



REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

CIVIL APPEAL NO. 24 OF 2014

CORAM: (MARAGA, MUSINGA & GATEMBU, JJA.)

PHILIP ODHIAMBO FIRST APPELLANT

ALBERT RENE OBUOLO SECOND APPELLANT

NOAH ODHIAMBO JUMA THIRD APPELLANT

CALVINCE OCHIENG OUKO FOURTH APPELLANT

VERSUS

MATHEW ISHMAEL OUMA ACHIENG RESPONDENT

(Appeal from the judgment and Decree of Sitati, J.) dated and delivered on the 31st day of January, 2013

in

the original KISII HCC NO. 5 OF 2009 (O.S)

JUDGMENT OF THE COURT

1. This appeal involves a claim by the appellants of the right of ownership of the parcel of land known as **LR. NO. WEST KASIPUL/KONYANGO KOKAL/322** (“the suit land”) by way of adverse possession, pursuant to the provisions of **section 38** of the **Limitation of Actions Act, Cap 22 Laws of Kenya**. The suit land measures 1.4 hectares which is the equivalent of 4 acres or thereabouts.
2. The appellants' suit in the High Court of Kenya at Kisii was brought by way of originating summons as then stipulated under **Order XXXVI rule 3D** of the **Civil Procedure Rules**.
3. The orders sought were as follows:

“1. A declaration that the Defendant’s right to recover the whole of LR. NO. WEST KASIPUL/KONYANGO KOKAL/322 is barred under the Limitations Of Actions Act, Chapter 22 of Laws Of Kenya, and his title thereto extinguished on the grounds that the

Plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 20 years.

2. *That there be an order that the Plaintiffs be registered as the proprietor(s) of the whole of LR. NO. WEST KASIPUL/KONYANGO KOKAL/322 in place of the Defendant.*
3. *That there be an order restraining the Defendant by himself, agents, servants and/or employees from interfering with the Plaintiffs' peaceful possession and occupation of the said parcel of land, that is, LR. NO. WEST KASIPUL/KONYANGO KOKAL/322, in any manner whatsoever and/or howsoever.*
4. *Costs of this originating summons be borne by the Defendant.*
5. *Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case."*

4. In an affidavit sworn by **Philip Odhiambo Obuolo**, the first appellant, for and on behalf of all the appellants, he deponed, **inter alia**, that the respondent became the registered proprietor of the suit land on 29th November, 1984 when the appellants were in occupation of the same, having been born on the suit land. The appellants have been in continuous and uninterrupted occupation of the suit land for over 30 years. The respondent all along had full knowledge of the appellants' occupation thereof.

5. Over that period of time, the appellants had buried on the suit land no less than 5 of their deceased family members.

6. The appellants contended that in view of their long and uninterrupted stay on the suit land as herein above stated, the respondent's right over the same had been extinguished by effluxion of time.

7. The respondent opposed the appellants' suit vide a replying affidavit filed on 19th February, 2009. He stated, **inter alia**, that after his registration as the proprietor of the suit land, he had been growing crops thereon until December, 2002 when the appellants unlawfully entered the suit land and started cultivating it.

8. The respondent further stated that arising out of the appellants' trespass onto the suit land, he filed a suit in the Chief Magistrate's Court at Kisii, Civil Case No. 1179 of 2004, against one **HANNAH OUKO**, the mother of the 4th appellant, claiming that she had trespassed onto his land.

9. The suit was however dismissed on 7th March, 2006, when the court upheld a preliminary objection raised by the appellants to the effect that a cause of action based on trespass to land fell within the ambit of the Land Disputes Tribunal and so **section 3 (1)** of the Land Disputes Tribunal Act ousted the court's jurisdiction to hear such a case.

10. The respondent further stated that in December, 1986 when the appellants moved to his land and cultivated a portion thereof, he complained to the area chief and the District Officer, who warned them to stop the trespass.

11. Regarding the appellants' deceased family members who were said to have been buried on the suit land, the respondent contended that they were buried on parcel No. **WEST KASIPUL/KONYANGO KOKAL/320**, the homestead of the first appellant's father.

12. The respondent added that it is only the first appellant who had forcibly constructed a home on the suit land but the 2nd, 3rd and 4th appellants were staying on parcel number 320 aforesaid.

13. On 5th July, 2010 the parties agreed by consent that:

“(i). The District Land Registrar, Rachuonyo do visit parcel NO(s) WEST KASIPUL KONYANGO KOKAL/320 and 322 and while thereon ascertain:–

(a). whether the two parcels of land share a common boundary;

(b). The human habitation or occupation on the two parcels of land;

(c). The parcel of land where on the homestead of the plaintiffs are situate;

(d). whether there are cemented or maintained graves traceable on LR. 320 and 322;

(e). The vegetation growing on both parcels

(ii). Each party to be at liberty to retain a private surveyor to accompany the District Land Registrar in ascertainment of the issues above.

(iii). The District Land Registrar’s charges to be shared by both sides and the report to be filed within 30 days.”

14. It was further agreed that the District Land Registrar’s report would be adopted as part of the court record and as a common document to be relied upon by both parties. Counsel also agreed that the originating summons be canvassed by way of the affidavits filed by the parties and by way of written submissions.

15. The District Land Registrar visited the land to determine the issues raised. His salient findings were that:

- a. **. The two parcels of land were shown in the area Registry Index Map but they did not have a boundary on the ground and the whole of parcel number 322 (the suit property) was fully utilized by the appellants.**
- b. **. Both parcels of land were occupied and had five homesteads thereon.**
- c. **. There was a total of 14 graves on both parcels of land. 10 graves were on parcel number 322 while 4 were on parcel number 320. Out of the 14 graves only two were cemented.**
- d. **. There were trees on the upper section of the two parcels of land which were confirmed to have been planted by the 1st appellant. There were banana stocks planted by the 2nd appellant. There were mature trees surrounding the homes of the appellants.**
- e. **. There existed three homesteads, one belonging to the 1st appellant, comprising of permanent structures. The 3rd and 4th appellants lived in their deceased parents’ houses, which were built prior to their deaths.**
- f. **. The entire suit property was occupied by the appellants except the upper part which was occupied by a family that was not a party to the dispute.**

16. The trial court, having considered the evidence on record as well as the submissions filed by counsel, held that the appellants had been in an uninterrupted occupation of the suit land for a period exceeding 12 years and that the respondent had full knowledge of that occupation. The court however held that the appellants were in occupation of 2 acres of the suit land and were therefore entitled to be registered as proprietors of the 2 acres. The court made no orders as to costs.

17. The appellants were not completely satisfied with the aforesaid judgment for the reason that they had been awarded only 2 acres of the suit land while their claim was for the whole of it. Consequently

they preferred an appeal to this Court and raised the following grounds:

“(1). Having found and held that there was sufficient and ample evidence to show that the appellants were in occupation of LR. NO.WEST KASIPUL/KONYANGO KOKAL/322, the learned judge of the superior court erred in law in restricting and/or limiting the award to only 2 acres out of the suit property.

(2). In arriving at and/or awarding only 2 acres of the suit property to and/or in favour of the appellants, the learned judge of the superior court misunderstood, misconceived and/or misapplied the uncontroverted contents of the report by the District Land Registrar, Rachuonyo District, whose contents were clear, explicit and unequivocal

(3). The learned judge of the superior court erred in fact and in law in confining her award to 2 acres only out of the suit property, whereas the evidence on record, by either side did not advert and/or allude to the aforesaid portion of 2 acres only. In this regard, the findings, holding and the decision of the learned judge of the superior court is at variance with the pleadings and evidence on record.

(4). The decision of the honourable judge of the superior court, whereby the honourable judge awarded 2 acres only out of suit property, was arrived at in the absence of any credible evidence and/or basis. Consequently, the said decision whereby the honourable judge of the superior court deprived the appellants of the remainder portion of the suit property was made in vacuum.

(5). The decision of the honourable judge of the superior court complained of, is contrary to and/or in contravention of the rules of pleadings.

(6). The learned judge of the superior court erred in law in denying and/or depriving the appellants of costs incurred in the superior court, without assigning any good/credible and/or lawful basis for such denial and/or deprivation whatsoever.

(7). The failure to order and/or award costs to the successful parties herein, (the appellants), was contrary to and/or in contravention of the provisions of section 27 of the Civil Procedure Act, chapter 21 laws of Kenya. Consequently, the exercise of discretion by and/or under the hand of the superior court, was coloured with error and in discretion and thus deserving to be varied.

(8). The learned judgment of the superior court failed to properly evaluate, appraise and/or analyse the entire evidence on record and thereby failed to decipher the crux and/or foundation of the appellants’ claim and thereby arrived at a conclusion that was partly at variance and/or contrary to the weight of evidence on record.”

18. The appellants urged this Court to allow the appeal and the part of the trial court’s judgement that deprived them of the remainder of the suit land be set aside, with the result that the appellants will be registered as the proprietors of the entire suit land. They also prayed for the costs of the appeal as well as costs incurred in the High Court.

19. The respondent filed a cross appeal and set out three grounds as follows:

“(1). The learned judge of the superior court erred in law in finding that the appellants had acquired prescriptive rights over a portion of the suit land measuring two (2) acres by way of adverse possession when the following facts prove the contrary:

(a). There had been several suits over the same land and therefore there was no peaceful occupation.

(b). Evidence shows that parties were not aware of where the boundary

between land parcel No. WEST KASIPUL/KONYANGO KOKAL/320 and 322 lay and therefore the element of knowledge of occupation was lacking.

0. *The learned judge of the superior court erred in law in holding that the possession of the portion was adverse in spite of the fact that the plaintiffs were laying claims as beneficiaries of the estate of Gaye Sigu who had several disputes over the said land.*

(3). *The learned judge of the superior court erred in law in holding that the period of adverse possession did not stop to run during the suits.”*

20. During the hearing of the appeal, **Mr. Oguttu**, learned counsel for the appellants, as well as **Mr. Okoth**, learned counsel for the respondent, made brief submissions. In respect of grounds 1, 2, 3, 4 and 5 of the appeal, Mr. Oguttu submitted that the appellants sought the entire suit property but the learned trial judge granted them only 2 acres thereof which does not accord with their pleadings. There was no evidence to the effect that the appellants were occupying only 2 acres of the suit land. The report by the District Land Registrar, Rachuonyo, showed that the appellants were in occupation of the entire suit land, counsel added.

21. Lastly, Mr. Oguttu submitted that the appellants were denied of costs of the suit for no apparent reason.

22. Mr. Okoth submitted that the appellants did not prove that they had been in adverse possession of the suit land, saying that there had been several suits filed against them by the respondent. He added that it was only after a survey was done that it was discovered that the appellants were occupying the respondent's land, and in such circumstances adverse possession cannot arise. He urged the court to dismiss the appeal and find that the suit land is rightfully owned by the respondent.

23. The law as regards a claim for land under the doctrine of adverse possession is well settled. **Section 38 (1)** of the **Limitation of Actions Act Cap 22** Laws of Kenya states that:

“(1). Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

Order 37 rule 7 (1) of the **Civil Procedure Rules** states that:

“(1). An application under section 38 of the Limitation of Actions Act shall be made by originating summons.”

24. In **WAMBUGU V NJUGUNA [1983] KLR 173**, this Court stated as follows:

“In 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 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.”

25. It follows therefore that the manner and circumstances under which the dispossession or discontinuance of possession was made must be clearly explained. The claimant's acts must clearly be intended or calculated to defeat the registered proprietor's title. As long as the dispossession was peaceful and has continued over an uninterrupted period of at least twelve (12) years, within which the registered proprietor did not take any step to assert his right over the property in dispute, the claim to the land is

sufficiently established.

26. In **NDATHO V ITUMO & 2 OTHERS (2002) 2 KLR 637** this Court held that the filing of a suit for recovery of land by the registered proprietor would stop time from running for the purposes of **section 38** of the **Limitation of Actions Act**. However, sending a mere demand letter by the registered proprietor to a squatter or trespasser requiring him to vacate the premises is not sufficient. See also **MEGARY & WADE. "THE LAW OF REAL PROPERTY"** 6th Edition, Pg 1309.

27. In this appeal, although the respondent was registered as the proprietor of the suit land way back in 1984, it is evident that some of the appellants and/or their parents were already living on the land at the time of such registration. The first appellant was born on the suit land in 1977. The respondent did not take any appropriate action to assert his title over the land but instead allowed the appellants to remain there, even to bury their deceased family members. The first burial there was in 1993. The act of openly burying a deceased person on a piece of land is, in our view, one that was intended to defeat the registered owner's title to the land in dispute. The appellants have also established homesteads on the suit land, some of which are permanent houses.

28. The respondent contended that the first appellant's father entered the suit land in 1986 and he made a complaint against him to the area Chief and District Officer who wrote letters to him asking him to stop his act of trespass. For purposes of asserting ownership and forestalling a claim based on adverse possession, such letters could not suffice.

29. In 2004 the respondent filed a suit against Hana Ouko, the 1st appellant's sister in law, to wit, **CMCC 1179 of 2004 at Kisii**, in which he alleged that in 2002 she trespassed onto the suit land, erected houses and cultivated the same. He sought for a declaration that he was the legal owner of the suit land, eviction of the defendant and general damages for trespass. The defendant (Hana) filed a statement of defence and denied the respondent's claim. She stated, **inter alia**, that she had not trespassed onto the suit land but her occupation of the same was by virtue of her marriage to one of the grandsons of the late Samuel Okumu, who was the original occupier of the suit land.

30. But before that suit could be heard and determined, Hana died on 17th December, 2008. The respondent filed another suit, this time against the 1st appellant, seeking to bar him from burying Hana on the suit land. This was **SPMCC N. 187 of 2008 at Oyugis**.

31. As earlier stated, that suit was struck out and eventually the body of Hana was interred on the suit land.

32. Notwithstanding those two suits, there is sufficient evidence that the first appellant was born in 1977 when his father was living on the suit land. The limitation period of filing a claim over land, 12 years, expired in 1989 and by that year the respondent had not commenced any suit against the appellants or their parents with a view to asserting his right of ownership. The two suits aforesaid were filed outside the statutory period of time.

33. In view of the foregoing, we agree with the learned trial judge that the appellants adduced sufficient evidence to demonstrate that their claim over the suit land under the doctrine of adverse possession was well founded.

34. The District Land Registrar, Rachuonyo, established that the appellants were in occupation of the entire suit land. We did not see any evidence that the appellants had actual possession of only two acres of the suit land as held by the learned trial judge. We therefore agree with Mr. Oguttu that the pleadings and evidence on record do not support the learned judge's finding that the appellants were occupying only 2 acres. In that regard, we must allow the appeal, reverse the trial judge's finding and substitute therefore our finding that the appellants are in occupation of the entire suit land. Consequently, we allow the appellants' originating summons, save for the issue of costs on which we shall pronounce ourselves in a short while.

35. For reasons that we have already stated, we find no merit in the cross appeal and dismiss it in its entirety.

36. On the issue of costs of the suit, **section 27** of the **Civil Procedure Act** empowered the trial judge to exercise her discretion appropriately. But the proviso to that section stipulates that costs of any action follow the event unless the court or judge for good reason otherwise orders.

37. The appellants herein were successful in their claim against the respondent but the learned trial judge, without assigning any reason, did not award them costs of the suit or any portion thereof. The judge was duty bound to give her reasons for so holding but she did not do so.

38. Having said that, we think that the respondent, having lost his land to the appellants though lawfully, should have been spared any further agony of condemning him to pay costs of the suit. For that reason, we shall neither disturb the trial court's holding regarding costs of the suit neither shall we order the respondent to bear the costs of the appeal. Instead we order that each party bears its own costs of the appeal.

DATED AT KISUMU THIS 19TH DAY OF JUNE 2015

D. K. MARAGA

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR