



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 30 OF 2014

BETWEEN

STEPHEN ONYANGO ACHOLA.....1ST APPELLANT

PAUL OBUYA MOLA.....2ND APPELLANT

AND

1. EDWARD SULE HONGO.....1ST RESPONDENT

2. KISUMU MUNICIPAL COUNCIL.....2ND RESPONDENT

3. ROSELYNE ADHIAMBO ODHIAMBO.....3RD RESPONDENT

(Appeal from the judgment and decision of the High Court Land & Environment Division at Kisumu Ali-Aroni, J.) dated 19th August 2013

in

Kisumu H.C.C.C. NO. 244 of 1998)

JUDGMENT OF THE COURT

This is an appeal from the judgment of Ali- Aroni, J, where the court dismissed ***the appellants'*** suit for ownership of, Land Parcel No. Kisumu/Kasule/3604 belonging to the 1st appellant's late father, Omumbo Achola, and Land Parcel No. Kisumu/Kasule/3606 belonging to the 2nd appellant's late father, Obuya Mola, and Land Parcel No. Kisumu/Kasule/3605 owned by both Omumbo Achola and Obuya Mola (***herein all referred to as the "suit parcels"***) which they claim were ancestral land, having belonged to their late fathers. They sought the following orders:

- 1. A declaration and orders that the appellants were the absolute owners of Land Parcel 3604, Land Parcel 3605, and Land Parcel 3606.*
- 2. An order of rectification of the Register by deleting the 1st respondent's names from Land Parcel 3604 and Land Parcel 3605 and replacing it with the 1st appellant's name; and deleting the 3rd*

respondent's name from Land Parcel 3809 and replacing it with the 1st appellant's name; and deleting the 1st respondent's name from Land Parcel 3606 and replacing it with the 2nd appellant's name.

3. *Interests; and*
4. *Any other further orders in the alternative as the court deems fit.*

By an amended defence and counterclaim the 1st respondent denied the appellants' claim and instead counterclaimed for:

- i. *General damages for trespass and loss of use;*
- ii. *An order that the respondents do demolish the structures they erected on the suit parcels;*
- iii. *A permanent injunction restraining the appellants, their agents or servants from interfering with the suit parcels;*
- iv. *Cost of the suit;*
- v. *Interest at court rates.*

It was the 1st appellant's case that he is the administrator of the estate of his late father, Omumbo Achola, who was the registered owner of Land Parcel No. Kisumu/Kasule/ 3604 and a part of Land Parcel No. Kisumu/Kasule/3605. The 1st appellant contended that the suit parcels were gifted to him by his father in 1972, where he had built homes and constructed a septic tank. He maintained that he had been in possession of the suit parcels ever since.

It was the 2nd appellant's case that his late father, Obuya Mola, had been in possession of Land Parcel No. Kisumu/Kasule/3606 and part of Land Parcel No. Kisumu/Kasule/3605 upon which he constructed a tannery and residential properties, and that he resided there until his death in 1996.

The appellants alleged that in 1998, the 2nd respondent illegally allocated the suit parcels to the 1st respondent, and that they learnt of this when the 1st respondent sought to fence off the land. In the alternative, it was also their case that, the suit parcels had vested in them by way of adverse possession.

On his part, the 1st respondent stated that he was the first registered owner of the suit parcels. It was his contention that the appellants had illegally trespassed onto the suit parcels.

In its determination, the High Court concluded that the claim for ownership either by way of registration of title or adverse possession was unfounded and dismissed it, but allowed the 1st respondent's counterclaim for trespass, and ordered that the appellants vacate the suit parcels.

The appellants were dissatisfied with the decision of the High Court and filed this appeal on the grounds that the trial court erred in failing to hold that the appellants were the absolute proprietors of the suit parcels; that the 1st respondent obtained title to the suit parcels fraudulently; failing to conclusively address the issues before it; failing to find that the respondents colluded to steal the appellants' land; failing to take into account the appellants' submissions, and that the judgment did not meet the requirements specified under the previous **order XX1** of the **Civil Procedure Rules**.

When the appeal came up for hearing, **Mr. T. Omondi**, learned counsel holding brief for Mr. Mwamu for the appellants, stated that he would consolidate the six grounds into one ground namely that, the High Court failed to evaluate the evidence.

Counsel submitted that though the 1st and 2nd appellants were not the registered proprietors of Land Parcel 3604, Land Parcel 3605 and Land Parcel 3606, their ownership emanated from gifts *inter vivos* from their respective fathers, who were neighbours. It was counsel's case that learned judge had failed to appreciate that the 1st appellant's father had resided on the property, but had migrated to another property leaving the 1st appellant to utilize the disputed parcels. The 1st appellant constructed residential properties and a septic tank on it, and had remained in occupation of the property. In the 2nd appellant's case, it was

submitted that his father occupied the subject land until he died in 1996.

Counsel further submitted that the 1st respondent had in connivance with the 2nd respondent fraudulently and illegally registered the suit parcels in the 1st respondent's name, which was in total disregard of the appellants' occupation; that the court did not consider that the registration process was not in accordance with the laid down procedures, but improperly relied on the registration documents produced by the 1st respondent.

In counsel's view, the judgment did not comply with the provisions of **Order 21 rule 4** of the **Civil Procedure Rules**, as it had not set out a concise statement of the issues for consideration, and neither did it set out the reasons for arriving at the decision.

Mr. S.M. Onyango, learned counsel for the 1st respondent, opposed the appeal and submitted that the trial court was right in finding that no substantive evidence had been placed before it to show that the appellants had proved possession of the suit parcels. Without such evidence, a claim of ownership would be incapable of success. **George Gichumu Gachie PW 3**, the District Land Registrar, Kisumu, confirmed the 1st respondent's title and ownership, which evidence remained uncontroverted. As a consequence, in the absence of any other evidence to the contrary, the 1st respondent was the bona fide registered proprietor of the suit parcels.

Mr. Onsongo, learned counsel for the 2nd respondent, also opposed the appeal, and contended that, since the appellants had not joined the Registrar of Lands to the suit, the latter was not a party, and no orders could issue against that office. Counsel further submitted that **section 143** of the now **repealed Registered Land Act** was in operation at the time of prosecution of the case, and being a first registration, the 1st respondent's proprietorship could not be defeated.

Counsel further argued that, the 2nd respondent is a public authority, and any dispute against it ought to have been brought within one year from the date when the cause of action accrued. The registration was effected in 1996, and the suit brought in 1998; that essentially, the suit was time barred. In any event, the 2nd respondent was not responsible for registering land, this was the mandate of the Registrar of Lands, and therefore it was non-suited in the dispute. In respect of the claim for adverse possession, counsel submitted that it ought to have been brought by way of Originating Summons, and not by way of a plaint, as such the claim for adverse possession was improperly before the court.

This is a first appeal, and as stated in **Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212**;

“On a first appeal from the High Court , the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.”

We have considered the pleadings, the evidence and the submissions of the parties and are of the view that the issues for our consideration are:

- i. *whether the appellants proved absolute ownership of the suit parcels;*
- ii. *whether the 1st respondent acquired title to the suit parcels fraudulently and through collusion with the 2nd respondent.*
- iii. *whether the appellants were entitled to prove their alternative claim for adverse possession; and*
- iv. *whether the appellants' alleged occupation was an overriding interest against the 1st respondent's*

title.

We will begin by determining whether the appellants proved absolute ownership of the suit parcel.

In order to prove ownership, it was incumbent upon the appellants to produce a document of title registered either in their names or in their respective fathers' names. Such title would have emanated either from land adjudication or from registration as a first proprietor under the repealed Registered Land Act.

The appellants' case was that at all material times Omumbo Achola and Obuya Mola were the absolute owners of the suit parcels. The 1st appellant stated that the original plot number of the suit parcels was plot no. 3601, and was occupied by his father since 1945. He contended that his father had built a home and lived on the plot with his 4 wives until the 1950s when he migrated to live in town; that thereafter, his father gave him the subject land upon which he constructed semi permanent houses which were swept away by floods, and that all that remained was a septic tank. In 1998, he was informed that the 1st respondent had been allocated the land by the municipality, which he had subdivided, into the suit parcels. He did not have documents of title to prove absolute ownership of the suit parcels, but maintained that they were ancestral land.

On his part, the 2nd appellant also contended that the suit parcels comprised ancestral land upon which a tannery and residential houses had been erected.

Mr. Gachie, the District Land Registrar, Kisumu, who testified for the appellants, produced the green cards and records for all the suit parcels which showed that they were registered in the name of the 1st respondent as the first registered owner. He testified that the head title to all the ensuing subdivided land parcels was Land Parcel Kisumu/Kasule/ 3228. He stated that the title was created through adjudication, but he was unable to state when the process had taken place for the area.

According to the 1st respondent's testimony which is to be found in his witness statement adopted for this purpose, it was stated that, he was the first son of John Hongo who was the grandson of the late Sule Awuoth, the original owner of the parcel of land in contention; that John Hongo had established his homestead in the Nyamasaria area; that on 19th May 1980 the Municipal Counsel requested Survey of Kenya to place beacons on the plots of land; that by 4th January 1982 the registration of the Nyamasaria market, shops and plots was completed; that in December of 1994 Land Parcel No. Kisumu/Kasule/3238 was registered in the 1st respondent's name, following which he was issued with a title deed.

Thereafter, this land parcel was subdivided into the suit parcels as follows: Land Parcel Kisumu/ Kasule/ 3569, 3570, 3571, 3572, and 3573. He further subdivided Land Parcel Kisumu/Kasule/ 3573 into 6 parcels, namely: Land Parcel Kisumu/Kasule/3601, 3602, 3603, 3604, 3605, and 3606. Land Parcel 3604 was further subdivided into Land Parcel Kisumu/Kasule 3809, 3810 and 3811.

The 1st respondent produced title documents to show that from 1996 he was registered as proprietor of all the suit parcels, and that the green cards and documents of title produced by Mr. Gachie attested to this.

In respect to the contention that their respective fathers owned the land, the learned judge stated thus:

“The Plaintiffs did not produce any documents or call witnesses to support this assertion. PW1, a land registrar did not in his evidence in any way nor (sic) adduce evidence to support this assertion. The Plaintiffs also claimed to have possession of the suit properties. They fell short of proving as no evidence was placed before the court to support the allegation.”

From this excerpt, clearly the difficulty the High Court encountered was that, there was no evidence or material before the court to show that the appellants had substantiated their claim to absolute ownership of the suit parcels.

From a re-evaluation of the evidence, we too can find nothing to support the contention that the appellants' respective fathers resided on the suit parcels from the 1940s. No evidence was led in this regard. No survey maps or surveyor's reports were produced showing the ground position occupied by the appellants' respective fathers. The land adjudication register was not made available to prove that following land adjudication the land parcels were registered in the respective names of the appellants' fathers, and finally, they had no title documents evidencing land ownership. In short, there is nothing upon which we can base a finding that the appellants' fathers were the absolute owners of the suit parcels.

On the other hand, the 1st respondent countered that his grandfather, Awuoth, and after him, his father, John Hongo, owned the land since the 1940s, and that there had been various dealings with the subject land culminating with the issuance of the titles to the suit parcels in his name. With respect to the period prior to issuance of the title document, he too did not produce any supporting documents concerning the land, save for the letter dated 19th April 1994 from J.O. Ongele, Acting Town Clerk for the Municipality of Kisumu reallocating land previously encroached upon by the market to the 1st respondent's family.

But having said that, the difference in his case is that he produced title documents showing that he is the registered owner of the suit parcels. It is this evidence upon which the High Court relied to reach a finding that the 1st respondent owned the suit parcels.

Given that there was no evidence to support a finding of absolute ownership on the appellants' part, we find that this claim must fail.

Faced with the already registered titles, the appellants have impugned the 1st respondent's ownership, and contended that in acquiring title to the suit parcels, the 1st respondent fraudulently misrepresented to the District Lands Officer, that the suit parcels belonged to him.

This brings us to the next issue which is whether the appellants proved fraudulent misrepresentation on the part of the respondents and the District Land Officer.

The particulars of the fraudulent misrepresentation alleged by the appellants were that the 1st respondent informed the District Land Officer that the suit parcels were the 1st respondent's private property; misrepresented to the District Land Officer that the suit parcels should be registered in his name; failed to ascertain the right owners of the suit parcels; instructed the District Land Officer to register the suit parcels in his name and that he caused or permitted the suit parcels to be registered in his name.

The High Court did not find any evidence of fraudulent misrepresentation in the registration of the 1st respondent as owner of the suit parcels. Indeed the court pointed out that Mr. Gachie who testified on the appellants' behalf did not allude to this in his evidence.

On allegations of fraud or misrepresentation, Law, JA (as he then was) in Gudka vs Dodhia Civil Appeal No. 21 of 1980 succinctly observed;

“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities as required in R G Patel Lalji Makanji [1957] EA 314.”

There was no evidence presented to the court to show that the 1st respondent had fraudulently misrepresented to the District Land Registrar or the County Council of Kisumu that he owned the suit parcels. The appellants did not prove how or in what way the suit parcels were fraudulently registered in the 1st respondent's name. As such, we agree with the learned judge that since fraudulent misrepresentation was not proved, this ground must fail.

The appellants also advanced an alternative claim for adverse possession of the suit parcels. Counsel for the 2nd respondent opposed consideration of the merits of this claim, as he contended that since it had not

been brought by way of Originating Summons under order **XXXVI rule 3D** of the previous **Civil Procedure Rules** it was not properly before the Court.

It is instructive that the same issue was raised by way of a Preliminary Objection before the High Court, whereupon, Tanui, J, relying on the case of ***Kenya Commercial Bank vs Osebe (1982-1988) 1 KAR 48***, the High Court dismissed the Preliminary Objection to strike out the alternative claim for adverse possession. In his view, the appellants' claim for loss of the suit parcels was complex, and was not exclusively one of adverse possession as envisaged under **section 38** of the **Limitations of Action Act**, but was mainly based on fraudulent misrepresentation.

We agree with the learned judge's observations. The claim for adverse possession was alternative to the primary claim of fraudulent misrepresentation, and therefore, the need to incorporate it in the plaint, instead of bringing it by way of a stand-alone Originating Summons was justified. This observation is fortified by **Article 159** of the **Constitution**, where in light of the dictates specified therein, we consider that substantive justice would be better served by the simultaneous and comprehensive determination of all the related issues set out in the plaint, including the alternative claim for adverse possession. As such, we will address the alternative claim for adverse possession.

In the case of ***Teresa Wachika Gachira vs Joseph Mwangi, [2009] eKLR*** this Court took the view that in circumstances where a claim for adverse possession is incorporated in a defence as was the case there, (*or indeed, in plaint such as in this case*), notwithstanding the procedure adopted, a person claiming adverse possession still required to prove that he had exclusive possession of the land *nec vi, nec clam, nec precario*. See ***Kimani Ruchine vs Swift, Rutherford & Co. Ltd [1980] KLR 10***.

As to whether adverse possession was proved, from our analysis of the evidence, there is nothing to point to the appellants or their fathers having been in continuous and uninterrupted occupation of the suit parcels for a period exceeding twelve years prior to the date of the filing of the suit. Though the 1st appellant contended that after his father moved away from the land, and he had built semi-permanent houses that were washed away by floods, no mention was made of when these occurrences took place, or how the land was occupied subsequently thereto. The presence of an unused septic tank would not, in our view, amount to occupation.

In the 2nd appellant's case, it was alleged that his father was in occupation of the suit parcels, having built a tannery on it. There was no evidence to show continuous actual occupation or to say the least, usage of the tannery either during his father's life, or even following his death.

Accordingly, there having been no demonstration of occupation for a period exceeding twelve years prior to the date of the filing of the suit, we find that the claim for adverse possession was not proved and as a consequence is without merit.

As regards the claim that an overriding interest existed and of which the 1st respondent was required to take cognisance, it is the appellants' contention that by virtue of their occupation and possession of the suit parcels they acquired an overriding interest as envisaged by **section 30 (f) and (g)** of the **Registered Land Act** (repealed).

With respect to overriding interests, **section 30** of the repealed **Registered Land Act, Cap 300** stipulated thus:

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

(a)...

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or prescription. (g) the rights of a person in

possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed”.

From this provision, any claim of the existence of an overriding interest could be hinged upon a successful claim for adverse possession. Since the appellants’ claim for adverse possession failed, it follows that the claim for the existence of an overriding interest must also fail.

Accordingly, for the reasons set out above, we find that this appeal has no merit and is dismissed with costs.

It is so ordered.

Dated and delivered at Kisumu this 21st day of April, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR