



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 2300 OF 2007

HUTU MISTRYPLAINTIFF

VERSUS

PORUS PHIROZE MISTRY

MASARI FLATS LIMITED DEFENDANTS

JUDGMENT

HUTU MISTRY, the Plaintiff herein is the sister of the 1st Defendant, **Porus Phiroze Mistry**, while the 2nd Defendant is the registered proprietor of the holding company that holds the flats in trust of the 6 flats' owners comprising of **LR No: 209/7125**.

The Plaintiff took out an originating summons seeking the following orders:

- 1. A declaration that the Plaintiff is entitled to be registered as the owner of flat No. 4 erected on L.R. No. 209/7125, Nairobi registered in the name of the 2nd Defendant which flat the Plaintiff has held in adverse possession since 19th August, 1982 to date and the 1st Defendant's title to the said Flat No. 4 erected on L.R. No. 209/7125, Nairobi if any, was extinguished on expiry of 12 years from 19th August, 1982 in view of the provisions of Section 7, 37 and 38 of the Limitations of Actions Act, Cap 22 of the Laws of Kenya.*
- 2. An order be issued directing the Defendants whether by themselves, agents, servants or otherwise howsoever to transfer 5,750 ordinary shares in the 2nd Defendant representing the Plaintiff's entitlement in respect of Flat No. 44 erected on L.R. No. 209/7125, Nairobi to the Plaintiff and to execute and perform or procure the execution and performance of such other acts deeds, documents, and things as may be necessary effectually to vest the beneficial and legal ownership of Flat No. 4 erected on L.R. No. 209/7125, Nairobi to the Plaintiff.*
- 3. An order be issued restraining the 1st Defendant whether by himself, agents, servants or otherwise howsoever from evicting the Plaintiff, interfering with the Plaintiff's quiet possession of, trespassing upon, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with Flat No. 4 erected on L.R. No. 209/7125, Nairobi.*
- 4. The costs of this summons be paid by the 1st Defendant.*

According to the Plaintiff, Flat No. 4 (hereinafter referred to as the flat) is erected on LR No: 209/7125, belonged to the Plaintiff's mother, the late **Mrs Dhubhai Mistry**. The deceased held 5,750 shares in the

2nd Defendant's company. The Plaintiff claims that she used to live with her late mother in the flat from 1st February, 1979, until she died on 19th August, 1982. The Plaintiff continued to occupy the flat for a period of 25 years. The Plaintiff contends that after the expiry of 12 years, she acquired proprietary interest over the flat on account of adverse possession.

Upon the death of the Plaintiff's mother, she left a will in which she bequeathed the flat to her sons. But, two of the Plaintiff's brothers, **Henri Philos Mistry** and **Sam Mistry**, bequeathed to the Plaintiff as per the copies of some communication attached to her affidavit. The Plaintiff complains that the 1st Defendant who is a resident of the United Kingdom used to visit and use the flat as a visitor. Sometime in the year 2000, the Plaintiff left the flat to the 1st Defendant and travelled to India. When she returned in May 2003, the 1st Defendant started becoming hostile and challenged the Plaintiff's entitlement to the flat. The 1st Defendant started demanding that the Plaintiff should buy his shares of the flat.

On 2nd July, 2007, the Plaintiff insisted that she needed to be left with the flat exclusively but the 1st Defendant purported to change the locks and denied the Plaintiff entry through the use of police. That is what prompted the filing of this suit.

Parties agreed that the matter be determined by way of affidavit evidence and with the aid of written submissions. Counsel for the Plaintiff relied on several authorities to wit the case of; **KIMANI VS KIBOGORO [1990] 49**, the court was considering a similar set of circumstances and held as follows on page 51:

*“While I agree with Mr Thuo’s statement of the general principle of the law on the subject of adverse possession, ie that the person claiming to have acquired title by adverse possession must prove that he has been in exclusive possession of the land for a continuous period of 12 years without any interruption, there is no authority for his further contention that the filing of a suit in 1975 interrupted the period of adverse possession; in fact the position is clearly the opposite. The filing of a suit does not interrupt adverse possession; in certain cases it may even amount to a re-affirmation of adverse possession (see the case of **Gatimu Kinguru vs Muya Gachangi [1976] KLR 253** cited by counsel for the plaintiff). Neither has the reference of the dispute to the Assistant Chief of the local area affected the adverse possession. The defendant has admitted that since 1964 the plaintiff has been in possession of the suit land. This possession has not been interfered with. The plaintiff has never been evicted. In those circumstances, how could it be argued that his possession has been interrupted. In my view, the correct position is that the plaintiff possession having begun in 1964, the plaintiff was in the process of acquiring what section 30(1) of the Registered Land Act recognises as overriding interests when the succession case was filed in Kiambu after the death of the defendant’s husband. The outcome of the case did not affect the plaintiff’s rights in the land for the defendant held it subject to overriding interests as were in the process of being acquired by the plaintiff. The defendant on being registered as the proprietor of the land as successor in title to her husband acquired exactly the same rights and liabilities as her husband held. She could not have acquired rights which were superior to her deceased husband. In this respect the decision in the case of **Sospeter Wanyoike vs Waithaka Kahiri** (cited above) is no authority for the general proposition made by Mr Thuo that the filing of a suit interrupts the period of adverse possession.”*

On the issue of possession, it was submitted that the Plaintiff acquired an indefeasible title to the flat on 19th August, 1994, upon the expiry of twelve [12] yeas. According to Mr Anzala, learned counsel for the plaintiff, by dint of the provisions of **Section 38 of the Limitations of Actions Act, Cap 22**, the Plaintiff is entitled to a claim of adverse possession against the 1st and 2nd Defendants’ (see the case of **PUBLIC TRUSTEE VS WANDURU (1984) KLR 314**).

On the issue of unlawful eviction of the Plaintiff from the flat, it was argued that that did not cancel the Plaintiff's entitlement. In the case of **Public Trustees vs Wanduru, Supra**, it was held that:

“4. The period of twelve years began to run the day the appellant and her husband took possession of the land as that was the day when the respondent’s possession was discontinued, and not on the last day by

which an application for the consent of the land control board was required to have been made under the Land Control Act as that Act did not apply to the appellant's claim."

As regards the claim that the deceased left a will, the 1st Defendant has never applied for letters of administration in respect of the deceased's estate. Moreover, the grant of probate which was issued to Sam Phiroze Mistry, has never been registered against the title.

On the part of the Defendants, the Plaintiff's claim was resisted by the matters deposed to in the replying affidavit sworn on 14th January, 2008 by the first Defendant. According to the 1st Defendant, there is no dispute that the flat belonged to his late mother, but, he contends that the Plaintiff resided in the flat from June 1973 until the mother died on August 1982.

Their mother left a will appointing the 1st Defendant with his brothers as her executor and trustee bequeathing the flat to the three brothers in equal shares. A grant of probate in respect of their mother's estate was issued in Nairobi High Court Succession Cause No. 328 of 1994. However, Sam died and left a will in which he appointed the 1st Defendant as the sole executor of his will. The 1st Defendant claims that he returned to Kenya in October 2000, to wind up the affairs of his parents and he took possession of the flat. By that time, the plaintiff had left Kenya to settle permanently in Pune, India. However, during his absence in July 2007, the Plaintiff invaded the flat and took possession. The 1st Defendant contends that he had left the flat being renovated and he travelled to England for treatment, but when he learnt of the Plaintiff's action, he reported the matter to the police who assisted him to recover the flat.

Mr **Goswami**, learned counsel for the 1st Defendant submitted that the Plaintiff's claim does not meet the threshold of a claim of adverse possession.

Firstly, the claimant must not be in possession with the consent of the owner. Secondly, the claimant must be in possession of the subject property at the filing of the claim. The 1st Defendant has highlighted several instances where the plaintiff has acknowledged that she was not in possession of the flat at the time of filing the suit. The plaintiff gives her address as Rhapta Road while the flat is located on 1st Avenue, Parklands. Thirdly, possession must be open, notorious, and there must be an ouster of the person against whom adverse possession is claimed.

Moreover, this suit is brought under the provisions of **Section 38** which deals with a title or lease, whereas this flat has no title or lease. The Plaintiff's mother only held shares in the 2nd Defendant's company and the main benefit was that she could occupy the flat in a block consisting of six flats. The section of the law does not apply to this case.

Counsel for the Defendants relied on several authorities especially the case of **WAMBUGU VS NJUGUNA (1983) KLR 172** where it was held that:

"2. In order to acquire by statute of limitations title to land which has an known owner, that owner must have lost his right to the land whether 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 his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.

3. The Limitations 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.

4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in

pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant, although the respondent's possession was exclusive and continuous but was not adverse; it only became adverse after the licence was determined.

5. The rule on 'permissive possession' is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land. For the respondent's claim for adverse possession to succeed, he must have an effective right to make entry and recover possession of land. He could not have that effective right because the occupation was under a contract, or licence, which had not been determined.

*6. Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of section 12 of the Limitation of Actions Act but time cannot run in favour of a licensee. A licensee therefore has no adverse possession (**Hughes vs Griffin [1969] 1 WLR 23**)."*

Also the case of **WANJE VS SAIKORO (1984) KLR page 288**. The Court of Appeal referred to a leading text **Megarry's Manual of the Laws of Real Property 5th Edn page 490**:

"If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title."

*In **Littledale vs Liverpool College [1900] 1CL 19 at p 21**, Lindley MR put it correctly that in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land whether by being dispossessed of it or by having discontinued his possession of it, and, in answering the question "what constitutes dispossession of a proprietor?" Bramwell LJ said in **Leigh vs Jack (1879) Ex D 264 at p 273**:*

"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."

Upon consideration of the evidence which is captured by the above summary, the singular issue for determination is whether the Plaintiff has established on a balance of probabilities, that she is entitled by virtue of adverse possession to be declared the owner of the flat. In determining that issue, the question of whether the Plaintiff has been in possession for the last 12 years or even longer is pertinent. The plaintiff did indicate in her affidavit that she left Kenya for India in the year 2000. However the plaintiff is not candid in the matters deposed to in her affidavit, the period of time she was in India and who was left in the flat during her absence.

Another auxiliary point is whether the flat which has no title or lease but is owned through shares in the 2nd Defendant fits the bill of the property that is described under the provisions of **Section 38 of the Limitations of Actions Acts** which deals with registrable rights to land or easement. The last issue to consider is whether the plaintiff's claim falls under the provisions of the **Limitations of Actions Act** or a claim by a beneficiary within the Law of Succession Act.

This matter came up for hearing before me on 3rd October, 2011, when counsel for both parties recorded consent as follows:

"The originating summons dated 21st November, 2007, be heard by way of affidavit evidence. The Plaintiff files and serves written submissions within 14 days from today's date. The 1st and 2nd Defendants file and serve their written submissions within 14 days of service. Matter be listed for hearing on 10th November, 2011."

That is how this matter proceeded for hearing. If parties had given oral evidence, no doubt the issue of whether the Plaintiff was in occupation or in possession of the flat as at the time of filing this suit would have been clarified better than it was by affidavit evidence. So is the issue of whether the Plaintiff's occupation was hostile and had ousted the 1st Defendant's rights would have been clarified.

As the records stand, it is the word of the Plaintiff that she left the flat in 2000 to the 1st Defendant, who was only allowed to use it as a visitor, against the 1st Defendant's word that the Plaintiff left in 2000 to settle in India and indeed bought her own property in India. The Plaintiff admits that she left the flat in 2000 but kept on returning until the year 2007, when the 1st Defendant with the use of force evicted her and took possession, thus according to **Mr Anzala**, the plaintiff is entitled to the orders because the illegal ouster did not dispossess his client of the right to claim ownership by adverse possession.

I find the facts in the case of **Kimani vs Kibogoro, supra**, different from the facts in this case. Firstly, the Plaintiff was occupying the flat with her mother by virtue of being a daughter and the flat was bequeathed to the plaintiff's brothers thus she continued to occupy as a member of the family. This occupation cannot have been hostile as this was a family flat. The 1st Defendant has annexed documentary evidence to show that the grant of probate of a written will of the estate of their late mother was issued. So is the will of his late brother that bequeathed him $\frac{1}{3}$ of the shares in the flat. The 1st Defendant although holding majority shares in the flat is not the absolute owner of the entire flat. The plaintiff has not sued the other share holder of the flat and the difficulty would arise on how the court can grant an order that is likely to affect a property owner without his participation.

Going by the above facts, it is more plausible that the Plaintiff was occupying the flat with the permission of the family members' up to about the year 2006, when the 1st Defendant insisted on taking over the flat as of right. The Plaintiff's case fails to show proof of stringent and straightforward possession of the flat that was notorious and hostile to the Defendants. The Plaintiff was not occupying the flat as a trespasser but a daughter of the registered owner of the flat and the sister to the 1st Defendant, indeed, a member of the family. The plaintiff should have pursued her claim as a heir of her mother's estate but not as an intruder who ousted the legal owners.

What is discernible from the pleadings is that the Plaintiff left the flat in 2000 although she claims she left the flat to the 1st Defendant as a visitor; this line of submission is not convincing because the 1st Defendant claims that he took over the flat following a grant of probate that bequeathed upon him majority shares. It is also more plausible that 1st Defendant took over the flat for renovation and to wind up the estate of his later mother and father.

In my considered view, the Plaintiff's claim should have been pursued under the law of succession if her two brothers bequeathed to her their shares in the flat. Throughout the Plaintiff's claim, there is no indication that her occupation of the flat was exclusive to the 1st Defendant. For the foregoing reasons, the Plaintiff's case does not meet the threshold of a claim of adverse possession.

It fails and it is dismissed. This being a family dispute over the estate of the parties' mother, each party should bear their costs of this case.

Judgment read and signed this 3rd day of February, 2012.

MARTHA KOOME

JUDGE OF APPEAL

Note:

*This application was heard and concluded on **10th November, 2011**, when I was a Judge of the High Court. The matter was pending for judgment when I was appointed as a Judge of the Court of Appeal. I proceed to write and append my signature thereto in my new capacity.*