REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC. NO. 372 (O.S) OF 2010

IN THE MATTER OF REGISTRATION OF TITLES ACT CAP. 281 OF THE LAWS OF KENYA

AND

IN THE MATTER OF FREEHOLD INTEREST IN L.R. NO. 209/12774 IN NAIROBI

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP. 22 OF THE LAWS OF KENYA

BETWEEN

DHARIWAL HOTELS LIMITED.....APPLICANT

V E R S U S

SATO PROPERTIES LIMITED.....RESPONDENT

R U L I N G

By originating summons under sections 7, 17, 37 and 38 of the Limitation of Actions Act (Cap. 22) and Order 36 rule 3D of the Civil Procedure Rules the Applicant, who claimed to have become entitled by adverse possession to all that land comprised in the title L.R. No. 209/12774 (hereinafter referred to as "the suit property"), sought orders that:-

a) it be registered as the proprietor of the suit property by virtue of adverse possession; and

b) the Respondent be ordered to remove the caveat dated 23rd October 2006 lodged against the title.

The application was on the grounds that:-

a) the Applicant has been in exclusive and uninterrupted possession of the suit property since January 1994;

b) it has substantially developed the suit property since January 1994 to dated and is still in use;

c) since 1994 the Respondent has lost its right to the suit property by being dispossessed of it and by discontinuing its possession of it between the years 1994 and 2006; and

d) by the year 2006 the Applicant had enjoyed exclusive and uninterrupted occupation of the suit property for over 12 years thus entitling it to ownership by adverse possession.

Mohan Singh Dhariwal, the Chief Executive Officer of the Applicant, swore an affidavit to support the claim and annexed various documents.

The Respondent filed a chamber application under Order 36 rules 3D (2) and 12 and Order 13 (1) (b), (c) and (d) of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act to have suit struck out (it says "dismissed") with costs because the same is vexatious and an abuse of the process of the court. The grounds were that:-

(a) the Applicant has not and could not have been in possession of the suit property since 1994 as it was until 28th December 1996 Government land;

(b) the Applicant acquired the next door property (L.R. No. 209/12775) after 28th August 1997;

(c) the Applicant is taking advantage of the fact that he is aware he can hold up developments on the suit property;

(d) the Applicant himself says he "occupies" only part of the suit land; and

(e) the Applicant had previously filed **H.C. ELC. No. 568 of 2009 (OS)** which was struck out with costs.

I listened to Mr. Shah for the Respondent and Mr. Oluga for the Applicant on this application and also consider the written submissions that each filed on the same. Mr. Shah's argument was that since the suit land was Government land upto 28th December 1996 when title was issued to Donald Kimutai who subsequently sold it to the Respondent on 13th July 2007, it could not have been subject of claim for adverse possession. The second argument was that time for the purposes of adverse possession could only begin to run from the date the suit premises was registered, that is on 28th December 1996, in which case, even if the Applicant has been in continuous and uninterrupted possession and occupation, the period was not 12 years for the purpose of adverse possession. Regarding this second issue, Mr. Oluga pointed out that the evidence showed that the Applicant had been in occupation since 1994 when the suit premises was leased to them by Mrs. Buluma who had been allocated by the Government on 5th August 1994. The Applicant occupied it until 2006, it was contended, which was for a period of 12 years. On the first issue, counsel argued that the letter of allotment issued to Mrs. Buluma gave title to her and that:-

"Registration merely regularized the title."

The Applicant's claim is based on sections 7, 17, 37 and 38 of the Limitations of Actions Act. Section 7

provides that no action to recover land should be brought after the expiry of 12 years. Under section 38 where a person claims to have become entitled by adverse possession to registered land he may apply to the High Court for an order that he be registered as the proprietor in place of the person then registered as proprietor of the land. It is material that the claim is being made in respect of registered land. The registration contemplated is the one under section 37. The section (section 37) provides that the Limitation of Actions Act applies to land that is registered under the Government Lands Act, the Registration of Titles Act or the Registered Land Act. The suit property is registered under the Registration of Titles Act (Cap. 281). Time can only begin to run from the date the property was registered, and that is 28th December 1996. Twelve years from that date would bring it to 28th December 2008. If the Applicant says it was in possession up to 2006, then it was not in possession, for the purposes of section 38, for a period of 12 years. In the case of **Dr. Joseph Arap Ng'ok -Vs- Justice Moijo Ole Keiwua and Others, Civil Application No. 60 of 1997 at Nairobi**, the Court of Appeal held that title to landed property can only come into existence after the issuance of the letter of allotment, meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held. It follows that the letter of allotment issued to Mrs. Buluma did not give her title to the suit property.

It should be recalled that adverse possession is occupation inconsistent with and in denial of the right of the true owner of the suit premises **(Mbira –Vs- Gachuhi [2002] EA 137)**. Such owner can only be the registered owner. In **Swalehe –Vs- Nassim R. Mohammed, Civil Appeal No. 16 of 2000**, the Court of Appeal held that adverse possession does not apply to land before registration. The same position was stated by the Court in **Francis Gitonga Macharia –Vs- Muiruri Waithaka, Civil Appeal No. 110 of 1997**. Under Order 36 rule 3D (1) of the Civil Procedure Rules, a claim for land under section 38 of the Limitation of Actions Act is required to be by originating summons which must be supported by an affidavit to which a certified extract of title to the land claimed must be annexed. It follows that time can only begin to run from the date of registration in the title.

There is no dispute that the suit land went to Mrs. Buluma by way of an allotment by the Commissioner of Lands. Such allotment was therefore over Government land under the Government Lands Act (Cap. 280). Section 41 of the Limitation of Actions Act provides that:-

> *"41. This Act does not:-*
>
> *(a) Enable a person to acquire any title to, or any easement over:-*
>
> *(i) Government land or land otherwise enjoyed by the Government;"*

It must follow that that for the time the suit premises was Government land, before it was allotted and subsequently registered thereby becoming private property, it could not be subject of claim by adverse possession.

The Respondent seeks the drastic remedy of striking out of the Applicant's suit at this stage. The effect would be to deny the Applicant the right to have its suit heard and determined on merits. The application is made under Order 6 rule 13 (1), (b), (c) and (d) which means that it is being alleged the originating summons:-

(a) is scandalous, frivolous or vexatious; or

(b) may prejudice, embarrass or delay the fair trial of the action; or

(c) is otherwise an abuse of the process of the court.

A pleading is scandalous if it is indecent, offensive or improper; is frivolous when it is without substance or is groundless or fanciful; is vexatious when it lacks *bona fides* and is hopeless or offensive and is hopeless or offensive when it tends to cause the opposite party unnecessary anxiety, trouble and expense; it tends to embarrass or delay a fair trial when it is ambiguous or unintelligible or which states immaterial

matters and raises irrelevant issues or allegations which will prejudice a fair trial; and is an abuse of the process of the court if it is brought merely to misuse the court machinery or process **(Trust Bank Limited –Vs- Amin & Company Ltd & Another [2000] KLR 164)**. A plaint, for instance, that discloses no cause of action has to be said to be an abuse of the process of court.

It is trite that striking out a pleading can only be done in a plain and obvious case **(D. T. Dobie And Company Ltd –Vs- Muchina And Another [1982] KLR 1)**, and where an amendment cannot change the situation. If a suit shows a mere semblance of a cause of action, provided it can be given life by an amendment, it should be allowed to proceed to trial. At the same time, however, a hopeless suit should not be left to burden the Defendant or to clog the court‘s diary or registry.

I have considered the Applicant’s originating summons. It is hopeless and a complete non-starter. The Applicant has no claim under section 38 of the Limitation of Actions Act that it can sustain against the Respondent. This is why I strike out the claim with costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2011

A. O. MUCHELULE

J U D G E