



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 330 OF 2009 (O.S.)

IN THE MATTER OF: PLOT NO. MN/II/778 ORIGINAL NO. MN/II/383

-AND-

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT, THE APPLICANT HAS OBTAINED OWNERSHIP OF TWENTY-TWO DECIMAL FIVE (22.5) ACRES OF THE ABOVE-SAID LAND BY WAY OF ADVERSE POSSESSION

-BETWEEN-

HASSAN MUSA MWACHIKUVI.....PLAINTIFF/APPLICANT

-AND-

FRANCIS BERTRAM LEETE.....DEFENDANT/RESPONDENT

MAISIE ALICE LEETE.....DEFENDANT/RESPONDENT

JUDGMENT

The plaintiff moved the Court by Originating Summons dated 23rd September, 2009, brought under Order XXXVI, rule 3D of the Civil Procedure Rules, ss.3 and 3A of the Civil Procedure Act (Cap 21, Laws of Kenya), and ss.7, 37 and 38 of the Limitation of Actions Act (Cap. 22, Laws of Kenya).

The plaintiff was laying claim to the suit land, being 22.5 acres of land known as Plot No.MN/II/778 Orig.No.383/II,MN by way of adverse possession. In this claim, the plaintiff defined the issues for determination as follows:

- (i) Is the plaintiff/applicant entitled to be declared as the proprietor of 22.5 acres of land on Plot No.MN/II/778, Original No.383/Section II M.N?
- (ii) Is the plaintiff/applicant entitled to be registered as the owner of Plot No.MN/II/778, Original No.MN/II/383?
- (iii) If the answer to (i) and (ii) is yes, then a declaration that Plot No.MN/II/778, Original No.MN/II/383 belongs to and shall be registered in the name of the applicant by reason of adverse possession.
- (iv) Is the plaintiff/applicant entitled to costs?

The plaintiff swore a supporting affidavit in which he avers as follows:

- (a) that the plaintiff is a resident of Majaoni near Shanzu in Plot No.MN/II/778, Original No.383 Section 2 Mainland North, where he has been in occupation for 50 years;
- (b) that the plaintiff and his family including his grand-children, have stayed on the suit land for over 50 years;
- (c) that the registered owner of the land (the defendant) has never stayed on the suit land;
- (d) that there was documentation showing the suit land to have arrears of land rates in the sum of Kshs.1,098,675; and the plaintiff has had to pay up the same, to avert the risk of the suit land being sold to offset the unpaid dues;
- (e) that the plaintiff and his family who have been on the suit land for over 50 years, have known no other home;
- (f) that the plaintiff and his family have a permanent home on the suit land.

The plaintiff prays for orders for the registration of the title to the suit land in his name, as proprietor of Plot No.MN/II/778, Original No.383/II/MN.

The applicant, by his Chamber Summons application of 23rd September, 2009 sought leave of the Court to make substituted service, by newspaper advertisement, upon the respondent and, the application being granted by **Mr. Justice Ibrahim** on 25th September, 2009 such an advertisement was published in the *Daily Nation* of 29th September, 2009. The respondent failed to respond; and consequently, the plaintiff has asked the Court to give judgment on the basis of the affidavit evidence on file.

The plaintiff has alleged that for 50 years and more, the defendant has never been in occupation of the suit land, but in that period, it is he, the plaintiff, who has been in occupation. The plaintiff gives documentary evidence of a large, accumulated rates bill, in the name of the defendant, which the defendant did not act upon; and it is the plaintiff who then bore the burden of paying the rates arrears to the municipal authority.

So there is *prima facie* evidence, firstly, that the defendant has not been in possession of the suit land, but it is the plaintiff who has occupied the same for several tens of years. The defendants were not available to pay their rates; they were unavailable to question the plaintiff's occupancy; they were not there to respond to Court summons, in relation to the instant suit. This leads to the inference, which this Court now draws, that, indeed, the plaintiff has been in possession and occupation of the suit land for more than the 12 years required to establish ownership through adverse possession.

I hold, therefore, that, firstly, the plaintiff/applicant is entitled to be declared as the proprietor of the suit land. Secondly, the applicant is entitled to be registered as the owner of the suit land. I shall make orders as follows:

- (1) It is hereby declared that the plaintiff/applicant is entitled to the legal title of ownership for the suit land, Plot No.MN/II/778, Original No.MN/II/383.
- (2) The Registrar of Titles shall, within thirty (30) days of the date hereof, issue the registered title for the said Plot No.MN/II/778, Original No.MN/II/383, in the name of the plaintiff herein.
- (3) There shall be no order as to costs.

Orders accordingly.

SIGNED:

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J.B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 5th day of March, 2010.

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JUDGE