IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 17 OF 2016

BETWEEN

CHEVRON (K) LTD (*FORMERLY KNOWN AS CALTEX*

***OIL KENYA LIMITED*) …..... APPELLANT**

AND

HARRISON CHARO WA SHUTU …….....….RESPONDENT

*(Being an appeal against the Judgment of the High Court of Kenya at Malindi (Angote, J.) dated 9th October, 2015 in **HCCC. NO. 29 OF 2008**)*

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JUDGMENT OF THE COURT

The appellant, Chevron (K) Ltd which, before its change of name, was known as Caltex Oil (K) Ltd and which was subsequently bought by Total (K) Ltd, was by stand premium of Kshs. 150,000 granted a lease of MALINDI LR. PORTION NO. 8897 (the suit premises) for a term of 99 years from 1st May 1994.

The appellant instituted a suit in the Malindi Environment and Land Court, being Civil Case No. 29 of 2008 against the respondent, Harrison Charo wa Shutu claiming that the latter had unlawfully trespassed on the suit premises and praying that he, his servants or agents be compelled by an order of mandatory injunction to demolish all permanent and temporary structures on the suit premises and to cart away the debris and that they further be restrained by a permanent injunction from trespassing, dealing, occupying or in any way interfering with the appellant's indefeasible right over the suit premises. Contemporaneous with the suit the appellant took out a notice of motion for temporary injunctive orders pending the hearing and determination of the suit. We have made reference to this application because it is alleged in this appeal that it was not determined, and that it was in error for the learned Judge to proceed to decide the main suit while an interlocutory application was still pending. Although we are not able to trace the ruling, in the record of appeal, we think the suit having been heard and determined on merit, the issues raised in the application were subsumed in the final judgment.

In both his statement of defence and the affidavit in reply to the interlocutory application the respondent contended that the suit premises was allotted to his father who, with his family settled on it 45 years ago; that he was born on the suit premises in 1963; that during that period he has been in open, continuous,

exclusive and adverse possession; that he has developed the suit premises, putting up on it temporary and permanent structures; and that, as a result, the appellant was forever barred by operation of **section 38** of the Limitation of Actions Act from recovering it.

The suit was heard in the Environment and Land Court at Malindi before Angote, J where the appellant's case was presented by its Network Development Manager, Gibson Kimoli Mutua who confirmed that the appellant, pursuant to its policy of acquiring properties all over the country for future development, purchased the suit premises in May 1994 for the purpose of putting up a petrol station. According to the witness, in 2008 the appellant learnt that the respondent had trespassed on the suit premises by erecting structures thereon without its authority compelling it to institute the aforesaid action.

The respondent, on the other hand testified that he was born on the suit premises in 1963, his parents having occupied it for over 45 years; that that being the case he had acquired it by statute of limitation; that he has established his home on the suit premises where his mother is also living. The mother, Kache Charo explained that she got married to the respondent's father who was already living on the suit premises and has lived there since; that as the third wife she was allocated the suit premises; that she lives in one of the three houses standing on the suit premises.

After evaluating the evidence by both sides the learned Judge was of the opinion that from, 1994, the year it was registered as proprietor of the suit premises, the appellant did not at anytime occupy or utilize it; that by the time the action was brought in 2008 there was evidence that the respondent had been in occupation for a period that would entitle him to raise the defense of limitation; that in the absence of a Part Development Plan (PDP) it was evident that the appellant did not visit the suit premises to ascertain its state; that had it done so it would have been apparent that it was not vacant; and that pursuant to **sections 7** and **17** of the Limitation of Actions Act, and after the expiration of over 12 years, the appellant was precluded from bringing an action to recover the suit premises. With that the appellant's suit was dismissed with costs.

The appellant being aggrieved by the dismissal of its claim has challenged the decision on some 13 grounds which were condensed into 4 and argued as such. In our considered view, however the main issue being raised in this appeal is whether adverse possession was proved. The other related question is whether the learned Judge erred in not visiting the *locus in quo*, to ascertain the parties' respective claims; whether the learned Judge misdirected himself in failing to make a finding that it was fatal for the appellant, a limited liability company to bring the action without authority of the company or its board of directors. This question was raised by the respondent before the learned Judge, who determined it thus;

> ***"31. As has been held in numerous decisions of this court and the Court of Appeal, when companies authorize the commencement of civil proceedings, a resolution or resolutions have to be passed either at the company's or board of Directors meeting and recorded.(see Bugerere Coffee Growers Ltd v Sabaduka & Another (1970) EA 147. In the absence of authority of the company and resolution(s), this suit should fail.***
>
> ***32. I shall however look at the merit of the suit."***

Both the appellant and the respondent have been aggrieved by this determination and have asked the Court to declare it a misdirection. According to the respondent the decision ought to have been conclusive and clear enough to be able to dispose of the question whether the appellant had authority to bring the action. The appellant, on the other hand contends that the learned Judge, by deciding the issue against it misapplied the law and relied on the provisions of **Order 4 Rule 1(4)** of the Civil Procedure Rules, 2010 which was not in force in 2008, when the suit was filed.

Because the answer to this question does not pose any difficulty, we shall dispose of it right away. By **section 79 G** of the Civil Procedure Act and **Order 42** of the Civil Procedure Rules, the respondent ought to have either challenged that decision within 30 days by filing an appeal or subsequently by filing a cross-appeal. He did not do so but only raised the issue from the bar. Regarding the appellant's complaint, it is a well-known principle of company law that, being an artificial body, a company can only

act through the agency of its organs, the board of directors and shareholders. Where, for example, it is demonstrated that a suit was instituted without the resolution of the board, the company cannot be said to be before the court. That was what the case of **Bugerere** (supra) decided. That being so, the only error the learned Judge made was to apply **order 4 rule 1 (4)** aforesaid which had not been promulgated at the time the suit was filed. He, however, came to the correct conclusion on the point. That should have ended the matter but the learned Judge was of the view that it was still necessary to determine the merit of the dispute. We think he took the right course to determine all the aspects of the dispute.

The other procedural issue raised in the appeal is whether the learned Judge was in error for failing to uphold the appellant's objection to the defence of adverse possession being raised in the statement of defence rather than by an originating summons or counter-claim. On this, learned Judge was of the mind that;

> ***"45. It….. follows that an adverse possessor can raise a defence of adverse possession without necessarily filing a suit or a counterclaim. The only thing the adverse possessor cannot get in a situation where he has not filed a cross suit is an order for a title to be issued in his favour"***

Under **Order 37 Rule 7** of the Civil Procedure Rules,

> ***"7 (1)) An application under section 38 of the Limitation of Actions Act shall be made by originating summons".***

The appellant has relied on the case of **Njunguna Ndatho** v **Masai Itumu & 2 others** Civil Appeal No. 231 of 1999 where the Court explained the procedure thus;

> ***"The question that next arises is; were the respondents entitled to invoke the doctrine of adverse possession to claim title to the suit land by way of a counter-claim in the suit? The learned Judge, despite the provisions of Order XXXVI rule 3D of the Civil Procedure Rules, thought that they could so counter-claim. He did not see any injustice caused to the appellant in the circumstances. This Court has on several occasions held that title by adverse possession is to be sought by way of an originating summons under Order XXXVI rule 3D of the Civil Procedure Rules. The claim for title by virtue of adverse possession by way of a cross-claim in a suit was in this case misconceived."***

The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See **Mariba** v **Mariba Civil Appeal No. 188 of 2002,** counter-claim or defence as was the case here. See **Wabala** v **Okumu (1997) LLR 609 (CAK).** In **Gulam Mariam Noordin** v **Julius Charo Karisa, Civil Appeal No 26 of 2015,** where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

> ***"Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted."***

Turning to the substantive ground, dealing with the question whether the learned Judge properly found on evidence that the respondent was entitled to the suit premises by adverse possession, it is necessary to remind ourselves of our primary role as a first appellate court. That role although notorious bears

repeating. It was succinctly propounded by this Court in the case of **Kenya Ports Authority** v **Kuston (Kenya)Ltd, (2009) 2 EA 212** in the following words;

> **"This being a first appeal to this Court, the duty of the court, is to r*econsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect…"***

The appellant presented evidence to the effect that a grant to the suit premises was issued in its favour on 1st May 1994; that at the time, the suit premises was vacant and the respondent was not occupying it; that it was only in 2008 that it *"discovered"* that he had encroached on the property; and that from the photographs of the suit premises and the survey report, it was apparent the encroachment was recent as two buildings on it were temporary, while the third one which was a permanent building was under construction. According to the appellant, had the trial court, pursuant to its own order visited the suit premises, this fact would have been made clearer.

The respondent, for his part, maintained that he was born on the suit premises in 1963; that he has lived his entire life on the suit premises; and that by 1994 the appellant could not have acquired it as the title had been extinguished by operation of the statute of limitation.

The learned Judge, faced with the two rival positions found that the appellant's claim was time-barred, having failed to prove that the respondent was a trespasser; and that the respondent had demonstrated that his occupation of the suit premises was for a period in excess of the 12 years statutory period.

What is clear to us is the fact that the appellant was the registered proprietor of the suit premises. The appellant's sole witness was however not well-versed with its case. For instance he conceded that when the suit premises was purchased in 1994 he had not been employed by the appellant; that he joined Caltex Oil (Kenya) Ltd in 1998; that he has always worked in Nairobi; and that it was from the valuer's report compiled in February, 2008 that the appellant learnt of the respondent's encroachment on the suit premises. The witness' lack of knowledge of relevant facts may be summarized in his confusing explanation as follows;

> ***"The encroachment was in February, 2008. We noticed the construction of the buildings in 2008. That was the first time we noticed about the construction** (sic)**……. I cannot tell the age of the said construction…… There were already structures as at the time the report was made. I cannot tell when the structures were constructed…… It is possible that temporary structures were in existence. We bought the land when there were no structures. In 1994 I was in studies** (sic) **but knew the policy of the company. The company never buys land with squatters on it…….I live** (sic) **it to the court as to whether the defendant has been on the land for 14 years between the time we bought the land and in 2008"***

It is apparent from this evidence that the appellant was unable to confirm the actual date of trespass yet it was from that date that it would be established whether or not the appellant's claim to recover the suit premises was statute-barred. A registered owner of land by the provisions of **section 7** of the Limitation of Actions Act may not bring an action-

> ***"….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 ".***

At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and **section 38** of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See **Littledale** v **Liverpool College** (1900)1 Ch.19, 21.

The respondent's case that he was born on the suit premises in 1963 and that his parents had been in occupation for over 45 years prior to the suit being filed has not been controverted. It is our considered view that the objective sought to be achieved by visiting the suit premises was not absolutely necessary in view of the two reports made to the appellant, first by the surveyors, Geocard Services Limited and a second one by the valuers, Tysons Limited, both of which left no doubt that there were people living on the suit premises and acknowledged the existence of three structures, two temporary/semi-permanent and a third permanent one, under construction. The onus was on the appellant to lead evidence to support its assertion that the three structures were put up in 2008 and not earlier, to rebut the respondent's contention that he has been on the suit premises since birth in 1963, and that the two temporary/semi permanent structures were not newly constructed. Although a visit to the suit premises would have revealed if the permanent building under construction began that year (2008), we do not know by what means the court would have determined the ages of the two temporary/semi-permanent structures.

The fact that the respondent has been in possession of the suit premises was also acknowledged in a letter on record dated 13th February,1989 addressed to the District Officer, Malindi by the Town Clerk lamenting that it was-

> *"…unfortunate that the official residence of Charo Shutu"* was designated industrial zone, that Charo Shutu *"has lived in the present place for the last forty five years when his father, Chief Shutu was before then (*sic*) a police officer in Malindi"*. The letter further acknowledged the respondent's large family and noted that he would need an alternative land *"in the event of the plot being developed."* It concluded with a proposal that the developer be advised to hold on any intended development on the suit premises until a solution to the respondent's problem was found.

The ultimate question still remains whether the respondent had been in possession of the suit premises for over 12 years as at the time the suit to evict him was instituted in 2008, and whether his possession was adverse to that of the appellant? It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See **Sophie Wanjiku John** v **Jane Mwihaki Kimani** Nairobi ELC Civil Suit No. 490 of 2010.

Until 1994 the property was Government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See **Wambugu v. Njuguna** [1983] KLR 172. The relevant period would therefore be between 1994, the date of registration of the appellant as the proprietor and 2008 when the suit was filed. That period, in aggregate translates to 14 years which is the period the respondent can legitimately base his claim.

We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The respondent's acts were *nec vi, nec clam,nec precario (*that is, neither by force, nor secretly and without permission).

We remind ourselves of the rationale of this method of acquiring land by adverse possession as explained in the following passage from the decision in **Adnam** v **Earl of Sandwich** (1877) 2QB 485.

> ***"The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties "***

With respect, we agree with the learned Judge that the appellant ought to have exercised diligence at the time it purchased the suit premises by inspecting it. The manner it dealt with the acquisition was

evidently contrary to its own policy not to purchase land occupied by squatters or one with a dispute. As this court stated in **Mweu v. Kiu Ranching & Farming Co-operative Society Ltd.** [1985] KLR 430:

> **"Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it."**

It follows therefore that when the appellant instituted the action in 2008 its title to the suit premises had been extinguished.

It was the appellant's contention that the learned Judge wholly misunderstood its case by basing his decision on the doctrine of adverse possession while the claim was premised on the tort of trespass to land; that the issue before the trial court was simply whether the respondent entered on the suit premises without its permission. We think it is futile to draw such a distinction. **Sections 13** and **38** of the Limitation of Actions Act, respectively simply recognize "**some person in whose favour the period of limitation can run"** and **"where a person claims to have become entitled by adverse possession to land….."** Invariably all cases of adverse possession arise from claims to recover land from persons regarded as trespassers.

The last matter for us relates to the final orders. We alluded at the beginning of this judgment to a statement in the trial court's judgment to the effect that the respondent was not entitled to an order directing that he be registered as the proprietor of the suit premises for the reason that the claim was not brought by suit pursuant to **section 38 (1)** of the Act. We reiterate that section 38 provides that whenever an adverse possessor claims to have become entitled to land he **"may apply to the High Court for an order that he be registered as the proprietor…."**

In the case of **Gulam Mariam** (supra) in which a similar question arose, this Court resolved it thus;

> ***"When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's was so extinguished."***

For all the reasons given above the appeal fails and is dismissed. Like in the above authority, we make the order that the appellant shall transfer to the respondent the property at the latter's expense within 30 days from the date hereof, failing which the Registrar of the High Court at Malindi shall execute, on behalf of the appellant the necessary transfer documents. Each party to bear their own costs.

Dated and delivered at Mombasa this 14th day of October, 2016

ASIKE-MAKHANDIA

….....……

JUDGE OF APPEAL

W. OUKO

…….....……

JUDGE OF APPEAL

K. M'INOTI

…….....……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR