



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 227 of 2001

BIDCO OIL REFINERIES LIMITED APPELLANT

AND

ROSSLYN DEVELOPMENTS LIMITED RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Milimani Commercial Courts (Hon. Mr. Justice Mbaluto) dated 5th June, 2001

in

HC.C.C.C. NO. 1825 OF 2000 (O.S.)

JUDGMENT OF THE COURT

Although the Memorandum of appeal in this matter puts forward three grounds, they all relate to one issue and it was argued as such by the appellant's Counsel – *the issue of adverse possession*.

The dispute between the parties revolves around a portion of a larger parcel of land in *Rossllyn Estate* Nairobi otherwise known as **LR No. 7788/21/R (Plot 21/R)** which was transferred and registered in the name of **Rossllyn Development Ltd** (“Rossllyn” or “the respondent”), on 30th May, 1952. Adjacent to that parcel of land is **LR. NO. 7788/36 (Plot 36)** which was sold and transferred to **M/s Bidco Oil Refineries Ltd** (“Bidco” or “the appellant”) on 15th February, 1995. The disputed portion, whose size is not stated though it is ascertained, lies between the two plots but is admittedly part of **plot 21/R**.

Bidco went before the superior court on 17th October, 2000 and posed various questions for determination by the Court in an Originating summons under **Order 36** of the *Civil Procedure Rules*. The questions were as follows:-

- “(a) Whether the applicant is in adverse possession of a portion of all that property known as L.R. No. 7788/21/R;***
- (b) Whether the applicant having purchased property to which a portion of L.R. No. 7788/21/R was annexed acquired all the rights that had accrued to the previous registered owners of the said property;***
- (c) Whether the applicant should be registered as the owner of a portion of all that property***

known as L.R. No. 7788/21/R;

(d) Whether a permanent injunction should issue restraining the Respondent from trespassing, remaining at or in any way interfering with the Applicant's quiet enjoyment and development of a portion of all that property known as L.R. No. 7788/21/R;

(e) Whether the applicant is entitled to costs.”

The basis for instituting those proceedings was stated in a 22 – paragraph affidavit sworn by a director of Bidco, Mr. Vimal Shah who deponed in part:-

“4. At the time of purchasing the said property there was a wire fence around it which fence had been there for quiet some time.

5. We occupied the said property as it was together with the perimeter fence.

6. Later we decided to build a stone wall around the property following the same perimeter that was defined by the wire fence.

7. Upon embarking on putting up of the stone wall the defendant through its officials informed us that the lower end of the property was not part of what we had purchased and that the portion of the property was part of the defendant's property known as L.R. No. 7788/21/R.

8. We entered into a protracted correspondence with the defendant's officials trying to show them why the disputed portion of the land should be the Plaintiff's but could not reach any compromise with them.

9. In the process of trying to resolve this matter it came to light that the property had been in the condition that it was together with the disputed portion being included as part of L.R. No. 7788/36 for a very long time. That each successive owner of the property had occupied it the way it is right from the beginning in 1968.

10. The defendant has owned the adjoining property since 1957 and the previous owners had occupied the disputed portion openly and without any secrecy.

11. The previous owners have occupied the portion of the disputed property and planted trees, which are over 30 years old.

12. The defendant's right to the said portion of the property has been extinguished and are only holding the portion as trustees of the persons in adverse possession.

13. The Plaintiff has acquired the rights that all the previous persons who owned the property had and should therefore be registered as the owners of the said portion of land.”

Mr. Shah further deponed that his Company had constructed a stone wall at great cost along the boundary of the disputed plot which the respondents had threatened to demolish. Such action would not only compromise the security of **plot 36** but also lower its value to a level that was incomparable in damages, hence the suit.

Rosslyn promptly responded with three affidavits and a large bundle of documents exposing the history of the disputed portion. One was from its director, **Montague Charles Ruben**, who annexed survey maps and title documents to authenticate ownership of **plot 21/R** by Rosslyn. By the time Bidco bought the land in 1995, he swore, the disputed portion had a fence consisting of random/broken wires and sisal plants enclosing some trees planted therein in early 1980's to screen off some ugly telephone exchange wall. The trees were planted by one Mrs. Beckmann at the instance of Rosslyn. As for occupation of the disputed portion by previous owners of **plot 36**, Mr. Ruben deponed that there never

was any claim of ownership by those owners and in particular the immediate past owners who sold their interest to Bidco, **Mr. & Mrs. Stame**. There were deed plans, an agreement and particulars of the property that was transferred to Bidco and it was therefore the duty of Bidco to ascertain what they were purchasing if they had any doubts. Mr. Ruben continued:-

“13. THAT at all the material times the Plaintiffs have always known the boundaries of our land. Indeed we had the beacons re-established in 1996 by Hime and Zimmerlin Surveyors. I annex hereto two letters of 22/1/96 and 9/4/96 marked MCR 5 (a) AND (b).

14. THAT we find the Plaintiffs’ prayer in the originating summons cunning and made in bad faith. This is because the Plaintiffs have since this dispute arose admitted that the portion of land belongs to us. They have by various correspondences (sic) offered to buy the plot. I annex herewith the Plaintiffs’ letters of 18/11/99 and 25/2/2000 marked MCR 6 (a) AND (b).

15. THAT it is only upon our refusal to sell the portion of land in question to the Plaintiffs and our warning that we would take all necessary steps to repossess our land that they have now decided to move to the court to allege entitlement by way of adverse possession. I annex hereto a letter by ourselves dated 25/2/2000 marked MCR 7 as evidence of this.

16. THAT Mr. Vimal Shah on paragraph 8 of this affidavit thus misleads this court and deliberately conceals the fact that the Plaintiffs have admitted that the disputed portion was indeed ours then went on to offer to buy the same from ourselves”.

Mrs. Maryjka Beckmann in the second affidavit deponed that she was Rosslyn’s water supervisor in the 1980’s when the Kenya Posts and Telecommunications Corporation built a telephone exchange on a portion of **plot 21/R**. The exchange wall was unsightly and so the owners of properties adjacent/across from the property agreed to have trees and other plants planted to screen off the unsightly view and improve the environment. **Plot 21/R** is essentially a wetland, so the fast growing gravillea and gum trees were best suited for it. Mrs. Beckmann then personally planted most of those trees and other plants or supervised the planting on behalf of Rosslyn.

The last affidavit was sworn by **Francesco Stame** who, jointly with his wife, **Maria Vittoria Stame, (the Stames)** had purchased the property in 1993 but sold it to Bidco in 1995. Two other proprietors had been registered respectively, as the owners of **plot 36** since 1968 when the subdivision was registered and a certificate of title **No. I.R. 22248/1** issued. Mr. Stame was categorical that the agreement for sale, the Certificate of Title and Transfer clearly described the plot sold to Bidco. It was also expressly agreed that Bidco would re-establish the beacons in conformity with the existing deed plan according to the acreage sold to them, and at no time was it represented to Bidco that the land sold to them extended to the disputed portion. Mr. Stame deponed in part as follows:-

“6. THAT whereas there was a fence consisting of random and broken wire and sisal plants and trees extending from my property towards the disputed portion of land, nonetheless we did not at any time occupy the said portion of land nor consider the same as part of our property as we always knew that this portion belonged to the (sic) Rosslyn Development Ltd who were our neighbours.

7. THAT at the time we bought the land from the Administrator of the Estate of Sardavllal Ganpartrai Kohli the said portion of land was not given to us as part of our property. Similarly at the time we sold the land to Bidco Oil Refineries Ltd., we did not represent the same to be part of the property and nor was any consideration taken of it in the negotiation leading to the transfer.

8. THAT on our part we have never claimed entitlement nor considered ourselves entitled to the disputed portion of property L.R. No. 7788/21/R as is claimed by Bidco Oil Refineries Ltd and we deny that we told them that the portion was part of our property.

9. THAT further at no time did we promise or purport to sell to Bidco Oil Refineries Ltd any bigger portion of land than was set out in the Agreement for Sale, the Transfer and Certificate of Title.”

There was no further affidavit sworn on behalf of Bidco. Both parties agreed that the matter would be decided on the basis of the affidavits and annexures on record and directions were given by the Superior Court to that effect. Mbaluto, J. considered those documents and heard submissions from counsel on both sides before coming to the conclusion that adverse possession had not arisen in favour of Bidco and that their suit had no merits. It was dismissed with costs on 5th June, 2001.

Bidco now comes before us, as stated earlier, seeking to challenge the findings of the Superior Court. The principles upon which an appellate court would be entitled to interfere with the decision of a court of first instance are now well settled and have been restated many times by this Court. A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. An appellate court also has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand, but this is a jurisdiction which should be exercised with caution – see *Makube v Nyamira [1983] KLR 403*, and *Kiruga v Kiruga & Another [1988] KLR 348*.

In directing himself on the law on adverse possession, Mbaluto J properly cited **section 7** of the *Limitation of Actions Act, Cap 22*, which provides:

“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.”

He further stated, and again we think correctly so:

“..... For the plaintiff to succeed in this action, it must be able to show that it has been in adverse possession of the disputed portion of land for an uninterrupted period of 12 years prior to the time when it took out this originating summons. It can of course do so also through some other person through whom it claims”.

On matters of fact, the learned judge accepted the affidavit evidence of Mr. Stame that he and his wife, as the previous owners of **plot 36** never claimed any ownership or acquired any rights over the disputed portion of land. Consequently, they could not confer any rights on the portion to Bidco which they had not acquired by the time they sold their plot to Bidco in 1995. He concluded:

“Because its alleged occupation of the disputed portion of land has lasted for only 5 or so years, it is obvious the plaintiff’s claim to the suit property on the basis of adverse possession cannot succeed unless it be pursued through the occupation of the portion by the previous owners of L.R. No. 7788/36, Mr. Francesco Stame and Maria Vittoria Stame”.

It is that finding which learned counsel for the appellant Mr. Billing, latched onto and submitted that the learned judge had erred. In Mr. Billing’s view, the appellant’s occupation was not 5 years but went back to 1968 when each successive previous owner of the plot openly used it without interference from the respondent. Consequently, the respondent’s right to the disputed portion was extinguished. For this proposition, Mr. Billing cited *Githu v. Ndete [1984] KLR 776* where the Court held that:

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession”.

According to Mr. Billing, the Affidavit of Mr. Stame only denied ownership as opposed to occupation of the disputed portion and it could not therefore be relied on to deny the appellant rights which had already accrued through such occupation.

For his part, learned counsel for the respondent, Mr. Michuki, submitted that it was paramount that the appellant not only shows physical occupation of the disputed portion but also dispossession of the respondent. On both counts, however, there was nothing on record to satisfy the Court on a balance of probability. The established fact was that the respondent's water supervisor was in occupation of the portion in the 1980's when she planted trees and other plants; and the respondent had remained in possession until the Stames sold their plot to the appellant. There was an admission by the Stames that there was no occupation and even if there was, it was not adverse but acknowledged the rights of the respondent. There was no intention at any time to exclude the whole world including the owner from the portion. As such, the appellant, even as a registered purchaser for value, could never be in a better position than his predecessor in title. The adverse possession, he submitted, arose in 1997 when the appellant tried to put up a wall in place of the existing broken fence but was stopped by the respondent who retook possession and asserted its rights.

We have carefully considered the appeal and the submissions of both counsel. We cannot, firstly, accept for one moment the submission by Mr. Billing that the Stames merely denied ownership of the disputed plot and not occupation of it. That is a plain perversion of Mr. Stame's affidavit which is reproduced above. Mr. Stame did, in paragraph 6 to 9 of the affidavit expressly state that there was no physical occupation of the disputed portion by him or the previous owner of plot 36, and further denied any representation to the appellant that the portion was part of the property sold to them. There was no response to those averments on oath or any affidavit from the previous owners of plot 36 since 1968. It was also open to the parties to seek cross examination of any of the deponents of the various affidavits filed in the matter but, as stated above, the parties chose to have the issues determined on the basis of the documents on record. We think, in the circumstances, that the learned Judge was at liberty to believe one version or the other and the version that was believable was Mr. Stame's. That is because it was buttressed by the written agreement between the parties, the transfer documents, and the land survey documents or "deed plan", all of which are unchallenged. There were also two other affidavits supporting Mr. Stame's assertion, and they too are unchallenged. In the face of such evidence, the assertion by Mr. Shah that it was the previous owners of plot 36 who had occupied the disputed portion and planted trees thereon, rings hollow. Physical possession of the disputed portion was only asserted by the appellant in 1997 when they started excavating along the existing broken fence and dug up a foundation for construction of a boundary wall principally for security reasons. They were promptly stopped by the respondent and were reminded that the portion lawfully belonged to the respondent. Indeed, it was pointed out to them that there was a previous attempt by other persons to illegally acquire or as put by the respondent in popular parlance "land grab" a portion of plot 21/R, a year earlier, but a surveyor was engaged by the respondent for re-establishment of all beacons for the plot which was done. Faced with those facts, the appellant wrote to the respondent on 18th November, 1999, stating in part as follows:-

"3. However in 1997 when we removed the fence and started erecting a boundary wall along the same fence, objections were raised on the grounds that as per the relocated beacons the concerned portion of land was part of your plot and not ours. In good faith we immediately stopped all further progress on the wall since we believe in amicable resolutions and not confrontations.

4. Now that construction work on our plot is nearing completion and building of the boundary wall is imperative for security reasons, we feel that there are only two possible options to resolve this small issue.

(a) The small triangle of marshy land which was physically within our plot (when we purchased the land) can be measured and sold to us. We are prepared to pay adequate compensation for the same. This will also ensure that all the valuable trees, which are in this area, can be protected and taken care of properly.

(b) If you decided that you cannot sell the concerned portion of land to us we will have to build the boundary wall along the relocated beacons and in that case all the trees which are on the boundary line or close to it will have to be cut down otherwise they will pose a major security hazard to us. We are sure you understand our problems in the light of the current security

problems in Kenya and would have no objection to the same.

In view of the above we kindly request you to look into the merits of our proposal and get back to us urgently so that the issue can be resolved.”

- *Emphasis added.*

The appellant was informed that the respondents Board of Directors had no powers to sell the portion or to agree to the destruction of the trees planted thereon. The appellant nevertheless continued to plead for the respondent’s indulgence. Their letter dated 25th February, 2000 is pertinent:-

“The fact is that our boundary markers (beacons) were some yards inside this fence. When we were advised of this land and told to discontinue the construction of the wall we did so.

Since then we have explored various options, which include not having a boundary wall, [planting a hedge (after approval) and cutting down the trees after re-siting the wall. The last option would be necessitated by security considerations. Whilst the trees are not indigenous and therefore protected, they are mature, having been planted by Mr. Stame some twenty years ago.

In the past we have offered to buy the small piece of land in order to resolve the situation. We have been advised that not only will this set a bad precedent, the Board of Rosslyn is not empowered to sell it anyway.

We need to resolve the situation. The fact of the matter is that we are not trying to increase our acreage by this small amount deliberately. We find ourselves in an extremely difficult situation and seek your guidance as property owners on the Estate.

Please note that we fully recognize that the onus was on us to establish the positions of the beacons at the time of purchase. This oversight was certainly not deliberate – we considered the fences to be the boundaries. Also, if you look at the set of our perimeter wall you will note that it is designed to blend in with the landscape, with all trees intact.

We would like to do the same with our wet wall. If permitted to erect a wall at the site of the original fence we will be prepared to enter into an agreement to pay the Estate a reasonable annul rental for that part of the common land. We will also undertake to make our best efforts to enhance the character of the Vlei as a bird sanctuary.”

- *Emphasis is added.*

When their plea was not heeded, the appellant went ahead and completed the wall fencing in September 2000 before instituting their suit in the superior court on 17th October after they were given an ultimatum to remove the wall and move out by 16th October 2000, otherwise they would be evicted at their cost.

We make reference to the above correspondence to underscore the view we hold that the appellant had acknowledged the title of the respondent to the disputed portion and they cannot therefore be heard to assert that they were in adverse possession. As Kneller, J. (as he then was) stated, and we agree, in ***Kimani Ruchine & Another vs. Swift Rutherford Co. Ltd. [1980] KLR 10 at pg 16:-***

“The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration; see *Wanyoike Gathure v Beverly*[1965] EA 514, 518, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; see section 9(1) and 13 of the Limitation of actions Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (e.g. if the area is flooded) then dispossession for that period cannot occur (see generally paragraphs 481 and 482 on pages 251, 252, of 24 Halsbury's Law of England (3rd Edn)."

We think we have said enough to show that the appellant was not in possession of the disputed portion of land either by themselves or through the previous owners of plot 36 which they purchased in 1995. We further find that any assertion of adverse possession was made in 1997 when the appellant constructed a wall fence but was only transient. The learned judge of the superior court was, in our view, right in making the finding that the appellant's case was not proved on a balance of probability and in dismissing it. We think however that he should have answered the questions put forward in the Originating Summons which we now proceed to do, *seriatim*:-

- a) ***No, the appellant is not in adverse possession.***
- b) ***No, the appellant acquired no rights beyond those that existed and were acknowledged by the previous owner of property LR 7788/36. Those rights did not include any entitlement to the portion of LR. 7788/21/R now claimed by the appellant.***
- c) ***The appellant should not be registered as the owner of any portion of LR 7788/21/R.***
- d) ***No permanent or any injunction should issue against the respondent over LR 7788/21/R.***
- e) ***The appellant shall bear the costs.***

The appeal is dismissed with costs.

Dated and delivered at Nairobi this 8th day of December, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO-OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR