



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 280 OF 2011

BETWEEN

MORAA NDEGE.....APPELLANT

AND

MOENGA MOENGA..... RESPONDENT

(Appeal from the judgment/decree of the High Court of Kenya at Kisii Musinga, J) dated 30th September 2010

in

Kisii H.C.C.C No. 211 of 2002 (OS))

JUDGMENT OF THE COURT

In this appeal, the appellant seeks to set aside the judgment of the High Court where the court found that, the appellant had failed to establish her claim for adverse possession over a portion of a property known as Parcel No. **West Mugirango/Bonyamatuta/525**, belonging to the respondent. The portion the appellant claimed measured 0.7 hectares (**“the disputed portion”**).

By way of an Originating Summons and the affidavit in support sworn by the **Moraa Ndege**, the appellant herein deponed that she is the administratrix of the estate of her husband, the **late Ndege Nyamora (the deceased)**, who died intestate on 23rd March 1994 at Kebirigo area. It was her contention that on 20th June 1963 Parcel No. **West Mugirango/Bonyamatata/526** was decreed to the deceased by the Court at Gesima in **Civil Case 60 of 1963 Ndege Nyamora vs Agori Akuma and Moenga Moenga**, where the physical boundaries between the deceased’s land and the respondent’s land were clearly demarcated, as a result of which the deceased enjoyed the peaceful and uninterrupted occupation of his property.

When land adjudication was carried out in the area in 1970, an error occurred in the Land Register, resulting in 0.07 of a hectare being taken from the deceased’s known as parcel No. West Mugirango/Bonyamatuta/526 and added to the respondent’s Parcel No. West Mugirango/Bonyamatuta/525. The deceased reported the error to the Land Registrar on 23rd March 1992, and paid the rectification fee, but the error was never rectified, forcing the deceased to file **HCCC No.**

118 of 1993 against the respondent for rectification of the Land Register.

The suit was dismissed by the court, and the appellant filed a separate claim for adverse possession of the disputed portion on the basis that, despite the land adjudication error, she and her children had remained in occupation of the disputed portion for over 12 years.

In his replying affidavit of 15th June 2005, the respondent averred that he was aware of the boundary dispute with the deceased which he said was resolved by the African Appeal Court at Gesima. That the issue had arisen again in 1970 during the land adjudication process, but was resolved by the Bonyamatuta Land Adjudication Committee. It was his case that, his property, Parcel No. West Mugirango/Bonyamatuta/ 525 was the subject of a dispute with another of his neighbours, Asande Okongo in **HCCC No. 124 of 1992** where, by consent, the parties had agreed that the respondent's parcel measured 5.8 hectares. Following that settlement, the deceased filed **HCCC No. 118 of 1993**, wherein he sought rectification of the Land Register, but that suit was dismissed on 28th June 2001. The respondent further deponed that he instructed a firm of surveyors, Geometrics Services to fix the boundaries between Parcel Numbers West Mugirango/Bonyamatuta/525 and 526, and that from the surveyor's report, he was informed that the actual measurement of his parcel was 5.03 hectares, instead of 5.8 hectares.

After reiterating the contents of her supporting affidavit during her testimony, the appellant concluded by stating that she had all along lived peacefully on the disputed portion. The respondent testified that he had not encroached on the appellant's land, but that it was the appellant who had encroached on his land.

In declining to find that the appellant had established a claim for adverse possession the learned judge stated thus,

“From the foregoing, it appears to me that there have been various boundary disputes between the plaintiff's husband and the defendant. The plaintiff cannot say that she has had open and uninterrupted occupation of the suit land for a period exceeding 12 years. It is clear that the suit was filed on 7th August 2002 shortly after dismissal of HCCC No. 18 of 1993 on 28th June 2001 where the plaintiff was seeking more or less the same orders as in the present suit. The plaintiff did not appeal against the order of dismissal in the aforesaid case”.

Being dissatisfied with the judgment of the High Court the appellant appealed to this Court raising 4 grounds of appeal that;

- A. *The learned trial judge erred in dismissing the suit for among other reasons that the same was Res judicata Kisii HCCC No. 118 of 1993*
- B. *The learned trial judge erred and misdirected himself in law in dismissing the appellant's case whereas it was not denied even by the respondent that the appellant was indeed in occupation of the respondent's land parcel No. West Mugirango/Bonyamatuta/525.*
- C. *The learned judge erred in law in not deciding the case in favour of the appellant whereas it was clear from the record and from the pleadings and evidence that the appellant and her family had been in uninterrupted and quiet possession of the portion of 0.07 hectares in land parcel No. West Mugirango/Bonyamatuta/525.*
- D. *The learned trial judge erred in law and in fact in deciding the case against the weight of the evidence on record.*

In his submissions, learned counsel for the appellant, **Mr. Soire** informed us that he would combine the remaining grounds as, the first issue on res judicata had been conceded by the respondent. Counsel submitted that the claim for adverse possession of the disputed portion was clear as the evidence showed that the appellant was in occupation of 0.5 and not 0.7 of a hectare as pleaded. The Geometric Surveyors'

report dated 27th March 2002 confirmed that the respondent's land was less by 0.5 hectares, which was the disputed portion that the appellant claimed through adverse possession, and that the boundaries had been fixed by the decision of the African Court tribunal in 1963 and were intact.

Since then, the appellant remained in uninterrupted and peaceful occupation of the portion. Counsel cited ***Kasure vs Mwaani Investments Ltd & 4 others [2004] eKLR*** in support of the contention that for a claimant to prove adverse possession, they must have been in open and uninterrupted occupation of the land for a period of 12 years.

Counsel concluded that the case for adverse possession for 0.5 hectares and not for 0.7 hectares was made out as the appellant has been in occupation of the disputed portion for over 12 years, and the learned judge erred in dismissing the appellant's case.

Mr. Momanyi learned counsel for the respondent opposed the appeal. Counsel argued that at all times the matter involved a boundary dispute between the appellant's husband and the respondent, and therefore the appellant's claim for adverse possession was unfounded. The appellant and her family had not become aware of any encroachment by the respondent until 1992, when her husband, the late Ndege Nyamora, lodged a complaint for rectification of the land register. The deceased had filed a dispute in court, but died before the issue was determined. When the appellant took over the case seeking rectification of the title, she acknowledged the existence of the respondent's rights over the disputed portion. Having conceded to the respondent's ownership of the disputed portion, it was untenable for her to turn around and claim that she occupied the disputed portion independently of her husband, and the doctrine of estoppel should be applied against her.

Counsel took the view that, in any event, time would have stopped running either from the date that her husband acknowledged the respondent's title, or when the deceased lodged the suit in the High Court for rectification of the title. Counsel further argued that, the appellant had not specified what portion of the land she was claiming, and the surveyor's report should be disregarded as it was not tendered in evidence.

As a final issue, counsel stated that the Originating Summons was incompetent as the affidavit in support sworn on 7th August 2002 ought to have been sworn before the Originating Summons which was dated 6th August 2002.

In his reply, Mr. Soire took the view that since the Surveyor's report was attached to the respondent's replying affidavit, it formed part of the record, and as such, could not be disregarded.

As a first appellate court, it is our duty to reexamine afresh the evidence and material tendered before the High Court and draw our own conclusions, but we should be slow in overturning the decision of the trial court bearing in mind that we have not seen or heard the witnesses so as to be able to assess their credibility. ***Selle vs Associated Motor Boat Company Limited [1968] EA 123***, and ***Williamson Diamonds Ltd. v. Brown [1970] EA 1***. Bearing this principle in mind we will now address the issues arising in the appeal.

Having regard to the circumstances of this case, we consider that the issues for determination are whether the appellant was entitled to lodge a claim for adverse possession having been party to the suit for rectification of her late husband's estate; whether a claim for adverse possession was established; whether the disputed portion was identified and whether the Originating Summons was defective.

It was the respondent's argument that, the appellant's claim for adverse possession was defeated by virtue of her appointment as administrator and personal representative of the deceased's estate in ***HCCC No. 118 of 1993***, so that by inference she was considered to have acknowledged or conceded that the disputed portion formed a part of the respondent's title.

In determining the issue, it will be necessary to establish the capacity assumed by the appellant in the two suits. On the one hand, it will be recalled that ***HCCC No. 118 of 1993***, was filed by the late Ndege Nyamora, as registered proprietor of Parcel No. West Mugirango/Bonyamatuta/526 seeking rectification

of the title following an alleged error on the land register, and the transfer of the disputed portion back to his title. Upon his demise, the appellant continued with the suit pursuant to letters of administration *ad colligenda bona* issued to her as personal representative on 10th November 1994. Subsequent to her appointment, the suit was dismissed.

On the other hand, the suit for adverse possession was brought by the appellant in her own personal and individual capacity, seeking the enforcement of prescriptive rights claimed in respect of the disputed portion that was included in the respondent's Parcel No. West Mugirango/Bonyamatuta/525.

In differentiating the appellant's capacity in the two suits, it will be borne in mind that it was the deceased and not the appellant who was the registered proprietor of Parcel No. West Mugirango/Bonyamatuta 526, and who sued the respondent. When the appellant stepped into the suit, it was in the capacity of a personal representative to pursue the deceased rights and interests in his land following his demise. Hence, at all times, it was the deceased and subsequently his estate that were party to the suit.

With respect to counsel for the respondent, we find it inconceivable that the appellant's claim for adverse possession was subsumed into that of the deceased. The appellant's role in **HCCC No. 118 of 1993**, as personal representative was limited to pursuing the deceased's claim for rectification of title, and any averments made were specific to such interests.

Given the difference in capacity and interests pursued by the appellant in the two suits, we find that her role as personal representative did not in any way preclude or defeat the action for adverse possession brought against the respondent in her own person capacity and in pursuance of separate and individual rights.

This leads us to the next issue of whether the appellant proved her claim for adverse possession against a portion of the respondent's property. When dealing with a similar issue in ***Kimani Ruchine & Another vs. Swift Rutherford Co. Ltd [1980] KLR 10*** by Kneller, J. (as he then was) observed thus at page 16,

“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 evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v Beverly [1965] EA 514, 518, 519, per Miles J.

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.

From the evidence, it is not in dispute that there was boundary dispute following which the appellant's husband was awarded Parcel No. West Mugirango/ Bonyamatuta/526 by the court in ***Civil Case No 60 of 1963***, when the boundaries were fixed between her husband's land and Parcel No. West Mugirango/Bonyamatuta/525 belonging to the respondent. It is also not in contention that the dispute over the same portion recurred following land adjudication in 1970 as a result of which the disputed portion of the deceased's land was included in the respondent's title.

The appellant has brought this claim for adverse possession in her own right through an Originating Summons, against the respondent for 0.07 of a hectare being the disputed portion. Her assertion is that, despite the existence of the error after land adjudication, she had nevertheless continued to reside on the disputed portion since 1963.

The respondent has countered that, the appellant was not in constant and uninterrupted occupation of the disputed portion, as she admitted during her evidence in chief that she had been forced to demolish the boundary after the demise of her late husband, the deceased. Furthermore, the appellant had not specifically identified or described the portion claimed.

In the case of *Githu vs Ndeete [1984] KLR 776* it was held among others that:

“Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

From the facts, we think that there is merit in the appellant’s claim. Despite the existence of the error in the respondent’s title from 1970, the appellant has remained in occupation of the disputed portion. When the period from 1963 to the date the Originating Summons was filed is computed, there is no doubt that the appellant would have been in occupation for a period in excess of 50 years. Assuming that the period prior to adjudication was to be disregarded for reasons that the land had yet to be adjudicated, when computed, the period subsequent to 1970, would amount to 32 years. This being a period of more than 12 years, clearly, this requirement was accordingly satisfied.

It should be further noted that there is nothing to show that the respondent took any steps to evict or deny the appellant occupation of the disputed portion. Instead, he conceded that it was the appellant who had taken a portion of his land, but despite the acknowledgment, he failed to pursue his ownership over the portion in the appellant’s possession. In the circumstances, we consider the appellant’s occupation of the disputed portion went on uninterrupted and unchecked, as a result of which, we find that the claim for adverse possession was justified.

On the question of whether the disputed portion was capable of being ascertained, we do not agree with the respondent that this was not identifiable. The appellant annexed copies of the land titles in question, namely, Parcel No. West Mugirango/Bonyamatuta/525 and 526 measuring 5.8 and 3.6 hectares respectively. And further support for her claim was to be found in the surveyor’s report of Geometrics Services dated 27th March 2002, annexed to the respondent’s replying affidavit where it was stated,

“(i) The area of West Mugirango/Bonyamatata/525 on the ground was 5.03 but its supposed to be 5.8 Ha as in the lands office and the map.

(ii) When comparing the two i.e the ground & record, we discovered that the acreage of Bonyamatata/ is less by 0.05 Ha.

(iii) This 0.5 was discovered to have been taken by the parcel Bonyamatuta/526. See the diagrams attached. This land measures approximately 75m by 66.5m (246 ft by 218 ft).

(iv) His land which is 0.5 Ha on the ground, there is some cultivate (sic) of maize and bananas and is marked X on the sketch”

From this report, which we have produced *in extenso*, the area specified as the disputed portion is defined in minute and specific detail. A map was attached to the report outlining the disputed portion, thereby adequately demarcating the land in question. In light of the given specifications, we find that the threshold for a claim of adverse possession was duly satisfied, save that the acreage claimed was 0.5 hectares instead of 0.7 hectares.

The final complaint was that the application was defective as the affidavit in support was executed after the Originating Summons was made, but ought to have been executed before.

With respect to counsel for the respondent, we do not consider this to be a viable or valid complaint.

Order XXXVI rule 3D of the **Civil Procedure Rules** (repealed) stipulated,

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

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

Evidently, this provision sets out the sequence of documentation in an Originating Summons. The Summons precedes the affidavit in support and not vice versa. Support for this view can be found in the decision of Chesoni, J. (as he then was) when he stated ***in Phillis Wamaitha Wahinya and 2 Others (trading as Phillis Wamaitha & Bros) vs Simeon Njogu Wahinya [1976] eKLR***, where it was stated **this**,

“The law contemplates commencement of a suit first before an affidavit can be sworn. In my opinion an affidavit which is sworn before action is valueless and cannot be acted on even if it is filed after issue of the summons. The Court may, however, in its own discretion, make an order on it upon an undertaking by the applicant to reswear and refile the affidavit, but such discretion will be exercised only where refusal to make the order prayed for would cause irreparable damage, hardship and injustice to the applicant.”

In the circumstances, the respondent’s contention that the Originating Summons was incompetent has no basis.

We have found that the High Court misdirected itself and wrongly concluded that the appellant did not establish her claim for adverse possession, despite the evidence to the contrary.

Accordingly, we find it necessary to interfere with that decision. We therefore allow this appeal, set aside the decree of the High Court and substitute therefore the following orders:

1. That the appellant has established her claim to adverse possession of 0.5 of a hectare of Land Parcel No. West Mugirango/ Bonyamatuta/525.
2. That the appellant shall accordingly be registered as the proprietor of the portion measuring 0.5 of a hectare being the disputed portion as demarcated by Geometric Services in the report dated 27th March 2002.
3. The appellant shall have the costs of this appeal and those of the Originating Summons in the High Court.

We so order.

DATED and delivered at Kisumu this 6th day of November, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true
copy of the original

DEPUTY REGISTRAR