of Kenya at Kitale, (E. Obaga,J.)

dated 5th May, 2015

in

Environment & Land Case No. 122 of 2012)

JUDGMENT OF THE COURT

[1] This is an appeal from the Judgment and decree of the Kitale Environment and Land Court (ELC) (Obaga, J.), allowing the respondent's suit against the appellant. The substantive reliefs granted against the appellant were a declaration that the late Sylvester Kimagut Sang is the sole registered owner of land title No. Kaplamai/Kachibora Block 2/Mateket/95, eviction order and a permanent injunction restraining the appellant from interfering with the land.

[2] The appellant is the widow of Gideon Kiplangat Bore who died on 30th June, 2005. The deceased was the registered proprietor of land title No. Kaplamai/Kachibora Block 2/Mateket/103 comprising of about 16 acres.

The Respondent is the widow of Sylvester Kimagut Sang who died on 13th January, 2011. He was the registered proprietor of land Title Kaplamai/Kachibora Block 2/Mateket/95 comprising of 3.197 Hectares said to be about 8 acres.

[3] On 28th September 2012, the respondent as a personal representative of her deceased husband filed a suit claiming that the appellant was unlawfully occupying six acres of her husband's land title No. Kaplamai/Kachibora Block 2/Mateket/95 which is in the same neighbourhood as the land registered in the name of the appellant's deceased husband.

She averred that the occupation of the land by the appellant was as a result of a contested sale. In the plaint, she referred to three previous proceedings before the Land Disputes Tribunal relating to the disputed sale of six acres culminating in the Kitale High Court Miscellaneous Civil Application No. 76 of 2010 where the High Court on 15th March, 2012 quashed the decision of Kaplamai Land Disputes Tribunal awarding the appellant six acres.

The Respondent averred that the occupation of six acres by the appellant had no legal basis and that she was a trespasser. She gave evidence

at the trial and did not call any witnesses.

[4] The appellant in her statement of defence denied that she was a trespasser and averred that her deceased husband purchased the land from the Respondent's deceased husband by three agreements of sale dated 24th April, 1983, 1st April, 1985 and 29th April, 1985 respectively and further that she was entitled to the land by adverse possession since 1983.

She gave evidence at the trial and called three witnesses, namely, William Kipkosgei Murei, Francis Kiplangat Sitienei and Gilbert Serem Tuga.

[5] The Respondent gave evidence at the trial relating to the previous proceedings partly as follows:

In 1987, her husband told her that Gideon Bore Sawe had leased the land but the latter claimed to have bought the land. She then filed land Tribunal Case No. 5 of 1987 before the Cherangani Land Disputes Tribunal for the recovery of the land. The land Disputes Tribunal awarded Gideon Bore Sawe 3 acres and 3 acres to her family. The decision was adopted as a Judgment of the court in Kitale Senior Resident Magistrate's Court Land Case No. 10 of 1987.

She and Gideon Bore Sawe were not satisfied with the decision and the latter filed an application for an order that the award be set aside and be remitted to the Tribunal for re-consideration. The application was allowed but Gideon Bore Sawe died before the proceedings were heard. After the demise of Gideon Bore Sawe the appellant filed another claim before the Kaplamai Land Disputes Tribunal which awarded her the entire six acres. The award was adopted as a Judgment of the court in Kitale Chief Magistrate Court Land Case No. 25 of 2010.

Thereafter, the respondent filed Judicial Review application - Kitale High Court Miscellaneous application No. 76 of 2010 seeking an order that the award be quashed. The judicial review application was allowed on 15th March, 2012 and subsequently the respondent filed the suit which gave rise to this appeal.

The appellant testified that her husband died before the Land Disputes Tribunal re-heard the case but that she was not aware of the decision quashing the award of six acres to her.

[6] The learned Judge considered the evidence and made findings, *inter alia* that;

(i) The appellant could not claim the six acres land based on agreements of sale entered between 28th April, 1983 and 1st April, 1985 as the agreements became void after six months for lack of consent of the Land Control Board.

(ii) The appellant's claim to land by adverse possession could not succeed because the appellant has not had a peaceful and uninterrupted possession of the land for the continuous period of 12 years since the agreements of sale became void. In this respect, the learned Judge made a finding of fact that the possession of the appellant was interrupted slightly over three years by the filing of a claim by the respondent before the Land Dispute Tribunal in 1987.

(iii) The appellant was not entitled to the land by equitable doctrine of constructive trust in the circumstances of the case and more so because there was no counter-claim.

[7] The appeal is solely against the Judge's findings with regard to the claim to land by adverse possession.

Firstly, it is contended that the learned Judge erred in law and in fact in finding that the filing of Kitale Resident Magistrate's Land Case 10 of 1987 effectively stopped time from running for purpose of adverse possession. In support of that ground of appeal, **Mr Katama Ngeywa**, the learned counsel for the appellant gave several reasons why Land Case No. 10 of 1987 could not have stopped time from running including the fact that the respondent had no capacity to file the claim as she had no proprietary interest in the land; the claim was filed against Gideon Bore and not against the appellant in her personal capacity; title to land did not exist in 1987 as land was vested in Settlement Fund Trustees (SFT). Counsel submitted that the suit filed before the Land Disputes Tribunal was irrelevant and time did not run before the respondent was registered as proprietor on 14th October, 1993.

Mr Kiarie, learned counsel for the respondent, while conceding that time started running on 14th October, 1993 submitted that the learned Judge was correct in his finding that the filing of the suit by the respondent against the appellant's husband stopped the time from running.

[8] It is true that the learned Judge based his decision that possession was interrupted on the fact that the respondent had filed a claim to recover the land from Gideon Bore. The appellant's counsel now submits that the suit was irrelevant for purpose of computing time as the land was vested in SFT and Sylvester Kimagut Sang, the husband of the respondent was registered as proprietor thereafter on 14th October, 1993. The respondent produced a certified copy of the register of the suit land which indicates that the Government of Kenya was registered as proprietor on 14th October, 1993 and, on the same day, the respondent's husband was registered as the proprietor.

The respondent relied on **Francis Gitonga Macharia v Muiruri Waithaka [1998] eKLR**, a decision of this Court to the effect that the right to claim adverse possession accrues when a person against whom a claim is brought becomes a registered owner. Further, **section 40 (1)** of the Limitation of Actions Act provides, *inter alia*, that, the Act does not enable a person to acquire any title to Government land.

As the certified extract of title indicates, the suit land was Government land before the husband of the respondent was registered as the proprietor. Since Gideon Bore could not in law have been in adverse possession of the suit land in 1987, the learned Judge erred in finding that adverse possession was interrupted by the filing of the suit by the respondent.

For the same reason, it would be futile to consider whether the respondent had capacity to institute the suit and whether the suit was capable of interrupting adverse possession.

[9] Secondly, the appellant contended that the learned Judge erred in law and fact in not finding that the appellant or her late husband had been in adverse possession of the suit land for over twelve years from the date of registration that is from 14th October, 1993 to 2005 or to 28th September, 2012 when the suit giving rise to this appeal was filed.

On the other hand, the respondent's counsel submitted that 12 years had not expired since 30th June, 2005 when the appellant's husband died; that the suit was not filed against the estate of the appellant's deceased husband; that there was no counter-claim for adverse possession; that the appellant had no independent possession of suit land from that of her deceased husband and that the 12 years had not expired from date of death of the appellant's husband and the date of filing the suit.

[10] By **section 38 (1)** of the Limitation of Actions Act, a person who claims to have been entitled to registered land by adverse possession may apply to the High Court for an order that he be registered as proprietor in place of the person then registered as proprietor of the land.

Further, by **section 28 (4)** of the Land Registration Act, 2012, rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription are overriding rights to which registered land is subject without being noted on the register.

In the absence of a counter-claim by the appellant seeking to be registered as proprietor of the suit land by adverse possession or other proceedings for that relief, the court could not have ordered the appellant to be registered as proprietor. However, since rights acquired or being acquired by adverse possession under the Limitation of Actions Act are overriding interests, the defence by the appellant that she was entitled to the suit land by adverse possession, if proved to the required degree, would have been a sufficient defence to the claim for eviction and permanent injunction such as was made by the respondent.

[11] In this case, Gideon Bore died on 30th June, 2005 11 years and 8 ½ months after Sylvester Kimagut Sang was registered as proprietor of the suit land. It follows, therefore, that the 12 years statutory period had not expired and the title of Sylvester Kimagut Sang had not been extinguished under section 17 of the Limitation of Actions Act and a claim to land by adverse possession could not have been made on behalf of the estate of the Gideon Bore.

As regards the appellant's own claim of the land by adverse possession, the evidence showed that it was her deceased husband who was claiming the land by purchase and that at the time of his death there was a pending land case before the Land Disputes Tribunal in which he was a party.

The appellant and her deceased husband were living in their own land which is near to the land in dispute. The appellant did not claim in her evidence that she has been at any time in possession of the suit land or claim any proprietary interest. Indeed, her evidence was that it was her son who was residing and cultivating the suit land.

It is clear, therefore, that the appellant did not prove that she was in possession of the land before her husband died. However it was not disputed that the appellant was in control of the suit land after her husband died. Indeed, she filed a suit before the Land Disputes Tribunal to recover the land after the death of her husband. However, the period of her possession from the time her husband died upto 28th September, 2012 when the suit was filed is approximately 7 years and 3 months which is less than the statutory threshold of 12 years.

[12] There was no appeal against the finding of the learned Judge that the equitable doctrine of constructive trust did not apply in the circumstances of the case.

[13] For the foregoing reasons, we are satisfied that the court below reached the correct decision. Accordingly, the appeal has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR