IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO.84 OF 2015

BETWEEN

ALFEEN MEHDIMOHAMMED ……APPELLANT

AND

BASIL FEROZ MOHAMED & 223 OTHERS ……..RESPONDENTS

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Omollo, J.) dated 30th October, 2015,

in

HCC.N0.37 of 2012)

****

JUDGMENT OF THE COURT

This appeal raises only one question, whether the respondents are entitled to be registered as proprietors of the suit land, parcel **No.148/V/MN** (in Changamwe, Mombasa) measuring 13.5 acres, by prescription. The property is famously known as Owino Uhuru. The 224 respondents and their families, were sued by the appellant, who sought in the Environment and Lands Court, Mombasa, their eviction, claiming they had trespassed on the property. The respondents in their

defence and counter-claim, denied the claim insisting that the appellant had a defective title; and that they had instituted an originating summons (HCCC No.510 of 2010 (0.S) against the immediate former registered owner, Sleek Properties Limited which summons was determined in their favour. In the suit the subject of this appeal, they counter-claimed that they had acquired the suit land by adverse possession by virtue of an interlocutory judgment in HCCC No.51 of 2010 (OS) and so they asked the trial court to dismiss the appellant's suit and instead declare them the owners by statute of limitation.

These averments formed the basis of the trial. The appellant testified that he inherited the suit land from his uncle Azim Shamshindin Ismael after obtaining a grant of probate of a written will on 4th October, 2011. However visiting the suit land he found it occupied by people whose number he gave as 224 who had put up semi permanent structures on it. His efforts, through the District Officer (D.O) to have the

people vacate the suit land was unsuccessful. On being cross-examined by the advocate for the respondents, he denied that he and his cousin never bought the suit land from Sleek Properties Ltd; and that they intended to do so but had no money and the deal fell through. He testified that he did not know from whom his deceased uncle purchased the suit land; that he did not know when those occupying the suit land took possession; and that he was not aware of an interlocutory judgment in HCCC No.51 of 2010(O.S). The respondents' case was presented by four witnesses, the combined effect of whose evidence was that they have been in occupation of the suit land for a period ranging between 30 – 40 years, having initially occupied it either as tenants of one of the previous owners, Lalji Maghaji, or permitted to occupy it by the previous owner's workers, Kenga Tuva and Owino- Uhuru. The suit land drew its name, Owino-Uhuru, from the latter; that when they learned the suit land had been transferred to Sleek Properties Ltd they instituted HCCC No.51 of 2010 (OS) praying to be registered as the owners by virtue the statute of limitation; that they were subsequently informed that the case file had disappeared; that on the suit land are 3 schools, a cemetery, 8 churches, and 1 mosque all serving a population of over 10,000 people; that only as recent as 2009 was their possession question when the appellant caused the Chief to summon some of the occupants of the suit land that the known owner, Lalji Meghalji never set foot on the suit land and the only thing the occupants did was to pay the Mombasa Municipal Council rates in his name and that later on they learnt that the appellant had caused the suit land to be registered in his name.

The trial court (Omollo, J.) considered the evidence and found, as a fact that the ownership of the suit land had devolved to various people from 1922 to 4th October 2012, when it was utimately transferred to and registered in favour of the appellant. Prior to this the suit land had been registered on 30th October, 2009 in the name of Seiyo Kenya Ltd and subsequently to Sleek Properties Ltd on 30th November 2009. The learned Judge also found as a fact that the respondents were in possession; that by the time the appellant's uncle acquired the suit land on 10th March 2010, it was already under the occupation of the respondents. The learned Judge concluded that from the totality of evidence, the appellant got a title that had been extinguished by prescription pursuant to **section 28 (1) (h)** of the Land Registration Act and was therefore not entitled to an order for vacant possession; that the respondents were entitled to be registered as proprietors by prescription. With that, she entered judgment in favour of the respondents.

The appellant being aggrieved, has brought this appeal arguing that the learned Judge erred in arriving at the above decision, by which the appellant was deprived of his suit land in violation of **Article 40 (3)** of the Constitution; that the alleged interests did not qualify as prescriptive rights; that the import, object and intent of Land Registration Act to the effect that the appellant as the holder of a title, was, *prima facie* the proprietor of the suit land with absolute and indefeasible ownership was not appreciated by the learned Judge; that the learned Judge erred in her understanding of the right to recover land and the running of time for purposes of statute of limitation; that the evidence presented by the appellant was suppressed; and that it was in error to hold that the respondents had been in adverse possession for an uninterrupted period of over 12 years.

The appeal was canvassed through written submissions. While Mr. Kilonzo assisted by Ms Muthee learned counsel, made brief oral highlight of their submissions, Mr. Obaga holding brief for Mr. Okanga counsel representing the respondents found no purpose to highlight. Both sides, however, relied on numerous authorities on the doctrine of adverse possession.

The appellant's submissions hinged on three areas, the sanctity of title, adverse possession as a prescriptive right and finally the infringement of the appellant's constitutional rights and the rules of natural justice. The appellant's argument is that by **section 26 (1)** of the Land Registration Act (cap.300) the certificate of title he holds is a *prima facie* evidence that he is the absolute and indefeasible proprietor of the suit land, subject only to encumbrances, easements, restrictions and conditions

contained in the title and the register that title to property could only be challenged on account of fraud or misrepresentation to which he is proved to be a party or where the certificate of title was acquired illegally, unprocedurally or through corrupt scheme. He relies on **Dr. Joseph N. K. Arap Ngok** v **Madison Insurance Co. Ltd** Civil Application No. 60 of 1997, **Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman)** v **J. B. Martin Glass Industries & 3 others** C.A. 130 of 2003, **Mutusonga** v **Nyati** (1984) KLR 425, **Obiero** v **Opiyo** (1972) EA 227, and **Esiroyo** v **Esiroyo** (1973) EA 338.

The appellant also submitted that by relying on proceedings of H.C.C.C. No.51 of 2010 (0.S), to which the appellant was not a party, the details of which were not before her, the learned Judge erred and caused the appellant to suffer prejudice by his rights under **Articles 25** and **40** of the Constitution were being violated; that for the respondents to succeed in their claim for adverse possession, they ought, but failed to prove, that their occupation of the suit land was open, peaceful, and continuous for a period of atleast 12 years. According to the appellant, a claim of adverse possession could not be maintained against him because for the period between 1975 and 2012 he was not the registered owner; that both dispossession and discontinuance was not proved; that since the respondents were tenants, occupying the suit land with the permission of the owner, they could not claim adverse possession; that the respondents' possession was interrupted several times as shown by entries of restrictions in the register; that past attempts to evict the respondents have turned hostile and violent leading to loss of life.

The respondents' submissions can be thus summarized. The appellant was the registered proprietor at the time the suit was instituted; that in terms of **section 28** of the Land Registration Act, No.3 of 2012 the appellant title was subject to overriding interests which attaches to and runs with the title; that that overriding interest could not be extinguished by the new owner of the property; that the learned Judge properly found in favour of the respondents since it was their word that they had been on the suit land for a period when in excess of 12 years against the appellant's word to the effect that did not know the respondents allegedly encroached on the property. The respondents relied on **Macharia Mwangi Maina & 87 others** v **Davidson Mwangi Kagiri**, Civil Appeal Nos.26 & 27 of 2011, in support of the case that the respondents had acquired rights which are overriding and protected by law. The other ground that was argued, although not contained in the memorandum of appeal was that the claims for all the respondents who did not testify were not proved; that the learned Judge ought to have so found as the testimony of the 4 witnesses only related to the claim by the four. By **Rule 104 (a)** of the Court of Appeal Rules no ground not specified in the memorandum can be argued without leave and that must be the fate of that ground.

In determining this appeal we shall be guided by the now well-settled principles governing the application of the doctrine of adverse possession which also form the common thread running through the cases relied on by both sides to this dispute. In considering the appeal and applying those principles, as the first appellate, court, it is our primary role to once more weigh for ourselves by reviewing the evidence presented at the trial before we decide whether or not the findings by the trial court can be supported but making allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. See **Selle & Another** v **Associated Motor Boat Company Ltd & others**, (1968) EA 123.

Like the trial court we find as a matter of fact, that the respondents were already on the suit land when the appellant inherited it in 2012. The only question as we have pointed out, is the status of the respondents on the suit land *vis á vis* the appellant. In other words, was adverse possession proved"

The following principles summarises the law on the doctrine of adverse possession, in so far as they

relate to the matter before us:-

i. An order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the latter is the current registered proprietor of the land which the applicant seeks to have registered in his name; see **Wasui** v **Musumba** (2002) KLR 396

ii. For an order to acquire title by the statute of limitation, the known owner of the land 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. See **Wambugu** v **Njuguna** (1983) KLR 173.

iii. A person who occupies another person's land with that other person's consent cannot be said to be in adverse possession because in reality he has not dispossessed the owner of his land and the possession is not illegal. See **Wanje & others** v **A. K .Saikwa & others** (1984) eKLR.

iv. Certificate of title or ownership issued under **section 23** of the Registration of Titles Act and **sections 27** and **28** of the Registered Land Act (repealed) was to be taken by all courts as conferring an absolute and indefeasible title to the property on the named proprietor, see **Maweu** v **Liu Ranching & Farming Coop Society Ltd**, Civil Appeal No.2 of 1983. However the

Land Registration Act, 2012, which repealed both the Registration of Titles Act and the Registered Land Act provides at section 26, that the certificate of title issued to the proprietor can only *"be taken by all courts as prima facie evidence that the person named as proprietor …. is the absolute and indefeasible owner…"*

v. The adverse possessor may stoutly possess the land but has no slightest interest until 12 years have lapsed and emerges after this period as the owner, and however absolute and indefeasible the owner's title is, it is lost forever.

vi. Adverse possession is a fact to be observed upon the land. It is not to be seen in a title and any person who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for 12 years after acquiring it. See **Maweu** case (supra).

vii. The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person's favour see **Kasuve** v **Mwaani Investments Ltd & 4 others** (2004)IKLR 184.

viii. The identification of the land in exact possession of an adverse possessor is an important and integral part of the process of proving adverse possession see **Kasuve** case (supra)

ix. A person seeking to acquire title to land by of adverse possession for the applicable statutory period, must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use by him, expressed in the Latin maxim, *nec vi nec clam nec precario.* See **Jandu** v **Kirplal & Another** (1975) EA 225. This denotes complete and exclusive physical control over the land in dispute and to have *animus possidendi,* or simply put, the intention to have the land. See **Eliva Nyongesa and another** v **Nathan Wekesa Omacha** Civil Appeal No.134 of 1993.

x. Time which has begun to run in favour of the adverse possessor will stop when the owner of the land asserts his right by taking legal proceedings or by making effective entry into the land. See **Njuguna Ndatho** v **Masai Itumo & 2 others**, Civil Appeal No.231 of 1999.

xi. Although in the past the courts, for instance in **Njuguna Ndatho** (supra) insisted, by dint of Order XXXVI rule 3 D of the Civil Procedure Rules, that a claim for adverse possession could only be brought by originating summon, that thinking has since changed and the courts do not take issue if the claim is pleaded in the defence or even in the counter-claim. See **Gulam Miriam Noordin** vs **Julius Charo Karisa** Civil Appeal No.26 of 2015.

xii. The doctrine of adverse possession is not unconstitutional (**Mtana Lewa** v **Kahindi Ngala Mwagandi** Civil Appeal No.56 of 2014.

By the time the suit giving rise to this appeal was filed the applicable law was the Land Registration Act, 2012. In section 28(h) it recognizes, as one of the overriding interests, the *"rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription*." (our emphasis)

The history of the title to the suit land stretches back to 1922, changed in 1932 twice, 1936, 1995, 2009, 2010 2012. Of relevance, are the transfers for the period between 1936 to 2012. It was the uncontroverted evidence of the respondents that they occupied the suit land around 1975/1976. It is uncontroverted because the appellant in an honest testimony admitted that he only went to the suit land in 2012 when he found people living on the suit land and that he did not know when the respondents occupied it. When the respondents occupied the suit land the owner was Lalji Maghalji to whom the property was transferred on 15th September, 1936. So that by the time the respondents occupied it, he had been registered owner for 39 years. In 1995 there was a vesting order registered in favour of Elizabeth Muthini and in the same year there was a court order in Civil Application No.32 of 1994 (O.S) vesting it in the names of Elizabeth Mutunga (we cannot tell if this is the same person as Elizabeth Muthini) jointly with Farouk Akserali. The nature of the application (No.32 of 1994 (OS) from what we gather, being an O.S, may have been a similar a claim to land by adverse possession. We are however, not saying that that was the claim because we do not have the facts.

In October 2009 the suit land was transferred to Saiyo Keya Ltd and then in November 2009 to Sleek Properties Ltd. The circumstances of these transfers are not clear. Eventually on 10th March 2010 the suit land was transferred to Azim Shanshudin Esmail, the appellant's uncle, who bequeathed it to him in his will in 2012. But according to the respondents upon being allowed on the suit land some of them paid rent to Lalji Maghalji but at some point stopped paying altogether, but continued to live on the suit land, while others simply moved in and settled.

From these events we come to the conclusion that even before the appellant got title to the suit land, it had gone through many hands. Those in whose favour it was transferred before him ultimately got to him never set foot on the suit land. Today the respondents have been on the suit land for over 40 years. They have 3 schools, 8 churches, 1 mosque, and a cemetery on the property. The original and subsequent owners were clearly dispossessed and their possession discontinued.

The acts done on the suit land by the respondents as enumerated above are adverse to the owner's title and it is immaterial that the appellant only acquired the suit land recently. His title, when acquired was subject to the existence of an overriding interest in the form of adverse possession by the respondents. The occupation and use of the suit land by the respondents had *animus possidendi* and was *nec vi, nec clam, nec precario.*

For these reasons we find no substance in this appeal. It is dismissed with costs.

Dated and delivered at Mombasa this 17th day of June, 2016

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR