



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 180 OF 2014

BETWEEN

PAUL MUSAMALI WEKESA 1ST APPELLANT

VINCENT BARASA WEKESA 2ND APPELLANT

VERSUS

PATRICK MACHINI NABALOKHA RESPONDENT

**(An Appeal from the Judgment of the High Court of Kenya at Bungoma, (Hon. A. Omollo, J.)
dated 13th May, 2014**

in

CIVIL SUIT NO. 32 OF 1998)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court of Kenya at Bungoma (A. Omollo, J.) delivered on 13th May 2014 dismissing the appellants' suit which had sought the eviction of the respondent from the property known as Title Number Bokoli/Chwele/78. By the same judgment, the court sustained the respondent's claim to that property on the basis of adverse possession.

Background

2. On 26th May 1998, the appellants instituted suit in the High Court of Kenya at Bungoma seeking eviction of the respondent from the property known as Title Number Bokoli/Chwele/78 (the property). The appellants averred in their plaint that the respondent had unlawfully entered the property in 1993 and remained on it without their consent as the registered owners. They contended that as a trespasser, he should be evicted from the property.
3. The respondent filed a defence and counterclaim in which he asserted that he is the legal representative of his father, one Joshua Nabalokha Musukuya, deceased; that his late father purchased the property from the appellants' father, one Ismael (Ibrahim) Wekesa Musamali in 1983; and that after the death of their father, the appellants fraudulently registered themselves as

the owners of the property leaving out the name of the respondent's father. The respondent also pleaded that the appellants' suit was barred by Section 7 of the Limitation of Actions Act as the respondent had lived on the property since 1983 and that he was therefore entitled to be registered as owner of the property. He accordingly sought judgment by counterclaim for an order to have the property transferred to him.

4. Although the record of his testimony appears to be incomplete, the 2nd appellant, Vincent Barasa Wekesa, stated that his late father, Ibrahim Wekesa Musamali, who was the owner of the property, died on 15th October 1989; that together with the 1st appellant they obtained a grant of letters of administration that was confirmed on 22nd November 1995; and that on the basis of that grant, the property was registered in the appellants' name. He denied that his late father had sold the property and pointed out that the agreement for sale on which the respondent was relying in support of his claim of the purchase had been tampered with and had erasures.
5. The respondent on his part testified that his late father purchased the property from the appellants' late father under an agreement for sale dated 12th November 1983 and immediately took possession of the property and started using it; that by the time he (the respondent) was testifying before the trial court, they had lived on the property for 30 years without any interference, despite the fact that the property was never transferred to his father; that by the time the appellants' father died in 1989, the property had still not been transferred to the respondent's father; that prior to his death in 1991, the respondent's father had instituted suit for specific performance against the appellants' father in Bungoma CMCC 51 of 1989 but the appellants' father died before that case was concluded and that the suit subsequently abated; that in 1996 the matter was referred to the District Commissioner, Bungoma, after which the dispute was heard by Nalondo Land Disputes Tribunal which awarded the property to the respondent; and that the award of the tribunal was adopted as a judgment of the court on 12th November 1996. The respondent maintained that there was no interference with possession of the property from 1983. With that, he asked the court to dismiss the appellants' claim and to allow the counterclaim.
6. In her impugned judgment delivered on 13th May 2014, the learned trial Judge dismissed the appellants' suit and allowed the respondent's counterclaim, having found as a fact that a "valid sale of land took place between the [appellants'] father and the [respondent's] father in 1983". The trial court was also satisfied that the respondent "took possession [of the property] in 1983 making his claim for adverse possession founded" and that the respondent's claim over the property had been established.
7. Dissatisfied with that judgment, the appellants lodged the present appeal.

The appeal and submissions by counsel

8. Learned counsel for the appellants, Mr. Kweyu, referred to the appellants' memorandum of appeal and submitted that the trial Judge erred in dismissing the appellants' suit and in allowing the counterclaim; that the appellants did establish their ownership of the property; that the respondent did not prove that he was in possession of the property for 12 years or more; that the alleged agreement for sale between the father of the appellants and the father of the respondent was allegedly entered into in 1983 and the appellants' father died 6 years later in 1989 with the result that time stopped running; that the suit filed by the respondent against the appellants' father, being Bungoma Civil Case No. 51 of 1989, seeking specific performance of the alleged sale agreement confirms that there was a dispute; that the effect of that suit was to interrupt the respondent's possession of the property; and that to the extent that the respondent is relying on the sale agreement entered into by his father, he should have obtained letters of administration for the estate of his father.
9. Opposing the appeal, Mr. J. S. Khakula, learned counsel for the respondent, submitted that the respondent did establish his claim for adverse possession to which there was no defence; that having occupied the property in 1983 when the father bought the property, the occupation was never

interrupted and no effort was made by the appellants to evict the respondent until about 15 years later when the suit giving rise to this appeal was filed in 1998; that the appellants cannot rely on the suit in Bungoma, Civil Case No. 51 of 1989, to claim that that suit had the effect of interrupting the respondent's occupation of the property.

Analysis and determination

10. We have considered the appeal and the submissions by counsel. Although the appellants' memorandum of appeal contains 10 grounds of appeal, the issue that was canvassed before us and the principal question for our determination therefore, is whether the respondent established a claim for adverse possession over the property. In that regard, we must review the evidence and draw our own conclusions. [See **Selle v. Associated Motor Boat Company [1968] E.A. 123**].
11. Asike-Makhandia, JA. captured the essence of adverse possession in **Mtana Lewa v Ngala Mwangandi [2015] eKLR** as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act.”

12. In **Njuguna Ndatho v Masai Itumo & 2 others [2002] eKLR** the Court observed:

“For the defence of adverse possession to succeed, the possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor.”

13. In **Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR** the Court had this to say:

“This Court in Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) approved the decision of the High Court in the case of Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B, where Kneller J. held 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 persuasion). So the plaintiff 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 purposes or any endeavours to interrupt it by way of recurrent consideration. ”

14. Although the 2nd appellant, Vincent Barasa Wekesa, in his testimony before the trial court denied that his late father, Ibrahim Wekesa Musamali, had prior to his death sold the property to the respondent's father, the preponderance of evidence shows otherwise.

15. The respondent produced as defence exhibit 1, an agreement for sale dated 12th November 1983 entered into between Ismael Wekesa Musamali as seller and Joshua Nabalokha Musokoya as buyer under which the seller agreed to sell the property for KShs. 12,000.00. The 2nd appellant also signed that agreement.

16. Although the appellants took issue that that agreement was tampered with by overwriting the

parcel number 78, there was other evidence on the basis of which the trial court correctly concluded that the subject matter of the agreement was the property. There was, for instance, evidence that prior to his death, the respondent's father, Joshua Nabalokha, had instituted civil suit number 51 of 1989 seeking specific performance against the appellants' father, Ismael Wekesa Musamali. He had testified in that suit on 27th July 1989 but following his death the respondent was substituted by an order of the court made on 27th May 1991. It is clear from the material placed before the trial court relating to that suit that the subject matter was undoubtedly the property.

17. In our view therefore, the learned trial Judge in her judgment satisfactorily addressed the appellants' complaint regarding the alleged overwriting in the agreement for sale when she said:

“I noticed the over writing in the plot number. However in Dex. 2, proceedings before chief and panel of elders, the plot number in dispute is indicated as parcels nos 62 and 78. L.R. No. 62 was sold to one Jackson Lumbuku. The case Bungoma CMCC 31/98 refers to parcel no. 62. L.R. no. 78 was mentioned to have been sold to the Defendant's father. The Plaintiffs admitted knowledge of the case before the D.O. Kimili. I do find the over writing of the number on the sale agreement did not invalidate it as there were other documents which corroborated it. The agreement was in writing, and executed by the parties and their witnesses as required by law under Sec. 3 (3) of the Law of Contract Act. I am satisfied there was a valid sale of land that took place between the Plaintiffs father and the Defendant's father in 1983.”

18. The respondent's testimony that his father took possession of the property immediately on entering into the sale agreement and that “we have lived on this land for 30 years without any interference” was not shaken in cross-examination.

19. Furthermore, it is not in dispute, that the property is agricultural and that consent of the relevant land control board was not sought or obtained. The effect is that under Section 6 of the Land Control Act, the transaction became void. The further consequence is that 6 months after the agreement dated 12th November 1989 the possession became adverse. This Court dealt with a similar situation in **Sammy Likuyi Adiema v Charles Shamwati Shisikani [2014] eKLR** where it stated:

“It is common ground that no Land Control Board's consent was sought or obtained with respect to the transaction involving the portion of the suit land between the respondent and the deceased father of the appellant.

Section 8 of the same Act reads:-

“8. Application for consent

1. An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto. ”

In the premises, the transaction between the respondent and the deceased father of the appellant became void after six months of the agreement for want of consent from the relevant Land Control Board. Thereafter, the respondent's possession of the suit land became adverse to the title formerly held by the appellant's deceased father and then the appellant.”

20. Similarly in this case, the respondent's possession of the property became adverse to the title formerly held by the appellants' deceased father and then the appellants. The assertion by the appellants that possession was interrupted by the complaints raised with the administration has no merit. In **Githu versus Ndeete (1984) KLR 776** the Court held that time ceases to run under

the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted and that assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitations of Action Act.

21. We are, in the foregoing circumstances, satisfied that on the evidence before her, the learned trial Judge reached the correct conclusion. In the circumstances, do not have any basis for interfering with the decision of the trial court. The appeal therefore fails and is accordingly dismissed with costs.

Orders accordingly.

Dated and delivered at Eldoret 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 a true copy of the original.

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DEPUTY REGISTRAR