IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G.B.M. KARIUKI, J. MOHAMMED JJ.A.)

CIVIL APPEAL NO. 289 OF 2009

BETWEEN

JOHN KIPLANGAT BARBARET.....1ST APPELLANT

CHRISTOPHER KIPTONUI MARITIM.....2ND APPELLANT

WILLIAM MAKILOT SANG.....3RD APPELLANT

JOSEPH KIPKOSGEI MARITIM.....4TH APPELLANT

SIMEON KIPLANGAT NNGERECHI.....5TH APPELLANT

KIMUTAI ARAP KENDUIYWO.....6TH APPELLANT

PHILIP KIPKIRUI CHESIMET.....7TH APPELLANT

BARTA TESOT.....8TH APPELLANT

CHEMIYWA ARAP CHEPKELAT.....9TH APPELLANT

AND

ISAIAH KIPLANGAT ARAP CHELUGET.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ojwang, J. (as he then was)) dated on 6th October, 2009

in

H. C. Miscellaneous Civil Application No. 400 of 2003 (OS))

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JUDGMENT OF THE COURT

1. The **nine appellants** in this appeal described themselves (in the suit No. 400 of 2003 (O.S) in the High Court at Nairobi which gave rise to the impugned judgment) as representatives and part of "Sagamian Community" whose members numbering 398 were named in a schedule attached to the Originating Summons dated 17th April 2003 which commenced the said suit. The respondent, **Isaiah Kiplangat Arap Cheluget,** was the sole defendant. The claim by the appellants against the respondent was for an order that they had acquired title to the respondent's land **LR No. NAROK/CIS-MARA/ILMOTIOK/54** (which is hereinafter referred to as "the suit land") through adverse possession of over 120 years. The appellants qua plaintiffs also sought orders to be registered as the proprietors of the suit land in place of the respondent and that the latter be required to execute an instrument of transfer of the suit land in their favour.

2. A certificate of official search dated 19th June 2001 attached to the Originating Summons commencing the suit in the High Court shows that the suit land was registered in the name of the respondent on 1st November 1980 and a title was issued to him on 2nd November 1980. It also shows the approximate area of the suit land as 2003.5 hectares and not 2339 hectares as pleaded by the appellants in the Originating

Summons.

3. The High Court **(J. B. Ojwang, as he then was)** did not find merit in the appellants' claim for adverse possession and in a judgment delivered on 6th October 2009, he dismissed the suit with costs to the respondent with an order that costs would bear interest at court rates as from the date of the institution of the suit on 17th April 2003. This is the judgment that prompted this appeal.

4. On 12th October 2009, the appellants gave notice of appeal as required by Rule 75 of the Court of Appeal Rules manifesting their intention to appeal to this Court against the whole decision of the High Court.

5. The Record of Appeal was lodged on 9th December 2009. In their Memorandum of Appeal, the appellants proffered 19 grounds of appeal. In summary, the appellants submitted that the learned Judge erred in his decision contained in the impugned judgment in attaching importance to the indefeasibility of title acquired through first registration under the Registered Land Act (now repealed) in a claim for title based on the doctrine of adverse possession; that the learned Judge misapprehended the rational basis of the doctrine of adverse possession and in not holding that the appellants had overriding interest which had priority over first registration; that the learned Judge erred in holding that the appellants did not "identify the area which they occupied," and "overlooked the fact that the suit land is about 5,000 acres in area"; and that the appellants and the respondent occupied different portions of the suit land and that the appellants were in possession of the portion known as "Sagamian" on LR No. NAROK/CIS-MARA/ILMOTIOK/54 in respect of which title deed was issued in 1980; that the evidence relating to possession was not properly analyzed; that the appellants had occupied the suit land since 1920s and that the learned Judge did not have regard to the fact that the respondent had resorted to criminal process before and after 1980 to disturb the appellants' possession of the suit land; and that the award of interest on costs by the learned Judge was in error.

6. The appellants prayed that the appeal be allowed and the impugned judgment be set aside and judgment be given in favour of the appellants in respect of the suit land No. LR No. NAROK/CIS-MARA/ILMOTIOK/54 otherwise known as Sagamian; that the superior court do receive evidence on the area of the portion of LR No. NAROK/CIS-MARA/ILMOTIOK/54 known as Sagamian; and that as an alternative to these orders, judgment of the superior court be set aside and the suit be tried by a Judge other than the one who tried it; and finally that the costs of this appeal be awarded to the appellants.

7. The appeal came up for hearing before us on 27th March 2017. Learned counsel **Mr. P. Gacheru Ng'ang'a** appeared for the appellants and learned counsel **Mr. A. M. Lubullelah** assisted by **Mr. Simiyu Wabuge** appeared for the respondent.

8. Mr. Gacheru Ng'ang'a submitted that the plaintiffs in the suit in the High Court were 9 plaintiffs who sued on their own behalf and on behalf of members of Sagamian Community who are close to 500. Counsel for the appellants showed the Court two maps No. JKB 1 and JKB 2 relied on to buttress the allegations that appellants were on the land as trespassers from 1920s and were still in possession in 1971 up to now and that they instituted the suit in 2003. The main thrust of the appellants' claim, contended their counsel, is that the appellants and their forefathers were born on the suit land long before independence and that they now have an established community comprising about 5000 people with necessary infrastructural amenities. Counsel for the appellants urged us to re-evaluate the evidence adduced in the High Court and come up with different findings from those of the trial Judge and give judgment in favour of the appellants.

9. Besides criticizing the learned Judge for not making findings in favour of the appellants, counsel for the latter contended that the court could infer trust even though it was not pleaded. Our attention was drawn to the case of **Mutiso vs. Mutiso [1988] KLR 846** in this regard. We were also urged to have regard to the overriding objectives expressed in Sections 3A and 3B of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya and Article 159(2)(d) of the Kenya Constitution 2010 and urged to dispense substantial justice "without regard to technicalities." It was the appellants' counsel's submission that the trial Judge misapprehended the concept of adverse possession.

10. **Mr. Lubullelah**, learned counsel for the respondent, opposed the appeal and urged us to dismiss it with costs. The 9 appellants, said counsel, represent an indeterminate number of people who have no National Identity Card numbers; that the land claimed is subject to a first registration; that any party interested in the land had an opportunity during the land adjudication to make and press their claims; that the appellants made no claim nor did any of them object to the land adjudication process; that there was a criminal case against the appellants which amounted to assertion of title by the respondent; that the trial Judge's judgment was correct; that the issue of trust was raised in submissions for the first time; that the maps could not be produced by the appellants' counsel as he was not a witness; that such maps should have been produced in the High Court; that the respondent was objectionable to their production; that it was incredible that the appellants could have been in adverse possession from 1920s; that the appellants have never been in exclusive possession; that the appellants have not shown by evidence the precise portion or portions of land they claim to have trespassed on; that there has been a long drawn out fight between the respondent and the appellants regarding a school on the suit land and that officials of the State seem to have aided the appellants to remain *in situ*; that the suit had no merit and the appeal should be dismissed.

11. mIn reply, Mr. Gacheru Ng'ang'a told the Court that leave to institute the suit in the High Court as a representative suit was not challenged when it was gotten.

12. We have perused the record of appeal and the submissions made and authorities cited by the parties through their respective counsel and have anxiously considered this appeal.

13. We are alive to the fact that this being a first appeal from the High Court exercising its original jurisdiction, we are enjoined under Rule 29(1)(a) of the Rules of this Court to re-evaluate the evidence and give the parties a retrial of the case in line with the principles in **Selle vs. Associated Motor Boat Co. [1968] EA 123;** and also **Abdul Mohamed Shalan [1955] 22 EACA 270.**

14. Perusal of the Originating Summons dated 17th April 2003 and filed on 17th April 2003 in the High Court sitting in Nairobi shows that the appellants instituted the suit against the respondent claiming to be entitled by virtue of the doctrine of adverse possession to "all that parcel of land situate in Narok District in the Rift Valley Province of the Republic of Kenya more specifically known as LR. No. NAROK/CIS-MARA/ILMOTIOK/54 measuring approximately 2329 hectares". They prayed for an order that they be registered as the

proprietors of the suit land in place of **Mr. Isaiah Kiplagat Arap Cheluget** in whose name the suit land is currently registered.

15. The Originating Summons was supported by an affidavit made up of 19 paragraphs and sworn on 17th April 2003 by the 1st plaintiff, John Kiplangat Arap Barbaret of Box 60 Olomirani in Kenya and who described himself as a farmer residing and working for gain at Sagamian in Narok, Kenya; he claims along with his co-plaintiffs the suit land. In paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of the said affidavit, the deponent states:

> ***"(7) THAT when our people were waiting for many years of struggle to bring religion and education to Sagamian tragedy struck in 1979. The tragedy was that all that the place of Sagamian Community had developed inform of a School and a church was flattened by one Isaiah Kiplangat Cheluget.***
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> ***(8) THAT the said Isaiah Kiplangat arap Cheluget was then a powerful official of the Kenya Government and it was impossible for us to differential Cheluget the man and Cheluget the Provincial Commissioner.***
>
> ***(9) THAT many years late it has dawned on us that this was a grotequare abuse of office by a government official.***
>
> ***(10) THAT it has also become apparent that although Mr. Cheluget hails from Buret District he was registered as the proprietor of land we have all along know as home.***
>
> ***(11) THAT the Kipsigis people who settled in Sagamian in the 1920's have intermarried with the original owners of Sagamian – the Maasai people and become a cohesive society.***
>
> ***(12) THAT over the years our people have developed their respective parcels of land into highly productive farms, where they have plaintin, coffee, tea, fruits and seasonal crops.***
>
> ***(13) That we have also carried on with our tradition of livestock husbandry albeit on a smaller scale due to the scarcity of land.***
>
> ***(14) THAT we have also built unviable social – cultural and economic network in Sagamian which will be destroyed if we were to be uprooted from our habital.***
>
> ***(15) THAT we have lived openly, peacefully and without interruption on our Sagamian homeland for over seventy years. Our story is contained in the bundle of documents hereto annexed and marked JKB-1."***
>
> ***(16) THAT the colonialists did not uproot us and the Kenya Government has never told us to abandon our ancestral land to date.***
>
> ***(17) THAT we are the true owners of the parcel of land now known as NAROK/CIS-MARA/ILMOTIOK/54 and measuring approximately 3000 hectares."***

16. It is crystal clear that suit instituted by the appellants against the respondent was premised only on the doctrine of adverse possession. The proper legal position with regard to pleadings is that parties are bound by their pleadings. It is the pleadings that dictate the issues for determination in a matter. A matter before a court of law must be determined on the basis of the issues raised by the pleadings. This principle may appear trite but far too often advocates and judicial officers alike engage in evidence that is at variance with the averments in pleadings and hence goes to no issue and must be ignored. The rationale for the requirement that parties are bound by their pleadings is that pleadings enable parties to know the case they have to meet and get ready for it by preparing their evidence on the issues raised in the pleadings. This also helps to avoid surprises which works out unfairness as the other party will not have had opportunity to prepare and respond. It was therefore idle for Mr. Gacheru Ng'ang'a to suggest in his submissions that we should infer trust in favour of the appellants although they did not plead it and although the suit was premised not on trust but only on adverse possession.

17. **Section 38** of the **Limitations of Actions Act, Cap 22**, provides the basis for a claim under the doctrine of adverse possession. The Section states:

> ***"38 (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.".***

18. The statutes referred in Section 37 of Limitation of Actions Act are the Government LandS Act, (now repealed) and the Registration of Titles Act, (now repealed). The Judicature Act, Chapter 8 of the laws of Kenya provides in Section 3(1) that:

> ***"(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with —***
>
> ***(a) the Constitution;***
>
> ***(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;***
>
> ***(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of***

equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

19. The English Common Law (in addition to decisions of this Court on adverse possession) applied to the appellants' suit in the High Court as much as it does to this Court by dint of Section 3(1) (supra). When the suit (No. 400 of 2003 (O.S.)) was instituted, the Registration of Titles Act had not been repealed by the Land Registration Act, now Cap 300. In **Benson Mukuwa Wachira versus The Assumption Sisters of Nairobi Registered Trustees [Civil Appeal No. 121/2006,** this Court stated with regard to adverse possession:

"A claim of adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an

uninterrupted period of not less than 12 years. An order for adverse possession made in favour of a trespasser is enforceable against the person registered as proprietor whose title is extinguished by adverse possession. The High Court in Amos Weru Murigu v. Marata Wangari Kambi and Another [H.C.C.C. No. 33 of 2002 (O.S) at Kakamega)) correctly held that:

"adverse possession can only arise where land is registered in the name of the person against whom the claim for adverse possession is made for the simple reason that land must be occupied by a trespassing claimant adversely to the title of the owner (proprietor) against whom the claim is made under Section 38 of the Limitation of Actions Act."

20. A person claiming to have become entitled by adverse possession to land registered under any of the Acts referred to in Section 37 of the Limitation of Actions Act, is entitled to apply to the High Court for an order to be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land if he can show that:

(1) he has, as a trespasser, been in adverse possession to the title of the registered proprietor for a period of not less than 12 years; and

(2) he has had continuous and exclusive possession of the suit land adversely to the title of the registered proprietor; and

(3) during the period of adverse possession the registered proprietor knew of the act of trespass on the suit land by the plaintiff; and

(4) that he was not on the suit land with the consent of the registered proprietor; and

(5) that the registered proprietor has never during the12 year period asserted his title to the suit land; and

(6) that the 12 year period of adverse possession has never been interrupted or broken; and

(7) that the plaintiff has been in exclusive possession of the parcel of land he claims and where such parcel of land is only a portion of a bigger parcel comprised in a title of the registered proprietor, that he can point out the physical boundaries of the portion he is in possession of; and

(8) that as was held in the case of **Mwangi Githu vs. Livingstone Ndeete [1984] KLR 776,** the plaintiff would be entitled to only the portion he (the plaintiff) is in exclusive possession of.

21. In this appeal, the appellants did not adduce evidence to show the portions they occupy adversely to the title of the respondent and did not appear to have marked any boundaries. The Originating Summons shows that the appellants number about 500; no evidence was led as to where each one or each family resides, or the boundaries thereof. In short, there is no evidence of where any family or appellant resides or of what is claimed or by whom. It is conceded that the appellants are not in possession of the entire land belonging to the respondent which was registered in the respondent's name on 11.9.1980 and measures 2003.5 hectares. It was not established by evidence the dates on which each appellant or each family among the appellants moved to the portions they allege they are in possession of or whether they have been in continuous and uninterrupted and exclusive possession of such portions. It is plain to see that the appellants failed to adduce evidence to prove the ingredients necessary to establish a claim for adverse possession because they moved in as squatters around the year 1999. The trial Judge heard the evidence of the parties and evaluated it. He assessed the demenour of the witnesses. He believed the respondent and his witnesses. The learned Judge stated in his judgment as follows:-

"In my opinion, if the land claimed by adverse possession is not identified in some clear and practical mode, then the claim cannot succeed.

Besides, this court believes the defendant's and not the plaintiffs' evidence, that he left the suit land in 2000, his son left in 2007,

and his workers have remained there since 2000; and the effect is that the plaintiffs will not claim they have been in exclusive possession of the suit land for the statutory period of twelve years.

There is credible evidence (especially from DW1 and DW2) that the plaintiffs entered the suit land forcibly, and remained there through breaches of the peace. The High Court held in Kimani Ruchine & another V. Swift Rutherford Co. Ltd & another [1977] KLR 10 that, in an adverse possession case (P. 16)

The plaintiffs have no prove that they have used this land which they claim as of right, nec vi, nec clam, nec precario (no force, nor secrecy, no evasion).

This court believes both DW1 and DW2: the plaintiffs entered the suit land in a turbulent manner, and threateningly forced the defendant out. On this test, the plaintiffs' case fails.

….....Credible evidence was given for the defendant, that the time of registering the suit land in the name of the defendant, in 1980, the land had no squatters. The Court believes the evidence for the defendant, that he continued to enjoy exclusive possession of the suit land following the issuance of registered title, and that he remained on the land until 2000; and that the squatter invasion which brought the plaintiffs to the suit land, took place in 1999/2000 period. This is confirmed by the defendant's efforts to remove the squatters, efforts which included the commencement of several legal actions, as from 1999.

The defendant's evidence was not controverted through cross-examination: he is an absolute owner by first registration of the suit land; he has cultivated this land since about 1970; he constructed substantial infrastructure on the suit land; he conducted a highly successful agricultural development on the suit land, for which he had won prizes;the defendant was forced out of his land by the plaintiffs, without any colour of right; the defendant incurred substantial financial loss, on account of the invasion and occupation of his land, and on account of the destruction of his property and his eviction.

This suit is the plaintiffs' case, and it clearly fails. The wronged party, it emerges from the evidence and from a consideration of the law, is the defendant. There is no doubt that the defendant may seek suitable orders, by moving the Court appropriately."

22. Yet the evidence shows that government officials are aware of the appellants on the respondent's suit land and appear intent on encouraging the appellants to trespass on the suit land. We digress to state that the suit land is private property and government officials have no right or capacity to permit or authorize the appellants to occupy it. However, the appellants were entitled to sue and claim the suit land under Section 38 of the Limitation of Actions Act as aforesaid. They failed to establish their claim.

23. Guided by the principles set out by this Court in many decisions on adverse possession including the case of **Benson Mukuwa Wachira vs. The Assumption Sisters of Nairobi Registered Trustees** (supra), we find no merit in this appeal. We uphold the decision of the learned Judge in dismissing the suit. We order that the costs of this appeal shall be borne by the appellants.

Dated and delivered at Nairobi this 29th day of December, 2017

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR