



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC CASE NO. 256 OF 2006

BIR SINGH & CO.....PLAINTIFF

-VERSUS-

J. K. M. INDUSTRIAL & COMMERCIAL

INVESTMENT LIMITED.....DEFENDANT

JUDGEMENT

The plaintiff by an originating summons dated 15th March, 2006 and filed in court on 16th March 2006 brought the instant suit under the provisions of the previous Order XXXVI Rule 3D of the Civil Procedure Rules for orders:-

1. That the plaintiff be declared to have been entitled to all that piece of land known as L.R. No. 337/647 (originally known as Plot Number 2) situated within Athi River Township Industrial Area Off Namanga Road in Machakos District and Registered within the meaning of the Registration of Titles Act Cap 281 laws of Kenya and measuring Nought Decimal Six Four Three One (0.6431) of a Hectare or thereabouts, by way of adverse possession as it has been in occupation of the same for more than twelve (12) years.
2. That the plaintiff be registered as the proprietor of the said piece of land known as L.R. No. 337/647 (originally known as plot number 20 in place of the above named Defendant.
3. That the costs of this application be provided for.

The plaintiff has filed a supporting affidavit sworn by Jagjit Singh the Managing Partner of the plaintiff on the 15th of March, 2006.

The originating summons was ordered to be served upon the defendant by way of substituted service by an advertisement twice in the Daily Nation Newspapers on 23rd October, 2007. Service was effected by way of placing two (2) Newspaper advertisements in the Nation Newspaper on the 19th and 21st July, 2008 as per the affidavit of service sworn on 18th February, 2009 and filed in court on 20th February, 2009.

The defendant did not appear and neither did they file any response to the originating summons following the service of the same in compliance with the order of 23rd October 2007.

The matter was fixed before me for hearing on 27th November, 2012 when Mr. Tagjit Singh testified on behalf of the plaintiff.

The plaintiff testified that he is the managing partner of his business company Bir Singh & Company which has been carrying on business since 1949. The plaintiff testified that they started operating business at Athi River on L.R. No. 337/647 (the suit property) under a temporary occupation Licence (TOL) issued by Commissioner of Lands to Messrs Bir Singh & Co vide an agreement dated 10th December, 1952 annexed to the Supporting Affidavit and marked "JS2". The plaintiff testified that they have constructed dwelling houses and stores on the suit property and connected piped water to the property. The plaintiff has been paying land rent to the Commissioner of Lands since being issued with the TOL. The plaintiff stated that in 1977 they applied to the Commissioner of Lands to be allocated the plot but instead of the Commissioner allocating the plot to the plaintiff the Commissioner of Lands gave the plaintiff Notice terminating the TOL and 3 months notice to vacate the property in 1978 indicating that the property had already been allocated to somebody else who the plaintiff subsequently came to learn was the Defendant when they obtained a copy of the title to L.R. No. 337/647. The plaintiff has produced a copy of the certificate of title as exhibit 3 that shows that **J.K.M. Industrial Commercial Investments Limited** are the registered owners of L.R. No. 337/647 for a term of 99 years from 1st October, 1978 and were issued with the title on 15th July, 1985 and the same was registered as I.R. No. 39757/1 on 18th July, 1985.

The plaintiff states that after the revocation of the TOL by the Commissioner of Lands they did not vacate the suit premises and that they continued carrying on business on the property and developing the same and that the plaintiff has remained in uninterrupted possession of the suit property from 1978 when the TOL was revoked to date.

The plaintiff testified that they do not know who the Defendant is and that since the Defendant was allocated the property in 1978 the Defendant has never visited the property and even after being issued a title and registered as owner in 1985 the Defendant has not come to the suit property to assert its rights of ownership.

The plaintiff in the premises asserts that by having been in adverse possession of the suit property for a period in excess of 12 years they have acquired title to the suit property and that the plaintiff ought to be declared as owner of the suit property. The plaintiff contends the title of the defendant has been extinguished through the operation of the law and that the plaintiff has acquired title to the suit property by reason of having been in adverse possession of the property to the exclusion of the registered owner for a period in excess of 12 years.

On the basis of the material evidence placed before the court by the plaintiff the court is called upon to determine, firstly, whether the plaintiff has established possession adverse to the rights of the registered owner and, secondly, whether on the facts and the evidence the plaintiff is entitled to the prayers sought.

The defendant was allocated the subject suit property in 1978 and subsequently issued with a title on 15th July, 1985 and as per the title the user of the property, the land and buildings were only to be used for inoffensive industrial purposes.

There is no evidence that the defendant sought re entry onto the suit property to effect the user of the property as per the title. There is no evidence that the defendant sought to recover possession of the suit land which was in possession of the plaintiff. In the case of **SISTO WAMBUGU VS. NJUGUNA (1983) KLR 172** the court of appeal discussed at length the circumstances under which the doctrine of adverse possession would be applicable. Inter alia the Court of Appeal in the case held:-

- i. That the general principle is that until the contrary is proved, possession in law follows the right to possess.
- ii. That in order to acquire by the statute of Limitation 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 inconstent with his enjoyment of the soil for the purpose for which he intended to use it.
- iii. The limitation of Actions Act on adverse possession, contemplates two concepts: **dispossession** and **discontinuance of 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.
 - iv. Having regard to the facts and evidence in this matter and applying the above principles in this case I am satisfied, in the absence of any evidence to controvert the evidence by the plaintiff that the plaintiff has been in continuous and uninterrupted occupation and possession of the suit premises to the exclusion of the defendant. The actions of the plaintiff in my view have dispossessed the defendant of the property and that this dispossession has been adverse and has continued for a period in excess of 12 years. This in my opinion has operated to extinguish any rights and/or interest that the defendant had over the suit property. It is therefore my finding and holding that the plaintiff has established his claim to entitle him to the orders that he seeks.

In the result therefore I enter judgment in favour of the plaintiff in the following terms:-

- a. That the plaintiff be and is hereby declared to have become entitled to all that piece of land known as L.R. No. 337/647 (originally known as Plot Number 2) situated within Athi River Township Industrial Area off Namanga Road Machakos County and measuring Nought Decimal Six four Three one (0.6431) of a Hectare or thereabout by way of adverse possession as it has been in occupation of the same for more than twelve (12) years.
- b. That the plaintiff be registered as proprietor of the said piece of land known as Land Reference Number 337/647 (originally known as Plot Number 337/647 (originally known as Plot Number 2) in Place of the Defendant and the Registrar of Titles hereby directed to forthwith delete the names of J.K. Industries and Commercial Investment Limited from the register and in its place to insert the name of BIR SINGH & CO. as the owner of the said property.
- c. That the costs of the suit to be paid by the defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant