



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 38 OF 2015

BETWEEN

AMINA AHMED OMAR MZEE HAJI.....APPELLANT

AND

KAHINDI KATANA CHENGO.....1ST RESPONDENT

SAMUEL KENGA NGENGE.....2ND RESPONDENT

CHARO NDENGE TUJI.....3RD RESPONDENT

NDENGE TUJI MBITA.....4TH RESPONDENT

CHANGAWA NDENGE TUJI.....5TH RESPONDENT

KAHINDI FUNDI MAITHA.....6TH RESPONDENT

SONY NELSON KENGA.....7TH RESPONDENT

HAMISI CHARO NDENGE.....8TH RESPONDENT

SIDI NDENGE TUJI.....9TH RESPONDENT

DAMA WANDENGE MOLE.....10TH RESPONDENT

LUVUNO TSENGE BENDEGWA.....11TH RESPONDENT

KARISA FUNDI MAITHA.....12TH RESPONDENT

JUMWA FUNDI MAITHA.....13TH RESPONDENT

JUMA KAHINDI FURAHA.....14TH RESPONDENT

ISAAC BOYD BEJA.....15TH RESPONDENT

MAIMA KENGA NDENGE.....16TH RESPONDENT

HALIMA MBARUK KHAMIS.....17TH RESPONDENT

KASICHANA KASHAHA CHENGO.....18TH RESPONDENT

MASHA MWAKAMUSHA.....19TH RESPONDENT

JUMA LAWRENCE MNYAPARA.....20TH RESPONDENT

*(Appeal from the Judgment and Decree of the Environment and Land Court at Malindi (Angote, J.)
dated 17th April 2015*

in

ELCC No. 97 of 2009 (OS)

JUDGMENT OF THE COURT

In this appeal the appellant, ***Amina Ahmed Omar Mzee Haji***, seeks to overturn the judgment and decree of the ***Environment and Land Court*** at Malindi (***Angote, J.***), dated 17th April 2015 in which the learned judge declared the 20 respondents in this appeal the proprietors, by adverse possession, of the property known as ***Plot No. 150/III/MN (the suit property)***. The learned judge further ordered the respondents to be registered as proprietors of the suit property and certificates of title to be issued to them. As of the date of the judgment of the trial court, the suit property, which measures 9.96 acres, was registered in the name of the appellant and three others, who are now deceased and did not take part in the proceedings in the trial court.

By way of background and context, before 12th September 1961, the suit property was registered in the name of the appellant's father, ***Omar Bin Mzee Haji***, deceased. On that date it was transferred and registered in the name of the appellant, her two deceased sisters, ***Fatuma Ahmed Omar Mzee Haji*** and ***Elaji Ahmed Omar Mzee Haji***, and their deceased aunt, ***Hafsa Omar Mzee Haji***. The latter got half share of the suit property while the appellant and her two sisters got the other undivided share. The evidence on record indicates that none of the four registered owners ever occupied the suit property, save for a son of the aunt, who is also deceased. Indeed, from the appellant's own evidence, a house that they had constructed on the suit property became dilapidated and ultimately collapsed due to disuse.

The 20 respondents are members of three families. The first family is that of the ***18th Respondent, Kasichana Kashasha Chengo***. She is the mother of Kahindi Katana Chengo (1st Respondent) and Halima Mbaruk Khamis (17th Respondent). She is also the grandmother of Isaac Boyd Beja (15th Respondent) and Juma Lawrence Mnyapara (20th Respondent).

The bulk of the respondents are members of the second family, that of ***Ndenge Tuji Mbita (4th Respondent, deceased)***. They are, his wife, Sidi Ndenge Tuji (9th Respondent), his sons Samuel Kenga Ndenge (2nd Respondent), Charo Ndenge Tuji (3rd Respondent), Changawa Ndenge Tuji (5th Respondent), Dama Wandenge Mole (10th respondent), Luvuno Tsenge Bendegwa (11th Respondent) and grandchildren Sony Nelson Kenga (7th Respondent), Hamisi Charo Ndenge (8th Respondent) and Naima Kenga Ndenge (16th respondent).

The last family is that of ***Jumwa Fundi Maitha, (13th Respondent)*** who is the mother of Kahindi Fundi Maitha (6th Respondent) and Karisa Fundi Maitha (12th Respondent) and the grandmother of Juma

Kahindi Fundi (14th Respondent). The only respondent who, from the record does not fall within the three families, is Masha Mwakamusha (19th Respondent).

By an Originating Summons taken out on 27th October 2009, the respondents sought determination by the High Court whether they were entitled to be declared the proprietors of the suit property by adverse possession, having occupied the same for over 12 years, and whether they were to be registered as owners thereof. The suit was subsequently transferred to the Environment and Land Court upon its creation. The averments in support of the summons were that the respondents had all lived on the suit property for over 12 years without the consent, authority or permission of the registered proprietors and that they had done so openly, uninterrupted, continuously and adversely to the title of the said proprietors.

The respondents further averred that the proprietor of the suit property sued one **Boyd Beja Mwachaka** before the former **Lands Disputes Tribunal** and obtained an eviction order against him, but unsuccessfully attempted to execute the same against the respondents, who were not parties to the suit. While the said Boyd Beja Mwachaka is a member of the family of Kasichana Kashasha Chengo (being her son and also the father of 15th Respondent, Isaac Boyd Beja), he is not a party to this appeal and was not a party to the suit in the Environment and Land Court.

By a replying affidavit sworn on 31st January 2011, the appellant confirmed that the suit property was registered in her name and those of her deceased sisters and aunt. She further averred that in 1998, Boyd Beja Mwachaka, who she insisted was one and the same person as Isaac Boyd Beja, the 15th respondent, entered the suit property and started subdividing it and allocating it to other persons. In response she filed in the Bahari Land Disputes Tribunal, **Case No. 63 of 1998** against the said Boyd Beja Mwachaka and by an award dated 26th March 1998, the Tribunal ruled in her favour.

Subsequently the Senior Magistrate's Court, Kilifi, adopted the award of the Tribunal and ordered the eviction of Boyd Beja Mwachaka from the suit property, which order he never appealed against. In the appellant's view, the eviction order was against Boyd Beja Mwachaka **"and his agents and any other persons who were illegally occupying my land."** She further averred that the eviction order covered the respondents because Boyd Beja Mwachaka brought them into the said property and that when an attempt was made to evict them on the strength of the eviction order, they resisted and rushed to the High Court where they obtained an order stopping their eviction pending the hearing and determination of their originating summons. In light of the foregoing the appellant averred that the occupation of the suit by the respondents was neither peaceful nor uninterrupted.

After filing their summons, the respondents applied for an injunction to restrain the appellant from evicting them from the suit property pending the hearing and determination of their summons. Satisfied that they had made out a *prima facie* case, **Omondi, J.** granted the injunction on 21st June 2010.

After hearing evidence from 15 of the respondents and from the appellant and her one witness, the learned trial judge was satisfied that the respondents had proved adverse possession of the suit property to be entitled to a declaration that they were its owners and to be registered accordingly. He therefore granted the orders that the respondents had prayed for. Aggrieved by the judgment, the appellant preferred this appeal in which she has set out some 11 grounds of appeal. By consent, the parties agreed to canvass the appeal through written submissions without oral summation.

From the outset we must state that the appellant has purported to introduce in her written submissions new issues that are not in her memorandum of appeal and which were neither raised before the trial court nor addressed by it in the judgment. These issues are not, in our view, jurisdictional but relate instead to questions of the competence of the suit by reason of deaths of some of the parties. The factual basis on which the appellant purports to challenge the competence of the suit and the appeal was well within her knowledge at the time of trial and she did not raise any complaint. On the contrary, she proceeded for all intents and purposes as if she was the representative of her co-proprietors, so that the trial judge had no opportunity to consider and pronounce himself on those issues. We must add that it is completely irregular for counsel to sneak in new issues in written submissions, which are not founded on the

memorandum of appeal, or which were never raised and addressed in the impugned judgment of the trial court.

While this Court has discretion whether or not to hear a new point on appeal, the exercise of that discretion is not automatic but will depend on the circumstances of each case. (See *Julia Kaburia v. Manene Kabeere & Another*, CA 340 of 2002). In the circumstance of this appeal, we are not impressed by the manner in which new issues are raised for the first time in written submissions. We also think that in the context of this appeal, it is apt to reiterate the words of Lord Birkenhead, L.C. in *North Staffordshire Railway Company v. Edge* (1920) A.C. 254, on the significance of the appellate system:

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

Excluding the issues surreptitiously introduced in the submissions, the memorandum of appeal sets forth 11 grounds of appeal. In our view, if the appellant had paid due regard to ***rule 86(1) of the Court of Appeal Rules***, which among other things require that the memorandum of appeal should be concise, only two issues fall for our consideration, namely:

- i. ***Whether the respondents were in occupation of the suit property, and for how long; and***
- ii. ***If the answer is in the affirmative, whether that occupation amounted to adverse possession.***

As far as the above issues are concerned, ***Mr. Kaburu***, learned counsel for the appellant, submitted that the respondents' occupation of the suit property did not satisfy the criteria of adverse possession because it was not open, peaceful, and without force for a period of 12 years. Relying on *Kimani Ruchine & Another v Swift, Rutherford Co Ltd & Another* [1976-80] 1 KLR 1500, counsel submitted that the respondents could not obtain title to the suit property by adverse possession because they had not occupied the suit property continuously for 12 years, having entered after April 1998. In addition, it was contended that their entry therein was by force and was subsequently retained and sustained by violence. In any event, it was further urged, the respondents' possession of the suit premises was interrupted on 12th September 2000 and again on 13th May 2009 when their houses were demolished in enforcement of the award of the Land Disputes Tribunal. Counsel relied on the judgment of this Court in *Wilson Kazungu Katana & Another v. Salim Abdalla Bashwein & Another*, CA No. 11 of 2014 in support of that proposition.

While conceding that the appellant had sued only Boyd Beja Mwamwaka in the Tribunal, it was contended that on the authority of *Njuguna Ndatho v. Maasai Itumo Mateo & Another*, CA NO 231 of 1999 the effect of the filing of the Tribunal Case was to stop time from running and that the award of the Tribunal as adopted by the Senior Resident Magistrates Court authorised eviction of all trespassers on the suit property. The award of the Tribunal, it was argued was a judgment in *rem* that was binding on the whole world, including the respondents.

Lastly it was also contended that to the extent that some of the respondents, namely the 1st, 3rd, 7th, 8th and 20th respondents were minors at the material time, the trial court erred by finding that they could own land by adverse possession.

Mr. Kenga, learned counsel for the respondents was of the contrary view, contending that the appeal had no merit because the respondents had adduced cogent evidence to show that they were entitled to be declared the owners of the suit property by adverse possession. It was submitted that the evidence on record disclosed that all the respondents had occupied the suit property continuously for more than 12 years either from their dates of birth or the date of entry into the suit property. Counsel denied that the respondents had entered the suit property in April 1998 and contended instead that the three families to

which the respondents belong had occupied the suit property before and immediately after independence.

It was further urged that the respondents were not evicted from the suit property and they could not have been so evicted because the appellant had sued only Boyd Beja Mwamwaka before the Tribunal. What had taken place, it was contended, was an illegal demolition of houses without successful eviction. As regards Boyd Beja Mwamwaka counsel submitted that he moved out of the suit property and relocated to Kaloleni after the Tribunal's award and was not a party to the proceedings giving rise to this appeal. Accordingly it was submitted that the suit in the Tribunal against Boyd Beja Mwamwaka did not stop time from running for the purposes of adverse possession by the respondents.

We have duly considered the evidence adduced before the trial court, the grounds of appeal, the respective written submissions, the authorities relied upon and the law. To the extent that this is a first appeal, we are enjoined to proceed as though it were a retrial and reconsider the evidence, evaluate it and draw our own conclusions, but remembering and making allowance for the fact that we did not have the advantage enjoyed by the trial judge who heard and saw the 17 witnesses as they testified. (See ***Selle v. Associated Motor Boat Company Ltd, (1968) EA 123.***)

Although virtually all the respondents testified before the trial court, the evidence of the eldest member of each family was the relevant evidence on when the three families entered into the suit property. Most of the other respondents testified that they were born on the suit property, although the appellant claims that they all moved into the suit property in 1998.

As regards the first family, that of Kasichana Kashasha Chengo, her evidence was that she was born during *Nzala ya Ngano*, (the famine of the wheat flour) which was sometimes during the Second World War. When she testified in September 2014, she said she was about 70 years old. Her evidence was that she married one Gondo wa Rebwe with whom she cohabited at Maandani. Her grandfather Asumani Ndole and his wife were already living on the suit property. When her marriage collapsed, she went to live with her mother on the suit property, which was before independence. When she moved into the suit property, apart from her grandfather, she found Jumwa Fundi Maitha and her family (the third family) living on the suit property. It was her evidence too that the second family, that of Ndenge Tuji Mbita and Sidi Ndenge Tuji was already of the suit premises. When he grandfather died, he was buried on the suit property.

Sidi Ndenge Tuji of the second family corroborated the evidence of Kasichana Kashasha Chengo. Her evidence was that she was also born during *Nzala ya Ngano* at Chanagande. She married Ndenge Tuji Mbita, the deceased 4th respondent, and settled on the suit property before independence. They were the first to settle and the family of Kasichana Kashasha Chengo found them already there. All her children were born on the suit property where they have cultivated, planted crops and keep goats. When her husband, Ndenge Tuji Mbita died, according to the evidence of his children, he was buried in the suit property.

Jumwa Fundi Maitha did not testify on behalf of the third family as she had died just before the hearing. But the evidence of Kasichana Kashasha Chengo was that she found the family of Jumwa Fundi Maitha already on the suit property when she moved into it. The two children of Jumwa Fundi Maitha testified that they were born on the suit property respectively in 1955 and 1969. The same applied to her grandson, the 11th respondent.

In addition to the evidence of the above "heads" of the families, the other respondents testified that they were all born on the suit property where they have lived all along, cultivating and planting crops. They conceded that the appellant had filed a suit in the Tribunal but only against Boyd Beja Mwamwaka. They further testified that the appellant's bid to evict them on the strength of the orders issued against Boyd Beja Mwamwaka was unsuccessful. Only their houses were demolished, but they were not evicted from the suit property, which they continued to occupy. When they filed their adverse possession claim, they obtained an injunction restraining the appellant from interfering with their occupation of the suit property until the hearing and determination of their suit.

The appellant's evidence on the other hand was that the suit property was at all material times registered in her name and those of her sisters and aunt. They never occupied the suit property save for her deceased cousin, Mwanana who had occupied it for sometime. The suit property had coconut and mango trees and there were no other people living on the land. Some years later, she saw a wall being constructed on the suit property and upon inquiring, she learnt that it was Boyd Beja Mwamwaka who had invaded the suit property and was busy allocating it to other people. She accordingly instituted a claim in the Land Disputes Tribunal against Boyd Beja Mwamwaka and the tribunal ordered the people on the suit property to vacate.

The appellant denied that the respondents had occupied the suit property prior to independence and that any of them were born on the suit property. She insisted that when she filed her claim in the tribunal, there was only one house belonging to Boyd Beja Mwamwaka.

As regards the first issue on whether the respondents were in occupation of the suit property and for how long, we are satisfied that there is cogent and consistent evidence on record that the three families were in occupation of the suit property before independence. That evidence disapproves the appellant's assertion that the respondents entered into the suit property only in April 1998. It is also worth noting a relevant finding of the Bahari Land Disputes Tribunal as regards occupation of the suit property. While the Tribunal found that Boyd Beja Mwamwaka was not registered as owner of the suit property, it nevertheless accepted his narration of the occupation of the suit property by his grandfather, Asumani Ndole, was a true historical account.

In addition, the sketch map drawn by the Tribunal after visiting the suit property indicates that contrary to the appellant's assertion that there was only one house thereon belonging to Boyd Beja Mwamwaka, there were other houses built on the suit property, which must have belonged to the appellants.

As regards the second issue whether the respondents' occupation of the suit property amounted to adverse possession, it is worth noting that in a bid to assert her right as the owner of the suit property, the appellant instituted against Boyd Beja Mwamwaka only, an action for possession in the Land Disputes Tribunal. She obtained judgment against him and obtained an order for his eviction. She did not institute any action against the other respondents who, as the trial court found, were in occupation of the suit property at the material time. The appellant asserts that the occupation of the suit property by the respondents was not peaceful because they resisted her attempt to evict them without an order of the court.

It is not in dispute that the eviction order that was obtained by the appellant related only to Boyd Beja Mwamwaka whom she had sued and who thereafter left the suit property in compliance with the order. The order of eviction was not against the respondents who were not parties to the proceedings before the tribunal. As against the respondents, the appellant employed bare force with no legal backing in a bid to evict them, but did not succeed. Thereafter the High Court issued an order prohibiting her from evicting the respondents from the suit property until their claim to the suit property by adverse possession was heard and determined.

From the evidence on record, we are satisfied that the respondents' occupation of the suit property was not disrupted as contemplated by law. The decision of this Court in **Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another, CA No. 11 of 2014**, which the appellant relies upon, is easily distinguishable. In that case the appellants had initially entered the suit property with the consent of the owner in consideration of paying *ijara* to him. When he died in 1970, they refused to continue paying *ijara* and as a result from 1970 to 1989 the respondents took all efforts to evict them including prosecution for criminal trespass which culminated in the conviction and imprisonment of some of the appellants. The efforts to evict the appellants involved the provincial administration and occasionally flared upon in open violence leading to deaths. In addition, the appellants did not adduce evidence of any definite, identified and identifiable portion of the suit property with clear boundaries occupied by them. In the circumstances of that case both the High Court and this Court found that occupation of the suit property by the appellants was not peaceful.

This Court stated as follows in ***Githu v. Ndeete (1984) KLR 776*** regarding assertion of right by the owner of the property:

“Time ceases to run under the Limitations of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.” (Emphasis added).

Earlier, in ***Gatimu Kinguru v. Muya Gathangi [1976-1980] 1 KLR 317, Madan J.***, (as he then was) stated that:

“The onus is upon the plaintiff to show that he made entry on the land amounting to a resumption of possession by him. The plaintiff has not done so; he has not discharged this onus. The plaintiff himself has stated that the land is still in possession of the defendant who is a trespasser.”

In the present appeal, we are satisfied that the trial court did not err in any way and that the appellant neither took out proceedings against the respondents to stop time running for purposes of adverse possession, nor made any effective entry into the suit property. In the premises, this appeal has no merit and is hereby dismissed. From the circumstances of this appeal we direct that each party shall bear its own costs. It is so ordered.

Dated at Mombasa this 22nd day of April, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR