



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 81 OF 2009 (O.S.)

USHIRIKA REAL ESTATE DEVELOPERS LTD.....APPLICANT

VERSUS

THE PERSONAL REPRESENTATIVES OF THE ESTATE OF

**1. CHUNILAL MADAN (DECEASED).....1ST
RESPONENT**

2. HOMI DOSSABHAI DRIVER2ND RESPONDENT

3. HIRJI VIRPOAL SHAL3RD RESPONDENT

**4. BALDER SAHAI MOHINDRA4TH
RESPONENT**

5. COMMISSIONER OF LANDS 5TH RESPONDENT

JUDGMENT

This is a suit by way of Originating Summons brought by the applicant against the respondents in respect of a parcel of land known as title No. 36/V/8a new Number LR. No. 209/11384/1-31. The applicant claims to be entitled to the suit premises by way of adverse possession and therefore seeks orders that a caveat entry No. 18 of 23rd June, 1971 be removed and that it be registered as proprietor in place of the respondents. It is also its prayer that the said substitution be entered into the register by the Chief Land Registrar and that the costs be provided for.

The applicant herein which is a limited liability company is represented by John James Njenga Mutemi having been granted the authority so to appear. The respondents were served by way of substituted service but did not enter any appearance or file any reply to the said summons. Upon directions, the court allowed the applicant to proceed by way of affidavit evidence and witness statement which was provided by Mr. John James Njenga Mutemi representing the applicant.

The facts are brief and to the point. The applicant and the respondents entered into an agreement for sale on 3rd May, 1968. The total purchase price was paid and the respondents were to sign the said sale agreement. However the 3rd respondent was not available and in due course, it transpired that he had left the country for good and therefore could not sign the transfer. The applicant's members took possession of the suit premises soon after signing the transfer form and have since lived on the said suit premises to date which they have developed. The Land Office records show that the suit property is still registered in

the names of the 4 (four) respondents; however the applicants' members have been paying rates to the Nairobi City Council.

The 1st respondent passed on and the Originating Summons was amended to include the administrators of his estate who were also served by way of substituted service. The applicant has provided all the documents relating to the summons which include the certified copy of the title, letters exchanged between the applicant and the 1st respondent, the grant of probate of written will in respect of the 1st respondent and notices of advertisement in relation to substituted service. In the absence of any rejoinder by the respondents the applicant's pleadings and affidavits remain uncontroverted.

Adverse possession contemplates two concepts, dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether the title holder has been dispossessed or has discontinued his possession for the statutory period.

The contention of the applicant that it has been in exclusive, continuous and un-interrupted occupation of the said piece of land for over 40 years has not been disputed. The respondents therefore have been dispossessed and therefore the applicant has acquired title to the suit property by adverse possession.

I am satisfied that the applicant has established its case for the orders sought in the Originating Summons and therefore find in its favour. There is no evidence that the respondents refused to part with possession and in fact the applicant's members have all along enjoyed the possession and occupation of the suit property. In that regard there will be no orders to costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of October, 2011.

A. MBOGHOLI MSAGHA
JUDGE