



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
HIGH COURT CIVIL CASE NO. 179 OF 2009 (O.S)
IN THE MATTER OF LIMITATION OF ACTIONS ACT SECTION 38 (1)

AND

**IN THE MATTER OF LAND REFERENCE NUMBER 1116 – SOUTH WEST OF MAKINDU
TOWNSHIP IN KENYA**

CHANDRAKANT DEVRAJ SHAH PLAINTIFF

VERSUS

ALIBHAI HAJI AND FAZAL VELJI VIRANI DEFENDANTS

J U D G M E N T

This matter was commenced by way of an Originating Summons initially filed in Nairobi as High Court Civil Case No. 608 of 2004 (O.S). The Originating Summons was dated 19th December 2003 but was filed with an affidavit sworn on 24th April 2004 by the Plaintiff.

The Plaintiff's Counsel applied for substituted service. It appears that leave to serve by advertisement in the daily newspaper was granted by the Deputy Registrar, Mr Matheka, on 10th November 2004. On 12th October 2005, another Deputy Registrar, whose name is not disclosed entered judgment in default of appearance, subject to the matter being fixed for formal proof hearing. It is not particularly clear to me how the Deputy Registrar could make substantive orders on substituted service and also to enter interlocutory judgment.

On 28th September 2006 Murugi Mugo J, rightly pointed out:-

“It appears the suit ought not to have been set down for formal proof but for a hearing in terms of Order IXA Rule 8 since the claim is neither for liquidated demand or pecuniary loss.”

In my view, had the matter been put before the Judge as required for decision, the above obvious mistakes would not have occurred.

Thereafter, on 15th July 2007 the Plaintiff made an application to amend the Originating Summons. The amendment sought was to include the words **“in the Machakos District”** in the opening paragraph and to replace the words **“South of Malindi Township”** with the words **“South West of Makindu Township in the Machakos District”** in the 1st prayer. The request for amendment was granted by Aganyanya J (as he then was) on 13th July 2007.

Thereafter, the file, which was a Nairobi matter was sent to Machakos High Court for further proceedings on 28th May 2009 by Osiemo J. Directions were given in Machakos on 19th August 2009 for proceedings to be taken on the basis of affidavits filed.

The matter subsequently came up for hearing before me on 8th November 2011. The Defendants did not appear, nor were they represented by Counsel. Mr Khan for the Plaintiff submitted in support of the amended petition. Counsel emphasized that the case of his client was for adverse possession. Counsel stated that his client bought half portion of the subject land and now wants to be declared owner of the whole piece of land, which includes the portion belonging to one ALIBHAI. Counsel submitted that his client has occupied and used the subject land openly and uninterrupted for more than 12 years from 1991. The Plaintiff had also paid rates and is in possession of the original title.

There was no response filed by the Defendants. They were also not present in court, nor were they represented.

The factual situation from documents filed is as follows.

Under the amended Originating Summons, which was amended on 22nd July 2009, the prayers are for the court to order as follows:-

- 1. The Plaintiff is entitled to be registered as the proprietor of one half undivided share of the Defendant in the land Reference Number 1116 – South West of Makindu Township in the Machakos District in Kenya title to which is registered at the Land Titles Registry at Nairobi in Kenya as IR 948/1 under Section 38 of the Limitation of Actions Act (Chapter 22) Laws of Kenya on the ground that since 18th February 1991 the Plaintiff has been openly peacefully and of right in occupation of the above mentioned land that is to say for a period of over twelve (12) years preceding the presentation of this summons.**
- 2. That the aforementioned occupancy has been done continuously as of right and without force from the Defendant and without permission from the Defendant and/or any one of the Defendant’s agents and or/servants.**
- 3. That by occupation for the reasons aforesaid the Defendant’s title to the one half undivided share in the said piece of land is extinguished under Section 17 of the Limitation of Actions Act (Chapter 22) Laws of Kenya.**
- 4. The Deputy Registrar of this Honourable Court be authorized to sign all the necessary papers on behalf of the Defendant.**
- 5. Costs of this Originating summons be provided for.**

Filed with the Originating Summons was the affidavit of the Plaintiff sworn on 24th April 2004 and a supplementary affidavit sworn by the same deponent on 22nd November 2008. The supplementary affidavit annexes a certified copy of the Grant of Title registered in Number IR 948/1 with an explanation that that entry No. 10 shows the half share interest of the Defendants.

I have considered the matter, the documents filed and submissions of Counsel for the Plaintiff.

This is a claim for adverse possession. For a Plaintiff to succeed in such a claim, he has to prove to the court that he is in possession, and that that possession of the subject land is adverse. In **PARKLANDS PROPERTIES LTD –vs- PATEL (1981) KLR 52**, Madan J (as he then was in 1970) held:-

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3. The issue whether a party's possession of a piece of land is adverse is a matter for evidence, and a decision thereon depends upon whether the party alleging adverse possession successfully establishes the particular of adverse possession pleaded.

The Plaintiff has pleaded that he has been in occupation of undivided one half share of the Defendant of the parcel of land known as LR No. 1116 South Makindu Township for a period exceeding 12 years and should therefore now be declared the legitimate owner and be registered as such owner.

He filed a copy of the document of title. He was himself entitled to ½ share of the piece of land transferred to him by Thomas Maingi Munyoki on 18th February 1991. He also filed copies of receipts for payment of rates to Makueni County Council issued on 13th June 1997, 23-4-1998 and 19th August 2002.

I note that entries in the title document are quite faint and brief. One has to strain to read them. There is also a big space between entry 9 and 10. That space is covered by a piece of paper, and no explanation for that big gap. Nobody from the Lands Office has sworn an affidavit to explain the entries in the title document and their purport. There is no affidavit filed from any other person, including possibly a chief or neighbours, to show that the Plaintiff actually occupies the land he claims to occupy and openly for the alleged length of time.

The receipts for payment of rates do not show whether it is for the Plaintiff's half portion or for the Defendant's half portion or both. In any case, payment of rates for a plot per se, does not give rise to a claim for adverse possession. There has to be physical occupation and it has to be adverse to the title holder. That possession has to be exclusive and uninterrupted for the entire period of more than 12 years.

Section 38 (1) of the Limitation of Actions Act (Cap 22) under which the Originating Summons herein was brought is instructive. It provides:-

38(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

The above underlining is mine. In my view, the words in the section specifically require physical possession, which is adverse and uninterrupted. That proof of possession can only be established through tangible admissible evidence, which the Plaintiff has not provided. In the result the Plaintiff has failed to establish a case of adverse possession in his favour. Consequently, the motion has to fail. Since the Defendants did not defend the proceedings, I will make no order as to costs.

For the above reasons, the Plaintiff's Notice of Motion is dismissed with no order as to costs.

Dated this 23rd day of February 2012.

George Dulu

JUDGE

In the presence of:

Mr A Khan for Plaintiff

Nyalo - Court Clerk.