IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, KOOME & G.B.M. KARIUKI, JJ.A.

CIVIL APPEAL NO. 87 OF 2013

BETWEEN

ISSAK ADEN MAHAD and ALIMA MOHAMED ABDI

(Suing on their own behalf and as the Administrators of the Estate of the late

MOHAMMED ABDI ROBA)…….....……....1ST APPELLANT IBRAHIM LEMARIN…….....……..2ND APPELLANT

AND

WEST END BUTCHERY LIMITED…….....…….....……..…RESPONDENT

(An appeal from the Ruling/Orders of the High Court of Kenya at Nairobi (Murugi G. Mugo, J) dated and delivered on 4th March, 2005

in

HCCC NO. 1540 OF 2002 (O.S))

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JUDGMENT OF THE COURT

By Originating Summons dated 27th September 2002, and amended on 14th November 2002, **Mohammed Abdi Roba** and **Ibrahim Lemarin (**1st and 2nd appellants respectively) moved the High Court in Civil Case No. 1540 of 2002 (O.S) seeking determination of the following questions:-

> *"(1) Whether the plaintiffs are entitled to be registered jointly as the proprietors of the Land Parcel No. 7149/10 (I.R. No. 30601) situate North West of Athi River under Section 38 of the Limitation of Actions Act; and further whether the said property is registered in the names of Messrs. WEST END BUTCHERY LIMITED (the respondent).*

2. *That the Land Parcel L.R. No. 7149/10 (I.R. No. 30601) is registered in the names of Messrs. WEST END BUTCHERY LIMITED the defendant herein.*

3. *That the aforesaid occupancy has been done continuously as of right and without force from the plaintiffs and without permission from the defendant and/or any one of the Defendant's agents*

and/or servants.

4. *That the defendant by itself, agents and/or officers while aware of such user, were able to resist the same, but did not in any manner do so.*

5. *Whether by any reasons of the aforesaid occupation the defendant's title to the piece of parcel of land L.R. No. 7149/10 (I.R No. 300601) is extinguished under Section 17 of the Limitation of Actions Act (Chapter 22).*

6. *Whether the officers, the defendant by itself, agents, and/or servants should execute transfer and do all the acts necessary to convey the said title to the plaintiffs as joint proprietors, to enable them to be registered as such proprietors and in default whether the Deputy Registrar be authorized to sign all the necessary papers on behalf of the defendant and/or any one of its agents, servants or officers in singular and plural.*

7. *Whether the plaintiffs are entitled to the costs of this suit."*

This claim is predicated on the appellants' averment that they have been in occupation and exclusive possession of the said parcel of land for a period exceeding 12 years.

According to the affidavit in support of the summons deposed by the 1st appellant on his behalf and that of the 2nd appellant on 27th September, 2002, the two were employed by the respondent in 1968 and 1978 respectively. From the affidavit, it is not clear what happened between 1968, 1978 and 1984, or where the two were living. We say so because, according to paragraph 4 of the said affidavit, the appellants have lived on the property since 1984, and not from the date of their employment. They have deposed that they have enjoyed peaceful, open and uninterrupted occupation of the suit land for over 12 years and hence their claim of adverse possession.

They state that sometime in January, 2002, some persons who were strangers to them went to the property and started claiming ownership, and threatened to evict them. They depose that they have nowhere to go if evicted. In our view however, nothing much turns on that deposition as that is not a necessary consideration in a claim for ownership of land by way of adverse possession.

In opposition to the originating summons and the affidavit in support thereof, the respondent, through its managing director Mohamed Juma Allarakha, deposed that the property in question belongs to the respondent; having purchased it on 24th December, 1976. Mr. Mohammed denied that the appellants were ever employed by the respondent either as security officers or drivers. The first time he ever saw the appellants was in 2002 when they filed this suit, he deposed.

He denied that the appellants have ever lived on the property in question saying that the intruders moved into the suit property in 2002 and hurriedly constructed temporary structures thereon. The invasion/trespass was reported to Athi River Police station vide O.B. report No. 31 of 23rd January 2002, following which the trespassers were evicted.

Five months later, another batch of trespassers invaded the land and constructed some illegal structures, and managed to stay on the property for three months before they too were evicted and the illegal structures demolished.

In negation to the appellant's averment that they are still living on the land and have nowhere to go if evicted, the respondent annexed a letter from the District Officer Athi River Division dated 16th September, 2002, wherein the District Officer confirmed that he had visited the suit land and confirmed that there were no structures there and that there were only two watchmen who were guarding the property on behalf of the respondent.

It was the respondents case therefore, that the appellants claim was not founded in law; they were

trespassers who had not lived on the suit land at all; and that their claim should be dismissed. Pending the hearing and determination of the originating summons, the respondent herein through its lawyers C. Mwangi Gachichio filed a chamber summons dated 7th May 2004, seeking the striking out/dismissal of the originating summons under **Section 3A, Order VI Rules 13(1)(b)(c)(d) 13(3)** and **16 of the Civil Procedure Act and Rules.**

The grounds proffered in support of this application were that the (OS) disclosed no reasonable cause of action; it was scandalous, frivolous, and vexatious; and was otherwise an abuse of the process of the Court.

In his affidavit in support of the chamber summons, Mr. Mohamed Juma Allarakha gave a list of several suits which had been filed by the appellants herein in respect of the same property, which were, not followed through to final conclusion. Such suits included HCC Nairobi No. 310 of 2002 and Machakos HCC No. 108 of 2002; within which several applications had also been filed.

We need not go into the nitty gritty of these suits and the applications referred to. From the annexures to the supporting affidavit, it is evident that the said suits and applications did exist and were not pursued to conclusion for one reason or the other.

The application for striking out/dismissal was opposed on grounds *inter alia* that there were no sufficient grounds upon which the application was predicated, and that the application was premature. The application was argued before Mugo, J.

Mr. Gachichio who argued the case for the appellants referred to several correspondences on record whereby the appellants had admitted that the suit property was registered in the name of the respondent, and that the appellants were only taking care of the same. He posited that if indeed in 2002, the appellants admitted that they were only taking care of the property on behalf of the respondent, then they could not claim any prescriptive rights over the said property only a few months after the said admission. His contention was that time could only start running from 2002, and resultantly, any claim of adverse possession was grossly premature.

Opposing the application, Mr. C. N. Kihara, representing the respondents (appellants herein), urged that the issue of adverse possession could only be argued by way of adduction of evidence in the originating summons, but could not be summarily dismissed. He submitted that the other suits referred to had not been heard and determined on merit. He also submitted that the application for striking out should not have been entertained before the summons for directions had been taken.

After hearing the parties, Mugo J rendered the ruling dated 4th March, 2005, in which she struck out and dismissed the application with costs.

That ruling is the subject of this appeal. The learned Judge summarised the issues before her aptly as follows:-

"I find this to be a matter wherein the real issues under determination have been obscured by the multiplicity of suits and applications, relating to the same dispute, namely the ownership of the suit land, and the main question being whether the claim for ownership under prescriptive rights can be upheld in favour of the plaintiffs as against the defendant. It is this question that the applicants have challenged in their various grounds and in support of their application to strike out the originating summons."

This being the gist of the claim, considered *vis-a-vis* the said acknowledgments from the appellants, led the learned Judge to arrive at the conclusion that indeed the respondents had no cause of action against the applicant. The application was therefore, allowed with the result that the originating summons was struck out and dismissed with costs.

In this appeal, the appellants have entreated us to re-evaluate the pleadings, the application for striking out and/or dismissal, and the evidence on record and find in their favour. We shall advert to this prayer

later.

The other prayer is that the appeal be allowed with costs both before the High Court and this Court. The appeal is predicated on some seven grounds which by way of summary are to the effect that the application in question was misconceived; it was prematurely before the Court, directions under **Order XXXVI Rule 8A** and **8B CPR** having not been taken; that the impugned ruling was arrived at without any conclusive findings of fact of a competent court; and that the learned Judge should not have referred to findings/rulings made in the previous matters which had not been heard and conclusive findings made as to whether the alleged prescriptive rights had accrued or not.

When urging the appeal before us, learned counsel for the appellants compacted the said grounds into three broad grounds. The first ground was on the issue as to whether the suit was defective and whether the Court should have been moved under **Order VI** of the Civil Procedure Rules **(CPR);** secondly, whether the learned Judge was in order to consider evidence contained in two earlier suits which had been withdrawn; and lastly, whether the suit could have been dismissed under **Order VI** before directions under Order **XXXVI Rule 8A** and **8B CPR** had been taken.

He urged us to allow the appeal and set aside the orders of Mugo J, and remit the originating summons back to the High Court for hearing.

In his reply in opposition to the appeal, Mr. Mwangi, learned counsel for the respondent reiterated that the application was not defective. He urged that **Order VI rule 13** allows a party to move the court for dismissal of a suit at any stage in the proceedings. Their application to strike out was therefore neither defective nor pre-mature. He submitted further that although **Order VI Rule 13(I) (a)** precludes the calling of evidence in support of such an application, the application before the Court was not premised on that rule exclusively.

On the issue of the learned Judge relying on findings made by another Judge in a matter that was later withdrawn, learned counsel submitted that the rulings made before the withdrawal of the suit were valid and could still be relied upon.

We have considered the grounds of appeal, rival submissions of counsel, the application in question; the impugned ruling, and indeed the entire record of appeal before us. We start by saying that although, Mr. Kihara's first prayer is for us to re-evaluate the evidence adduced before the trial court, that is indeed our duty on first appeal as mandated by **Rule 29(1)(a) of this Court's** Rules. This Court has reiterated this duty in a litany of cases we have determined dating way back to the days of the predecessor of this Court (see **Selle vs Associated Motor Boat Company Limited [1968] EA 123**.) See also **Jivanji vs Sanyo Electrical Company Ltd [2003] KLR 425,** and the more recent decision in **Kefa Omanyala Ingura v Ibrahim Omerikit Papai [2015] eKLR.**

It is in light of this that we shall proceed to re-appraise and re-evaluate the evidence before the learned Judge and arrive at our own independent conclusion. In the appeal before us, there was no adduction of oral evidence and what we shall consider is the affidavit evidence on record. Before we re-evaluate the said evidence, we need to address some pertinent issues raised by counsel in this matter.

First, and in our view most importantly, is whether the learned Judge was in order to consider the application for striking out the originating summons before directions were taken under **Order XXXVI Rule 8A and 8B CPR.**

For purposes of clarity, **Order VI Rule 13(I)** provided as hereunder:-

"At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that…." (Emphasis supplied)

VI 13(3) provided as follows:-

"So far as applicable, this rule shall apply to an originating summons, and a petition as if the summons or petition were a pleading."

These provisions of the law are self-explanatory and need no embellishing. An originating summons does not become a pleading only after **Order XXXVI Rule 8A** and **8B** have been complied with. We say no more on that point. The learned Judge was squarely within the law when she entertained the said application.

The other issue is whether the learned Judge erred in considering a ruling in a matter that had already been withdrawn. There was no legal authority cited to us by learned counsel for the appellant in support of this proposition. Our view is that a concluded ruling, which has not been appealed against has a life of its own and continues to survive even though the suit within which it was filed is subsequently withdrawn.

Indeed, in our considered view, even without taking reference to the ruling of Rimita J, Judge Mugo could still have arrived at the same conclusion she did on the basis of the material before her.

Having clarified that, and reminding ourselves of our duty to re-appraise the evidence as stated earlier on, we now come to the affidavit evidence before the trial Court. Was the same sufficient to enable the High Court come to the conclusion that the appellants herein had no cause of action against the respondent?

As pointed out at the beginning of this judgment, the appellants averred that they were employed by the respondent in 1968 and 1978 respectively. They are loudly silent on where they were living then; until 1984 when they claim they started living on the suit property. They do not state either at what point they ceased working for the respondent.

From their own annexure 'MAR I' the District Commissioner on 7th February 2002, confirmed that the appellants were the only persons authorised to take care of the suit property and any other person(s) entering the property would be trespassing. This is what the learned Judge found was an admission on the part of the appellants that they were on the property with the permission of the respondent.

We agree with the learned Judge and learned counsel for the respondent on that issue. The law on adverse possession is explicit and well settled. Occupation *per se* is not what creates rights of adverse possession. The occupation must be adverse /hostile; it cannot therefore, be sanctioned by the registered owner.

The appellants' averment that they were employees of the respondent, even as at 2002 makes their claim on adverse possession a non-starter. This consideration is what caused Mugo J, to pronounce herself as follows:-

"There being on record a finding of fact to the effect that the applicants prescriptive rights (if any) have been defeated by virtue of acknowledgements, it is impossible for the court to call evidence on the trial, since the existence of such determination leaves the applicant without any cause of action at all, leave alone a reasonable cause of action…"

The learned Judge deduced from the contents of the affidavits sworn by the appellants, and the annexures, that there was an admission, by the appellants themselves that they were on the suit property as licensees of the respondent.

A licensee cannot in law claim any rights to property by prescription as long as he lives on the property with the permission of the owner of the property. (See **Samuel Miki Waweru vs Jane Njeri Richu**, **Nairobi Civil Appeal No. 122 0f 2001).**

We are alive to the fact that this is not an appeal from a decision dismissing the originating summons on merit. It will not therefore be necessary to articulate the law on adverse possession in greater detail for purposes of this judgment. We appreciate, and we have pronounced ourselves on this issue many times that striking out a suit is a draconian act which should be applied in very limited and deserving cases.

This is so because the Court does not want to dislodge a deserving litigant from the seat of justice.

On the other hand, where it is explicit, as it was here, that the applicant or plaintiff is out to frustrate the conclusion of a suit by filing a multiplicity of suits and applications, and added to that, it is clear that the party has a dismal or no cause of action at all, then the court is justified in stepping in to stem abuse of the Court process, in the interest of justice.

This is what happened in this matter. The admission, by way of averments and annexures to the effect that the appellants were licensees of the respondent, left them bereft of a cause of action that could have been nurtured to full hearing.

On the issue of the learned Judge making an observation that she had not "unearthed" the amended originating summons referred to, we are unable to say whether indeed there was an amended originating summons in the original file or not when she perused it. What we can say however is that from the face of the copy of the 'amended originating summons' in the record of appeal, nothing seems to have been amended as is clear from the underlining of the amendments. There were no amendments whatsoever to the contents or the body of the originating summons. Only the word "Amended" has been underlined and the date of the 'amendment'. The learned Judge could also be taken to have been saying that the so called amended originating summons was, in actual fact, not amended at all! Moreover, it is not disputed that the learned Judge considered the contents of the originating summons whose contents were basically the same as those in the 'amended' originating summons. Her comment did not prejudice the appellants in any way.

Our own independent conclusion, after re-appraising the evidence before the trial Court is that the originating summons was for striking out.

In sum therefore, we are unable to find fault with the ruling, the subject of this appeal. We find the appeal lacking in merit and dismiss it with costs to the respondent both here and in the High Court.

Dated and delivered at Nairobi this 22nd day of February, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

G. B. M. KARIUKI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR