



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 53 OF 2017

BETWEEN

MOMBASA TEACHERS CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LIMITED.....APPELLANT

AND

ROBERT MUHAMBI KATANA & 15 OTHERS.....RESPONDENTS

(An appeal from the judgment of the Environment and Land Court at Mombasa (Omollo, J.) delivered on 29th June, 2017

in

E.L.C No. 20 of 2012 (OS) as consolidated with

E.L.C No. 240 of 2012.)

JUDGMENT OF THE COURT

1. The appeal herein relates to competing interests between the parties over a parcel of land described as **364/MN/1** (suit property). The appellant's claim is based on the title issued in its favour while the respondents claim is pegged on the doctrine of adverse possession.

2. According to the respondents, they had gained entry into the suit property, occupied various portions thereof without permission for a continuous and uninterrupted period of over 12 years prior to the registration of the same in the appellant's favour. They continued having uninterrupted possession even after the sale of the suit property to the appellant. As far as they were concerned, they were entitled to be registered as the proprietors in place of the appellant hence, they filed an originating summons at the Environment and Land Court (E.L.C) being **E.L.C. No. 20 of 2012** to that effect.

3. The appellant's version was that it purchased the suit property measuring 14 acres which was later registered in its favour on 10th December, 1997. At the time of purchase and registration, the suit property was vacant. The respondents invaded the suit property in the year 2011 after the appellant concluded a sale agreement with a third party, Jaki Enterprises Limited. As a result, the appellant considered the respondents as trespassers and filed a suit being **E.L.C No. 240 of 2014** praying for:

a) A declaration that the defendants are trespassers on the suit property.

b) A permanent order of injunction restraining the defendants, their family members, agents and/or servants from occupying, constructing, cultivating and/or remaining and being on the suit property or interfering in any manner whatsoever with the plaintiff's possession.

c) An order of eviction of the defendants from the suit property.

d) An order directing the Coast Provincial Commissioner and administration assisted by the Officer Commanding Station Bamburi Police Station to supervise and provide security during the eviction.

4. Following the court's directions both suits were consolidated and heard together with E.L.C. No. 20 of 2012 being the lead suit. In support of the respondents' case, 5 respondents testified. In his testimony, Robert Mulambi Kalama (PW1) stated that he had occupied the suit property since the year 1962 without any interruption. Bahati Hamisi (PW2) was born on the suit land in 1973 and had never left. In point of fact his parents were buried thereon. He had even sold a portion thereof for over Kshs.500,000. Similarly, Suleiman Kibwana Juma (PW3) and Bidhala Wajumaa (PW5) both gave evidence that they were born on the suit land. On the other hand, Katana Kombe Kiti (PW4) was not specific on the date he entered the suit land but stated that he entered the suit property when he was young and has continued living thereon with his family.

5. Sona Makau Mutuku (DW1), the then chairman of the appellant reiterated that the suit property was vacant at the time it was purchased in the year 1996. He testified that respondents trespassed onto the suit property without any colour of right.

6. The trial Judge (**Omollo, J.**) after weighing the evidence before her agreed with the respondents and entered judgment in their favour which was delivered on 29th June, 2017. In her own words, she expressed:

***“The plaintiffs on their part narrated to (sic) Court the different years they got on to this land which has been more than 12 years. The plaintiffs have also stated that they have even sold portions of this land to third parties as their (sic) need arose which 3rd parties have also constructed on the land. DW 1 said the last time they went to the land was in the year 2000 when they wanted to replace the uprooted beacons. The evidence adduced by both sides show the defendant never took possession from the time they purchased this land. Accordingly, I am convinced that their rights have been extinguished by operation of the law in favour of the plaintiffs who dispossessed them.*”**

***Did the defendant have any title to pass on to the Interested Party when they entered into the sale agreement on 27th June 2011? I don't think so because time did not stop running against the defendant. The defendant only took steps to claim their land after the plaintiffs had filed their suit for adverse possession. Therefore, the sale agreement does not add any value to the defendant's case that they have sold neither can the interested party claim any rights over the land since such rights if any had been extinguished by the provisions of section 7 of the Limitation of Actions Act Cap 22. The interested party's claim must also collapse.*”**

In light of the foregoing I do safely conclude that the plaintiffs have proved their case on a standard of probabilities as is required under the law. Accordingly, I do enter judgement in their favour as prayed in their originating summons...”

7. Ultimately, the learned Judge issued the following orders:

***“i) That the plaintiffs be registered as the proprietors in common of the land comprised in the title No 3634/MN/II – CR No 24635 in place of the defendant.*”**

ii) That the defendant and his servants and or agents be restrained by way of permanent injunction from entering the suit land or demolishing the plaintiffs' houses and structures and or evicting the plaintiffs, their families & tenants and or interfering with the plaintiffs' peaceful occupation of the suit land.”

8. The appellant took issue with that decision thus, it filed this appeal complaining that the learned Judge erred in fact and law by:-

***“i) Granting the prayer of adverse possession despite the lack of evidence to establish the same.*”**

***ii) Failing to give weight to the appellant's evidence.*”**

iii) Ordering that the respondents be registered as proprietors in common.”

9. Rising to his feet, Mr. Ngonze holding brief for Mr. Wachira, for the appellant, begun by attacking the learned Judge's finding on adverse possession. He argued that firstly, the respondents had not identified the specific and distinct portions they occupied and/or were entitled to by virtue of adverse possession. He added that it was crucial for the said portions to be identified since it was the respondents' own evidence that the suit property was not only occupied by over 200 people but also that it had not been surveyed. To buttress that line of argument reliance was placed on this Court's decision in ***Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others [2004] eKLR.***

10. Secondly, that the learned Judge erroneously granted the orders in question in favour of a large amorphous group yet no evidence was led with respect to the area occupied and the length of occupation by each, all of which were essential to the doctrine of adverse possession. In that regard, counsel referred us to the High Court's decision in ***Daniel Kimani Ruchine & Others vs. Swift Rutherford Co. Ltd. & Another [1977] eKLR.***

11. Besides, the suit was not a representative suit and the learned Judge was wrong to grant the orders in favour of over 200 people allegedly occupying the suit property. He contended that each person claiming the suit property by virtue of adverse possession was required to tender evidence in support of his/her claim. What is more, the learned Judge also failed to appreciate that some of the respondents testified that they had sold portions of the suit property to third parties.

12. Thirdly, the evidence tendered by some of the respondents clearly indicated that their occupation had been interrupted by the appellant. Elaborating further, counsel submitted that Robert (PW1) and Suleiman (PW3) testified that they had occupied the suit property without any problem until the appellant purchased the same. It was the appellant's uncontroverted evidence that it had made several attempts to survey and subdivide the suit property. It is on those grounds that we were urged to allow the appeal.

13. In opposing the appeal, Mr. Shimaka, learned counsel for the respondents, contended that the appeal turned on one major issue, namely, whether the respondents were entitled to the suit property through adverse possession. In his view, the evidence tendered on behalf of the respondents satisfactorily established their entitlement to the suit property.

14. Counsel submitted that the respondents' suit was a representative suit and the evidence tendered by the 5 respondents' witnesses was sufficient to establish the interest of over 200 people who were in occupation of the suit property. He went on to argue that the respondents were claiming ownership of the entire suit property on their own behalf as well as on behalf of other occupiers thereon.

15. We have considered the record, submissions by counsel and the law. As this is a first appeal we are guided by the principle enunciated by the predecessor of this Court in ***Selle vs. Associated Motor Boat Co. [1968] E.A. 123 at P. 126:***

“An appeal to this court from a trial by the High Court is by way of retrial 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 witnesses 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 in the case generally.”

16. Having perused the impugned judgment, our minds are clear that the orders issued therein were not in favour of the alleged over 200 people but the respondents. It would have been absurd for the learned Judge to have issued orders in favour of unknown/unidentified persons. Furthermore, we do not think the suit as filed by the respondents was a representative suit within the meaning of **Order 1 rule 8** of the **Civil Procedure Rules** which reads in part as follows:-

“8

1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.”

This is because a notice of institution of the suit as a representative suit as envisaged under **Order 1 rule 8(2)** was not issued.

17. Circumstances under which the title of a registered owner can be defeated by a claim of adverse possession was succinctly set out by this Court in ***Peter Kamau Njau vs. Emmanuel Charo Tinga - Civil Appeal No. 29 of 2016 (unreported)*** as follows:-

“A registered owner of land, may not, by the provisions of section 7 of the Limitation of Actions Act bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner’s title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner’s permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner’s enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner.”[Emphasis added]

18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See ***Jandu vs. Kirplal & Another (1975) EA 225***. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in ***Wambugu vs. Njuguna [1983] KLR 173***. Did the respondents discharge this burden?

19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See ***Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others (supra)***.

20. We cannot help but note that the evidence tendered in support of the respondents’ case was by five respondents. These respondents only gave evidence with relation to the dates they each entered into possession of the suit property. There was no evidence to show that such possession was without the consent of the former registered owner. The photographs of the structures erected on the suit property could equally not establish the absence of consent from the previous registered owner. In addition, we, unlike the learned Judge, find that no further evidence was given with respect to when the other respondents took possession. Without such evidence there was nothing to support the respondents’ contention that they had been in adverse possession of the suit property prior to the appellant’s title.

21. Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In ***Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR*** this

Court observed:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.” [Emphasis added]

22. In totality, the respondent’s had failed to prove they were entitled to the suit property by virtue of adverse possession. Consequently, as it stood the appellant’s title over the suit property was indefeasible rendering the respondents trespassers. In the circumstances, we find that the appellant was entitled to the orders it sought.

23. The upshot of the foregoing is that appeal herein has merit and is hereby allowed with costs. We hereby set aside the impugned judgment in its entirety and substitute the same with an order dismissing the respondents’ suit. Further, we allow the appellant’s suit in the following terms:

- i. The respondents are hereby declared as trespassers on the suit property.***
- ii. An order of eviction of the respondents from the suit property is hereby issued.***
- iii. The Officer Commanding the Bamburi Police Station to supervise and provide security during the eviction.***

The appellant shall also have costs at the ELC.

Dated and delivered at Mombasa this 14th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR