



## IN THE COURT OF APPEAL

### AT KISUMU

(CORAM: G. B. M. KARIUKI, MUSINGA & GATEMBU, J.J.A)

CIVIL APPEAL NO. 87 OF 2015

BETWEEN

ALBERT FRED EKIRAPA.....APPELLANT

AND

NYONGESA SIRARI.....1<sup>ST</sup> RESPONDENT

PATRICK OCHI.....2<sup>ND</sup> RESPONDENT

JOSEPH OCHI..... 3<sup>RD</sup> RESPONDENT

GODFREY OPILL.....4<sup>TH</sup> RESPONDENT

JOEL ONGIRO.....5<sup>TH</sup> RESPONDENT

DENNIS SIRARI.....6<sup>TH</sup> RESPONDENT

*(Being an Appeal from the Judgment of (Kibunja, J) on 28<sup>th</sup> May, 2015*

*in*

*BUSIA H. C. ELC NO. 17 OF 2013)*

### JUDGMENT OF THE COURT

1. In a judgment delivered on 28<sup>th</sup> May 2015, the Environment and Land Court at Busia (S. M. Kibunja, J) dismissed the appellant's suit seeking an order for the eviction of the respondents from the property known as Title Number North Teso/Angurai/213 (the property). In the same judgment, the court allowed the respondents' counterclaim against the appellant by decreeing that the appellant's title to the property be cancelled and that the 1<sup>st</sup> respondent be registered as proprietor of the property, having acquired title thereto by adverse possession. Aggrieved, the appellant lodged this appeal.

#### Background

2. The appellant's case before the lower court was that he became registered as the proprietor of the property, which measures approximately 3.6 hectares, on 10<sup>th</sup> November 2011, having purchased it from one Rosela Akisa Odama under an agreement for sale dated 23<sup>rd</sup> April 2011; that when he purchased the property, the same was "free and nobody was using it"; that in December 2012 he learnt that plans were afoot to bury the body of the 1st respondent's wife on the property; that he reported the matter to the local Chief; and that the Chief summoned the respondents who claimed to own the property.

3. The appellant testified that when buying the property, he did not find the respondents on the property but he had seen remains of houses and learnt that "they belonged to persons who had been staying on the land but had been removed through eviction orders in Busia PMCC. No. 143 of 2010"; that the respondents returned to the property in December 2012; that he could not tell how long the respondents had lived on the property before he purchased it; that he learnt that the vendor, Rosela Akisa Odama, had inherited the property from her deceased brother, Cornelius Omuse, (also referred to as Coronel Omusee alias Coronell Omusee) in Busia High Court Succession Cause No. 132 of

2008; and that the respondents had filed objection proceedings in that Succession Cause claiming to have bought the property. He asserted that the vendor never informed him that the Land Disputes Tribunal (the Tribunal) had awarded the property to the respondents and that had he known that, he “*would not have agreed to buy the land.*” His prayer was for the respondents to “*be evicted from the land...*”

4. Rosela Akisa Odama (Rosela) testified in support of the appellant and confirmed having sold the property to him “*after getting it through succession cause from my brother Coronel Omusee (sic) who died in the year 2000.*” She stated that the land had been left idle and that she only found the 1st respondent on the property but got an eviction order, which was executed, and all houses of the 1st respondent demolished. She stated that objection proceedings filed by the 1st respondent in the Succession Cause were dismissed.

5. Rosela further stated that she filed a claim against the 1<sup>st</sup> respondent before the Tribunal where she sought an order for the 1<sup>st</sup> respondent to vacate the property but the Tribunal gave the property to the 1<sup>st</sup> respondent. She asserted that her late brother “*had sold one acre of the suit land*” to the 1<sup>st</sup> respondent and if the 1<sup>st</sup> respondent “*abandons his claim for whole suit land*” she would be prepared to buy him one acre of land. She indicated that she was not aware when the agreement for the sale of land between her late brother and the 1<sup>st</sup> respondent was made.

6. In their defence and counterclaim, the respondents pleaded that they have been living on the property for over 40 years and “*qualify to be owners by virtue of statutory provisions of adverse possession*”; that in light of previous litigation on the matter the appellant’s suit was *res judicata*; that the appellant’s title to the property having been obtained by fraud should therefore be cancelled and the property registered in the name of the 1st respondent.

7. In his testimony before the lower court, Nyongesa Sirari, the 1<sup>st</sup> respondent testified that he bought the entire property from Cornelius Omuse in 1970 and paid the purchase price of Kshs. 11,050.00 in instalments; that he took possession immediately upon purchase and has been living on the property with his family, including the 2<sup>nd</sup> to 6<sup>th</sup> respondents, since then; that Rosela had earlier sued him before the Tribunal, but the Tribunal awarded the property to him; that later, she sued him in Busia PMCC No. 143 of 2010, obtained an eviction order on the basis of which his houses were demolished; that he later returned to the property; that the appellant had also filed suit in Busia CMCC No. 15 of 2013 seeking eviction of the respondents from the property but that suit was dismissed by the court; that when he learnt that Rosela had filed Busia Succession Cause No. 132 of 2008 seeking to inherit her brother Cornelius Omuse, he unsuccessfully filed objection proceedings; and that the sale of the property by Rosela to the appellant was not legal considering that the Tribunal had awarded the property to the 1st respondent.

8. The 1<sup>st</sup> respondent further testified that upon purchasing the property from Cornelius Omuse in 1970, there was one house on the property, which he took over, and started living in it and subsequently constructed other houses; that after demolition of the houses by Rosela, 2 of the houses belonging to the 2<sup>nd</sup> and 4<sup>th</sup> respondents remained on the property; and that the demolished houses were repaired and new ones constructed and the respondents continue to live on the property.

9. Ochi Nyongesa Patrick, the 2<sup>nd</sup> respondent and son of the 1<sup>st</sup> respondent testified for the defence and stated that he was born in 1970 and grew up on the property; that his family has since been exclusively occupying the property using it for grazing, cultivating and planting trees; that his father and Rosela had a dispute over the property adjudicated before a Tribunal which awarded the property to his father; and that the award of the Tribunal was subsequently adopted as a judgment of the court. He stated that some of their houses on the property were demolished on 24<sup>th</sup> March 2011 after Rosela obtained an eviction order but his family returned to the property on 7<sup>th</sup> July 2014.

10. After reviewing the evidence, the trial Judge found as a fact that “*by April 2009, the 1<sup>st</sup> [respondent] had been in occupation and therefore adverse possession of the suit land for over twelve (12) years.*” The learned Judge concluded that the law relating to adverse possession affects the title and the purchase of the property by the appellant from Rosela was subject to the 1st respondent’s rights as an adverse possessor, which had crystallized by the time the appellant purchased the property in 2011.

11. Accordingly, the lower court declined to order the eviction of the respondents from the property; ordered the cancellation of the appellant’s title; and ordered that the property be registered in the name of the 1<sup>st</sup> respondent who had acquired it through prescription under Section 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya.

#### **The appeal and submissions**

12. The appellant contends that the decision of the trial court is erroneous. He has urged us to set it aside. Mr. Ipapu, learned counsel for the appellant, referred us to the appellant’s memorandum of appeal and submitted that the appellant purchased the property in 2011; became registered as the proprietor and obtained vacant possession; that the respondents did not establish adverse possession as they neither filed suit against the appellant nor against the previous registered owner of the property; that the claim by the 1<sup>st</sup> respondent that he purchased the property is incompatible with a claim for adverse possession; that in any event the evidence presented by the respondent demonstrated that the purchase related to only one acre of the property and not the entire parcel which measures 3.6 hectares; that no evidence was tendered by the respondents to demonstrate occupation; that the judgment of the court is therefore not supported by the evidence; that in any case, the

respondents occupation of the property was interrupted before the expiry of a period of 12 years as an eviction order was issued by the court in a suit filed in 2010.

13. Opposing the appeal, learned counsel for the respondents, Ms. W. L. Mutenyo, submitted that the judgment of the trial court is supported by the evidence; that the 1<sup>st</sup> respondent started residing on the property in 1970; that by the time the appellant filed suit to evict the respondents, entitlement to title over the property by adverse possession had already crystallized. Furthermore, counsel argued, there is a decision of the Tribunal upholding the respondents' claim to the property. Citing the decision of this Court in **Kairu vs. Gacheru (1988) 2 KAR 111**, counsel submitted that the transfer of ownership of the property from the Rosela to the appellant in November 2011 did not affect the respondents' accrued right to title to the property by adverse possession.

#### **Determination**

14. We have considered the appeal and submissions by counsel. This is a first appeal. As such, we bear in mind our role as articulated in **Selle v. Associated Motor Boat Company [1968] E.A. 123** where **Sir Clement De Lestang, V.-P** of the Court stated 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 witness and should make due allowance in that 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 demeanour of a witness is inconsistent with the evidence in the case generally.”***

15. Keeping that in mind, and based on the memorandum of appeal and submissions by learned counsel, the issue for determination is whether the learned trial Judge erred in concluding that the 1<sup>st</sup> respondent acquired title to the property by adverse possession.

16. The question whether the 1<sup>st</sup> respondent was in adverse possession of the property is a matter of evidence. As stated in **Mbira v. Gachuhi (2002) 1 EALR 137**:

***“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption***

***...”***

17. The principle of adverse possession was more elaborately set out in the case of **Wambugu vs Njuguna [1983] KLR 172**, where 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 dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”***

And that:

***“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”***

18. Although we are not bound by the findings of the trial court and are duty bound to re-evaluate the evidence and draw our own conclusions, we can only interfere with findings of fact if the same are not based on evidence or if the same are based on a misapprehension of the evidence or if it is shown that the trial Judge acted on wrong principles in arriving at the finding. See ( **Mwanasokoni vs. Kenya Bus Services Ltd [1985] KLR 931**).<sup>1</sup>

19. It is a common fact that Cornelius Omuse was the registered proprietor of the property in 1973. That fact is supported by the extract of title that was produced before the trial court. It is also not in dispute that the appellant derived his title over the property from Rosela, having purchased the same from her under an agreement for sale dated 23<sup>rd</sup> April 2011 and that he became registered as proprietor of the property on 10<sup>th</sup> November 2011.

20. Rosela on her part had, prior to selling the property to the appellant, inherited the same from her late brother, the said Cornelius Omuse. She acknowledged in her testimony that the 1<sup>st</sup> respondent was living on the property and that she had to institute legal proceedings, being PMCC No. 143 of 2010 at Busia for his eviction. She obtained an eviction order in those proceedings on 18<sup>th</sup> February 2011. Before that she had filed a complaint before the Land Dispute Tribunal whose award was adopted as a judgment of the court on 23<sup>rd</sup> July 2008. The Tribunal had resolved that *“the piece of land belongs to Nyongesa Sirari and advises him to go for land succession.”*

**1 See also Ndiema Samburi Soti vs. Elvis Kimtai Chepkess; Eldoret Civil Appeal No. 136 of 2005 (CA)**

21. According to Rosela, the 1<sup>st</sup> respondent had bought only one acre of the property from her late brother and it was on that basis that she was urging the 1<sup>st</sup> respondent to abandon his claim over the whole property and in return she would buy him an acre of land. Instructively however, in her suit before the Magistrate's court at Busia in PMCC No. 143 of 2010, there was no suggestion that the 1<sup>st</sup> respondent occupied only a portion of the property. Rather, the contention by Rosela Odama in that suit was that the 1<sup>st</sup> respondent should be evicted from the entire parcel of land and be restrained from entering or cultivating it.

22. The appellant on his part, though asserting that the "land was free and nobody was using it" at the time he bought it from Rosela, acknowledged that he had "seen remains of houses and learnt they belonged to persons who had been staying on the land but had been removed through the eviction orders in Busia PMCC No. 143 of 2010." Under cross examination he stated that he was not aware for how long the respondents had lived on the property; that had Rosela disclosed to her at the time he was purchasing the property that the Land Disputes Tribunal had awarded the property to the 1<sup>st</sup> respondent he "would not have agreed to buy the land"; and that he had filed another suit being Case number 15 of 2013 for the eviction of the respondents that was dismissed for want of jurisdiction.

23. The 1<sup>st</sup> respondent in his testimony stated that he bought the property from Cornelius Omuse in 1970; that he had "a sale agreement made and would make a written document when paying"; that he paid before the village elder and the chief. He produced copies of 3 handwritten notes dated 1991, 23<sup>rd</sup> August 1996 and 5<sup>th</sup> September 1996. He stated that he took possession and started living on the property from 1970; that he has been living on the property with his family since that time save for a short interlude when he was evicted on the basis of an eviction order in February 2011; and that he promptly returned to the property once that order was set aside.

24. The 1<sup>st</sup> respondent's son, Ochi Nyongesa Patrick who is the 2<sup>nd</sup> respondent, corroborated the testimony of his father and asserted that "we have been using the whole land by grazing, cultivating and planting trees" and that "there is nobody else who had used the suit land during the period we have been using it." He maintained that although one of the exhibits produced by the 1<sup>st</sup> respondent as evidence of purchase referred to one acre, his father was indeed purchasing the entire parcel of land.

25. Having regard to the evidence, the findings by the trial Judge that the property was first registered in the name of Cornelius Omuse; that in 1970, Cornelius Omuse agreed to sell the property to the 1<sup>st</sup> respondent on the basis of which the 1<sup>st</sup> respondent took possession of the property; that the last payment towards the purchase price was made on 5<sup>th</sup> September 1996; that six months after 5<sup>th</sup> September 1996, (i.e. March 1997) the sale transaction became void by reason of Section 6 of the Land Control Act, Chapter 302 of the Laws of Kenya because land control board consent in respect of the transaction was not obtained; that the respondents' possession of the property "became adverse to the interest of the registered owner from April 1997" and "by April 2009, the 1<sup>st</sup> [respondent] "had been in occupation and therefore adverse possession of the suit land for over twelve (12) years" are well supported.

26. Based on the evidence, we are ourselves satisfied that the 1<sup>st</sup> respondent purchased the entire property from Cornelius Omuse and that he took possession of the property upon entering into that agreement. The learned Judge properly excluded the period of occupation of the property by the 1<sup>st</sup> respondent between 1970 and 1996 because a person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal, (**Wanje vs. Saikwa (No.2) [1984] KLR 284**).

27. There was no evidence that land control board consent in respect of the transaction between the 1<sup>st</sup> respondent and Cornelius Omuse was obtained and the learned Judge correctly held that the transaction became void and that the 1<sup>st</sup> respondent's occupation became adverse from April 1997. The Judge rightly concluded that:

***"It follows therefore that the 1<sup>st</sup> [respondent] continued being in adverse possession of the suit land even after [Rosela Akisa Odama] became the registered proprietor of the suit land in 2009. The title that [Rosela Akisa Odama] got from her late brother through succession, and which she transferred to [the appellant] was subject to the 1<sup>st</sup> [respondent's] right of an adverse possessor from the date the sale agreement became void. The right to recover the suit land could have been exercised by Coronell Omusee during his lifetime, and thereafter by [Rosela Akisa Odama] before the period of twelve years expired in 2009, but they did not do so. It is therefore clear that by the time [Rosela Akisa Odama] filed Busia PMCC No. 143 of 2010 and the [appellant] filed Busia CMCC NO. 15 of 2013 and thereafter this suit, the window for recovery of the suit land from 1<sup>st</sup> [respondent] had been closed on or about April 2009."***

28. In our judgment therefore, there is no basis for the complaint that the conclusion reached by the trial Judge is not supported by evidence. In our view, the 1<sup>st</sup> respondent's claim for adverse possession was, on a balance of probabilities, proved. We therefore have no basis for interfering with the decision of the trial court. Accordingly, the appeal fails and is hereby dismissed with costs to the 1<sup>st</sup> respondent.

Orders accordingly.

***Dated and delivered at Kisumu this 28<sup>th</sup> day of September, 2017.***

**G. B. M. KARIUKI, SC**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**