



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO.26 OF 2015

BETWEEN

GULAM MIRIAM NOORDINAPPELLANT

AND

JULIUS CHARO KARISARESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Malindi (Angote, J.) dated 12th July, 2013

In

Land and Environment Case .No.85 of 2012)

JUDGMENT OF THE COURT

The appellant, a holder of a registered indenture in respect of a portion of land known as **No.7729 Malindi measuring 0.940 ha** brought an action in the High Court for the eviction of the respondent who she claimed to have trespassed on the suit property and was erecting a house thereon. The respondent's response was that the appellant was a stranger and that having been on the suit property since birth and his parents and forefathers having settled on the suit property, he was entitled to it by operation of the law of limitation of actions.

The appellant adduced oral evidence to prove her claim while the respondent also called evidence to assert his defence. After receiving the competing evidence by both sides the learned Judge (**Angote, J**) entered judgment for the respondent holding that pursuant to **section 7** of the Limitation of Actions Act the appellant's claim to the suit property was extinguished in view of the respondent's evidence that he was born on the suit property and has been in continuous, open occupation for a period far in excess of 12 years required. He also found that the appellant had failed to prove that the vendor who sold the suit property to her, one Mudaris Salim Suleiman had any proprietary interest in the suit property. On the appellant's contention that since the respondent's claim for adverse possession was not brought by way of a counter-claim, and ought to have failed, the learned Judge held the view that a claim to land by adverse possession can be pleaded in the defence.

Following the dismissal of her suit and the entry of judgment in favour of the respondent the appellant now brings this appeal to this Court on 9 grounds, which were argued in the appellant's written

submissions in 6 clusters. We were urged to find that the learned Judge erred in failing to appreciate that the respondent had not pleaded adverse possession; that it was not the duty of the learned Judge to tooth-comb the pleadings to establish the claim on behalf of the respondent; that the respondent ought to have brought his claim by an originating summons, supported by an affidavit on which a copy of the title document would be annexed. Relying on the decision of this Court in the case of **Kenyenga v Ombwori** (2001) KLR 103 the appellant urged us to find that failure to comply with this procedural requirement was fatal and cannot even be cured by **Article 159** of the Constitution.

The other cluster of grounds are to the effect that the learned Judge ignored the provisions of **section 25(1)** of the Land Registration Act, 2012 which vests in the appellant an absolute right which cannot be defeated; that no fraud had been alleged against the appellant with regard to her title; that the respondent's occupation of the suit property was not adverse to the appellant's title; that the trial court erred in assuming the role of a surveyor by taking measurements on the suit property during the court visit, a role it was ill-equipped to perform; and that by the time the appellant purchased the suit property the vendor's title had not been extinguished as the respondent took no steps to dispossess the vendor. Finally it was submitted that the learned Judge erred in ignoring the appellant's documentary evidence but instead relied on the respondent's evidence which only proved that he occupied the suit property just before the suit was instituted.

The respondent out of choice did not file submissions or respond to the appellant's submissions. In support of her claim to the suit property the appellant relied on a written agreement between her and one Mudaris Salim Suleiman dated 25th November, 1988 in which the latter is alleged to have sold to her **2.5 acres** after sub-division of the larger parcel **No.302/42** measuring **251.1 acres** at a consideration of Kshs.65,000/=, of which Kshs.10,000/= was paid upon signing of the agreement. The date upon which the balance of Kshs.55,000/= was to be settled, in 1989 is not specified in the agreement but it was a term that it would be preceded by the vendor's surveyor identifying and demarcating the boundary limits and physical extent of the portion intended to be conveyed to the appellant; and that only after the sub-division was approved by the Director of Surveys would the vendor transfer the sold portion to the appellant. The appellant was allowed by a term of the agreement to take possession of the purchased portion once it was identified by the vendor's surveyors.

The appellant also relies on a conveyance made on 8th June, 2011 between her and the said vendor, Mudaris Salim Suleiman in which the latter is said to be selling portion **No.7729(LTXII)** Deed Plan Number 175265 (original **No.302/42** Malindi measuring **0.9407 ha** (approximately)). The consideration is in the sum of Kshs.200,000/= said to have been paid to the vendor.

The appellant exhibited before the trial court clearance certificate from the Municipal Council of Malindi in respect plot **No.7729** and receipts signifying payment of property rates to the Municipal Council. In her oral evidence the appellant maintained that the property she had purchased was 2.5 acres; that the suit property was vacant until 1994 when she asked some old man, Karisa Chengo Wala to occupy it, perhaps to keep off grabbers and squatters; and that the coconut trees on the suit property were planted by this old man. The appellant also confirmed that she has never occupied or planted any crops herself on the suit property. She maintained that the only structure near the suit property belonged to the respondent constructed on a road reserve, some few meters from the suit property. She did not call the old man, Karisa Chengo Wala as a witness.

The respondent for his part testified that he was born in 1960 on the suit property and he has never left it; that even before he was born his grandfather and father lived, died and were buried on the suit property, that he constructed his house on the suit property in 1986 and planted the mango trees. Throughout his lifetime nobody has ever laid a claim to the suit property. No surveyor ever visited the suit property. The respondent estimated the size of the suit property as 4 or 4 ½ acres and stated that six members of his family occupy distinct portions of the suit property.

The learned Judge in what he described as the exercise of the inherent powers of the court and in the interest of justice, summoned the Assistant Chief of Kijiwe Tanga sub-location, **Karisa Baya Maitha** and the village elder, **Edward Gona Charo**. It would appear only the former testified at the *locus in quo*.

The Assistant Chief who was born in the area and went to school there, completing his primary education in 1986, confirmed that the respondent's parents lived and were buried on the suit property. But according to him the larger parcel of which the suit property was part, belonged to one Bwana Mtumwa, who had donated a power of attorney to one Muthamia to settle on the land squatters who were already on the land; and that this man, Muthamia went away and never came back. In the meantime more squatters invaded the land; that the houses on the suit property were put up by the respondent; and that he had never seen the appellant until she went to him to complain against the respondent.

From the foregoing rival evidence, the question before us is whether the learned Judge erred in failing to order the eviction of the respondent from the suit property. Put differently, was the respondent a trespasser on the appellant's property?

By a conveyance of 8th June, 2011 the appellant became the registered proprietor of the suit property. There is no history and evidence of how the property devolved to the vendor, **Mudaris Salim Suleiman**. We can only assume that he had transferable interest on account of the conveyance which was duly registered. The certificate of postal search showed the appellant as the registered owner. By her own admission the appellant confirmed that since she purchased the suit property she has not done any farming or any form of development; and that she allowed an old man, **Karisa Chengo Wala** to cultivate it since 1994. She however maintained that the suit property was vacant throughout; that the respondent's house was not on the suit property but on the adjacent road reserve. She testified that in fact she had no problem with the respondent's house as it was not on her land. However, she asked that the new structures put on the suit property by the respondent be removed and the respondent evicted.

From the respondent's evidence, that of his brother, Joseph Daniel Kenga and the Assistant Chief, Karisa Baya Maitha as well as the observation on the ground by the learned Judge we are satisfied that while the respondent's first house said to have been built before 1986 is on the road reserve there are other houses belonging to him on the suit property itself. One of the houses on the suit property was built in 1990 by the respondent while the third house appeared to the learned Judge to be "*fairly new...built a few years ago.*" From these factual findings, the period that concerns us is from 1990 when one of the houses on the suit property was put up. Although by this time (1990) the appellant had purchased the property she had no title to it. The registered owner at this time was the vendor, Mudaris Salim Suleiman. It is trite that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession. See **Githu v Ndeete** [1984] KLR 776. The appellant had never stepped on the suit property. We are equally not persuaded that she had allowed her agent, Karisa Chengo Wala, to use the land in the meantime from 1994. She did not call him to confirm her assertion. If Karisa Chengo Wala was indeed on the land he would have alerted her about the two structures the respondent had on the land.

After the learned Judge rendered the decision the subject matter of this appeal the appellant went back to the High Court with an application to, among other things, open and re-hear the suit, on the ground that she wished to adduce fresh evidence by calling two witnesses to prove her claim. Karisa Chengo Wala was not among the two proposed witnesses. That application was dismissed, the court finding *inter alia* that even with the purported new evidence the appellant's case against the respondent remained weak.

The respondent, it was proved at the trial occupied the suit property in 1990 so that in 2011 when the appellant discovered that the respondent was on the suit property, the latter had been on it for a period of 21 years. **Section 7** of the Limitation of Actions Act, provides that;

"7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

It follows that the suit instituted by her on 6th June 2012 came after the horse had bolted, as time began to run against the appellant and her predecessor in title in favour of the respondent from the time the latter occupied the suit property and was engaged in acts that were inconsistent with the appellant's title, for instance building houses on the suit property. There is nothing to suggest that that occupation was secret or that it was not known to the appellant or her predecessor in title.

When would time stop running? In **Joseph Gahumi Kiritu v Lawrencece Munyambu Kabura** Civil Appeal No.20 of 1993, this Court held that;

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

Neither the appellant nor her predecessor in title took any steps throughout the 21 years the respondent was in possession of the suit property that would interrupt time from running. We reiterate that the suit filed by the appellant came too late in the day and conclude this part by quoting the well-known and oft-cited line in **Littledale v Liverpool College** (1900) 1 Ch.19, 21 that;

“In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it the next question, therefore, is what constitutes dispossession of the proprietor?acts must be done which are inconsistent with his (the owner’s) enjoyment of the soil for the purpose for which he intended to use it.”

It is also trite law that a claim for adverse possession must fail if it is demonstrated that possession was with the owner’s permission or where the owner’s title is acknowledged by the adverse possessor. The respondent, we have noted elsewhere, dealt with the suit as if it belonged to him and in a manner that was in conflict with the appellant’s rights. The developments, building of houses and planting mango and coconut (palm) trees by the respondent were not acts of transient nature but constituted dispossession of the appellant. The respondent’s acts were *nec vi, nec clam, nec precario*, (neither by force, not secretly and without permission). By dint of **section 17** of the Act the appellant’s title to the suit property was extinguished and by **section 38** the respondent was entitled to;

“..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”

This brings us to the question whether the learned Judge fell in error by declaring that the appellant was barred by statute of limitation to evict the respondent on the basis of a plea raised in the defence. The appellant contended that for the court to find for the respondent the claim ought to have been brought by way of originating summons. That contention is based on the provisions of **Order 37 rule 7** of the Civil Procedure Rules. It has been held that although that is the procedural requirement, a party is not precluded from articulating his claim by way of a plaint. See **Mariba v Mariba** Civil Appeal No. 188 of 2002. In **Njuguna Ndatho v Masai Itumo & 2 others** Civil Appeal No.231 of 1999, this Court held that the respondent’s counter-claim for adverse possession was misconceived because it ought to have been brought by originating summons. The orders vesting the property in the respondent by the High Court was set aside. The Court went further and held that the defence of limitation, would however succeed and the appellant’s suit in the High Court would succeed but the respondent would have to take such action necessary to enable him to obtain title to the property.

That position is no longer tenable. Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that **Order 37 Rule 7** requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of **Wabala v Okumu** [1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in **Bayete Co. Ltd v Kosgey** [1998] LLR 813 where the plaintiff made no specific plea of adverse

possession, the plea was nonetheless granted.

The Court has in **Teresa Wachika Gachira v Joseph Mwangi**, CA 325 of 2003 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario*. It is clear that the change in the court's approach to this question has, by and by been dictated by the need to do substantive justice. The respondent averred in his statement of defence that;

“4. The defendant further avers that even in the event that the plaintiff title is legal it only confers him the status of the paper owner as the defendant has been in exclusive physical control of the suit property from the 1950 and their occupation has been continuous without interruption from any person and they have rightly acquired the suit premises by way of adverse possession.”

The difficulty, however that one claiming by adverse possession will face when the claim is simply raised as a defence in a statement of defence is demonstrated in the kind of limited order the High Court in this dispute made. The learned Judge in entering judgment for the respondent said;

“49. ...the defendant to furnish evidence that he has been in adverse possession of land for 12 years.... The defendant has done that. That defence cannot be taken away just because he has not filed a counter-claim. In the circumstances, and for the reasons I have given above, I dismiss the plaintiff's suit with costs.”

Where does this leave the respondent? Does he re-litigate as was directed by the court in **Njuguna Ndatho** (supra)? Under **Section 38** to which we have referred earlier the adverse possessor;

“...may apply to the High Court for an order that he be registered as the proprietor...”

When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's title was so extinguished. By **Section 3(2)** of Appellate Jurisdiction Act we order the appellant do transfer the suit property to the respondent at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar, High Court, Malindi will execute on behalf of the appellant all the necessary transfer documents.

We think it will be in the interest of justice not to condemn the appellant to pay costs of this appeal and those in the court below. It is so ordered.

Dated and delivered at Mombasa this 4th day of December, 2015

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR