



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 1 OF 2009

KADZANDANI LAND SETTLEMENT TRUST.....APPLICANT

-AND-

1. KARMALI MANJI KANJI
2. DIAMOND JUBILEE INVESTMENTSRESPONDENTS
TRUST (KENYA) LIMITED

JUDGMENT

The applicant moved the Court by Originating Summons dated **5th January, 2009** and brought under Order XXXVI, Rule 3D of the earlier edition of the Civil Procedure Rules, s.81 of the Civil Procedure Act (Cap.21, Laws of Kenya) and s.38 of the Limitation of Actions Act (Cap.22, Laws of Kenya). The applicant claims that its trustees and beneficiaries are entitled to acquire plot No.259, Section I, Mainland North by way of adverse possession; and it places before the Court for determination, in that behalf, the following questions:

(1)Are the respondents the registered owners of Plot No.259/I/MN?

(2)Are the trustees and beneficiaries of the applicant entitled to acquire title from the respondents by way of adverse possession?

(3)Is the applicant acting for and on behalf of its trustees and beneficiaries?

Hassan Mzee Khamis, one of the applicant's trustees, swore an affidavit on **5th**

January, 2009, as supporting evidence. The deponent's material averments may be set out as follows:

(i) the deponent and his fellow-trustees and the beneficiaries [listed in an annexure], numbering some fifteen-score, are in possession of the suit premises and have so been "for over twenty continuous and uninterrupted years with the full knowledge of the respondents";

(ii)the suit property belongs to 1st respondent who had charged the same to various persons as from sometime in 1931, the latest such charges, in respect of 1946 and 1948, being transferred to 2nd

respondent on **26th March, 1968**;

(iii) the deponent and his fellow-trustees and the beneficiaries of the trust “have built, constructed and/or erected on the suit property permanent structures with the full knowledge, permission and/or acquiescence of the Municipal Council of Mombasa, which is the planning authority mandated by law, and with the knowledge of the respondents, without the respondents’ protest and/or objection”;

(iv) the houses of the deponent, his fellow trustees, and the beneficiaries of the trust were all constructed more than 20 years ago;

(v) the deponent and his fellow trustees and the beneficiaries of the trust pray the Court to order that the suit property be registered in the name of the applicant, for the purpose of “carrying out sub-division thereof in favour of [himself], [his] fellow-trustees, and the beneficiaries of the trust in respect of the area developed by each of [them]”;

(vi) it is the [deponent’s] belief that he and his fellow-trustees and the beneficiaries of the trust “have acquired the right of ownership of the suit property by way of adverse possession.”

Certain significant documents are annexed to the supporting affidavit, to bear out the depositions; these are:

(a) trust deed of **26th March, 2007** establishing the applicant as a corporate entity;

(b) list of squatters on the suit property;

(c) charge of the suit property to one **Liladhar Pragji**, executed by 1st respondent on **6th July, 1931**;

(d) discharge of the charge to **Liladhar Pragji**, executed on **1st September, 1934**;

(e) charge of the suit property to **Kamalagauri Dullabhji** executed on **1st October, 1934**;

(f) discharge of the charge to **Kamalagauri Dullabhji**, executed on **27th October, 1938**;

(g) charge of the suit property to **Hussein Rajan Nanji** executed on **27th October, 1938**;

(h) discharge of the charge to **Hussein Rajan Nanji**, executed on **19th June, 1942**;

(i) charge of the suit property to Diamond Jubilee Investment Trust Limited on **23rd May, 1946**;

(j) charge of the suit property to Diamond Jubilee Investment Trust Limited on **21st October, 1948**;

(k) Deed Plan No. 15000 “bordered red attached to Certificate of Ownership No. 3001 dated **25th May, 1922** issued by the Recorder of Titles at Mombasa and registered at the Coast Registry, Mombasa as No. C.R. 1802/1”;

(l) Certificate of Postal Search as on **28th November, 2001**;

(m) a series of photographic illustrations showing the identity cards of the individual squatters by their facial portraits, set against the (mainly) stone-built, corrugated-sheet-roofed houses.

In an application by *ex parte* Chamber Summons, under certificate of urgency dated **3rd March, 2009**, M/s. **Timamy & Co., Advocates** had sought leave that the Originating Summons herein be served upon the respondents by substituted service. **John Kombe**, a duly-authorized process-server had sworn an affidavit of service (dated **3rd March, 2009**) deponing that he was unable to effect service upon Diamond Trust Bank (K) Limited as the Manager thereof refused service, on the basis that “they are Diamond Trust

Bank (K) Limited and not Diamond Jubilee Investment Trust (K) Limited"; and when the process server attempted to serve upon Jubilee Insurance Company Limited, he was turned away because the process herein made no reference to "*Jubilee Insurance Company Limited*". The process server returned with the Originating Summons and the Hearing Notice unserved.

On **11th June, 2009** *Lady Justice Odera* granted leave for service to be effected through the Court Notice Board, and by an advertisement in at least one of the daily newspapers. Counsel acted on these directions by making the required advertisement in the two main local newspapers, *The Daily Nation* (**6th July, 2009**) and *The Standard*: the respondents being put on notice that "*unless you enter appearance within fifteen (15) days, the case will be heard in your absence.*"

On **8th January, 2010** *M/s. Timamy & Co. Advocates* made a formal request for Judgment; and on **25th January, 2010** the Deputy Registrar entered default Judgment in favour of the applicants herein, in the following terms:

"Upon reading the request for Judgment dated 31st December, 2009 by the firm of M/s. Timamy & Co., Advocates for the plaintiffs, interlocutory Judgment is granted against the defendants who have failed to file defence within the required time."

Counsel moved this Court by Chamber Summons of **26th April, 2010** seeking the disposal of the formal-proof stage on the basis of the affidavits on record, and *Mr. Justice Azangalala* granted the same on **7th July, 2010**. This matter came up before me on **24th June, 2011**.

The evidence on record is corroborated by the many annexures which identify the location and registration-status of some 28.7 acres that constitute the suit land. The Registry search-records show the comprehensive historical profile of the property, right from the **1920s** when it was registered in the name of *Karmali Manji Kanji*, the 1st respondent. The 1st respondent periodically charged the suit land, with lawful discharges thereof taking place thereafter. The last chargee, just as the proprietor-and-chargor, has not entered appearance and has not lodged a defence against the applicant's claim, notwithstanding proper service of process.

While the applicants would otherwise succeed in their claim, as proof in civil claims is on a *balance of probability*, it is essential this Court should make certain findings, as the case is based on *adverse possession*, a concept governed by law. Have the applicants shown entitlement to the suit property by adverse possession?

The applicants aver that they have been in possession of the suit land for at least the minimum period of **12 years**, as required by the law of adverse possession; they have been in *continuous* occupation and possession; they did not come to the land by *permission* of the registered owner; they occupied and used the suit land without *secrecy*, and on the basis that it belonged to them; *all persons*, including the Municipal Council of Mombasa, gave the manifestation of acknowledgment that the applicants were the *de facto* owners of the suit property.

Adverse possession is defined in **Black's Law Dictionary, 8th ed (2004)** as:

"The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open, and notorious."

Upon considering the evidence, I have come to the conclusion that this is a case demonstrating ***continuous, exclusive, hostile, open*** and ***notorious*** possession by the applicants; and consequently, they are entitled to be declared the new owners of the suit land and to be conferred with registered title as such.

I will make a ***decree*** in the following terms:

(1)The trustees and beneficiaries of the applicant are entitled to acquire the title for the suit property from the respondents, by way of adverse possession.

(2)The suit property, plot No. 259/I/MN shall, within 21 days of the date hereof, be registered in the name of the applicant.

(3)Upon Order No.(2) herein being complied with, the suit property shall be subdivided among, and registered in the names of, the trustees and beneficiaries of the applicant, on the basis of plot sizes possessed and occupied, to-date, by each of the said trustees and beneficiaries.

(4)There shall be no Order as to costs.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 19th day of March, 2012.

**MAUREEN ODERO
JUDGE**