IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 36 OF 2013

BETWEEN

JOHN FRANCIS MUYODI……..……....…….……APPELLANT

AND

1. PETER LUNANI ONGOMA…….1ST RESPONDENT

2. CELTEL alias ZAIN KENYA LIMITED.....2ND RESPONDENT

3. SAFARICOM LIMITED……..……..……..…3RD RESPONDENT

(Appeal from the ruling and order of the High Court Land & Environment Division at Busia Kibunja , J) dated 4th July 2013

in

Kisumu H.C.C.C. NO. 65 of 2009)

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JUDGMENT OF THE COURT

In this appeal from the judgment of Kibunja, J, ***the appellant, John Francis Muyodi,*** seeks a declaration and orders that he is the absolute owner of Land Parcel Number Marachi/Elukhari/1482 (*herein referred to as "Land Parcel 1482"*) and that it be registered in his name for the benefit of the estate of the Laurent Ongoma (the deceased).

By an Originating Summons dated 12th August 2009, the appellant filed a suit for adverse possession against the 1st, 2nd and 3rd respondents where he claimed:-

1. *That he had been in actual possession of Land Parcel 1482 operating a market and grazing cattle thereon since 1952 peacefully, openly and without interruption.*

2. *That by the time the 1st respondent bought the land and had it registered in his name, the seller's title had been extinguished, and as a result the 1st respondent held the land in trust for him.*

3. *That the appellant be declared as the owner of Land Parcel 1482 and that the title be registered in his name for the benefit of the estate.*

4. *That the respondents be ordered to sign and execute all necessary documents for transfer of Land Parcel 1482 and the proceeds of the lease to the appellant, and in default the Court's Executive Officer be empowered to execute all necessary documents to give effect to the transfer.*

5. *That the respondents pay the costs of the suit.*

In his affidavit in support of the Originating Summons, sworn on 12th August 2009, the appellant averred that Land Parcel 1482 which is registered in the name of 1st respondent was leased to 2nd and 3rd respondents in 2004 and 2007 respectively without his authority.

The appellant's case was that Land Parcels Marachi/Elukhari/944, 430 and Land Parcel 1482 had all belonged to the deceased since 1952; that the deceased had given Land Parcel Marachi/Elukhari/430 to the Busia County Council. He retained the portion comprising Land Parcel Marachi/Elukhari/944 and Land Parcel 1482 as one portion on the ground. The appellant stated that, in 1952, the deceased had given him a portion of the combined Land Parcel Marachi/Elukhari/944 and Land Parcel 1482 where he has operated as an open air market, and grazed his cattle ever since.

The appellant's complaint was that Land Parcel 1482 was excised from the deceased's Land Parcel Marachi/Elukhari/944, and registered in the name of John Maloba. It was thereafter sold to Gabriel Wasike in 1972, who in turn sold it to the 1st respondent in 1990.

In 2000, Busia County Council took over the running of the open air market, and he filed ***Bungoma High Court Civil Case No. 108 of 2000,*** against the Council; that the market was subsequently moved to another area. Thereafter the 1st respondent took over the portion previously utilised by the market, whereupon, the appellant filed ***Busia High Court Civil Case No. 27 of 2000*** to stop the 1st respondent utilising that portion of land, but the suit was struck out as he had not obtained letters of administration to represent the deceased's estate.

Following the construction of telecommunication masts in 2004 and 2007 respectively by the 2nd and 3rd respondents, the appellant demanded that they be removed from the portion of land. But in a letter dated 12th June, 2007, the 3rd respondent informed him that by virtue of lease agreements entered into with the 1st respondent, they had been authorized to construct the telecommunication masts on Land Parcel 1482, and as such were not in occupation of Land Parcel Marachi/Elukhari/944.

The appellant stated that by the time of transfer to Gabriel Wasike any title to Land Parcel 1482 had been extinguished and as a result could not have passed to the 1st respondent, but that in any event, any title that could have been transferred to the 1st respondent was held in trust for the estate of the deceased who died in 1980.

In response, the 2nd and 3rd respondents through their legal counsel, Njomo Kamau and Jennifer Caroline Gakunga respectively, averred that a lease with the 2nd and 3rd respondent was entered into on 27th July 2007 and 2nd November 2005 with the 1st respondent, who was the registered proprietor of Land Parcel 1482 where it was agreed that they would erect their telecommunication boosters. That the suit brought by the appellant was an abuse of the court process.

In an affidavit sworn on 29th June 2012, the 1st respondent deponed that Land Parcel 1482 was a subdivision from Land Parcel Marachi/Elukhari/ 431 which did not belong to the deceased; that an open air market was on Land Parcel Marachi/Elukhari/198 owned by Busia County Council and not on Land Parcel Marachi/Elukhari/944 as alleged. He further deponed that he bought the Land Parcel 1482 from Gabriel Wasike and John Awuor on 4th May 1990 and took immediate possession whereupon he had

fenced it. He stated that he had leased a portion to 2nd and 3rd respondents without objection from the appellant; and that in any event Land Parcel 1482 was not part of the deceased's estate. He concluded by stating that the suit was an abuse of the court process and should be dismissed.

The 1st respondent attached a sale agreement dated 4th May 1990 between himself and Gabriel Wasike and John K. Awuor for the sale of Land Parcel 1482, and copies of the application for letters of administration of the estate of the late Laurent Ongoma specifying the properties of the estate of which Land Parcel 1482 was not included.

In its judgment, the High Court concluded that the claim for adverse possession was unfounded for lack of evidence of possession of Land Parcel 1482, and dismissed the suit with costs to the respondents.

Dissatisfied with the decision of the High Court, the appellant has filed this appeal specifying a raft of grounds, in particular that the learned judge fell into error when he failed to realize that the deceased had dispossessed the owner of Land Parcel 1482 since 1952 and not 1972 which had been fenced off and occupied by the deceased together with Land Parcel Marachi/Elukhari/944; that the learned judge was wrong in holding that the non existence of boundary dispute between Land Parcel Marachi/Elukhari/ and Land Parcel 431 could not give rise to a claim for adverse possession; that the learned judge failed to appreciate that the ownership of Land Parcel 1482 by the 1st respondent was as a result of interference with the ownership and acreage of the deceased 's property; that the learned judge failed to take into account that both John Maloba and Gabriel Wasike did not possess or attempt to take possession of Land Parcel 1482 whilst they were registered as proprietors; that the learned judge misinterpreted the principles of adverse possession and in so doing, arrived at the wrong conclusion.

In addition, the appellant complained that the High Court did not consider that the respondents had failed to file their replying affidavit as required by ***sections 19 and 20*** of ***the Civil Procedure Act***, and that the submissions and authorities were not served on the appellant and as a result he was not afforded an opportunity to reply.

When the appeal came up for hearing, Mr. Muyodi, who appeared in person, stated that he would rely on his submissions filed on 14th October 2013 and the further submissions filed on 18th March 2015. He expressed dissatisfaction with the failure by the 1st respondent to file and serve him with their submissions, which he informed us had only been served upon him on the morning of the hearing. He requested the Court to ignore the submissions.

Mr. Omondi, learned counsel holding brief for the Mr. Mangare for the 1st respondent, stated that he would make oral submissions and would not rely on his written submissions. Counsel opposed the appeal and submitted that the findings and decision of the trial court were well founded and that the court arrived at the correct decision. It was counsel's submission that the suit filed by the appellant and the evidence tendered were at variance as, according to the Originating Summons dated 12th August 2009, the appellant was described as suing as the representative of Laurent Ongoma, yet from the prayers he sought to be declared as the absolute owner of Land Parcel 1482 for the benefit of the deceased's estate. It was counsel's submission that the appellant had not proved that either the deceased had been in possession of Land Parcel 1482 for a period of 12 years as, the parcel had come into existence in 1972 following subdivision of Land Parcel 431, and since the deceased died in 1980 only a period of 8 years of his alleged occupation would have lapsed.

It was counsel's further submission that, the appellant had failed to prove his claim by showing that the deceased had dispossessed the 1st respondent, or that the 1st respondent had ceased to have possession over Land Parcel 1482. Further proof that the appellant was not in possession of Land Parcel 1482, was the appellant's admission that he no longer operated the open market or grazed his cattle there since, the land was fenced, and housed a commercial building, and further, that two telecommunication masts had been constructed by the 2nd and 3rd respondents without his knowledge or consent.

On the issue of costs, counsel submitted that costs follow the event and that the respondent was entitled to

costs in the High Court.

Learned counsel ***Ms. Martim*** holding brief for the firm of Daly and Figgis Advocate for the 3rd respondent stated that the reason that the 2nd and 3rd respondents had been joined in the suit was on account of the construction of the telecommunication boosters which belonged to them. That the appellant's capacity to sue on behalf of the deceased's estate commenced in 2009, while the leases were registered against Land Parcel 1482 in 2005. That before registration of the leases was effected, a search of the title was conducted which showed that the 1st respondent was the registered owner whose rights were indefeasible. As such, the claim for adverse possession against the 2nd and 3rd respondents was incompetent, and any dispute against them ought to have been for rent and profits by way of a plaint.

We have considered the pleadings, submissions of the parties, as well as the law, and it is evident that the dispute turns on the ownership and possession of Land Parcel 1482, and whether a claim for adverse possession had been successfully made out by the appellant. In our view the following issues require to be determined:-

i. *Whether the appellant and the deceased in occupation of Land Parcel 1482 prior to 1966;*

ii. *Whether the appellant enjoyed continuous and uninterrupted possession of Land Parcel 1482 after 1972.*

This is a first appeal and it is our duty to reevaluate the evidence and come to our own conclusion on the facts, but remaining cognisant of the fact that we have not seen or heard the witnesses. This Court held in ***Mwanasokoni vs Kenya Bus Limited [1985] KLR 931*** that we can only interfere with a finding of fact by the High Court where the finding is based on no evidence, or a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in arriving at that finding.

We will begin by addressing the procedural complaints raised by the appellant that the 1st respondent failed to file his replying affidavit until 2 ½ years after the Originating Summons without leave of the court, and that the respondents failed to serve their submissions on the appellant.

From the record, it is apparent that both issues were not raised before the trial court, where any redress ought to have been sought by the appellant at the time. More particularly, with respect to the submissions, it is noteworthy that on 28th March 2013 when the matter was mentioned before Kibunja, J, save for the submissions of the 3rd respondent, the 1st and 2nd respondents confirmed having filed their submissions, yet no mention was made by the appellant of their having failed to serve him with the concerned submissions. As such, having filed to raise the issue at the time, we consider this complaint to be frivolous, and we accordingly disregard it.

Turning to the claim for adverse possession, we will begin by determining whether the appellant and the deceased could have been in occupation of Land Parcel 1482 prior to 1966, and if so, whether the subject parcel had been properly ascertained.

The appellant's contention is that Land Parcel 1482 was occupied by his father, the deceased, since 1952, and that, the deceased and his estate had been in possession for a period of over 46 years. It was the appellant's evidence that, land adjudication and registration commenced in 1966, and that according to a copy of the green card Land Parcel 1482 was a part of, and comprised a portion of Land Parcel Marachi/Elukhari/ 944 that was registered in the name of Laurent Ongoma, the deceased. It was his further evidence that the deceased had authorized him the use of a portion of the combined Land Parcel Marachi/Elukhari/944 and Land Parcel 1482 to utilize for an open air market and to graze his cattle.

The 1st respondent on the other hand argued that, Land Parcel 1482 did not exist prior to 1972, but came into existence when one John Maloba, the registered proprietor of Land Parcel Marachi/Elukhari /431 subdivided this parcel on 8th November 1972, to create Land Parcel 1481 and Land Parcel 1482. The

latter portion was later transferred to Gabriel Wasike, who in turn transferred it to the 1st respondent on 4th May 1990. That since then, the 1st respondent contended that he had been growing maize and beans on part of the land, while on another portion he had constructed a commercial building and yet another portion was leased to the 2nd and 3rd respondents in 2004 and 2007. That the appellant did not occupy any part of Land Parcel 1482 as it was fenced and remained under the 1st respondent's exclusive use. It was further contended that Land Parcel 1482 was not at any time a part of Land Parcel Marachi/Elukhari 944.

With regard to whether the deceased could have been in possession of the subdivided Land Parcel 1482 before 1972, the learned judge stated thus,

> ***"…though the plaintiff's pleadings and the evidence he adduced during the hearing suggested that, Laurent Ongoma (deceased) and himself, have been in possession of Marachi/Elukhari/1482 since 1952, the documentary evidence availed in the terms of the green card for the parent title, shows the registration of that land occurred in 1966. The green card copies also show Marachi/Elukhari/1482 did not exist as such until 18th October, 1972 when it was registered following the subdivision from Marachi/Elukhari/431. There was therefore no land known as Marachi/Elukhari/431 and 1482 in 1952. Parcel Marachi/Elukhari/1482 did not exist in 1966. It would therefore have been impossible for plaintiff and his father to have been in possession of Marachi/Elukhari/1482 in 1952 or even in 1966, and time for anybody claiming for that parcel on the basis of adverse possession could have only started to run in 1972 when it came into existence."***

It was the appellant's argument that the deceased occupied Land Parcel 1482 prior to 1972, because Land Parcel Marachi/Elukhari/944 which belonged to him also encompassed Land Parcel 1482.

In addressing this issue the learned judge observed that, since land adjudication had taken place in the area in 1966, a claim of this nature which followed land adjudication would have borne the hallmarks of a boundary dispute between the title owners of Land Parcel Marachi/Elukhari 944 and Land Parcel Marachi/Elukhari 431, from which Land Parcel 1482 was derived.

Yet, the record does not show that either the deceased, or John Maloba registered a boundary or any other dispute following adjudication. It is apparent that, neither the appellant nor the deceased sought rectification of the Adjudication or Land Register in respect of the Land Parcel Marachi/Elukhari 431 or Land Parcel Marachi/Elukhari 944. No survey maps or copies of the Land Register were produced to show that discrepancies existed between the boundaries of Land Parcel Marachi/Elukhari/ 431 and Land Parcel Marachi/Elukhari 944 in the survey maps or with respect to the ground position.

If indeed there were discrepancies in the Land Register and Survey Maps following adjudication, the appellant or the deceased ought to have lodged an objection in accordance with ***section 26*** of the ***Land Adjudication Act.*** We can find nothing to show that such objection was lodged to dispute the acreage or boundaries of Land Parcel Marachi/Elukhari 944 as captured in the Land Adjudication Register and the ensuing Land Register. Without such objection, the terms of ***section 27*** of the ***Land Adjudication Act*** were applicable, and the Adjudication Register was at that point deemed to have been duly finalized.

What was in evidence were the green cards of Land Parcel Marachi/Elukhari 944 and Land Parcel Marachi/Elukhari 431 which showed that both parcels were registered on 8th November 1966. Also produced was a mutation form dated 18th October 1972 showing that Land Parcel Marachi/Elukhari 431 was subdivided into Land Parcel Marachi/Elukhari 1481 and Land Parcel 1482.

From the above it is clear that, since there was no boundary dispute between the deceased and John Maloba, and that Land Parcel Marachi/Elukhari 944 was separate and distinct from Land Parcel Marachi/Elukhari 431, it was not possible for the ensuing subdivided Land Parcel 1482 to have been a part of Land Parcel Marachi/Elukhari 944.

As to whether the portion claimed by the appellant was properly identified, in the case of ***Titus Mutuku Kasuve vs Mwaani Investments Ltd & 4 others [2004] eKLR*** this Court held that it was important and integral part of the process of proving adverse possession for the descriptions of the portion including the size, boundaries and grounds positions to be specified so as to identify the land in question. ***Order 37 Rule 7(2)*** of the ***Civil Procedure Rules*** requires that application under ***Section 38*** of the ***Limitation of Actions Act***, be brought by originating summons "…***supported by an affidavit to which a certified extract of the title to the land in question has been annexed***."

The appellant did not produce any Survey maps or sketches to prove that Land Parcel 1482 was a part of Land Parcel Marachi/Elukhari 944. No description was given of the land, and no demarcation or acreage was provided.

Accordingly, we agree with the learned judge that, without any evidence to show that a boundary or any other dispute over errors in the Land Register or the Survey Maps existed at the time of adjudication which would have created Land Parcel 1482, it followed that the said parcel could not have existed or been identified before 1972. As such, the only conclusion that could be reached was that Land Parcel 1482 came into existence following the subdivision of Land Parcel Marachi/Elukhari/431 in 1972, and we find that a claim for adverse possession against the title holders of Land Parcel 1482 could not arise between 1952 and 1972.

The next issue is whether adverse possession was proved for the period after 1972. For a claim for adverse possession to succeed, it must be proved that both the appellant and the deceased dispossessed the registered owners of Land Parcel 1482 by their peaceful, continuous and uninterrupted occupation of the subject land for a period of 12 years. And, as to whether the appellant proved dispossession on a balance of probabilities for the requisite period is a matter of fact that must be discerned from the evidence. See ***Teresa Wachuka Gachura vs Joseph Mwangi Gachira, Civil Appeal No. 325 of 2003.***

In ***Wambugu vs Njuguna [1983] KLR 173,*** this Court addressed the meaning of possession when it stated thus;

> ***"In order to acquire by Statute of Limitation title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his action are acts which are consistent (sic) with his enjoyment of the soil of the purpose of which he intends to use it for a continuous 12 years. The Limitation of Actions on possession contemplates two concepts: dispossession and discontinuous of possession. The proper way of assessing proof of title is 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 he has been in possession for the requisite number of years".***

Having found as we have that Land Parcel 1482 did not exist prior to 1972, could the deceased have acquired the subject parcel by adverse possession? From the record, the deceased died in 1980. Therefore the period from 1972 to 1980 was only 8 years. As such, this period did not meet the statutory threshold of 12 years, as a result of which a claim for adverse possession could not arise.

In relation to the contention that since 1966, that Land Parcel 1482 had been fenced off within Land Parcel Marachi/Elukhari/944, and that at all times the deceased and the appellant grazed cattle and operated an open air market, was possession proved in this instance?

The appellant relied on the letters from the Busia County Council dated 19th May 1999, 9th August 1999, 31st August 1999, and 12th November 1999, to show that both himself and the deceased operated the Butali open air market until the Council ordered them to cease operating the market on their Land Parcel Marachi/Elukhari 944.

It is noteworthy, that while the letter dated 19th May 1999 required the appellant to stop holding the open air market on Land Parcel Marachi/Elukhari 944, no reference was made to market operations on Land

Parcel Marachi/Elukhari 431, or on Land Parcel 1482. There was no evidence, to show that the appellant and the deceased carried on continuous and uninterrupted market activities on Land Parcel 1482 from 1972. In effect, what this meant is that, the market was solely confined to the deceased's land, and not any other land, and it is difficult to see how the appellant adversely interfered with the title holder's occupation of Land Parcel 1482.

As to whether the appellant acquired possession by grazing cattle on Land Parcel 1482, it was stated in ***Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another [1980] by Kneller J,*** (as he then was***)*** thus,

> ***"Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because these are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it".***

Similarly, occasionally grazing cattle on neighbouring land is not adequate proof that the title holder had been dispossessed or displaced from use of the land in question.

To the contrary, the 1st respondent stated that from the time he purchased the land in 1990, he had fenced of Land Parcel 1482 and was carrying on various commercial activities thereon. More particularly, he produced leases between himself and the 2nd and 3rd respondents showing that as registered proprietor, he had authorized the construction of two telecommunication masts on a portion of Land Parcel 1482. By so doing, the 1st respondent demonstrated that he held exclusive occupation of Land Parcel 1482, and, that the appellant had not dispossessed him from the subject land parcel, or discontinued his occupation.

As a consequence, since the appellant has not proved on a balance of probabilities that he was in continuous and uninterrupted occupation of Land Parcel 1482 for a period of 12 years as required by ***Order 38*** of the ***Civil Procedure Rules*** as read together with ***section 7*** of the ***Limitation of Actions Act***, we are satisfied that the claim for adverse possession was not merited, and must accordingly fail.

From our reevaluation of the evidence that was before the High Court, we are satisfied that the learned judge considered the facts and having applied the applicable law, rightly concluded that the appellant's claim for adverse possession was unfounded, and accordingly, we dismiss the appeal with costs to the respondents.

Dated and delivered at Kisumu this 4th day of March, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..……..

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