



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO.32 OF 2015

BETWEEN

ROBERT SHUME1ST APPELLANT

KAZUNGU DZOMBO.....2ND APPELLANT

NICHOLUS NGOLO GONA.....3RD APPELLANT

LUCY BUYA.....4TH APPELLANT

AND

SAMSON KAZUNGU KALAMA.....RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.) dated 4th April, 2014 In E.L.C. 144 of 2011)

JUDGMENT OF THE COURT

The appellants do not dispute the fact that parcel of land measuring approximately 36 acres and known as **Plot No. 7651** (originally **No. 570/2 MALINDI** (*the property*)) belongs to the respondent who purchased it from the original owner in 1972 and an indenture in his favour duly registered.

The appellants' claim to the property is based on the statute of limitation; that they had been in occupation of the property '*from time immemorial*', that they, their parents and forefathers planted mango, cashewnut and other trees on the property; and that their deceased family members were buried thereon.

While it was equally not in dispute that at the time the respondent purchased the property there were squatters on it, it was the respondent's case that all the squatters on the property were compensated for the mango and coconut trees they had planted on the property and thereafter vacated it; and that subsequently the appellants together with others not exceeding ten persons re-occupied the property claiming it to be their ancestral land. The dispute escalated and the 3rd appellant was arrested and charged with the offence of forcible detainer contrary to **Section 91** of the Penal Code. The local District Officer's effort

to resolve the dispute came to naught. The respondent thereafter brought an action in the Environment and Land Court, being **Suit No. 144 of 2011**.

At the trial, the respondent and his five witnesses built his case around the fact that the owners of the original title, **Anverali Mulla Abdulahi** and **Mohamed Mulla Abdulahi** transferred all the 36 acres of the original parcel to the respondent by an indenture dated 14th July, 1972 at a consideration of Kshs.5,000/-. Thereafter the respondent sub-divided the property in order to distribute the resultant portions to a colleague who had a share in it. The squatters he admitted, had planted cashew nuts, mangoes and other trees on the property under an arrangement described as “*ijara*” where a land owner, for an agreed rent, allowed another person to plant crops or build a house on his land. This arrangement was terminated and those concerned appropriately compensated; that because of the temporary nature of the arrangement only temporary structures were on the property, and that the appellant only invaded the property in 2010. It was further contended for the respondent that he fenced the property before building a house in 1975. He also planted some fruit trees during this period. However, the fence was destroyed within three months and later in the year he demolished the house and relocated because it was being vandalized; that at the time the respondent purchased the property in 1972, the appellants were young children.

According to **Amos Mwaniki Rukwaro** (PW 5), the Agriculture Officer, there were 25 squatters who had planted various crops and trees on the property. After a verification exercise, all the 25 were compensated and ceased to occupy or farm the property; and none of the appellants was in the list.

Of the four appellants, only the 1st appellant, a graduate of the University of Nairobi testified and called three witnesses. It was their claim that the property belonged to their forefathers and fathers; that the property was used over the years for farming; that their deceased relatives were buried on the property; and that it was the respondent who was a stranger to the property since he had never settled on it or carried on any form of farming. The 1st appellant admitted that when the respondent purchased the property in 1972 he (the 1st appellant) was only three years of age; that his father was not buried on the property but on a different property known as No. 226, where his mother too lived at the time of the trial; that his father was among the 25 who were compensated; and that he has only one temporary house on the property, which he has leased to the 4th appellant at a monthly rent of Kshs.1,500/-. The 1st appellant and his witnesses only recall seeing the respondent then an employee of Ministry of Water, many years ago engaged in water vending business in a kiosk on a road reserve near the property; and that, according to them, that was the nearest the respondent came to the property. They testified further that although the Government evicted them from the property and settled them near Malindi Prison, they continued to cultivate and plant food crops on the property. Because of the long use, lack of title notwithstanding, the appellants maintained they were entitled to the property.

After considering this evidence and visiting the disputed property, the learned Judge (**Angote, J.**) was convinced that there were persons who were allowed, pursuant to an *ijara* system by the original owners to use the property on a temporary basis. Those persons did not include the appellants; that those persons' occupation of the property was with the permission of the original owners and therefore could not amount to adverse possession. The learned Judge further found from the testimonies of the witnesses that the aforesaid 25 squatters without resistance accepted the compensation and voluntarily vacated the property; that the right to own property cannot be defeated unless it is proved that the title was unlawfully granted, a situation the learned Judge did not find in this matter.

Regarding the claim by the appellants that they acquired the property through adverse possession, the learned Judge was of the view and accordingly held that they were not in quiet occupation because they were evicted in 1970; that they failed to prove when they re-occupied the property after their eviction in 1970; that upon visiting the property, the court formed the opinion that the property was not occupied by any of the appellants. For instance, the court observed that the 1st appellant's temporary structure was leased out to the 4th appellant and he himself did not live on the property. He lived on a different parcel, so did his mother. His father was also buried elsewhere. The 3rd appellant was said to have demolished his house and fled the area while the 2nd and 4th appellants' respective cases collapsed after they failed to

call evidence in support. In the end the learned Judge concluded that there was no evidence that the respondent was dispossessed of his possession or that he discontinued his possession of the property. The learned Judge accordingly declared him the true owner of the property, who as a result, was entitled to its exclusive possession; and that the appellants or their agents were in an unlawful possession. They were restrained by a permanent injunction “*from remaining on or continuing remaining on the suit property*” and were ordered by a mandatory injunction to give vacant possession.

The appellants have challenged this conclusion on seven grounds which were condensed and argued in the written submissions as follows:-

1. That, the learned Judge misdirected himself in holding that *ijara* was paid to the land owners by those who were using it, and that the list produced by PW 5 was proof of payment made to those who were using the property; that the question of *ijara* was not in the respondent’s pleading; that the list was an afterthought; that the list itself did not constitute proof of payment but only amounted to an assessment of the value of the trees; and finally, that PW 5 was not the maker of the list and could not authenticate its contents;
2. That by **Section 7** of the Limitation of Actions Act and on the strength of **Leigh v Jack** [1879] 5 EXD 264, the respondent was barred from claiming the property since, after purchasing the property in 1972, he did nothing on it while the appellants and their parents on the other hand had been on it even before it was sold to the respondent; that the respondent has never enjoyed the soil and was therefore dispossessed by the appellants; that on the authority of **Wambugu v Njuguna** [1983] KLR 172, the appellants were in continuous, uninterrupted occupation of the property; that in accordance with the *Giriama* way of life, the appellants lived on one parcel of land but farmed the suit property; and that such an arrangement constituted adverse possession. Relying on the holding by this Court in **Ng’ati Farmers Co-operative Society Ltd v Councilor John Ledidi, & 15 others** [2009] KLR 331, the appellants submitted that the respondents’ absence of possession of the property amounted to abandonment in favour of the appellants and therefore the learned Judge erred in failing to find that adverse possession was proved.
3. That the trial court erred in receiving evidence of PW 5, in the absence of the appellants’ counsel. The witness produced the list of the 25 farmers who were purportedly compensated for their crops on the property. That evidence was therefore received in violation of the appellants’ rights and amounted to a miscarriage of justice as the appellants were denied an opportunity to cross-examine PW 5 in order to establish the veracity of the list.

The effect of the respondent’s written submissions in answer to those of the appellants were that there was evidence (from PW 2, PW 4 and DW 3) that *ijara* was paid to the original land owners by 25 squatters who had been using the property temporarily; that indeed the list produced by PW 5 corroborated this fact; that the evidence of PW 5 was received after the court was satisfied that the appellants’ advocate had not offered a plausible explanation for his absence on the day the hearing resumed and after the said advocate had on a previous hearing, having duly been served with the list, expressed no objection to it being produced.

The respondent was in agreement with the learned Judge that the claim of adverse possession was not proved and relying on the English decision in **Wellis’ Cayton Bay Holiday Camp Ltd v Shell Mex & B.P. Ltd** [1975] QB 94, he submitted that the fact that he intended to use the property in the future did not disentitle him to it as the true owner simply because the appellants had trespassed on it.

We have considered these submissions bearing in mind our role as the first appellate court, namely to approach this appeal as if conducting a trial by reconsidering afresh the evidence recorded, evaluating it and drawing our own conclusions. We are not bound necessarily to follow the trial Judge’s finding of fact if it is apparent that the Judge failed to take into account relevant matters or took into account irrelevant matters. As we do so, we must also bear in mind that we have neither seen nor heard the witnesses. See **Selle v Associated Motor Boat Co.** [1968] EA 123.

We reiterate that the 2nd, 3rd and 4th appellants did not present evidence in support of their respective claims. Our independent assessment and analysis of the entire evidence on record shows that the 1st

appellant and his parents, were at some point in time in occupation of the property. There is however no evidence as to the exact time of their entry into the property. When they occupied it, they planted cashewnut and mango trees on the property. We do find in evidence that the 1st appellant's parents along with other squatters were, in 1970 relocated by the Government from the property to a parcel of land near Malindi GK Prison where they were settled. The reason for the relocation is not apparent from the record. So that by the time the respondent was purchasing the property, there were no squatters on it. The 1st appellant and his witnesses, however, maintained that the squatters continued to farm the property from their new homes near Malindi GK Prison. According to the respondent's witness, **Robert Johnson Kazungu Hare** (PW 2), the appellants re-entered the property only 2 -3 years before the suit was filed. That testimony was confirmed by **Luwali Fondo Birya** PW3 and **Mohamed Osman Noor**, PW4.

The 1st appellant who was born in 1969 and was only three years when the respondent purchased the property, on the other had admitted that his father was listed as No. 24 on the list of the 25 squatters who were compensated; and that when his father died he was buried on his own parcel of land No. 226 and not on the property. His witness, **Benjamin Katana Karisa**, DW2 explained:-

“I am 57 years old....I was born in the suit property.... We farm maize, cow peas, cashewnuts, cassava and other trees. We also have mango trees....We have about 20 families on the land. We have more than 100 people on the land....My father and grandfather were born on the suit property.....I stay next to Prison. We were moved by the Government in 1970....Where we are staying is different from where we are cultivating. We don't stay there. We are just cultivating....this is a community land. It is our parents who showed us where to cultivate....I was shown the land by my parents in 1960.....I was five years old when I was shown where to cultivate....It is true I do not stay on the land.. I am just cultivating it.”

Similar evidence was adduced by **Karisa Katoya Chetho**, DW3 who, in addition confirmed that people used to pay *ijara* but he could not recall doing so himself. When his son died the remains were buried at the Prison land and not on the property. Likewise **Jonathan Luhya Ngamba** conceded that they did not live on the property but only cultivated it.

What emerges from the totality of this evidence and the trial court's visit to the disputed property is that the 1st appellant and his witnesses at only 3, 5 and 10 years respectively in 1972 when the respondent purchased the property, were too young to understand the circumstances under which their parents lived and used the property and how (or why) they relocated. Jonathan Luhya Ngamba's grandmother and the 1st appellant's mother who were alive at the time of the hearing and who would have been better placed to relate this history were not called as witnesses. Since they were relocated, they have continued to bury their dead elsewhere. The court noted only three houses on the property, namely the 1st appellant's semi-permanent house which was occupied by a tenant, the 4th appellant and two abandoned structures. The court further observed that the 3rd appellant had demolished his house and moved out, while the 2nd appellant's claim could not be established as he did not testify.

The sole question is whether, from the foregoing set of facts or circumstances, the 1st appellant established that he was in adverse possession of the property with the burden to prove this being on him.

By dint of **Section 7** of the Limitation of Actions Act, the appellants ought to have demonstrated that the respondent had lost the right to bring the action to recover the property on account of the former having been in a quiet and continuous occupation and use of the property in a manner inconsistent with the respondent's title for a period of 12 and more years. Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was *nec vi, nec clam, nec precario*, that they were in exclusive possession of the property; that their possession was open, continuous, peaceful and notorious with the knowledge but without permission of the owner.

In **Kimani Ruchire v Swift Rutherfords & Co. Ltd** [1980] KLR 10, , this Court said:-

“the plaintiffs have to prove that they have used this land which they claim, as of right: nec

vi nec clam, nec precario....The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by way of recurrent consideration.”

In **Teresa Wachuka Gachura v Joseph Mwangi Gachira**, Civil Appeal No. 325 of 2003, this Court emphasized that proof of possession, being a question of fact, will depend on the circumstances and peculiar facts of each case. The Court explained that:-

“Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

Similarly in **Wabala v Okumu** [1997] LLR 608 (CAK), this Court emphasized that:-

“Thereafter he left and he had not lived there upto the time he was sued in 1990. The house which he had built on the land and which constituted tangible or physical evidence of his occupation had fallen down. That means that the only form of “occupation” the respondent had over the land was cultivating it. That in these circumstances, the learned magistrate was perfectly justified in coming to the conclusion that the respondent had failed to prove that he had been in occupation of the land for a continuous period of twelve years. We think that it would not only be wrong but also dangerous to introduce the concept of constructive occupation. To be able to acquire title to land registered in another person’s name, one had to literally be in occupation of the land, for mere presence of crops on land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land. As the lawyers of old used to say, the occupation must be nec vic, nec clem, nec precario.”

In the matter before us, we find from the facts that it has all along been acknowledged by those who used the property that it belonged to the original owner of Asian descent in an acceptable land tenure phenomenon in this region called “house without land” where the owner of land, upon being paid rent (*ijara*), allows a person the use of his land until such time it is required by the owners.

The use of the property was not hostile to the true owners’ title as demonstrated by the temporary structures constructed on the property and its transient and periodic cultivation. This finding is further reinforced by the fact that those who were initially in occupation of the property were relocated to another site without resistance. The evidence of PW 5, listing those compensated, which in our view was properly admitted after counsel then representing the appellants consented to its production, further demonstrates that the possession was with the permission of the original owner.

In the end the appellants have not convinced us that the leaned Judge committed any error to warrant our interference with his decision. This appeal therefore fails and is dismissed with costs.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR