IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 52 OF 2007

BETWEEN

JOHN BARAZA OJIAMBO …..... APPELLANT

AND

VERONICA AUMA OJIAMBO) .

SILVANUS ONYANGO OJIAMBO) …..... RESPONDENTS

BONFACE ODUORA OJIAMBO)

JOSEPH BWIRE OJIAMBO)

(Appeal from a judgment of the High Court of Kenya at Busia (Sergon, J) dated 3rd February, 2006

in

H.C.C. NO. 28 OF 2000)

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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the High Court (J.K. Sergon, J) dated 3rd February, 2006 by which the learned judge held that the respondents had been in adverse possession of land parcel number **Samia/Bujwanga/629** (*hereinafter* ***"the suit land"***). The suit land was registered in the names of the appellant, ***John Barasa Ojiambo***, on 19th July, 1974. He is the eldest son of ***Peter Ojiambo*** who died in 1994 (hereinafter referred to as ***"the deceased"***).

The 1st respondent, ***Veronica Auma Ojiambo,*** is the appellant's step mother and the 2nd, 3rd and 4th respondents are his step brothers. They all live on the suit land.

On 25th October, 2000 the respondents filed a suit in the High Court at Busia by way of Originating Summons under ***Order XXXVI rules 3*** and ***7*** of the old Civil Procedure Rules and S***ections 37*** *and* ***38*** of the ***Limitation of Actions Act***. They sought the following orders of the court:-

> *"1. That the applicants Veronica Auma Ojiambo, Silvanus Onyango Ojiambo, Bonface Oduori Ojiambo and Joseph Bwire Ojiambo be declared absolute owners of all that parcel of*

land known as SAMIA/BUTABONA/629 in which they have resided on, cultivated and have been in actual possession peacefully openly and uninterruptedly for a period exceeding 28 years.

2 That the respondent JOHN BARASA OJIAMBO be ordered to execute all documents of transfer in respect of Parcel of land known as SAMIA/BUTABONA/ 629 in favour of the Applicants herein failing which an authorised officer of this Honourable Court be empowered to execute the same in place of the respondent

3. That an inhibition do issue restraining the respondent from transferring or in any manner interfering with parcel of land SAMIA/BUTABONA/629.

4. That the respondents, their agents, representatives, servants and/or assignees and/or heirs be permanently restrained by injunction from interfering with the parcel of land.

5. That this Honourable Court be pleased to grant such further orders or relief as (it) may deem fit and just.

6. That the costs of this Application be awarded to the plaintiffs."

The Originating Summons was supported by an affidavit deponed to by the second respondent on his own behalf and on the authority of the other respondents. He deponed, among other things, that the 1st respondent is his mother and the rest of the respondents are his brothers whilst the appellant is his step brother. He also swore that the suit land initially belonged to their father, the deceased, and that they have, since 1972, adversely occupied the land. He further swore that the said occupation has been adverse and that the appellant was given land parcel number ***Samia/Butabona/623***. The deceased lived on the suit land until his demise in 1994. He further swore that their occupation of the suit land has been hostile and uninterrupted for a period exceeding 12 years; that they have planted different types of crops on the suit land and they have no other piece of land save the suit land.

In a replying affidavit sworn by the appellant on 17th January, 2001 he stated that the suit land is ***Samia/Bujwanga/629*** and not ***Samia/Butabona/629*** a fact confirmed by the extract of title annexed to the Originating Summons. He admitted that the suit land was part of the property of the deceased but it ceased to be so when the deceased gave it to him during land adjudication. He further admitted that they all established homesteads on the suit land with his consent which consent was withdrawn when his sons became of age. He therefore demanded that the respondents vacate the suit land and when they refused, he filed ***Busia SRMCC NO. 405 of 1998*** which suit is still pending determination in the said court.

The case appealed from was heard at Busia High Court by J.K. Sergon J. between 29th November, 2004 and 28th November, 2005. Judgment was delivered on 3rd February, 2006 in which the learned Judge rendered himself as follows:-

> **"Both the plaintiffs' evidence and that of the defence agree that the plaintiffs have been in occupation of L.R.NO. SAMIA/BUJWANGA/629 for a very long time. The issue which remains is whether they can acquire the same by adverse possession. I have taken into account the detailed written submissions of the learned counsels in this matter. The truth of the matter is that the plaintiffs have been in actual possession of the land for over a period of 12 years. Their occupation has been adverse and continuous. I am not convinced that the plaintiffs were in occupation with the consent of the defendant. In the end, I enter judgment for the plaintiffs and against the defendant as prayed in the Originating Summons dated 24th October, 2000."**

The appellant was aggrieved and therefore lodged the appeal before us citing five (5) grounds of appeal expressed as follows:-

"1. That learned trial Judge did not evaluate evidence before him in relation to every issue

raised in the pleadings and in evidence.

2. The learned trial Judge did not make categorical findings on every issue raised in the pleadings and evidence at the hearing.

3. The learned trial Judge erred in law and fact in holding that the respondents had held the land adversely for a period of 12 years.

4. The judgment of the learned trial Judge is inconsistent with the weight of the evidence on record.

5. The finding by the trial Judge on the issue of adverse possession was arbitrary and inconsistent with the weight of evidence on record."

In summary, the written submissions of the appellant, who appeared in court in person, were that the deceased gave him the suit land during the land adjudication process just like he gave land to some of his siblings and reserved title number ***Samia/Bujwanga/551*** for the siblings who had not been given their shares; that he allowed the deceased and the respondents to live on the suit land and withdrew his permission in 1998 when he asked the respondents to vacate the suit land; that the respondents refused to vacate and instead filed the Originating Summons giving rise to the appeal before us; that the learned trial Judge failed to evaluate the evidence adduced before him and thereby failed to consider the prerequisites before an order of adverse possession could be made; that the respondents were on the suit land by virtue of their kinship and consanguinity with him and the deceased and could not claim as adverse possessors and after the withdrawal of his consent, the respondents remained on the suit land as trespassers.

The respondents supported the judgment of the High Court and said that they had indeed occupied the suit land for over 12 years and the appellant held the same in trust for them. In those premises, the respondents concluded their submissions that the appellant as one of their family member should not be allowed to evict and/or interfere with their livelihood.

This being a first appeal to this Court its duty is to:-

> **"Reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally" s**ee Selle vs Associated Motor Boat Company [1968) EA 123 at page 126, and also Jivanji vs Sanyo Electrical Company Limited [2003) KLR 425 at page 431.

The Originating Summons lodged in the High Court was under ***Order XXXVI rules 3*** and ***7*** of the Civil Procedure Rules and ***Sections 37 and 38*** of the Limitation of Actions Act. ***Rule 3*** of ***Order XXXVI*** of the former Civil Procedure Rules provided as follows:-

> **"3. A vendor or purchaser of immovable property or their representatives respectively, may at any time or times take out an Originating Summons returnable before the Judge sitting in Chambers for the determination of any question which may arise in respect of any requisitions or objections or any claim for compensation, or any other question arising out of or connected with the contract of Sale (not being a question affecting the existence or validity of the contract)."**

And ***rule 7*** of the same order prescribed the form under which an Originating Summons could be made. It is plain that the citing of ***Order XXXVI rule 3*** on the Originating Summons was a misconception because the claim of the respondents did not involve a vendor or a purchaser, nor did it relate to any

contract for the sale of land or compensation.

However, the respondents also invoked the provisions of ***Section 38*** of the Limitation of Actions Act. ***Sub-section (1)*** of that Section reads as follows:-

> **"38 (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."**

The respondents claimed to have become entitled, by adverse possession, to the suit land which is registered under the Registered Land Act *(one of the Acts cited in Section 37)* and therefore, in our view, properly invoked the above provision.

In order to be entitled to the suit land in the manner envisaged in ***Section 38 (1)*** of the ***Limitation of Actions Act***, the respondents were required to prove open, uninterrupted and exclusive possession and user thereof for a period of at least 12 years either after dispossessing the appellant or by discontinuation of possession by the appellant on his own volition. It is common ground that the appellant was registered as proprietor of the suit land at the time of adjudication. His case was that he was given the suit land by the deceased and he allowed the deceased and the respondents to live on the suit land until the year 1998 when he withdrew his permission and demanded that the respondents vacate the suit land. By that time the deceased had died. The appellant contended that he permitted the respondents to live on the suit land on the basis of his relationship with them; the 1st respondent is his step mother whilst the other respondents are his step brothers. Notwithstanding that relationship he withdrew his permission as he wanted to give the suit land to his sons who had become of age. According to him, the respondents will not be rendered landless as they can relocate to title number **Samia/Bujwanga/551** which is the land designated for them by the deceased.

The respondents case at the trial was that they had always lived on the suit land which belonged to the deceased and that during the life time of the deceased the appellant lived on land title number **Samia/Bujwanga/623**. According to them the appellant moved to the suit land after the demise of the deceased. The 1st respondent testified that when the appellant came to the suit land he occupied a portion thereof at the edge. The 2nd respondent was more specific. He stated that after the demise of their father the appellant started occupying a portion of the suit land comprising three acres.

On the evidence adduced before him, the learned Judge of the High Court concluded, in a rather brief judgment, that the respondents had demonstrated that they were entitled to the suit land by way of adverse possession. In his own words: -

> *"The truth of the matter is that the plaintiffs have been in actual possession of the land for over a period of 12 years. That occupation has been adverse and continuous. I am not convinced that the plaintiffs were in occupation with the consent of the defendant.*
>
> *In the end I enter judgment for the plaintiffs and against the defendant as prayed in the Originating Summons dated 24th October, 2000."*

As we have already stated, we have a duty to re-appraise the evidence and make our own findings. The respondents' case as can be gleaned from the pleadings and the evidence was two pronged. Firstly they were claiming to be entitled to the suit land as widow and sons of the deceased respectively. Their long use and possession of the suit land referred to in their evidence was, according to them, as of right as members of the deceased's family.

Secondly, they claimed to be entitled to the land by adverse possession. That is why they invoked the provisions of ***Section 38 (1)*** of the ***Limitation of Actions Act*** (supra). It cannot be gainsaid that the respondents demonstrated long user and possession of the suit land. With regard to the 1st respondent the

suit land was bequeathed to her and she has lived thereon for many years. There is no dispute that by the time of commencement of the suit at the High Court she had lived on the suit land for over 12 years. The 2nd respondent, on his part testified that they had lived on the suit land since the year 1972, a period of about 28 years before lodging the Originating Summons. The 5th respondent adopted the evidence of the 1st and 2nd respondents.

The appellant's main answer to the respondents' claim was that the latter were living on the suit land with his consent. He indeed pleaded the consent in paragraph 6 of his replying affidavit. However, did he demonstrate, on a balance of probability, that the respondents were indeed on the suit land with his consent? We expected the answer would be found in his evidence at the trial before the High Court. We have carefully considered his testimony before the High Court and nowhere did the appellant state that the respondents were living on the suit land with his consent. That was his main defence to the respondents' claim and we would have expected the consent to feature prominently in his testimony at the trial. But it did not. Allegations in the replying affidavit did not amount to evidence as *viva voce* evidence was also given at the trial. But would failure to verbalise his consent be construed as absence of consent given his relationship with the respondents? Would he in reality evict his own father, step mother and step brothers merely to prevent time running against him under the Limitation of Actions Act? In those premises would the respondents' claim to the suit land by adverse possession lie? The learned Judge of the High Court did not interrogate these issues exhaustively and we do not know how he would have resolved them if he had done so. On our part however we have our doubts whether the respondents demonstrated the prerequisites for a claim to the suit land by adverse possession.

The respondents are however in possession of about ten (10) acres of the suit land and have been in such possession for about 28 years. They claimed ownership of the suit land. Being in possession of the suit land the burden of proving that they were not owners was on the appellant by dint of the provisions of ***Section 116*** of the ***Evidence Act***. The Section reads as follows:-

> **"116. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving**
>
> **that he is not the owner is on the person who affirms that he is not the owner."**

The respondents also, in our view, demonstrated that the suit land originally belonged to the deceased. They swore that they were given the suit land by the deceased and that the appellant was given another parcel namely, ***Samia/Bujwanga/623.*** An extract of title to that parcel of land was produced at the trial as exhibit 5 and shows that the land is indeed registered in the name of the appellant. It comprises approximately 4.8 hectares which is smaller than the suit land by about 0.8 of a hectare. The appellant testified that the respondents' share of family land is in parcel number ***Samia/Bujwanga/551***. A certificate of Official Search of that parcel of land was produced at the trial. It indicates that the same is registered in the names of the deceased together with **Benendicto Ojiambo, Fabiano Ojiambo and Augustino Ojiambo**. The deceased owned ¼ of that parcel of land. As the parcel comprises five (5) hectares, the deceased share was about 1.25 hectares. Given the registration particulars of parcel number ***Samia/Bujwanga/551***, we are not persuaded that the same was designated for the respondents. In any event, the appellant, in cross examination, at the trial before the High Court, admitted that the 2nd to 5th respondents did not have any land from the deceased.

The appellant also testified that parcel number ***Samia/Bujwanga/624*** was given to **Maurice Sumba** and **David Otumbo** who are also sons of the deceased. A Search Certificate produced at the trial confirms that position. The title comprises 5 hectares, each of the two getting 2.5 hectares. Another son of the deceased, **Nicholas Namanyi Ojiambo**, is registered as proprietor of title number ***Samia/Bujwanga/625*** which comprises 0.28 of a hectare as per the Search Certificate produced at the trial.

It is therefore plain that none of the sons of the deceased was given more than three hectares of family land except the appellant who would appear to have been given the lion's share of family land comprising about 10.6 hectares *(parcel number Samia/Bujwanga/623 and parcel number Samia/Bujwanga/629 combined).*

We do not think that the deceased intended that the appellant gets such a disproportionate share of family land whilst the respondents get almost nothing. The respondents demonstrated that the suit land is family land to which they are entitled. They occupied the suit land during the life time of the deceased and even after his demise. They have been in such occupation for 28 years. The evidence at the trial therefore demonstrated, in our view, that the appellant held the portion they have so occupied under a trust under customary law in their favour. They did not expressly plead the trust in their favour but the facts established at the trial clearly proved, on a balance of probabilities, that the appellant held the said potion in trust for them. In **Odd Jobs vs Mubia [1970] EA 476,** it was held as follows:-

> **"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."**

That is what happened in this case. So, although a trust was not pleaded, the court would still have found for the respondents on the basis of proved facts. The trust need not have been entered on the register in respect of the suit land. In our view, the respondents' interest was protected by the proviso to ***Section 28*** of the ***Registered Land Act Cap 300 Laws of Keny***a. The section is in the following terms:-

> **"28. The rights of a proprietor whether acquired on first registration, or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject-**
>
> **(a) to the leases, charges and other encumbraces and to the conditions and restrictions, if any, shown in the register, and**
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> **(b) unless the contrary is expressed in the register to such liabilities rights and interests as affect the same and are declared by Section 30 not to require noting on the register.**
>
> **Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee"**
>
> ***(emphasis supplied)***.

This is not the first time a trust under customary law is being enforced. There are other cases of this Court where such a trust has been declared, among them, **Phillicery Nduku Mumo vs Nzuki Makau [Nairobi CA No. 56 of 2001] (UR)**. In that case this Court held as follows:-

> **"...there is nothing in the Registered Land Act Cap 300 Laws of Kenya..... which precludes the declaration of a trust in respect of registered land even if it is a first registration."**

In that case, the appellant had sued her step brother for trespass upon, damages in respect of, and eviction from ***Machakos/Kiandoni/3013*** *(the suit land)* which the appellant claimed was registered in her name absolutely. The respondent denied the appellant's claim and counter claimed against the appellant that the suit land had been registered in the appellant's name in trust for herself and the respondent and other family members. The High Court found that the suit land had originally belonged to the father of the appellant and the respondent who had died before the land had been demarcated which land was occupied by the mothers of the appellant and the respondent. At the time of adjudication and registration, the appellant's mother registered the suit land in her name – and subsequently transferred the same to the appellant.

On those facts the High Court held that the suit land was registered in the name of the appellant's mother on her own behalf and on that of the mother of the respondent. The appellant appealed. This Court dismissed the appeal and stated as follows:-

> **"On our own consideration of the evidence on record we agree with the learned judge that customary law trust had been proved. It is trite that trust is a question of fact and has to be proved by evidence."**

The facts in that case are somewhat different from the facts in our case but the principle enunciated therein applies to the facts we have found proved in this case.

The facts pleaded by the respondents and the evidence adduced at the trial proved, on a balance of probability, that ten (10) acres of the suit land was the respondents' share of the deceased's land which the appellant caused to be registered in his name in unclear circumstances. The consequence was that the appellant became a trustee in respect of the ten (10) acres of the land the respondents occupy.

Although the learned Judge of the High Court found that the respondents had proved their claim against the appellant as required in law, he was wrong in his conclusion that they had demonstrated adverse possession. The respondents were only entitled to the area they are in actual possession of. The 1st respondent did not specify the size of the portion they occupy. She however, as already observed, stated that the appellant was occupying a portion at the edge of the suit land. The 2nd respondent was categorical that they occupy about ten (10) acres of the suit land whilst the appellant occupies three (3) acres. The 2nd respondent was not challenged in cross-examination about his testimony on the portions occupied by the respective parties.

The learned Judge of the High Court did not consider the effect of the appellant's occupation of three (3) acres of the suit land on the respondent's claim. In not doing so, we think he fell into error as adverse possession which he wrongly found proved, must encompass actual possession and the respondents freely admitted that they were in actual possession of about ten (10) acres of the suit land and not the entire suit land.

These findings further show that the appellant did not discharge his burden, under ***Section 116*** of the Evidence Act (supra), of proving on a balance of probability that the respondents are not the owners of ten acres of the suit land even though the land is registered in his name.

In the end the appeal therefore succeeds only to a very limited extent with regard to the area the respondents are entitled to. We set aside the High Court judgment by which the entire suit land was declared the property of the respondents. We substitute therefor an order allowing the respondents' Originating Summons limited to ten (10) acres of the suit land. The remaining part will continue to be occupied by the appellant. Judgment accordingly.

Since the parties are close relatives, there will be no order for the costs of the appeal.

Those shall be our orders.

Dated and delivered at Kisumu this 26th day of July, 2013.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR