



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 27 OF 2013

BETWEEN

SAMUEL KIHAMBAAPPELLANT

AND

MARY MBAISI RESPONDENT

***(Appeal from a Judgment and Orders of the High Court of Kenya at Kakamega (S. J. Chitembwe, J)
dated 29th May, 2013***

in

KAKAMEGA No. 136 OF 1996

JUDGEMENT OF THE COURT

The dispute between the appellant Samuel Kihamba and the respondent Mary Mbaisi revolved around a parcel of land known as plot number Kakamega / Lugari / 67 (“the suit land”) measuring 5.4 hectares. The suit land was registered in the appellants name on 19th February, 1997 as was evidenced by the title deed produced as evidence at the trial. The appellant is a step son of the respondent.

The respondent filed an Originating Summons against the appellant at the High Court of Kenya, Kakamega, where several questions were posed for determination by that court.

The central issue raised was whether the respondent had acquired adverse rights over the suit land against the appellant and whether in the premises, the court should order cancellation of the title to the suit land consequent to which the respondent would be registered as owner of the suit land by adverse possession. Said J. Chitembwe, J, heard the matter and in a judgment delivered on 29th May 2013 the learned judge found that the respondent was entitled to the land as an adverse possessor. The learned judge ordered cancellation of the title to the suit land and registration thereof of the respondent as the owner of the land. Those are the orders that provoked this appeal. Being a first appeal we are entitled to reconsider the evidence to reach our own conclusions based on the evidence on record after evaluating how the judge below treated the evidence before him. The judge was exercising a discretion and as has been stated in the various decisions of this court we should not interfere with the exercise of discretion unless it can be shown that the judge has misdirected himself in the matter and in the result reached a wrong decision or unless it is manifest from the case as a whole that the judge was clearly wrong in the

exercise of his discretion and that this has resulted in a misjustice – See **Mbogo & Anor v Shah [1968] EA 93** and **Mwanasokoni v Kenya Bus Service Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur)**.

The respondent testified that she had resided on the suit land since 1964 with her late husband and had cultivated on the said land without interruption or interference. She had buried her dead children on the suit land. Her daughter Joyce, since deceased, who then resided in Nairobi, had taken documents in respect of the suit land ostensibly to have the respondent registered as owner of the suit land but the respondent never saw the documents again only to discover upon a search of the title that the appellant had been registered as owner of the suit land. She denied that the appellant had allowed her to reside on the land and also denied that he had erected a house for her on the suit land. She also denied knowledge of various documents shown to her in cross-examination which showed various payments by the appellant to Settlement Fund Trustees and transfer documents for the suit land in the name of the appellant.

Lawrence Kapchanga Rongo, a retired teacher, testified that he was the respondents' immediate neighbour and that he was a witness to the fact that the respondent had resided on the suit land from 1964 where she grew maize, beans and bananas. He attended burials of four of the respondents children who were buried on the suit land and no one had objected to their being buried there.

Ezekiel Mwasame, another neighbour, testified in the same vein.

The appellant testified that he was the owner of the suit land and resided on it and that it was the respondent, as original owner of the suit land, who gave it to him as a gift. According to him the respondent after gifting the land to him constantly harassed him and forcibly removed him from the suit land in 1986 using hired thugs. He had reported the matter to the local administration. He denied that the respondent could have resided on the land for a period of twelve years to found a claim for adverse possession. The appellant further testified that it was he who had allowed the respondent, his step-mother, to reside and cultivate the suit land alongside himself and had even assisted her by paying her hospital bills and building a house for her. Responding to a question in cross-examination the appellant testified that although the respondent and people she had sold land to had constantly harassed him he had not sued the respondent in any court because he respected her as his step-mother.

Evans Adaraji Lilova, a chief of the subject area, testified that he had tried to resolve differences between the appellant and the respondent in vain. He had perused documents relating to the suit land and established that the suit land belonged to the appellant who had however been chased out of the land in 2002 by people who occupied the suit land brought there by the respondent.

Nathan Mudare Liboywo testified that he was a neighbour to the respondent and he knew as a fact that she had been allotted the suit land which she had freely transferred to the appellant but later changed her mind. He knew that the appellant had erected two houses on the suit land, one of which was occupied by the respondent and that the appellant took care of the respondent in accordance with the wishes of the appellants' deceased father.

That was the case made out by both sides and the trial judge found that the respondent had proved adverse possession and made the orders already alluded to.

There are seventeen grounds in the Memorandum of Appeal filed for the appellant but these can easily be collapsed and summarized into three: whether the appellant had granted a license to the respondent to reside and occupy the land and secondly, whether, as such licensee, the principle of adverse possession could apply. The third issue was whether the learned judge could make findings based on fraud when fraud had not been pleaded or proved.

In submissions before us Ms Kabutha, learned counsel for the appellant, thought that adverse possession could not apply to the situation where the appellant had allowed his step mother to occupy and work the suit land. Learned counsel also faulted the learned judge for making findings of fraud against the appellant when fraud had neither been pleaded nor proved.

Mr. Athunga, learned counsel for the respondent, while supporting the judgment, submitted that the respondent had resided on the suit land from 1963 and that although the appellant was registered as owner of the land in 1974 he had not asserted any rights over the suit land at the time the suit was filed in 1996. While conceding that fraud had not been pleaded learned counsel thought that the learned judge was right to make that finding in the face of documents produced at the trial like an application for consent of the land control board which, stated counsel, was not dated. Also, that application for consent gave consideration as a gift while the accompanying transfer stated a monetary consideration.

The issue whether or not a claimant is in adverse possession of land is a matter of evidence with the standard of proof being that of a balance of probabilities.

This Court advised on the approach to be taken in the examination of proof in determining a claim for adverse possession in the case of *Wambugu v. Njuguna* (1983) KLR 173, where it was held that:

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

Courts in Kenya have taken a strict interpretation of the law on adverse possession in making a determination on such claims.

In a recent case by the Court of Appeal sitting at Nyeri in *Eunice Karimi Kibunja v. Mwirigi M'ringera Kibunja* [2013] eKLR, the appellant was a relative in a family. The respondents' contention was that the appellant was a member of the family, the suit land was ancestral land and that the principles of adverse possession could not apply. The court restricted its determination to the limited or strict interpretation of the provisions of the Limitation of Actions Act and the proof of dispossession without a licence or permission of the land owner.

Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land **openly**, that is, **without force, without secrecy, and without license or permission of the land owner**, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land. See *Eliva Nyongesa Lusenaka & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur)*. These prerequisites are required of any claimant, irrespective of whether the claimant and the respondent are related or whether the claim relates to family/ancestral land.

This Court in *Kasuve v. Mwaani Investments Ltd. & 4 Others* (2004) KLR 184 at page 188 decided that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See Wanje v. Saikwa [1984] KLR 284.”

Accordingly, when determining a claim in adverse possession the court must consider two questions: firstly, whether the owner has been dispossessed openly or willingly and secondly whether the claimant has been in uninterrupted possession for 12 years with an intention to own the land.

This Court in the case of Wambugu v. Njuguna (supra) referred, with approval, to the case of Wallis Cayton Bay Holiday Camp Ltd v. Shell Mex and B.P. Ltd. [1975] Q.B. 94 and cited the following passage:

"The next question therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh vs. Jack (1879) 5 Ex D 264 said at 273, that to defeat a title by dispossessing the former owners 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it."

See the persuasive case of Wanyoike Gathure v. Beverly [1965] EA 514, 518, 519, per Miles J. where it was held:

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; see section 9(1) and 13 of the Limitation of Actions Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (e.g. if the area is flooded) then dispossession for that period cannot occur (see generally paragraphs 481 and 482 on pages 251, 252, of 24 Halsbury's Law of England (3rd Edn)."

Open and willing dispossession has been interpreted to mean that the owner has knowledge, whether actual knowledge or not, or a means of having that knowledge of the occupation of his or her property by the claimant. This Court in Francis Gicharu Kariri v. Peter Njoroge Mairu, Nairobi Civil Appeal No. 293 of 2002 (ur) 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."

Occupation of land by consent or license does not accrue any right of adverse possession on the claimant. In Mwinyi Hamis Ali v. Attorney General & Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997 it was held that ***"adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes."***

Consent, may be oral or written. It may also arise by way of a license, whether implied or written, or through a valid tenancy agreement. The question of whether one is a licensee, to water down a claimant's case, is a question of fact that needs to be determined by court. The claimant's case would only be watered down if the licence had not terminated or had terminated and the licensor (owner) interrupted the possession upon the determination of the license.

In Wambugu v. Njuguna, (supra) at holding 4, this Court held:

"Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined".

Consent and such determination is the key consideration with regard to adverse possession among relatives. When and how does the court determine consent by a family member?

The Court of Appeal in the case of Eunice Karimi Kibunja (supra) quoted the decision of the trial court (Kuloba J) with approval that a relative on ancestral land cannot be considered as a licensee. The Court stated that:

“Although the respondent's counsel maintained that Eunice was a licensee, we are disinclined to belabor this point as the learned Judge discounted that notion in his judgment when he opined in part of the judgment;-

“An aunt, uncle, nephew, niece or other relatives who has lived, built, planted permanent commercial crops and harvests crops on ancestral land as described above, does not fit to quality in any of a description (sic) of a licensee as analyzed above”

.....The logical argument about a licensee is because for instance, Eunice was a child of the original owners, she occupied the land as a child, later on the land changed hands and she actively participated in securing the land by registering it in the name of the respondent. In conclusion the Court can only test the type of consent that was given to the occupant of the land by the number of years and whether the owner of the land did not claim or claimed.”

We recently dealt with the same issues in the case of ***John Baraza Ojiambo v. Veronica Auma Ojiambo & 3 others*** [2013]eKLR when we acknowledged the difficulty that the concept of adverse possession posed with regard to the issue of consent and family relations. We stated:

“.....But would failure to verbalise his consent be construed as absence of consent given his relationship with the respondents? Would he in reality evict his own father, step mother and step brothers merely to prevent time running against him under the Limitation of Actions Act? In those premises would the respondents' claim to the suit land by adverse possession lie? The learned Judge of the High Court did not interrogate these issues exhaustively and we do not know how he would have resolved them if he had done so. On our part however we have our doubts whether the respondents demonstrated the prerequisites for a claim to the suit land by adverse possession.”

Although persuasive, the High Court in the case of ***Rodgers Mwamboje v. Douglas Mwamboje*** [2014]eKLR had occasion to make a determination as to whether a person staying on his brother's land for more than twelve years could claim ownership to the land under the doctrine of adverse possession. The Court determined that given African customs, **the issue of consent in such a situation is a rebuttable presumption on the claimant.** The High Court stated that;

“Indeed, if I was to feign ignorance of the African customs of people accommodating their kin on their land for long periods, I will be visiting calamity on the innocent. Taking a cue from the sentiments of the court in the *Mbui case (supra)*, which I am in agreement with, this court cannot overlook the fact that in the African cultural set up, a brother will more often than not allow his brother or sister to stay on his land whenever necessary.

In my view, where a relative, like a brother, a sister, a father, a mother, or even an uncle lives on one's land, unlike in a case of a stranger, there is a rebuttable presumption that consent (sic) has given consent. The burden of proving that the consent or permission was not given will be on the person claiming the relatives land by virtue of the doctrine of adverse possession.”

The same High Court also relied on the case of ***Mbui v. Maranya*** [1993] KLR 726. In that case, *Kuloba J* stated as follows:

“Now, in this country, go to the country side, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness. Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.

To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow these things; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession..... I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.

The keeping on our land of landless relatives, clansmen...for long periods of time until they are able to buy their own land is a custom we all know.... The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society."

It is therefore inevitable to state that the Court must take extreme caution in the determination of the consent given by an owner of land to a relative and be able to determine when such consent was withdrawn. This determination is a matter of fact and we are persuaded by the analysis of the Judge in the case of *Mwambonje (supra)* that the burden of proof is on the claimant.

The person invoking the doctrine of adverse possession must prove that his occupation was adverse to the owner of the suit land. He must prove that the occupation was without the consent of the owner of the suit land. Further, even if he had entered the land with consent of the owner, he may also have to prove that the consent was later withdrawn but he, nonetheless, continued to occupy the land in excess of 12 years after the withdrawal of the consent. See *Susan Mumbi Waititu & 2 others v Mukuru Ndata & 4 others [2008] e KLR*.

The possession of a claimant in an adverse possession claim must be continuous and without any interruptions. In the case of *Kimani Ruchire v. Swift Rutherfords & Co. Ltd (supra)* the court held that:

"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."

Possession of land or any property for that matter need not be actual and physical; possession can also be constructive.

In the *Peter Mbiri Michuki v. Samuel Mugo Michuki [2014] eKLR*, at para 27 this Court of sitting at Nyeri stated that:-

"Possession of land or any property for that matter need not be actual and physical; possession can also be constructive. In the instant case, the record shows that the plaintiff entered the suit property in 1964; constructed a house thereon in 1970 and put his elder brother to live in the house and the plaintiff together with his wife occasionally visited and lived in the house. These facts on record not only prove actual possession but also constitute constructive possession of the suit property by the plaintiff. The elder brother of the plaintiff was in possession of the suit property by license and permission of the plaintiff. In law, actual possession of any property by a licensee is constructive possession thereof by the licensor."

As we have stated the central issue in the case appealed from was whether the respondent, who is step mother to the appellant, had acquired adverse possession rights over the suit land against the appellant and whether the respondent was entitled to orders sought. Another issue raised before us by counsel for the appellant was whether the learned judge could make findings based on fraud when fraud had not been pleaded in the pleadings.

The evidence tendered by the respondent before the learned judge, which we have summarized in

this judgment, was inter alia to the effect that the respondent had resided on the suit land since 1964 with her late husband, the appellants father. The respondent stated that:

“I am claiming the land from Kihamba because he stole the land from me. We have previously disagreed with the respondent – Kihamba never allowed me to use the land for life as his step-mother. The land is mine and I am the one who acquired it. Joshua is the one who sold it to me. He was my cousin. I presently have no child who is alive.”

The appellant testified that:

“The plaintiff organizes people to remove me from the land and yet the land is mine. I did not steal any land documents from the plaintiff. The land belonged to the plaintiff she is my step-mother. We went to the LCB – She gave me the entire land 15 acres.”

Documents were produced in evidence which included title to the suit land showing that the land belonged to the appellant who was registered as proprietor after a loan owing to Settlement Fund Trustees was paid by the appellant.

The learned judge after analysing the evidence tendered before him held that the respondent did not transfer the suit land by way of a gift to the appellant. He also held that the appellant had acquired the land fraudulently. He said:

“From the evidence on record, I am satisfied that the plaintiff did not transfer the property to the defendant in form of a gift. Although the originating summons does not state that the defendant acquired the suit land fraudulently and although it is a requirement that particulars of fraud have to be pleaded, I do find that the evidence on record leads me to to no other conclusion that (sic) the fact that the defendant obtained his title deed through fraudulent means. There is no evidence in form of minutes from the Kakamega land control board to show that the plaintiff appeared before the Board on 8/2/1973 as per letter dated 18th January, 1973. If in 1973 the plaintiff was recognized as the owner of the suit land, it is unclear as to how the same land could be allocated to the defendant on 27/11/1974. From 1974 the defendant never exercised any claim of ownership to the suit land despite the purported allotment later.

From the evidence on record, I am satisfied that the plaintiff is the lawful owner of the suit property. I do find that she has acquired title through adverse possession and that the defendant acquired his title to the suit property through, unlawful means. Article 159 of the Constitution calls upon the courts to administer justice without undue regard to procedural technicalities. The bottom line is that the plaintiff is the owner of the suit land. She did not acquire the land through the help of the defendant's father. She did not give it as a gift to the defendant and she has all along taken herself to be the owner of the suit land.”

It was common ground, therefore, that the respondent was step-mother to the appellant and that the appellant was the registered proprietor of the land. The learned judge held that the respondent had been in open occupation of the suit land for more than twelve years and was entitled to an order of adverse possession.

The appellant maintained all along that he had allowed his step-mother, the respondent, to occupy the land; that he had erected a house for her, paid her medical treatment bills and assisted her every time she was in need.

We are satisfied, on the material that was tendered before the learned Judge, that the appellant acquired the suit land from the respondent who later changed her mind after the suit land had been registered in favour of the appellant. The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land

having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives. The appellant testified that he could not have taken action against the respondent because in his own words:

“...I respected the plaintiff – that is why I did not take her to court...”

So he had allowed the respondent to reside on the land which gave her a licence to remain thereat. Whether that licence could be or was withdrawn was

the subject of our discussion in **John Baraza Ojiambo (supra)** where we asked:

“...But would failure to verbalise his consent be construed as absence of consent given his relationship with the respondents? Would he in reality evict his own father, step-mother ... merely to prevent time running against him under the Limitation of Actions Act?...”

We think we have said enough to show that the learned Judge clearly erred in holding that the respondent was entitled to an order of adverse possession.

Counsel for the appellant raised another issue – could the learned Judge find fraud against the appellant when fraud was not pleaded at all? The simple answer is that the learned judge erred, with due respect to him, by finding fraud when the respondent had not pleaded fraud at all. Allegations of fraud are serious taking on a criminal character and the party making them must prove them strictly, not on a mere balance of probabilities – See **Gudka v Dodhia [1982] e KLR** where it was held that allegations of fraud must be strictly proved more than on a mere balance of probabilities.

Considering every aspect of the matter before the learned judge we are of the considered opinion that the learned judge misdirected himself and made erroneous findings in the matter before him and we are in the premises entitled to interfere. We do so by allowing this appeal. Given the relationship between the appellant and the respondent, we order that each party bears his /her own costs of this appeal and those at the High Court.

Dated and Delivered at Kisumu this 5th day of February, 2015.

D. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR