



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 114 of 2006 (OS)

KENNEDY KINYA HIUKIA.....APPLICANT/PLAINTIFF

VERSUS

MAGAN LALJI SHAH..... 1ST DEFENDANT

HEMRAJ LALAJI SHAH..... 2ND DEFENDANT

NASHI LALAJI SHAH..... 3RD DEFENDANT

JUDGMENT

I. PROCEDURE.

1. This Originating Summons filed on the 8th February 2006 by Kennedy Kinya Hiuka prays for adverse possession under section 38, Limitation of Actions Act, Cap 22. The Registrations of Titles Act Cap 281, section 3A of the Civil Procedure Act order XXXVI rule 3A of the Civil Procedure Rules cap 21 Laws of Kenya.
2. The three respondents Magan Lalji Shah, Memraj Lalaji Shah, Nashi Lalji Shah were not traced. An application for substitutive service was applied for under order V rule 17 (1)(4) of the Civil Procedure Rules on 17.3.06. This was granted (Aluoch J) and an advertisement placed in the Daily Nation on March 29th, 2006 page 30.
3. No appearance was filed by the three respondents nor was affidavit in reply of the Originating Summons filed. The deputy registrar at the request of the applicants advocate entered Interlocutory Judgment on 12th June 2006.
4. Under order 1XA rule 8 Civil Procedure Rule a suit by way of Originating Summons that does not seek a pecuniary claim under order 1XA rule 3 Civil Procedure Rules should not have an Interlocutory Judgment entered by court.

Rule 8 reads:

“Subject to rule 3, in all suit not otherwise specifically provided for by this order, where any party served does not appear the plaintiff may set down the suit for hearing under order 1XB rule 1.

Order 1XB rule 1(1)

“At any time after the close of pleading, the plaintiff may, upon giving reasonable notice to every defendant who has appeared set the suit down for hearing.”

4. As this matter is an Originating Summons order XXXVI rule 8a r 12 Civil Procedure Rule provides that parties proceed to directions. The applicant would take out an application for directions as to the manner and way the tribunal would be conducted.
5. In this suit, the directions was taken out and granted on 11.10.07 (by Rawal J). The matter was to be conducted by

affidavit evidence.

II. ORIGINATING SUMMONS

A) BACKGROUND.

6. Sometime in 1960, the applicant bought land reference LR Nairobi 209/4401/94, 95, 98 and 99 in a public auction that was conducted by M/s C.B Ministry Auctioneers. A certificate of sale and all the documents of title was given to the applicant who in turn handed to the firm of advocates A. R. Kapila & Co. Advocate for registration. No registration was affected. The reasons being that the said firm of advocates had lost the documents. It appears that from 1961 to date the applicant took no actions to the said documents.

7. The applicant nonetheless took possession and made extensive development. He continued to pay the land rents and rates and has been in control since then.

8. He filed this Originating Summons for Adverse Possession and prayers that the title be registered in his name.

B) AUTHORITIES

9. I was referred to the authority of Wambugu vs. Njuguna (1983) KLR 172(Kneller, Hancox JJA & Chesoni Ag JA) whereby the

Chesoni Ag JA relied on the text Megamy's manual on the meaning of "Adverse" which today means:-

"That there must be possession inconsistent with the title of the true owner ...

Time does not begin to run merely because the owner abandons Possession... If the owner has little present use of the land, much may be done on it by others without demonstrating a possession in consistent with the owner's title...."

10. In relying on the case law of:-

Wallis Caylon Bay Holiday Camp Ltd vs. Shell Mex & BK Ltd (1975) QB 94

where the word "**possession**" was said by Ormerod LJ at page 114 as having acquired a special and restricted meaning "**... courts have always been reluctant to allow an encroacher or squatter to acquire a good title to land against the true owner and have interpreted the word possession ... very narrowly. It is a question of fact depending on a particular circumstances of the case**".

11. The advocate for the applicant wished that I deal with the term dispossessed and discontinued.

Chesoni Ag JA (as he then was) in relying on the case of Kynoch Ltd vs. Ronalds (1912) Ich 534 and Luttledale vs. Liverpool College (1900) Ich 19, 21 where the "general principle" is that possession in law follows the right to possess until the contrary is proved.

"In order to acquire by the statute of limitation a title to land which has a known owner must have lost his right to the land either by having dispossessed of it or by having discontinued his possession of it. (Lindlely MR)"

The best formula for address possession is to ask the question:-

"Has the claimant proved that the title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period?"

This reasoning was adopted and followed in the case law of:

Chimba Mbeyo Mokuga Vs Ahmed Ahdullah HCCC144/04 OS (Mombasa) Sergon J and the case of:-

Stephen Kiptonui Sang Vs KipNgeno Korir HCCC 41/2004 OS (Kericho) Kimaru J

12. Although in the matter before me the question of dispossession may not be relevant but the question of

discontinuation, the case law in Littledale (Supra) quoting Leigh vs. Jack at page 273 describes that what constitutes dispossession of a proprietor on foremen owner is:-

“Acts must be done which are inconsistent with his enjoyment of the soil for the purpose of which he intends to use it.”

III. OPINION

13. The respondents herein had their possession discontinued. This was done in 1961 through an auction sale of their property. The new owner and buyer took possession but failed to effect transfer of the said property. This is done when he requests the 3 respondents to sign the transfer forms. If they refused to do so, the buyer files a suit to court stating that he bought the same through an auction and that the respondents had refused to sign transfer forms. Thereafter the court gives orders to have the property so sold in an auction transferred to the new buyer and owner.

14. The applicant stated the lawyer handling his matter did none of this. He instead has been in possession for 45 years.

15. In this case I am satisfied that the applicant has shown that the three respondent's title had been discontinued. This was why her Majesty supreme court of Kenya at Nairobi Civil case No. 878/58

Kanji vs. Heraj Lalji Shah.

Decree passed on 18.11.1959 against title 209/4401/94, 95, 98 and 99 Nairobi Makadara Estate and the auction of the said decree thereafter.

16. That for 45 years the applicant has been in possession and control of the suit land and premises.

17. I accordingly grant the orders prayed namely that the applicant has acquired absolute right and interest over the said title. That the registrar of Land be accordingly rectified to register the applicant as the sole proprietor.

18. I award the costs of these proceeds to the applicant.

DATED THIS 10TH DAY OF MARCH 2008 AT NAIROBI

M. A. ANG'AWA

JUDGE

D.M. Kibicho instructed by M/s J.K. Kibicho & Co. Advocates for the applicant – present

No appearance for respondent 1,2 and 3.