IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO.29 OF 2016

BETWEEN

PETER KAMAU NJAU.....APPELLANT

AND

EMMANUEL CHARO TINGA.....RESPONDENT

(Being appeal from Judgment of Land and Environment Court at Malindi,

(Angote, J.) dated 11th March 2016

in

ECL. NO. 156 OF 2013)

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JUDGMENT OF THE COURT

The acquisition of property by adverse possession is a very common phenomenon at the Coast of Kenya and it is not an exaggeration to say that Courts in this region have inundated to deal with such claims more or less on a daily basis. This, in our experience hearing appeals arising from disputes relating to land, can be attributed to the wide spread landlessness of the indigenous populace, who, often times are forced by their circumstances to invade private land, resulting in the kind of conflict involved in this appeal.

According to the title deeds in respect of KILIFI/JIMBA 1223 and 1224 (the suit property), which are the subdivisions of the original PLOT NO. 135, the appellant was registered as the proprietor of the suit property on 6th September, 2006 and titles issued in his name on 12th April, 2011.

From his evidence in court, by a written agreement dated 1st July 2005, and payment of a consideration of Kshs. 500,000, the appellant purchased the suit property from Joel Ngaruiya and his wife, Lilian. He confirmed that when he purchased the property he was aware that there was encroachment on the original PLOT NO. 135; that he was also informed that the issue of encroachment had been resolved. On 30th August, 2013, however the appellant learnt that the respondent had trespassed on the suit property, deposited building materials and was in the process of building a permanent house. After efforts to stop these activities failed, the appellant instituted, in the Environment and Land Court at Malindi, Land Case

No. 156 of 2013 in which he asked the court to order the eviction of the respondent and thereafter to restrain him, his agents and servants, by an order of injunction, from interfering with the suit property.

The respondent filed a defence and counter-claim, contending that he had been a squatter on the suit property since 1996, and was its beneficial owner; that in 1997 he was identified and recognized as a squatter by a task force established to inquire into the question of squatters in Kilifi/Jimba Settlement Scheme; that by this time he had planted trees and built permanent houses on the suit property; and that the subdivision of the original parcel was irregularly done. In the result, he applied that he be declared the owner of the property and the appellant a trespasser, to be condemned to compensate him in damages for trespass and be restrained by an order of permanent injunction from encroaching on the suit property.

Angote, J. heard from the appellant how he visited the suit property before committing himself to buy it. He insisted that during the inspection he never saw any form of settlement or development on the suit property, no crops or trees, etc. But in 2013 he discovered that the respondent had occupied the suit property. He confirmed however that he was aware prior to that year that someone was illegally occupying the property and carrying out certain activities, but was assured that the issue had been sorted out.

The appellant's only witness was Joel Ngaruiya, the person from whom he purchased the suit property. Ngaruiya testified that he became the owner of the original parcel in 1981. Later, in 2006/2007 he subdivided it into 16 parcels and sold two of the subdivisions, measuring half acre each, to the appellant; that prior to that period, in 2004 he had had a dispute with the respondent who, without his permission, entered the suit property and fenced a portion thereof, claiming ownership. He made a report to the area chief before whom the respondent produced a letter addressed by the Chairman and Secretary of a local Lands Committee to the Director of Adjudication and Settlement Nairobi purporting to be the basis of allocation of the suit property to him. Ngaruiya told Angote, J that he went to Nairobi where he confirmed that the letter was a forgery. Although Ngaruiya was aware there were many task forces on the squatter question in the area, he did not think any of them would make such a mistake, allocating private land to a squatter. He maintained that by the time the appellant bought the suit property, the dispute with the respondent had been resolved. In conclusion, he told the learned trial Judge that, while out of the country in 1982 he got information that someone had trespassed on the suit property.

The respondent reiterated the line that he has been in occupation of the property, comprising in total 1 acre since 1994; that he fenced it, planted subsistence crops and constructed permanent structures, the latest structures being 17 rental houses. He insisted that even prior to this date in the 1990's his father was cultivating the suit property. As a result of his possession the Kilifi/Jimba task force recognized him as a squatter on the suit property; and that he only learnt that the suit property belonged to the appellant when the latter filed the suit giving rise to this appeal, seeking to evict him from the suit property. Regarding the rental houses, the respondent testified that he completed their construction in 2014 although he had two existing residential houses built over the years, which the task force noted in 1997; and that Ngaruiya came to the suit property for the first time in 1999 and later in 2015.

With that evidence before him, Angote, J. after evaluating it, held the strange view that the original owner (Ngaruiya) did not in the first place present evidence on how he acquired his title to original parcel No. KILIFI/JIMBA 135; that in the absence of a search certificate or green card, there was nothing to show that Ngaruiya and his wife were the true owners and could sell the suit property to the appellant; that the appellant did not offer any explanation why, if indeed he purchased the property in 2005, the title deed was issued many years later in 2011; that there was no evidence of a transfer or payment of stamp duty; that there was also no proof that, in terms of **section 6 (1) (b)** of the Land Control Act, the relevant land control board had approved the subdivision of the original parcel No. KILIFI/JIMBA/135 or the sale of the suit property to the appellant, being agricultural land.

Guided by the decision of this Court sitting at Nyeri in the case of **Munyu Maina V Hiram Gathima** Civil Appeal No.239 of 2009, the learned Judge stated his understanding of the law in the following words;

"45. The mere production of a title deed without any evidence from the District Land Registry to show the existence of the title is a dangerous path that cannot afford this court the opportunity to conclusively state that the plaintiff acquired the suit property lawfully.

46. Where the fact of registration of an individual as a proprietor of a parcel of land is challenged, the proprietor of such land can only prove that fact by producing a certified copy of the extract of the register or an official search. Even after the production of such documents, the registered proprietor has to show that the land was registered in his name lawfully."

Ultimately the learned Judge concluded that the respondent had provided proof that he had occupied the suit property since 1996, a period in excess of 12 years, a fact not only confirmed by the respondent's own evidence but also by two different chiefs of the area in their separate letters; that the appellant, on the other hand, had failed to show that Mr. and Mrs. Ngaruiya had a good title to pass to him. In the result the appellant's action was dismissed with costs, while the respondent's counter-claim was granted by being declared the owner of the suit property. The appellant was declared a trespasser and restrained permanently from encroaching on or interfering with the suit property. The respondent's prayer for general damages for trespass was, however dismissed.

The appellant has challenged before us that decision relying on 10 grounds, condensed and argued by his advocate, M/s Michira Messah, in written submissions as follows;

(a) The learned Judge erred in requiring the appellant to establish how the previous owner of the suit property acquired his title yet he was not under any statutory duty to discharge such a burden. The appellant, it was submitted, was only expected to conduct due diligence to establish the status of the suit property, which he did before purchasing it and only after ascertaining the registered owner.

(b) That it was in error for the learned Judge to ignore the evidence that the appellant followed all conveyance protocol and procedure, including obtaining the land control board consent prior to subdivision and purchase; that if indeed the respondent was on the suit property, the land control board would not have given consent;

(c) The learned Judge erred in concluding that the respondent had occupied the suit property from 1996 yet if that was the case he would have objected to the subdivision; that had he been on the suit property he would have taken out originating summons to lay his claim against the owner of the original parcel; that the learned Judge relied on the letters by two chiefs in support of the respondent's claim without the two chiefs being called; that the respondent's counter-claim was in contravention of order **7 rule 5 (a)** of the Civil Procedure Rules for failing to be accompanied by an affidavit;

(d) The trial court ought, on evidence, to have found that the respondent only began to construct structures on the suit property the moment the appellant applied for an order of injunction;

(e) The court failed to appreciate the appellant's evidence that the title deed to the suit property was initially issued on 6th September 2006, but got lost prompting the re-issuance on 12th April 2011.

The respondent for his part, in supporting the decision of the trial court submitted through M/s Kilonzo & Aziz Advocates, that the learned Judge correctly directed himself in holding that the appellant did not exercise due diligence before purchasing the suit property as a result of which he failed to notice the presence of the respondent and the existence of the developments on the suit property; that the suit property being agricultural land, the appellant failed to prove that the necessary consent of the relevant land control board was obtained before the transaction; that the appellant conveniently omitted from the record, the affidavit sworn by the respondent to verify the counter-claim; and that the respondent was not aware of the subdivision otherwise he would have objected.

The respondent maintained that he demonstrated by evidence that he had been in occupation of the suit

property for a period of over 12 years; and that the letters written by the chiefs having been admitted in evidence without objection, cannot, this late, be objected to.

Unlike the appellant the respondent relied, in support of his opposition to the appeal, on a number of authorities, which we shall consider as we go along, but the general principles enunciated in them can be summarized as follows.

Our duty in this appeal, being a first appeal is to analyze afresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion. See **Selle V Associated Motor Boat Co.** (1968) EA 123.

A registered owner of land, may not, by the provisions of section 7 of the Limitation of Actions Act bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner's title will be extinguished by operation of the law. **Section 38** of the Act permits the person in peaceful possession, without the land owner's permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner's enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner. See **Littledale V Liverpool College** (1900) 19.Ch.19,21 and **Chevron K Ltd V Harrison Wa Shutu** Civil Appeal No.17 of 2016.

A claim to land by adverse possession can only be mounted against the registered owner. Indeed **order 37 rule 7 (2)** of the Civil Procedure Rules requires the claimant to attach to the originating summons an extract of title to the land in question. See **Sophie Wanjiku John V Jane Mwihaki Kimani** ELC Civil Suit No. 490 of 2010.

Therefore, the first thing to determine is the appellant's title to the suit property. Although a copy of the title deed was not annexed to the counter-claim, we are nonetheless, satisfied from the copies of the title deeds exhibited at the trial, that the property was registered in the appellant's name. The appellant himself called evidence to the effect that he purchased the property from Joel Ngaruiya and his wife, Lillian. The copies of the title deeds produced in evidence are, by the provisions of **section 26** of the Land Registration Act, 2012, to be taken by all courts as *prima facie* evidence that the person named as the proprietor is, in fact, the absolute and indefeasible owner, subject only to the encumbrances, easements, restrictions and conditions contained in the certificate. In terms of the requirement of **section 107** of the Evidence Act, the burden was on the respondent to demonstrate, on a balance of probabilities that the title was obtained fraudulently. That being the law, we find no evidence to impeach the appellant's title. He was not required to do more than he did, to satisfy himself before purchasing the property that it was registered in the name of the couple, Mr. & Mrs. Ngaruiya.

It was, with respect, a grave misdirection on the part of the learned Judge to burden the appellant to prove that the Ngaruiya's title to the original property was regularly obtained. Fraud must be pleaded with a great degree of particularity and to be proved by evidence on a standard heavier than on a balance of probabilities generally applied in civil matters. There was no scintilla of evidence before the learned Judge to warrant his conclusion that the original title was doubtful. The learned Judge was clearly misled by the statement of this Court sitting at Nyeri in **Munyu Maina** (*Supra*) in the passage reproduced earlier, which, in effect erroneously suggests that a document of title is worthless without further supporting evidence. Due diligence expected of a purchaser does not extend beyond the title of the vendor and, so long as the vendor's name is contained in the certificate of title, section 26 of the Land Registration Act enjoins "*all courts*" to take that certificate of title as *prima facie* evidence that he is the absolute and indefeasible owner, subject only to encumbrances and conditions endorsed on the certificate.

In the absence of evidence in rebuttal, it was in grave error for the learned Judge to impeach the appellant's title in the manner he did.

The next crucial factor for consideration is the period of occupation and the magic wand is 12 years. The respondent was required to prove, not only that he had occupied the suit property for a period of 12 years, but also that his occupation was continuous, open, without force and without the permission of the

appellant or the Ngaruiya's. The critical dates are, 31st January 1981, when the Ngaruiya's first obtained title, 1997, the date the respondent claims to have occupied the property and 6th September 2006 when the suit property was registered in the appellant's name. It is also important to bear in mind the 5th September 2013, the date the appellant brought, for the first time, the action to recover the property. The burden of proving that the appellant was barred by the statute of limitation from recovering the suit property rested on the respondent.

The period between 1997 and 2013, amounts in aggregate to 16 years. Although from the time the appellant obtained ownership of the suit property in 2006 to the date he brought the action the period translates to only 7 years, it is settled law that the mere change of ownership of land adversely occupied by another will not interrupt or stop time from running. See **Janet Ngendo Kamau vs. Mary Wangari Mwangi** Civil Appeal No. 173 of 2003. If we are persuaded that the respondent was on the property from 1997, it will follow that at the time the appellant purchased it, time had already began to run in favour of the respondent against the Ngaruiya's title.

Even if we were to exclude the letters from the two chiefs which the learned Judge has been accused of irregularly admitting in evidence, we are nonetheless satisfied, from the totality of the evidence presented by both sides that the respondent discharged the burden of proving that he got onto the property in 1997 if not earlier. By the agreement for sale the Ngaruiya's gave an assurance to the appellant that there were no adverse claims on the suit property and that it was sold in vacant possession. The evidence before the trial court is, however, not consistent with this averment. For example, the appellant stated at the trial that he went to the suit property in 2005 before he decided to purchase it, and subsequently in 2011; that on both occasions he did not see any developments or people on the suit property. Yet in the same vein he admitted that the Ngaruiya's had made him aware of the encroachment on the property but assured him that the issue had been resolved. It is equally difficult for us to reconcile his evidence that on both occasions when he went on the suit property there was no form of settlement or development with his admission that the buildings were probably on the suit property in 2010. Joel Ngaruiya himself confirmed that he had had problems with the respondent since 2004. Although he was aware of several task forces formed in the past to resolve squatter problem in the area, he argued that the report of the task force identifying the respondent as a squatter from 1997 was false.

But of significance is Mr. Ngaruiya's evidence that while out of the country in 1982 he was informed that someone had "grabbed" his land as well as the road reserve. He did not specify when precisely he learnt of the encroachment or when he was told the trespasser had entered the suit property. He involved the local chief and police to remove the trespasser without any success.

The respondent told the court that he and his father had cultivated the one acre comprised in the suit property from 1994. He subsequently settled on the property; and one of several task forces recognized his status as a squatter in 1997. Perhaps believing that that was the period he was formally recognized, he pinned his claim to 1997, although it is likely he was on the suit property earlier, bearing in mind the evidence of Mr. Ngaruiya that he learnt of the encroachment while abroad in 1982. He did not, as we have pointed out, state when he returned to Kenya. He, however, confirmed that he met the respondent in 2004.

In order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land. See **Njuguna Ndatho V Masai Itumu & 2 Others** Civil Appeal No 231 of 1999.

There was no evidence of effective entry. The only time the appellant asserted his right against the respondent's occupation of the suit property was when he instituted the action in 2013, by which time the statutory 12-year period had lapsed and his title, with regard to the 1 acre comprised in the suit property had, forever been extinguished. The appellant had lost his right to the property upon being dispossessed by the respondent who has over the period of occupation used the suit property *nec vi, nec clam, nec precario,* as though it was his. He put up several houses on the property and leased some to tenants for rent.

With the above inevitable conclusion, we find no need to consider the other grounds which were only of technical nature.

In the end we conclude that the learned Judge ultimately reached the correct determination and issued appropriate orders.

Accordingly the appeal fails and is dismissed with no orders as to costs.

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