



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPEAL NO. 41 OF 2017

BETWEEN

GABRIEL MUMELA MACHASIO.....APPELLANT

AND

GEORGE WANYAMA MACHASIO.....RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya

at Bungoma, (Mukunya, J.) dated 10th day of March, 2017

in

H.C. CIVIL SUIT NO 83 OF 2010 (O.S))

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the Environment and Land Court (*ELC*), (**Mukunya, J.**) dismissing the appellant's suit to recover land title **No. Ndivisi/Muchi/2111** (*suit land*) from the respondent.

[2] The appellant is the father of the respondent. Sometime in August, 2010, the appellant filed a suit by way of originating summons (O.S) under Order XXXVI Rule 3A and 7 of the Civil Procedure Rules (*now Order 37 Civil Procedure Rules, 2010*) to recover the suit land from the respondent.

The appellant stated in the O.S that he has been in continuous and peaceful occupation of the suit land for a period exceeding 12 years; that the title to the suit land is registered in the name of the respondent in trust for the appellant and the family; that the respondent's title to the suit land had been extinguished by adverse possession of the appellant. The appellant sought orders that the trust has been abused and should now determine and that, in the alternative, the respondent's title has been extinguished by adverse possession.

[3] The O.S was supported by the affidavit of the appellant in which he stated, *inter alia*, as follows, that he owned the suit land which approximately measured forty two (42) acres; that during the land registration process he was employed and was away from home in the course of his duties; that he authorized the Land Committee to register the land in the name of the respondent as the first born son in trust for his whole family; that upon retirement he called clansmen to assist to distribute the land amongst his eight children including the respondent; that the suit land was distributed according to acreage; that in 1984 the respondent sub-divided the suit land into four portions – Nos. 2109, 2110, 2111 and 2217, and that the respondent was supposed to transfer sub-division No. 2111 to the appellant which he did not.

The respondent filed a replying affidavit sworn on 23rd April, 2012 in which he asserted that he obtained land title No. Ndivisi/Muchi/1202 in 1972 during the first land registration, that he was not registered as trustee for the appellant and sub-division No Ndivisi/Muchi/2111 (*suit land*) was during the period between 1974 and 2008 Government land, the Government having acquired it for excavation of murrum for road construction, and that, he sub-divided title No. Ndivisi/Muchi/1202 and gave the appellant sub-division No. Ndivisi/Muchi/2109 as a gift which the appellant later distributed to his sons.

[4] On 7th February, 2013, a consent order was recorded before A. Omollo, J. in the following terms:

- “(i) The O.S and supporting affidavit be deemed as plaint.
- (ii) The replying affidavit be deemed as defence.
- (iii) The supplementary affidavit deemed as reply to the defence.
- (iv) The matter be heard by *viva voce* evidence.
- (v) The respective parties to rely on the documents annexed to their affidavits.
- (vi) Parties to file agreed issues and do discovery.”

[5] The appellant gave evidence on 26th November, 2013, before A. Omollo, J., called three witnesses and closed his case. Thereafter, the defence case was adjourned on two occasions. It was thereafter transferred to ELC. On 18th May, 2015, the respondent’s counsel applied for adjournment before Mukunya, J. of the ELC. It was brought to the attention of the trial court that the respondent had not complied with the orders of 7th February, 2013.

The court adjourned the suit and directed the respondent to comply within 14 days and in default “*defence filed herein shall stand struck out*”.

When the hearing resumed on 3rd November, 2016, **Mr. Situma**, counsel for the respondent informed the court that the respondent had not complied with the previous orders and that therefore the defence was struck out by operation of law. He asked the court to give a date for the judgment which the court did.

[6] Upon consideration of the evidence, the ELC made findings in part:

“(8) The plaintiff states in the originating summons that the land was his even before land consolidation. He allowed his son to be registered as a trustee.

He now wants that trust determined to enable him to get part of his land now registered as Ndivisi/Muchi/2111.

(9) He brings this suit not through trust but under originating summons for adverse possession.

...

I am afraid that adverse possession has not been established in this case at all. This suit in as far as it is based on the doctrine of adverse possession fails. The suit is dismissed.”

[7] The appeal is based on three grounds namely; that the ELC erred in law and in fact in dismissing the appellant’s suit when there was overwhelming evidence in support of adverse possession; the ELC erred in law and in fact in dismissing the suit without considering the 2nd limb of the appellant’s claim based on trust and determination of trust and, that, the ELC erred in law and in fact in dismissing the claim when there was no defence to it.

[8] **Mr. Khakula** appeared for the appellant and made oral submissions in support of the appeal.

Mr. Situma, learned counsel for the respondent did not attend the hearing of the appeal despite having been served with a hearing notice.

[9] The originating summons was filed on or about 19th August, 2010 before the publication of Civil Procedure Rules, 2010 on 10th September, 2010. The suit by originating summons was governed by Order XXXVI of the previous Civil Procedure Rules which is *pari materia* with the current order 37 Civil Procedure Rules, 2010. By Order XXXVI rule 1 (*now Order 37 rule 1*), the person who could file a suit by originating summons includes:

“any person claiming to be interested in the claim sought as a creditor; devisee, legatee, heir or legal representative of a deceased person, or as *cestui que trust* under the terms of any deed or instrument.”

Order XXXVI rule 3(1) (*now Order 37 rule 7(1)*) provides that an application under **Section 38** of the Limitation of Actions Act – (*that is a claim to be registered as proprietor by adverse possession*) should be made by originating summons.

[10] Mr. Khakula submitted that a beneficiary can take out an originating summons under Order 37 for a determination of a trust. That submission is not wholly correct for, as Order 37 expressly stipulates, it is a person who is claiming as *cestui qui trust* - (that is one who possesses an equitable rights in property) under the terms of a deed or instrument who qualifies to file an originating summons. (Emphasis

added).

The appellant did not claim in the O.S or at all that he was entitled to a beneficial interest in the suit land by virtue of a deed or instrument. His claim was in essence based on an implied trust which was not dependent on a deed or instrument.

To the extent that the claim of beneficial interest in the suit land was not based on a deed or instrument it could not technically be brought by the procedure of originating summons.

[11] However, as already noted, the O.S was converted into a plaint on 7th February, 2013 by consent order of the respective counsel for the parties which consent was recorded. The trial court had power under Order 37 rule 19(1) on its own motion to adopt such a course. By that act, the O.S became an ordinary suit by which the appellant was claiming the suit land from the respondent as a trustee or alternatively through adverse possession.

[12] The appellant's claim was that he owned the land which he caused to be registered in the name of the respondent as his eldest son during land adjudication in 1974 and which was registered as title No. Ndivisi/Muchi/1202 in the name of the respondent.

The appellant further testified that on 22nd December, 1974, he called clan elders and the land was distributed to the appellant's children without objection of the respondent. It was also the appellant's case that the respondent instead sub-divided the land into four portions which were registered in 1984 as Nos. Ndivisi/Muchi/2109, 2110, 2111 and 2217.

The appellant and his two witnesses gave evidence and were cross-examined by the respondent's counsel.

[13] The evidence of **Jackson Musungu Mukisi** who was a village elder amply supported the appellant's case. A copy of the Register in respect of **Title No. Ndivisi/Muchii/1202** was produced. It shows, *inter alia*, that, the respondent was registered on 2nd October, 1972 and that on 3rd October, 1984, the register was closed upon sub-division into Nos. 2109, 2110, 2111 and 2217.

The Certificates of official search also show that the respondent was registered as proprietor of Ndivisi/Muchi/2111; the appellant as proprietor of Ndivisi/Muchi/2109 and **Fredrick Wekesa Machasio** as proprietor of Ndivisi/Muchi/2217.

The minutes of the meeting of 22nd December, 1974 showing the fact and manner of the distribution of the original suit land was also produced at the trial. A letter dated 26th March, 1985 written by the respondent and addressed to the Chief Registrar was also produced. It shows that the respondent had no objection to the sub-divisions. The dispute he raised was about the proprietor of each of the four sub-divisions. The letter also shows that according to the Land Registrar, the respondent was registered as proprietor of Ndivisi/Muchi/2110.

[14] The real dispute between the parties was about the ownership of sub-division of title Ndivisi/Muchi/2111. The evidence shows that this portion had been acquired by the government to extract murrum. It was later returned to the family and registered in the name of the respondent on 6th March, 2008 long after the other three sub-divisions had been registered in 1984.

As already indicated, the appellant sought as the main relief in the O.S – an order that the respondent was a mere trustee and determination of the trust and as an alternative relief that, the title to the suit land had been distinguished by adverse possession. The respondent's defence was struck out and he did not give evidence at the trial.

[15] From the evidence, the appellant proved by preponderance of evidence that the respondent was registered as proprietor of original land title No. Ndivisi/Muchi/1202 and the sub-division thereof title No Ndivisi/Muchi/2111 as a trustee for the appellant. In finding that the suit was not based on trust but on an O.S for adverse possession, the ELC clearly, but inadvertently, erred in ignoring the order of 7th February, 2013 which converted the O.S into a plaint and the fact that the determination of the trust was the main relief sought in the plaint.

As to the costs of the suit, the ELC did not award costs of the suit. The respondent did not participate in this appeal and the parties are father and son. It is just that each party bears his own costs of the appeal.

[16] For the above reasons:

(i) The appeal is allowed.

(ii) The order dismissing the suit is set aside.

(iii) In substitution therefor judgment is entered for the appellant against the respondent in terms that the respondent is registered as proprietor of title No. Ndivisi/Muchi/2111 in trust for the appellant.

(iv) The trust is determined and the suit land to be registered in the name of the appellant as proprietor.

(v) Each party to bear his own costs of the appeal.

It is so ordered.

DATED and Delivered at Kisumu this 7th day of December, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR