



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 60 of 2006

IN THE MATTER OF: MSA/XLII/13

BETWEEN

HAMZAALI ALIBHAI ESSAJE ALIBHAI
PLAINTIFF

VERSUS

ZEINUDDIN ANVERALI DOSSAJEE as personal Representative of

HASSANALI ADAMJE ABDULHUSSEIN
....DEFENDANT

J U D G M E N T

The plaintiff herein Hamzaali Alibhai Essaji Alibhai, took out an Originating Summons pursuant to the provision of Section 38 of the Limitation of Actions Act in which he sought to be declared to have acquired the parcel of land known as Mombasa/Block XLII/13 by adverse possession. He filed an affidavit he swore in support of the Originating Summons. The Originating Summons was served upon Zeinuddin Anveral Dossajee the Defendant herein, in his capacity as the legal representative of the Estate of Hassanali Admaji Abdulhussein, deceased who is the registered proprietor of Mombasa/Block XLII/13. He only filed an appearance without filing any replying affidavit to controvert the facts deponed on the affidavit5 of the plaintiff.

When the Originating Summons came up for hearing, the plaintiff was granted leave to proceed with the hearing of the same ex parte when this court was satisfied that a hearing notice had been served upon the defendants as evidenced in the affidavit of service of Liverson Babu Mdoma sworn on 18th September 2006.

In his affidavit of 30th March 2006, Hamzaali Alibhai Essaji Alibhai avers that he has been in continuous and uninterrupted occupation and possession of the suit property for over a period of twenty (20) years. A copy of the official search is attached to the aforesaid affidavit which indicates that title No. Mombasa/XLII/13 is registered in the name of Hassan Adamji as Trustee of the Wakf.

The plaintiff gives the brief history of this matter in his affidavit. He avers that the late Adam Abdulhussein was the registered owner of the property and that on 3/9/1947 he purported to consecrate the same as a wakf and appointed himself as a first trustee and upon his death, his son Hassanali Adamji was to be the trustee. The plaintiff further avers that Adamji Abdulhussein passed on 11th September

1947 while his son Hassali Adamji died on 5th February 1984. His widow called Rukiyabai Hassanaali Adamji Abdulhussein survived him until 1986 when she passed away leaving behind no issues of their marriage nor any relatives. The plaintiff claims that Rukiyabai was his aunt.

It is the averment of the plaintiff that he took over possession and control of the aforesaid property from the deceased's and that he has been in continuous and uninterrupted possession for a period of 20 years. In fact he annexed to his affidavit a copy of a Will dated 20.7.80 in which the late Rukiyabai appointed him as the sole beneficiary of her estate. The plaintiff is of the view that the title has been extinguished under sections 17, 37 and 38 of the Limitation of Actions Act and hence he is entitled to be registered as the proprietor by adverse possession.

I have also said that the aforesaid averments have not been controverted by a replying affidavit. I have no reason to disbelieve the plaintiff's averment made under oath. Having come to that conclusion the question which must be answered is whether or not the Limitation of Actions Act will apply to land held in trust by Wakf. To answer this issue it suffices to refer to Vol.24 of the Halbury's Laws of England at page 286 which reads as follows:

"569. Trespass in possession of Charity Land:

If the trespasser, or a person who claims independently of the right of the charity, gets into possession of charity land, time will run against the title of the charity just as it would against any cestui que trust entitled under a trust, if the trustee were out of possession and the property was held by a stranger."

It is clear from the above excerpt that the plaintiff's suit is properly before this court. I am also satisfied that the affidavit evidence tendered and the oral submissions made by the plaintiff's learned advocate have sufficiently established the suit.

For the foregoing reasons this Originating Summons is allowed as prayed with costs to the plaintiff.

Dated and delivered at Mombasa this 9th Day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Kasmani for the applicant.

N/a for defendant.