



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WARSAME, SICHALE & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 164 OF 2011

BETWEEN

GACHUMA GACHERU.....APPELLANT

AND

MAINA KABUCHWA.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nairobi (Wendoh, J) dated 30th July, 2010

in

HCCC NO. 168 OF 1981 [OS])

JUDGMENT OF THE COURT

Introduction:

1. This is a first appeal from the decision of the High Court revolving around a claim of adverse possession pursuant to *Section 7* of the *Limitations of Actions Act Chapter 22 of the Laws of Kenya* which provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Background:

2. The appellant filed suit in the High Court in the year 1981 claiming entitlement to a parcel of land described as *LOC 8/MATHARITE/KIAHEHO/592* (suit property) measuring 2.3 acres which is registered in the respondent’s name by way of adverse possession. The appellant’s case in the trial court was that in the year 1966 he and the respondent entered into an oral agreement wherein the respondent agreed to sell the suit property; he took possession and occupied the suit property in 1966 after he paid the purchase price of Kshs. 1500/= to the respondent. Since then he has made several developments on the

suit property; the oral agreement was subsequently reduced into writing on 22nd January, 1968.

3. After receiving the full purchase price, the respondent left for Rift Valley without obtaining the requisite Land Control Board consent and transferring the suit property into his name. According to the appellant, efforts to trace him bore no fruit and he continued in occupation of the suit property without any interruption; the respondent's title over the suit property was extinguished in January, 1979.

4. On the other hand, the respondent vehemently denied the appellant's allegations maintaining that he never sold the suit property to him; he only leased out the same to the appellant in the year 1977 for four years in consideration of KShs.500 for purposes of grazing cattle; therefore, the appellant was in possession of the suit property with his consent and authority.

5. Upon considering the evidence tendered by both parties, the trial court by a judgment dated 30th July, 2010 dismissed the appellant's suit on the ground that he had failed to prove his case. It is that decision that has provoked this appeal which is predicated on seven grounds which can be summarized as follows:

- ***The learned Judge erred in law in failing to deal with the issue placed before her which was adverse possession and instead dealt with the sale of land.***
- ***The learned Judge erred in law in failing to find that all the legal elements of adverse possession had been satisfied by the applicant.***

Submissions:

6. Mr J. Gacheru, learned counsel for the appellant, submitted that the learned Judge erred in dealing with the sale of the suit property as opposed to the issue of adverse possession yet the contract of sale was not in issue. He argued that the learned Judge did not properly evaluate the evidence on record hence arriving at the wrong conclusion. In his view, the learned Judge failed to take into consideration the fact that the appellant had been in exclusive and uninterrupted possession of the suit property for more than 12 years. Mr Gacheru faulted the learned Judge for holding that the attempted sale of the suit property by the respondent to a third party amounted to interruption of the appellant's possession of the suit property. To buttress his position that the appellant had proved his case he cited the cases of ***GITHU V NDEETE, (1984) KLR 776, KASUVE V MWAANI INVESTMENTS LTD & 4 OTHERS, (2004) 1 KLR*** and ***KIMANI V KIBOGORO, (1990) KLR 49***. On the status of the suit property, Mr. Gacheru informed the Court that there was no one in occupation of the same including the appellant; that there are only tea bushes thereon which belong to the appellant. Counsel urged the Court to allow the appeal.

7. Mr E. T. Gaturu, learned counsel for the respondent, submitted that the learned Judge properly considered the issues before her and arrived at the right conclusion. He maintained that the appellant was in possession of the suit property with the permission of the respondent. According to him, adverse possession could only arise where there is a valid title issued to a party; that in this case the suit property was registered in the name of the respondent in the year 1976; therefore, time ought to have begun running then. The appellant filed the suit in the year 1981, that is, four years after the title was issued. He argued that the evidence of the plaintiff's witnesses was contradictory. In Mr Gaturu's view, the appellant had failed to prove the three requisite ingredients, that is, firstly that there was adverse possession; secondly, the respondent had sold the suit property to him and thirdly, that he lives on the suit property. Consequently, the appeal must fail.

Determination:

8. As the first appellate court, this Court has a duty to re-consider the evidence, evaluate it and draw its own conclusion while appreciating that it did not have the advantage, like the trial court had, of seeing and hearing the witnesses. This Court in ***SUMARIA & ANOTHER V ALLIED INDUSTRIES LTD, (2007) KLR 1*** expressed itself as herein under:

“Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its

own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did.”

9. The appeal herein turns on whether or not the appellant had established that he was entitled to the suit property by way of adverse possession. As was set out in the case of **BABER ALIBHAI MAWJI V SULTAN HASHAM LALJI & ANOTHER, [2010] eKLR**, adverse possession and ownership are two distinct rights which operate against each other with the first one extinguishing the second one. That being the case, the burden is upon the person claiming adverse possession to prove his claim on a balance of probability. This Court in Francis **GICHARU KARIRI V PETER NJOROGE MAIRU, (2005) eKLR** cited with approval the decision of the High Court in the case of **KIMANI RUCHINE V SWIFT RUTHERFORD & CO LTD, (1980) KLR** wherein it was stated on this point that:

“The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See Wanyoike Gathire v Beverly, (1965) EA 514, 518, 519 per Miles, J.”

10. Further, in **KIM PAVEY & 2 OTHERS V LOISE WAMBUI NJOROGE & ANOTHER, [2011] eKLR** it was observed:

“Thus to prove title by adverse possession it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances – see R.E. Megarry & Wade – The Law of Real Property 4th Edition page 1014.”

11. It must also be established that the title holder has lost his/her right to the land either by being disposed of it or having discontinued his/her possession of it. This was set out in **SAMWEL NYAKENOGO V SAMWEL ORUCHO ONYARU, [2010] eKLR**:

“The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession.

The proper way of assessing proof of adverse possession will then be 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 that he has been in possession for the requisite period.

See Wambugu v Njuguna, CA No. 10 of 1982.”

12. It is not in dispute that the appellant is in possession of the suit property. **TERESA WACHUKA GACHIRA V JOSEPH MWANGI GACHIRA, (2009) eKLR** described possession as follows:

“Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land.”

13. The first issue that falls for consideration is how the appellant came into possession of the suit property. This issue is relevant in the determination of whether the appellant’s possession was adverse to the respondent’s title. There are two conflicting versions by the parties on this issue. On one hand, the appellant claims to have come into possession in the year 1966 through an oral sale agreement. On the other hand, the respondent claims the appellant came into possession through a lease agreement wherein he leased the suit property to the appellant for a period of 4 years at a consideration of KShs.500/=.

Where there is a conflict of primary facts between witnesses, the appellate court will hardly interfere with a conclusion made by the trial court after weighing the credibility of witnesses. See **HAHN V SINGH, [1985] KLR 716.**

14. From the evidence on record, we find that the trial court was correct to consider the alleged oral sale agreement which according to the appellant was the basis of his possession of the suit property. In **CHUMO ARAP SONGOK -VS- DAVID KEIGO ROTICH, [2006] eKLR** this Court held:

“The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”

15. In this regard, the trial court correctly found that there were glaring and irreconcilable inconsistencies in the appellant’s evidence. Firstly, there wasn’t any evidence in support of alleged oral sale agreement. All of the appellant’s witnesses admitted that neither were they present when the oral sale agreement was made nor were they aware of the terms therein. Secondly, as aptly observed by the trial court, the appellant gave different versions of how much he had paid to the respondent as purchase price. At one point the appellant stated that the agreed purchase price was KShs.600/= per acre; in his affidavit in support of the Originating Summons, he deposed that he had paid KShs.1,500/=; during his evidence in chief he claimed to have paid KShs.1,558/= and in cross examination he claimed to have paid KShs.3,000/= or more. This is a clear testimony of material contradiction on the evidence of the appellant as to the exact amount he paid to the respondent. If the appellant cannot remember the actual sale purchase and amount he paid for the property he is claiming, he cannot be trusted to be telling the truth.

16. The next issue for our consideration is when did the appellant’s possession commence? Again in this regard, the appellant’s evidence was marred with inconsistencies and contradictions. In his Originating Summons the appellant averred that he entered into possession of the suit property in the year 1966 when he paid the purchase price. However, the appellant’s witness, Samuel Kimunya Mwangi (PW3), testified that the appellant came into possession in the year 1976 when he allegedly purchased the suit property from the respondent. Accordingly, the trial court was correct in holding that from the evidence it was not clear when the appellant took possession of the suit property.

17. The learned judge in her judgment stated:

“The conclusion this court makes is that it is not known when the plaintiff took possession of the suit land, whether as a lessor or as a purchaser.”

18. Even if the Court were to assume that the appellant’s possession commenced in the year 1966, which was not proved, there still was not sufficient evidence that the appellant was in exclusive, continuous and uninterrupted possession of the suit property for 12 years or more. We say so because the appellant in his evidence admitted that at some point he was incarcerated for an offence and upon his release he filed the suit subject of this appeal. There was uncontroverted evidence by the appellant’s witness, James Chege Kiragu (PW5), that in the year 1977 a dispute between the parties regarding the tea bushes in the suit property was arbitrated by the area Chief.

It is also not in dispute that the respondent sometime in the year 1976 with the intention to sell and transfer the suit property to one Stephen Karanja Mukui obtained the requisite consent from the Land Control Board and as a result the appellant lodged a caution on the title.

19. Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of this Court in **MAWEU V LIU RANCHING & FARMING COOPERATIVE SOCIETY, [1985] eKLR:**

“What logic is there in saying that this concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for

shorter periods because the adverse possession commenced during the time of the owner's predecessor. How is it lost at all?

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.

The plaintiff Society of course relies upon the decision of the earlier court, but no argument on the point of principle was pressed that I could see, with great respect to learned counsel. Certainly he was unable to advance any cogent argument from the reasoning in Alibhai's case, or otherwise why absolute and indefeasible title interfered with the operation of the Limitation of Actions Act (cap 22).

There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the Limitation of Actions Act (cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession." Emphasis added.

20. From the evidence, we find that the appellant failed to demonstrate that he was entitled to the suit property by way of adverse possession. Accordingly, this appeal lacks merit and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 27th day of May, 2016.

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR