IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 46 OF 2015

BETWEEN

MISTRY VALJI ……...APPELLANT

AND

JANENDRA RAICHAND ……. 1ST RESPONDENT

VIRCHAND MULJI MALDE ……...2ND RESPONDENT

RATILAL GHELA SAMAT …….3RD RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Tuiyott J.) dated 12th August, 2014,

in

HCC.N0.84 of 2005)

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JUDGMENT OF THE COURT

The subject matter of this appeal is a parcel of land known as **MOMBASA/BLOCK XII/4** *"the property"* originally registered in the names of Dolatkhanu w/o Amirali Khetsi Hansraj, Abdulahi Khetsi Hansraj and Zulfakir Khetsi Hansraj. Sometimes in 1971 the three leased one half of the property to the appellant from where he conducted business of construction. A dispute relating to tenancy and rent arose between the original owners and the appellant, which dispute was referred to a single arbitrator, Mr. K.I Joshi, advocate.

The arbitrator awarded a lease of the property to the appellant for a further term of five (5) years with effect from 1st January, 1975 at a monthly rent of Kshs.1,650 expiring on 31st December, 1979. After the expiration of the new term in December 1979 the appellant held over and remained in possession without paying rent as ordered by the arbitrator. The original proprietors then sold the property to the respondents on 10th June 1985.

The suit giving rise to this appeal (HCCC No.84 of 2005) was instituted by a plaint on 12th May, 2005 because, even after the property was transferred to the respondents, the appellant who was still in occupation did not pay rent. In the suit the respondents sought *mesne* profits in the sum of Kshs.156,086,545.75/=, general and punitive damages for trespass, wrongful occupation and loss of the suit premises, costs and interest. In his statement of defence the appellant argued that the respondents lacked the *locus standi* to make the claim in respect of the property their title having been extinguished by reason of statute of limitation; that the appellant having been in uninterrupted, continuous and hostile possession of the property for a period of over 12 years, was entitled to be registered as the owner of the property. As a matter of fact the appellant filed an originating summons in HCCC No. 204 of 2001 to pursue his claim of adverse possession. The respondents on the other hand brought HCCC No. 423 of 2001 (O.S) against the appellant for orders of eviction and damages for wrongful occupation of the property. The appellant brought yet another action against the respondents and others, being HCCC No.55 of 2004, in which he prayed for, *inter alia*, an order to restrain the respondents and three others from dealing with the property until the Originating Summons was heard and determined.

By a notice of preliminary objection dated 17th May 2006 the appellant sought a declaration that the respondents' suit (No.84 of 2005) was time barred as it was brought in 2005 when the cause of action arose on 28th June 1985. The appellant by a separate Chamber Summons filed more or less at the same time asked the court to strike out the respondents' suit for being scandalous, frivolous and vexatious. In the alternative he once more sought orders to stay the proceedings in HCCC No.84 of 2005 pending the hearing and determination of HCCC Nos.423 of 2001, 204 of 2001 and 55 of 2005 (O.S). The notice of preliminary objection and the application were argued together and **Njagi, J** rendered a ruling on 14th September, 2006 declaring the respondents' suit "hopelessly out of time" thereby upholding the preliminary objection and striking out the plaint. The respondents immediately lodged an appeal to this Court to challenge that decision. In its Judgment the Court (**O'kubasu, Aganyanya and Nyamu, JJA**) in allowing the appeal observed that the suit raised the question of limitation which is a question of law and which was disputed by the other side. In the court's view, bearing in mind this question, it was erroneous for the learned Judge to determine the dispute by way of preliminary objection without evidence in proof of the claims being presented.

Having allowed the appeal the court ordered that the suit be remitted to the High Court for hearing and determination on merit.

When the suit went back to the High Court it was placed before **Tuiyott, J** who heard the witnesses and rendered the impugned judgment. Having heard the oral evidence by both sides the learned Judge framed four main questions for determination as follows;

> 1) What was the nature of the appellant's occupation of the suit premises between June 1985 to November 2004?
>
> 2) Was the appellant's claim time barred?
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> 3) Were respondents entitled to *mesne* profits? And if so what was the quantum?
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> 4) Were the respondents entitled to general damages for trespass, wrongful occupation and use of the suit property? If so, what was the quantum?

He found with regard to the first question that the appellant entered the property as a tenant to the original owners: that after the 1975 arbitral award and contrary to its terms the appellant declined to execute a formal lease and to pay the new rent; and that the respondents sold the property to Vantage Road Transporters Limited while the appellants were still on it. On the basis of the evidence presented before him, the learned Judge held, by the provisions of **section 53** of the repealed Registered Land Act, that the appellant having recognized the respondents as his landlord could not claim to have been in occupation in a manner adverse to their title, because he was on the property, in the first instance with the consent of both the original owner and that of the respondents; that the appellant was a tenant at sufferance; that at any rate the respondent's claim was not for the recovery of land but one under **section 4(1)** and **(2)** of the

Limitation of Actions Act, a tortuous claim for *mesne* profits as a result of trespass to land in which case the limitation period was three years from the date the cause of action accrued.

Relying on **Canas Property** v **KL Television Services Ltd** (1970) All ER 79, the learned Judge, in this regard found that the cause of action accrued on 31st December, 1989 when the lease expired. However, he continued, since the respondents became the owners of the property on 28th June 1985 *mesne* profits would be payable from that date; that that notwithstanding, since the tort of trespass is a continuing one, *mesne* profits due to the respondent would be for the three years before the date of filing of suit, that is from 12th May 2002 to 24th November 2004. On the quantum the learned Judge placed the probable rent at Kshs.250,000/= per month for the above period translating to *mesne* profits of Kshs.7,500,000/= plus interest at court rates from the date of filing the suit as well as costs. This time the appellant and the respondents were aggrieved. The appellant lodged this appeal while the respondent filed a notice of cross-appeal. The latter complaint is that the learned Judge erred in holding that *mesne* profits claim is founded in tort and not in equity, that the learned Judge erred in limiting the appellant's liability to the period between 12th May 2002 and 24th November, 2004 instead of from 28th June 1985 to 24th November, 2004; and that he erred in excluding the element of interest on the *mesne* profits of Kshs.7,500,000/= .

In the appeal the Court is urged to find, in the main, that the learned Judge erred in entering judgment in a claim that was time-barred; and that on the whole the decision was not supported by evidence on record and entirely erroneous. In his written submissions the appellant maintained that from the time the respondents purchased the property on 28th June 1985 to November 2004 when they sold the property to Vantage Road Transporters Ltd, the respondents never claimed rent from the appellant, hence in terms of **section 4 (2)** of the Limitation of Actions Act, the cause of action accrued on 28th June 1985 and the suit having been brought on 12th May, 2005, the suit was hopelessly out of time; that at the time the suit giving rise to this appeal was filed the appellant's right to the property had crystallized by virtue of section 38 of the Registered Land Act (repealed) and the respondents' title extinguished; that the appellant was in exclusive and adverse occupation from 1st January, 1980; that when the respondents purchased the property in 1985 until November, 2004, a period of 19 years, the appellant was entitled to the property by statute of limitation. The appellants have further submitted that it was in grave error for the learned Judge to award Kshs.7,500,000/= after finding that *mesne* profits of Kshs.156,086,544.76 /= was not supported by evidence.

In response to these submissions, the respondents urged us to dismiss the appeal and allow the cross-appeal because the learned Judge properly found that the claim to adverse possession had not been proved, that there was continuous trespass that entitled the respondents to *mesne* profits. However, the respondent faulted the learned Judge's finding that they were only entitled to *mesne* profits from 12th May 2002 to 24th November, 2004 instead of from 28th June 1985 to 24th November, 2004; that as a result the learned Judge arrived at a wrong finding on the *mesne* profits awardable to the respondents; that by limiting the case of action to 3 years, the learned Judge contradicted himself having found that the cause of action accrued from day to day as long as the appellant remained in wrongful occupation; that taking the monthly rent adopted by the learned Judge, for a period of 233 months the award for *mesne* profits ought to have been Kshs.58,250,000/= with a reasonable interest at the rate of 12% per annum, the respondents were entitled to Kshs.65,240,000; that the Judge ought to have awarded interest at court rate from the date of filing suit till payment in full; and that in awarding Kshs.7,500,000/= the learned Judge omitted the element of interest in working out *mesne* profits. Finally the respondent submitted that adverse possession was not raised as a ground of appeal and this Court should ignore submissions based on it.

We have considered all the grounds argued in support and in opposition of both the appeal and the cross-appeal. We are guided in considering this appeal by the well-known limitations of this Court on first appeals to re-evaluate afresh the evidence on record so as to come to our own independent conclusions but bearing in mind that, unlike the trial court we have neither seen nor heard the witnesses. See **Seascapes Ltd vs Development Finance Co. Ltd (2009) KLR 384**.

It is common factor that before his eviction from the property in 2004, the appellant had been on the property as a tenant to the former owners from the early 1970s; that the terms of arbitral award of 1975 extending the tenancy for five years were not complied with; and that the property was sold and transferred to the respondent's in1985. While there is no dispute that the relationship between the appellant and the previous owners was that of landlord and tenant, one of the issues in this appeal is the nature of the relationship between the appellant and the respondents. Sale agreement between the original owners and the respondents recognized the appellant as an existing tenant and it was agreed that the respondents would continue to receive rent from the appellant, including the outstanding rent. While the appellant asserts that from June 1985 when the respondents acquired the property to 2001 when he instituted HCCC No.204 of 2001 (O.S.) a period of 16 years he had been in undisturbed and open possession of the property entitling him to its ownership.

The respondents for their part maintained that the appellant having failed to honour the terms of the arbitration, to sign a five year lease and to pay rent either to the former owner or to them was a tenant at sufferance, hence the respondents' suit No.423 of 2001 praying for a declaration that the appellant were mere occupiers at sufferance, their ejectiment, a mandatory injunction to remove structures erected on the property without consent of the former owner or the respondents. In other words the respondents viewed the appellants' presence on the property as unlawful.

The following principles, among others, regarding adverse possession are now settled.

i. Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession. See **Samuel Miki Jane v Jane Njeri Richu Civil Appeal No. 122 of 2001**.

(ii) The occupation of the land must be *nec vi, nec clam, nec precario*. See **Mtana Lewa v Kahindi Ngala, Civil Appeal No. 56 of 2014.**

ii. The adverse possessor must prove that through his occupation the true owner has been dispossessed or his possession discontinued. See **Wambugu v Njuguna (1983) KLR 172**.
iii. It is equally established that adverse possession does not arise merely by occupation and use. See **Alfred Warimo v Mulaa Sumba Baraza, Civil Appeal No. 186 of 2011 (Ksm**)
iv. The filing of a suit for recovery of land or any other recognized assertion of title to the land by the owner stops time from running for purposes of **section 38** of the Limitation of Actions Act. See **William Gatuhi Murathe v Gakuru Gathumbi, Civil Appeal No. 49 of 1996.**

The appellant's claim is against the respondent hence the period that concerns us is that between 1985 when they purchased the property and 2004 when the former was ejected. There is no doubt that this period would qualify the appellant under **section 7** and **38** of the Limitation of Actions Act to apply to the High Court for an order that he be registered as the proprietor of the property. But that is not the only requirement. That only amounts to what we have said above, that mere occupation and use does not establish adverse possession. The other strictures enumerated above must also be satisfied.

After the respondents purchased the property and when it became apparent to the appellant that they (the respondents) intended to re-sell it, the latter made several attempts to purchase it from them. A flurry of correspondence in 1989 between the appellant, the respondents, advocates, provincial administrators, lands officials and politicians leave no doubt that the appellant recognized the respondents as the owners of the property as we demonstrate here. For instance on 14th July 1989, just 4 years after the respondents acquired the property the appellant addressed a letter to the Provincial Commissioner asking for the latter's intercession in persuading the respondents to consider selling the property to him. It would appear the parties had disagreed on the purchase price prompting the appellant to resort to third party's assistance. While the respondents demanded Kshs.7 million, the appellant counter-offered Kshs.3 million as the purchase price. In the letter to the then Provincial Commissioner, Coast the appellant pleaded that;

"…it is in this spirit of humility that we are once more appealing to you to use your

good offices to impress upon the other parties … we do not want to rob anyone of their property and hence our offer of Kshs.3 million."

The following month following the date of this letter on 2nd August, 1989 another letter was once more addressed to the Provincial Commissioner by Hon. Darius M. Mbela asking the former to summon both sides so as to persuade the respondents to consider selling the property to the appellant failing that, to compensate him for the developments on the property. The parties were indeed summoned by the Provincial Commissioner to a meeting on 22nd August, 1989. It is not apparent what transpired or even if at all it took place. From the record it is clear to us that prior to this there were other meetings convened by the Provincial Commissioner to resolve this stand-off. For instance the meeting of 2nd October, 1987 where the only subject was the sale of the property to the appellant. There were several other letters, all towards compelling the respondents to sell the property to the appellant. What followed were notices to the appellant from the respondents to vacate the property culminating with the one dated 30th May 1998 addressed to them by the firm of N.M. Doshi Advocate asking the appellant to vacate the property within one month from the date of the letter.

It follows from all these that at the time the negotiations fell through and the property sold to Vantage Road Transporters Ltd in 2004 the appellant still recognized and respected the respondents' title to the property. He had no intention of dispossessing the respondents. His claim based on the statute of limitation was properly rejected by the learned Judge. In any case the respondents had not in their suit sought to recover the property so as to avail the appellant the statute of limitation. The respondents sought to recover *mesne* profit for the unlawful occupation of the property. **Section 8** of the Limitation Actions Act provides that; ***"An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due"***.

The next and final question is whether the learned Judge erred in awarding Kshs.7,500,000/= in *mesne* profits. An award of damages or *mesne* profits is an exercise of discretion. This Court will not ordinarily interfere with that discretion unless the judge took into account irrelevant factor, or left out of account a relevant one or that the award was so inordinately low or high that it must be wholly erroneous estimate. See **Kemfro Africa Ltd vs Lubia, (1987) KLR 30**. The award depended on the period it is claimed the appellant was in wrongful occupation. It will be recalled that the respondents in the plaint had asked for *mesne* profits in the sum of Kshs.156,086,545.75/=. That figure it would appear was plucked from the air because no evidence to support it was presented at the trial. The witness called by the respondents to prove the claim, Maina Chege (PW2) suggested a monthly rent of Kshs.250,000/=. It was on the basis of this that the learned Judge awarded Kshs.7,500,000/= made up of a monthly rent of Kshs.250,000/= for 30 months, namely, from 12th May 2002 to 24th November, 2004. **Kenya Hotel Properties Ltd** v **Willesden Investments Ltd**, Civil Appeal No.149 of 2007 which has widely been cited, even in this appeal held that in a claim for *mesne* profits the first task is to determine the days the occupation was wrongful and the correct rate (rent) for the period in question.

It is not in doubt that the appellant was in the occupation and use of the suit property without paying rent for a period of 29 years from January 1975 to 2004. The rent recommended by the arbitrator for the period between 1st January 1975 to

31st December 1979 was Kshs.1,650/=. Not a single cent was paid. Any rent due during this period would be payable to the original owners. Because they accrued before the respondents purchased the property and it is immaterial that in the sale agreement the respondents and the former owners agreed that it would be paid to the respondents. The appellant was not privy to that agreement.

For the period the respondents were owners of the property between 28th June 1985 and 2004 when it was sold, a period of 19 years, again not a single cent was paid. We believe, of course, that the recommended monthly rent of Kshs.1,650 for the 5-year period ending December 1979 cannot be applicable to the period between 1985 to 2004 and must be confined to that period. According to two valuation reports commissioned by both sides, they show that the value of the property has been appreciating. The learned

Judge limited the claim to 30 months because in his view the claim was based on **section 4(2)** of the Limitation of Actions Act, an action founded on tort which must be brought before the end of 3 years. The learned Judge having found that the tort of trespass is continuous tort, he fell into error in limiting the award to 30 months first because 30 months do not constitute 3 years. *Mesne* profit is defined in **section 2** of the Civil Procedure Act to mean; - "***in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession***". The cause of action from this definition clearly fell under **section 8** of the Limitation of actions, namely an action for distress or for the recovery of arrears of rent, or damages which may not be brought after the end of 6 years from the date on which the arrears became due. Measure for *mesne* profit was described in the Privy Council decision in **Invergue Investments** v **Hacketh (1995) 3 All ER 842** cited with approval in the **Kenya Hotel Property Ltd** case (supra) as follows:

> ***"This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land….The question for decision is the appropriate measure of damages."***

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess *mesne* profits down to the date when possession is given.

Although the respondents purchased the property in 1985, the appellants continued occupation only became wrongful when the respondents issued to him a notice to vacate in 1998 by a letter dated 6th May 1998. The appellant was therefore in wrongful occupation of the property for 6 years.

Taking into account all the factors, including the period the appellant was on the property without paying rent even before the respondents purchased it all the way to 2004, the appellant's disappointment for not being able to purchase the property from which he had over the years operated his business and considering further the developments he had put upon the property, we think it would be unconscionable to both sides of this dispute to interfere with the award granted by the learned Judge, even though he may not have taken into account relevant factors such as the correct period for the award, and the rent. We think Kshs.7,500,000/= for the period involved represents reasonable rent.

For these reasons both the appeal and the cross appeal fail. We award costs of both to the respondents.

Dated and delivered at Mombasa this 27th day of May, 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