



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL 343 OF 2005

JECINTA ADHIAMBO OBILI *suing as Administratrix of the*
***estate of the deceased MICHAEL BWIRE ONGANDI* APPELLANT**

AND

ONAMU ODINGA RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisii (Bauni, J) dated 19th July, 2005

in

H.C.C.C. NO. 170 OF 2002(OS)

JUDGMENT OF THE COURT

1. By way of an originating summons, the appellant, **JECINTA ADHIAMBO OBILI (suing as Administratrix of the estate of the MICHAEL BWIRE ONGANDI [deceased])**, sought for an order declaring that the deceased acquired by way of adverse possession a portion of land parcel **No. KANYAMKAGO/KAWERE II/522**. The appellant also sought for a determination of the following questions:

“1. Whether or not Michael Bwire Ongadi has acquired adverse possession of a portion (sic) of land measuring slightly over ½ acre with a clearly delineate boundaries.

2. If so, the name of Onamu Odinga should be cancelled therefrom and the same be substituted by (sic) the name of plaintiff herein as the administratrix of Michael Bwire Ongadi, deceased.”

2. The respondent opposed the originating summons; directions were given that the dispute would be determined through oral evidence. Both the appellant and respondent adduced oral evidence in support of their respective positions. The learned trial judge evaluated the evidence and found that the appellant’s deceased husband failed to honour the agreement by building a shop for the appellant as agreed in the agreement for sale. Secondly, the appellant’s husband was ordered by the respondent to vacate the land in 1993, thus the appellant was not in occupation of the suit land continuously for a period of twelve years. The appellant’s originating summons was dismissed with costs.

3. Being dissatisfied with that order made on 19th July, 1993, the appellant has now appealed on the following grounds:

“(a) The learned trial magistrate misdirected himself to address himself to the crucial issue that the appellant herein and in particular the estate of the deceased had been uninterrupted occupation since 1989.

(b) The learned trial magistrate failed and/or misdirected himself overwhelming evidence from both sides which confirmed that the estate of deceased had been uninterrupted occupation of the disputed plot.

(c) The learned trial magistrate erred and misdirected himself by not applying of all the legal principals which can entitle one to require adverse possession.

(d) The learned trial magistrate failed to and/or misdirected himself in deciding this case against the weight of evidence.”

4. In further arguments to support the above grounds, Mr Soire, learned counsel for the appellant, argued the above grounds of appeal together. He submitted that there was ample evidence to show that the appellant’s husband had been in occupation of the suit land for a period of more than twelve years. That occupation should have entitled the appellant to an order of adverse possession. The respondent admitted that there was a sale agreement and the appellant’s deceased husband took possession of the land in 1989 but he was requested to leave in 1995. Shortly, thereafter, the appellant’s husband was shot and suffered serious injuries from which he succumbed to death in 2002.

5. The respondent did not take further steps to evict the appellant who built a shop and developed the plot. Even though the appellant moved to Busia and vacated the suit land in 1994, she left the plot to one **Jamhuri Nyakwara** who was renting the premises. Nyakwara also gave evidence that he was in occupation of the appellant’s premises from 1997. We were referred to the case of **GITHU VS NDETI (1984) KLR 776** whose facts are all on fours with the current case. This appeal was not opposed by the respondent, although the firm of Minda & Company Advocates who are on record for the respondent was duly served with the hearing notice.

6. This being a first appeal, we are mandated by law to re-evaluate the entire evidence before the trial court and arrive at our own independent conclusion on whether or not to allow the appeal. This is with the usual caveat that we did not see or hear the witnesses testify and give due allowance for that.

Under **Section 38 of the Limitation of Actions Act**, it is provided that:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited under Section 37 of this Act, 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.

(2) An order made under sub section (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

In **Volume 24 of Halsbury’s Laws of England, 3rd Edn at page 252**, it is stated:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

7. In this case, the question we have set out to answer is whether the appellant proved that her late husband was in continuous and uninterrupted occupation of the suit premises for a period of twelve years? The brief evidence by the appellant is that her late husband entered into an agreement with the

respondent over the sale of ½ acre of parcel No. KANYAMKAGO/KAWERE II/522 in 1988. The appellant's husband paid KShs.2,000/= towards the purchase price but did not construct a shop for the respondent as per the agreement but nevertheless he continued being in occupation.

It is also common ground from the evidence of both the appellant and respondent that the appellant was supposed to pay KShs.2,000/= towards the purchase price and also construct a shop for the respondent.

8. It is also common ground that the appellant's husband constructed the shop but failed or neglected to hand it over to the respondent. Thus in 1994, the respondent asked the appellant's husband to vacate from the premises. The appellant's husband did not vacate, unfortunately he was attacked by unknown people who inflicted injuries upon him and in the year 2002, he succumbed to death as a result of those injuries. The appellant claims that they left the premises under the care of one Wesonga who leased it to Jamhuri Nyakwara. Nyakwara also gave evidence that he was in occupation of the shop as the tenant of the appellant from 1997. From the appellant's own evidence, they started living on the plot in 1992.

9. The respondent denied that the appellant was in occupation of the suit premises. He insisted that the appellant's husband failed to honour the agreement for sale as he was to build a shop for the respondent in addition to the sum of KShs.2,000/=. Wilson Okanda Obili also testified on behalf of the respondent. He told the court that he used to lease the suit land and later he purchased it from the respondent and the appellant has not been in occupation thereto.

10. Based on this evidence, the learned trial judge found that the claim of adverse possession was not proved. On page 2 of the judgment it is noted:

“The sale was in 1989 and evidence adduced was that the deceased started to build on the land the same year. Presumably, this is the time he went into occupation. However, PW 1 told the court that in 1993 the defendant ordered them to vacate the land. Thus even if one were to assume that time started running in 1989, the occupation was interrupted in 1993. The deceased left the land in 1994. Clearly there is no time when he was in occupation of the land for an uninterrupted period of 12 continuous years. In 1993, the defendant clearly told him to leave. From then he was not staying in the land with the consent of the defendant. Adverse possession thereto does not lie.”

11. We have re-evaluated the evidence before the superior court and the submissions by learned counsel for the appellant. The evidence on record did not prove to the required standard that the appellant was in possession of the suit land, continuously for a period of twelve years. It is trite that possession must be continuous; it must not be broken for any temporary purposes or by any endeavours to interrupt it or by way of recurrent considerations. The evidence is clear that possession was interrupted in 1993 or 1994 when the respondent asked him to leave the land. It is clear from the evidence that the appellant's husband left after he was attacked and never returned. One Nyakwara leased the suit land from 1997 which can be deemed as constructive possession on behalf of the appellant; even then, there is a period of three years between 1994 and 1997 which, therefore, breaks the claim based on possession. The claim of continuous possession broke. If the claim is based on presumption that possession began in 1997 and this suit was filed in 2005, this is outside the period of twelve years.

12. This case was decided based on the evidence that the learned judge considered and found the appellant failed to prove a case of adverse possession, this Court cannot interfere with those factual findings, especially the fact that the trial judge found the appellant did not prove the case to the required standard.

13. In the oft' cited case of; **PETER VS SUNDAY POST [1958] EA 424 and 429, E**, Sir Kenneth O'Connor P said:

“It is a strong thing for an appellate court to differ from the findings, on a question of fact, of the Judge who tried the case and who has had the advantage of seeing and hearing witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with

caution: it is not enough that the appellate court might itself have come to a different conclusion.”

14. In view of the foregoing, we are satisfied that the learned judge properly evaluated the evidence and arrived at the right conclusion that the appellant did not prove that she was in adverse possession of the suit land.

We have come to the same conclusion as the learned judge thus this appeal lacks merit and the same is dismissed. Since this appeal was not defended, there will be no order as to costs.

Dated and delivered at Kisumu this 21st day of June, 2012.

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

H. M. OKWENGU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR