IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & MUSINGA, JJ.A)

CIVIL APPEAL NO. 326 OF 2017

BETWEEN

KURIA KIARIE.....1ST APPELLANT

NJUGUNA KURIA.....2ND APPELLANT

KIMANI KURIA.....3RD APPELLANT

AND

SAMMY MAGERA.....RESPONDENT

(An Appeal against the Judgment of the High Court of Kenya

at Nairobi (B. M. Eboso, J .) dated on 28th July, 2017

in

ELC No. 405 of 2002)

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JUDGMENT OF THE COURT

1. This appeal arises from orders of eviction and permanent injunction issued against the appellants by the Environment and Land Court **(ELC) (Eboso, J.)** sitting in Nairobi on 28th July, 2017. The suit which sought those orders was filed some 15 years earlier on 4th March, 2002 but the proceedings do not appear to have commenced until 2nd February, 2017. We do not find any explanation on record for such inordinate delay in disposing of the matter. The record also appears to have been prepared unprofessionally, although there are Advocates on record, as it omits the original plaint as well as written statements referred to, and relied on, by the parties in their oral evidence. Be that as it may, we shall determine the appeal on the basis of the record before us.

2. The suit relates to some parcels of land in South Kinangop in Nyandarua District, and once again, one may wonder why the suit was filed in Nairobi and not within the local limits of where the land is situate. Nevertheless, no party sought for transfer of the suit and the trial court did not do so on its own motion. The question of jurisdiction does not arise.

3. The facts are fairly straight forward. On 8th August 1991, one **Sarah Njoki Mugachia (Sarah)**, was registered as the absolute proprietor of Land Title Number **Nyandarua/South Kinangop/586** (Plot 586) measuring approximately 15 hectares (37 Acres) and a Title Deed was issued to her. Before registration, the land was part of the bigger South Kinangop Settlement Scheme under the Settlement Fund Trustees **(SFT**). Ten years later in April 2001, Sarah applied to the Kinangop Land Control Board for subdivision of plot 586 into two parcels, i.e. **Nyandarua/South Kinangop/6059** (Plot 6059) measuring 12.95 hectares (32 Acres) and **Nyandarua/South Kinangop/6058** (Plot 6058) measuring 2.023 hectares (5 Acres), and the subdivision was completed accordingly.

4. Two months later on 29th June, 2001, Sarah sought a further consent from the same Land Control Board for sale and transfer of plot 6058 to the respondent herein and the consent was granted. The transfer was effected on 25th October, 2001 and a Title deed issued to

the respondent. Upon taking possession, the respondent found the cattle of the 1st appellant and his sons, the 2nd and 3rd appellants, grazing on the land and when he sought an explanation, the appellants claimed ownership of the land. That is why he went to court in March 2002 and filed suit seeking two substantive orders:

> ***"(a) An injunction to issue against the defendants jointly and severally, by their servants and/or agents or otherwise howsoever from remaining, entering or trespassing or doing any acts and/or continuing occupation of that piece of land known as Nyandarua/South Kinangop/6058 which belongs to the plaintiff.***
>
> ***(b) An order for eviction and delivery of vacant possession of the said land to the Plaintiff and Mesne profits from the 29th June 2001 to date."***

5. The appellants' defence as amended on 28th April, 2016 (the original defence dated 3rd May, 2002 is not on record) was that before part of plot 586 was purchased by the respondent from Sarah, as alleged, the appellants were *'residing, grazing and cultivating*' thereon since 1963, long before Sarah acquired it. Consequently, they had an overriding interest in it or, alternatively, they had acquired ownership through adverse possession for a period in excess of 45 years. They further averred that there was no Land Control Board's consent obtained for the subdivision and sale of a portion of plot 586, and if there was any, it was obtained through fraud and misrepresentation, and was therefore illegal, null and void. They simply prayed for dismissal of the suit but made no counter claim.

6. As stated earlier, the parties agreed to file their evidentiary statements and documents on which they were cross examined, but the statements are not on record. The respondent testified and produced the documents supporting his acquisition of the plot; including the consent to sub-divide; mutation forms, certificate of official search, sale agreement, consent to sale and transfer, and copy of the Title Deed. He denied the suggestion that he was aware, before the purchase, of any interest the appellants may have had or their presence in the portion sold to him which was vacant. He called Sarah as a witness to confirm the sale and the documentation issued in that respect. She denied, as suggested to her, that there was any suit pending before any court between her and the 1st appellant, asserting instead that a case filed by the 1st appellant questioning her ownership of plot 586 was finalized in 2001 in her favour. The 1st appellant had claimed that the SFT had allocated plot 586 to him for amalgamation with the adjacent plot 587 which had been allocated to the 1st appellant.

7. Only the 1st appellant testified before the trial court and called a neighbour, born in 1975, who simply stated that the 1st appellant was the owner of plot 587 although he had never seen the Title Deed. The 1st appellant's case was that he was allocated plot 587 by SFT and it was subsequently amalgamated with plot 586 which was adjacent to it originally. However, up to the date of his evidence on 3rd April, 2017, he had not obtained the Title Deed for plot 587, and the reason was, to quote him, "*because I thought if I went for the Title my acreage will reduce"*. He produced a bundle of documents, including a letter dated 17th December, 1963 from SFT confirming a loan advanced to him for purchase of plot 587; another letter from SFT written in 1977 to the Director of Settlement, suggesting that plot 586 had not been allocated to anyone and talking about amalgamation with plot 587 or other plots; reference to a court case - **HCCC No. 3776 of 1983** - against Sarah who had been allocated plot 586, which case was subsequently withdrawn; and his complaints made to the SFT in 1991, 1992 and 1993, about the allocation of the plot to Sarah. He also referred to another case he filed against Sarah - **HCCC No. 3649 of 1993** - which he said was pending but which Sarah testified had been finalized in her favour in 2001. There was also an application for Judicial Review - **No. 558 of 2000** - filed by the 1st appellant. None of the parties produced a record of the proceedings or decisions in those court cases.

8. Upon consideration of that evidence, inclusive of the written statements and submissions of counsel, the trial court came to the conclusion that the Title deed issued to the respondent conferred on him absolute proprietary rights which were capable of protection under **Article 40** of the **Constitution**; that there was similar protection under the **Land Registration Act, sections 24** and **25**; that there was no evidence of physical occupation or development of plot 6058 by the appellants; that there was no evidence of ownership of plot 586 by the 1st appellant or any concluded amalgamation process for plots 586 and 587; and that on the contrary, the evidence on record shows plots 586 and 587 were separate plots within Kinangop Settlement Scheme.

9. Referring to the defence of *"overriding interest"*, asserted on the basis of continuous occupation, the trial court noted the various complaints and court cases between the 1st appellant and Sarah, filed since 1977 and concluded that the defence was not tenable. The court stated thus:

> ***"From the foregoing, it is clear that the 1st defendant unsuccessfully lodged a number of cases seeking to impugn PW2's title to Parcel No. 586. It is also clear that at all times PW2 resisted those cases and asserted her rights as proprietor of Parcel No. 586. The defendants cannot therefore be said to have acquired overriding interest during the period those of court battles. I therefore reject that plea".***

10. Lastly, on the defence of ownership through *"adverse possession"*, the trial court made the following finding:

> ***"Evidence on record shows that in 1977 the suit property was vacant. In the same year it was allocated to PW2. Six years later, in 1983, the 1st defendant filed his first suit challenging the plaintiff's title. The suit, and indeed subsequent litigations were resisted by PW2. There is sufficient evidence that PW2 fully asserted her rights over Parcel No. 586 from the time she was allocated the property. In those circumstances a plea of adverse possession cannot be upheld."***

11. Nine grounds of appeal were laid out in the memorandum to challenge those findings. However, the focus of those grounds and the written submissions of counsel, were the findings, said to have been made in error, that the appellants had no overriding interest in plot 6058 when it was transferred to the respondent on 25th October, 2001; and that the appellants had not acquired any interest in the land through adverse possession. The trial court was also accused of ignoring the defence and submission of the appellants that the transaction relating to the transfer to the respondent was fraudulent and illegal; and finally in applying the wrong provisions of the **Land Registration Act** and the **Land Act** which were enacted in 2012, long after the registration of the transfer.

12. Learned counsel for the appellants, **Mr. Chrispine Wainaina** (holding brief for Ms. Mwirichia)**,** instructed by M/s M. M. Muriuki & Company Advocates, filed three pages of written submissions which he fully relied on without oral highlights. The submissions dwelt on two issues only: adverse possession and fraud. On adverse possession, it was submitted that the trial court largely ignored or superficially dealt with the issue which had been raised in the amended defence. Counsel cited and relied on the case of ***Gulam Miriam Noordin vs Julius Charo Karisa [2015] eKLR*** where this Court upheld a mere defence of adverse possession pleaded without a counterclaim of ownership and transfer, and went ahead to make an order for transfer of the property after proof of adverse possession was satisfied. In his view, there was no evidence from the respondent to show either that there was no adverse possession or if there was, how it was extinguished. He cited the case of ***Githu vs Ndeete [1984] KLR 776*** for the proposition that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession.

13. As regards the issue of fraud, counsel submitted that the trial court ignored it although it was clear in the defence pleading, that the appellants were challenging the manner in which the transfer to the respondent was processed. According to him, the sale agreement was signed in Nairobi on 29th June, 2001 while the Land Control Board's consent was applied for and issued in Kinangop on the same day.

In his view, it was not possible, due to geographical distance, to execute both transactions on the same day and therefore the consent was clouded with uncertainty. Such uncertainty, counsel contended, could only have been cleared by production of the application made to the Land Control Board and the Minutes of the Board granting the consent, which were sadly lacking. It followed therefore that there was no valid consent to the transfer which then renders the transaction null and void, he concluded.

14. The response in the written submissions filed by learned counsel **Mr. D. K. Osoro,** instructed by M/s Osoro Juma & Company, Advocates, was equally brief. It was two pages which he briefly highlighted orally. It was submitted that the trial court dealt with all the issues properly raised before it. It was counsel's view that the appeal and submissions made before this Court were centered on plot 586 which did not belong to the respondent and the submissions were therefore irrelevant. There was clear evidence on how the respondent became registered as proprietor of plot 6058, which was in issue, and therefore, the law protects the sanctity of his Title, having been obtained without notice of any dispute. If the appellant wished to urge the issue of adverse possession, contended counsel, then he ought to have filed suit against the owner of plot 586 long before the suit or filed a counter claim.

15. We have fully considered the appeal and the submissions of counsel. As it is a first appeal, the standard of review as dictated by ***rule 29*** of the Court's Rules is by way of a retrial in order to draw our own conclusions. Ordinarily, we should defer to the findings of fact made by the trial court, especially so where the findings are based on the credibility of witnesses, for then the trial court is a better judge, having seen and heard those witnesses. Where, however, such findings are based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the finding, or it appears that the trial judge failed to take account of particular circumstances or probabilities material to an estimate of the evidence or where the trial court's impression, based on the demeanor of a material witness, is inconsistent with the evidence in the case generally, we shall have no hesitation but to interfere. See ***Mahira Housing Co. Ltd vs Mama Ngina Kenyatta & Another KLR [2008] 31*** and ***Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278.***

16. In our view, the appellants have really left two issues only for our determination. These were the only issues urged before us and we take it that the other grounds in the memorandum of appeal were abandoned. We shall first examine the issue of adverse possession.

17. The doctrine of adverse possession has received its fair share of criticism both locally and internationally as sometimes arbitrary, illogical, irrational, disproportionate and an aberration in our land tenure system. The constitutionality of it has even been tested in our courts severally, but this Court in ***Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR*** held that it was neither arbitrary nor an unconstitutional limitation of the right to property. In that case **Makhandia, JA**. summarized the doctrine as follows:

> ***"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is***

twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

See also ***sections 9, 13, 17, 37*** and ***38*** of the Limitation of Actions Act **(LAA)** which make further provisions on the mechanics of the doctrine.

18. In the case of ***Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR,*** this Court stated as follows:

"For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin *maxim nec vi, nec clam, nec precario****. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:***

'In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.'"

19. It is clear from those principles that the onus lies on the person claiming title by adverse possession to prove the essential elements before an order is granted in his or her favour. A procedural issue was raised by the respondent that the only way one can invoke the provisions of ***section 38*** of the **LAA** is to move the High Court under ***Order 37 rule 7*** of the Civil Procedure Rules by an Originating Summons or by filing a counter claim in a suit for trespass as the current one. Having omitted to follow that procedure, it was contended, the issue of adverse possession cannot be considered. The appellants on the other hand rely on the ***Mtana Lewa case*** (supra) which held as follows:

"Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that *Order 37 Rule 7* ***requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of*** *Wabala vs Okumu* ***[1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in*** *Bayete Co. Ltd vs Kosgey* ***[1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted.'*** [Emphasis added].

In view of that holding, the respondent's procedural protests fall flat.

20. But the main issue still remains: did the appellants acquire ownership as against the registered owner openly without force or stealth, or under the licence or knowledge of the owner and have they shown continuity and non-interruption of that process? The onus of proving all that remains on the appellants and it is not for the respondent to prove, as submitted, that there was no adverse possession or that if there was any, it was extinguished. In this case, the appellants pleaded in their defence that they had *"resided, grazed on and cultivated"* plot 586 for a period of 45 years since 1963. It would appear that that pleading was made on the mistaken belief that plot 586 was amalgamated with plot 587 on which the appellants were residing and no doubt carrying on other activities. Amalgamation entails the collapsing of two titles held under separate parcel numbers into one. But, as correctly found by the trial court, there was no proof of amalgamation of the two plots and they remained separate entities. Cross examined on the issue, the 1st appellant simply stated thus:

"***I have not applied for the title for the amalgamated plots, I have not applied for the original plot 587 measuring 17 acres, I do not have any document of title for the land I stay on."***

21. On the evidence on record, both plots were part of the larger Kinangop Settlement Scheme which commenced in 1963. The available evidence also shows that plot 586 was registered in the name of the first owner, Sarah, on 8th August, 1991. Before then it was public land under the SFT and therefore no claim could lie under the doctrine of adverse possession. That much is clear from ***sections 37*** and ***41*** of the LAA as read with ***section 175*** of the Agriculture Act, Cap 381. It is also clear from a five-bench decision of this Court in ***Gitu vs Ndungu [2001] EA 149*** which approved an earlier decision of the Court in ***Boniface Oredo vs Wabomba Mukile, CA No. 170 of 1989 (UR)*** holding that the interest of SFT is not extinguishable under the Limitation of Actions Act. The period between 1963 and 1991 was therefore

for exclusion in the computation of time.

22. Further available evidence in the case shows that there were raging disputes in courts and before the SFT over the original plot 586 from the time the SFT allocated it to Sarah and it cannot be said therefore that the occupation by the appellants, even if they could show they were wholly or partly in occupation of plot 586, was peaceful, continuous and uninterrupted. At all events, the appellants failed to adduce any cogent evidence of occupation through residence or cultivation of plot 586 as pleaded. We are satisfied that the trial court properly directed itself in finding that there was no peaceful and uninterrupted possession.

23. More importantly, the claim on trespass made before the trial court was in respect of plot 6058 which became the property of the respondent on 25th October, 2001. His complaint was that the appellants' cattle had trespassed and grazed on the land and he sought orders to restrain them. There was no evidence tendered by the appellants on any other physical occupation of that portion of land and therefore the contention by the respondent that the plot was vacant cannot be faulted. The appellants did not deny that their cattle grazed on the land as complained. If there was any time running in their favour towards adverse possession, it was interrupted when the suit was filed in March 2002. As this Court stated in ***Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura [1996] eKLR:***

> ***"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.***
>
> ***…He must therefore make a peaceable and effective entry, or sue for recovery of land."***

24. We have said enough on the first issue to satisfy ourselves that the claim for adverse possession was not proved and therefore no orders could be made in favour of the appellants. That ground of appeal fails.

25. The next and only other issue is fraud. The law is clear and we take it from the case of ***Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR,*** where ***Tunoi, JA. (as he then was)*** stated as follows:

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."*** [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See ***Order 2 Rule 4 of the Civil Procedure Rules.***

26. As regards the standard of proof, this Court in the case of ***Kinyanjui Kamau vs George Kamau [2015] eKLR*** expressed itself as follows;-

> ***"…It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."***

27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a Consent for transfer cannot be obtained on the same day is well below the standard of proof set under the authorities cited. We need not belabour this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.

28. In sum, we find no merit in this appeal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 13th day of July, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR