



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 142 of 2007

CIVIL APPEAL NO. 142 OF 2007

BETWEEN

LEONOLA NERIMA KARANI.....APPELLANT

AND

WILLIAM WANYAMA NDEGE.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Busia (J.K. Sergon J) dated 4th August, 2006.

in

H.C.C.C NO. 40 of 1997)

JUDGMENT OF THE COURT

The appellant **Leonola Nerima Karani** moved to the seat of justice and presented Busia High Court HCCC No. 40 of 1997 (OS) dated the 1st day of August, 1997 and filed on the 16th day of September, 1997 against the Respondent **William Wanyama Ndege**, seeking entitlement by way of adverse possession of a portion of land measuring 0.3 Ha out of land parcel **No. LR.Bunyala/Bukoma/433**.

The respondent countered the appellants claim by filing of a replying affidavit deponed to by the respondent on the 26th day of May, 1999 and filed on 1st December, 1999 in which he denied the appellants claim and prayed for its dismissal.

Parties were heard, and in a Judgment delivered on the 4th day of August, 2006 **J.K. Sergon J** dismissed the originating summons. The appellant thereby became aggrieved by that dismissal order, and preferred the appeal subject of this Judgment. A total of four grounds of appeal have been put forward for consideration namely:-

“(1) The trial Judge erred in law and in fact in holding that the appellant had not acquired a piece of land measuring 0.3 hectares land comprised in Title No. Bunyala/Bukoma/1433 by virtue of adverse possession.

- (2). **That the trial Judge erred in law and fact in holding that time began to run when the purchase price was completed instead of when the contract was entered into or when the contract became null and void for lack of land control board consent.**
- (3). **That the trial Judge erred in law and fact in failing to hold that the appellant had enjoyed quiet and open occupation and possession of the said land for a period of 12 years and the trial Judge therefore erred in law and fact in computing time.**
- (4). **The Judgment was against the weight of the evidence on the record.”**

On the hearing date, learned counsel **Mr. Athung’a Washington** appeared for the appellant, while learned counsel **Mr. Onsongo O. Wicliffe** appeared for the respondent. In his submissions to court, **Mr. Athung’a** urged us to allow the appeal for the reasons that evidence adduced before the learned trial Judge of the High Court demonstrates that the deceased husband of the appellant purchased the suit land in 1977, and immediately took possession; numerous structures were erected on the land in 1983; the purchase price was completed in 1983; Although the respondent alleges to have come on to the scene in the year 1984-86 after he had allegedly purchased the whole parcel of land he did not assert his rights against the appellant as he settled on the lower part of the land, leaving the appellant residing on the upper part of the suit land. First assertion of appellants rights to the suit portion came in 1996 when the late husband of the appellant filed Busia HCCC NO.436/96 seeking adverse possession and shortly thereafter followed by the presentation of the originating summons whose dismissal gave rise to this appeal. He stated further that as at the time the respondent came on board in the year 1988, the Title in favour of the appellant was already being acquired; that the change in ownership from the original owner to the respondent did not stop time for Title acquisition through adverse possession by the appellant from running; that by reason of the said time having continued running despite the change of ownership, Title by adverse possession had been acquired as at 1986 when the deceased husband of the appellant moved to court to claim Title; as by 1996 a period of 13 years had lapsed, whereas, as at the time the originating summons subject of this appeal was filed in 1997, title by way of adverse possession had already been acquired; that the learned trial Judge computed the time wrongly and that is why he failed to find for the appellant. Lastly that upon payment of the 1st installment of the purchase price, the appellant ceased to reside on subject portion of the suit land with the permission of the owner.

In response to that submission, **Mr. Onsongo Wicliffe** for the respondent urged us to dismiss the appeal on the grounds that the originating summons is defective as it did not comply with the provisions of order 36 rule 3B CPR; that title by way of adverse possession had not crystallized in favour of the appellant because it is not known when the appellant purchased the suit portion of land or when the appellant entered the suit land as there is no sale agreement; that there is no evidence as to when the last installment in respect of the purchase price was paid as the appellant said it was paid in 1977 while the deceased husband of the appellant stated that he had purchased the land in 1984; that the appellant was a mere licensee on the suit land as she had been permitted to be on the land by the owner of the land; lastly that when the evidence on the record is considered in its totality, it does not support the appellant’s assertion of being entitled to the portion claimed out of the land by way of adverse possession. Both sides cited authorities to court which we have perused and considered.

This being a first appeal we are reminded of our role as the first appellate court which is to re-evaluate and re-assess the evidence adduced before the High Court putting in mind that the High Court saw the parties and heard them and giving allowance for that; applications of the law to those facts and the conclusions reached by the learned trial Judge and then determine whether conclusions reached by the trial Judge are to stand or not and give reasons either way. See the case of **Selle versus Associated Motor Boat Co.(1968) EA 123** at page 126 where in **Sir Clement De Lestang V.P.** made the following observation:-

“An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court, must 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 this 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 in the case generally (Abdul Hameed Saif versus Ali Mohamed Sholan (1955) 22 E.A.C.A 270) followed."

We have re-evaluated the evidence on the record under the guidance of the principles of the case cited above and we now proceed to make the following findings of fact on the said evidence:-

(i). The dispute is in respect of land parcel number **BUNYALA/BUKOMA 1433** comprising of 0.6. Ha translated to four and half acres (4 ½) acres as per the evidence of (PW4) **James Siguna Omari**. The land was adjudicated in the year 1974 in favour of **Bwire Buluma (PW2)** and one **Kechula/Buluma** said to have been a father and daughter respectively. By virtue of this adjudication, the said registered owners became vested with all the rights enumerated under section 28 of the repealed Registered land Act cap 300 laws of Kenya. Likewise by virtue of the registered owners being vested with the mentioned rights, there arose a corresponding right to divest themselves of those rights either voluntarily or involuntarily by way of sale or other voluntary transfer or by way of ceding possession and ownership rights accrued through a claim by way of adverse possession.

(ii). The competing interests of the disputants herein have their roots in alleged sale agreements variously entered into by the appellant and the respondent as the purchasers on the one hand and (PW2) **Samuel Bwire Buluma** as the owner on the other hand. A written agreement for the sale transaction in favour of the appellant's deceased husband though alleged to have been in existence was not exhibited. It was however confirmed by the appellant/and her witness (PW2) **Samuel Bwire Buluma**, the seller, and conceded by one of the defence witnesses **DW3 Boniface Mjanji Wanjala** who alleged to have been a village elder since 1962, and had allegedly witnessed the said sale agreements between appellant's deceased husband and (PW2) as well as that between the respondent and (PW2). There is consensus that the sale respecting the appellant took place in the year 1977. In contrast, the agreement of sale between (PW2) **Samuel Bwire Buluma** and the respondent **William Wanyama Ndege** was annexed to the replying affidavit besides its existence being confirmed by the evidence of (DW3) (PW2).

(iii). According to the appellant, her deceased husband and his entire family took possession of the portion of land currently under her possession in the year 1977 and have ever since, openly carried out various activities on it to the exclusion of the original owner (PW2) and the respondent, a position supported by the evidence of (PW2) and (DW3). It was alleged by her and not controverted by the respondent that her deceased husband was buried on this same portion.

(iv). The computation of time of possession by the appellant and her husband as having started running in 1977 appears to have been interrupted by the evidence as to when payment of the purchase price was completed. Although the appellant had initially claimed that full purchase price was paid in the year 1977, and possession taken immediately thereafter, she conceded in her cross-examination that they completed payment of the purchase price in the year 1983, and as per the content of paragraph 5 of the plaint filed by the appellants' deceased husband in the Senior Principal Magistrates court at Busia in HCCC NO. 434/1996, the deceased was put in possession, built houses and started living on the said portion since 1982.

(v). The respondent and his witnesses (DW2) and (DW3) confirm that the respondents interests were brought on board with regard to the suit land in the year 1984 when he allegedly purchased his interest from (PW2).

(vi). The documentation relating to land control board consent respecting both sale transactions tendered in evidence by (PW4) indicate that (PW2) made a request for Land Control Board consent for purchase and transfer respecting both sale transactions in the year 1985. Vide this documentation, the owner intended the suit land to be subdivided into three portions namely two and half (2½) acres to go to the respondent as per the sale agreement between them, one (1) acre was to go to the deceased husband of the appellant, while one acre was to go to the original owner (PW2). The said application for consent was granted as sought and a transfer in favour of the respondent initiated thereafter. This transfer in favour of

the respondent was supposed to be for only two and half (2½) acres, but when the Title deed was processed on the same date of the 22nd day of June, 1988, the whole suit land was transferred and registered in favour of the respondent.

(vii). (PW2) the original owner is on record as having said that he sold only two and half (2½) acres to the respondent; that it is the respondent who drafted the sale agreement between him (PW2) and the respondent, and that the intention of (PW2) when seeking the blessings of the area land control board consent respecting both transactions was to give the respondent only two and half (2½) acres and the rest to himself (PW2) and the appellant being an acre each. Failure to honour the land control board consent is what prompted the deceased husband of the appellant to move to the seat of justice in the Senior Principal Magistrate court at Busia and filed SRMCC No.434/1996 against **Samuel Bwire Buluma** (PW2) and **William Wanyama Ndege**, the respondent claiming an interest limited in 0.3 Ha in the suit land.

(viii). Although Vide paragraph 9 of the respondents' replying affidavit to the originating summons, the respondent named **Ismael Okuku Ndege**, **Joseph Okuku Adwasa** a step father and **Lucia Ngira Ndege** a mother, as persons who had been requiring the appellant to vacate the suit land since 1984, these did not depone supporting affidavits to confirm that assertion. Save that **Joseph Okuku Adwasa** gave evidence as (DW2) but he did not say that he had ever required the appellant to vacate the suit land. He instead conceded that it is the appellant who took the first action to assert her rights over the suit portion.

On principles of law and case law, we are satisfied that the appellant followed the correct procedure and directed her grievances to the right forum in terms of **Section 38(1)** of the **Limitation of Actions Act Cap 22 Laws of Kenya**. The retired order 36 rule 3DCPR provides:

“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”.

“Order 36. 3D (1) An application under section 38 of the limitation of Actions Act shall be made by originating summons.”

(See **Kiprop Kanda versus Gabriel Biwot Kanda and 3 others Eldoret CA No. 219 of 2003 (UR)** decided by the CA on the 23rd day of February, 2007 wherein this court held inter alia that:-

“The claim for title by adverse possession is to be mandatorily sought by way of an originating summons under order XXXVI rule 3D of the CPR Rules....”

The appellant having used adverse possession as the vehicle chosen to champion her rights of entitlement to the suit portion, all the appellant was obligated to demonstrate to the trial court then and to this appellate court now is that there is existence of possession, existence of a right to so possess, and existence of loss of possession and right to so possess by the owner or a subsequent title holder in her favour. See the case of **Wambugu versus Njuguna (1983) KLR 171** wherein this court laid down the following guiding principles:-

- (1) **The general principle is that until the contrary is proved possession in law follows the right to possess.**
- (2) **In order to acquire by the statute of limitation 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it....**
- (3) **The limitation of Actions Act, in adverse possession contemplates two concepts, disposition and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for**

the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

- (4) Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist...**
- (5) The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land...**
- (6) Adverse possession means that a person is in possession in whose favour time can run...**
- (7) Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...**
- (8) Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.**

This court went on to stress further in the case of **Ng'ati Farmers Co-operative Society Limited versus Councilor John Ledidi & 15 others Nakuru CA 64 of 2004(UR)**, after drawing inspiration from the observation of **Mr. Lindhoy** in the case of **Kynoch Limited versus Rour Lands (1912) 1ch.527** and also **Little Dale versus Liver Pool College (1900) Ich19, 21** that:-

“In order to acquire by the statute of limitations 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...Two things appear to be contemplated by that enactment; disposition and discontinuance of possession...if this is the correct way to approach the problem, the question becomes, has the claimant proved that the Title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period? Rather than has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years?

The next question therefore is what constituted dispossession of the proprietor. It simply means that in order to defeat a title by dispossession the former owner there must be demonstration of existence of acts done which are in consistent with his enjoyment of the soil for the purpose for which he intended to use it.

Besides addressing acts in consistent with the owners right to use, the claimant has also to address acts inconsistent with subsequent title holders' right to use the soil. See the case of **Githu versus Ndeete (1984) KLR 776** wherein the court of appeal held inter alia that:-

- (1) The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession.**
- (2) Where the person in possession has already began and is in the course of acquiring rights under section 7 of the limitation of Actions Act (cap 22) and by virtue of section 30(f) of the Registered land Act (cap 300) those rights are overriding interests to which the new registered purchasers' title will be subject.**

(3) Time ceases to run under the limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possession assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the limitations of Action Act.

(4) A Title by adverse possession can be acquired under the limitation of Actions Act to a portion of the piece of land which the owner holds”

The suit land namely **BUNYALA/BUKOMA/1433** had been adjudicated on the 8th day of November, 1974 (8/11/74) in favour of (PW2) **Samwel Bwire Buluma and Kechula Buluma**. By reason of the afore said registration of the suit land in the names of (PW2) **Samwel Bwire Buluma and kechula Buluma** they became vested with all the rights set out in section 28 of the defunct registered land Act cap 300 laws of Kenya, among them (PW2's) ability to voluntarily dispose of either a portion of or the entire suit land by way of sale and transfer. Alongside this right to dispose off, also runs a corresponding right of the running of the period of time for a claim of adverse possession against such a Title in favour of a 3rd party.

The appellants' claim to the suit portion of land has its roots in an alleged sale transaction between (PW2) **Samwel Bwire Buluma** and the deceased husband of the appellant way back in 1977. Although, no sale agreement between the deceased husband of the appellant and PW2 was exhibited, there is credible evidence adduced in the record from the appellant as supported by (PW2), **Samwel Bwire Buluma** the original owner and one defence witness (DW3), **Boniface Mjanji Wanjala** a village elder allegedly since 1962, to the effect that indeed there was such a sale of a portion of the suit land to one **Okello Karani**, the deceased husband of the appellant. It was also confirmed by the three that possession was given by (PW2). The exact area in terms of acreages of the portion sold and possession given is not indicated as it is said the appellant's husband was simply shown a defined area on the ground and sisal plants planted to mark the boundary separating the appellant's portion from the rest of the balance of the land then left in favour of (PW2). Although the respondent attempted to deny the immediate taking of possession by the appellant by alleging that the land was vacant when he purchased it, that denial was controverted by the evidence of (PW2), and (DW3) a defence witness that indeed the deceased husband of the appellant was given possession and was in such possession in 1984 as at the time the respondent purchased a portion of the same suit land.

We note from the record that indeed the time and or date when the said possession was given was inconsistent as the appellant said it was in 1977 as confirmed by (PW2) and (DW3), and yet paragraph five (5) in the plaint filed in Busia Senior Resident Magistrates' Court SRMCCC.434/1996, her deceased husband had averred that possession was given in 1982. The appellant also changed in cross-examination that they completed payment in 1983. The court was and still is duty bound to reconcile these discrepancies when computing time for purposes of establishing the appellant's right of entitlement on account of adverse possession.

Being agricultural land, the divestation of rights of possession over the suit portion from (PW2) and vestation of the same rights in the appellant and the respondent needed the blessing of the area land control board. The documentation tendered in evidence through the then area land Registrar Busia, **James Siguna Omari,(PW4)** indicate that only one application to the area land control board dated 26th December,1984 was presented in a meeting held by the **Hakati** land control board on the 11th day of January,1985 and granted on the 22nd January 1985. It was for subdivision of the suit land into three portions and transfer of the resulting subdivisions of two and half (2½) acres, which (PW2) maintains are the acres sold to the respondent, one (1) acre allegedly comprised in the portion sold to the appellants' deceased husband, leaving one (1) acre for (PW2) which he allegedly left for his use. (PW2) said he was surprised when he learned that the entire suit land had been transferred to the respondent to the exclusion of the appellant and himself.

It was (PW2s') further testimony that he never intended to transfer the entire suit land to the respondent.

(PW2)s assertion on this aspect was supported by the evidence of (PW4) which was uncontroverted testimony that besides the consent approving subdivision of the suit land into three portions and transfer of the indicated specific portions to the named three persons, there is no other application for consent to the said land control board and consent of the said land control board approving the transfer of the entire suit land to the respondent. (PW4) was surprised that the instrument of transfer received in 1988 indicated transfer of the entire portion of the suit land to the respondent. Although the respondent denied making alterations or being privy to the making of alterations on the transfer document, he did not tender in evidence any other application for consent of the area land control board and consent for the transfer of the whole suit land to him besides what (PW4) tendered in evidence as evidence of what the then owner of the suit land (PW2) intended to do with regard to the owners' divestation of rights from himself to the two buyers and himself.

On the basis of the above, we are satisfied that the appellant has brought herself within the ambit of the ingredients required to be established before one can earn a relief of entitlement to Title by way of adverse possession by, demonstrating existence of an assertion to a portion of the suit land namely 0.3 Ha, that the then owner namely (PW2) had become dispossessed of the said portion or alternatively that (PW2s') possession of the suit portion was discontinued. Lastly she has demonstrated that she had taken possession of the portion of the suit land claimed by her and put it to her own use to the exclusion of the then owner (PW2) and the respondent. This stand on our part is supported by the fact, that absence of proof of existence of a written agreement of sale of a portion of the suit land by (PW2), to the deceased husband of the appellant notwithstanding, there is credible evidence on the record from the appellant herself (PW2) and (DW3) which point to the existence of such a sale having taken place. Secondly the appellant also has locus standi to pursue the said portion of the suit land in her favour as she holds a grant of letters of administration to the estate of her deceased husband. Thirdly despite the discrepancy in the evidence with regard to the date when possession was given to the appellant, such possession could have been given in 1982 as per the averment in the plaint in SRMCC 434/96, or in 1983 as per the evidence in cross-examination of the appellant. Both of these dates are relevant in computing time for purposes of adverse possession. It means that as at the time when the deceased husband of the appellant made an assertion to the land in 1996 a period of 12 years from 1982 and 11 years from 1983 had lapsed. While as at 1997, when the originating summons subject of this appeal was filed, a period of 15 years as of 1982 and 14 years as of 1983 had lapsed. In the premises, we are satisfied that the appellant was within the bracket of the period permitted for the laying of acclain by way of adverse possession and on this account the appellant was entitled to complain that the learned trial Judge had erroneously and wrongfully computed time for purposes of either establishing or ousting the appellants claim by way of adverse possession.

The above findings notwithstanding, we are alive to the existence of evidence of intervening events whereby the entire suit land was transferred to the respondent in the year 1988, thereby allegedly bringing to an end the running of the period of time by way of adverse possession in favour of the appellant as against the original owner (PW2). The position in law on such a change is as was stated in the case of **Githu versus Ndeete (Supra)** which is that a mere change in the title holding in favour of the respondent did not stop time which had started running in favour of the appellant as against (PW2) the original owner from continuing to run as against the incoming owner. For this reason the respondents' assertion of entitlement to the entire suit land is defeated by his own sale agreement exhibited by him in his replying affidavit to the originating summons which talked of sale of two and half to three (2½ -3) acres out of the suit land. Further support is from the uncontroverted evidence of (PW4) who testified clearly that the suit land comprised 0.6 Ha which translates to four and half (4½) acres. When the respondents two and half (2½) acres are excised off and given to the respondent, there is left a balance of two (2) acres which should have rightly gone to the appellant and (PW2) as per the consent granted herein. Since (PW2) is not pursuing his entitlement at least not in these proceedings, the balance of that acreage should go to the appellant. More so when it is evidently clear that (PW2's) evidence supports the appellant's assertion to entitlement of 0.3. Ha of the suit land.

There has been no interruption of the appellant's possession of the suit portion by either (PW2) or the respondent from the time possession was taken by the appellant (PW2) who gave evidence in favour of the appellant at the trial did not mention existence of such a move on his part. None was also

demonstrated to exist on the part of the respondent as the persons named to have been the ones who made moves to require the appellant to vacate the portion of the suit land allegedly occupied by her did not depone affidavits in support of this assertion. Further (DW2) one of those named to have made such moves never mentioned it in his testimony in court The respondent's assertion that when he purchased the suit land it was vacant was controverted by the evidence of his own defence witness (DW3) who witnessed the sale transaction between (PW2) and the respondent way back in 1984 and who confirmed that the suit land was not vacant at the time of the said sale, as the appellant had already settled on the portion of the suit land over which she moved to court to assert an ownership Title.

The respondent never took and has never taken any legal action to divest the appellant of title from the portion of the suit land claimed by her. Mere administrative action through the area chief as well as the writing of letters has been held not to be a sufficient move which can be held to oust actions anchored on adverse possession. (See **Githu versus Ndeete (Supra)**)

We are therefore satisfied on the basis of what we have stated above that this appeal ought to succeed. We accordingly allow this appeal, set aside the judgment dated and delivered on 4th August, 2006. In its place, the prayers in the originating summons dated 1st August 1997 are allowed in terms of prayers 1, 2 and 3; costs of this appeal and of the High Court to be paid by the respondent. Judgment accordingly.

Dated and delivered at Kisumu this 28th day of November, 2012.

J.W.ONYANGO OTIENO

JUDGE OF APPEAL

ALNASHIR VISRAM

JUDGE OF APPEAL

R.N. NAMBUYE

JUDGE OF APPEAL

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

DEPUTY REGISTRAR