IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 153 OF 2017

BETWEEN

THE CHAIRMAN, BOARD OF GOVERNORS

MURANG'A COLLEGE OF

TECHNOLOGY PRIMARY SCHOOL.....APPELLANT

AND

JULIUS NGIGI MUNJUGA.....RESPONDENT

(Being an appeal from the judgement of the Environment and

Land Court at Kerugoya (Olao, J.) dated 5th May, 2017

In

***NYERI H.C.C.C. NO. 133 OF 2017 KERUGOYA ELCC No. 614 of 2013*)**

****

JUDGMENT OF THE COURT

The respondent herein **JULIUS NGIGI MUNJUGA** filed a plaint dated 17th June 2013 at the Environment and Land Court at Kerugoya. The Chairman, Board of Governors, **MURANG'A COLLEGE OF TECHNOLOGY PRIMARY SCHOOL,** the appellant herein was named as the defendant. The respondent's claim was that he was the rightful registered owner of all that parcel of land known as **MURANG'A MUNICIPALITY/BLOCK 11/257** (hereinafter 'the suit property'). In paragraph 5 of the plaint he averred that '***In the year 2011, the plaintiff visited his above said land and discovered that the defendant has illegally encroached onto the suit property to the detriment of the rights and interest of the plaintiff***'

The respondent sought the following orders:

> ***"(a) An order directed at the defendant to remove all fencing around or across the plaintiff's property and to forthwith cease from any or further encroachment upon the plaintiff's property being MURANG'A MUNICIPALITY/BLOCK 11/257.***
>
> ***(b) A permanent injunction restraining the defendant by itself, its servants, agents or anyone acting through it from trespassing, encroaching, entering, taking possession, fencing, working therein, constructing, developing or in any other way interfering with the plaintiff's quiet possession and enjoyment of all that land being MURANGA MUNICIPALITY/BLOCK 11/257.***
>
> ***(c) General damages for trespass.***
>
> ***(d)Costs of this suit.***
>
> ***(e)Interest on (c) and (d) hereinabove.***

(f) Any other or further relief that this Honourable Court may deem fit and just to grant."

In a statement of defence dated 29th July 2013 the appellant contended that it was the registered owner of the suit property and that the respondent's title had ***'… been extinguished by adverse possession in addition to the repossession by the local authority'*** as it had been in possession since 1985.

The pendency of that suit notwithstanding, the appellant filed an originating summons (0.S.) dated 8th November 2013, the same being ELC Case No. 223 of 2013 and named the respondent herein as the defendant. He sought the following orders:-

"1. That the defendant's title to land parcel LR. Murang'a Municipality Block 11/257 has been extinguished by way of adverse possession.

2. That the defendant's name be deleted from the title herein and in its place the name of the plaintiff be inserted.

3. That the costs of this case be awarded to the plaintiff."

The O.S. was supported by the affidavit of ***HARRISON MWANGI MWITHIGA,*** the then chairman of the appellant,, sworn on 8th November 2013 in which he deposed that the appellant had been in possession of the suit property which it fenced in 1985 and that it became the registered owner on 9th February 1990. Further, the appellant contended ***'…and the then Local Authority the Murang'a Municipal Council in 1990 reached an agreement whereby the defendant was to be compensated with another land by the said Local Authority and forthwith cease all claims to the suit land. I annexe correspondence on the issue of the said exchange and mark it HMM6 (a) to (c) as a bundle'***

In response to the O.S., the respondent filed a replying affidavit sworn on 16th December 2013 and he denied that the appellant had been in exclusive and uninterrupted possession of the suit property for more than 12 years. He also raised the fact that there was a subsisting suit at the E & L Court at Kerugoya touching on the suit property, the same being ELC Case No. 614 of 2013.

On 21st April, 2015 the parties agreed by consent to consolidate Nyeri ELC Case No. 233 of 2013 with ELC No.614 of 2013. It was also agreed that the O.S be converted into a plaint and the replying affidavit filed by the respondent be converted into a defence.

On 22nd November 2016 the trial proceeded before Olao, J. The respondent's testimony was that he acquired the suit property in 1979 and obtained title in 1990 and that although he has been in occupation and possession of the suit property, he had not erected any structures thereon.

HARRISON MWANGI MWITHIGA (**HARRISON**) and **GRACE NYAMBURA NJERU** (**GRACE**) testified on behalf of the appellant.

According to **HARRISON**, the suit property was allocated to the appellant by the defunct Murang'a Municipal Council (MMC) and that the appellant had been in occupation since 1985. On her part **GRACE** told the trial court that she was the headmistress of the appellant school between 1989 – 1995. It was her evidence that although the school was established in 1984, she joined it in 1989 and that the suit property had been used as part of children's playground.

In a judgment delivered on 5th May 2017 Olao, J. found that the respondent had a valid title to the suit property and dismissed the appellant's contention that it had acquired the suit property by way of adverse possession. The appellant was dissatisfied with the said outcome and hence this appeal.

In a memorandum of appeal dated 24th October 2017 the appellant listed 7 grounds of appeal.

Pursuant to the directions given on 26th March 2018 the parties herein agreed to dispose of the appeal by way of written submissions which written submissions were highlighted on 25th June 2018.

On 4th June 2018 learned counsel **Mr. Mbuthia** and **Mr. Ng'ethe** holding brief for **Mr. Mwaniki** for the appellant and the respondents respectively appeared before us for plenary hearing. Each respective counsel highlighted their written submissions.

In its written submissions dated 25th April 2018, the appellant consolidated the 7 grounds into two. In ground I, Mr. Mbuthia, learned counsel for the appellant faulted the trial judge who inspite of finding that the appellant had been using the property since 1985 and had fenced it in 1990, erred in finding that the respondent knew of the said occupation in 2009; that the land having been fenced in 1990 and the plaint having been filed in June, 2013, this was 23 years later. Further, that the learned Judge erred in finding that the respondent knew of the appellant's possession in 2009, 4 years before the filing of the suit in 2013; that the respondent knew of the dispossession vide a letter dated 15th March 1990 addressed to the respondent by MMC informing the appellant that ***'…it has been decided that the above plot No. 257 which was allocated to you in 1981 (and have not been developed)'*** *(sic)* be acquired in order to provide expansion area for the above school. ***'However, we are ready to compensate you with another piece of land…'*** that the respondent had ***'… lost at the very least by 2002 (12 years from 1990).'***; that in his letters of 4th February 2009 and 31st August, 2009 addressed to MMC the respondent acknowledged that he had been dispossessed of the suit property, hence he was making a follow up of the promised alternative plot. In concluding ground I, counsel contended that ***'… the learned Judge should have concluded that the respondent knew or had the means to know of the appellant's full possession of the suit land by 1990'***

In ground II, counsel urged us to find that the learned trial Judge misconstrued the originating summons as being in contravention of the Land Acquisition Act and yet the originating summons was based on adverse possession.

The respondent filed submissions dated 24th May 2018 and countered the appellant's claim of adverse possession on the basis that it based its right to the suit property by virtue of allocation by MMC. It was the respondent's further position that the appellant had failed to establish the prerequisites for a claim based on adverse possession.

This being a first appeal, we have the onus to reconsider both matters of law and fact but without losing sight that we did not have the advantage of seeing and hearing the witnesses. In ***John Teleyio Ole Sawoyo vs David Omwenga Maobe [2013] eKLR*** thus court held:-

> "***This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyze the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same. In the case of Mwangi vs Wambugu [1984] KLR 453 at page 461, Kneller JA (as he was then) stated:***
>
> '***This is a first appeal so this Court is obliged to reconsider the evidence assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making allowance for this; (Selle & Another –vs- Associated Motor Boat Company Ltd & Others [1968]EA 123, 126 (CA Z) and Williamson Diamonds Ltd –vs- Brown [1970 EA 1.12] (C A T)'. Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in Ephantus Mwangi & another –vs- Duncan Mwangi Wambugu [1982 -88] 1 KAR 278 at page 292, as follows:-***
>
> ***A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.'***

In our view, this appeal is not difficult to determine. The respondent was issued with a Certificate of Lease on 9th February, 1990. He admitted to having erected no structures on the suit property. He claimed to have known of the appellant's encroachment in the year 2009. On the other hand, **HARRISON** the appellant's chairman stated:-

> ***"I was not aware that the plot in dispute was registered in the plaintiff's names until 2013 when his lawyer wrote to the defendant. I did not consult the plaintiff over this plot. We did not know about the plaintiff until February 2013 when we received this demand letter dated 18th February 2013 from his advocate***."

It was the appellant's contention that having taken possession in 1990 by fencing, 23 years had elapsed before suit was filed in 2013 and hence the respondent's cause of action, if at all, was barred by the Limitation of Actions Act. It was on this basis that the appellant claimed to have acquired the suit property by way of adverse possession.

In ***Alfred Welimo vs. Mulaa sumba Barasa, CA No. 186 of 2011*** this Court expressed itself thus:

> ***"It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry's manual of the Law of Property, 5th ed. Page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land. In such circumstances, the appellant would be said to have been dispossessed of the suit property by the respondent."***

In the matter before us, the appellant stated that he was in occupation from 1985 but fenced the property in 1990. It was the evidence of **HARRISON** on behalf of the appellant that they got to know of the respondent in the year 2013. The trial judge summed up the evidence and concluded that:

> ***"The defendant may have occupied the suit property as far back as 1985 or even 1990. However, it was not until 2009 that the plaintiff had knowledge of that occupation. That was clear from his evidence both in chief and during cross-examination. It was then that he started making enquiries culminating with a demand to the defendant in 2013. In fact the defendant's Chairman first met the plaintiff in February 2013 from his own testimony. Therefore time for purposes of adverse possession could only start running from 2009 and not before. Indeed the defendant did not even know that the plaintiff was the registered proprietor of the suit land until 2013. The defendant's counter-claim to the suit property by way of adverse possession cannot therefore be sustained from the evidence herein and must be rejected."***

In our view the learned judge correctly arrived at the date when the respondent got to know of the appellant's presence on the suit land. At the time the respondent filed suit in 2013, 12 years had not elapsed. Further, our determination is made simpler by the fact that the appellant's other claim to title is that it had been allocated the land by MMC. **HARRISON** tendered in evidence a letter dated 15th March 1990 addressed to the respondent. The said letter is reproduced in extenso in the judgment of Olao, J. and reads:

> "***Dear Sir***

EXCHARGE OF PLOT 11/257 (MURANGA MUNICIPALITY) WITH ANOTHER SITE FOR PURPOSES OF TECHNOLOGY PRIMARY SCHOOL EXTENSION

As you are probably aware, your above plot is adjacent to the above school. The above school does not have enough area for expansion.

In view of the above, it has been decided that the above plot No. 257 which was allocated to you in 1981 (and have not been developed) be acquired in order to provide expansion area for the above school.

However, we are ready to compensate you with another piece of land and you are therefore advised to call on the undersigned to show you the alternative site."

A claim based on allotment is not the same as a claim based on adverse possession. The appellant could not assert right of an adverse possessor and in the same breath claim to have been allocated the land in 1990. If this be the case then the appellant held the land as the rightful allottee and hence the possession was not adverse to the interests of the respondent.

The upshot of the above is that we find no merit in this appeal which we hereby dismiss with costs to the respondent.

Dated and delivered at Nyeri this 17th day of October, 2018.

P. O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR