



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI J.J.A)**

**CIVIL APPEAL NO. 4 OF 2013**

**BETWEEN**

**WANYANCHA GIBITI}**

**ROBA GIBITI            }**

**MUNIKO GIBITI        } ..... APPELLANTS**

**NCHAGWA GIBITI (DECEASED)}**

**AND**

**WAIGOGO NYAHIRI SINDA ..... RESPONDENT**

***(Appeal from judgment and decree of High Court of Kenya at Kisii (Makhandia, J.) dated 4<sup>th</sup> June, 2012 in H.C.C CASE NO. 131 OF 2003***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal against the judgment of the High Court at Kisii (*Makhandia J, as he then was*) dated 4<sup>th</sup> June, 2012 dismissing the appellants' claim to a portion comprising approximately 8.3 hectares of parcel number *Bungembe/Mabera/307* ("The suit land") by adverse possession.

By an Originating Summons dated 14<sup>th</sup> August, 2003 the appellants with one *Nchagwa Gibiti* (now deceased) sought a declaration that they had acquired the suit land by adverse possession and a further relief that the court orders that the suit land be sub-divided and the said portion be registered in the names of the appellants. The last main relief claimed was for an injunction restraining the respondent from interfering with the appellants' enjoyment of the said portion. The original respondent died and was substituted with his son the respondent in this appeal.

The Originating Summons was supported by four affidavits sworn by the appellants and the said *Nchagwa Gibiti*, deceased. The contents of the affidavits were similar. They deposed, among other

things, that although the suit land was registered in the name of the original respondent, they had, since the year 1988, been occupying equal portions thereof and had put up their homesteads thereon. Consequently they averred that they had acquired rights as adverse possessors. The 1<sup>st</sup> appellant gave evidence in support of the suit. In his evidence he testified, *inter alia*, that the entire parcel of land belonged to their father **Gibiti Wanyancha**, now deceased who in 1973 left it in the hands of the original respondent when he went to Tanzania to seek treatment for a sick child. Their father returned in 1980 and died in 1992. He was buried on the suit land. The 1<sup>st</sup> appellant further stated, in his evidence, that at that time he was working in Tanzania and returned in October, 1988. The second appellant, according to the 1<sup>st</sup> appellant, was then living in Mombasa while the 3<sup>rd</sup> appellant and the deceased applicant before the High Court, were with him in Tanzania. When they returned they lived with the respondent for 15 years until the year 2003 when people, he did not know, demolished his houses forcing him to set up camp at Nyachapo Market.

On cross-examination, the 1<sup>st</sup> appellant testified that he knew that the respondent had filed a case against his brother **Anthony Ntori Gibiti** but did not know its outcome; that he filed the case giving rise to this appeal in the High Court after he had been evicted.

The appellants' 1<sup>st</sup> witness, **Cleophas Matiko Kibwabwa** (PW2), testified that he had previously been an Assistant Chief and was aware of the land in dispute which was registered in the name of the deceased respondent; that it had previously been occupied by Gibiti Wanyancha, the father of the appellants who relocated to Tanzania followed by the appellants; that in 1986 the said Gibiti Wanyancha returned to the suit land and was followed by the appellants; that Gibiti Wanyancha died and was buried on the suit land; that the appellants stayed on the suit land until 2003 when they were evicted by police officers who were accompanied by the deceased respondent.

On his part, the respondent deposed in the affidavit in opposition to the Originating Summons which affidavit he erroneously titled as "*affidavit in support*", that the appellants moved into the suit land in 1996 after learning that their brother Anthony Ntori Gibiti had been evicted; that their houses were demolished on 22<sup>nd</sup> July, 2003 following an eviction order issued in Kisii HCCC No. 112 of 1993; that the appellant's claim that they were staying on the suit land was false and that they did not enter onto the suit land in 1988.

The respondent testified, in part, that he was the son of **Waigoge Nyahiri Sinda** the original defendant who died in the year 2004 but before he died he had evicted the appellants from the suit land pursuant to an order in Kisii HCCC No. 112 of 1993 in which he had sued Anthony Ntori Gibiti. On cross-examination, the respondent testified that the appellants were all evicted together with the said Anthony Gibiti and have never returned to the suit land.

The High Court evaluated the evidence and concluded:-

***"In this case the plaintiff filed this suit long after they had been lawfully and forcefully evicted from the suit premises following a court order issued in Kisii HCCC No. 112 of 1993. The plaintiffs admit this much. Apparently an application dated 14<sup>th</sup> August, 2003 in the same file seeking to restrain the defendant from evicting them was dismissed on 24<sup>th</sup> September, 2003 as well. From the foregoing uncontested facts, the plaintiffs are no longer in occupation of the suit premises or a portion thereof. By evicting them from the suit premises, the defendant had taken effective and legal steps to assert his title to the entire suit premises. Therefore time for purposes of limitation stopped running. Since the plaintiffs are no longer in occupation of the suit premises, a claim in adverse possession cannot lie. I do not agree with submissions of the plaintiffs that since they were not parties to Kisii HCCC No. 112 of 1993, the eviction order did not apply to them. I have seen the decree issued in the above suit. It was partly in terms "(b) Eviction order and permanent injunction restraining the defendant his agents and or servants from interfering with the plaintiff's parcel of land No. Bungembe/Mabera/307 measuring 16.6 Hectares or thereabouts, is hereby issued forthwith". This order is encompassing. It applied to the plaintiffs' deceased father***

*as well as the plaintiffs. The plaintiffs could easily pass as agents of their deceased father. In any event by their admission, they were evicted from the suit premises.*

*I do not buy the plaintiffs' argument that the defendant could not in law gain lawful and effective entry into the suit premises occupied by them after the expiry of 12 years.....*

*In my view the defendant reserved the right to assert his right of entry any time before the plaintiffs applied to the High Court for the declaration of their ownership of a portion of the suit premises by way of adverse possession.....*

*.....*  
*In my judgment the eviction of the plaintiffs in July, 2003 from the suit premises by the defendant constituted a lawful assertion of his rights to the suit premises and had the effect of bringing to an end the occupation of a portion of the suit premises by the plaintiffs in a manner adverse and inimical to his title.”*  
*.....*

*By filing the above suit, time which had begun to run under the Act stopped. That suit having been filed in 1998, by the time the plaintiffs took out this O.S. in 2003, the plaintiffs had not been in continuous and uninterrupted possession for 12 years for purposes of section 38 of the Limitation of Actions Act and they are not therefore entitled to judgment on that score.”*

Those are the findings which provoked this appeal premised upon five (5) grounds of appeal which were condensed into one by **Mr. Marwa**, learned counsel for the appellants, when he argued the appeal before us. The gist of Mr. Marwa's submissions was that the learned Judge of the High Court erred in law in his finding that the deceased respondent could assert his rights of ownership of the suit land even after the expiry of 12 years of possession of the land by the appellants. Counsel contended that the suit by which the appellants were evicted did not involve them as they were not parties thereto.

**Mr. Masese**, learned counsel for the respondent on the other hand submitted, *inter alia*, that the appellants did not prove possession as they had, on their own admission, been evicted from the suit land before they lodged the Originating Summons. In counsel's view, having not challenged the eviction order which they were aware of, it was not open to the appellants to rely upon adverse possession for their claim before the High Court. In counsel's view that eviction order was directed at all trespasses upon the suit land who included the appellants and that even after that order of eviction they did nothing until 2003 when they filed the O.S. In learned counsel's view, by the time the OS was filed, any rights which the appellants may have had had been extinguished.

We have considered the record, the grounds of appeal, the submissions of learned counsel and the law. The appellants' claim to the suit land by adverse possession was based on **Order XXXVI Rule 3 D** of the Civil Procedure Rules, as then provided, **section 38** of the Limitation of Actions Act and the provisions of the Registered Land **Act Cap, 300** Laws of Kenya (now repealed). The question we ask ourselves is whether the claim was proved. The salient facts of this dispute are really not in dispute. The suit piece of land is registered in the name of the deceased respondent who was so registered on first registration. The entire parcel of land measures about 16.6 hectares and the appellants laid claim upon a portion thereof comprising 8.3 hectares. At the time they lodged their Originating Summons in the High Court at Kisii, they were not in possession of any part of the suit land as they had been evicted therefrom. The eviction suit, Kisii HCCC No.112 of 1993, was filed by the deceased respondent against one Anthony Ntori Gibiti who was a brother of the appellants but was erroneously described by the learned Judge of the High Court as their father. The said Anthony Ntori Gibiti did not appeal against the decision which evicted him from the suit land. The appellants did not apply to set aside the judgment in Kisii HCCC No. 112 of 1993 so that their side could be heard. Instead they lodged an application in that suit to

restrain the deceased respondent from evicting them which application was dismissed. They thereafter filed the Originating Summons which was dismissed thereby provoking the present appeal.

The issue whether or not the appellants were in adverse possession of the suit land is a matter of evidence. Although the first appellate court is not bound by the findings of fact by a trial court and is under a duty to re-appraise the evidence and reach its own conclusion, the first appellate court, nevertheless, should be slow to interfere with the findings of fact by the trial Judge. The first appellate court will however interfere when the findings of facts are based on no evidence or an a misapprehension of evidence or where it is shown that a trial Judge has acted on wrong principles in arriving at the finding in issue. See *Mwanasokoni -Vs- Kenya Bus Services Ltd [1985] KLR 931*. Moreover where there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court will hardly interfere with a conclusion made by the trial Judge after weighing the credibility of witnesses. (See *Hahn -Vs- Singh [1985] KLR 716*).

The gist of the appellants' case is that by **section 17** of the Limitation of Actions Act, at the expiry of the period of 12 years, the title of the person who ought to have brought an action to recover land is extinguished. They therefore contended that although they were not in possession of the suit land, they were evicted therefrom after being in possession of the suit land for over 12 years when the title of the deceased respondent had long been extinguished. In their view by the time they were evicted the respondent's father had long lost the right to evict them. The appellant's however made their claim in the High Court under **section 38 (1)** by which a person who claims to have been entitled to land by adverse possession may apply to the High Court for an order that he be registered as proprietor of the land in place of the registered proprietor. The learned Judge did not agree with them. He said:-

***“I also do not buy the plaintiffs' argument that the defendant could not in law gain lawful and effective entry into the suit premises occupied by them after the expiry of 12 years. That his title to that portion measuring 8.3 Ha got extinguished by virtue of section 17 of the Limitation of Actions Act and therefore as at July, 2003 the defendant had nothing to recover from the plaintiffs as his title had been extinguished by adverse possession of 12 years and more. In my view the defendant reserved the right to assert his right of entry any time before the plaintiffs applied to the High Court for the declaration of their ownership of a portion of the suit premises by way of adverse possession. It cannot be that the Limitation of Actions Act in respect of adverse possession was designed with a view to making it illegal for the defendant to seek to recover back his land by way of assertion of his rights even after the expiry of 12 years. To my mind the owner of land retains the right to assert his title to land even after the expiry of 12 years as long as the adverse possessor has not moved to court for appropriate adverse possession declarations.”***

It appears to us, as the term **“adverse possession”** suggests, that for the appellants to succeed in their claim under **section 38 (1)** of the Limitation of Actions Act, they had to demonstrate, on a balance of probabilities, that at the time they lodged their Originating Summons, they were in continuous, uninterrupted and exclusive possession of the 8.3 hectares they claimed. Adverse possession, in our view, was a prerequisite to their claim under the said section.

All the authorities cited to us by counsel involved plaintiffs who were in possession at the time of lodging their claims. Learned counsel for the appellants did not avail any single authority where a plaintiff successfully claimed land by way of adverse possession when he was not in possession of the subject land.

Having said that, we hasten to add that it cannot be gainsaid that adverse possession can be used as a shield. We must however, add that for the claim of adverse possession to succeed the possessor(s) must demonstrate that the possession was adequate, continuous and exclusive. In other words for such possession to be adverse, it must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the registered proprietor. The appellants, on their own admission, were not in possession and did not therefore fulfill a fundamental requirement of adverse possession. By the time the appellants lodged their claim before the High Court they could not claim that they had dispossessed the

respondent's father who was the proprietor. Indeed the reverse had occurred. The registered proprietor had already asserted his rights and made an effective entry into the suit land.

We have, with a tooth comb, gone over the evidence which was adduced in support of the appellant's claim. We find nothing to suggest that the appellants could have successfully resisted the claim of the deceased respondent for eviction even if they had been joined as defendants in the eviction suit. We say so, because the testimony of the 1<sup>st</sup> appellant, Wanyancha Gibiti who was the only appellant who testified, did not, in our view, establish, to the required standard, that the appellants were in adverse possession of 8.3 hectares of the suit land. The 1<sup>st</sup> appellant testified that he occupied 5 acres when he returned to the suit land from Tanzania. His evidence further suggested that he may have returned to the suit land when the suit against the late Antony Ntori Gibiti, his brother had been concluded. We have come to that conclusion on the basis of what the 1<sup>st</sup> appellant testified on cross-examination. In his own words:-

***“I knew Anthony Ntori Gibiti. He is my younger brother. He is the fifth born. He was at our father's land when I was in Tanzania. I knew the defendant filed a case against Anthony Ntori Gibiti. I do not know whether the court referred the case to a parcel [panel] of elders. In 1995 I was at our home. I was not there if any case between them was done. I heard that the case was done. I do not know what the outcome was.”***

That being our view of the matter, the inevitable conclusion is that even on the evidence, the 1<sup>st</sup> appellant did not demonstrate that he had been in adverse possession of the suit land for the requisite period when the Originating Summons was lodged before the High Court. The suit had been lodged in 1993. If he returned after it was determined that would be after the year 1993, clearly before 12 years had elapsed.

The 2<sup>nd</sup> and 3<sup>rd</sup> appellants did not testify at the trial. In the absence of their evidence, we wonder how their respective claims over the suit land could have been established as by law required. A court of law can only act on tangible evidence and not on the whims and/or beliefs and/or hopes of a party without proof.

For those reasons, we have no reason to intervene and set aside the learned Judge's judgment. It is confirmed as the appeal lacks merit.

This appeal is dismissed with costs to the respondent.

**DATED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF APRIL, 2015**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**