



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 806 of 2007**

CLOVER FOODS (K) LTD.....1ST APPELLANT

SADRUDIN KARIM KURJI.....2ND APPELLANT

VERSUS

THE CITY COUNCIL OF NAIROBI.....1ST RESPONDENT

NGAREGA MBAI.....2ND RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate Court at Nairobi by Clover Foods Kenya Limited and Sadrudin Karim Kurji hereinafter referred to as the 1st and 2nd appellants. The appellants had sued the City Council of Nairobi and Ngarega Mbai, hereinafter referred to as the 1st and 2nd respondents. The litigation concerned Stall No. 63 at City Market in Nairobi, hereinafter referred to as “the stall”, in respect of which the appellants sought an order for permanent injunction restraining the 1st and 2nd respondents, their agents, servants or employees from evicting the appellants from the stall.
2. As per the amended plaint, filed on 28th April, 2004, the 2nd appellant claimed that he was initially in partnership with the 2nd respondent but in July 1980 the 2nd respondent resigned from the partnership and assigned all his interests in the business which included the stall, to the 2nd appellant for agreed consideration. From the year 1980 to the year 2002 the 2nd appellant continued in occupation of the stall, until October 2002 when the 1st appellant acquired the stall for valuable consideration from New Kenya Fish, a nominee of the 2nd appellant. The 1st appellant thereafter continued in occupation of the stall until 16th February 2004, when the 1st respondent served a notice on the 2nd appellant to vacate the stall maintaining that the 2nd respondent was the rightful owner.
3. The appellants maintained that the 2nd respondent was guilty of fraud and material non-disclosure as he had suppressed the fact that he had transferred the stall to the 2nd appellant and relinquished all his interests. The 2nd respondent was therefore misrepresenting himself to the 1st respondent as the rightful owner of the stall. The appellant maintained that they will suffer great financial loss and damage to their business goodwill if evicted from the premises.
4. The 1st respondent filed a defence denying the appellant’s claim. The 1st respondent contended that he was a stranger to the alleged acquisition of the stall by the 1st appellant, as the stall was held by the 2nd respondent under a written tenancy agreement No.2098 commencing from January 1967, which tenancy had not been terminated. The 1st respondent admitted giving notice to the 2nd appellant to vacate the stall,

but explained that the notice was pursuant to a complaint lodged by the 2nd respondent who is the lawful tenant of the stall.

5. The 2nd respondent also filed a statement of defence. He denied having entered into any partnership with any of the appellants for joint ownership and use of the stall, or having resigned from any such partnership. The 2nd respondent alleged that upto the year 2001, the stall was occupied by Gikambura Kiriti Company Limited of which the 2nd respondent was founding director and shareholder. The 2nd appellant fraudulently transferred the businesses of Gikambura Kiriti Butchery Co. Ltd to the 1st appellant without following the laid down procedures. In particular no Annual General Meeting of the company was held, nor was the matter discussed.

6. During the trial the 2nd appellant testified that he got possession of the stall when he was in partnership with the 2nd respondent. He initially joined the 2nd respondent in the business but later the 2nd respondent left the business. Thereafter for over 15 years the 2nd appellant continued with the business until the year 2004 when the 2nd respondent broke open the stall and took possession of it. The 2nd appellant maintained that during the time that he was in possession of the stall he regularly paid rent for the stall. As at the time of coming to Court, the stall was in the possession of the 1st appellant who was operating the business, although the rent was still being paid in the name of the 2nd respondent. Shamsha Ali who claimed to be the one operating the 1st appellant, testified that they have been paying rent in respect of the stall. They were in possession of the stall having been reinstated by the Court.

7. Dominic Ndua Kinyuru a senior superintendent of markets with the 1st respondent testified that rental card No.2098 in respect of the stall was issued to the 2nd respondent in the year 1967. He produced a renewal card dated 30th April, 1986 in respect of the stall which was still in the name of the 2nd respondent. He maintained that according to their records the lawful tenant of the stall was the 2nd respondent.

8. The 2nd respondent testified that he has been the tenant in the stall since 1967. He produced a rent card and rent receipts in evidence. He explained that he got into a business association with the 2nd appellant with whom they operated a butchery in the name of Gikambura Kiriti Butchery Limited in the stall, on the understanding that they were to share profits. Between 1971 and 1980, the 2nd respondent did not get any share of the profits. He therefore resigned as a director of the company. He told the 2nd appellant to look for another place for the company to carry on business. In the year 2003 the 2nd appellant claimed the stall was his. The 2nd respondent therefore complained to the 1st respondent who served the 2nd appellant with an eviction notice. The 2nd respondent maintained that during the time the company carried on business in the stall, the stall remained his, although the 2nd appellant was to provide the stock.

9. Counsel for the appellant filed written submissions urging the Court to find that although the 2nd respondent was the one originally allocated the stall, the appellant was the one who has been paying rent for the past 20 years. Counsel submitted that the 1st respondent was aware of the appellants' presence in the stall as it was accepting rent from the appellants. It was further maintained that the relationship between the 1st respondent and the appellants was a business relationship. Counsel for the appellant argued that the 2nd respondent was adequately compensated for the stall, that is why he made no efforts to take possession of the stall nor paid any rent for the 24 years that the appellants were in possession. Counsel submitted that the respondents were estopped by their conduct from denying the tenancy of the appellants.

10. Counsel for the 2nd respondent filed written submissions urging the Court to find that there was ample evidence that the 2nd respondent was the lawful tenant of the stall and that his tenancy had not been terminated. Counsel submitted that the fact that the 2nd appellant joined the business previously carried

out by the 2nd respondent under the name of Gikambura Kiriti Butchery as a business partner did not automatically make the 2nd appellant a partner in the tenancy. It was maintained that the 2nd appellant only allowed Gikambura Kiriti Company Ltd to operate business in the stall but never transferred, sold or alienated the tenancy in respect of the stall to the company or any of the appellants.

11. It was further submitted that Gikambura Kiriti Company Limited was a separate legal entity from the 1st and 2nd appellants. The company was neither a party to the suit nor was it claiming anything from the respondent. It was argued that there was no change of tenancy between the 2nd respondent and any of the appellants and that the 1st respondent, who was the owner of the stall, determined the dispute in favour of the 2nd respondent, hence the notice to the appellants.

12. In support of his submissions, counsel for the appellant relied on **Misc. Appl.1242 of 2005 Ruth K. Wachira trading as Ami Girl Beauty Parlour vs. Chairman, Business Premises Rent Tribunal**, wherein the Court held that a person who has no title to property cannot purport to transfer the same title or grant a lease.

13. In his judgment the trial Magistrate found that there was no lease agreement in existence between the respondents and the appellants, and that the allegation that the 1st appellant had been in occupation of the stall for 24 years had not been established, as the 1st appellant was uncertain as to the exact year he took possession of the stall. The trial Magistrate further found that the allegation that it was the 1st appellant who has been paying rent to the 1st respondent for the stall for the past 20 years was not supported by any evidence.

14. On the other hand, the trial Magistrate found that the 1st respondent produced a rental card in the name of the 2nd respondent. A rental receipt was also produced as evidence of payment of rent to the 1st appellant. The trial Magistrate concluded that the 2nd respondent was the legal tenant of the stall, regardless of how long he had absented himself from the stall. He therefore found that the appellants' claim was not proved and dismissed the appellants' suit.

15. Being aggrieved by that judgment, the appellants have lodged this appeal raising three grounds as follows:

- (i) That the learned Magistrate misdirected himself in law in finding that the 24 year delay was not a relevant consideration.
- (ii) That the learned Magistrate misdirected himself in law and fact in finding that the production of one receipt by the 2nd defendant was sufficient to determine the case.
- (iii) That the learned Magistrate misdirected himself in law and in fact by finding that the 24 year of possession by the appellant was irrelevant.

16. Following a consent recorded by the parties, written submissions were exchanged and filed and the Court invited to dispose of the appeal on the basis of those submissions. For the appellants it was submitted that although the stall was in the name of the 2nd respondent, he was not the one paying the rent nor was he in possession from the year 1980. It was argued that the occupation of the stall by the 2nd appellant was adverse to the 2nd respondent who made no attempts to recover the stall until after the year 2003. It was contended that the 2nd appellant obtained possession of the stall without the consent of the 2nd respondent and therefore the 2nd appellant having been in possession for a period of between 15 and 24 years, the 2nd respondent had no interest capable of being enforced by the Court. It was submitted that the 2nd respondent could not pursue the recovery of the stall after 23 years.

17. It was submitted that the trial Magistrate ignored the evidence that the 1st appellant was the one

paying the rent in the name of the 2nd respondent. That evidence at best only confirmed that the 2nd respondent was the first tenant, but was irrelevant where the first tenant had abandoned the tenancy and a trespasser had subsequently acquired interests and continued paying faithfully. It was submitted that the trial Magistrate did not address his mind to the Limitation of Actions Act, as the appellant acquired interests in the land through adverse possession.

18. For the 1st respondent it was submitted that the 1st respondent being the landlord and owner of the demised premises, it was best suited to confirm who the legal tenant of the stall was, and that according to the 1st respondent, the 2nd respondent was its tenant. It was argued that there was no privity of contract between the 1st respondent and the appellants with regard to the stall, and that this was admitted by the 1st appellant who accepted that the 1st respondent had not rented the stall to him.

19. It was further maintained that the lease agreement between the 2nd respondent and the 1st respondent provided that the tenant was not to sublet or assign, transfer or otherwise part with or change the proprietorship of the stall, without the written consent of the 1st respondent. Counsel for the 1st respondent maintained that the appellants had no contractual or lawful interests in the stall to support their prayer for injunction. He urged the Court to dismiss the appeal as it lacked merit.

20. For the 2nd respondent it was submitted that the trial Magistrate came to the correct judgment having regard to the evidence and documents adduced. It was stated that the 1st respondent who was the undisputed lawful owner and lessor of the stall, had pleaded that the 2nd respondent was the lawful tenant or lessee of the stall. It was maintained that the 2nd respondent did adduce evidence before the trial Magistrate confirming that he was the lessee of the stall. It was submitted that the appellants were illegal trespassers in the stall.

21. It was submitted that if the 2nd appellant purported to transfer the stall to the 1st appellant, then he had no good title to transfer to the 1st appellant, as he was never a tenant of the 1st respondent. It was maintained that the lease agreement in respect of the stall did not allow subletting of the tenancy. It was further argued that the relationship between the 2nd respondent and the 2nd appellant was a business relationship, and not a tenancy relationship. It was contended that the theory of adverse possession could not hold any water as the appellants were never accepted by the 1st respondent either expressly or impliedly as the tenants of the stall. The Court was urged to reject the appellant's submissions on the limitation period and dismiss the appeal with costs.

22. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate and the submissions made by counsel. I have also given due consideration to the judgment of the trial Magistrate, the grounds of appeal, and the written submissions filed by counsel for all the parties.

23. The undisputed facts before the trial Magistrate were as follows:

- That the stall belongs to the 1st respondent who is the lessor.
- That the stall was leased to the 2nd respondent by the 1st respondent in the year 1967, and the lease still remains in the name of the 2nd respondent.
- That upto the year 1980 the 2nd respondent and the 2nd appellant were partners (co-directors) in Gikambura Kiriti Butchery Co. Limited.
- That the company carried out its business of selling meat from the stall.
- That sometime around the year 1980, the 2nd respondent resigned from the company, and left the company still carrying on the business at the stall.

· That in the year 2004, the 2nd respondent complained to 1st respondent who served the 2nd appellant with a notice to vacate the stall.

24. The dispute concerns the tenancy of the stall which the appellants allege was assigned by the 2nd respondent to the 2nd appellant for an agreed consideration. Nevertheless in his evidence the 2nd appellant did not offer any evidence to corroborate his allegation that the 2nd respondent assigned the tenancy to him or that the 2nd appellant paid any consideration to the 2nd respondent. The 2nd appellant could not tell what consideration he paid or when the same was paid.

25. The 2nd appellant conceded that he had no agreement allowing him to take over the stall from the 2nd respondent, and that there was no change of the tenancy made with the 1st respondent. The appellants have continued paying the rent in the name of the 2nd respondent. There was therefore no evidence adduced to prove the alleged assignment of interest in the stall to 2nd appellant or payment of any consideration. No evidence of any fraud or material non-disclosure was therefore established.

26. Further the 2nd appellant alleged that he transferred his interest in the stall to a nominee, New Kenya Fish, who in turn transferred the interest to the 1st appellant. Again, no documentary evidence was offered in support of this contention nor was there any evidence of any consideration paid, notwithstanding the fact that 1st appellant is a limited company which should transact its business through Board Resolutions.

27. It was conceded that the 2nd appellant and 2nd respondent were co-directors in Gikambura Kiriti Butchery Co. Limited and that the company carried on business at the stall. The question is, what was the implication of the occupation of the stall by the company, and the subsequent resignation of the 2nd respondent from the company leaving the business in the hands of 2nd appellant, and the company still operating from the stall? Did this imply transfer of the tenancy in respect of the stall to the company or the 2nd appellant?

28. It is evident that there was no direct transfer of the tenancy in respect of the stall to the company or the 2nd appellant as no communication of any change was made to 1st respondent and the appellants continued paying rent in the name of the 2nd respondent. Nevertheless the 2nd respondent was effectively not in possession of the stall between 1980 and 2004 when he complained to the 1st respondent. This leads to an issue as to whether the respondents are estopped from their conduct from denying the change of tenancy to the appellants, having allowed the appellants to remain in possession of the stall for a period of about 24 years.

29. It is noteworthy that the issue of adverse possession was neither pleaded nor raised before the trial Magistrate. It is therefore a new issue now being raised by the appellant. Be that as it may, adverse possession is a shield which a party may use in an action for recovery of land. It arises from section 7 of the Limitation of Actions Act Cap.22 which bars a person from bringing any action for recovery of land after the end of 12 years from the date on which the right of action first accrued to him, or to some person through whom the claimant could have brought the action.

30. In this case the dispute is not over ownership of land. It is a dispute over the tenancy interest in a market stall. I have examined Defence Exhs Nos. 1& 2 which are the market stall rent cards which spell out the terms under which the stall was rented out to the 1st respondent by the 2nd respondent. In my view, there is no proprietorship interest which was transferred to the 2nd respondent by the 1st respondent. The ownership of the market stall remained with the 1st respondent and the 2nd respondent's interest was possession of the stall for the purposes of carrying on business subject to the payment of rent.

31. It is also clear that clause 16 of the tenancy agreement between the owner of the stall that is, 1st respondent and the 2nd respondent (Defence Exh.2) provides that the 2nd respondent cannot sub-let or part with possession of the stall without the written consent of the 1st respondent. Further, clause 27 of

Defence Exh.2 provided a restricted right of entry to the stall between 6.00 a.m. and 6 p.m. for purposes of carrying out business only. The tenancy between the 1st respondent and the 2nd respondent was thus qualified and was more of a licence rather than a conventional lease. The issue of the appellants acquiring the tenancy by adverse possession cannot therefore, arise.

32. Moreover, the payment of rent by the appellants in the name of the 2nd respondent, is a clear acknowledgement of the 2nd respondent's interest in the tenancy, and therefore it cannot be said that the appellants dispossessed the 2nd respondent, or openly asserted their rights to the stall. Thus the fact that the appellants may have effectively been in possession of the stall for a period of 24 years, did not give them any rights to the stall as they remained in the stall as nominees or representatives of the 2nd respondent. Moreover, the appellants presence in the stall not having been sanctioned by the 1st appellant, the same was in breach of the agreement between the 1st respondent and the 2nd respondent and cannot therefore be binding on the 1st respondent.

33. Further, although the appellants have come to this Court seeking an order of permanent injunction restraining the respondents from evicting them from the stall, the appellants have not sought any declaration or order with regard to the ownership or tenancy of the stall. It being undisputed that the 1st respondent is the owner of the stall, the prayer of injunction sought, has nothing upon which it can be anchored.

34. For the above reasons, I find that the appellants were unable to prove their case and the trial Magistrate was right in dismissing their suit. Accordingly I find no merit in this appeal and I do therefore dismiss it with costs.

Those shall be the orders of this Court.

Dated and delivered at Nairobi this 21st day of July, 2009

H.M. OKWENGU

JUDGE

In the presence of:

Wayiaki for 2nd respondent, present

Advocate for 1st respondent, absent

Advocate for appellant, absent