REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 85 OF 2015

BETWEEN

KILIMO SHUTU ……………………………………………1ST APPELLANT

PHILIP CHARO SHUTU………………………………..….2ND APPELLANT

JOHN CHARO SHUTU ………………………………... 3RD APPELLANT

TIMA MAULANA SAID AHMED …………………………..4TH APPELLANT

MAULANA SAID MOHAMED ……………………………..5TH APPELLANT

ADIJAH MAULANA MOHAMED …………………………6TH APPELLANT

PRISCILLA MUGAMBI ………………………………….....7TH APPELLANT

AND

GODFREY KARUME ……………………………………......RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Angote, J.) dated 19th June,, 2015,

in

H. C. ELC Civil Case No.30 of 2009)

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JUDGMENT OF THE COURT

As this Court observed in **Mtana Lewa** v **Kahindi Ngala Mwagandi**, Civil Appeal No. 56 of 2014, adverse possession, as a global phenomenon has been criticised as an unjust means of land acquisition, where a wrong doer need only prove uninterrupted possession of land for a period of at least 12 years to be registered as its owner in place of the registered owner without paying for it. It was also observed that

the doctrine has not fitted easily with the concept of indefeasibility of title that underlies the system of land registration.

Section 7 of the Limitation of Actions Act bars a registered land owner from bringing an action to recover land after the end of twelve years from the date on which the right of action accrued to him. Instead the law allows the adverse possessor to apply to the High Court to be registered as the proprietor. It is now firmly established that for a claim of adverse possession to succeed, the party claiming ownership by adverse possession must demonstrate that the possession has been actual, exclusive, continuous, open and notorious and also hostile to the title and interest of the true owner. In other words it has to be proved that the adverse possessor has used the land which he claims as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion). In the case of **Wambugu** v **Njuguna** (1983) KLR 172 the Court emphasised that in order to acquire land by virtue of the statute of limitation, it must also be shown that the owner has lost his right to the land upon being dispossessed by the adverse possessor or by the owner himself discontinuing possession on his own volition.

To apply these principles to the facts in this appeal, we must remind ourselves, this being a first appeal, that our duty is to analyse the evidence recorded by the trial court before we can reach our own conclusions bearing in mind the caution in **Jabane** v **Olenja**, [1986] KLR 661, 664, that, on first appeal the Court will not lightly depart from the findings of fact of a trial judge unless they are based on no evidence or on a misapprehension of the evidence or where it is demonstrated that the trial judge acted on wrong principles in reaching the impugned conclusion.

Charo Shutu Masha (mzee Shutu), a well- known Chief in Malindi is said to have married 38 wives with whom (he was blessed) with over 100 children. It is alleged that he lived with his large family, that included the 1st, 2nd and 3rd appellants, in an equally large chunk of land known as **Plot Numbers M4 and M5**, whose size was compared to a size of an entire location. The land is located opposite Malindi Airport, on the right hand side abutting the main Mombasa – Malindi road, and was estimated to stretch towards Malindi town through BP and Total Petrol Stations, to the former Municipal Council of Malindi's offices, all the way to Muyeye, Mbuzi Wengi and Naran areas.

To demonstrate how long ago mzee Shutu's family had lived on the land, Elizabeth Fondo Shutu told the court that she got married to mzee Shutu's brother, Joseph Fondo, in 1959 and settled on the land where she established her matrimonial home. She had all her children on that parcel of land. For instance she got her first born child in 1963 and the third one, who is the 1st appellant, Kilimo Fondo Shutu, in 1974. So that when they testified that they knew of no other home, that is what they meant.

In the course of time, it was contended, the Government compulsorily acquired a large part of the land and allocated it to other developers. After the death of mzee Shutu, and following many years of incessant pursuit, involving meetings and exchange of letters between his family, the then Provincial Administration and the Lands Ministry, to have the land formally allocated to the family, a letter of allotment was finally issued on 12th April 2001 in the names of Charo Shutu Masha, Kazungu Fondo Japhet and Noti Charo in respect of approximately 7.53 hacters being a leasehold for a term of 99 years over **Unsurveyed Residential Plot No "A"**, even though the land was a designated industrial zone. It is also in evidence that prior to and after the grant of the allotment letter, the family of mzee Shutu constructed on the land their residential houses, some of brick walls and corrugated iron sheet roofs and others of Makuti and earth walls. In the course of the trial, the court directed that a survey be conducted to establish the boundary of the suit property and ascertain the people occupying it. Although the survey exercise ordered by the court was not complete due to violence, the surveyor report presented to the court confirmed the existence of 14 houses on the south-west of the land, two to the East, along the main Malindi-Mombasa Road and two more to the southern part of the land. Apart from his family, mzee Shutu had also invited to live on the land, his long time friend, Maulana Said Maulana, the 5th appellant, who unfortunately died before the case was heard.

At some point after the death of mzee Shutu some family members began to sell portions of the land. For instance they sold to the 4th, 6th and 7th appellants, dealing with it in the belief that it was their property. It

therefore came as a surprise when sometimes in 2013 they learnt that, apart from the respondent holding a letter of allotment, he had also been subsequently registered as the proprietor of a portion, now described as parcel number **LR. No. 4161** (the suit property) originally known as "**Plot No. A1"** within **Unsurveyed Residential Plot No "A"**, which they had all along considered part of mzee Shutu's parcel.

The respondent confirmed that indeed the suit property was allotted and a 99 year-grant issued to him in 1986; that thereafter he took possession thereof, fenced it with barbed wire and started planting maize on it; that he did so for one year before, in 1987 leasing it to Tabitha Wanjiru David (PW2), who in turn farmed it until 1990. The respondent explained that from the moment the farming activity stopped, interference with the suit property by third parties began. First the fencing poles and the barbed wire around the suit property were stolen. In examination in-chief he testified that it was in 2001 that he learnt that a group of people, who he later found out to be family members of mzee Shutu, had invaded the suit property and were subdividing and selling it. In cross-examination, however he said that he learnt of the encroachment in 2003. His attempts to repossess parts of the property that had been disposed of was met with violent resistance and he was prevented from setting foot on the suit property. The intervention and caution against interference with the suit property by the District Commissioner went unheeded. As a matter of fact when both the respondent and a surveyor went to the suit property to re-establish the beacons, they were beaten up and chased away. The respondent, in the process sustained serious injuries. Some of those involved were charged in court.

Arising from these events, the respondent instituted **ELC Civil Case No. 30 of 2009**, praying for a declaration that the suit property belonged to him and for the eviction of the respondents, claiming that, as the registered owner of the suit property, he was entitled to occupy and use it; that the appellants, without any colour of right encroached upon the suit property and started subdividing and selling it; and that, for these reasons they were trespassers and deserved to be evicted.

The appellants filed their respective statements of defence in which the 1st, 2nd and 3rd appellants maintained that their occupation of the suit property was adverse to the respondent's title; and that having been born and all along lived on the suit property, they were entitled to be registered as its owners; and that they knew of no other home but the suit property. The 4th, 5th and 6th appellants, a part from relying also on adverse possession, claimed in addition or as an alternative that they were innocent purchasers for value and without notice, believing the sellers were legitimate owners with authority to sell. The appellants maintained that their long occupation and ownership of the suit property was recognized by the Government through several letters to the respondent and the then provincial administration.

At the trial the 4th, 5th, 6th and 7th appellants did not testify. We have noted earlier that the 5th appellant was deceased at the time of the trial. But counsel representing the four of them, urged the trial court to find that, on account of their long occupation of the suit property over a period of more than twelve years and being innocent purchasers for value and without notice, they were entitled to be registered as proprietors of the portions they occupied.

Angote, J heard the rival arguments presented by the parties and their witnesses, and identified a single issue for determination, namely, whether the 1st, 2nd and 3rdappellants, and by extension the 4th to 7th appellants, who were claiming interest in the suit property through them as purchasers, were entitled to be registered as proprietors of the suit property under the statute of limitation.

Basing his conclusion on the report of the Land Officer, the learned Judge found that mzee Shutu's family dwelling houses were clustered around site "A" with semi permanent houses in an area measuring approximately 6.70 Ha; that a small fragment of plot "A" indicated as "A1" measuring 1.70 Ha was marked "committed" and constituted the suit property claimed by the respondent. The suit property was therefore located within plot "A". Having further concluded that when the Commissioner of Lands issued the letter of allotment to Shutu family in 2001 for plot marked "A", he did not take into consideration the existence of the suit property, which was, at that time already "committed"; that for that reason the suit property was not part of Plot "A" but independent of, and outside the land owned by the Shutu family. The learned Judge noted that, given the proximity of the two parcels, there was a likelihood that mzee Shutu's family was cultivating it at some point in time.

Following that finding the learned Judge ultimately answered the single question he had earlier posed, saying;

> **"Even if the family of Mr. Shutu was cultivating the plot indicated as "A1" by 22nd August 1995, the Government had already allocated the said plot to the Plaintiff….The survey plan that was produced in court shows that the suit property was surveyed on 23rd April 1986 vide a survey plan number FR 176/178. The Deed Plan in respect to the suit property was issued on 19th September 1995 and the grant was signed by the Commissioner of Lands on 28th December 1995.**
>
> **It therefore follows that by the time the Shutu family was issued with a letter of allotment for land measuring approximately 7.53 hectares, a portion of that land abutting the Malindi-Mombasa road measuring 1.70 Ha had already been allocated to the Plaintiff and was not available for allocation…….**
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> **It is not in dispute that the suit property is Government land. ..Once an individual has been allocated Government land, that land ceases being available for allocation to any other person, unless the allottee fails to comply with the conditions thereof. Consequently, the Shutu family could not have been lawfully allocated the suit property by the Government in the year 2001 because the same had already been allocated to the plaintiff and duly surveyed".**

Because there was no evidence to show when time began to run in favour of the appellants, by dint of **Section 41(a)(ii)** of the Limitation of Actions Act and on the authority of **Training Institute** v **Agnes Nyavu Charo & 106 Others**, Mombasa Civil Appeal No. 286 of 2010, the learned Judge was of the opinion that that notwithstanding, time could only start running upon the suit property being registered in the name of the respondent and not when it was in the name of the Government for which reason, he held, it was immaterial how long mzee Shutu's family was on or used the suit property during the latter period, as no adverse possession claim could attach to land owned by the Government; that therefore the appellants had failed to demonstrate the application of **Section 7** of the Limitation of Actions Act to their claim; that time could only begin to run in favour of the appellants against the respondent's title from 16th April, 2004 when he was registered as the owner of the suit land, because by **sections 21(2)** and **32(1)** of the Registration of Titles Act (repealed) an interest in land could only be effectual upon registration; that the suit having been filed in 2009 the appellants' occupation of the suit property did not amount to adverse possession for period between registration and institution of the suit was less than 12 years.

In the end the learned Judge agreed with the respondent and entered judgment in his favour whose effect was that he was the lawful owner of the suit property, and that as trespassers, the appellants were liable to be evicted.

This appeal has been brought by the 4th and 5th appellants but because the rest are affected and participated in the court below, under **rule 77** of the Court of Appeal Rules they were properly joined in this appeal. The appeal challenges the decision of the court below on six very broad and vague grounds. First, the learned Judge is accused of not upholding the **"principle that each case must be decided or determined on its peculiar facts and features";** that he erred in **"not reading and carefully considering and applying the principles contained in the submissions";** ignored the affidavit evidence; failed to apply the principles of equity and common law; overlooked the sacred tenets of overriding objectives; and finally, erroneously held that the respondent was the legal owner of the suit property.

Apart from the last ground, it should be apparent that the rest of the grounds do not comply with **rule 86** of the Court of Appeal Rules, which requires the memorandum of appeal to specify the points which are alleged to have been wrongly decided by the court appealed from. No doubt, however the last ground is all-inclusive and all-encompassing to challenge the entire decision, being concerned with granting to the

respondent the ownership of the suit property and directing the eviction of the appellants.

The appeal was canvassed through written submissions which more or less reiterated what we have set out in the preceding paragraphs and which we do not intend to rehash here. Reviewing the evidence before the trial court, it is not in dispute that mzee Shutu and his family had for very many years occupied a large portion of land near Malindi Airport within which the suit land is today situate. It was similarly common factor that until title to the suit property was issued to the respondent, it was Government land set apart as an industrial zone. It was estimated through the evidence of Elizabeth Fondo Shutu, DW5 and Mohamed Ali Bakari, DW6 as well as numerous correspondence on record that the period of occupation pre-dated 1959, and that there were 16 houses on the suit property including those belonging to the appellants. While this was the case advanced by the 1st to the 3rd appellants and their witnesses, the respondent and his witnesses, on the other hand maintained that the suit property was vacant when it was allotted to him; that he fenced it, carried out some farming on it before leasing it to Tabitha Wanjiru David; and that the appellants only encroached on it in 2001/2003. Although the learned Judge was persuaded by the latter's evidence, and expressed doubt over the existence of houses belonging to the appellants on the suit property prior to 2003, we have difficulties understanding the reasoning leading to that conclusion, bearing in mind that in two earlier rulings **Omondi, J** found, *albeit prima facie*, from affidavit evidence, including photographs annexed thereto of permanent structures on the suit property, that the appellants had been on the suit property longer than the respondent claimed. In the impugned judgment the learned Judge entertained the opinion that by being occupants of the neighbouring property, the appellants were only cultivating the suit property; and that the land in question being Government land at the time, they were trespassers and could not assert prescriptive rights over it. Although it is recorded that the court visited the suit property on 14th June, 2013 no report of such visit is on record, apart from the learned Judge noting that he had made observations and taken notice and the observation of DW4 that on suit property were very old houses.

We also find from the evidence by both sides in the form of letters exchanged over the subject by various Government agencies and offices that point to the fact that at least the 1st, 2nd, 3rd appellants and mzee Shutu's family had been on the suit property much earlier than 2003.

In a letter dated 13th December, 1989 the Malindi Town Clerk informed the District Officer that mzee Shutu had lived on the land for the last 45 years; and that;

> "**The case of Charo Shutu should receive the highest consideration as he has a large family and will need alternative residence in the event the plot is developed. The Council will advise the developer to wait until the matter is solved."**

On 2nd August, 1994 the Provincial Commissioner, F.S.K. Baya wrote another letter to the District Commissioner, Kilifi, stating, among other things, regarding mzee Shutu and his claim to **Plot No. M 5,** that;

> **"It is unfortunate that inspite of the D.O's letter being explicit the seriousness of the problem facing this old man with such a large family, nothing tangible has been done to reverse the unfair decision made against the family until now. I would therefore suggest that you take up this matter personally now and recommend to the Commissioner of Lands that the allotment letters already issued to other people be revoked and the allottees be given alternative land elsewhere so that this family is left to occupy the land they have lived on for so long".**

Two years later, on 21st June, 1996, in reply to the above letter, the Kilifi District Commissioner wrote back assuring the Provincial Commissioner that, in consideration of mzee Shutu's large family, comprising 38 wives, 4 brothers and 49 married sons, and in view of fact that the larger portion he had initially occupied had been allocated to others, leaving him and his family squatters on a parcel of land they had occupied for many years, everything was being done to secure and regularise his ownership of the suit property.

If further evidence of the fact that the appellants had been on the suit property prior to its transfer to the respondent, is needed, we shall cite one more letter, written by the former area Member of Parliament, Hon. Lucas Maitha to the Minister of Lands dated 20th September, 2007 in which he drew the attention of the Minister to the troubles of mzee Shutu over the suit property which he said had been in possession of mzee Shutu and his family for nearly 70 years; that during planning of Malindi Town, the land was earmarked as industrial zone; and that as a result, there has been conflict of interest between mzee Shutu family and investors. The purpose of the letter was to request the Government to allocate the suit property to mzee Shutu's family whose number was given in the letter as over 500.

While we are ourselves satisfied, on the basis of the foregoing, that the first three appellants together with the larger Shutu's family have been on the suit property for a much longer period than the statutory 12 years, the critical question remains whether they have successfully brought themselves within the provisions of **sections 7** and **37** of the Limitations of Actions Act. Unless land, the subject of a claim by adverse possession is registered at the time of the claim, such a claim would be misplaced and, no court order would issue in favour of the alleged adverse possessor. Since a letter of allotment is not evidence of title, the period before the respondent was registered would not count, because all he had was only a letter of allotment. That is what was reiterated in **John Mukora Wachihi & Others** v **Minister For Lands & Others,** High Court Petition No. 82 of 2010**,** where it observed that;

> **"…a letter of allotment is not proof of title as it is only a step in the process of allocation of land".**

The court relied on the position enunciated earlier in the case of **Wreck Motors Enterprises** v **The Commissioner of Lands and 3 Others** NAI. Civil Appeal No. 71 of 1997, where it was stated thus:

> **'Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.'** (Emphasis added)

> See also **Joseph Arap Ng'ok** v **Justice Moijo Ole Keiwua** NAI Civil Application No. 60 of 1997.

As a holder of an allotment letter the respondent was only a beneficial owner hence the doctrine of adverse possession could not be invoked against him at that stage and similarly he could not effectively assert his title to the suit property. The year the letter of allotment was issued to the respondent was not indicated. It was simply dated as 18th April. But it shows nonetheless that rent would be paid for the period 1st February 1986 to 31st December, 1986. It must follow therefore that it was issued in 1986.

Our consideration must now turn to the date the respondent became a lawful owner, namely the **1st February, 1986**, and not 2004 as erroneously found by the learned Judge, when a grant No. 37527 was issued to the respondent for a term of 99 years from that date. According to the respondent the land was vacant in 1986 and he utilised it between that year and 1990. In 2002 or 2003 he learnt of its invasion by the appellants. He explained that he was involved in a road accident in 1986 and had to travel to France where he remained for some time undergoing treatment. Although the respondent argued that the appellants were not on the suit property between 1986 and 2001 or 2003 we think, from the totality of the evidence that we have reproduced earlier, that mzee Shutu's family had all along been on the property. Instead we are convinced that after his registration as the lawful owner of the suit property, the respondent took no action to recover it from the appellants. All the letters written before 2003 that we have alluded to regarding the whole parcel occupied by mzee Shutu's family including the suit property, confirm that the respondent did not take any steps to reclaim it or to assert his right as the true owner. The letters were concerned more with the Shutu family than with the respondent. Indeed no reference, even once, was made of him in any of them.

Apart from the road accident that took the respondent out of jurisdiction and prevented him from asserting his proprietary right once the suit property was transferred to him, he also explained that as a friend to mzee Shutu, he did not wish to take any drastic action and hoped that the impasse would be resolved amicably.

We are persuaded equally on the evidence that all attempts by the respondent to evict the appellants and to assert his interest on the suit property only began in 2003, when he complained to the District Commissioner and two meetings between himself and mzee Shutu's family members convened on 1st and 9th August, 2003, respectively. There are letters on record written by the area Chief in Kiswahili, requiring, among others, John Charo Shutu to attend a meeting on 1st August, 2003. Although the subject matter of the meeting was not disclosed, we think that they were produced in court by the respondent in support of his case regarding the suit property. It cannot also be correct as alleged by the respondent that, upon the suit property being registered in his name he fenced it and began to farm it and later leased it. His letter of 6th August, 2003 to the District Surveyor, Malindi betrays that contention. In it he was requesting the assistance of that office:-

> **" ….in establishing the beacons for the referred plot…..to facilitate me to fence my plot as shown on the attached copy of the deed plan"**

From the date he became the lawful owner of the suit property to this time, the 1st, 2nd, 3rd appellants and their families had been on the suit property for 17 years.

The subsequent attempts at recovery of the suit property came in 2006 when the respondent addressed individual notices dated 2nd October, 2006 to those on the suit property telling them that;

> **"I write to inform you that I own Plot No.4161- MALINDI opposite the Malindi Airport.**
>
> **I have learnt that you have trespassed on it and fenced off part of it. This is to inform you to remove your fencing or any possible development on the same to avoid any desired** (sic) **court litigation and costs thereon"**

The third occasion was in 2009 when the respondent was attacked and injured by those in occupation of the suit property. Those involved were charged in Criminal case No. 698 of 2009. The fourth attempt was by a letter addressed by the firm of Machuka & Company Advocates to all the seven appellants demanding that they admit liability within five days from the date of the letter for the injuries inflicted upon the respondent when he went to the suit property and was attacked. They were also warned that the respondent would institute a civil action to evict them. On the fifth and final attempt during the pendency of the suit, the District Surveyor, Margaret Munga who had gone to the suit property to establish the beacons on 5th May, 2013 pursuant to a court order was ejected before completing the exercise by angry residents of the suit property.

For the reason that the respondent failed to take any steps to recover the suit property within 12 years, by the provisions of **section 7** aforesaid, he was permanently barred from filing suit to recover it. The suit was therefore filed after the expiration of the 12 years period prescribed by law and the respondent's title to the suit property was, by **section 17** of the Limitation of Actions Act, extinguished.

This finding only relates to the claim in respect of the 1st 2nd and 3rd appellants, who have, through evidence demonstrated that they have been in actual, exclusive, continuous, hostile, open and notorious possession of the suit property and did acts which were adverse and contrary to the respondent's interests, including subdividing and selling parts of it as if they were the true owners. Tima Maulana named in the appeal as the 4thappellant, who is the daughter of Maulana Said Mohammed, the 5th appellant was said to have been one of those who purchased a portion of the suit property and put up a house. The 4th, 5th, 6th and 7th appellants did not testify. The 5th appellant was deceased while some of the appellants were said to be in Italy and others in England and their attendance could not be procured without undue delay and expense. The result was that they did not give evidence regarding when they entered the suit property. The 1st appellant however testified that one Maulana, the father of the 5th appellant, a great friend of mzee Shutu was invited by the latter and settled on suit property many years ago and lived with his family throughout. DW6, Mohammed Ali Bakari, a nephew of the 5th appellant confirmed this. From this we can only say that since the 4th 5th and 6th appellants based their claim both on adverse possession

and purchaser's interest, the second limb of their claim could be sustained as it was dependent on the titles of the first three appellants, who we have found to have had a legitimate claim over the suit property..

For all these reasons we come to the conclusion that the learned Judge failed to adequately evaluate the evidence before him, in the manner we have done with the result that he arrived at a wrong conclusion that the appellants were not entitled to claim ownership of the suit property by statute of limitation and conversely by declaring the respondent the lawful owner. We, accordingly allow the appeal with costs. Pursuant to the provisions of **section 3(2) of the Appellate Jurisdiction Act** as read with **section 38** of **the Limitation of Actions Act** it is ordered that the appellants be registered as the proprietors of the portions of the suit property which they occupy.

Dated and delivered at Malindi this 31st day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR