IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 3 OF 2014

BETWEEN

SAMMY LIKUYI ADIEMA ……………………………………. APPELLANT

AND

CHARLES SHAMWATI SHISIKANI ………………………. RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 14th November, 2013

in

H.C.C.C. NO. 50 OF 2008)

****

JUDGMENT OF THE COURT

The appellant, ***Sammy Likuyi Adiema***, sued the respondent, ***Charles Shamwati Shisikani***, in Kakamega High Court Civil Suit No. 50 of 2008 seeking his eviction from Land Parcel ***No. S/Kabras/Shamberere/2650 (***hereinafter *"the suit land"*). In his plaint, filed on 7th August, 2008, he averred, *inter alia*, that he was the absolute proprietor of the suit land upon which the respondent had broken and entered thereon and taken possession of 3 acres thereof without any colour of right.

In an amended written statement of defence delivered on 2nd January, 2010, the respondent denied the appellant's claim and pleaded that he had, in 1984, purchased from the appellant's deceased father, one ***Johana Adiema Okumu***, a portion comprising two acres of Land Parcel No. S/Kabras/Shamberere/1172 at the consideration of Kshs.26,000/= which consideration he paid in full and had been in possession thereof since 1984. The respondent contended that Land parcel No. S/Kabras.Shamberere/1172 is the parent title from which the suit land was created and that the appellant's suit was statute barred.

The respondent further averred that the dispute between him and the appellant had been referred to the Malava Land Dispute's Tribunal which resolved the dispute in his favour and an appeal by the appellant to the Western Province Appeals Committee was dismissed.

In those premises, it was the respondent's contention that the appellant was not entitled to the relief he had sought against him and prayed for the dismissal of his suit. The respondent also set up a counter-

claim against the appellant seeking the transfer to himself of two acres from the suit land.

The appellant filed a reply and defence to counter-claim on 6th June, 2011 in which he denied the counter-claim. He further contended that he was not a party to any sale agreement between the respondent and his deceased father.

He said that his suit was dismissed with no order as to costs and the respondent's counter-claim was allowed beyond his pleading as the learned Judge ordered the subdivision of the suit land and transfer of 3 acres to the respondent prompting him to lodge this appeal. In his memorandum of appeal filed on 13th January, 2014 the appellant relies upon seven grounds to impugn the judgment of the High Court. In our view, however, several of those grounds of appeal are overlapping and all raise the following issues:

1. *That the learned Judge entered judgment in favour of the respondent for 3 acres of the suit land which was not claimed.*

2. *That the award of 3 acres to the respondent was based on a sale agreement which was void in law by dint of the provisions of Section 6 of the Land Control Act, Cap 302 Laws of Kenya.*

3. *That the said award was based on a sale agreement to which the appellant was not a party.*

4. *That the learned Judge erred in law in holding that the respondent could not be evicted from the suit land because he had utilized 3 acres thereof for long when the respondent's claim was not based on adverse possession.*

5. *That the learned Judge erred in law in not ordering the eviction of the respondent who was, on the evidence, a trespasser on the suit land.*

At the hearing of this appeal, the appellant was represented by learned counsel, Mr. Ombaye and the respondent was represented by learned counsel Ms. Muleshe. In addressing the above issues, Mr. Ombaye condensed the same into two and submitted that the respondent had claimed 2 acres in his counter-claim and was bound by that pleading. In the premises, according to counsel, it was not open to the learned Judge to enter judgment for the respondent beyond what was claimed. In any event, according to learned counsel, the award of the 3 acres to the respondent offended the provisions of the Land Control Act as consent of the Land Control Board was neither sought nor obtained. The sale agreement, according to counsel, was therefore void for want of the Land Control Board Consent. It was also counsel's contention that the appellant was not privy to the contract of sale between his deceased father and the respondent and could therefore not be bound by it.

Counsel further submitted that the learned Judge of the High Court entered judgment for the respondent based upon possession yet the land parcel sold to the respondent had ceased to exist before the suit was instituted and when the appellant was the absolute registered proprietor of the suit land and his rights were protected in law.

Ms. Muleshe, submitted that although the respondent had claimed 2 acres of the suit land, the evidence disclosed that he had purchased and was in possession of 3 acres and the learned Judge was entitled to award what the evidence revealed. Learned counsel further submitted that although adverse possession was not specifically pleaded in the counter-claim, eviction was not available to the appellant as the respondent's possession was legitimate and was with the knowledge of the appellant.

We have considered the record of proceedings, the judgment of the High Court, the grounds of appeal, the submissions of learned counsel and the relevant law. As a first appellate court, we are required to consider the evidence adduced before the trial court afresh, evaluate it ourselves and draw our conclusion. In so doing, we must bear in mind and make allowance for the fact that, unlike the trial court, we did not see or hear the witnesses testify (See **Selle and Another - V – Associated Motor Boat**

Company Ltd & Others [1968] EA 123, **Ramji Ratna and Company Limited - V – Wood products (Kenya) Limited [Civil Appeal No. 117 of 2001] (UR)** and **Hanh - Vs – Singh [1985] KLR 716)**

We also remind ourselves that this Court will not normally interfere with a finding of fact by the trial Judge unless such finding, is based on no evidence or is based on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings that he did. Nevertheless, we are entitled to and will interfere if it appears that the trial Judge failed to take account of particular circumstances or probabilities material to an estimate of the evidence or where his impression, based on the demeanor of material witnesses is inconsistent with the evidence in the case generally. (See the case of **Ephantus Mwangi and Another - V – Duncan Mwangi Wambugu [1982 – 88] 1KAR 278.**

After a careful evaluation of the evidence, the following facts are not really in dispute: The appellant is the registered proprietor of the suit land. The suit land is a sub-division of land Parcel No. S/Kabras/Shamberere/1172 which was registered in the name of the appellant's father *(now deceased).* A portion of land parcel No. S/Kabras/Shamberere/1172 was sold by the deceased to the respondent. The respondent took possession of the disputed portion of land in 1985 and remains in possession to date. The transaction between the respondent and the deceased did not receive the approval of the Land Control Board of the area. The respondent's counter-claim was based on the agreement between him and the deceased, and he resisted the appellant's claim on the basis of possession which was legitimate.

On the registration status of the suit land, the appellant produced the title deed thereof which is in the appellant's name. The proprietorship section of the title deed indicates that the title deed is a sub-division of land parcel number S/Kabras/Shamberere/1172 and was transferred to the appellant as a gift on 22nd January, 2002. This is in consonance with the appellant's evidence that he got the land from his mother after succession proceedings. It is also in consonance with the respondent's evidence that the suit land is part of parcel No. 1172. The property section of the title deed shows that the suit land comprises 5.0 hectares.

As to when the respondent obtained possession, the appellant stated at the trial that it was in 1984 but the respondent, whilst stating that he indeed purchased a portion of the suit land in 1984, he was categorical that he started using the land in 1985 when he built various structures thereon. With regard to the period the respondent has been in possession, the suit at the High Court itself demonstrated that upto the time the suit was filed on 7th August, 2008, the respondent was in possession and as the claim for eviction was dismissed and the counter-claim allowed, it is plain that the respondent remains in possession.

It is also not disputed that the appellant was not privy to the sale agreement between the respondent and his deceased father. The respondent indeed acknowledged that fact in his amended defence and counter-claim and even in his testimony before the High Court. He also admitted that the transaction did not receive the approval of the relevant land Control Board.

A further undisputed fact is that the respondent, in his amended statement of defence and counter-claim, pleaded that *"he bought part of LAND PARCEL NO. S/KABRAS/SHAMBERERE/1172 measuring two (2) acres which gave rise to the land in dispute pursuant to sub-division, at the purchase price of Kenya Shillings Twenty Six Thousand (Kshs.26,000/=) only which purchase price was paid by the defendant in full and final settlement and the defendant was given vacant possession by the deceased one JOHANA ADIEMA OKUMU the plaintiff's father in 1984 and has been in occupation of the suit land since 1984 …"*

It is also plain that notwithstanding the respondent's express pleading that he purchased two acres of the suit land and was given possession in 1984, the learned Judge of the High Court directed the appellant to sub-divide the suit land and transfer three (3) acres thereof to the respondent.

A perfunctory consideration of the appellant's grounds of appeal would, in the light of the above undisputed facts, appear to be unassailable. But are they? We commence our analysis with a consideration of the pleadings before the High Court. The appellant's foundation for his claim was

registration as proprietor of the suit land upon which, according to him, the respondent had entered and taken possession of 3 acres thereof and continued to use and occupy the same without any colour of right. It is significant that the appellant did not give the date when the respondent took possession of the three (3) acres.

The respondent's answer to those averments was that he had purchased a portion comprising two (2) acres of the suit land from the appellant's deceased father at a purchase price of Kshs.26,000/= which he fully paid and he was given vacant possession in 1984 and has been in possession since then to date. Significantly, in our view, he pleaded as follows:-

> *"The Defendant shall raise a Preliminary Objection that the plaintiff's suit is barred by limitation period and ought to be dismissed and NOTICE is hereby given*."

> Then in the counter-claim, the respondent averred, *inter alia,* as follows:-

> *"7. The Defendant reiterates the averments of law and fact contained in paragraph 1(a) through 5(a) of the defence.*

> *8. The Defendant counter-claims for two (2) acres of LAND PARCEL NO. S. KABRAS/SHAMBERERE/2650, to be transferred to him by the plaintiff which is a sub-division of LAND PARCEL NO. S.KABRAS/SHAMBERERE/1172 which he legally bought from the plaintiff's father, now deceased for value in1984 and completed the purchase price, was given vacant possession and developed the said parcel the plaintiff being Administrator of the deceased property and finally the owner of the disputed land."*

In our view, the respondent's averment that the appellant's suit was barred by *"limitation period"* was a plea invoking the provisions of ***Section 7*** of the Limitation of Actions Act as more than twelve (12) years had passed since the respondent took possession of his portion of the suit land. In other words, the respondent was plainly pleading adverse possession. The said ***Section 7*** is in the following terms:-

> **"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."**

In this case, we have found as undisputed, the fact that the respondent, on the pleadings and on evidence, took possession of the disputed portion in 1984 or in 1985. The suit land is in an agricultural area and was therefore subject to the provisions of the Land Control Act Cap 302 Laws of Kenya. ***Section 6*** provides as follows:-

> **"6. Transactions affecting agricultural land.**

1) Each of the following transactions that is to say –

> **(a) the sale, transfer, lease, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**

> **(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area less than twenty acres into plots in an area to which the Development and Use ofland (Planning) Regulations, 1961 L.N. 516/1961 for the time being apply; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."**

It is common ground that no Land Control Board's consent was sought or obtained with respect to the transaction involving the portion of the suit land between the respondent and the deceased father of the appellant.

Section 8 of the same Act reads:-

> **"8. Application for consent**
>
> 1. **An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto …."**

In the premises, the transaction between the respondent and the deceased father of the appellant became void after six months of the agreement for want of consent from the relevant Land Control Board. Thereafter, the respondent's possession of the suit land became adverse to the title formerly held by the appellant's deceased father and then the appellant.

Section 13 of the Limitation of Actions Act provides as follows:-

> **"A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) …."**

So, in terms of the provisions of ***Section 13*** of the Limitation of Actions Act, the respondent was in possession which was adverse to that of the registered proprietor and a right of action clearly accrued to him.

In his reply and defence to counter-claim, the appellant denied the respondent's allegations in the amended defence and counter-claim. The appellant specifically averred that he was not a party to the sale agreement between the respondent and his deceased father. Of significance was the averment denying there being numerous suits over the suit land.

With regard to the evidence, the appellant freely admitted that the respondent *"came to the land in 1984"* but he *"was not involved in the alleged sale of land between"* the respondent and his deceased father which transaction did not receive the approval of the Land Control Board. The appellant further testified that the respondent was occupying three acres of his land without his permission. According to him, the respondent has planted trees; he cultivates it and has built houses on the plot.

On his part the respondent confirmed, in his testimony at the trial, that he purchased three acres of the suit land in 1984 when it was known as land parcel number ***S/Kabras/Shamberere/1172*** and started living thereon in 1985 and still lived on the land at the time of testifying which was on 31st July, 2012. He continued that he had on the suit land *"four semi permanent houses, a toilet, trees, banana plants and other crops."*

The appellant's father died in 1992 leaving the respondent in possession of the portion he had purchased. The appellant's father was survived by the appellant and his mother ***Fridah Lupeya Adema*** and other siblings. Succession proceedings were then instituted without involving the respondent. The portion purchased by the respondent was incorporated in the area allocated to the appellant and the new parcel became known as ***S/Kabras/Shamberere/2650***, the suit land. Notwithstanding the change in legal ownership of the suit land the respondent continued in possession of the portion he purchased.

The respondent's possession of the said portion was open and notorious. There was no discontinuance of possession by the respondent since 1985. There was no evidence of entry onto the said portion at any time by the appellant for the entire period the respondent has been in possession cultivating and developing it with the knowledge of the appellant. The respondent, in our view, openly asserted hostile title to the portion he purchased as against the appellant and before him his late father. The respondent's acts were clearly inconsistent with the enjoyment of the soil by the persons entitled ie the appellant and his deceased father. The assertion of hostile title was admitted by the late father of the appellant. The respondent testified that the deceased sued him before Kakamega RMCCC No. 124 of 1989 but died before the case was resolved. His wife, Fridah, took over the conduct of the case in 1992 and applied that

the dispute be referred to the Land Disputes Tribunal which determined the dispute in favour of the respondent. An appeal to the Provincial Appeals Committee confirmed the decision of the Land Disputes Tribunal. Although those proceedings were subsequently quashed by the High Court, no order of eviction was issued against the respondent. In our view, those proceedings demonstrated beyond peradventure the assertion of hostile title by the respondent over the portion he had purchased. The suit giving rise to this appeal presented another chance to the respondent to demonstrate hostile title against the appellant over the said portion of land. The two occasions demonstrated that the respondent not only denied the appellant or his deceased father's title but refused to vacate the said portion. In his defence before the Land Disputes Tribunal, the respondent sought confirmation of his right of ownership. He did the same in his defence and counter-claims before the High Court in the suit giving rise to this appeal. On both occasions, the respondent did not acknowledge the appellant's title to the said portion nor did he do so in the suit filed by the appellant's deceased father.

To demonstrate dispossession, the appellant had the onus to show that there had been interruption to the possession of the said portion by the respondent. The appellant did not do so. He indeed testified that the respondent was occupying the said portion and utilizing it without his permission.

It is therefore plain that the respondent was in adverse possession from 1985 to the date of the suit before the High Court. From 1985 to the time of the suit, in 2008, the full circle of twelve, 12 years adverse possession had long been completed.

In our view, and for the reasons given above, the respondent established, on a balance of probabilities, a title to his portion by adverse possession which was, in an imprecise manner, pleaded in his defence and counter-claim. In his judgment the learned Judge of the High Court concluded, in part, as follows:-

> ***"The counter-claim herein is for 2 acres but the defendant informed the court that he bought 3 acres. Paragraph 5 of the plaint recognizes that the plaintiff is using 3 acres of the suit land. The valuation report dated 16.6.1991 indicate(s) that what was being sold was 3 acres. From all the above, I am satisfied that the defendant is utilizing 3 acres and is entitled to that portion of land."***

That finding is in accord with our findings above. Possession, per se, cannot in our view, found a cause of action. It is when it is adverse that it can found a claim in favour of the person in adverse possession which, as analyzed above, was the position taken by the respondent in his pleadings and in his evidence. In the premises, the statement of the learned Judge that he did not find the respondent's claim to be that of adverse possession is most unfortunate as it was clearly a misdirection. Given the provisions of Article 159 (d) and (e) of the Constitution, 2010, the respondent need not have filed a separate suit *(Originating Summons)* claiming the subject piece of land by way of adverse possession. The Article Reads:-

> **"159 (d) Justice shall be administered without undue regard to procedural technicalities; and**
>
> **(e) The purpose and principles of this Constitution shall be protected and promoted."**

At any rate in **Mariba v. Mariba [2007] 1 EA 175**, this Court held that failure to claim adverse possession by way of an originating summons is not fatal. In our view, and as already stated, having pleaded that he had been in occupation of his portion of land, since 1984 and that the *"appellant's suit was barred by limitation period,"* the respondent was resisting the appellant's claim under the Limitation of Actions Act. He reiterated that averment in his counter-claim and specifically averred that he *"legally bought from the plaintiff's (appellant's) father, now deceased for value in 1984 and completed the purchase price, was given vacant possession and developed the said parcel …"* It is plain, in our view, that the respondent's claim was based on adverse possession and the learned Judge clearly failed to appreciate that claim. Although his final decision was in favour of the respondent and was based on prolonged possession, the learned Judge, with all due respect to him, fell into serious error in his appreciation of the principles of adverse possession.

We also find it difficult to appreciate the learned Judge's views on the provisions of the Land Control Act. In his own words:-

> ***"To rely on the lack of consent of the Land Control Board is to introduce technicalities even though such technicalities were provided for under the law. The vendor should stick to his promise that he was selling the land to the purchaser and should he turn around and claim that he did not take the purchaser to the Land Control Board, the Court should find that such vendor is estopped from relying on that contention."***

The decision of this Court in **Kariuki - V - Kariuki** was not brought to the attention of the learned Judge. In that case, the Court stated:

> **"When a transaction is clearly stated by the express terms of Parliament to be void for want of the necessary consent, a party to the transaction which has become void cannot be guilty of fraud if he relies on the Act and contends that the transaction is void. That is what the Act provides and the statute must be enforced if its terms are invoked."**

To rely upon the provisions of an Act of Parliament cannot be to introduce technicalities. And a party cannot be estopped from relying on the provisions of an Act which has not been repealed. This notwithstanding, however, as this Court stated in **Mbugua Njuguna Vs Elijah Mburu Wanyoike & Another, Civil Appeal No. 27 of 2002,** ***"[t]he provisions of the Land Control Act apply where there is a claim of title to agricultural land based on an agreement…and not where the claim is based on the operation of the law such as by adverse possession."***

Before concluding this judgment, we venture to state that even if the respondent had not invoked the Limitation of Actions Act, he would have succeeded on the basis of constructive trust. In the case of **Macharia Mwangi Maina & 87 Others – V – Davidson Mwangi Kagiri [2014] EKLR**, we held that the appellants, who were purchasers of portions of the suit land and had been put in possession of the said portions by the respondent, were protected by ***Section 30 (g)*** of the Registered Land Act. The act of the respondent, we held, had created an overriding interest in favour of the appellants in relation to those portions of land. We also held that the respondent created an implied or constructive trust in favour of the appellants who had purchased the said portions from him. We cited with approval the case of **Mwangi & Another - Vs – Mwangi [1986] KLR 328**, where the court held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights; the absence of any reference to the existence of a trust in the title documents does not affect the enforceability of the trust since the reference to a trustee under ***Section 126 (1)*** of the Registered Land Act is permissive and not mandatory.

In this case, the respondent bought three (3) acres of the former title number S/Kabras/Shamberere/1172 from the deceased father of the appellant who put him in possession in 1985. When the appellant's father died in 1992, the respondent was in possession. The appellant was allocated 12.5 acres of the former title after succession proceedings and the subdivision became registered as S/Kabras/Shamberere/2650 on 22nd January, 2002. This new title incorporated the three (3) acres purchased by the respondent who was and is still in possession. The respondent has been in possession with the knowledge of the appellant. The appellant is therefore not a bonafide purchaser for value without notice. In the premises the circumstances under which the respondent is in possession of the said three (3) acres are such as to raise equity in his favour and the extent of the equity is known. The appellant, in our view, holds the respondent's three (3) acres on a constructive trust in his favour.

There is however one ground of appeal we find with merit ie that the learned trial Judge erred in entering judgment for the respondent for 3 acres of land out of L.R. No. S/Kabras/Shamberere/2650 when that was not claimed in the pleadings. The respondent pleaded as follows in paragraph 8 of his defence and counter-claim:

> ***"8. The Defendant counter-claims for two (2) acres of LAND PARCEL NO S.KABRAS/SHAMBERERE/2650, to be transferred to him by the plaintiff which is sub-division***

of LAND PARCEL NO. S KABRAS/SHAMBERERE/1172, which he legally bought from the plaintiff's father, now deceased for value in 1984 and completed the purchase price, was given vacant possession and developed the said parcel the plaintiff being the Administrator of the deceased property and finally the owner of the disputed land."

When the respondent testified, he gave evidence on three (3) acres. His pre-trial statement indicated he purchased 3 acres. We find it difficult to appreciate why at no stage, counsel for the respondent sought leave to amend the respondent's written statement of defence and counter-claim, to accord with the respondent's instructions. The respondent claimed only two acres. He was bound by his pleading because that was the claim the appellant had notice of to defend. Despite the evidence, it was not, in our view, open to the learned Judge to amend the respondent's claim in the judgment.

In Civil Appeal No. 219 of 2013 **Independent Electoral and Boundaries Commission & Another - V – Mutinda Mule & 3 Others (UR),** we cited with approval a Malawi Supreme Court decision in **Malawi Railways Ltd - V – Nyasulu [1998] MWSC 3**, in which the court quoted, with approval, from an article by Sir Jack Jacob entitled **"The Present Importance of Pleadings" [1960]** Current legal problems at page 174:

> **"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings and cannot be allowed to raise a different or fresh case without the amendment properly made. Each party thus knows the case he is to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.**
>
> **In the adversarial system of litigation therefore, it is the parties themselves, who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda there is no room for an item called "Any Other Business in the sense that points other than those specific may be raised without notice."**

The position enunciated in the above article is the position in this country and is in consonance with our views. In the premises the ground of appeal challenging the award of 3 acres to the respondent, despite our analysis, succeeds. Save for this limited success, we find no merit in the rest of the grounds of appeal. We set aside the High court Judgment by which the appellant was directed to sub-divide plot number S/KABRAS/SHAMBERERE/2650 and transfer 3 acres to the respondent and substitute therefor an order directing the appellant to sub-divide the same plot and transfer two (2) acres thereof to the respondent within **(90)** days from the date hereof failing which the Deputy Registrar of the High Court at Kakamega shall execute all the relevant documents which will enable the respondent obtain his rightful share of the suit land, that is two (2) acres.

Each party shall bear their own costs of this appeal. Orders accordingly.

Dated and delivered at Kisumu this 9TH day of DECEMBER, 2014

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

<u>DEPUTY REGISTRAR</u>