



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & M'INOTI, JJA)

CIVIL APPEAL NO. 241 OF 2013

BETWEEN

WOKI KAMONDE.....APPELLANT

VERSUS

LIVINGSTONE MUNYUI KINUTHIA.....1ST RESPONDENT

HARRISON WAGACHA KINUTHIA.....2ND RESPONDENT

MUNYUI KINUTHIA.....3RD RESPONDENT

ESTHER KANYI MUNGAI.....4TH RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Rawal, J.) Dated 8th April, 2008 In H.C.C.C. No. 3955 of 1993 (O.S))

JUDGMENT OF THE COURT

This is an appeal arising from the judgment of **Rawal, J.** (as she was then), dated the 8th day of April 2008, dismissing the appellants' originating summons (OS) with costs to the respondents.

The brief background to the appeal is that the appellant is a step sister to the 1st, 2nd and 3rd respondents, (the respondents), being children of **Paul Kinuthia Munyui** (deceased). The deceased was the registered proprietor of land parcel Number **Kiambaa/Ruaka/T.210**, (the suit property), on which he settled the appellant in 1958. On 6th October 1973, the deceased transferred the suit property to the respondents and another person by way of a gift *intervivos*. The OS resulting in this appeal was triggered by the respondents' sale and transfer of the suit property to the 4th respondent while the appellant was still settled thereon.

In the OS, the appellant contended that the deceased settled her on the suit property in his capacity as her father; that she was therefore entitled to it as of right; and that she was not aware of the transfer of the suit property to the respondents by the deceased. She denied any knowledge of or receipt of notices dated 5th December 1973, 5th January 1978 and 24th of June 1985, from the respondents, requiring her to vacate the suit property after the deceased transferred it to them. She also denied responding to the said notices on 10th February 1978 and 28th October 1991, seeking more time within which to vacate the suit property. According to her, in 1991 she was summoned to an elders' meeting at the instigation of the respondents, when they offered to sell the suit property to her, which she rejected, contending that she was entitled to the same as of right.

She acknowledged receipt of the respondents' letter dated the 21st October 1991 offering to sell to her the suit property, but denied authoring the purported response dated the 28th October 1991, seeking a reduction of the purchase price and extension of the time within which to raise the purchase price. She added that she was not aware of any negotiations by the respondents to sell the suit property to **Esther Kanyi Mungai**, the 4th respondent. According to her, she learnt of the sale and transfer of the suit property of the suit property to the 4th respondent in 1993, which prompted her to file the OS, seeking a declaration that she was entitled to the suit property by adverse possession, a declaration that the 4th respondent held the suit property in trust for her, an order bringing the said trust to an end, and an order for registration of the suit property in her name.

The respondents opposed the OS vide a replying affidavit in which they contended *inter alia* that upon the transfer of the suit property to them by the deceased on the 6th day of October 1973, they issued notices to the appellant, requiring her to vacate the suit property; that she responded to the said notices seeking time within which to vacate, but never did so; and that it was only after she failed to vacate that they offered to sell the suit property to her. The appellant was unable to raise the purchase price even after they reduced the same, and instead they sold the suit property to the 4th respondent. Although they conceded the appellant was their step sister and that she had been settled on the suit property by the deceased in 1958, they maintained that she was not settled as of right, but as a *muhoi* (a tenant at will). Lastly, they maintained that the appellant had no cause of action against them because they had already sold and transferred the suit property to the 4th respondent.

On her part, the 4th respondent opposed the OS vide a replying affidavit sworn on the 27th day of November 1998. She contended that she was a purchaser for value without notice; that she verified that title to the suit property was owned by the respondents before she entered into the sale agreement with them; and denied holding the suit property in trust for the appellant.

Upon dismissal of the OS, the appellant filed this appeal, contending that the learned judge erred by;

- 1. Construing receipt of the respondents' letter dated 21st October 1991 by the appellant as acknowledgement by her of the respondents' ownership of the suit property;**
- 2. failing to appreciate that the appellant had settled on the suit property in 1958 as of right;**
- 3. treating the appellant's acknowledgment of receipt of the respondents' letter dated 21st October 1991 as evidence that she was the author of the letters dated 10th February 1978 and 28th October 1991, which were disputed;**
- 4. holding that the appellant has reason to deny the authorship of the disputed letters because her case depended on such denial, but failed to make a similar finding against the respondents;**
- 5. giving undue weight to the evidence and demeanor of the respondents and disbelieving the evidence of the appellant who had testified before a different judge.**

The appeal was canvassed by way of written submissions, which learned counsel for the respective parties fully adopted but elected not to highlight.

The appellant submitted that the learned judge erred in finding that although the deceased settled her on the suit property in 1958, and that she had stayed thereon openly and with the knowledge of the respondents for more than twelve (12) years, adverse possession was interrupted in 1978 and 1991, when the appellant acknowledged the respondents' ownership of the suit property and authored the letter dated the 28th October 1991. The appellant also faulted the learned judge for holding that she had all the reasons to deny writing the letter of 28th October 1991, because, the success of her claim depended on that denial, but failed to appreciate that the success of the respondents' case also depended on their claim that she was the author of the letter. Lastly, the appellant contended that the learned judge misdirected herself by relying on the demeanor of the respondents, whilst she had no opportunity to observe the appellant's demeanor because a different judge took the appellant's evidence.

Opposing the appeal, the respondents relied on **Kweyu v. Omuto [1990] KLR 709**, **Wasui v. Musumba [2002] 1KLR 396**; and **Njuguna Ndatho v. Masai Itumo & 2 others, Civil Appeal No. 231 of 1999** in support of their submissions that the appellant's claim for adverse possession could not be sustained because it was initiated against the 1st, 2nd and 3rd respondents after they had ceased to hold title in the suit property. They also contended that the claim was unsustainable for the additional reason that the appellant acknowledged the respondents' proprietary rights over the suit property when she acknowledged receipt of the notices requiring her to vacate the suit property, and prayed for time to vacate and subsequently to purchase the suit property. They also contended that the OS was fatally defective for failure to annex the documents of title of the suit property.

As this is a first appeal, we are obliged to analyze and re-assess the evidence on record and arrive at our own conclusions on the matter. (See **Selle & Another v. Associated Motor Boat Co. & Others [1968] E.A. 123**). In **Jabane v. Olenja [1986] KLR 661** this Court stated, *inter alia*, that it will not lightly differ from the findings of fact by a trial Judge and will only interfere if the findings are based on no evidence. (See also **Ephantus Mwangi v. Duncan Mwangi Wambugu [1982-88] 1KLR 278** and **Mwanasokoni v. Kenya Bus Services [1982-88] 1KAR 870**).

Having carefully considered the evidence on record and the rival submissions by the parties, we are satisfied that only one issue falls for our determination, namely, whether the learned judge erred by holding that the appellant did not prove her claim for adverse possession against the respondents.

The learned judge found that the appellant's claim for adverse possession was based on Section 38 of the Limitation of Actions Act; that the appellant entered the suit property in 1958 with the consent of the deceased; that the deceased subsequently transferred the suit property to the respondents on the 6th October 1973; that the appellant acknowledged receipt of the respondents' letter of 21st October 1991 requesting her to purchase the suit property for Kshs 100,000/-; that she failed to raise the said purchase price after which the respondents sold the suit property to the 4th respondent; and that as at the time the appellant filed the OS on the 25th April 1993, the respondents had already divested themselves of title to the suit property in favour of the 4th respondent, who had purchased it for value.

It is common ground that the appellant was on the suit property from 1958 with the consent of the deceased. The deceased transferred the suit property to the 1st, 2nd and 3rd respondents on 6th October 1973 and the appellant continued to occupy the suit property openly and as of right

without the consent of those respondents. As correctly found by the learned judge, the period of adverse possession would have crystallized in October 1985, in the absence of any interruption or effective eviction of the appellant or re-entry by the 1st, 2nd and 3rd respondents. The respondents relied on the letters dated 5th December 1973, 5th January 1978, and 24th June 1985 and contended that the appellant's occupation of the suit property was interrupted when by a letter dated 10th February 1978, she requested for more time to vacate the suit property. The appellant however denied having received or responded to those letters and only acknowledged receipt of the letter dated 21st October 1991 offering to sell the suit property to her, but denied writing the response dated 28th October 1991 seeking reduction of the purchase price.

The appellant contends that there was no evidence that she received and responded to the letters she disputed and that the learned judge only found against her on the mere basis that she had admitted receipt of the letter of 21st October 1991, which was in favour of her case. Having carefully re-evaluated the evidence, we are satisfied that there is substance in the appellant's claim. The letters in question do not indicate when the respondents wrote them or when the appellant received them. Likewise, the contested responses purportedly written by the appellant do not show when she wrote them or when the respondents received them. From the record the appellant was consistent throughout her evidence-in-chief and cross-examination that she was not aware that the deceased had transferred the suit property to the respondents; that at no time did the respondents ask her to vacate the suit property even after the deceased had transferred it to them without her knowledge; and that the first time that she learnt of the transfer was in 1991 in the meeting of elders where she was summoned to appear at the respondents' instigation when they offered to sell the suit property to her, which she declined.

In our view, the respondents' evidence on the disputed letters left a lot to be desired. **Livingstone (D.W 1)** used the word "we" as regards who wrote the letters. It was also his evidence that because they sent a similar notice to a *muhoi* called **Ndirangu** who was on the suit property like the appellant, after which he vacated, the appellant must also have received the letters sent to her. **Harrison (PW 2)**, similarly used the plural "we" and could not tell who received the letter of 28th October 1991 or who delivered it to the respondents. The most he could do was "think" that Peter Njoroge, who was their secretary and was deceased at the time of the hearing, received it. He readily admitted that the appellant did not know how to write and that the letter did not have her thumbprint, but speculated that the letter could have been written for her by one of her sons.

We would also agree with the appellant that the learned judge, having not heard and seen all the witnesses when they testified, should not have placed much weight on the demeanor of the witnesses. The learned judge only heard and saw the respondents as they testified, and not the appellant, whose evidence was taken by a different judge. Moreover, the demeanor of the respondents could not make up for the lack of evidence, which we have alluded to above, or fill up gaps in their evidence.

To succeed in her claim, the appellant was obliged to demonstrate that the respondents held title of the suit property at the material time and that for a period of at least twelve years, she carried out peacefully, openly and as of right acts of ownership on the suit, which were inconsistent with the respondents' title (See **Warui v. Musimba** (supra), **Ng'ati Farmers Co-operative Society Ltd v. Councilor Ledidi & 15 others**, Nakuru CA No. 64 of 2004 and **Francis Gicharu v. Peter Njoroge Mairu**, Civil Appeal No. 293 of 2002. She also had to establish that her occupation of the suit property was without the permission or consent of the respondents. (See **Benjamin Kamau Mirima & others v. Gladys Njeri** Civil Appeal No. 213 of 1996 and **Wambugu v. Njuguna** [1983] KLR.

It is not in dispute that the respondents became proprietors of the suit property on 6th October 1973, when the appellant was already settled on the said suit property, having been so settled thereon by the deceased in 1958. 6th October 1973 was therefore the effective date for purposes of computing the period of limitation. The evidence on record shows that the appellant continued to exercise proprietary rights over the suit property openly, peacefully and as of right and without the permission of the respondents, from 6th October 1973 until 6th October 1985. The respondent did not adduce any evidence to show that the appellant's occupation of the suit property was interrupted over that period.

As regards the contentions that the OS was incompetent due to failure to annex a certified copy of the title and that the respondents had divested themselves of title to the suit property in favour of the 4th respondent when the appellant filed the OS, we do not think there is any merit in the assertions. The purpose of the requirement to annex an extract of the title is to satisfy the court on the existence and proprietorship of the suit property. (See **Symon Gatutu Kimamo & 587 Others v. East African Portland Cement Co Ltd** [2011] eKLR). In this case there is no dispute that the suit property was at the material time registered in the names of the respondents and subsequently in the name of the 4th respondent. The extract would be critical if there was a dispute as to the registered owner, which is not the case in this appeal.

As regards the transfer of the suit property to the 4th respondent, in **Githu v. Ndeete** [1984] KLR 776 this Court stated that the mere change of ownership of land which is occupied by a person claiming it by adverse possession does not defeat the claim for adverse possession and that where the rights of such person are overriding interests to which the new owners' title is subject. We reiterate that position. By the time the respondents sold the suit property to the 4th respondent in 1993, 12 years of adverse occupation of the suit property by the appellant had expired on 6th October 1985.

For the foregoing reasons, we allow this appeal, set aside the judgment of the High Court and substitute therefor an order allowing the appellant's OS filed in August 1993, as prayed therein. The appellant will have costs both in the High Court and in this Court

Dated and Delivered at Nairobi this 27th Day of July 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR