



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 97 of 2009**

CLAIM OF TITLE TO LAND BY ADVERSE POSSESSION

**TOOLS AND PAINTS HARDWARE LTD.....APPLICANT
VERSUS
RAMCO HARDWARE LIMITED.....RESPONDENT
JUDGMENT**

1. The applicant herein M/S Tools and Paints Hardware Ltd Took out the O.S on 13.3.2008 asking for orders:-

1. **THAT** the applicant be declared to have acquired title over a portion of LR 209/785/19 measuring 0.0153 hectares by adverse possession.
2. **THAT** the defendant cease to be registered proprietor of 0.0153 hectares of LR209/785/19 and the applicant be registered as the proprietor thereof.
3. **THAT** the defendant be permanently restrained from entering upon the said area measuring 0.0153 hectares being portion of LR209/885/19.
4. **THAT** costs of the application be provided for.

2. The dispute herein relates to two parcels of Land known as LR No.209/785/19 and 209/2585 on which stands a single-storeyed building constructed in or about 1938 pursuant to a building Plan No.8605 duly approved by the then Municipal Council of Nairobi on 2/06/1938. According to the applicants, the said building occupies the entire area covered by the two plots with common roof, common floor and common outer walls divided only by a common wall dividing the building into two portions namely LR No.209/2585 owned by the applicant and LR 209/785/19 owned by the respondent. It is said that LR No.209/2585 encroaches onto part of LR 209/785/19.

3. It is averred that the applicant bought LR No.209/2585 from a Mr. Ashok Kumar H. Patel and others while the respondent bought LR No. 209/785/19 on 28/01/1994. That before buying LR No.209/2585, the applicant had a lease over the said parcel of land which was registered on 17/10/1984.

4. The applicant contends that it has satisfied all the conditions for the granting an order for adverse possession namely: -

- (i) Actual possession
- (ii) Open and notorious possession
- (iii) Exclusive possession
- (iv) Hostile possession
- (v) Continuous and uninterrupted possession
- (vi) Statutory period of 12 years.

5. The applicant relies on Sections 7 and 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya and on the following decisions: - **Nguyai vs Ngunayu [1985] KLR 6506; Maweu vs Liu Ranching & Farming Co-operative Society Ltd [1985] KLR 430, Parklands Properties Ltd vs Patel [1981] KLR 52 and Wasui vs Musumba [2002] KLR 396.**

6. The applicant submits that it has been in actual physical possession of the land in question for more

than 12 years, and that the land has been so adversely possessed by the applicant's predecessors in title since 1938. The applicant further contends that the applicant's possession of the land has been open and notorious where the act of operating a hardware store has been carried on the land with the full knowledge of the Respondent and that though the land was separated by a mere wall from the respondent's land the respondent and other members of the public could see that the applicant's possession of the land was open and notorious. The applicant also contends that since the building of the single-storeyed building in 1938, on the combined LR No.209/2585 and LR No.209/755/19 the respondent has not had the benefit and use of an area measuring 0.0153 hectares or thereabouts of parcel LR No.209/785/19 which portion has been in continuous occupation by the applicant and their predecessors in title for close to 70 years.

7. It is also the applicant's contention that at no time during the material time did it share the suit property concurrently with the respondent or any other person nor has the respondent ever acted like the owner of the said piece of land during the said period. The applicant says that all the people who knew the suit property knew it as belonging to the applicants, and that such possession has thus been exclusive of the respondent.

8. The applicant also says that its possession of the disputed portion has been hostile since at no time during such possession was the applicant granted permission to possess or act like the owner of the said piece of land by the respondent. The applicant argues that its interest in the piece of land in question is in direct conflict with the right of the Respondent to the said property. The applicant contends that it has had adverse possession of the piece of land in question for over 12 years openly and notoriously and to the exclusion of the respondent and that as such it is entitled to the orders sought.

9. Finally, the applicant says that HCCC No.1928 of 1981, filed by one Mr. **Geoffrey G. Kabaki**, the predecessor in title to the respondent was dismissed with costs to the defendants. In the said suit Mr. Kabaki had sued the applicant's predecessors in title for orders inter alia: -

(i) *Mesne profits from August 1974 until the defendants remove the encroachment.*

(ii) *An order directing the defendants to pull down the wall which causes the encroachment.*

10. Mr. Kabaki had alleged as follows at paragraph 5 of the plaint dated 6/7/1981: -

"The defendants and/or their predecessors in title developed and built a godown on the said piece of land namely land Reference Number 209/2585 and by so building and/or development the defendants and/or their predecessors in title caused one of the walls of the said godown to develop or encroach on the plaintiff's said piece of land to the extent of about 2 metres wide and 50 metres long."

11. In their statement of defence dated 20/08/1981 and filed in court on the same 20/08/1981, the defendants pleaded thus at paragraph 4 of the defence: -

"In reply to paragraph five the defendants state that they neither developed nor build a godown on the adjoining property as alleged or otherwise. The defendants further aver that they bought the said property with the said wall from one Yvonne Bell. The defendants further state that the wall of the said godown mentioned in paragraph 5 of the plaint alleged to extend 2 metres wide and 50 metres long on the adjoining property (which said wall with the said 2 metres by 50 metres piece of land is hereafter called "the said improvements") was always part and parcel of the said property."

12. The defendants also averred at paragraph 6 of their statement of defence that they had actually taken and enjoyed as of right the said property including the said improvements without interruption for the full period of about 36 years next preceding the commencement of the action and that the defendants had acquired a right of ownership under Section 32 of the Limitation of Actions Act. In his judgment dated 21/10/1986, A. Rauf J. found that the plaintiff had failed to discharge the burden of proof of his claims on a balance of probabilities that there was encroachment by the defendants.

13. The applicant herein prays that on the basis of the above facts and the law, the court ought to find that the applicant has acquired title to the portion in question measuring 0.0153 hectares or thereabouts being part of LR No.209/785/19 by adverse possession.

14. The applicant's claims are resisted. The defendant filed both a replying affidavit sworn by **Gulamhussein Jivanjee** on 9/05/2008 and Grounds of Opposition dated 12/05/2008. On the 28/09/2009 when the parties appeared before me, Mr. Munyi told the court that the matter was proceeding by way of

affidavits. The assumption by the court is that the respondent has elected to rely on the affidavit of Mr. Jivanjee in arguing the Originating Summons. It is also noteworthy that though the parties were ordered to file and exchange skeleton arguments within some 17 days from 25/04/2008, only the applicant did so on 2/05/2008. The respondents however filed their replying affidavit on the 9/05/2008. The deponent of the Replying Affidavit, Mr. Gulamhusein Jivanjee avers that the applicant's case has no basis since the applicant has not placed any evidence before the court to show that it is the registered owner of that piece of land known as LR No.209/2585(IR 84141). He says further that the applicant's supporting affidavit is based on falsehoods as the area claimed by the applicant, measuring 0.0153 hectares cannot be ascertained and hence cannot form the basis for a claim in adverse possession. The deponent also says the following at paragraph 7 of the replying affidavit: -

"7. THAT the two parcels of land known as LR No.209/2585(IR 84141) and LR No. 209/785/19 (IR 60194) are distinct and separate with none encroaching on the other. In the premises the applicant's claim amounts to nothing more than an attempt to justify its unlawful action of trespassing on the respondent's property. This Honourable court cannot be called upon to aid a party in breaking the law."

15. The deponent also says that HCCC No.1908 of 1981 Nairobi was about encroachment by the applicant's predecessor in title on the respondent's predecessor in title of the latter's property. I do not think that this distinction by the respondent can hold water. Paragraph 5 of the plaint in HCCC No.1908 of 1981 is clear that there was alleged encroachment by the applicant's predecessor in title onto the respondent's portion of the land. The basis for the allegation was that the defendants in the 1981 case had developed and built a godown on the land reference No.209/2585 which encroached on the respondent's predecessors land. The defendant's case in the 1981 case was that what was being complained of had always been there since 1938 when the godown was built. The court agreed with the defendant's side of the story and consequently dismissed the plaintiff's case. It therefore seems strange that the respondent herein is trying to draw a line between the subject matter in this case. In my view the distinction which the respondent is trying to make borders on the scandalous and is therefore rejected.

16. The respondent also avers that the applicant's prayers in the O.S have been made in bad faith and because of serious financial problems which the applicant is facing, and further that it is an attempt by the applicant to unjustly enrich itself at the respondent's expense by alienating and selling a larger portion of land than it actually owns for the purposes of settling its debts.

17. I have now carefully gone through the pleadings and considered the contending positions of the parties in this suit, and in particular the affidavits that were filed in the matter. I have also carefully read the plaint, the statement of defence, the reply to defence and the judgment in HCCC No.1908 of 1981 – Nairobi. The issue that arises for determination is whether on the evidence before the court, the applicant has satisfied the conditions for a claim in adverse possession. For the applicant to succeed on its claim, it must show, as earlier indicated that the possession was open and notorious exclusive, continuous and uninterrupted and that it was in actual possession of the portion of land claimed. The applicant must also show that it has been in such occupation for a period of 12 years and above. (See **Njuguna Ndatho vs Masai Humo & 2 Others – Court of Appeal at Nakuru, civil Appeal NO.231 of 1999**).

18. It is quite obvious from the evidence on record in this case that the construction of the godown and the offending wall took place in 1938 and that the applicants have had an open and uninterrupted possession of the said portion of land extending 2 metres by 50 metres into the respondents' portion LR 209/785/19 adverse to the title of the respondents and the respondents' predecessors in title. There is no evidence that the respondent or the respondents' predecessors in title interfered with such possession. The case filed by the respondent's predecessors in title in 1981 was dismissed and since 1986 when the case was dismissed, until 2008 when this case was filed, the respondent or the respondent's predecessor in title took no active step to interfere with the possession of the applicant or the applicant's predecessor in title. I am bringing out this point to buttress the point that even between 1986 and 2008, there has been more than 12 years continuous possession by the applicant (see Section 38 of the Limitations of Actions Act and **Joseph Gahumi Kiritu vs Lawrence Munyambu Kabura (Civil Appeal No.20 of 1993) – Court of Appeal.**)

19. In the **Njuguna Ndatho case** (above), the Court of Appeal referred to a number of other important decisions as to when time would stop against an adverse possessor. Particular reference was made in an excerpt from the judgment of Kwach JA (as he then was) in **Kiritu vs Kabura** (above) where the learned JA said the following words which appear at pages 6 – 7 of the court's judgment in the **Ndatho case:-**

"The passage from Chesire's Modern Law of Real property to which Potter JA made reference in

Githua vs Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says-

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor.

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.

*I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in **Githu vs Ndeete**, and which has solid backing in the passage I have read from Chesire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in **Muthoni vs Wanduru** does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. And on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed.”*

20. It would therefore appear from the above words by the learned Judge of Appeal in the **Ndatho case** that even the filing of the suit by the respondents’ predecessors in 1981 did not stop the time from running since the action was taken more than 12 years after the twelve years limitation period had run out.

21. In conclusion, I am persuaded that the applicant in this case has made out a case for adverse possession against the respondent. That being the case, I find that the applicant has acquired title over a portion of LR No.209/785/19 measuring 0.0153 hectares by adverse possession. I accordingly order judgment for the applicant and order that the respondent do transfer 0.0153 hectares out of LR No. 209/785/19. I also order that for the time being, and because LR No.209/785/19 is already registered, the applicant and the respondent be registered as tenants in common with the respondent of LR No.209/785/19 until the land is subdivided to allow the applicant to be registered as the owner of the 0.0153 hectares therefrom.

22. The applicant shall also have the costs of this suit.

It is so ordered

Dated and delivered at Nairobi this 21st day of January, 2010.

R.N. SITATI
JUDGE

Delivered in the presence of:-

Mr. Muriuki Njagagua (present) for the Plaintiff/Applicant

Miss Mikangi for Miss Marete (present) for the Defendant/Respondent

Weche - court clerk