



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 58 OF 2013

BETWEEN

JOSEPH CHEBAYI CHESOLI APPELLANT

AND

PAUL KHAKINA MUSUNGU 1ST RESPONDENT

PEPELA KHATIELI 2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma, (Muchelule, J.) dated 20th December, 2012

in

BUNGOMA HCCC NO. 102 OF 1994)

JUDGMENT OF THE COURT

1. This appeal challenges the judgment of **Muchelule, J.** in **HCCC NO. 102 of 1994** at Bungoma, where the court allowed the 1st respondent's claim to a parcel of land known as **Ndivisi/Ndivisi/64** (*the suit land*) under the doctrine of adverse possession. The suit land was initially registered in the name of the 2nd respondent but sometimes in 1994 the appellant became the registered proprietor thereof. By that time, as per the trial court's judgment, the 2nd respondent's title had been extinguished by virtue of the 1st respondent's exclusive possession of the suit land for over 14 years.

THE SUIT BEFORE THE HIGH COURT

2. **Paul Khakina Musungu**, the 1st respondent, filed an originating summons dated 24th October, 1994 supported by his affidavit, in which he claimed that since 1979 he had been in open, continuous and uninterrupted possession of the suit land, having purchased it from **Pepela Khatieli**, the 2nd respondent.

3. **Joseph Chebonyi Chesoli**, the appellant, filed a replying affidavit stating, *inter alia*, that the suit land was registered in his name sometimes in 1994 and that the 1st respondent was in illegal occupation thereof.

4. The 1st respondent (*the plaintiff in the High Court matter*) testified that in 1979 he paid **Kshs.25,000/=** to the 2nd respondent as the purchase price for the suit land and produced an agreement to that effect. Thereafter he was put in possession of the suit land. Before the suit land could be transferred to him, the 1st respondent realized that the 2nd respondent had purportedly resold the land to the appellant.

5. Although it was alleged that Pepela Khatieli (2nd respondent) had died in 1967, the 1st respondent said that Pepela actually died in April, 1997. In support of that averment the 1st respondent produced, as an exhibit, an affidavit allegedly sworn and filed by Pepela Khatieli in the suit on 27th March, 1995.

6. On the other hand, the appellant testified that the suit land had been registered in his father's name, Pepela Khatieli, in 1964. This was a first registration. The appellant's father died in 1967. The appellant's mother was living on the suit land while the appellant was working in Trans-Nzoia.

7. Sometimes after the demise of the appellant's father, his mother informed him that the 1st respondent had moved into the suit land, saying that the land had been sold to him by one **ERNEST KHATIELI LUSAMOYA**, the appellant's nephew, who was then a police officer. The 1st respondent began to cultivate the suit land and put up a house there in 1994. Both the 1st respondent and the appellant filed separate suits against each other in the High Court at Bungoma and Kitale respectively, each seeking to affirm his entitlement to the suit land. By then the appellant had put up a house on the suit land. The two suits were eventually consolidated and heard together.

8. The appellant further testified that the 1st respondent had not lived on the suit land for 14 years, as he vacated it in 1994. He added that his nephew, Ernest Khatieli Lusamoya, (*now deceased*) who purportedly sold the suit land to the 1st respondent in 1976, acted fraudulently. Those are the brief facts of the case that gave rise to the impugned judgment.

THE APPEAL

9. Being aggrieved by the decision of the High Court, the appellant preferred an appeal to this Court. He faulted the learned judge for failing to determine whether the 2nd respondent (*now deceased*) who allegedly sold the suit land to the 1st respondent, died prior to the agreement of 4th January, 1980; for failing to carefully analyse the evidence adduced; for misconstruing the respondents' claim regarding adverse possession; and for finding that the appellant's registration as the proprietor of the suit land was irregular and fraudulent.

10. **Mr. Sichangi**, learned counsel for the appellant, submitted that the learned judge came to the wrong conclusion because he ignored the issues for determination that had been identified by counsel for the parties.

11. Counsel further submitted that the suit land was fraudulently sold to the 1st respondent by one Ernest Khatieli Lusamoya, who purported to be Pepela Khatieli, the registered proprietor thereof. He added that the 1st respondent had not established his claim over the suit land by way of adverse possession.

12. **Mr. Kweyu**, learned counsel for the 1st respondent, opposed the appeal. He submitted that the 1st respondent had proved that the suit land was actually sold to him by the appellant's father, Pepela Khatieli. He cited the sale agreement dated 4th January, 1980. He added that there was no proof that the Pepela Khatieli died in 1967 and therefore could not have signed the sale agreement as the vendor of the suit land.

13. This being a first appeal, we are enjoined to reconsider the evidence that was tendered before the trial court, evaluate it and draw our own conclusions. See **KENYA PORTS AUTHORITY V KUNSTAN (KENYA) LIMITED [2009] 2 E.A.212**.

14. The evidence tendered by the 1st respondent, who was the plaintiff in the suit that was before the High court, was that on 2nd October, 1979 he met Pepela Khatieli and they discussed and agreed about the sale of the suit land at a price of Kshs.25,000/=. He paid that sum in five (5) instalments. Upon payment of the last instalment they entered into an agreement dated 4th January, 1980. The agreement was witnessed by **Simon Musungu (PW 2) and Edward Makola.**

15. The 1st respondent went on to state that on 14th September, 1985 together with the 2nd respondent, who he said was also known as Ernest Khatieli Lusamoya, filled an application for consent of the area Land Control Board. The 1st respondent confirmed that the land was then registered in the name of Pepela Khatieli. The seller however failed to appear before the Land Control Board and that is what made the respondent file the suit. The respondent further stated that he had been put in possession of the suit land in 1980.

16. In cross examination, the 1st respondent reiterated that the suit land was sold to him by Ernest Khatieli Lusamoya who died on 30th April, 1997. According to the 1st respondent, Ernest Khatieli Lusamoya was also known as Pepela Khatieli. That is why the 1st respondent could not agree that Pepela Khatieli died sometimes in 1967.

17. **Simon Musungu, PW 2**, is a brother to the 1st respondent. He testified that Pepela Khatieli was his brother in law; that he was the one who drafted the sale agreement dated 4th January, 1980; that on 4th September, 1985, together with the vendor and the purchaser they went to the office of one **James Wafula advocate**, who endorsed the sale agreement.

18. In cross examination as to who actually sold the land, PW 2 stated:

“Pepela Khatieli is one and the same person as the deceased, Ernest Khatieli Lusamoya. The identity was in the name of Pepela Khatieli but the death certificate is not in the name appearing on the identity card which is Papela Khatieli. But the two are one and the same person. It is not true that Papela Khatieli died before the land was sold.”

19. The appellant testified that the suit land was registered in his father's name (*Pepela Khatieli*) in 1964. He produced a copy of the land register, which showed that the suit land was actually registered in the name of his father as the first proprietor on 16th July, 1963. His father died in 1967. At that time the appellant was working in Trans-Nzoia District. The appellant's mother was the one living on the suit land.

20. The appellant further testified that his late father had not sold the suit land to anyone. He added that Ernest Khatieli Lusamoya was his nephew who died in 1997. He produced his death certificate as an exhibit. The appellant stated that his late mother informed him that when the 1st respondent moved into the suit land he alleged that he had bought it from Ernest Khatieli. The appellant did not state when the 1st respondent moved into the suit land, but he said that the latter moved out in May, 1994. The suit land was registered in the appellant's name on 20th September, 1994.

21. We have considered the evidence that was tendered before the trial court as contained in the record of appeal as well as the brief submissions by counsel. The 1st respondent's claim was that he had acquired prescriptive rights over the suit land, alleging that he had been in open, continuous and uninterrupted possession thereof since 1980 upto 1994.

22. In **WAMBUGU V NJUGUNA [1983] KLR 172** this Court laid down the principles that ought to be considered in determining whether a claim over land under the doctrine of adverse possession has been established. It was held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period of twelve years and not whether or not the claimant has proved that he has been in possession for the requisite number of years. In other words, the claimant must show that there has been a complete and

exclusive physical control of the land in dispute, and the possession should be open, peaceful, continuous and uninterrupted over a period of not less than 12 years. Further the possession must be adverse and not by consent of the owner.

23. **BLACK'S LAW DICTIONARY, 9th Edition** defines adverse possession as *“the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious.”*

24. In this case, the 1st respondent contended that he entered into the suit land in 1980 with consent of the registered owner, Pepela Khatieli, having executed a sale agreement with Pepela, although there is a dispute as to whether the vendor was Pepela Khatieli or Ernest Khatieli Lusamoya. We shall revert to the issue of the true identity of the vendor. But irrespective of who the vendor was, the entry was not adverse to that of the registered owner. Between 1980 and 1985 when an application for consent for sale was made to the area Land Control Board and the registered proprietor failed to attend the Board, no prescriptive rights over the suit land accrued to the 1st respondent.

25. In **WAMBUGU V NJUGUNA** this Court held that:

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

26. Likewise, in **SAMUEL MIKI WAWERU V JANE NJERI RICHU C.A. No. 122 of 2001 (VR)** this Court stated that:

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise.”

27. On 14th September, 1985 the 1st respondent and Ernest Khatieli appeared before J. M. Wafula advocate and adopted the sale agreement that they had entered into 4th January, 1980. That is also the same date when they applied for Land Control Board consent for sale of the suit land. The purpose of validating the sale agreement so that it was to be deemed as having been entered into on 14th September, 1985 was out of the realization that the earlier agreement was void as consent to sell had not been sought within six months from 4th January, 1980.

28. It is not clear when the matter was listed for consideration before the Board. What is clear is that on the scheduled date Ernest Khatieli failed to show up and consent for sale of the suit land was not granted. Consequently, under **section 6 (1) of the Land Control Act** the sale transaction became null and void. For purposes of a claim under the doctrine of adverse possession, time began to run after the vendor (*whether he had a right to sell the suit land or not*) refused to appear before the Land Control Board as a consequence of which the Board could not give consent to the proposed sale. Between 1985 and 1994 when the appellant was forced to vacate the suit land is a period of 9 years. That falls short of the statutory time limit of 12 years. It is therefore clear that the 1st respondent's claim over the suit land under the doctrine of adverse possession did not lie and was not established.

29. Regarding the alleged sale of the suit land, we entertain no doubt that Pepela Khatieli and Ernest Khatieli Lusamoya are two different persons, they were not one and the same person as alleged by the 1st respondent and his brother, PW 2. The suit land had been registered in the name of Pepela Khatieli since 16th July, 1963. It is apparent that Ernest Khatieli Lusamoya entered into a fraudulent sale transaction with the 1st respondent. Obviously Ernest could not pass a good title to the purchaser. We shall not dwell on this issue since the 1st respondent's claim was not based upon the sale agreement but on adverse

possession of the suit land.

30. In view of the foregoing, we allow this appeal, set aside the judgment of the trial court and substitute therefor an order dismissing the 1st respondent's suit in the High Court. For avoidance of doubt, the suit land, parcel No. Ndivisi/Ndivisi/64 shall revert to the appellant.

31. The 1st respondent shall bear the appellant's costs of this appeal as well as the costs of the High Court suit.

DATED and Delivered at Kisumu this 29th day of July, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.