IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 51 OF 2016

BETWEEN

TAURA MTSANGANYIKO.....APPELLANT

AND

JULIUS JUMBAE MUNDU.....RESPONDENT

(Appeal from the judgment and decree of the Environment & Land Court

at Malindi, (Angote, J.) dated 11th March 2016

in

ELCC No. 8 of 2013)

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JUDGMENT OF THE COURT

On 11th May 2016 the ***Environment and Land Court*** at Malindi ***(Angote, J.)*** dismissed with costs an Originating Summons filed by the appellant, ***Taura Mtsanganyiko***, claiming by adverse possession title to the parcel of land known as ***Plot Number 506/Roka/Uyomba*** in Kilifi County (the suit property). The suit property is registered in the name of the respondent, ***Julius Jumbae Mundu,*** since 18th October 1991. After hearing the evidence of the appellant and that of the respondent and his one witness and making a site visit, the learned judge was not persuaded that the appellant had been in open, continuous and uninterrupted occupation of the suit property for 12 years. Accordingly he dismissed the summons, which has aggrieved the appellant, leading to this appeal.

The appellant took out the summons on 22nd January 2013 and averred that he had been in open, continuous and uninterrupted occupation of the suit property, which measures in area 1.4 hectares, for over 12 years and that he had developed the same by planting coconut trees, building houses and carrying out subsistence farming. The appellant was the only witness in support of his claim and the substance of his evidence was that he entered into the suit property on 15th January 1981 when it was a forest. He cleared the forest, built a house and started cultivating the land. He testified that since then he has lived with his wife ***Kanze*** and their 9 children on the suit property and planted 13 coconut trees, a lemon tree, and kept cows and goats. It was his evidence that some of his sons have also built their houses in the suit property.

As to how the suit property came to be registered in the name of the respondent when he and his family were living on it, the appellant stated that during the adjudication process, he was away and did not know how the process was conducted. He did not raise any objection, although he knew that the suit property was ultimately registered in the name of the respondent, whom he testified not to know. Nevertheless, he continued staying on the suit property after it was registered in the name of the respondent until 2012, when he decided to claim it by adverse possession and took out the summons under the Limitation of Actions Act. He denied that he moved into the suit property in 2012.

The respondent's case on the other hand was that he was in occupation of the suit property with his family from 1968, when he took it over from his father, who up to that time was living on it. When the adjudication process started in 1978, the suit property was demarcated and ultimately registered in his name in 1991. He continued living on the suit property until 1998 when he moved to Lunga Lunga and allowed his nephews Chiberu Pasia and Mwango Pasia to occupy and look after it. The appellant was nowhere on or near the land.

In 2009, ***Kanze Baya,*** the widow of the appellant's brother, ***Karisa Baya***, moved into ***Plot No. 500*** which was adjacent to the suit property and owned by ***Kandoro Munyu***, where the appellant joined and started living with her. The respondent testified that the photographs produced by the appellant to purportedly show his house and developments on the suit property were in fact of developments on Plot No. 500 and that the appellant only invaded the suit property in 2012. After moving into the suit property, the appellant caused the settlement officer to summon the respondent to produce his documents of title to the suit property and shortly thereafter the respondent wrote a letter on 3rd August 2012 to the Department of Land Adjudication and Settlement protesting, among others, the invasion of his property by the appellant. That letter was produced as defence exhibit 2. The respondent further testified that on 12th February 2013 he reported to the police the invasion of the suit property by the appellant. It was the respondent's further evidence that the appellant built his house in the suit property only in 2014.

Chiberu Pasia (DW2), a nephew of the respondent who is also the son of ***Pasia Tsuma***, the owner of No. 507 which abuts the suit property, confirmed having been allowed by the respondent to occupy and cultivate the suit property and that the appellant was nowhere on the land. In 2009 Kanze Baya, started living on Plot No. 500 and later the appellant joined her and they started living together thereon. It was only in March 2014 that the appellant built a house in the suit property. He also testified that the photographs relied upon by the appellant were taken on Plot 500.

The court visited the site on 15th September 2014 and noted five temporary houses, an animal shed and two coconut trees, all of which belonged to the appellant. Having satisfied itself that the respondent was the registered owner of the suit property and that the appellant was in occupation of it, the learned judge narrowed the issue for determination to whether the appellant had occupied the suit property for 12 years continuously, exclusively, and without the respondent's permission. Ultimately the learned judge was not persuaded that the appellant had entered the suit property in 1981 as he claimed and noted that the appellant's houses on the suit property were barely three years old. Accordingly he concluded that the evidence on record was consistent with the appellant having entered the suit property in 2012 as claimed by the respondent. That is what provoked this appeal.

With the consent of both the appellant and the respondent, we directed that the appeal be heard through written submissions and limited oral highlighting. On the date scheduled for highlighting of the submissions, only the appellant had filed his submissions. The respondent did not file his submissions and his counsel did not appear even though he was duly served with a hearing notice. Accordingly we heard only counsel for the appellant.

The appellant set forth 10 grounds of appeal, which he argued in three clusters. In support of the appeal, he contended that all developments on the suit property belonged to him, a fact that was confirmed by the County Surveyor, Kilifi in his report dated 3rd July 2015 and by the court after the site visit. The learned judge was criticized for failing to conclude that the developments must have taken place over a long period of time and occupation. Relying on ***Munyu Maina v. Hiram Githiha Maina, CA No. 239 of 2009***, the appellant invited us to find that the respondent never rebutted the above evidence, that it was therefore

conclusive, and that the learned judge erred by failing to act on it.

The appellant further contended that the learned judge placed on him the burden of calling evidence to corroborate his evidence on when he entered into the suit property, while the law placed no such burden on him and also failed to place a corresponding burden on the respondent to call witnesses to corroborate his defence. The appellant also assailed the conclusion by the learned judge that his houses on the suit property were barely three years old without any evidence and whilst the appellant had explained the reason why the houses looked fairly new.

Next the appellant submitted that the court ignored the respondent's evidence that the appellant had a house on the suit property in 2006 and also erred by concluding that the appellant's siblings were not living on the suit property without any evidence being led in that regard. Relying on ***Kenya Ports Authority v. Kuston (Kenya) Ltd, CA No. 315 of 2005,*** the appellant urged that the duty of the court was to rule on the evidence on record and not to introduce extraneous matters. The appellant also relied on the fact that the respondent had not filed a counter-claim against the appellant and argued that it was evidence that the respondent had no claim to the suit property; otherwise he would have applied for eviction of the appellant. In the appellant's view, the learned judge erred by failing to consider that aspect of the case.

Lastly the appellant submitted that the trial court failed to evaluate all the evidence, which showed among other things, that the respondent had no presence on the suit property and invited us to re-evaluate the evidence and allow the appeal or remit the case back to the Environment and Land Court for retrial by a different judge.

Section 16 of the ***Environment and Land Court Act, cap 12A*** confers on an aggrieved party before that court a right of appeal to this Court. The appeal before us is a first appeal from that Court. In such an appeal we are obliged to rehear the matter, revisit the evidence on record, and subject it to fresh and exhaustive scrutiny before coming to our own independent conclusion on that evidence. (See ***Selle & Another v. Associated Motor Boat Company Ltd & Others*** ***[1968] EA 123*****).** It is only then that we are able to say whether the trial judge properly appreciated the evidence in its totality or whether he ignored some material evidence or laid undue emphasis on some evidence that was not material.

However, in doing so, we must also bear in mind the fact that on matters touching on credibility of witnesses, or in determining which version of the evidence tendered by the respective witnesses is more trustworthy, the trial judge who had the advantage of seeing and hearing the witnesses as they testified had a distinct advantage over us. In that respect therefore, we must defer to the conclusions by the learned judge, unless the evidence on record suggests otherwise. This caution was sounded in ***Susan Munyi v. Keshar Shiani CA. No. 38 of 2002*** as follows:

> ***"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions. In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."***

We have no doubt in our minds that the learned judge, having found that the suit property was registered in the name of the respondent and that as of the date of the site visit on 15th September 2014 the appellant was in occupation, the only issue for determination was the length of the appellant's occupation and whether that occupation was *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion). (See ***Kimani Ruchine v. Swift, Rutherfords Co. Ltd. (1980) KLR 1500).*** That central issue therefore can be determined, with respect, without having to delve into many of the peripheral issues raised by the appellant.

Under ***section 7*** as read with ***section 13*** of the Limitation of Actions Act, the owner of a property loses the right to claim his property after it is occupied continuously without interruption by an adverse possessor for a period of 12 years. Conversely, under ***section 38(1)*** after a period of 12 years of adverse possession, the adverse possessor is entitled to apply to the court to be declared the owner of the land. The burden was on the appellant, as the person who was asserting that he was entitled to be declared the owner of the suit property by adverse possession to prove, on a balance of probabilities, possession of the suit property openly, without consent of the respondent, peacefully and as of right, without force, for an uninterrupted period of 12 years. (See ***section 107***, ***Evidence Act***, ***Kimani Ruchine v. Swift, Rutherfords Co. Ltd (supra), Wilson Kazungu Katana & 101 Others v. Salim Abdall Bakshwein & Another, CA No. 11 of 2014*** and ***Mtana Lewa v. Kahindi Ngala Mwagandi, CA No. 56 of 2014*** (per Ouko, JA)).

The learned judge accepted that at the time of trial that the appellant was in possession of the suit property. However, the learned judge was not satisfied that the appellant had been in occupation of the suit property continuously for 12 years. This is how he expressed himself:

> ***"The plaintiff has therefore not proved on a balance of probabilities that before 22nd January 2013 when he filed this suit, he had lived on Plot 506 (the suit property) continuously, exclusively and peacefully and without the permission of the defendant for a period of 12 years."***

We ask ourselves what evidence did the appellant adduce to prove occupation of the suit property for at least 12 years? The only evidence on record is his testimony that he entered the suit property in 1981. We agree with the appellant's counsel that the appellant was not obliged to call a multiplicity of witnesses to prove occupation of the suit property for at least 12 years. (See ***section 143*** of the Evidence). Even the evidence of the appellant alone could prove that fact, if the trial court found it credible and believable, when considered against all the other evidence adduced at the trial.

The learned judge was not impressed by the appellant's evidence regarding when he entered the suit property. In our view, it is easy to understand why. If the appellant was in occupation of the suit property from 1981, how come he let the adjudication process, culminating in registration of the suit property in the name of the respondent in 1991, pass by without as much as a question? The appellant's answer was a vague response that ***"I was not around".*** Adjudication is a process, not a one-day event that one can easily miss. As against the appellant's evidence was that of the respondent and DW2 who testified that the appellant first moved into an adjacent plot occupied by his brother's widow, Kanze Baya, whom the appellant says is his wife, and only invaded the suit property in 2012. The respondent's version of events looks more credible, if one takes into account his letter dated 3rd August 2012 to the Department of Land Adjudication and Settlement (Defence Exb. 2) complaining of the invasion of the suit property by the appellant as well as his report to the police on 12th February 2013.

The learned judge himself, after visiting the site, was not convinced that the appellant had been in occupation of the suit property for as long as he claimed. These were his observations and conclusions:

> ***"When the court visited the site, it observed that the five houses were barely three years old and when the court sought from the plaintiff why the houses looked new, it was informed that it was because of the frequent renovations***."

In our view, far from being theoretical postulations as claimed by the appellant's counsel, those were observations by the learned judge that he was legitimately entitled to take into account, together with the appellant's answers to questions, while assessing the credibility of the appellant's evidence.

The appellant made heavy weather of an isolated statement by the respondent in his evidence in chief when he stated:

> ***"In 2006, there was a house for the plaintiff, for Priscilla and a pen for goats".***

The appellant insists that was admission by the respondent that he was on the suit property in 2006. We find it difficult to agree with that conclusion. It is unclear whether the respondent meant that it was the

plaintiff or Priscilla who was on the suit property. Taken as whole, the respondent's evidence is very clear that he was saying that the appellant was not in the suit property before 2012. For example, after making the above statement, the respondent told the court in unequivocal terms:

> ***"My land never had any complaints at all. It is not true that the plaintiff has been on the plot since 1981."***

It is also not lost to us that even if somehow the statement in question is interpreted to mean that the appellant was in the suit property in 2006, that in itself still would not amount to the prescribed period of 12 years.

With respect, we do not see how the appellant's failure to file a counterclaim for eviction of the appellant from the suit property assists the appellant's adverse possession claim. To accede to the appellant's argument would be tantamount to making counter-claims compulsory in adverse possession claims. It would also mean that in the absence of counterclaims, adverse possession claims would be granted as a matter of course, irrespective of the quality of evidence adduced by plaintiffs. We think the proposition is plainly preposterous and untenable.

In ***Peter Njau Kairu v. Stephen Ndung'u Njenga & Another, C.A. 57 of 1997,*** this Court addressed itself to the quality of evidence required in adverse possession claims and stated:

> ***"In order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary...Such title can only be deprived in the clearest of cases and it is for this reason that summary procedure in 0.36 rule 3(D) is provided by the rule-makers in their wisdom, for summary adjudication thereof."***

As we stated earlier in this judgment, it is the trial court, which the appellant was obliged to satisfy on a balance of probabilities. That, he failed to do. This Court will not readily interfere with findings of fact by the trial court unless we are satisfied that no reasonable tribunal, properly addressing its mind, would have arrived at the conclusion the trial court did. Having evaluated and reappraised the evidence on record, we do not see any err on the part of the trial judge that would justify interference with his conclusion.

This appeal has no merit and is hereby dismissed in its entirety. Because the respondent did not appear to defend the appeal, we make no orders on costs.

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