IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 84 OF 2019

BETWEEN

LOISE NDUTA ITOTIA.....APPELLANT

AND

AZIZA SAID HAMISI.....RESPONDENT

(*Being an appeal from the judgment and decree of the Environment and Land Court at Malindi (J.O. Olola, J.) dated 29th May 2019* in

ELC No. 122 OF 2015 (OS))

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JUDGMENT OF MURGOR, JA

In an Originating Summon filed against ***the appellant, Loise Nduta Itotia*** the registered proprietor of a property known as Subdivision Number MN/III/506 and registered as C.R. 14011 measuring One Decimal Six One Six (1.616) hectares or thereabouts *(the disputed property)* located at Jumba Ruins, Mtwapa, ***the respondent, Aziza Said Hamisi*** claimed that; 1) she was in possession of the disputed property for a period of over twelve (12) years; 2) she was in open, continuous and uninterrupted occupation of the disputed property; 3) she had developed a permanent residence, an operational restaurant and cultivated and farmed on the disputed property for a period exceeding twelve (12) years, and 4) she was entitled to ownership of the disputed property by way of adverse possession.

In the suit, the respondent claimed to have occupied and settled on the disputed property sometime in 2002, and that while there, she constructed a permanent residence and had carried on the business of a restaurant for the past 7 years. She also claimed to have put up a fence around the disputed property, developed a well for water, and later connected piped water and electricity to the disputed property. It was her case that for the entire duration of her occupation of the disputed property, the registered owner, had not interfered with her in any way, and nor had anyone ever approached her. She claimed to have been in occupation for more than 12 years and for this reason prayed for the court to declare her as registered proprietor of the disputed property. A letter from the area village elder ***Omar Salim Stajabuni, PW2***, dated 9th June 2015 lent support to her claim.

The appellant opposed the application and countered that the disputed property belonged to her late husband who had since passed away; that the respondent had not been in peaceful, continuous and open occupation of the disputed property for over 12 years, and therefore could not claim to have acquired the property through adverse possession. The appellant further asserted that her son, ***Peter Kimacia Itotia DW2*** *(Peter)* had visited the disputed property sometime in 2006, and had subsequently contracted developers to clear the bush and thickets; that while there, nothing disclosed the respondent's occupation; that she had not produced any business licences or approvals for the restaurant business, and that the water and power supply were only recently connected.

The appellant also contended that since the respondent was not in occupation of the disputed property, she could not have approached her and therefore the Chief's letter of 9th June 2015 supporting her application was implausible and unreliable.

Upon hearing the respondent's and the appellant's case, the learned judge (Olola, J.) rendered a judgment on 29th May 2019 wherein the court determined that there was no evidence to show that the appellant occupied the disputed property or put it to use since 1972, but there was evidence to show that the respondent had been using it for some time, particularly as the surveyor's report, *inter alia*, confirmed the existence of old structures. The court held that the respondent was entitled to be registered as the proprietor of the disputed property by reason of adverse possession, and ordered the Registrar of Titles to issue her with a provisional Certificate of Title.

The appellant was aggrieved by the decision of the trial court and appealed to this Court on grounds that the trial judge had failed to appreciate that the respondent's occupation of the disputed property was for a period less than 12 years; that on account of the inconsistencies in the evidence, the learned judge failed to appreciate that the respondent had not proved her case on a balance of probabilities, that she was in active possession of the disputed property, and that as a consequence adverse possession was not established; that the trial judge failed to take the appellant's defence into account, and instead relied on irrelevant considerations.

Both the appellant who was represented by learned counsel ***Mr. M. Kilonzo*** holding brief for Mr. D. Farah and the respondent represented by ***Mr. Mulwa Nduya*** filed written submissions which the parties informed us that they would rely on in their entirety.

In the submissions, the appellant submitted that the respondent had not satisfied the threshold requirements necessary for a claim for adverse possession in that, it was not demonstrated that she was in continuous occupation for a period of 12 years without the owner's permission, or proved that her acts were inconsistent with the owner's enjoyment of the land, or that her occupation was visible, open and notorious and nothing showed that her occupation ousted the registered owner.

On whether the respondent enjoyed continuous and uninterrupted occupation of the disputed property, it was submitted that this was not established, as when Peter, DW2 and ***George Kamau Kagiri, DW3*** (*George Kagiri*) visited the disputed property between 2005 and 2006 the land was overgrown with bush and thickets, and there was no one in occupation; that George Kagiri who at the time was working on an adjacent site did not see anyone living on the dispute property, and furthermore, ***Murshid Abdulla Mohamed, PW3*** *(Mushid)* stated that the National Museums had built the restaurant or hotel sometime in 2008; that the same witness was unable to confirm when the respondent had taken up occupation of the disputed property. It was further submitted that the evidence also did not disclose when cultivation and livestock rearing, commenced, or on which part of the disputed property. It was asserted that the evidence pointed to the respondent having taken up occupation in 2008 and not 2002 as alleged.

As to whether the respondent's occupation was visible, open, and notorious to the extent that the owner and community had notice of her occupation, it was submitted that the appellant had no knowledge of her occupation. And relying on the case of ***Githu vs Ndeete [1984] KLR 776***, it was submitted that the 12 year requirement was not fulfilled as time ceased to run when the appellant asserted her rights over the disputed property in 2006 when Peter visited the disputed property, and after a notice to quit was issued.

It was finally asserted that, merely because the appellant did not use the disputed property over the period did not render it conclusive that she was automatically dispossessed of the disputed property.

In response, the respondent submitted that, the appellant's evidence did not in any way controvert the fact of the respondent's open, peaceful and continuous possession of the disputed property from 2002; that the existence of the coral wall, chain link fence and a gate, and the permanent buildings in 2006 were sufficient proof of her having been in occupation; that even after gaining access to the disputed property in 2006, the appellant thereafter took no steps to seize control of the land, which situation prevailed until the respondent filed the suit for adverse possession; that the appellant had full notice and was fully aware of the respondent's occupation of the disputed property.

The respondent submitted that the trial judge rightly found that the respondent was in occupation of the disputed property without the appellant's permission for a period exceeding 12 years and that since 2006 had taken no action to take back possession of the disputed property.

I have considered the appeal, the record and the parties' submissions. This is a first appeal, and as stated in ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212;***

"On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence."

Bearing in mind the aforegoing, the main issue for consideration is whether the learned judge properly evaluated the evidence and rightly concluded that the respondent's claim for adverse possession over the disputed property was proved on a balance of probabilities, and in conjunction with this, whether the trial court took into account the appellant's evidence.

The evidence, which is fairly straight forward is that, the respondent claimed to have taken over the physical occupation of the disputed property sometime in 2002; that her family who were fishermen utilized the disputed property over the past 30 years. When she took over occupation, she lived in an old mud house and cultivated vegetables and reared turkey, chicken and poultry for a living. In the course of time, she built a permanent house, and from 2008 to 2009 she sold seafood in her restaurant called Jumba Ruins Monsoons Restaurant, which she later extended by leasing a portion of the National Museums' land. Initially, she used water from a well dug by her family, and later constructed a water tower. In 2015, she connected electricity and water to the disputed property. The respondent denied that the appellant visited the land in 2006, or that she had issued instructions for the land to be cleared.

Omar Salim Stajabuni, PW2, a village elder stated that the respondent lived on and operated a hotel business on the disputed land for many years. *Murshid* an employee of the National Museums testified that he had worked next door to the disputed property at Mtwapa-Jumba Ruins for almost 20 years. He confirmed that the respondent was a neighbor from 2002 when she moved onto the disputed property; that initially she occupied a mud hut and used an old well. She also carried out farming activities. Later, she built a second house. He further stated that she rented the restaurant that was built by the National Museums, and paid the electricity bills through the museum. On cross examination he stated that he did not know who was living on the land before 2002.

The appellant testified that her husband had acquired the disputed land in 1972, and that she was the administrator of his estate. Peter, the appellant's son was next. He stated that, in 2006 when he visited the disputed property, he was unable to access the

property due to dense bush, and had to gain access through the beach; that thereafter, he contracted George Kagiri to come up with a proposal for a development project. When cross examined, he stated that they had commissioned a survey report which indicated that the property buildings on it, were referred to as “old foundations”.

George Kagiri stated that he visited the disputed property a number of times in 2005 and that in 2006 he found that the property was covered with dense bush. He stated that the structures in the photographs taken comprised of the Jumba Ruins owned by the National Museums, and that he had drawn up plans for a development project. When cross examined he stated that at the time he was working on a project nearby and knew the property quite well; that among the features present on the disputed property were a coral wall, a chain link fence, an old house and disused structures, which were not part of the Jumba Ruins; that there was no green house or borehole. The land had been cleared, but he did not know who had cleared it.

The evidence also comprised a surveyor’s report dated 16th August 2016 prepared by BC Mwanyungu and commissioned by the appellant. The report clearly indicated that there were structures existing on the disputed property.

Having outlined the evidence that was before the trial court, it is essential to consider the elements necessary to establish a claim for adverse possession. These are found in the Limitations of Actions Act, Cap 22.

Section 7 of the Act 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 its first accrued to some person through whom he claims, to that person.”

Section 13 of the ***Limitation of Actions Act*** provides that a right of action to recover land does not accrue unless a person in whose favour the period of limitation can run is in possession of the land. ***Section 17*** of the Act provides that once the period of 12 years of adverse possession prescribed by the Act has expired without an action to recover the land, the title of the registered owner of the land stands extinguished by the operation of the law.

In line with the Act, Kneller, J. (as he then was) in the case of ***Kimani Ruchire vs Swift Rutherford & Co. Ltd. [1980] KLR. 10***, outlined some tenets of adverse possession thus;

“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 persuasion). 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 any endeavours to interrupt it or by way of recurrent consideration.”

In the case of ***Wambugu vs Njuguna [1983] KLR 172*** This Court cited the case of ***Wallis Cayton Bay Holiday Camp Ltd. vs Shell Mex and B.P. Ltd. [1975] Q.B. 94*** with approval and cited the following passage therefrom

"The next question, therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh vs. Jack (1879) 5 Ex D 264) said at 273, that to defeat a title by dispossessing the former owner 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it."

The above considered together, make it clear that for a claim of adverse possession to succeed it must be demonstrated that the occupation was continuous, open and uninterrupted for a period of 12 years.

Beginning with whether the evidence disclosed when the respondent began to occupy the disputed land, the respondent said she

moved onto the land in 2002. Murshid PW3 also stated that he had known the respondent for 16 years, and that she moved onto the land in 2002. As no other evidence demonstrates anything else to the contrary, it can be concluded that respondent took up occupation of the disputed property in 2002.

Was the respondent's occupation of the disputed property visible, open, and notorious" In her claim, the respondent sought to demonstrate that she was in open occupation of the entire property. Her evidence was that whilst in occupation of the disputed property, she had constructed a permanent house and a water tower, and was cultivating vegetables and rearing poultry. She later operated a restaurant business called Jumba Ruins Monsoons Restaurant. This evidence was not only supported by Murshid's testimony. George Kagiri also confirmed that in 2006 there was an old house, coral wall and a chain link fence surrounding the land. A survey report dated 16th August 2016 also lent further support to her occupation and the conduct of the stated activities on the disputed property. It indicated that;

"…the plot is fenced with a chain link between beacons GM2-GM3,… there is also a dry stone fence between boundary beacons GM2 and GM1. The plot is Developed, with permanent buildings, green house, poultry farm, store restaurant, shades, water distribution tower and borehole as per the attached plan. There are two buildings that serves as the restaurant known as "Moonsoons" on the beach side."

The appellant on the other hand denied that this was the case, for the reason that when Peter visited the property in 2006, there were only bushes and thickets on the property, and no one was in occupation. It was the appellant's submission that the respondent did not demonstrate that she was in physical occupation of the entire disputed property.

My analysis of the evidence points, to the open existence of structures and developments on the disputed property, all of which the respondent claims belonged to her. Since, the appellant did not claim ownership of the structures or provide any explanation of how the structures came into existence, it can be concluded that the structures belonged to the respondent.

More importantly however, even after the structures were found to be in existence, nothing in the evidence is suggestive of any steps having been taken or effort made by the appellant to take up physical occupation or to utilize the land.

With regard to the respondent's physical possession of the entire property, a review of the facts and evidence, do not disclose this was an issue for the trial court's consideration. The evidence was expressly limited to whether or not the respondent was in quiet, continuous, open and uninterrupted possession of the disputed property. No evidence was led on the specific areas of physically occupation, that is, whether the respondent occupied all the land or occupation was limited to a portion or portions. Further, the appellant did not interrogate or question her on the acreage of land occupied by the house, the restaurant or the farming activities. Without such evidence controverting her occupation of the entire property, I am satisfied that the trial court was entitled to reach the conclusion that the respondent was in open and notorious possession of the disputed property, and I so find.

Was the appellant aware of the respondent's occupation of the disputed property" The respondent testified that she was in possession since 2002, and nothing in the evidence showed that between 2002 and 2006, when George Kagiri noted the extant structures, that they were hidden or obscured from the appellant's view. It would follow that if George Kagiri saw the structures in 2006, Peter would also have taken note of their existence when he visited the disputed property in 2006. My view is that the structures were open and visible to the appellant and the community, and she therefore cannot be heard to say that she did not have notice of the respondent's occupation of the disputed property.

Finally, did the respondent prove on a balance of probabilities that she had occupied the disputed property for a period of 12

years" I have found that the respondent occupied the property around 2002. I have also found that the respondent was in open and notorious possession of the entire property. Between 2005 and 2006 Peter and George Kagiri visited the disputed property. And after 2006, nothing was done to take back control of the disputed property until 2015 when the respondent instituted these proceedings. From 2002 to 2015 is a period of 13 years during which period the respondent had remained in open and continuous occupation of the disputed property.

This Court in ***Gulam Miriam Noordin vs Julius Charo Karisa [2015] eKLR,*** cited the observations made in the case of ***Joseph Gahumu Kiritu vs Lawrence Munyambu Kabura, Civil Appeal No 20 of 1993***, and stated;

"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry onto the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him…He must therefore make a peaceable and effective entry, or sue for recovery of the land".

Since the appellant neglected to take any steps to recover the disputed property within the 12 years, by reason of the suit having been filed after an expiration of 12 years, the appellant's title to the disputed property was by virtue of ***section 17*** of the ***Limitation of Actions Act*** extinguished.

In evaluating the evidence, the learned judge stated;

"…there is no evidence whatsoever that the Respondent has ever occupied or put the property in any use since its acquisition in 1972. There was however evidence that the Applicant has been using the said property for some time. The Applicant's position that she has been in continuous use and occupation of the suit property was supported by the evidence of the Area Village Elder (PW2) as well as PW3 an employee of the National Museum of Kenya which owns an adjacent piece of land.

The learned judge also took into account the Survey Report dated 16th August 2016 prepared by one BC Mwanyungu, that showed, *"… the existence of old structures on the property together with additional permanent buildings including a restaurant known as Jumbo Ruins Moonsoons Restaurant on the suit property"*. Also taken into consideration was the appellant's evidence, where the court observed that despite Peter's visit to the disputed property in 2006, the appellant did nothing thereafter to bring the respondent's occupation to an end.

Based on the evidence, the learned judge concluded that, the respondent had established that she had been in exclusive, open, quiet and uninterrupted possession of the disputed property for the requisite statutory period. And following my reanalysis of the evidence, I have come to a similar conclusion. I would add that I can find no inconsistences in the respondent's evidence. Whether or not the respondent or the National Museums constructed the restaurant did not negate her evidence that she was in actual occupation of, and present on the disputed property for over 12 years. As such, I am satisfied that the learned judge properly evaluated the evidence in its totality, and in so doing arrived at the correct decision that the respondent was entitled to the ownership of the disputed property through adverse possession, and I have no reason to interfere with that decision.

In sum, the appeal is without merit, and is dismissed with costs to the respondent.

It is so ordered

Dated and delivered at Nairobi this 5th day of June, 2020.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 84 OF 2019

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AND

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in

ELC Case No. 122 of 2015 (OS)

****

CONCURRING JUDGMENT OF D.K. MUSINGA, J.A.

I have had the benefit of reading the judgment of the Hon. Lady Justice A. Murgor, J.A. in draft. I entirely concur with her findings and I have nothing useful to add. Consequently, the final orders of the Court shall be as proposed by the Hon. Lady Justice A. Murgor, J.A.

Dated and delivered at Nairobi this 5th day of June, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

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DISSENTING OPINION OF GATEMBU, JA

1. I have had the benefit of reading in draft the judgment of ***Murgor, JA*** in which the background to this appeal is fully set out. The appellant's grievances with the impugned judgment of the Environment and Land Court (ELC)decreeing that the respondent is entitled to be registered as the proprietor of the property known as Plot No. MN/III/506 (the property) by virtue of adverse possession include complaints that: the Judge ignored the appellant's defence and evidence that the respondent had not resided on the property for a period of 12 years "*in total exclusion thereon*"; the Judge disregarded the inconsistencies in the respondent's evidence; and the Judge failed to appreciate that the respondent's occupation of the property was for less than 12 years.

2. My brother and Sister Judges have concluded that the learned Judge of the ELC was right in holding that the respondent had established to the required standard that she had been in exclusive, open, quiet and uninterrupted possession of the property for the requisite statutory period.

3. The burden to establish entitlement to the property by adverse possession lay with the respondent. See ***Christopher Kioi & another vs. Winnie Mukolwe & 4 others [2018] eKLR***. In her originating summons dated 16th July 2015, the respondent averred that she has been in possession of the property for a period of over 12 years and that "*she had developed the land by having a permanent residence together with operation (sic) restaurant business on the said property*."

4. In her affidavit sworn on 16th July 2015 supporting the originating summons, she deposed that:

"*I have developed the property by constructing there on my permanent residence together with an operating restaurant business which has been in operation for seven*

*(7) years now and have put up wall fence all around the property and constructed therein water well****."***

5. She deponed further that she had applied for her own power line and connected electricity to the property. She exhibited, as annexures to her affidavit, photographs of the structures on the property.

6. In her witness statement filed before the ELC on 22nd July 2015, she stated that "*sometime in 2002"* she moved to "*an unoccupied parcel of land known as MN/III/506*" and reiterated that she had constructed a permanent residence; had operated a restaurant business for 7 years and that she had put a wall fence all around the property.

7. Over a year later, on 26th September 2016, after the appellant's witness statements had been filed contesting her claim, the respondent filed a further witness statement. In what appears to be an embellishment of her claim, the respondent introduced a new perspective to her case claiming that, "*my family has/is still openly enjoying and in physical and actual possession of the property as their "shamba" for well now over 30 years*" and that "*over/about 14 years ago" she made use of "water well that had been dug by my family*" and that on making searches about the property at the Kilifi County office she found that the property land rates were under the name of her family members; that she had dedicated her efforts in developing the land and constructed a stone house in place of the mad house constructed earlier and several permanent structures; that bush clearing exercise on the property is carried out by her family on regular basis when needed.

8. The respondent's witnesses, Omar Salim Stajabuni (PW2) and Murshid Abdalla Mohamed (PW3) added that in addition to putting up permanent houses on the property, the respondent also kept domestic animals such as goat, chickens and turkey for 14 years now and was earning her livelihood from the shamba.

9. Strikingly, in my view, the respondent did not in her originating summons and in her initial affidavit make reference to these other activities beyond stating that she had constructed a permanent house and operated a restaurant on the property even though in her oral testimony before the trial court she alluded to them maintaining also that her family was using the property for about 30 years.

10. The evidence tendered on behalf of the appellant by George Kamau Kagiri, (DW3), an architect who had been engaged to develop a plan for villas on the property, was that the property "*was too bushy when*" he visited it in 2006 and that he requested Peter Kimachia Itotia (DW2) who had engaged him, to have the property cleared; that he was later able to access it and took photographs which he produced as exhibits.

11. Quite apart from the inconsistencies in the evidence tendered by the respondent, based on my review and evaluation of the totality of the evidence, including report and valuation by Wairagu Mbuu & Associates dated 21st April 1980 referring to the property as *"an undeveloped cliff plot";* the photographs produced showing extensive uncleared bush on the property; the Survey Report by B.C. Mwanyungu, Licensed Surveyor together with the plan annexed to it, the overall impression that

I form is that the respondent's occupation of the property is not exclusive and extends to a portion of the property and not the entire property which measures 1.616 hectares (approximately 4 acres).

12. Being of that persuasion, I would have, in exercise of the powers of the Court under Rule 31 of the Court of Appeal Rules,

remitted the proceedings to the ELC with directions for the parties to adduce evidence and for that court to take evidence to ascertain with precision the extent of the respondent's occupation of the property and to make any necessary consequential orders based on such evidence. To that extent, I would have allowed the appellant's appeal.

Dated and delivered at Nairobi this 5th day of June, 2020.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL