



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 103 of 2012

**IN THE MATTER OF A CLAIM OF TITLE TO LAND UNDER SECTION 38 OF THE
LIMITATION OF ACTIONS ACT,**

CAP 22 LAWS OF KENYA

JOHN MUANGE KITHIOKOI.....PLAINTIFF

-VERSUS-

ERNST HJALMAR FRIDOLF ANDREBERG.....RESPONDENT

COMMISSION OF LANDS.....INTERESTED PARTY

JUDGMENT

The Plaintiff commenced this suit by way of an originating summons dated 24th February 2012 and filed in court on 28th February 2012. The originating summons was supported by affidavits sworn by John Mwange Kithiokoi the Plaintiff herein and one Noah Odhiambo Omuoni. The Originating Summons sought to determine a claim expressed to be made under the provision of Section 38 of the Limitation of Action Act, Cap 22 Laws of Kenya.

The Plaintiff claimed to have resided on land parcel known as L.R N. 3734/28 situated in Nairobi stealthily and peaceably without the permission of the registered proprietor and to have thus acquired interest thereto and sought the determination by the court of the following questions, namely:-

- (i) Whether John Muange Kithiokoi the Plaintiff herein has resided on all that parcel of land known as L.R. NO. 3734/28 for uninterrupted period of over 12 years without the permission of the Respondent or at all as the registered owner.
- (ii) Whether John Muange Kithiokoi the plaintiff herein has acquired legal, rightful and lawful title/proprietorship to all that parcel of land known as L.R. No. 3734/28 as against the Respondent under Section 38 of the limitation of actions Act Cap 22 Laws of Kenya.

The Plaintiff consequently sought for orders that:-

- (a) That the plaintiff has registered as the owner of the suit property
- (b) The costs of the suit.

The court on 21st May 2012 directed that the originating summons be served personally on the respondent and the plaintiffs advocates on 29th May 2012 filed an application to be allowed to serve the originating summons on the respondent by way of substituted service and this application came for hearing on 8th June 2012 before Hon. Justice Ougo who granted leave. The respondent was duly served by way of substituted service through an insert in the people Daily on 14th June 2012 as per the return of service filed in court on 12th July 2012. The respondent did not appear within 15 days as required and neither was any response filed on his behalf.

The court on the application of the plaintiff on 19th July 2012 gave directions that the originating summons be heard vice voce on a date to be fixed at the court registry.

The matter came for hearing before me on 6th December 2012 and as at this date the Respondent had not appeared or filed any response to the originating summons. Equally the interested party in spite of being served on various dates had neither appeared nor filed any response.

The plaintiff John Muange Kithiokoi testified before me and reiterated the contents of his witness statement dated 23rd February 2012 and produced the documents contained in his list of documents filed in Court on 23rd February 2012.

Briefly the gist of the plaintiff's evidence was that in 1977 he was working as a waiter at Pigale Hotel near the Jevanjee Gardens when he came to know one Radar Syoblom who was a regular customer at the hotel. The said Syoblom offered him a job at his residence on L.R No. 3734/28 in the Lavington area of Nairobi which the latter was leasing. The plaintiff moved to the property and was occupying the servant's quarter until 1985/86 when Mr. Syoblom left the country.

The Plaintiff continued to occupy the plot and has remained on the property, ever since. The plaintiff testified that even when the property was vandalised during his absence sometime in 1986 when he was visiting his rural home at Mbooni in Machakos when he came back he constructed a semi permanent structure on the property where he continues to reside to date.

The plaintiff further testified that no person has since his occupation from 1977 come claiming or laying claim to the parcel land. The plaintiff states that he has never met the owner, Mr. Ernst Hjalmar Fridoll Andreberg, who he came to learn was the registered owner from a copy of uncertified certificate of title that Mr. Syoblom had left in the house and which is included in the plaintiffs bundle of documents. The plaintiff states that he has been in continuous uninterrupted possession and occupation of the suit premises in circumstances that are adverse to the rights and interest of the registered owner and has therefore acquired title through adverse possession.

The plaintiff called one witness Noah Odhiambo Amuom who testified that he has known the plaintiff since 1977 and that he has been aware that the plaintiff has occupied the suit property and has been in possession since 1986 when Mr. Syobalom left the county. This witness testified that he has regularly visited the plaintiff at this property and he testified that the plaintiff has to his knowledge occupied this property exclusively for over 35 years.

On the basis of the foregoing facts and evidence the court has to determine whether the plaintiff is entitled to the orders he seeks under Section 38(1) of the Limitation of Actions Act Cap 22 Laws of Kenya.

The rationale in claims for adverse possession is that where a person takes possession of land through wrongful means and continues in uninterrupted possession for a period of 12 years or more such a person acquires a possessory title to the land and the act of being in adverse possession serves to extinguish the interest and title of the registered owner and such a person who shows to have exclusively adversely possessed the land as against the owner would be entitled on application to the court to be declared as owner and entitled to registration as owner.

In determining whether or not to declare that a party has acquired land by adverse possession certain

principles or requirements must be satisfied.

The Court of Appeal in **WAMBUGI VS. NJUGUNA (1983) KLR 172** outlined the principles and I can do no better than set out inter alia part of their holding:-

***“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession, of the proprietor that defeats his title are acts which are inconsistent with this enjoyment of the soil for the purposes for which he intended to use it. The respondent could and did not prove that the appellant had either been disposed or had discontinued possession of the suit land for a continuous statutory period of 12 years as to entitle him, the respondent, to title to that land by adverse possession.*”**

The Limitation of Actions Act, on adverse possession contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years”.

In the instant case there is evidence that the respondent is the registered owner as per the copy of the certificate of title and the city council rates demand notes that continue to be issued in the name of the respondent. The lawful tenant of the respondent left the county in 1986 and henceforth the plaintiff continued to adversely possess the suit property. The act by the plaintiff served to discontinue possession by the registered owner and this discontinuation has continued to date such that at the time the plaintiff brought this suit the registered owner had been discontinued of possession for upto 26 years. In terms of section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya the registered owner's title can be said to have been extinguished after the expiry of 12 years from 1986. 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 it first accrued to some person through whom he claims to that person”.

In the premises it is my considered view that the plaintiff has proved and has established his claim as per the originating summons and is entitled to the orders sought. I would in the result answer the two questions posed in the originating summons affirmatively.

Before I conclude this judgment I wish to make a comment on the joinder of the Commissioner of Lands as an interested party. I have considered the issue and I find there was really no basis to enjoin the Commissioner of Lands as an interested party in an adverse possession claim. The Commissioner of Lands as the depository and custodian of the land records would be obliged to comply with any lawful order that would emanate from the court. In the result I hold that the Commissioner of Lands was not a necessary party or interested party in these proceedings.

On the Originating Summons for the reasons that I have already set out above I enter judgment in favour of the plaintiff by declaring that he has become entitled to be registered as owner and proprietor of all that parcel of land known as L.R No. 3734/28 by virtue of adverse possession.

Consequently the Registrar of Titles is directed to cancel the registration of Ernst Hjalmar Gridolf Andereberg as owner and instead to substitute **John Muange Kithiokoi** as the registered owner.

I make no order as to costs for the originating summons.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant