



IN THE COURT OF APPEAL

AT ELDORET

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

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 69 OF 2015

BETWEEN

SUSAN MOSS.....APPELLANT

AND

SILAS SIELE STEPHEN.....1ST RESPONDENT

DAVID SISIMWO STEPHEN.....2ND RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale

(Obaga, J.) dated 28th day of May, 2015

in

ELC NO. 111 OF 2011

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the Kitale Environment and Land Court (*Obaga, J.*) whereby the court decreed that the respondents had acquired 125 acres out of title No. LR. No. 1948/10 registered in the name of Daniel Chepnoi Naibei Moss (DCN Moss) by adverse possession.

[2] The appellant is the widow of DCN Moss who died on 6th August, 1984. By a grant of representation dated 7th December, 1988, the appellant was appointed as the personal representative of D.C.N. Moss. The 1st and 2nd respondents Sisimwo Sila Siele and David Sisimwo are sons of Stephen Haron Sisimwo who died on 12th June, 1998. The two respondents are also the personal representatives of Stephen Haron Sisimwo by virtue of grant of letters of administration dated 11th April, 2005 which was later amended.

[3] By an originating summons dated 19th December, 2011, the respondents sought two main orders, namely, that they be deemed to have acquired 125 acres out of 469.5 acres in LR. No. 1948/10 through adverse possession since 1992 and that the 125 acres purchased by Stephen Sisimwo be vested in the two respondents who are the administrators and beneficiaries of the estate of Stephen Haron Sisimwo.

The originating summons was supported by the affidavit of the 1st respondent and annexed documents. The appellant filed a replying affidavit opposing the originating summons. At the hearing of the suit, the originating summons was converted into a plaint and the replying affidavit as a defence.

Thereafter, the 1st respondent gave oral evidence and called two witnesses, Samson Kachuwai Arap Mayiek and Geoffrey Psia Sisimwo. The appellant also gave oral evidence but did not call witnesses.

[4] The respondents' case was briefly as follows.

The suit land LR 1948/10 measuring 469.5 acres was registered in the name of DCN Moss 1974 as proprietor as lessee from the Government for the remainder of the term of 999 years from 1st July, 1919.

On about 2nd February, 1983, the respondents' father Stephen Sisimwo and four others known as Museng group entered into a sale agreement with DCN Moss whereby the latter sold 225 acres to Museng group out of which the respondents' father was to get 125 acres. However, DCN Moss died in 1985 and immediately the appellant started interrupting the quiet enjoyment and possession of Museng group. The respondents' father and the four others filed a claim before Saboti Land Disputes Tribunal whose decision was adopted as decree of the court by Kitale Senior Resident Magistrate's Court in Land Case No. 25 of 1988. The decree of the court dated 19th May, 1988 was produced as exhibit and states in part:

1. Applicants group are entitled to 225 acres of Land Parcel No. L.R. 1948/10

2. The boundaries between the aforesaid 225 acres occupied by applicant's group and the respondent's family be as it was during the late Moss's lifetime"

The appellant filed an appeal - against the decree in High Court Civil Appeal No. 20 of 1988 which was summarily rejected on 2nd August, 1988.

Subsequently, an eviction order dated 16th December, 1991 was issued by Senior Resident Magistrate's court and the appellant was evicted and both parties occupied their respective portions which they have occupied without interruption since 1992.

In 1988, the appellant without the knowledge of the respondents filed Nakuru Succession High Court Succession Cause No. 121 of 1988 excluding Stephen Sisimwo as a beneficiary and a certificate of the confirmation of the grant was issued on 9th February, 2007. When the respondents came to learn of the succession cause in March, 2009, they filed a summons for the revocation of the grant but the application was dismissed on the ground that they should have filed a suit instead.

[5] The appellant's case as disclosed by her replying affidavit and the evidence is summarised below.

The parents of the respondents entered into the land through a lease, which she produced, dated 22nd November, 1979, whereby DCN Moss leased 220 acres of the suit land to Museng Farm Limited for a period of five years to expire on 22nd November, 1984. The appellant's husband died before the lease expired,

Upon expiry of the lease, the appellant asked Museng group to vacate but they refused and since then there has been running court cases.

The deceased, DCN Moss did not agree to sell the land to Museng group but there was a proposed agreement of sale for which consent of the Land Control Board was not obtained. The respondents' father and the respondents have all along been living at a place called Museng, and have never lived in the suit land or built permanent structures.

The respondent denied that she has ever been evicted from the suit land.

[6] The learned judge after analysing the evidence made a finding that the respondents could not claim adverse possession on behalf of the estate of their deceased father for the reason that the deceased did not enjoy continuous, peaceful possession for a period of 12 years as the deceased's possession was interrupted in 1988 when DCN Moss's family filed an appeal to overturn the verdict in favour of Museng group.

However, the court made a finding that the respondents in their own right had acquired the land by adverse possession and reasoned:

"In the present case it is clear that the plaintiffs' possession of the land since 1992 was open, uninterrupted and adverse to the title of D.C. N. Moss. The family of DCN Moss did not take any active step to evict them. The only step taken by the defendant to lay a claim to the estate of D.C.N. Moss and by extension the suit land was in 2009 when the defendant filed Succession Cause No. 71 of 2009. By this time, the period of 12 years was long over and the title holder had been dispossessed of the same, the plaintiffs having been in continuous occupation uninterrupted since 1992"

[7] The grounds of appeal in essence fault the finding of the court on the ground that the 125 acres awarded were not identifiable and that the elements of adverse possession were not proved.

Mr. Wanyonyi, the learned counsel for the appellant submitted, *inter alia*, that the 225 acres had not been surveyed and boundaries fixed, the respondents came into the possession of the land through a lease agreement and the entry was not therefore hostile, that the suit land had no owner from date of death of DCN Moss until 28th October, 2011 when appellant was granted letters of administration and that the eviction order was against Moss's family and not specifically against the appellant.

[8] On the other hand, Mr. Balongo, learned counsel for the respondents submitted, amongst other things, that the appellant was sued as administratrix of the estate DCN Moss, the registered proprietor; that the respondents entered into the land with the consent of their father; that the respondents entered into possession through a sale and not through a lease agreement; that the occupation of the respondent became adverse when the sale agreement became invalid for lack of consent of the Land Control Board; that respondents were claiming 125 acres

which was the share of their father while the share of the other members of the group was 100 acres and, that, the respondents have been in continuous possession without interruption since 1992.

[9] To be entitled to land by adverse possession, the respondents had to prove that they had been in exclusive and continuous possession of 125 acres openly, without force, with the knowledge of the owner and without interruption for a period of 12 years. Adverse possession must be distinguished from illegal possession.

Section 16 of the Limitation of Actions Act provides:

“For the purposes of provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”.

Since therefore administration dates back to the time of death, the contention by the appellant that the land had no owner until the appellant was granted letters of administration in 2011 is not valid. In any case, the documents produced at the trial show that the appellant was issued with a grant of representation on 7th December, 1988 which was confirmed on 9th February, 2007.

[10] The originating summons which was converted to a suit shows that the respondents sought two reliefs, firstly that they were entitled to 125 acres by virtue of adverse possession and, secondly, that the estate of their deceased father to which they were administrators was entitled to 125 acres by virtue of purchase. The record does not show that the second claim was abandoned. Indeed, substantial evidence was presented to support the claim that the respondents’ father and four others purchased 225 acres from D.C.N. Moss.

The decree in Kitale Senior Resident Magistrate’s court Land Case No. 25 of 1988 shows that the plaintiff was “Moss family” while the defendant was “STEPHEN SISIMWO & GROUP”.

That decree gave “Stephen Sisimwo & group” 225 acres and further ordered that the boundary of the 225 acres and the remaining land belonging to “Moss family” be as it was during the late D.C.N. Moss’ lifetime.

The respondents’ case was that out of the 225 acres, their deceased father was entitled to 125 acres and the other members of the group to 100 acres.

The eviction order on which the respondents relied again ordered “Moss Family” to be evicted from the portion of 225 acres belonging to “Stephen Sisimwo and his group”

The 1st respondent testified at the trial that he and the 2nd respondent live on the land; that his deceased father is not buried in the land, and that his co-administrator live in another land.

Samson Kuchwai Arap Mayiek testified that the two widows of Stephen Sisimwo live in a different land (*Museng farm*), that it is Geoffrey Sisimwo (PW3) who lives on the disputed land. On his part, Geoffrey Psia Sisimwo testified that the two respondents live on the disputed land.

However, according to the appellant, the respondents’ father never lived in the land in dispute and the respondents live in another piece of land and that there were other families living on the disputed land.

[11] From the evidence which was tendered at the trial, there was no evidence that the 225 acres claimed by “Stephen Sisimwo & group” was ever demarcated to separate and earmark the acreage of 125 claimed by the respondents and the 100 acres claimed by the rest of the group. There was evidence that other people are also occupying the land. In addition, there was also evidence that Stephen Sisimwo and his family were living in another land and did not settle on the said land.

Further, there was no clear evidence that the two respondents are exclusively in possession of a specific portion of the suit land.

It seems to us that the respondents were ostensibly by adverse possession claiming the acreage that their deceased father would have been entitled to from the group’s claim of 225 acres.

For those reasons, we would agree with appellant’s counsel that the respondents did not establish that they were exclusively in possession of an identifiable portion of 125 acres of the expansive 469.5 acres.

[12] The respondents claimed that their father entered into the land by virtue of a purchase agreement while the appellant claimed that the entry was through a lease agreement.

The lease was for a term of 5 years which expired on 25th September, 1984.

The sale was disputed and the High Court did not determine the validity of the sale. There is no cross-appeal and in this appeal we are not called upon to determine the validity of the alleged sale.

However, the respondents have throughout maintained that there was a valid sale of 225 acres to Museng group.

On 17th March, 2009, the 1st respondent filed an application for revocation of grant in High Court Succession Cause No. 71 of 2009 on the basis that the respondent fraudulently failed to disclose that there was an agreement of sale of 225 acres and the decree dated 26th May, 1988. So, up to 2009, the respondents were claiming entitlement to 225 acres by way of sale.

The decree dated 19th May, 1989 awarded “Stephen Sisimwo & group” 225 acres.

The respondents entered into the land through their father who was claiming a purchaser’s interest of part of 225 acres. After the death of their father, the respondents continued to claim the land as personal representatives of their deceased father. Although the respondents’ father died on 12th June, 1998, the grant of representation dated 11th April, 2005 by dint of section 16 of Limitation of Actions Act relates back to the time of death meaning that up and until 11th April, 2005, the respondents’ possession of land was by virtue of grant of representation.

The respondents could not have been in possession of the land in two capacities, as individuals independently of the possession of their father and as personal representatives of the estate of their deceased father. Furthermore, the claim of adverse possession could not run parallel to claim of land and possession by virtue of purchase.

[13] It follows from the foregoing, and we hold, that, up to 12th June, 1998 when the respondents’ father died, the respondent entered into possession of part of the suit land with permission of their deceased father who, in turn, was in possession pursuant to a disputed agreement of sale and also pursuant to a decree of Senior Resident Magistrate’s court dated 19th May, 1998 and that thereafter the respondents were in possession of the land as personal representatives of their deceased father.

We further hold that the High Court erred in law in holding that the respondents were in adverse possession of the land from 1992.

[14] Lastly, the learned judge failed to appreciate that the entry into the land by the respondents was not peaceful and that the appellant took action to regain possession.

Firstly, the finding of the learned judge that the only action taken by the respondent was in 2009 when she filed Succession Cause No. 71 of 2009 is factually erroneous. The evidence showed that the appellant filed Nakuru High Court Succession Cause No. 121 of 1988, obtained a grant of representation on 7th December, 1988 and that by a certificate of confirmation of grant dated 9th February, 2007, the entire land including the portion in dispute was distributed to the beneficiaries of D.C.N. Moss. It seems that the Succession Case No. 71 of 2009 filed in the High Court, Kitale refers to the summons for revocation of grant filed by the 1st respondent.

Secondly, there was evidence by the appellant that when the lease expired the Museng group refused to vacate the land and that there has been legal battles since then. There was also evidence that the appellant filed an appeal – appeal No. 20 of 1988 against the decision of the Senior Resident Magistrate’s court at Kitale but the appeal was summarily rejected. The suit giving rise to this appeal was filed on December, 2011, fourteen years after the estate of D.C.N. Moss was distributed.

In the light of the decree in the Senior Resident Magistrate’s court, Kitale dated 19th May, 1988, the appellant could not have evicted the Museng group without breaking the law.

[15] For the above reasons, we are satisfied that the respondents did not prove the claim to land by adverse possession. We allow the appeal, set aside the judgment and decree of the Environment and Land Court and in lieu thereof dismiss the respondents claim. The respondents shall pay the costs of this appeal and the costs in the court below to the appellant.

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