



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 1523 OF 2005 (O.S)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF LAND PARCELS REFERENCE NO. 196/32**

**ANDRIAN RADCLIFFEE .....**  
**PLAINTIFF**

**VERSUS**

**JOHN CECIL HAWLEY BALL .....**  
**.....DEFENDANT**

**JUDGMENT**

The Plaintiff has filed an Originating Summons under Sections 17, 18, 37 and 38 of Limitation of Actions Act (Cap 22 Laws of Kenya) and seeks Order that he be declared to have become the legal owner entitled by adverse possession of over twelve years since 1989 of the parcel of land comprised in title No. LR No. 196/32 situate in Nairobi (hereinafter referred to as "The Suit Land").

The application is supported by supporting affidavit of the applicant sworn on 20<sup>th</sup> December, 2005 and supplementary affidavit sworn by him on 15<sup>th</sup> July, 2010.

The Defendant has opposed the same and has filed his replying affidavit sworn on 21<sup>st</sup> May, 2010.

The directions were given as per the agreement that the Originating Summons be heard and determined on submissions based on the affidavits on record hence no oral evidence was produced.

Both parties have conceded that the Plaintiff entered the premises since August, 1989 and has continued to occupy the same since then. It is also conceded that the Plaintiff made renovations on the property and paid City Council's rates. He has also paid utility bills.

What the parties differ on are the circumstances under which the Plaintiff occupied the premises and continued to occupy the same.

The claim of the Plaintiff is that a neighbour of the Defendant referred him to one Donald Vincent, an estate agency and he only paid shs.6,000/= to the agent as a finder's fees. On asking about the rent, the said estate agent informed him that it would be sorted out later and that the Defendant would liaise

directly with him. The Plaintiff did not disclose in his supporting affidavit about the correspondence he had written to the Defendant as well as the fact that he started paying the City Council rent at the instructions of the Defendant and that the City Council also wrote to him the letter to that effect vide its letter dated 31<sup>st</sup>, July, 1997 (page 15 of the Annexure 'JCHB 1'). It is pertinent to note that on the same date, the Plaintiff had also written a letter to the Defendant (page 13 and 14 of Annexure JCHB 2).

I would like to cite some portions of the said letter:-

***“We keep waiting for your visit to discuss things with you, but I did think of asking what your plans were”.***

***“We are not well off by any standard, but if you ever considered selling the plot at a level we might afford, I would in turn be willing to sign agreement never to sub-divide..... If you decide ultimately to sell to the highest bidder or whatever, do try to give us a bit of notice if you can, it does take a while to find a nice place for a family.”***

The said estate agent, whom the Plaintiff has trashed as a finder and having no connection or contact whatsoever, has written a letter to the Defendant on 14<sup>th</sup> August, 1997 (page 16 of Annexure JCHB1). It stated inter alia:

***“I have spoken to Adrian Radcliffe who says that he has paid rates both 1996 and 1997 and will send me copies of both rates receipts. I do not know what your future plans are but exchange control regulations here have changed and on sale you would now be able to get proceeds remitted to you in England.”***

The said letter was in response to the Defendant's letter to him on 9<sup>th</sup> July, 1997. The intention of sale of the suit property had been with the Defendant and the Plaintiff had offered to buy the same with a plea to give him bit of notice, if his bid was not accepted.

I would pause here and note that only from the aforesaid letter, it is clear that he was not adversely occupying the premises as at 31<sup>st</sup> July, 1997 or from that date to the filing of this suit as well.

The Plaintiff's disregard of the estate agent and his position as an agent of the Defendant as well as the denial of depositing the rent in an account flies on the face of his own correspondence to the Defendant's wife. His averments that he did not have any idea of the whereabouts of the Defendant and that he could possibly be not alive, not only very sad but *mala fide* in view of the correspondence on record addressed by him to the Defendant's wife. I would thus find that the averments made by him to the contrary are untrue looking to the facts of this case.

In any event, with the offer to purchase the property vide letter of 31<sup>st</sup> July, 1997 it is quite clear that as at that date, the Plaintiff was recognizing the ownership of the Defendant and that he was in occupation as a tenant or with consent of the Defendant who has not been dispossessed of his proprietary right.

I am fortified on my aforesaid observations not only from the circumstances of the case, but also from the authorities sent by the Plaintiff very late to the court, namely, ***The Mayor and Burgesses of the London Borough of Lambeth and Jack Blackburn (2001) EWCA Civ 912.***

In the said case, after considering several authorities, the Court of Appeal found that in order to establish adverse possession, a claimant must show that he has both factual possession of the land and the requisite intention to possess the land, the *animus possidendi*. This intention in simple meaning is “The intention of excluding the owner as well as other people”.

It was also found to be necessary to show that the acts of the claimant were unequivocal.

I have considered the facts of this case namely, the offer to purchase before the expiry of the period of limitation i.e. 12 years as well as continued negotiations failing which the filing of this suit, and I cannot accept that the Plaintiff has satisfied me that his intention to dispossess the Defendant was made sufficiently clear to the owner.

With the above facts, which are not disputed, and cannot be disputed in any event, I do find that as at the date of filing the Originating Summons on 20<sup>th</sup> December, 2005, the Plaintiff had not acquired adverse possession as per Sec. 38 of the Limitation Act.

I have noted and considered several authorities cited by both the parties and am grateful to the counsel for their sincerity. However, the facts of the case do suggest, without referring to any one of them, that there is no case for the Plaintiff.

I dismiss, as a result, the Originating Summons dated 20<sup>th</sup> December, 2005 with costs.

**Dated, signed and delivered** at Nairobi this 28<sup>th</sup> day of **February, 2011**

**K. H. RAWAL**  
**JUDGE**  
**28.02.2011**