IN THE COURT OF APPEAL

AT MALINDI

(CORAM: W. KARANJA, KOOME & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 8 OF 2018

BETWEEN

RAPHAEL KAHINDI KAWALA.....APPELLANT

AND

MOUNT ELGON BEACH PROPERTIES LIMITED.....RESPONDENT

(Appeal against the judgement of the Environment and Land Court at Malindi (Angote, J.) dated at Machakos on 18th September 2017 (O.S) and delivered on 5th December 2017

in

Malindi ELC No. 230 of 2014 (O.S))

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JUDGMENT OF THE COURT

1. The appellant ***Raphael Kahindi Kawala*** filed an Originating Summons dated 2nd August, 2012 claiming adverse possession of the suit property against the respondent.

2. At all material times in this suit, the respondent, ***Mount Elgon Beach Properties Limited***, was the registered proprietor of all that parcel of land known as L.R. No. 20824 (C.R. 27288) situate in Kilifi Township. The respondent obtained a Grant of the parcel of land for ninety-nine years from the Government of Kenya with effect from 1st November, 1993.

3. In the Originating Summons, the appellant claims that he has been in occupation of the suit property for a period of over twelve (12) years without interruption from either the respondent or anybody else. He alleged that he has developed the suit property by planting coconut trees, an orchard of fruits such as mangoes and has constructed permanent houses and carries out subsistence farming.

4. In a further affidavit dated 23rd April 2014, the appellant deponed that he entered the suit property in 1966 and has been in occupation to date; that prior to this, his late father moved into the suit property in the 1950s.

5. At the hearing, the appellant called as his witness ***Patrcik Vidzo Choya*** (PW2), who testified that he resided in Roka Location in which the suit property is situated; that he knew the applicant as his neighbor and that since 1975 he knew the applicant and his father who have been living on the suit property as fishermen.

6. In its replying affidavit dated 10th April 2014 filed and deponed by ***Mohammed Hamoud Mbarak***, the respondent avers that the appellant was not in occupation of the suit property when it purchased and obtained the Grant; that the appellant has never been in occupation of the suit property; that sometimes in 2011 or thereabouts, some squatters were claiming to be occupying the suit property for purposes of farming and requested the respondent to allow them; that the squatters entered the suit property and occupied it with permission of the respondent and that as at 17th April, 2011 all the squatters who had occupied the land were compensated by the respondent for the coconut trees they had planted. The respondent reiterated that the appellant has never been in occupation of the suit property.

7. The suit property is adjacent to **LR No. 18664** which has at all material times been in occupation of the family of ***Mr. Kalume Mwanongo Mwagaro (Mwanongo)***. In support of the respondent, several affidavits were deponed by members of the family of ***Mwanongo***. Of significance is the affidavits by ***Ms. Mwanongo Mwajima Mwagaro***, ***Ms. Fredy Mwajima Mwanongo***, ***Ms Kadiri Mwajima Mwanongo*** and

Ms Kahindi Mwajima Mwanongo who all deponed that the suit property was at all material times unoccupied.

8. At the hearing, the respondent called the area chief ***Julius Dziro(DW1)*** to testify. In his testimony, he stated that he was the area chief for Roka location in Kilifi County in which the suit property is located; that he has been the chief since 2004; that he knew the suit property, that since he became chief, he is aware that the suit property was not occupied by anyone; that he was the area sub-chief since 1996, that the suit property was bushy with footpaths; that the property has never been used for cultivation and that the land has two old coconut trees.

9. Upon hearing the parties, the trial Judge made the following findings:

> ***"42. Although the applicant's case is that he has always lived on the suit land since 1975 with his family, the applicant did not call any of his family members to testify in this matter.***
>
> ***43. Indeed, the only person the Plaintiff called to testify in this matter, PW2 admitted that the Plaintiff does not live on the suit land.***
>
> ***44. Having failed to avail evidence to show that indeed he has been in actual possession of the suit land or that he has been cultivating the suit land for a period of twelve (12) years, and in view of the evidence of the Chief of the area whose evidence was that the applicant's home is in Ngenrenya, I am convinced that the applicant has never been in occupation of the suit land for twelve (12) years or at all.***
>
> ***45. For those reasons, I dismiss the applicant's Originating Summons dated 2nd August 2012 with costs."***

10. Aggrieved by the judgment of the trial court, the applicant has lodged the instant appeal citing the following abridged grounds in the memorandum of appeal:

> ***"(i) The judge erred in law and fact in failing to hold that the appellant has been in occupation of the suit property for over 12 years.***
>
> ***(ii) The trial court erred in relying on the evidence of PW 2 Patrick Vidzo Choya, as the basis of holding that the appellant did not live on the suit property yet the said witness never gave such evidence.***
>
> ***(iii) That the judge erred in law in basing his judgment on a theory propounded by the court and which theory lacked any support from the evidence on record.***
>
> ***(iv) That trial court erred by failing to hold that the failure to call the sub-chief to wit Lawrence Maitha Thoya and the respondent's previous managers was so prejudicial to the respondent's case and this rendered the respondent case unreliable.***
>
> ***(v) The trial judge erred in failing to give reasons why it upheld the evidence on DW2, Julius Dziro and disregarded the evidence of PW2 Patrick Vidzo Choya.***
>
> ***(vi) The trial court erred in arriving at a decision that was wholly against the weight of the evidence."***

11. At the hearing of this appeal, learned counsel **Mr. Gikandi Ngibuini** appeared for the appellant while learned counsel Messrs **Ndalila Nelson**, **Phillip Musamia** and **Mokaya Oweya** appeared for the respondent. All parties filed written submissions and list of authorities in this matter.

12. Mr. Gikandi Ngibuini submitted that the appellant has been in continuous occupation of the suit property and also produced photographic evidence to back up his claim; that the said photographs showed the appellant had indeed constructed a house on the suit property where he lived together with his family and had planted coconut and mango trees; that the appellant testified he carried out farming activities and fishing on the nearby beach; that the appellant called one of his neighbours, ***Patrick Dziro Choya(PW2)***, who testified that he has been in occupation of the suit property. Counsel submitted that the trial court erred in ignoring the testimony of ***PW2***; that the court failed to take judicial notice of the fact that the appellant testified he had been in continuous and uninterrupted occupation of the suit property for over 12 years; that the court erred in finding that the appellant failed to call his family members to testify and that the evidence of *PW2* was more independent and was stronger than the evidence that could have been given by the appellant's family members. He cited dicta from the case of **Emmanuel Mwangemi vs. Teita Sisal Estate Limited (2016) eKLR** citing dictum of this Court in **Kenya Ports Authority vs. Kuston Civil Appeal No. 315 of 2005** where it was stated that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their evidence.

13. Counsel submitted that the trial court came up with its own theory because the court did not give any weight to photographic evidence tendered by the appellant; that the photographs depict and show the coconut trees and the house constructed by the appellant; that the photographic evidence and ***PW2's*** testimony prove that indeed the appellant has been in occupation of the suit property; that the court misinterpreted the evidence of ***PW2*** and arrived at a result that was dramatically different from ***PW2's*** testimony.

14. Faulting the trial court's reliance on the testimony of the area chief ***Julius Dziro (DW2)***; it was submitted that ***DW2's*** testimony was not corroborated; that he simply stated that the appellant lives in an area known as Ngerenya which borders Roka location and which area is outside ***DW2's*** jurisdiction as a chief and hence the testimony of the area chief of Ngerenya village would have been crucial to corroborate the allegation of ***DW2***; that there is no prohibition in law for a person to maintain two or more residential places; that the critical issue is

whether the appellant had been in continuous uninterrupted occupation of the suit property for a period exceeding twelve (12) years.

15. In concluding his submission, counsel urged us to find that the trial court erred in failing to consider the totality of the evidence adduced by the appellant and proceeded to dismiss the appellants claim based on uncorroborated evidence given by the Respondent. We were urged to find that the appellant has always been and is in occupation of the suit property.

16. The respondent in its submissions urged us to dismiss the instant appeal with costs. It was urged that the photographs tendered in evidence by the appellant have no evidential value and that the photographs are undated and it is not clear when they were taken. The respondent urged us to note that the trial court (S. Mukunya, J) visited the suit property and made observations which indicated that there was no house on the suit property and that it is clear that the photographs tendered in evidence were taken after the site visit by the court and these photographs cannot contradict the findings and observations by the court made on site. Further, counsel submitted that the photographs cannot give evidence as to how long the structures have been on the property; that photographs *per se* is not evidence of adverse possession for a period exceeding twelve (12) years and that the respondent's witnesses ***DW2*** testimony is in line with and corroborate the findings of the site visit by the court.

17. Counsel submitted that ***Patrick Vidzo (PW2)*** in his evidence never mentioned the **Land Reference Number 2824** which is the suit property; that the witness simply mentioned several other plot numbers without any specific reference to LR 2824.

18. The respondent further submitted that the appellant did not discharge the legal and evidential burden of proof that is cast upon him. On the issue that the respondent failed to call former Farm managers to testify, it was submitted that one of the managers had quit his job to pursue political ambitions and was a Member of Parliament at the time of hearing before the trial court; the other had died.

19. The respondent cited various case laws in support of its submissions. The case of **Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui (2017) eKLR** was cited to support the proposition that non-use of property by the owner even for a long time won't affect his title, but the position will be altered when another takes possession of the property and asserts a right over it. Counsel reiterated that whereas the law on adverse possession is well settled, the appellant did not prove that he had adversely occupied the suit property for over twelve (12) years. That it is not enough for the appellant to merely allege occupation of the suit property, such allegations must be proved to the required threshold.

20. We have evaluated the rival written submissions by learned counsel, examined the record of appeal and considered the authorities cited. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle vs. Associated Motor Boat Co. [1968] EA 123,** thus:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."**

21. In our consideration and determination of this appeal, we remind ourselves that there are issues of fact and points of law that have been urged before us. This Court, as an appellate court, will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judge has misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he/she should have taken into consideration and in doing so arrived at a wrong conclusion.

22. The gist of this appeal is the claim for adverse possession by the appellant. The law on adverse possession is well settled. This law is not in dispute in the appeal. The dispute is whether the facts as revealed by the evidence on record proves adverse possession by the appellant against the respondent. In effect, the dispute in this appeal relate to findings of fact by the trial court and application of those facts to the settled law on adverse possession.

*23. It is a well settled principle of law that an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. (*See the Supreme Court decision in ***Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779****).*

24. **In Gabriel Mbui vs. Mukindia Maranya eKLR**, it was correctly stated that the burden of proving title by adverse possession rests upon the person so asserting. Further, this Court stated in **Mweu vs. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430**: that **"adverse possession is a fact to be observed upon the land. It is not to be seen in the title. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12years after he had acquired it."** In addition, it is equally established that adverse possession does not arise merely by occupation and use. (See **Alfred Warimo vs. Mulaa Sumba Baraza**, **Civil Appeal No. 186 of 2011 (Ksm)**).

25. In the instant appeal, the pertinent issue is whether the appellant proved that he had been in adverse occupation of the suit property for a period exceeding twelve (12) years. In our re-evaluation of the evidence on record, it is manifest that both the appellant and ***PW2*** testified that the appellant has been in occupation of the suit property. In contrast, ***DW2's*** testimony as well as the replying affidavits deposed by the family of ***Mr. Kalume Mwanongo Mwagaro*** are to the effect the suit property has been unoccupied.

26. To resolve this apparent contradictory evidence, we have examined the report of the site visit by the court made on 11 th July 2014 at 1.30 pm by the late S. Mukunya, J. The learned Judge recorded as follows:

> ***"The court saw two coconut trees, no cultivation at all; no-houses, structures 10 X 15 temporary, three-quarters of the land is bush, it abuts the sea, lower part of the land recently cleared- bushes drying."***

27. Our re-evaluation of the evidence on record shows that the testimony by ***DW2*** is in tandem with the report on site visit by the court. ***DW2*** testified that there was no cultivation on the suit property. He further testified there were two old coconut trees. There is no evidence of mango trees planted or cultivated on the property as alleged by the appellant. The affidavits deponed by the family members of ***Mr. Kalume Mwanongo Mwagaro*** to the effect the suit property has been unoccupied also contradicts appellant's testimony that he has been in continuous occupation of the suit property.

28. In face of the conflicting and contradictory evidence relevant to proving adverse occupation of the suit property by the appellant, the law on legal and evidential burden of proof sets in. The burden of proving title by adverse possession rests upon the appellant being person so asserting. It is also settled that **adverse possession is a fact to be observed upon the land. Both *DW2's* testimony as well as the site visit by the court do not demonstrate and prove occupation by the appellant.**

29. **The appellant faulted the trial court in failing to take judicial notice** of the fact that the appellant testified he had been in continuous and uninterrupted occupation of the suit property for over twelve (12) years. In **Commonwealth Shipping Representative - v- P. & O. Branch Service [1923] A.C. 191 at p. 210**, Lord Sumner in the English House of Lords thus observed:

> ***"Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."***

30. **Kenya's Evidence Act (Cap. 80, Laws of Kenya)** expressly provides in ***[Section 60 (1)]*** that:

> **"The courts shall take judicial notice of the following facts***:*
>
> a. ….
>
> ***(o) all matters of general or local notoriety [things that everyone knows] …"***

31. In ***Gupta vs. Continental Builders Ltd (1976-80) 1 KLR 809,*** *Madan, JA,* (as he then was) stated as follows on judicial notice:

> ***"The party who asks that judicial notice be taken of a fact has the burden of convincing the judge (a) that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."***

32. In the instant appeal, the appellant faults the trial judge for failing to take judicial notice that the appellant was in continuous and uninterrupted occupation of the suit property. Judicial notice can only be taken of notorious facts and matters that are capable of accruable undisputable demonstration. There is no evidence on record proving that the appellant's occupation of the suit property was a matter of general public notoriety. The conflicting and contradictory evidence on record shows that appellant's alleged occupation of the suit property was neither notorious nor capable of immediate and accurate demonstration. The conflicting testimony by ***PW2*** and ***DW2*** reveals that the appellant's alleged occupation of the suit property was not a matter of local notoriety. ***PW2*** as well as the family members of ***Mr. Kalume Mwanongo Mwagaro*** all stated they are neighbours to the appellant yet all cannot agree as a matter of local notoriety whether the appellant was in occupation of the suit property or whether the suit property had ever been cultivated. In view of such conflicting evidence, we are satisfied that the appellant's alleged occupation of the suit property was not a matter of local or general notoriety suitable for judicial notice by the trial court. We are satisfied the trial court did not err in failing to take judicial notice of any matter in this case.

33. The appellant further faults the trial court in finding that the appellant ought to have called his family members to testify. In this matter, the legal burden of proof in the claim for adverse possession rests with the appellant. The respondent had called ***DW2*** and the family members of ***Mr. Kalume Mwanongo Mwagaro*** to testify. In light of the testimony by the respondent's witnesses, the evidential burden to prove occupation of the suit property for over 12 years had shifted to the appellant. We are satisfied that the appellant did not lead sufficient evidence to either rebut or disprove the testimony of these witnesses. The number, type, category or family relationships of any witnesses to the appellant is immaterial. It is the appellant to choose how many and which witnesses to call. We agree that the trial judge erred in finding that the appellant ought to have called his family members to testify. Be that as it may, we are satisfied that this error by the trial court does not affect the findings of fact by the trial court in relation to the claim for adverse occupation of the suit property.

34. We note that the appellant contends the trial court erred in relying on the testimony of ***DW2*** who was the area chief and erred in not relying on the evidence of ***PW2***. Further, that the court erred as it did not give reasons for choosing and relying on the evidence of one and not the other. We have considered this contestation. Having perused the judgment by the trial court, it is manifest that the court did not expressly address the issue of credibility of the two witnesses. However, the trial court states that "in view of the evidence of the chief of the area whose evidence was that the appellant's home is in Ngerenya" the judge was convinced that the appellant has never been in possession of the suit property. On our part, although the trial court did not expressly determine the credibility of the two witnesses, we have re-evaluated the evidence on record and are satisfied that the evidence on record supports the final findings of fact made by the trial court.

35. In totality, upon our re-evaluation of the evidence on record, we are satisfied that the appellant did not discharge both the legal and evidential burden to prove his claim for adverse possession of the suit property. There is no cogent and satisfactory evidence proving that the appellant had adversely occupied the suit property for a period exceeding twelve (12) years. We are satisfied that the trial court properly evaluated the entire evidence on record. Accordingly, we find that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 8th day of November, 2018

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR