



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 723 OF 2008

FRANCIS SONORA OLOITIPTIP PLAINTIFF

VERSUS

KIBUCHO LIMITED *through* THE OFFICIAL RECEIVER..... DEFENDANT

JUDGMENT

This matter is brought by way of Originating Summons dated 19/7/07 under **Section 38 of Limitations of Actions Act** and **Order 36 Rule 3 of Civil Procedure Code**. It seeks a declaration that the plaintiff, **Francis Sorora Oloiptip** has become entitled by virtue of adverse possession of more than 12 years to all that piece of land known as **L.R. No. 209/9749** registered in the name of Kibucho Ltd. And that the defendant's name be cancelled at the Land Registry and in its place, the plaintiff be registered as proprietor of the whole parcel, namely **L.R. No. 209/9749**. And that this court do declare that the entry in the Register of a charge by PAN AFRICAN CREDIT and FINANCE LTD. over the said land has become extinct in accordance with the provisions of **Law of Limitation of Actions Act, Cap. 22**.

And that the Land Registrar do make an entry in the register to note that the charge is wholly discharged and endorse on the grant a memorandum of the date on which the entry was made on the Register. And the Land Registrar, Nairobi be directed to issue a new certificate of title in favour of the plaintiff.

The grounds upon which the application is made are set out on the application and supported by affidavit of the plaintiff. It is sworn that the suit was commenced with leave of the court. The plaintiff says he entered onto suit land in 1981 and was operating a bar and restaurant, hair saloon, butchery and car wash which he is still operating. In July 1999, he obtained a permit from the City Council of Nairobi to construct and connect sewer line. He exhibits the receipts and letter of the Nairobi City Council. He swears that he has been in possession of the suit land for 12 years openly exclusively and without interruption.

The plaintiff has filed a list of documents. Furthermore, there was a trial when the plaintiff gave oral evidence. His counsel also filed written submissions. Firstly, the suit is not defended. The summons was served by court order through substituted service by advertisement. Secondly, there is sufficient evidence documentary and oral showing that the plaintiff has been in possession for more than 12 years since 1981. He has been in open possession carrying on business and no one has tried to dispossess him.

Although there was a suit **HCC No.644/1986** by a mortgagee/chargee, no one has tried to

repossess him. It is possible the bank did recover its money. However, the decree which was entered on 18/1/1990 **HCC No.644/1986** must have lapsed due to influx of time pursuant to the **Limitation of Actions Act** and therefore the charge has been rendered extinct. **Section 4 (4)** of **Limitation of Actions Act** provides that action cannot be brought against judgment after expiration of 12 years.

The counsel has cited authorities:

1. **Wambugu vs. Njuguna (Court of Appeal decision – 1983) KLR 172** where the Court of Appeal held (holding 2) in order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it. Dispossession of the proprietor by acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. In this case the land is in the City. He becomes dispossessed and discontinuance of possession.

2. **Wanja vs. Saikwa [1984] KLR 284 (Court of Appeal)** where the court emphasized the same principles.

3. **Kimani vs. Kibogoro – HCC** judgment where it was held (J. Mbaluto) that filing a suit does not interrupt adverse possession.

4. **Kasuve vs. Mwaani Investments Ltd. & 4 others (Court of Appeal decision)** where the court held that **Section 38 (1)** of **Limitations of Actions Act** authorize a person who claims to be entitled to land by adverse possession to apply to the High Court that he be registered as the proprietor instead of the registered proprietor and that a certified extract of the title in question should be annexed to the affidavit in supporting Originating Summons. In this case the certificate of title (copy) is attached.

Upon considering the evidence adduced by the plaintiff and upon reading Originating Summons and affidavit in support together with annexures, I am satisfied that the plaintiff has proved his claim on a balance of probability. I enter judgment in his favour as prayed in the Originating Summons with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 23rd day of June 2009.

JOYCE N. KHAMINWA

JUDGE