



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 106 OF 2009

RAMCO INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

UNI-DRIVE-IN THEATRE LIMITED.....DEFENDANT

JUDGMENT

Introduction

The Plaintiff filed the suit herein by way of an originating summons dated 13th March 2009 seeking a determination of the questions whether the Defendant's title to a portion of the land parcel L.R No. 10341 situated on the northern boundary of the said parcel and measuring approximately 0.1249 Hectares (hereinafter referred to as the "disputed portion of land") has been extinguished through adverse possession, and whether the Plaintiff should be registered as the proprietor thereof. The Plaintiff is seeking the following orders:

1. That a declaration be and is hereby issued that the title over the disputed portion of land registered in the name of the Defendant his assigns and/or successors in title thereof has been extinguished by adverse possession.
2. That consequently the Plaintiff should be registered as the proprietors of the disputed portion of land in place of the Defendant, his assigns and/or successors in title thereof.
3. That a permanent injunction be issued restraining the Defendant by itself, its agents employee, nominees and/or representatives from interfering, wasting, damaging or in any other manner dealing with the disputed portion of land.
4. Such other order/and relief that the court may deem fit in the circumstances
5. The costs of the suit be borne by the Defendant.

The grounds for the Plaintiff's suit are in a supporting affidavit and supplementary affidavit sworn on 13th March 2009 and 21st May 2009 respectively by Kantilal Shah, a director of the Plaintiff. The Defendant's response is in a replying affidavit sworn on 25th March 2009 by Nilesh Patel, a director of the Defendant, and a Further Affidavit sworn on 21st November 2009 by Kirit Patel, who was a director and shareholder of the Plaintiff company from the time of its incorporation until its transfer to the current owners.

The hearing of the suit took place between 24th November 2009 and 4th June 2013, and included a site visit to the suit property on 31st July 2013. The Plaintiff called two witnesses to testify on its behalf, and five witnesses were called to testify on behalf of the Defendant. Counsel for both parties were then instructed to file written submissions. A summary of the respective cases of the parties from their pleadings, testimony in court and submissions now follows.

The Plaintiff's Evidence

The Plaintiff's claim is that it is the registered owner of the parcel registered as L.R No. 209/10515, which is adjacent to the parcel registered as LR. No. 10341 belonging to the Defendant. Kanti Zaverchad Shaw (PWI) who is a director of the Plaintiff, testified that that he and other shareholders bought the shares of the Plaintiff company in 1985 and took possession of L.R No. 209/10515 in 1985, and that at the time the boundary alienating the Plaintiff's and Defendant's parcels of land was already demarcated by a stone walled fence erected by the Defendant. He further testified that he did not know when the said wall was built, and that he was aware that they had been using part of the land belonging to the Defendant since they took possession in 1985, and that they were told by Mr. Kirit Patel (DW4) a previous shareholder of the Plaintiff at the time of purchase of his shares that that part of the land they occupied belonged to the Defendant.

PWI further testified that the Defendant first attempted to take back the said portion of their land in a demand letter dated 23rd January, 2009 addressed to the Plaintiff. He stated that he then asked a surveyor Mr. P. K. Thagishu, to survey the area, who confirmed that the Plaintiff had been encroaching on the Defendant's parcel No. L.R. NO. 10341, and indicated that the area of the alleged encroachment was approximately 0.1240 hectares. PWI referred to the said survey plan indicating the area of encroachment, and to a letter from the surveyor which were annexed to the supporting affidavit he swore on 13th March 2009.

PW1 further stated that they have built four blocks of apartments on the Plaintiff's parcel of land, and used the disputed portion of land as an entertainment area and garbage collection point, and had planted a garden, hedge and constructed children's swings and slides thereon. He testified that there were electricity poles on the said portion, and he was not aware who constructed them or who maintained them. It was PW1's averments that the Plaintiff has been in exclusive occupation and user of the suit portion since 1985 and has enjoyed quiet, undisturbed, open and peaceful occupation of the disputed portion of land since then. Further, that at no time since the year 1985 has the Defendant interfered in any manner whatsoever with the Plaintiff's occupation and user of the disputed portion of the suit parcel.

PW2 was Stevenson Wachira Wanjohi, the Deputy Director of Mamuka Ltd which manages the Plaintiff's apartments. He testified that he had managed and lived on the Plaintiff's apartments since December 1997, and he produced as the Plaintiff's Exhibit 1 a letter from their Managing Director seconding him to the said apartments known as Ramco Apartments. He described his duties as security liaison, maintenance of the perimeter wall, rent collection and addressing the tenant's complaints and concerns. He produced as the Plaintiff's Exhibits 2 , 3 and 4 maintenance reports by and agreements entered into with maintenance companies. He confirmed the use of the disputed portion of land as described by PW1, and stated that he only became aware of the dispute when the Defendant wrote its demand letter to the Plaintiff.

The bulk of PW 2's testimony was on the electricity poles that are situated on the disputed portion of land, and he stated that the poles facing the Defendant's parcel of land are not maintained nor do they work. He further stated that the Plaintiff has electricity lights for its apartments which are maintained, and that they also maintained the electric fence on the wall between the Plaintiff's and Defendant's parcel of land. He was not aware who constructed the electricity poles that face the Defendant's parcel of land, and he was of the view that it is possible to maintain the said poles from the Defendant's parcel of land using a long ladder. He further stated that there was a transformer on the disputed portion of which he thought was built by Kenya Power and Lighting Company.

The Defendant's Evidence

The Defendant called 6 witnesses. The first witness was Mr. Lalji Visram Padria (DW 1) an electrical engineer who testified that he has been maintaining the electricity pole erected on the boundary wall separating the Plaintiff's and Defendant's parcels of land since 1998. He stated that he replaces the bulbs and wires that were causing short circuits. He further stated that the electricity poles are mounted on the Plaintiff's side of the disputed portion of land and face the Defendant's property, and that are switched on

from a projector room located on the Defendant's property. Further, that the said lights are working, and the electricity poles do not require any painting as they are galvanised. He also stated that the lamp posts/bulbs are accessed by placing a ladder which rests against the posts.

The Defendant's second witness was Michael Oluoch (DW 2), a way leaves officer employed by Kenya Power and lighting Company Limited, who testified that he visited the disputed portion of land in 2010 after a complaint was made that the wayleave trace was being interfered with. He testified that he made drawings which were produced as the Defendant's Exhibit 1. He further stated that there were high tension power lines on the way leave corridor which was supposed to be 10 metres wide, and that the Defendant had complied with the requirements with regards to the way leave by leaving a distance of 5 metres from its boundary. However, that no corresponding 5 metres had been left on the part of the Plaintiff's side of the property for the power supply lines way leave.

The Defendant's third witness was Irene Kashindi, (DW 3), an advocate employed by the firm of Hamilton Harrison & Mathews Advocates. PW3 testified that she had assisted with the preparations of the Defendant's case, and produced three letters, namely, two letters dated 18th January 2010 and 16th April 2010 from Hamilton Harrison & Mathews Advocates to Kenya Power and Lighting Company, and a letter dated 25th May 2010 from Kenya Power and Lighting Company to the said firm of Advocates. The said letters were marked as the Defendant's Exhibits 2, 3 and 4 respectively. The letters sought confirmation of the KPLC on whether the disputed portion of land falls within the way leave as per special condition 16 of the Grant in respect of the Defendant's property (LR. No. 209/10515).

The Defendant called Kirit Patel as its fourth witness (DW 4), who testified that he was a former director of the Plaintiff until 2004, and was familiar with the disputed portion of land. DW 4 stated that the boundary wall between the Plaintiff's and Defendant's properties had been built by the Defendant, and that he had entered into an agreement with Dhruvkumar B Patel, a director of the Defendant, that the Plaintiff would not build a boundary wall as it would create an alley between the Plaintiff's property and the Defendant's property which would be a security risk. He stated that the actual boundary of the Defendant's land was the plant hedge on the disputed portion of land.

The Defendant called Dhruvkumar B Patel as its fifth witness (DW5), who also filed a witness statement signed and dated 24th November 2009. DW5 testified that he is a director of the Defendant company, and that the Defendant is the registered owner of LR 10341 and of the disputed portion of land. He further testified that the Defendant constructed the boundary wall between the Plaintiff's and Defendant's land in 1962, and left some space from its boundary for electricity poles for lighting and the power lines as is required by law.

Further, that they had been maintaining the said electricity poles which face their property, and that the actual boundary of their land is located at the hedge on the disputed land. He also stated that he had entered into a verbal agreement with the Director of the Plaintiff, Kirit Patel, and had allowed the Plaintiff to construct two walls adjoining the wall already constructed by the Defendant so as to prevent the public from accessing the Plaintiff's land.

The Defendant's last witness was Nilesh Patel (DW6) who swore the replying affidavit filed in this suit which he adopted as his evidence. He stated therein that the Defendant is the registered proprietor of the parcel of land known as Land Reference number 10341, and the Plaintiff is the owner of property known as Land Reference number 209/10515 adjoining the Defendant's property.

Further, that in or about 1962 the Defendant built a wall protecting its land from the land then owned by the Crown, and that in order to comply with special conditions under the Grant, the wall had to be some distance away from its boundary. Specifically, that special condition 7 of the Grant required the Defendant to provide adequate storm water drainage to the satisfaction of the County Council, and special condition 16 required the Defendant to allow the Governor General or such other persons or authority as may be appointed for that purpose to enter the property and lay and have access to water mains service pipes drains telephone or telegraph wires and electric mains. Further, that special condition 16 prohibits the Defendants from erecting any building is such away as to cover or interfere with the mains, service

pipes, telephone wire and electric mains situated on the property.

DW6 stated in his replying affidavit that in accordance with special condition number 16, the Defendant granted the Kenya Power and Lighting Company a way leave to put up electric mains on the disputed portion of land, and he attached photographs showing the mains and the wall constructed by the defendant. He also stated that when the Plaintiff acquired its property in 1985, its boundary was marked by a hedge which still exists to date. Further, that he was informed by Dhruvkumar B. Patel, his father who was then a director of the Defendant, that he had a verbal agreement with Kiritkumar Rambhai Patel, a former director of the Plaintiff in which the plaintiff was allowed to construct the two walls on the Defendant's property.

DW6 stated that he had been a director of the Defendant since 1996, and was aware of the circumstances of the dispute herein. He also stated that the Defendant's directors were on friendly terms with the previous directors of the Plaintiff.

The Issues and Determination

Arising from the foregoing facts, evidence and submissions, and as observed by the court during the site visit to the disputed portion of land, it is not IN dispute that the Plaintiff has been using the disputed portion of land. The nature and effect of the said use is what is disputed, and this court therefore finds the issues for determination to be the following:

1. Whether the Defendant has retained possession of the disputed portion of land.
2. Whether the Plaintiff's possession of the disputed portion of land was adverse.
3. Whether the Plaintiff is entitled to the reliefs sought

I consider it necessary to first lay out the requirement of adverse possession to guide the consideration and determination of these issues. **Black's Law Dictionary, Ninth Edition** at page 62 defines adverse possession as "the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious". Section 7 of the Limitation of Actions Act sets the statutory threshold of be 12 years for such enjoyment and/or occupation by a claimant to give rise to adverse possession.

The requirements for adverse possession in the Kenyan situation have been set out in various judicial decisions. In **Mbira v. Gachuhi (2002) 1 EALR 137**, this court held thus:

"... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption"

Likewise, in **Jandu v Kirplal and Another (1975) EA 225** it was held as follows:

".....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual visible, exclusive, open and notorious. "

The Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that 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 that he or she has been in possession for the requisite number of years.

Certain qualities are therefore required for the possession by a claimant to amount to adverse possession as described in the **Elements of Land Law, 5th Edition** by Kevin Gary and Susan Francis Gray at

paragraphs 9.1.44 to 9.1.52. These are that there must be a complete and exclusive physical control over the land in dispute, the possession should be open meaning not secret, it must be peaceful and not by force, and lastly it must adverse and not by consent of the true owner. It is with these elements in mind that I proceed to address the issues raised in this suit.

a. *On whether the Defendant has retained possession of the disputed portion of land*

The Defendant's claim is that the Plaintiff's alleged occupation was not exclusive and that the Defendant has remained in actual and legal possession of the suit property without being dispossessed of it at any point, as it has erected and maintained electricity poles thereon, and uses it as a way leave as stated in the special condition 16 of its title. The Defendant relied on the decisions on dispossession in **Wambugu v Njuguna (1983) KLR 172** and **Kim Pavey & 2 others v. Loise Wambui Njoroge (2011) eKLR**. Further, that the requirement for evidence of the Defendant's interruption of the Plaintiff's possession only arises if such possession is proved and cannot arise if time has not begun to run in the absence of actual, open, notorious, exclusive and adverse possession.

The Plaintiff's arguments on this issue were that the maintenance of light bulbs by the Defendant on the disputed portion land cannot amount to interruption of its possession of the suit property, and that the only act of attempting to enter the property was by use of a ladder. Further, that no evidence has been adduced to show that the Defendant made any attempt to assert their right of ownership to the property or interrupt the Plaintiff's occupation save for a demand letter in 2009. The Plaintiff relied on the decisions on interruption of occupation in **Kipketer Togom v Isaac Cipriano Shingore (2012) eKLR**, **Githu v Ndeete (1984) KLR**, and in **Kim Pavey & 2 Others vs. Loise Wambui Njoroge & Another (2011) eKLR**.

The law on adverse possession requires a claimant to have exclusive possession and control over the land being claimed, and to have dispossessed the true or legal owner from the said land. The Defendant brought evidence of its use and maintenance of electricity poles on the disputed portion of land, and of the existence of electricity supply lines that pass through the portion of land pursuant to condition 16 of its title to the land.

DW 5 and DW6 testified that the Defendant erected the electricity poles on the disputed portion of the suit property and that the said poles face the Defendant's land, and this evidence was not disproved by the Plaintiff. DW1 testified that the said electricity poles were in a working condition and that he maintained them on behalf of the Defendant. He confirmed that he could access the electricity poles using a ladder placed on the Defendant's land. These assertions were disputed by the Plaintiff, who alleged, and also asked the Court to observe that this was not possible. However as on the day of the site visit there was no ladder on the disputed portion of land the Defendant's assertions could not be verified.

DW2 testified to the use of the disputed portion of land by the Kenya Power and Lighting Company for the electricity main supply lines, and that they had also erected a transformer on the said land. He also testified that the Defendant had in this regard provided a wayleave of 5 metres which was on the disputed portion of land, and that the Plaintiff had not provided any way leave as required. He further testified that the Kenya Power and Lighting Company require such a wayleave for safety reasons. The power lines over the disputed portion of land were visible in the photographs attached to DW6 replying affidavit sworn on 25th March 2009, and were also observed by the court during the site visit.

It was not disputed by the Plaintiff that the electric supply lines and transformer by the Kenya Power and Lighting Company are situated on the disputed portion of land, and have been there since their occupation of the same. They did not bring any evidence of having given Kenya Power and Lighting Company permission to put the said supply lines and transformer on the disputed portion of land.

DW 6 also stated that Condition 16 of the Defendant's title required them to provide such a wayleave. I have perused the said Condition 16 of the title which was attached as exhibit "NP1" to DW 6's replying affidavit sworn on 25th March 2009, and it states as follows:

“The Governor-General or such person or authority as may be appointed for the purpose shall have the right to enter upon the site and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the Grantee shall not erect any buildings in such a way as to cover or interfere with any existing alignments of main or services pipes or telephone or telegraph wires and electric mains.”

The said condition does indeed provide that the Defendant was not to erect any buildings on the part of their property reserved for electricity supply lines or water service and drainage pipes, and is consistent with the Defendant’s evidence in this regard.

The effect of laying of power lines on the disputed portion of land is also provide by section 51 of the Energy Act which provides as follows:

“After electric supply lines have been laid in accordance with this Act, the licensee or any person authorised by the licensee may, from time to time as it becomes necessary, enter the land on which the electric supply lines are laid, with such assistance as may be necessary, for the purpose of inspecting or repairing the lines, or removing such lines in case where the electric supply lines are no longer required.”

Similar provisions were also provided in section 106 of the repealed Electric Power Act.

From the evidence adduced it is manifest that the Defendant maintained a presence on the disputed portion of land, mainly through Kenya Power and Lighting Company whom it had given the land to use as a way leave for electricity supply lines. It is thus my finding that the Plaintiff did not have exclusive use of the disputed portion of land, and on the contrary the said land was being used for a specific purpose as an electricity way leave by the Defendant.

It cannot therefore be said that the Defendant had been dispossessed of the same within the meaning given in **Wambugu v Njuguna (1983) KLR 172** where the Court of Appeal stated as follows relying on the decision in **Littledale v Liverpool College (1990) I Ch. 19**:

“The next question therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh v Jack 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”

In the present case the Defendant brought evidence to show that it intended the disputed portion of land to be used as a wayleave for electricity supply lines, and that indeed that is what it was used for.

(b) Whether the Plaintiff’s possession of the disputed portion of land was adverse.

Even though this court has found that the Plaintiff’s occupation of the disputed portion of land was not exclusive, it is necessary to consider the other arguments put forward by the parties as to whether the occupation of the land by the Plaintiff was adverse. The Plaintiff denied that it was in occupation of the suit property as a licensee as alleged in the Defendant’s evidence with respect to the verbal personal agreement that was entered into between DW 4, a previous director of the Plaintiff company, and DW 5, a director of the Defendant Company. Further, that there were no minutes produced as proof of their respective Boards approval and no corroboration of their accounts.

It was also argued that DW 5 did not bring any evidence of his communication to the current directors of the Plaintiffs on the circumstances of their occupation of the dispute portion of land as alleged. The Plaintiff submitted that the Defence had failed to demonstrate the existence of any agreement that allegedly existed that allowed the Plaintiff to build a perimeter wall that encroached on the Defendant’s land, and that the plaintiff was therefore not occupying the Defendant’s portion of the suit property as a licensee but as an adverse possessor.

The Plaintiff argued in this respect that it has undertaken landscaping on the suit property and has also created a playground that is used by tenants that reside in the plaintiff's property. In addition, that the Plaintiff had built on the suit property a stone storage space for the transformer provided by Kenya Power and Lighting Company. It was submitted that the Plaintiff's actions are inconsistent with the Defendant's rightful ownership of the suit property and amounted to dispossession, and that the Plaintiff can therefore be said to have adversely acquired title to the suit property.

The Defendant argued on this issue that it had furnished the court with evidence that the alleged occupation of the suit property by the Plaintiff was consensual. Further, that the agreement between the directors of the Plaintiff and the Defendant explains how the Plaintiff was allowed to access to the disputed portion of land property. The Defendant also argued that any possession as alleged by the Plaintiff, was done with consent of the Defendant and that such consent vitiates any claim for adverse possession as there clearly exists evidence that it was intended by both parties that the suit property would remain under the Defendant's ownership.

Lastly, it was argued by the Defendant that no evidence was furnished by the Plaintiff in support of the alleged use of the suit property for the purposes of, *inter alia*, a playground, clothing line and garbage disposal since 1985 or for a period of more than twelve years, and this court cannot therefore infer the fact of possession. Further, that the mere presence of the Plaintiff's equipment and waste materials on the suit property for the alleged period does not amount to actual possession nor does it amount to a denial of the Defendant's right by open assertion of a hostile title.

The court did observe that the suit land was being used by the Plaintiff as a playground for children and a garden and PW1 claimed that they have been so using the property since they acquired it in 1985. However, no corroborating evidence was brought that the said portion was in the same state and used for the same purposes on the date of acquisition in 1985 by the current directors of the Plaintiff.

On the issue of whether the said use of the disputed portion of land by the Plaintiff of consensual, it was not disputed that DW 4 was a former Director of the Plaintiff. The Plaintiff as a legal person existed before the current directors acquired their shareholding, and therefore any initial agreement between the Plaintiff's former directors and the Defendant's directors as to the use of the disputed portion of land would be material. It was argued by the Plaintiff that decisions of companies are made through resolutions, and that none were produced by the Defendant. This is indeed the position in law, and to the extent that there was no evidence produced of such resolutions this court cannot find that there was an agreement as between the Plaintiff and Defendant as to the use of the disputed portion of land.

However, it is my view that this finding notwithstanding, consent by an owner of land to another to occupy the land does not have to be in a formal agreement, and any form of mandate or permission can suffice, including acts founded on amity and good neighbourliness. From the evidence of DW 4, DW5, and DW 6 it was evident that DW4 was not only a former director of the Plaintiff but also good family friends with the Defendant's directors. The initial occupation by the Plaintiff was therefore based on this friendship and was to that extent consensual.

The fact that later directors of the Plaintiff considered their possession to be hostile did not negate the initial and subsisting consent to the Plaintiff's possession by the Defendant's directors. It is thus the finding of this court that while the Plaintiff's occupation of the disputed portion of land was open and continuous, it was not adverse as it was not exclusive and was consensual. This court is in this respect guided by the elements that must be present for adverse possession to arise as stated by the Court of Appeal in **Jandu v Kirplal and Another (1975) EA 225** and **Mbira v. Gachuhi (2002) 1 EALR 137**, which decisions were cited in the foregoing.

c. Whether the Plaintiff is entitled to the reliefs sought

The arguments and findings made in the foregoing also apply to the prayers sought by the Plaintiff for declarations of ownership of the disputed portion of land by adverse possession which cannot lie as the Plaintiff has not been found to be in adverse possession of the disputed portion of land. Likewise the

Plaintiff is consequently also not entitled to any permanent injunction as there is no legal basis for the same. As the Defendant is the successful party in this suit, it shall be entitled to costs since the general rule is that costs follow the event.

The Orders

This court accordingly finds that the Plaintiff has not proved its case on the balance of probabilities and hereby dismisses the Plaintiff's suit herein with costs to the Defendant.

Dated, signed and delivered in open court at Nairobi this ____30th____ day of

____January____, 2014.

P. NYAMWEYA

JUDGE