



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL CASE 109 OF 2009

JOHN MWATELA SHEDE.....APPLICANT
-VERSUS-
VITALILIBHAI BHULABHAI PATEL..... RESPONDENT

JUDGMENT

The plaintiff moved the Court by Originating Summons dated 16th April, 2009 brought under Order XXXVI rule 3 of the Civil Procedure Rules, s. 3 and 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), and ss. 37 and 38 of the Limitation of Actions Act (Cap. 22, Laws of Kenya).

The plaintiff claims to be the proprietor by adverse possession of the suit plots, and asks this Court to determine certain questions:

- (i) *is the plaintiff/applicant entitled to be the proprietor of the suit plots which he has acquired by way of adverse possession after being in occupation for over 12 years?***
- (ii) *is the plaintiff entitled to be registered as the owner of the suit plots and issued with certificates of title?***
- (iii) *is the plaintiff entitled to costs?***

The hearing proceeded in the absence of the respondent who, though served with suit papers as directed by the Court on 3rd June, 2009, did not enter appearance and did not defend.

In his evidence, the plaintiff testified that the respondent knows about the suit plots – because on 14th May, 1974 he, **Vitalilibhai Bhulabhai Patel** swore an affidavit stating that he was the sole owner of the parcel of land situated at Port Reitz, Plot Nos. 2847/VI/MN to 2854/VI/MN.

The plaintiff testified that his grandfather had come to the suit land as a gardener, and he (the plaintiff) was born there in 1967 and has always lived on that land. The respondent admitted the same in an affidavit sworn by him, **Vitalilibhai Bhulabhai Patel**, on 15th December, 1976; and this affidavit, so far as is relevant, reads as follows:

“2. THAT I employed GALAA CHUMPHI MBUI as my shamba boy as from 22nd February, 1962 and up to now the said GALAA CHUMPHI MBUI has settled and stayed in this land as his own house, and it has made me believe that he has no other home than this plot of mine.”

In the plaintiff’s supporting affidavit dated 16th April, 2009 he depones that his late father, **Shede Galaa Chuphi** had informed him that “this is our land which my grandfather was given as a token of appreciation by the defendant after working for him for a duration of 20 years”. The plaintiff depones that his late grandfather and late father also lived and died on the same parcel of land.

The plaintiff deponed that he has occupied and resided on the suit land “for over 12 years with the permission and/or consent and/or authority from the defendant herein, who is the registered owner of the said plots”. The plaintiff further depones that he has been paying the municipal rates in respect of the suit property in the name of the donor.

The plaintiff avers that “every one” knew that the suit land belonged to him, and it is on that basis he had been dealing with this land.

The plaintiff, in bringing this action, is actuated by the apprehension that “the land may be alienated and acquired fraudulently by strangers”.

Learned counsel **Mr. Chidzipha**, in his submissions, restated the content of the plaintiff’s affidavit, notably as follows:

“...the plots in dispute belonged to one VITALILIBHAI BHULABHAI PATEL who donated the plots to the plaintiff’s grandfather, one GALAA CHUMPHI MBUI.”

Although the suit is founded on adverse possession, **Mr. Chidzipha** did not attempt to show how the facts of the case tallied with the recognized law of **adverse possession**; his primary concern was that the plaintiff be not **disinherited** and rendered homeless. Counsel thus submitted:

“Having been given the plots of land by virtue of the plaintiff’s grandfather having worked for him [the donor] for a very long period of time, the plaintiff and his extended family has been in occupation and use of the plots of land [in such a way] that he knows no other home....than the suit land”.

Counsel also urged that this case should succeed because “the plaintiff is the one who has been paying the Municipal Rates for the plots **in the name of the donor.**”

All the information placed before the Court shows that **Vitalilibhai Bhulabhai Patel**, who no doubt was the holder of the title to the suit land, had the **intent** of being a **benefactor**; he was donating the suit property to his long-time employee, **Galaa Chumphi Mbui**, the father of **Shede Galaa Chumphi** who was the father to **John Mwatela Shede**, the plaintiff.

Clearly, if **Vitalilibhai Bhulabhai Patel** intended (and there **is** evidence he did) to donate the suit

land to ***Galaa Chumphu Mbui***, then that was a voluntary, ***testamentary intent*** which, therefore, could not give ***Galaa Chumphu Mbui*** any right based on ***adverse possession***. Had a valid testamentary step been taken, then the suit land would have been duly registered in the name of ***Galaa Chumphu Mbui***; and if that went on to become a bequest by ***Galaa Chumphu Mbui***, then the plaintiff's father, ***Shede Galaa Chumphu*** would have acquired the suit land by ***transmission***, and he would then be registered as the title-holder; and thereafter, the plaintiff, ***John Mwatela Shede*** would acquire from him by transmission, and become the registered owner. However, none of these succession-steps took place; and therefore the suit property remained registered in the name of ***Vitalilibhai Bhulabhai Patel***, and that is to be presumed to be the case to-date.

Is this land that the plaintiff can, in law, claim title to on the basis of ***adverse possession***? This is the question that must determine the outcome of this suit, and it is largely dependent on issues of ***law*** which, however, learned counsel did not address.

The basic law of ***adverse possession*** is stated in ***Wambugu v. Njuguna*** [1983] KLR 172:

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it....”

There is, therefore, a clear condition to be satisfied before a party can claim to have acquired land by adverse possession. This is a significant point in relation to a party's pleadings, and, in particular, as regards the possibility of obtaining a ***default judgment*** where the respondent fails to enter appearance, or to put in a defence. In his submissions learned counsel, ***Mr. Chidzipha*** states:

“The plaintiff herein instituted a suit herein by way of Originating Summons on 16th April, 2009; the same was served upon the defendant by way of substituted service and the defendant having been duly served failed to attend Court; judgment in default of appearance was [thereupon] entered.”

Default judgment, in such circumstances, may be normal for a suit by ***plaint***, but may be out of order where a claim is by adverse possession, and the essential condition for the existence of adverse-possession is not satisfied.

Of the nature of the adverse possession claim, this Court, in ***Margaret Wambui Magu v. Rachel Njeri Nyawanga & Another***, Nairobi HCCC No. 1509 of 2002 (OS), thus expressed the relevant principle:

“Although the title-holders, by [the] formal records, hold a valid position in law, they stand to have their recorded rights taken away and conferred, instead, upon the new moral claimant who has had physical possession of the suit land and who entered thereupon nec vi, nec clam, nec precario.....”

So the question is to be asked whether the plaintiff in the instant case came to possess the suit land

nec vi, nec clam, nec precario. Was the plaintiff's occupation an instance of open, **adverse possession**?

From the evidence, **Galaa Chumphi Mbui** (the plaintiff's grandfather) did not at any time occupy the suit land in denial of, and challenge to the registered title of **Vitalilibhai Bhulabhai Patel**; instead, **Galaa Chumphi Mbui** occupied the suit land by the **permission** of **Vitalilibhai Bhulabhai Patel**. It is clear then, that **Galaa Chumphi Mbui** could not have claimed the suit land by adverse possession; but could his son, **Shede Galaa Chumphi** have claimed by adverse possession? Can **John Mwatela Shede** claim by adverse possession?

Has **John Mwatela Shede** denied the legal ownership of **Vitalilibhai Bhulabhai Patel** over the suit land? By the plaintiff's own evidence (para 7 of the supporting affidavit of 16th April, 2009), he has "resided on the [suit land] for over 12 years with the permission and/or consent and/or authority from the defendant". It is also part of the evidence that the plaintiff has been "paying the Municipal Rates for [the suit property] in the name of the donor....."

From such evidence, the conclusion is to be drawn that the proprietor's consent which enabled **Galaa Chumphi Mbui** and then **Shede Galaa Chumphi** to live on the suit land uninterrupted, is the **consent** which has enabled the plaintiff to remain on the suit premises.

To say that the plaintiff has become the owner of the suit property, is to say that the defendant ceased to be the owner of that land. But the way in which the defendant would cease to be the owner, is defined by law, and it has not been demonstrated by the plaintiff in this case; that element is thus described in *Halsbury's Laws of England*, 3rd ed., Vol. 24 (para. 482):

"How owner ceases to be in possession. An owner of land may cease to be in possession of land by reason of dispossession or discontinuance of possession."

Did the plaintiff disposes the defendant of the suit land? No, there is no such evidence; and indeed, the plaintiff is on that land by the consent of the defendant. Was there a discontinuance of possession by the defendant?

Professor E.H. Burn in **Maudsley and Burn's Land Law: Cases and Materials, 7th ed.** (London: Butterworths, 1998) at P. 186 [quoting **Slade, J.** in **Powell v. McFarlane** (1979) 38 P & CR 452) notes that:

"In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right of possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner."

Thus, in the instant case, the plaintiff could only claim the suit land by showing an **exception** to the foregoing principle: and that could only be done by proving **adverse possession**, what **Black's Law Dictionary**, 8th ed (2004) [page. 1439] defines as:

“The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious....”

The plaintiff has not shown occupancy of the suit property that is “continuous, exclusive, hostile, open and notorious” – and therefore it must be concluded that he has no proper claim based on adverse possession.

The burden of the plaintiff’s case is contained in the following submission by his advocate:

“Having been given the plots by virtue of the plaintiff’s grandfather having worked for him for a very long period of time, the plaintiff and his extended family has been in occupation and use of the plots of land [in such a way] that he knows no other home....than the suit land”.

This, clearly, is a plea on the moral principle that the plaintiff be not deprived of a home. The moral case, however, cannot be accorded the impress of **legality** through the doctrine of adverse possession, as the elements of that doctrine are missing.

Accordingly, the plaintiff’s suit by Originating Summons dated 16th April, 2009 is dismissed. Parties to bear their respective costs.

Decree accordingly.

DATED and DELIVERED at MOMBASA this 11th day of June, 2010.

.....
J. B. OJWANG
JUDGE

Coram: *Ojwang, J*

Court Clerk: *Ibrahim*

For the Plaintiff/Applicant: *Mr. Chidzipha*

Defendant/Respondent: *unrepresented*