IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, AZANGALALA & GATEMBU, JJ.A)

CIVIL APPEAL NO 79 OF 2011

BETWEEN
GODFREY SHIMONYA PETER.............1ST APPELLANT
CORENEL GERMAN MUMIA...............2ND APPELLANT
GERALD OYEMBA MUMIA.................3RD APPELLANT
JOSEPHAT AFUBWA MUMIA............4TH APPELLANT
VERSUS
MARY ANYANGO AMEKA................1ST RESPONDENT
LEVI OMONDI AMEKA.....................2ND RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya

at Kakamega (Chitembwe J) dated 12th November, 2009

in

H.C. MISC. CIVIL APPL. NO. 82 OF 2006)

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JUDGMENT OF THE COURT

The dispute surrounding land Parcel LR NO. **BUTSOTSO/INDANGALASA/232** (suit property), the subject of this appeal, spans almost three decades with the parties litigating before the Land disputes Tribunal, the Senior Resident Magistrate's court Kakamega, the High Court and eventually ending up in this Court by way of this appeal.

We shall attempt to give a brief history of the same without delving into unnecessary detail for purposes of this judgment.

From the record of appeal before us, one **Frank Ameka** now deceased, (whose estate is represented in this appeal by the respondents herein), is said to have purchased the suit property from one **Omumia Ingabi alias Sebastiano Mumia Ingabi** (also deceased), on 30th August, 1973. According to Mr. Ameka, he purchased the suit property after doing due diligence and confirming that the land in question was registered in the name of Mr. Mumia, and further that the land was unoccupied.

Mr. Ameka did not take physical possession of the suit property immediately, and when he went to the land some years later, he found that Mumia's brother, **Andrea Salamu** had moved into the land and constructed some structures thereon. His pleas to Andrea to vacate the suit property were not heeded and so he filed suit in 1988, seeking *inter alia* orders of eviction from the suit property, mesne profits and a mandatory injunction against the defendant or any person claiming under him.

In his defence, Andrea maintained that he was still in occupation of the suit property when it was sold by his brother. He stated that although the suit property was registered in Mumia's name, he held it in trust for both of them.

The matter was fully canvassed before Mbogholi-Msagha J, who in a judgment dated 5th October, 1989, determined that Frank Ameka had established that he had purchased the suit property from Mumia Ingobi and was entitled to the orders he sought. This was followed a few months later by the Order of R.S.C Omolo J (as he then was) on 23rd March ,1990 issuing an eviction order against Andrea Salaam and anyone claiming under him and in default, force to be used to obtain vacant possession and demolition of any standing structures on the suit property.

Despite these orders and the failure to prefer an appeal, Andrea Salamu did not vacate the suit property. This resulted in Frank Ameka seeking eviction orders from the Court on several occasions which ultimately also proved unfruitful. He also sought assistance from the

former Attorney General, the Honourable Amos Wako, who wrote to the District Commissioner requesting the administration to co-operate instead of frustrating efforts to execute the Order of the Court.

The saga continued after the demise of the original parties to the suit and the matter was taken over by their respective kin. **Peter Amala Mumia, Corenel German Mumia, Gerald Oyemba Mumia, Josephat Afubwa Mumia** (the present appellants) and **Stanley Njirimani** filed a claim against **Mary Anyango Ameka** and **Levi Omondi Ameka** (the present respondents) at the **Kakamega Municipality Division Land Disputes Tribunal, Case No. 5 of 2004**.

From the record it is clear that **Stanley Njirimani** was the son to Andrea Salaam (deceased); whereas it would seem that **Peter Amala Mumia, Corenel German Mumia, Gerald Oyemba Mumia** and **Josephat Afubwa Mumia** were sons to Mumia Ingobi (deceased). **Mary Anyango Ameka,** wife to Frank Ameka (deceased) and **Levi Omondi Ameka,** son to the deceased were personal representatives and joint administrators of the estate of Frank Ameka.

The Tribunal conferred upon itself jurisdiction to hear the matter which had already been determined conclusively by the High Court. After hearing the parties, the Tribunal despite the objections by the respondents, rendered the decision dated 19th January, in which it pronounced itself as follows:

> "***This court therefore rules that the Mumia's shall continue to occupy and live on that land Butsotso/Indangalasia/232 according to land dispute tribunals Act section 3 sub-section 7. Each party to bear their own costs.***"

The respondents were obviously aggrieved by this decision and moved the High Court by way of a Notice of Motion dated 7th March 2007 seeking orders of Certiorari to *"quash the decision of the tribunal in Case No. 5 of 2004; and quash the proceedings in the* ***Resident Magistrate's Court Kakamega in Cause No. 70 of 2006*** *and any consequential orders resting in the reading and adoption of the Tribunal's award"*.

They also sought vacant possession of the suit property with costs. The application was premised on grounds, *inter alia,* that the tribunal exercised jurisdiction not vested in law by purporting to divest ownership from the registered owner of the suit property and granting "*rights of ownership, occupation and working*" to third parties. Further that the issue of ownership had already been judicially determined by the **High Court in HCCC No. 190 of 1988** not confer upon itself the jurisdiction subject matter.

(Mbogholi-Msagha J) and the tribunal could to re-open the dispute involving the same

The respondents also added that the tribunal had failed to satisfy itself as to the appellants' locus before deciding to entertain the dispute since unlike the respondents who were representatives and administrators of the registered proprietor, the appellants had no basis or locus to claim ownership over the suit property.

In a replying affidavit sworn on 15th November, 2007, by Corenel German Mumia on behalf of the appellants, it was deponed that the tribunal did not adjudicate over the title nor divest ownership of the suit property, but merely held that the appellants had a right to occupy and to work on the suit property. Further, it was deponed that none of the appellants were a party to HCCC No. 190 of 1988 and therefore that case was not applicable or relevant to the present proceedings.

Before the motion for judicial review was heard, the appellants who were named as the interested parties in the motion, filed a Chamber Summons application dated 30th December, 2008 seeking orders of transfer of title of the suit property to their names by virtue of adverse possession; as well as a declaration that the respondents are holding the suit property in trust for the appellants, and in default an order authorising the Deputy Registrar of the High Court to execute all documents necessary to transfer title to the appellants.

The application was based on grounds that the appellants had been in occupation of the suit property for an uninterrupted period of 12 years and were entitled by virtue of adverse possession to the suit property; and that the respondents' title to the suit property had been extinguished by operation of the law. It was supported by the affidavit sworn by Corenel German Mumia on behalf of the appellants, where it was stated that the appellants had lived and developed the suit property for a period of over 57 years, openly, peacefully and continuously.

Levi Omondi Ameka, on behalf of the respondents, in a replying affidavit dated 17th February, 2009 opposed the application, terming it misconceived and an abuse of the Court process mainly because it was a Chamber Summons application in the form of Originating Summons. He also deposed that an Originating Summons cannot be brought under **Order XXXVI** within an application for Judicial Review. Further, that the claim for adverse possession if any, was incompetent in law for being time barred under the statute of Limitations of Actions. Furthermore, the appellants' occupation had not been exclusive, open, quiet and uninterrupted as there had been an old on-going dispute over the suit property which was well within the knowledge of the appellants.

The two applications were heard by Chitembwe J., who after considering the history of the matter and all the material placed before him made a finding to the effect that the appellants were affected by the decision of the Court in **HCCC No. 190 of 1988,** which ordered the appellants' father to vacate the suit property, having found that the same had been sold and rightfully transferred to the respondents' father. The learned Judge found that the order of eviction and demolition issued by the High Court would also apply to any structures constructed on the suit land by the appellants, and further that they were to be restrained from trespassing on the suit property. Having so determined, the learned Judge found that the Tribunal lacked jurisdiction to entertain the dispute between the parties, it having been conclusively heard and determined by the High Court.

In respect of the originating summons, the learned Judge was of the view that the then **Order XXXVI Rule 3D**, on which the application was premised provided that under **S.38** of the Limitation of Actions Act, such application is by way of Originating Summons supported by an affidavit to which a certified extract of the title to the suit property is to be annexed. Notwithstanding the non compliance with these

requirements, the learned Judge invoked the overriding objective under **S.1A** of the Civil Procedure Act, and decided to determine it on its merit, instead of striking it out. On the claim of adverse possession, the learned Judge opined that since the appellants were still young in 1988 when the suit was first presented to Court, their claim could not stand as by that time they could only claim through their father. He found that the order of adverse possession was not available to them, and dismissed that claim.

On the prayers based on the Judicial Review application, the learned Judge found that the Tribunal had acted in excess of its jurisdiction and allowing its decision to stand would be tantamount to defeating the orders of the Court. He issued an order of certiorari in the following terms:

> "***...to remove into this Court and quash the entire proceedings and decision/award relating to Kakamega Municipality Division Land Disputes Tribunal Case No. 5 of 2004 between Peter Amala Mumia, Cornel German Mumia, Gerald Oyemba Mumia, Josephat Mumia, Stanley Njirimai Salamu AND Levi Omondi Ameka and Mary Anyango Ameka.***
>
> ***The proceedings in Kakamega Resident Magistrate Case No. 70 of 2006 and all consequential orders therein relating to the reading and adoption of the award in the Tribunal Case No. 5 of 2004 aforesaid shall also be removed into this court and be quashed. The application by the interested parties dated 30th December 2008 is hereby dismissed. Each party shall meet its own costs for the two applications.***"

That is the Ruling that provoked this appeal, which is predicated on grounds that the learned Judge:

> *erred in law and fact in finding that the Tribunal had acted in excess of its jurisdiction; erred in law and fact by assuming erroneously that the appellants were the sons of Andrea Salamu; erred in finding that the appellants were affected by the judgment and orders issued in HCCC No. 190 of 1988 to which they were not party; erred in failing to hold that the appellants had acquired title to the suit property by virtue of adverse possession; and erred in failing to analyse the issues before him thus arriving at an erroneous conclusion.*

The appellants' prayer before this Court is that the impugned Ruling of Chitembwe J to be quashed, discharged, set aside and/or vacated and the same be substituted with the following orders:

> *an order dismissing the respondents' Judicial Review application dated 7th March 2007; an order allowing the appellants' application dated 30th December 2008 and the appellants be declared the owners of the suit property by virtue of adverse possession; and for costs of the appeal and those of the High Court.*

When the matter was urged before this Court on 15th November, 2016,learned Counsel Mr. Akwala and Mr. Oguttu represented the appellants and the respondents respectively.

Mr. Akwala cudgelled the judgment of the learned Judge for the finding that the appellants' claim was not for title to the suit property, but for the use of land which was why the Tribunal did not order for the transfer of title. Counsel argued that if the respondents were dissatisfied with that decision they should have appealed to the Provincial Tribunal. Counsel denied that the matter was *res judicata* since the parties were not the same.

Learned Counsel defended the appellants' Chamber Summons application dated 30th December, 2008 and contended that the respondents, having failed to assert their rights after judgment of the High Court, their rights were thereafter extinguished by operation of the law. Counsel urged the Court to allow the appeal.

Opposing the appeal, Mr. Oguttu reiterated the tribunal's lack of jurisdiction to adjudicate over the appellants' claim. According to learned counsel, what the tribunal did was to reverse the sale of the suit property, which amounted to *ipso facto* reversal of transfer of title. Further, he pointed out that the issues of sale, title and right of occupation had been dealt with by the High Court in **HCCC No. 190 of 1988**, and fully supported the findings of Chitembwe J that the matter was *res judicata*. Learned counsel further submitted that the Order of Omolo J (as he then was) affected all the appellants.

Moreover, according to Counsel, adverse possession was not available to the appellants as it was not lawful to resist eviction orders and then seek the benefit of claiming property by adverse possession. He urged the Court to find that adverse possession was not proved, and that this appeal is for dismissal.

In reply, Mr. Akwala insisted that the claim for adverse possession was sufficiently proved since there was no attempt by the respondents to make entry into the suit property.

As a first appellate court, we have reanalysed the evidence as presented before the trial Court as mandated as mandated by **Rule 29 (1)(a)** of the Rules of this Court. What we need to do now is re-evaluate and reconsider this evidence critically while bearing in mind that we did not have the advantage of seeing the witnesses as they testified in order assess their demeanour, and arrive at our own independent decision.

See this Court's decision in ***Kenya Ports Authority v Kuston (Kenya) Ltd, (2009) 2EA 212*** where the Court expressed itself as follows:

> "***This being a first appeal to this Court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...***"

We must from the outset make it clear that the judgment of Mbogholi J which pronounced the rights of the parties herein was not appealed against. That is the judgment that ratified the sale of the suit property by the Respondents' father to Mr Mumia. That is an issue we cannot reopen in this judgment. What is before us is the Ruling of Chitembwe J which quashed the Land disputes Tribunal's decision which allowed the respondents to remain on the suit property, and his finding that the matter was *res judicata*.

We shall first consider the Judicial Review application. Judicial Review proceedings are not ordinary Civil proceedings, nor are they criminal in nature. They enjoy what is referred to as *sui generis* status. By their very nature therefore Judicial Review proceedings cannot carry other civil proceedings. Judicial Review proceedings seek remedies against public decision making bodies, where the process followed before arriving at the impugned decision is challenged on grounds of unreasonableness, impropriety, denial of right to be heard, lack of jurisdiction, among others. Judicial Review orders are not directed at private individuals, and that is why an application

seeking to determine rights in the private law realm cannot find a place in a Judicial Review application. Although the learned Judge was well intentioned, the best he could have done for the parties was to strike out the said application and advise the applicants to follow the correct procedure. That way, the parties would have been at liberty to even adduce *viva voce* evidence in support of their originating summons if they so wished, which they could not do within the Judicial Review application.

That said however, we note that the learned Judge considered the merits of the Judicial Review application and also the adverse possession. He allowed the Judicial Review application and dismissed the adverse possession one.

On the Judicial Review, we note that in his Ruling, the learned Judge observed that the applicants had filed the application for certiorari without leave which is a pre-requisite of all such applications. On that basis therefore he pronounced himself as follows;

> ***"I do find that the orders of certiorari cannot be granted to the applicant under the application."***

The learned Judge nonetheless still went on to find that the Kakamega Municipality Land Tribunal had acted in excess of jurisdiction and granted an order of "certiorari'' and quashed the decision of the Tribunal, the proceedings of the Kakamega Resident Magistrate Case No.70 of 2006, and all consequential orders arising from the decision of the Tribunal.

Was that decision wrong? We hold the view that the procedure followed by the learned Judge to arrive at that decision was quite unorthodox and not provided for in our laws. In our view however the decision was correct in law. The same though not supported by any procedure, was the only decision that the justice of the case demanded. This is so because, the tribunal contravened clear and well settled provisions of the Land Disputes tribunal Act (LDTA) from which it purported to draw its jurisdiction.

Under section 3 of the repealed LTDA, the Tribunal had no jurisdiction to divest a registered owner of his land and confer title to another person. Although the appellants argued that their claim was on working and occupying land, which was covered under the LDTA, clearly, that was not so. Title to land is not confined to a piece of paper in the name of a title deed. It includes a registered owner's right to occupy his property and utilise it as he deems fit, within the confines of the law. In this case the Tribunal gave the appellants constructive ownership of the suit property to the exclusion of the registered owner. In doing so, it manifestly overstepped its jurisdiction.

We note further that under **section 13** of the same Act, the tribunal was barred from hearing matters which had already been heard and determined by the court. The same provision is replicated in the current LTDA **(Cap 303A Laws of Kenya)** which provides;

> ***13 (3) For the avoidance of doubt it is hereby provided that nothing in this Act shall confer jurisdiction on the Tribunal to entertain proceedings in respect of which the time for bringing such proceedings is barred under any law relating to the limitation of actions or to any proceedings which have been heard and determined by any court."***

It is clear that the tribunal overstepped its jurisdiction by entertaining a matter that had already been determined by the court. The tribunal not only entertained the matter but also countermanded orders of eviction and demolition given by the High Court many years earlier.

A registered proprietor has exclusive right of use over his property, which includes exclusive right of occupation. Frank Amera was therefore entitled to exclusive ownership of the suit property as well as all other rights similarly accruing to him. The judgment of Mbogholi J, was followed by the orders of Omolo J (as he then was) who issued eviction orders against Andrea Salamu and all other persons claiming under him; as well as vacant possession and demolition of any standing structure on the suit property when the judgment-debtor failed to honour the High Court decree. Ground 1 of appeal therefore fails.

Grounds 2 and 3 revolve around the doctrine of res judicata.

The doctrine of *res judicata* is provided for under S. 7 of the Civil Procedure Act which provides as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***
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> ***Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
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> ***Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as***

to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." (emphasis added)

As can be seen from the above provisions, the ingredients of *res judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be between the same parties; or parties under whom they or any of them claim, litigating under the same title; and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see ***Karia & Another v the Attorney General and Others [2005] 1 EA 83*** and ***John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR***.

The appellants' contention is that they were not parties in the previous suit as they were minors. Indeed, the learned Judge found that they could not sue in their own right as they were not of age. That being so it is clear that their interests were being represented by their parents, or other relatives who were parties to the suit. The orders of the Court were not just against Omumia Ingambi, who was claiming the land from his brother Andrea Salamu but against all those claiming through him, meaning all those who were residing on that plot because they were related to Omumia Ingambi one way or another.

That being so, we are in agreement with the determination of the learned Judge that the appellants were affected by the orders of the High Court in **HCCC No. 190 of 1988** and the orders of the Tribunal in this regard were *res judicata.* Ground 3 therefore also fails.

Lastly, on the issue of adverse possession, it is clear that nothing turns on this ground. The doctrine of adverse possession dictates that firstly, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. See: ***Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another Civil Appeal 11 of 2014 [2015] eKLR.***

However, as stated in ***Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)***:

"***...the possession must not be broken, or any endeavours to interrupt it.***"

In ***Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another (supra)*** attempts at eviction were held to interrupt the adverse possession count-down.

It was stated that*:*

"***The respondents using every means and avenue available to them, attempted albeit unsuccessfully to evict the appellants from the suit premises at times with disastrous consequences. All these happened because the respondents were in law asserting their title to the suit premises which action had the effect of stopping the time from running for purposes of adverse possession***." (emphasis added).

There had been various attempts made by the deceased Frank Ameka and his representatives to seek vacant possession of the suit property. From the record of Appeal, and more particularly the judgment of Mbogholi J, which as stated earlier was not appealed against, the sale transaction was in 1973. The dispute arose soon thereafter and there were attempts to resolve it as early as 1977, before the same was escalated to the High Court by way of **HCCC No. 190 of 1988** seeking final determination as to ownership of the suit land. That was certainly far below the 12 years period of uninterrupted occupation required before a right can accrue under the doctrine of adverse possession.

The claim under adverse possession is in our view very farfetched and unsupported by evidence. Ground 4 therefore turns a cropper.

On the last ground, although the learned Judge got it wrong and got muddled in some aspects of procedure as we have outlined earlier, there is no doubt that his analysis and re-evaluation of the evidence was irreproachable.

In conclusion, after re-evaluating the entirety of the evidence on record, we are not persuaded that the learned Judge erred in his substantive findings. We find this appeal devoid of merit and dismiss it with costs to the respondents.

This judgment is delivered pursuant to **Rule 32(3)** of the Court of Appeal Rules, Azangalala J.A having retired from the position of Judge of this Court.

Dated and delivered at Kisumu this 20th day of July, 2017.

W. KARANJA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR