



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: VISRAM, KARANJA & KOOME JJA)**

**CIVIL APPEAL NO. 33 OF 2018**

**BETWEEN**

**WINES & SPIRITS KENYA LIMITED.....1<sup>ST</sup> APPELLANT**

**WAIGANJO INVESTMENTS LIMITED.....2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE MWACHIRU MWANGO .....RESPONDENT**

(Being an appeal from the Judgment of the Environmental and Land Court at Malindi (Angote J.) delivered on 5<sup>th</sup> October, 2017 in E&LCCNo. 166 of 2014 (O.S.)

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**JUDGMENT OF THE COURT**

[1] By an Amended Originating Summons dated 3<sup>rd</sup> November, 2014, the respondent sought to be declared the rightful proprietor of land described as **Plot No. 188/III/MN/Kanamai/Kikambala** (*the suit land*) under the doctrine of adverse possession. According to the respondent, the suit land had always been occupied by his family, his family's agents and licensees; having been taken over by the respondent's father over 50 years ago. The respondent contended that his family's occupation of the land has been continuous, notorious, peaceful and within the appellants' knowledge. He also alleged that his father had always worked the land agriculturally; a legacy that the respondent carried on. It was to the respondent's dismay therefore, that sometime in the year 2012, the 1<sup>st</sup> appellant through her agent the 2<sup>nd</sup> appellant, purported to evict the respondent and his proxy from the land.

[2] While the respondent conceded that the land was registered in favour of the 1<sup>st</sup> appellant, he argued that title thereto had changed the moment he and his family consistently occupied the land for over 12 years. To the respondent, the purported eviction was thus unjustified as not only had he been tilling the land diligently over the years, he had also lawfully licensed some third parties who paid valuable consideration to conduct farming activities thereon. He argued that his title to the land under the doctrine of adverse possession had matured and it was on that premise, he sought to be declared the legitimate owner thereto.

[3] The claim was opposed vide the 1<sup>st</sup> appellant's replying affidavit to the initial claim, sworn on 24<sup>th</sup> October, 2014 as well as the 2<sup>nd</sup> appellant's affidavit sworn on 1<sup>st</sup> August, 2014. From the outset, the 1<sup>st</sup> appellant denied the allegation that the respondent and his family had been in occupation of the suit land for over 50 years. To the contrary, the 1<sup>st</sup> appellant asserted that she had acquired the property in 1988 and the same was conferred with vacant possession. Further, that to the 1<sup>st</sup> appellant's knowledge, the respondent only came in the land's vicinity sometime in 2009 - 2010 and it was only in 2011 that the 1<sup>st</sup> appellant learnt that the respondent had encroached onto the suit land, built a temporary structure thereon and was inviting third parties to cultivate the land as aforesaid. This prompted the 1<sup>st</sup> appellant to build a perimeter wall and to deploy security agents to stop the invasion.

[4] The 1<sup>st</sup> appellant also alleged that thereafter, she got into an agreement with the respondent and the other invaders; whereby it was agreed that they would desist from committing further acts of trespass in exchange for a small token from the 1<sup>st</sup> appellant, which the 1<sup>st</sup> appellant duly paid. In view of the 1<sup>st</sup> appellant's valid title and the minimal occupation of the land by the respondent, the appellants were of the common view that the doctrine of adverse possession was inapplicable to this case and prayed for the dismissal of the respondent's case with costs.

[5] Upon considering the case and submissions of the parties, the learned trial Judge (**Angote, J**) reserved the matter for judgment, which

was delivered on 5<sup>th</sup> October, 2017. Allowing the Originating Summons, the learned Judge gave orders declaring the respondent as the lawful proprietor of the suit land under the doctrine of adverse possession and directed the Chief Land Registrar to register him as such. In addition, a permanent injunction was also issued restraining the appellants from interfering with the respondent's peaceful possession of the suit land.

[6] That judgment has spurred this appeal, in which the appellants contend that the learned trial Judge erred; by ignoring the evidence before him and declaring the respondent to be the proprietor of the suit land; by failing to appreciate that the respondent's house was outside the suit land; by failing to appreciate that the respondent's occupation of the land was for a period of less than 12 years; by failing to appreciate that the 1<sup>st</sup> appellant was the registered owner of the property; by ordering that the respondent be registered as the proprietor of the land under **Section 38** of the Limitation of Actions Act and; by failing to consider that this was a long drawn dispute which had even been referred to the local administration. The appellants entreat the Court to allow the appeal, set aside the impugned judgement and restore them as the legal owners of the property in question.

[7] Opposing the appeal, the respondent filed his grounds affirming the decision of the trial court. In a nutshell, he urged this court to affirm the impugned judgment because the appellants neither proved their uninterrupted possession of the suit land nor how they sought to protect the same against dispossession by the respondent. In contrast, that the respondent had successfully shown that his occupation of the land met the threshold for adverse possession.

[8] The appeal was ventilated through written submissions with oral highlights at the hearing. Learned counsel for the appellants **Ms. Chepkwony** submitted that in order for adverse possession to occur, the possession of the land must be open and continuous for 12 years; which begin to run from the time the registered proprietor learns of the invasion. Counsel contended that such was not the case herein, as the respondent's trespass began in 2011 and by the respondent's own admission; they were ejected from the property in 2012. Consequently, the requisite 12 year period had not lapsed and conferment of title under the doctrine of adverse possession was thus improper.

[9] In addition, it was submitted that contemporaneously with the Amended Originating Summons, the respondent had filed an application seeking injunctive orders restraining the appellants from selling the suit land; which the court declined to grant. The appellants contend that the court's refusal to grant the temporary injunction implied that the court was unconvinced of the respondent's alleged peaceful uninterrupted possession of the land. Further to this, counsel submitted that the respondent's testimony indicated that he learnt of the 1<sup>st</sup> appellant in 2012 and as such, his purported occupation was neither notorious nor within the knowledge of the 1<sup>st</sup> appellant as claimed and thus could not be said to be adverse. The decision in the case of **Kimani Ruchine & Another v. Swift Rutherford & Co. Ltd (1980) KLR 10** was cited for the contention that adverse possession must be notorious and within the knowledge of the registered owner. The appellants emphasized that the respondent had failed to prove that the 1<sup>st</sup> appellant was dispossessed of the land or that the respondent had ever enjoyed actual constructive and uninterrupted possession thereof. Counsel concluded by stating that the trial court failed to heed the requisite timelines with regard to adverse possession. In particular, that the trial court ignored the fact that from the evidence, the earliest that the 1<sup>st</sup> appellant could have learnt of the invasion was in 2010 and given that the claim was filed in 2014, the necessary 12 years required for adverse possession to occur were yet to lapse and the orders granted were thus pre-mature.

[10] Although learned counsel for respondent opted not to address the court at the hearing, in his written submissions, he stated that the orders of the trial court were devoid of fault as the appellants had failed to demonstrate that they had worked the suit land since the time of purchase in 1988. He reiterated that the respondent and his family had asserted a hostile occupation of the land which went uncontested by the 1<sup>st</sup> appellant for over 50 years. In addition, that the testimony adduced on behalf of the 1<sup>st</sup> appellant was inadmissible and unreliable, as the witness called to testify lacked the authority of his co directors to so testify. Citing the case of **Bugurere Coffee Growers Ltd v. Sebuduka & Another (1970) EA**; the respondent stated that such testimony was of no evidentiary or probative value and ought to be disregarded. Ultimately therefore, it was submitted that the appellants' case was unsupported by any evidence and the resultant judgment cannot be faulted.

[11] The respondent maintained that given his continued occupation of the suit land as well as his constructive activities thereon, adverse possession had occurred as rightly held by the trial court. On that note, he urged the dismissal of this appeal with costs.

[12] This being a first appeal, the duty of this Court is as re- stated in the case of **Abok James Odera t/a A.J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where it was held in part that:-

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

The main issue for determination in this appeal is whether the respondent was entitled to be declared the registered proprietor of the suit land under the doctrine of adverse possession. The law on adverse possession is well settled and is anchored on **Sections 7, 13, 17 and 38** of the **Limitation of Actions Act (the Act)**. **Section 7** thereof provides *inter alia* that:-

**“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 is first accrued to some person through whom he claims, to that person”.** (Emphasis added)

So when does the cause of action accrue? **Section 13** provides that:

**“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”** (Emphasis added)

Further, under **Section 17**, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of **Benjamin Kamau Murima & Others vs. Gladys Njeri, C A No. 213 of 1996** where it was held that:

**“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”**

Once an adverse possessor is eligible for title under the doctrine, he must move court **Section 38** of the Act; which provides that:-

**“(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”**

[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See **Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.**)

[14] Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. At the outset therefore, the respondent's contention that it was for the 1<sup>st</sup> appellant to prove her active possession of the land, fails. Closely related to this, the respondent has taken issue with the oral testimony of the appellants' sole witness, Mr. John Waiganjo; whom the respondent claims lacked authority to testify. This being a preliminary point, it is perhaps pertinent to dispose of it immediately, before delving into the merits of the case.

[15] Looking at the record, no objection appears to have been raised regarding Mr. Waiganjo's competence to testify. The issue was however mentioned, albeit peripherally, in the course of his cross examination. Asked whether he had been authorized by his co-director to testify on the 2<sup>nd</sup> appellant's behalf, he stated that though he was duly authorized, he had not brought the resolution with him to court. The respondent now asserts that on account of Mr. Waiganjo's failure to produce a written resolution detailing his authority to testify, his testimony ought to have been disregarded. However, save for the decision the **Bugurere Coffee Growers** case, no law has been cited to support the contention that a witness, who is a director of a company must evince a written authority from the company in order to testify on behalf of the company. In addition, the decision in the Bugurere case is vastly distinguishable from the circumstances herein because in that case, the question for determination was whether an unauthorized firm of advocates could institute legal proceedings on behalf of a company. In this case however, the question is whether a witness needs similar authority in order for him to testify on the company's behalf.

[16] Under the law of evidence, the court is allowed to make certain presumptions of fact. One such presumption is with regard to persons acting in a certain capacity or under documents. According to **Phipson on Evidence; 17<sup>th</sup> Edn at p.1264-65**; where a public official purports to act in a certain capacity, the court may readily presume the veracity of his capacity to so act. However, a higher premium is placed upon a private individual. The authors had this to say on the subject:

**“Generally however, private relationships cannot, except as against the parties acting or acquiescing, be so established.....**

**As against the parties themselves, however, acting in a capacity is, in civil cases, generally, and even in criminal cases sometimes, sufficient proof; though, where the appointment is by written contract, and not mere resolution, and its terms are material, parol evidence will be inadmissible if the document itself can be produced.”** (Emphasis added)

In our view therefore, the production of written authorization is only mandatory where contractual issues have been raised not in cases of authorization by mere resolution. In this instance, the authorization was by way of a resolution dated 15<sup>th</sup> September, 2014 which resolution is on record and has not been challenged by the respondent. Consequently, the testimony of Mr. Waiganjo was properly on record.

[17] This leaves us with the question of whether the respondent had managed to prove his entitlement to title under the doctrine of adverse possession. Two issues arise from this, first is whether from the evidence on record the respondent was able to establish occupation is the suit land; and second whether the appellant was aware of the said occupation and did nothing about it for a period of at least 12 years.

[18] It is common ground that the 1<sup>st</sup> appellant is the registered proprietor of the suit land and that the same was encroached on by the respondent. It was the respondent's evidence that his house was 'slightly outside the fence' but he used to cultivate the rest of the land. This lends credence to the appellant's contention that what the respondent had occupied was an adjacent parcel; upon which he constructed a dwelling. This was reiterated by Kai Mwasa (PW 4) who stated as follows:

**“The land has a fence. The applicant's home is outside the fence but near the fence.”**

If he used to live outside the suit land, can he be said to have been in exclusive occupation of the same? Why was his house outside the fence? If the fence was put up in 2012 as alleged by the respondent, then why did he not file suit for adverse possession until 2 years later? Though the respondent contended that his family took occupation of the land more than 50 years ago, no evidence of such occupation was tendered. All the court had to rely on was the testimonies of the respondent's witnesses all of whom had an interest in the suit land. The claim that he even used to 'lease' out grazing grounds to other people does not in our view amount to possession. Continuous occupation for

50 years as alleged was in our view not proved to the required standard.

[19] This brings us to the second issue as to when computation of time for purposes of adverse possession started. The respondent stated that though he had been living on the land all his life, he only came to know of the 2<sup>nd</sup> appellant in 2012 when the 2<sup>nd</sup> appellant came to fence the land. It is evident from that admission that the appellant only learnt of the invasion to his property in 2012. The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See **Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd (1980)** *supra*). Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. Immediately thereafter, the appellants had the respondent evicted from the suit premises. Even as at the time they filed their claim before the High Court, they had already been evicted. It was evident therefore that the respondent was not in actual possession for over 12 years as alleged.

[20] In addition, no evidence was ever proffered to show that the appellant had been aware of the trespassers during the last 12 years. If anything, both sides to the dispute contend that confrontations over the occupation of the land occurred in the period between the years 2010 -2012. Considering that the suit was filed in 2014, in the absence of evidence proving otherwise, then the 1<sup>st</sup> appellant can only be construed to have had knowledge of the occupation for only 2 years. We hold the view that having failed to prove his continuous occupation of the land for 12 years, and that such occupation was within the 1<sup>st</sup> appellant's knowledge, the respondent cannot succeed in obtaining title under the doctrine of adverse possession, the respondent has failed to satisfy the ingredients of adverse possession.

[21] Consequently, we are persuaded that the judgment of the trial court should be set aside. This appeal therefore succeeds and the same is allowed with the result that the judgment appealed from and all consequential orders are hereby set aside, and *in lieu* thereof we substitute an order dismissing the Amended Originating Summons dated 3<sup>rd</sup> November 2014 with costs to the appellants, both here and in the court below.

**Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 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**