



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 910 of 2005

CLEOPHAS NYANGIRO OGENDO PLAINTIFF

VERSUS

SAVANNAH DEVELOPMENT CO.LTD DEFENDANT

JUDGEMENT

I: PROCEDURE

1. This suit was filed on 20 July 2005 by Cleophas Nyangiro Ogendo. The defendants M/s Savannah Development Co. Ltd are Developers of the Savannah Shopping Complex. They entered into a sale agreement to sell and transfer House No.25 of their development of Savannah Phase I LR Nairobi Block 82/788 to the plaintiff.

2. The plaintiff took possession of the property in 1990 and has been in occupation since.

3. The dispute that arose between the parties is the defendant's failure to transfer the property to the plaintiffs. The plaintiff filed suit. The defendants failed to enter appearance. The then Deputy Registrar entered Interlocutory Judgment against the defendants. This case being one not under Order IX a r 3,4,5 or 6 the Deputy Registrar should have directed that the suit be placed for hearing under Order IXa r8 Civil Procedure Rules. Namely, the plaintiff do proceed to trial under Order IXb Civil Procedure Rules.

4. On 26 April 2007, the suit came before Rawal J for trial. She commenced to hear one witness when upon her discretion she granted the plaintiff leave to amend the plaint and include an alternative prayer for adverse possession.

5 The plaint was duly amended but the plaintiff was not available for hearing on 18.10.07. When the matter came before me on 3 March 2008, Rawal J having been transferred to a different Division, I directed that a fresh service be made upon the defendants' share holders and directors. That this service be personal upon the directors being one:-

David Munene Kairu (now deceased)

Lucy Wagechi Munene

6. The plaintiff duly complied and service was effected. The defendants failed to attend court and the hearing proceeded for trial.

II: Trial

7. The plaintiff informed this court that he had purchased the suit premises from the defendant. He nonetheless was never given the title to the property. He stated in his pleading that he had been in occupation of the suit premises without any interruption of the said occupation by the defendant. His concern was that the suit premises be transferred to him.

8. In the case law of:-

Francis Gicharu Kariri

v

Peter Njoroge Mairu (as a personal representative of Mairu Wangaru deceased)

CA 293/02 Omolo, Okubsu, Deverell JJA

The deceased plaintiff had commenced his case by way of Originating Summons. The plaintiff was in occupation of the suit premises from the 1960 to his death in 1979. Owuor J held that adverse possession had been proved.

The court of appeal also held that adverse possession was proved. All the plaintiff required to establish is that there was no force, no secrecy, nor persuasion. That there was knowledge of the possession and occupation.

9. Relying on a further case, the

Samuel Miki Waweru

v

Jane Njeri Richu

CA 122/01

Tunoi, Githinji and Onyango Otieno JJA

The advocate for the plaintiff stated that the appellant in the above case took out letters of grant from the estate of the plaintiff's deceased uncle. He obtained title through a succession case. The respondent claimed adverse possession of one acre only.

The court of appeal confirmed she acquired adverse possession although she originally had purchased the land. The issue of the Land Control Board did not arise.

10. In the last case that was referred to was that of:-

Maweu

v

Liu Ranching Farming Cooperative Society Ltd

where the court held that the Land Titles Act had no application to the case for adverse possession.

The respondents had purchased land in 1971 whilst the appellants had been in possession since 1933. The Hon. Judge in the superior court strike out the defence on grounds that any period sought for adverse possession was irrelevant even if proved. The court of appeal held that an action for adverse possession was indeed maintainable.

III: Opinion

11. The issue before this court is whether or not the plaintiff is entitled to be registered as the owner of the premises LR House No.25 Nairobi/Block 82/788?. The plaintiff came into possession of this property by way of the same being sold to him. I believe this is the reason why he relied on the case law of:-

Samuel Miki Maweu

v

Jane Njeri Richi (supra).

Where the respondent came into possession of the property through a sale. No title deed was then available to effect a transfer to the respondent Jane Njeri Richi. She instead claimed adverse possession.

12. The plaintiff in this case has no formal title issued to him by the defendants whom he claimed sold him the property but failed to make a transfer to him.

13. The said plaintiff prays to this court to be registered as owner of the said property.

14. The defendants failed to enter appearance nor file any response to this case.

15. I would accordingly allow there to be judgment in favour of the plaintiff and order that the plaintiff be registered as the owner of LR Nairobi Block 82/788 house No.25.

16. I award the costs of this suit to the plaintiff.

DATED THIS 5TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

A.M.B. Enonda instructed by Enonda, Makoloo, Makori & Co. Advocates for the plaintiff – present

No appearance for advocate for the respondent – absent