



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 115 OF 2015

BETWEEN

WENSLEY BARASA.....APPELLANT

AND

IMMACULATE AWINO ABONGO..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Bungoma, Mukunya, J.) dated 28th October 2015

in

HC Land Case. No. 93 of 2011)

JUDGMENT OF THE COURT

Wensley Barasa (Barasa), the appellant, is aggrieved by the decision of the High Court, which ordered his eviction from land parcel No. E. Bukusu/S. Kanduyi/5778 (*the suit property*), following a suit filed by ***Immaculate Awino Abongo, (Immaculate)***, the respondent, seeking his eviction.

It was Immaculate's case that she had purchased the suit property from Aggrey Maurice Nandwa, (*Aggrey*) PW2, in 1993 for a sum of Kshs. 550,000, and thereafter obtained title to the suit property. Immediately after purchasing the land, she had gone onto the land, and found that a semi-permanent house, and a toilet had been constructed upon it. She came to later learn that the structures belonged to Barasa.

Aggrey, who had sold the suit property to Immaculate testified that the suit property was a portion of Land Parcel No. Bukusu/S. Kanduyi/4766 and initially belonged to Simiyu Khwatenge (deceased); that he had bought the land from Evans Masika who had died in 1993, through his brother, Simon Wekesa Simiyu (*Simon*) PW3, the administrator of the deceased's estate.

He also testified that in 1993 when he found out that someone had trespassed on his land, he had reported the matter to the chief but had not taken any steps to evict the trespasser, so that, when he sold it to Immaculate in 2010, the mud hut was still on the land. He further stated that he did not file a case to evict Barasa, but had agreed to evict him prior to selling the suit property to Immaculate. Immaculate had instead, gone ahead to file the present suit for eviction.

Simon stated that Aggrey had bought the suit property from Evans Masika, his brother in 1991. He was not aware that the suit property had been sold, but was aware that Barasa had entered upon Aggrey's land. According to him, neither Barasa nor his family lived there, and that the people who live there were hawkers of groundnuts.

On cross examination, he stated that, he was not aware that Barasa had purchased the suit property in 1987. He also stated that Barasa did not fence the place where he had built a hut.

In his defence, Barasa stated that he had purchased the suit property from Evans Masika in 1987, but was unable to obtain the title; that he filed Civil Suit No. 611 of 1993 in pursuance of the title, but due to lack of funds, the suit was dismissed for want of prosecution; that since then, he had occupied and developed the suit property for a period of 33 years, which development, Immaculate should have taken notice of at the time of purchase.

It was his evidence that, he had purchased the suit property in portions, ending up with a combined parcel of 96X100 ft; that he continued to live on the land until Immaculate demolished his structures. He stated that he had left the land when there were land clashes in Mount Elgon. He complained that he had been unable to obtain the title for the land, as Evans Masika had demanded a crate of beer from him in exchange, and being a Muslim, he was not able to provide it.

Upon hearing the evidence and considering the submissions of the parties, the High Court concluded that Barasa did not establish any interest in the suit property, and that no structures existed on the suit property; that if indeed there were, Immaculate was at liberty to demolish such structures and take full control of the land after 60 days; or in the alternative, Barasa had 60 days within which to remove his structures.

Barasa was aggrieved by the decision of the High Court and has filed this appeal on grounds that, the court failed to appreciate that by virtue of his having been in occupation of the suit property, he had acquired an interest through adverse possession; that the court wrongly concluded that no rights had accrued to him or to Evans Masika; that the learned judge misconstrued the evidence that Barasa had admitted that he had left the suit property during the Mount Elgon land clashes to live in Bungoma but that the suit property was relocated in Bungoma; that the learned judge wrongly concluded that Immaculate was a bona fide purchaser without notice, yet she had admitted that Barasa, whom she described as a squatter, was living on the suit property.

Appearing for Barasa, learned counsel **Mr. Sichangi**, submitted that Immaculate purchased the suit property from Aggrey in 2010, and soon thereafter, found Barasa in occupation; that at the time of purchase, Immaculate admitted that she had seen mud huts on the land, and was informed by the neighbours that Barasa was living there as a squatter since 1992. Counsel further submitted that Aggrey had purchased the suit property from Simon in 1991, and had later found that Barasa had constructed a structure on the suit property in 1993. After reporting the issue to the chief, he had not pursued the issue any further; that after 26 years of Barasa's occupation, Aggrey had returned, and sold the suit property to Immaculate without evicting him. Needless to say, counsel argued, Barasa had continued to live on the suit property since 1987 to date.

Counsel argued that the trial court was wrong to find that Barasa did not reside on the suit property, as he had moved to Bungoma following the Mount Elgon land clashes; that what the court overlooked was the appellant's claim for adverse possession which, by the time of the sale to Immaculate in 2010, had long since come into operation, and Aggrey's title had already been extinguished. Counsel cited ***Wambugu vs Njuguna [1983] eKLR***; where it was stated that, adverse possession would continue to exist against the title as an overriding interest.

On his part learned counsel, **Mr. Situma**, opposed the appeal, and submitted that this was an appeal arising out a suit for eviction of Barasa from the suit property, and was not a claim for adverse possession; that that claim was dismissed in Civil Suit Number 611 of 1993 for want of prosecution; that no appeal had been filed against that dismissal; and that on this basis, Barasa did not hold any title to the

suit property. It was counsel's further submission that Immaculate obtained a good title from Aggrey, as Barasa did not live on the suit property.

It was counsel's further contention that, if anything, Barasa only occupied the suit property for 17 years, but could not have lived in a mud hut without doors. He had also admitted that he lived in Sirisia. Furthermore it was contended, he did not at anytime challenge Immaculate's title, and therefore she was entitled to the orders for removal of Barasa's structures.

In his reply, **Mr. Sichangi** asserted that, Barasa was in occupation, and that the various attempts to evict him were testament to this fact; that Immaculate had found him in occupation, and that the order of eviction was not warranted as adverse possession had already come into existence by way of an overriding interest.

As a first appellate court, it is our duty to reexamine afresh the evidence and material tendered before the High Court and draw our own conclusions, but we should be slow in overturning the decision of the trial court, bearing in mind that we have not seen or heard the witnesses so as to be able to assess their credibility. see **Selle vs Associated Motor Boat Company Limited [1968] EA 123**, and **Williamson Diamonds Ltd vs Brown [1970] EA 1**. Bearing the principles in mind we will now address the issues arising in the appeal.

In our view, the issues for our consideration are whether, at the time Immaculate purchased the suit property, Barasa was in occupation, and depending on the answer to this, whether she was entitled to the order for eviction.

There is no question that the dispute herein arose out of Immaculate's suit seeking orders of eviction of Barasa from the suit property which property, Immaculate claimed she had purchased from Aggrey in 1993 for a sum of Kshs 550,000, and therefore it belonged to her.

In this regard the trial court stated thus;

“The question therefore is, what piece of land and/or interest was the defendant buying between 1987 and December 1988? No interest had accrued or existed in favour of the late Evans Simiyu. None is noted in the Register of the suit land. Evidence is on record that the interest in plot in plot (sic) No. 4766 that would have belonged to Evans Masika Simiyu who sold his land to Aggrey Moses Nandwa o 31/7/92. Nandwa then sold the land to the plaintiff on 30/12/2010.

By the time the plaintiff bought the suit land, there was no indication at all that there was any inhibition on the suit land. The defendant was not on the suit land. He had left the same during the land clashes in the area and had come to Bungoma Town. She was a bona fide purchaser for value without notice of the defendant's presence on the suit land.”

It is Immaculate's case that, immediately after she purchased the suit property from Aggrey in 2010, “... she went to the site and noticed that somebody whom [she] came later to learn was the defendant herein who had in the month of May 1993 or thereabout put a semi-permanent house and also a toilet...” She thereafter demanded that Barasa vacate the suit property.

She testified that, “I walked through the land before buying. There were mud houses... I do not know the defendant. I asked around neighbors gave me his name as the occupant of the mud house. I want him to be evicted from my land.”

Immaculate further contended that the seller, Aggrey had acknowledged that he had been away from the land for sometime, and that someone may have squatted on the land. When she enquired as to who had built the structure, she was informed that they belonged to Barasa. To this end she stated, “The defendant lives on my land as a squatter. I was not told when the house was put up but could be between 1992 and 2010.”

Aggrey stated that he purchased the land in 1991, and that at the time of purchase there was no structure on the land; that around 1993 he testified that, "...I found someone had put a structure on the plot," and that he had reported the matter to the police. Further that, "The hut put there was the one still there when I sold the land in December 2010."

Barasa on his part stated that, he had lived on the suit property since 1987, and though he stayed in Sirisia, was also in occupation of the suit property.

There can be no doubt that by the time of purchase of the suit property from Aggrey, Immaculate found mud structures had been constructed on it, and that when she enquired from neighbours, they confirmed that the mud structures belonged to Barasa. Aggrey did not live in the area and that despite obtaining the title, he had not taken over possession. He admitted that around 1993, he realized that mud structures had been constructed on the suit property and that Barasa had sued him over the suit property. It was further admitted that, he had informed Immaculate that he would evict Barasa, and then transfer title over the suit property to her.

Clearly, we find by the time Immaculate purchased the suit property in 2010, she was aware, and had notice of the existence of the mud structures belonging to Barasa. Having admitted that the structures existed since 1993, and in view of the report made to the chief, and following the offer made to evict Barasa, there is no doubt that Aggrey had notice of and was aware of Barasa's occupation of the suit property. And it was this occupation that led Immaculate to seek orders to evict Barasa from the suit property, on the basis that he was a squatter. Accordingly, we are satisfied that Barasa was in occupation of the suit property at the time Immaculate purchased the suit property.

Having so found, the next issue is whether Immaculate was entitled to evict Barasa from the suit property.

Section 30 of the repealed **Registered Land Act, Cap 300** specifies that thus:

"Unless the contrary is expressed in the register all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –

(a)...

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or prescription. (g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed".

This Court has variously stated that possession and occupation of land can create an overriding interest to which a proprietor's rights and interest were subject. In ***Obiero vs Opiyo [1972] EA 227*** it was stated thus;

"The Respondent has rights against the appellant stemming from possession and occupation of part of the land, which amounted to an overriding interest not required to be noted on the register and the appellants' proprietorship was subject to it, section 30 (g)."

In ***Janet Ngendo Kamau vs Mary Wangari Mwangi, Civil Appeal No. 173 of 2003***, this Court reached the conclusion that;

"The suit land is and has been at all material times registered under the Registered Land Act, Cap 300 laws of Kenya. Under section 30(f), above, rights in the process of being acquired under the Limitation of Actions Act, are in the nature of overriding interests and go with the land and not the registered proprietor. Change of ownership does not affect those rights as they attach to the land. In the circumstances as the plaintiff's occupation started long before the defendant became the registered owner, his rights were in the nature of an overriding interest

over the land and could be enforced at the expiry of the limitation period.”

Barasa’s case is that he had purchased the suit property from Evans Masika in 1987, and therefore had been in possession for 33 years. The learned judge was of the view that, he could not have acquired any interest as, by that time, there was no title in place, as the Green Card for the suit property was opened on 24th May 1992.

The existence or not of the title notwithstanding, what the learned judge failed to consider was Aggrey’s evidence that by 1993, the mud structures belonging to Barasa had been constructed on the suit property. They remained undisturbed until Aggrey sold the suit property to Immaculate in 2010. Having found as we have that Barasa was in occupation by this time, it would have in any event, been 17 years from 1993, to 2010 since Barasa was in occupation of the suit property. Hence, by the time Immaculate purchased the suit property, an overriding interest had been created.

Evidently, Barasa’s occupation of the suit property started long before Immaculate became the registered owner, and therefore in terms of **section 30** of the retired **Registered Land Act** his rights were in the nature of an overriding interest over the land. The change of ownership of the suit property did not affect those rights as they were attached to the land in question, in this case, the suit property.

Furthermore, contrary to the learned judge’s finding, Immaculate had notice of Barasa’s occupation and therefore she was not a bona fide purchaser without notice.

It is our finding that the learned judge misconstrued the evidence that the appellant had not established any interest in the suit property, despite the distinct evidence pointing to the existence of an overriding interest on the basis of Barasa’s occupation and possession of the suit property, which occupation had remained uninterrupted for a period of 17 years. For these reasons, the court ought not to have ordered the eviction of Barasa from the suit property, and we find it necessary to interfere with that decision.

In view of these circumstances, the appeal is allowed, we set aside the judgment and decree of the High Court ordering the eviction of Barasa from the suit property with costs to him.

It is so ordered.

Dated and delivered at Kisumu this 28th day of September, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR