



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, AZANGALALA & MURGOR, JJ.A.)

CIVIL APPEAL NO. 102 OF 2015

BETWEEN

TITUS ONG'ANG'A NYACHIEO.....APPELLANT

AND

MARTIN OKIOMA NYAUMA.....FIRST RESPONDENT

JULIUS MAGERO MARTIN.....SECOND RESPONDENT

THOMAS BOSIRE MARTIN.....THIRD RESPONDENT

JOHN MAGERO MARTIN.....FOURTH RESPONDENT

(Appeal from the judgment of the Environment and Land Court at Kisii, (Okong'o, J.) dated the 27th day of August, 2015

in

Original KISII

ENVIRONMENT & LAND CAUSE NO. 68 OF 2012 (O.S.)

JUDGMENT OF THE COURT

INTRODUCTION

1. This is an appeal from the judgment of Okong'o, J. where the learned judge dismissed the appellant's claim for a parcel of land that was based on the doctrine of adverse possession. The appellant, being aggrieved by that decision, has preferred an appeal to this Court. This being the first appeal, this Court is bound to revisit the evidence on record, evaluate it and reach its own conclusion. The Court however appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching the findings. See **Mwanasokoni v Kenya Bus Services Limited (1982-88) 1 KAR 278.**

THE APPELLANT'S CLAIM BEFORE THE TRIAL COURT

2. On 23rd February, 2012 the appellant filed an originating summons in the High Court of Kenya at Kisii seeking the following reliefs:

“(i) a declaration that the defendants’ right to recover a portion measuring 198ft by 69ft (approximately ¼ acre) of L.R. No. Central Kitutu/Daraja Mbili/819 is barred under the Limitation of Actions Act Cap 22 Laws of Kenya, and their title over a portion in occupation/use of the plaintiff thereof extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation/use and possession of the aforesaid portion measuring ¼ acre for a period exceeding 12 years;

(ii) an order that the plaintiff be registered as the proprietor of the portion measuring 198ft by 69ft (approximately ¼ acre) of land parcel No. L.R. NO. Central Kitutu/Daraja Mbili/819, in place of the defendants and/or the register thereof be rectified to reflect the plaintiff’s ownership of the aforesaid ¼ acre under his use;

(iii) an order that the defendants do execute all the requisite papers necessary to have the plaintiff registered as owner of the portion of L.R. No. Central Kitutu/Daraja Mbili/819, measuring 198ft by 69ft (approximately ¼ acre), decreed by the court and in default, the deputy registrar and/or court executive officer be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of the court;

(iv) costs of this originating summons to be borne by the defendants;

(v) such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.”

3. In his affidavit in support of the originating summons, the appellant stated that in 1975 the first respondent sold to him a portion of his land parcel No. L.R. Central Kitutu/Daraja Mbili/819 measuring 198ft by 69ft (*approximately a quarter of an acre*), herein after referred to as *“the suit land”*.

4. Immediately thereafter, the appellant took possession of the suit land, fenced and began to cultivate it. The appellant also made the effort to have the first respondent obtain the area Land Control Board consent for the transaction, but the first respondent was evasive. The sale agreement therefore became null and void for want of the requisite Land Control Board consent, but the appellant remained in possession thereof.

5. On 18th January, 1996, the appellant and the first respondent signed a document that indicated that the first respondent had surrendered and/or relinquished any claim over the suit land to the appellant. The said document reads as follows:

“18/1/1996

I, Martin Okioma Nyauma the holder of I/D No. have surrendered the disputed piece of land of approximately a quarter of an acre to Mr. Titus O. Nyachieo whose I/D. No. is -0249154/64. The piece of land is 198ft long and 69ft wide. I have agreed to take him to the Land Board when is (sic) ready any time.

Witnesses:

1. Martin Okioma Nyauma - land owner (sign) - I/D No. 2616617/65

2. Titus O. Nyachieo - owner (sign)

I/D No.

3. Mariko Motiri - Village Elder - (sign)

4. Peter Onsongo - Village elder - (sign)

P.T.O.

The land in question was bought on 19th March, 1975 at the price of 8,000/=. Any of the two people, e.g. Martin Okioma Nyauma and Titus O. Nyachieo who destroys the fence or any property will be taken to court. This was agreed unanimously.”

6. Notwithstanding the aforesaid document, the first respondent reneged on the terms of the said agreement, the appellant contended. The first respondent refused to obtain the Land Control Board consent and continued to lay claim to the suit land.

7. The appellant further stated that the first respondent had sub-divided the land parcel No. Central Kitutu/Daraja Mbili/819 and caused the same to be registered in the names of his sons, the second, third and fourth respondents, who were threatening to forcefully evict him from the suit land, despite the fact that the appellant had been in actual, open peaceful and uninterrupted possession of the suit land for over 35 years.

8. It is on the basis of the foregoing that the appellant urged the trial court to make a finding that he had acquired ownership of the suit land under the doctrine of adverse possession.

THE RESPONDENTS' REPLY

9. The fourth respondent filed a replying affidavit for and on behalf of all the respondents. He stated, *inter alia*, that his father, the first respondent, was sickly and he had briefed him on the issues raised by the appellant and authorized him to swear the replying affidavit.

10. The respondents denied that the first respondent had ever sold the suit land to the appellant. They contended that the appellant had only leased the suit land for sometime but the lease had since been terminated. They further contended that land parcel No. Central Kitutu/Daraja Mbili/819 had been sub-divided and two new title numbers 3873 and 3874 created in the names of the first, second and third respondents. In their view, adverse possession cannot be asserted as against a person who is not the registered owner of the land in dispute.

11. The respondents denied any knowledge of the document that was allegedly executed by the parties on 18th January, 1996. They however conceded that by an agreement dated 20th December, 1973 Nyauma Mbiru and the first respondent sold to the appellant a parcel of land measuring $\frac{3}{4}$ of an acre and registered as parcel No. 255 /Daraja Mbili which is adjacent to the suit land.

SUMMARY OF EVIDENCE BEFORE THE TRIAL COURT

(i) The appellant's evidence

12. Prior to commencement of the hearing, the court gave directions to the effect that the originating summons would be disposed of by way of *viva voce* evidence; that the originating summons would be treated as a plaint and the replying affidavit as a defence; and that the parties were to file and serve their bundle of documents within 30 days from the date of the directions.

13. The appellant adduced evidence in accordance with his affidavit in support of the originating summons. He reiterated that he took possession of the suit land in 1975 and started growing maize and bananas on the land. He said that he had been in uninterrupted possession of the suit land since 1975 until sometime in 2012 when the second, third and fourth respondents in the company of their mother forcefully evicted him. He then made a report to the area Chief, who advised him to keep off the land until determination of the dispute. Subsequently, the respondents as well as the second to the fourth

respondents' mother were arrested and charged for their unlawful actions, convicted and sentenced to imprisonment for a term of six months.

14. The appellant further testified that in the year 2007 he filed a claim before the area Land Disputes Tribunal, which, in its judgment dated 18th July, 2007, ruled in favour of the first respondent. However, the appellant filed a judicial review application and had the Land Disputes Tribunal's decision quashed. The appellant did not produce a copy of the Tribunal's decision.

15. The appellant called **Job Nyakundi Onchera, PW 2**, as a witness. PW 2 was the area Chief from 2001 until 2007. He was also a neighbour of both the appellant and the respondents.

16. PW 2 told the trial court that the dispute over the suit land started before he became the area Chief. In the year 2006, the appellant reported to him that the first respondent had destroyed his boundary fence.

17. The witness further testified that he was aware that the first respondent had sold the suit land to the appellant in 1975 and since then, the appellant had been in occupation of the same until 2012 when he was forcefully evicted from the land. He added that the agreement dated 18th January, 1996 was produced by the parties before him; that the first respondent had agreed that he had sold the suit land to the appellant; that he had signed the agreement, but that he had been advised and warned by his wife and sons not to admit that he had executed the same.

18. **Peter Onsongo Maiko, PW 3**, a neighbour of both the appellant and the respondents, also testified that he was aware that the first respondent sold the suit land to the appellant but refused to grant him title to the same. The witness was categorical that the appellant had been in possession of the suit land since 1975. He added that the first respondent occupied one half of the suit land in the year 2000. PW 2 was one of the witnesses to the agreement that had been signed by the parties on 18th January, 1996. He confirmed that all the signatures on the agreement were genuine and not forgeries.

19. In answer to questions put to him by the trial court, PW 3 stated that prior to the agreement dated 18th January, 1996, the appellant had been in occupation of the land and the dispute between the appellant and the first respondent arose in 1996 when the appellant demanded that the suit land be formally transferred to him, since the first respondent had refused to obtain Land Control Board's consent for sale of the suit land.

(i) The Respondents' Evidence

20. The first respondent told the court that the only parcel of land that he sold to the appellant was No. 255/Daraja Mbili, way back in 1973 and that was the piece of land the appellant was occupying. The first respondent denied any knowledge of the agreement dated 18th January, 1996 in respect of the suit land. He added that appellant filed a case over the suit land before the area Land Disputes Tribunal but the suit was determined in his (*1st respondent's favour*).

21. In cross-examination, the first respondent said that he had leased the suit land to the appellant for about 8 years and after the expiry of the lease period, the appellant refused to vacate the same. The first respondent did not, however, state the commencement date of the alleged lease. He conceded that the dispute over the suit land had earlier been referred to the area Chief, wherein the agreement dated 1st January, 1996 had been cited.

22. The second, third and fourth respondents corroborated the evidence of their father to the extent that they were in occupation of the suit land. The second respondent, who was 26 years old in 1996, obviously knew nothing about the alleged sale of the suit land in 1975, having been born in 1970.

23. The second, third and fourth respondents confirmed that title to the suit land had been transferred to them by their father.

TRIAL COURT'S FINDINGS

24. The trial court, having considered the evidence on record and submissions by the parties' advocates, framed four issues for determination, namely:

“(i) whether the plaintiff has been in actual, open, peaceful and uninterrupted occupation of a portion measuring 198feet by 69feet (approximately ¼ acre) of all that parcel of land known as L.R.No. Central Kitutu/Daraja Mbili/819 (“the suit property”) for a period exceeding 12 years.

(ii) Whether the plaintiff has acquired rights over the suit property adverse to the defendants' title over the same;

(iii) Whether the plaintiff is entitled to the reliefs sought against the defendants;

(iv) Who is liable to pay the costs of the suit?”

25. In its determination of the first and second issues, the trial court was not satisfied that the appellant had sufficiently proved that he had been in peaceful, open and uninterrupted possession of the suit land since 1975 for a period exceeding 12 years. The court further held that the appellant had not placed before it evidence that he had been cultivating the suit land upto August, 2012 when he was forcefully evicted by the respondents. The learned judge held, *inter alia*:

“17. I have carefully analyzed and evaluated the evidence on record. As I have stated earlier in this judgment, the onus was upon the plaintiff to prove that he has occupied the suit property continuously without any interruption, peacefully, openly and without any fraud. I am not satisfied that the plaintiff has discharged this burden. The plaintiff has claimed that he purchased the suit property from the 1st defendant in the year 1975 and took possession thereof immediately. There is no evidence of whatsoever nature of this agreement which is said to have been the basis of the plaintiff's entry and occupation of the suit property. It is instructive to note that an agreement that was entered into earlier in the year 1973 between the plaintiff and, the 1st defendant and his deceased father over a different parcel of land was reduced into writing and as copy thereof was produced in evidence (d.Exh.1)

18. The only agreement that was placed before the court which is said to have been made between the plaintiff and the 1st defendant was that dated 18th January, 1996 (P.Exh.2). The 1st defendant denied having executed this agreement. A perusal of the agreement also reveals that it does not contain the particulars of land that was the subject thereof. It does not also purport to be an agreement for sale.”

APPEAL BEFORE THIS COURT

26. Being dissatisfied with the trial court's judgment, the appellant preferred an appeal to this Court. The grounds of appeal were, *inter alia*, that the learned judge misdirected himself in law and fact when he held that the appellant did not prove the salient ingredients of a claim for adverse possession; that he misapprehended the contents, purpose and intention of the surrender agreement dated 18th January, 1996; that the arbitration of the dispute by the area Chief and the subsequent proceedings before the Land Disputes Tribunal did not interrupt the running of time; and that the learned judge erred in his analysis of the evidence on record.

27. During the hearing of the appeal, **Mr. Nyambati** appeared for the appellant while **Mr. Sagwe** appeared for the respondents.

28. Mr. Nyambati submitted that computation of time ought to have commenced in 1975 when the appellant purchased the suit property and moved in, fenced the land and planted maize and bananas; that between 1975 and 1996 there was no evidence of any dispute between the parties; that the surrender

document dated the 18th January, 1996 was duly signed by the parties in the presence of several witnesses; that the appellant was forcefully evicted by the second, third and fourth respondents after the first respondent transferred the entire parcel of land parcel No. Central Kitutu /Daraja Mbili/819 to them; that the transfer could not defeat the appellant's claim under the doctrine of adverse possession.

29. On the other hand, Mr. Sagwe submitted that the agreement dated 18th January, 1996 did not show any land parcel number; that the said document is attached to an unsigned document which simply states that the land in question was bought on 19th March, 1975, but, the respondents were strangers to the annexed document; that the appellant had not been in peaceful occupation of the suit land as there were several disputes that were referred to the area Chief as well as the Land Disputes Tribunal; and that the appellant had failed to prove that he had been in open, peaceful and uninterrupted occupation of the suit land for a period of 35 years as claimed.

ANALYSIS OF THE EVIDENCE & DETERMINATION

30. We have carefully considered the record of appeal as well as the submissions by counsel as summarized herein above. In **Wambungu v Njuguna [1983]** KLR 172, this Court held that in order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it; but dispossession of the proprietor that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

31. It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute. See **Kimani Ruchine & Another vs Swift Rutherford Company Limited & Another [1976-80]** 1 KLR 1500.

32. It is not in dispute that in 1973 the first respondent sold to the appellant a parcel of land known as No. 255/Daraja Mbili Scheme. That parcel of land is adjacent to the suit land. According to the appellant, in 1975, he entered into an oral agreement with the first respondent for sale of the suit land at an agreed price of Kshs.8,000/= . The suit land measures 198ft by 69ft. But according to the first respondent's testimony before the Land Disputes Tribunal, he had only leased the suit land to the appellant for a term of 8 years. The first respondent did not state the commencement date of the alleged lease.

33. The appellant testified that upon entry into the suit land in 1975 he fenced the land and started growing maize and bananas thereon. He added that the first respondent had refused, failed and/or neglected to obtain the area Land Control Board's consent for the sale of the suit land. In 1996 when the appellant put pressure on the first respondent to take steps to formally transfer the suit land to him, they entered into the hand-written agreement dated 18th January, 1996.

34. It is instructive to note that Peter Onsongo Maiko, PW 3, who was a neighbour to both the appellant and the respondents was one of the witnesses to the signing of the said agreement. PW 3 explained the background that led to the signing of the said agreement. The witness was categorical that the appellant had bought two parcels of land from the first respondent, but the seller had refused to transfer the second parcel (*the suit land*) to the buyer.

35. In the aforesaid agreement, the first respondent stated that he had surrendered the disputed piece of land to the appellant and that, he would take the appellant before the area Land Control Board for purposes of obtaining consent for sale and transfer of the suit land to him. The first respondent signed the agreement and put down his identity card number thereon.

36. Even if the said agreement did not indicate the land parcel number, the measurements that are stated thereon as 198ft long by 69ft width leave no doubt in our minds that the parties were referring to the suit land.

37. The agreement referred to herein above was annexed to another document that is unsigned and which

contains the following words:

“The land in question was bought on 19th March, 1975 at the price of 8,000/=. Any of the two people, e.g. Martin Okima Nyauma and Titus O. Nyachio who destroys the fence or any property will be taken to court. This was agreed unanimously.”

38. Testifying about the agreement dated 18th January, 1996, PW 3, who was then 72 years old and a village elder, told the court that:

“P exh. 2 was executed after the parties had already entered into the agreement for sale orally. When the agreement was entered into, the plaintiff had already started using the suit property or the second parcel. I was present when P exh.2 was executed. The chief had asked me to summon the first defendant to his office. When the first defendant and the plaintiff appeared before the chief, the chief asked the first defendant to give the plaintiff a title for the second parcel of land. The agreement dated 18/1/1996 (P exh 2) was entered into so that the first defendant can give the plaintiff title for the second parcel of land that the plaintiff had purchased from the first defendant.”

39. From the foregoing, the circumstances under which the agreement in question was signed are quite clear. As to when the dispute over the suit land between the appellant and the respondent began, PW 3 stated:

“From 1996, the plaintiff and the first defendant have not had peace over this second parcel of land.”

40. In 2006, when the appellant reported to the area Chief, PW 2, that the first respondent had destroyed his boundary fence, PW 2 summoned the two parties and he took down minutes of the deliberations. PW 2 produced those minutes as P Exh 4. In the same meeting, the parties made reference to the agreement of 18th January, 1996. We have no reason to disbelieve the evidence of PW 2 and PW 3, who are close neighbours of the parties herein. PW 3 was present when the first respondent signed the agreement in dispute. In view of the foregoing, the first respondent’s denial before the trial court that he had not executed the agreement dated 18th January, 1996 is without any basis and must be rejected.

41. In his defence, the first respondent did not controvert the evidence of PW 2 and PW 3, save for his bare denial that he was a stranger to the agreement of 18th January, 1996. His sons, the second, third and fourth respondents, could not say much regarding the transaction that began in 1975.

42. From the totality of the evidence on record, we are satisfied that the appellant proved, on a balance of probabilities, that he moved into the suit land in 1975, having entered into an oral agreement with the first respondent for sale of the suit land at an agreed price of Kshs.8,000/=; that the area Land Control Board consent for sale of the suit land was not obtained at all and hence the intended sale became null and void; that the appellant took possession of the land in 1975 and started cultivating it; that in 1996 the appellant and the first respondent entered into a written agreement in respect of the suit land; that between 1975 and 1996 (*a period of 21 years*), the appellant was in open, quiet and uninterrupted possession of the suit land; that in an effort to defeat the appellant’s claim, the first respondent sub-divided parcel No. 819 and transferred the two sub- divisions to the second, third and fourth respondents.

43. In the circumstances, we find that the learned trial judge erred in law in reaching the conclusion that the appellant had failed to prove that he had been in open, peaceful and uninterrupted possession of the suit land for a period of at least 12 years as at the time he filed the proceedings in the High Court of Kenya at Kisii. The suit was subsequently transferred to the Environment and Land Court at Kisii.

44. As regards sub-division of parcel No. 819 and transfer of the two resultant sub-divisions, it is trite law that mere change of ownership of land which is the subject matter of a claim for title under adverse possession cannot, *per se*, defeat the claim. See **Githu v Ndeete [1984] KLR 776.**

Secondly, although the initial entry into the suit land by the appellant was with the consent and approval of the first respondent following the aborted sale agreement due to lack of consent from the area Land Control Board, the occupation became adverse. This Court has severally held that when a purchaser of land in a controlled transaction is permitted to be in possession of the land by the vendor pending completion of the transaction, the intended sale becomes void, and the permission to occupy the land is terminated by operation of the law. Any continued occupation becomes adverse from the time the transaction becomes void. See **Samuel Miki Waweru v Jane Njeri Richu, [2004] e KLR.**

45. In view of our findings, we allow the appeal, set aside the trial court's judgment and substitute therefor an order granting the prayers as sought by the appellant in his originating summons dated 23rd February, 2012. The costs of this appeal as well as the costs of the trial court's proceedings are awarded to the appellant against the respondents jointly and severally.

DATED and Delivered at Kisumu this 30th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.