



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

Civil Case 496 of 2006

VIOLET SSENTONGOPLAINTIFF

VERSUS

EVANGELICAL MISSION FOR AFRICA.....1ST DEFENDANT

IM HWA OCK2ND DEFENDANT

RULING

In an Originating Summons dated 12th May 2006 and filed in this Court on 15th May 2006, the Applicant ***Violet Ssentongo*** sought various orders, namely:

- 2. Has the Plaintiff acquired Title to L.R. No. 1160/314 Gate 110 Hardy Estate by reason of adverse possession thereof since 1994?***
- 3. Does the Defendant now hold the Title to L.R. No. 1160/314 Gate 110 Hardy Estate in trust of (for) the Plaintiff?***
- 4. Is the Plaintiff entitled to an order of this Honourable Court that she be registered as the proprietor of L.R. No. 1160/314 Gate 110 Hardy Estate in the place of the Defendant?***
- 5. By whom are the costs of this application payable?***

I have not mentioned prayer 1 of the application because it was as to whom and the manner in which summons of the application should be served because the same have been served, hence the application subject to this ruling.

The application was supported by an affidavit which was deponed to by the Applicant in which she stated, amongst others, that she entered upon the suit parcel of land in April 1994 and had remained in exclusive occupation thereof since then.

That nobody whatsoever has ever gone to the suit land to claim ownership thereof or to demand any rent or any other payment from her in respect to her occupation of the same; that she has lived on this parcel of land openly as the owner and her possession, use and enjoyment thereof has been continuous exclusive, undisturbed and uninterrupted since April 1994.

That the first Defendant are registered as proprietors and joint tenants for an estate in fee simple of the suit land but the Applicant has never seen the said Defendants ever since she entered upon the land and

does not know of their whereabouts.

The Applicant depones further that by reason of her continuous and exclusive possession of the suit land for over twelve (12) years, she has become entitled to it by adverse possession.

That the Applicant believes since her becoming entitled to the suit land by adverse possession the Defendants hold the same in trust for her and that she is entitled to be registered as proprietor of the same land in place of the Defendant/Respondent.

On the same day the Originating Summons was filed, the same Applicant filed an application for injunction to restrain the Defendant/Respondents, their agents, servants and/or representatives and assigns and all those deriving title from the Defendants evicting and removing her from the suit land or in any manner whatsoever interfering with the Plaintiff/Applicant's peaceful occupation and actual possession of the suit property until the hearing and determination of this suit or application inter parties or further orders herein.

Two further orders were prayed for in the application, one, to restrain the same Defendants, their agents, successors, representatives and assigns and all those deriving title from the Defendants selling, changing, disposing of, interfering, mortgaging or in any other manner whatsoever dealing with the suit land in any manner in consistent with the rights of the Plaintiff/Applicant or until the hearing and determination of this application inter parties or further orders of this Court; the other, that this Honourable Court be pleased to order that the Plaintiff be granted an opportunity to register against the suit land any mandatory order made in this suit and any such or other orders as may be desirable.

The Court was also asked to make an order authorizing the Officer In- Charge, Karen Police Station to assist in ensuring compliance with orders of this Court, and so on.

The application was based on the grounds stated therein which were similar to those averred in the supporting affidavit to the Originating Summons save the threat of eviction and demolition of the Applicant's structures on the suit land issued by one **Im Hwa Ock** claiming to be a representative of the Defendant/Respondent after 4th May 2006.

She dismissed the said **Im Hwa Ock** (2nd Defendant and First Defendant respectively) as unknown entities to her.

The supporting affidavit had averments similar to those grounds stated in the application itself.

Then on 25th May 2006 a Certificate of Urgency was filed in Court by the Applicant in which no Court order was prayed for but a further affidavit was filed in which the applicant stated that she had tried to make a search at the Lands Office to ascertain the ownership of the whole plot to no avail as the Registry file was reported missing.

On the said further affidavit was annexed a demand notice by a firm of Messrs Kaplan & Stratton requiring that the Applicant do vacate the suit premises within fifteen (15) days from 24th May 2006, and another document from the City Council of Nairobi.

The application dated 12th May 2006 was placed before the Court on 16th May 2006 *ex parte* but no order was made for lack of an extract of the title to the suit.

On 26th May 2006 the matter was again placed before the Court and an *ex parte* order was made in terms of prayer 2 thereof. In this order the Applicant was ordered to file an undertaking as to damages within three (3) days of that order.

Memorandum of Appearance by Counsel for the Defendant was filed on 30th May 2006 and the undertaking as to damages by the Plaintiff filed on 31st May 2006. No replying affidavit was filed to the

Originating Summons but instead the Respondent filed an application under **Order VI** Rule 13(1) (b), (c), (d) Rule 16 and **Order XXXVI** Rule 12 of the Civil Procedure Rules.

The orders sought in the application were:-

1. ***That the Originating Summons dated 12th May 2006 filed on 15th May 2006 be struck out;***
2. ***That the suit be dismissed with costs;***
3. ***That the costs of the application be awarded to the Defendant/Applicants.***

The application was based on the grounds:-

1. ***That the first Defendant is the registered owner of the property L.R. No. 1160/314.***
2. ***That in 1993, Youth With A Mission Limited transferred the property to the first Defendant (formerly known as the Fourth Waves)***
3. ***That the Plaintiff is the wife of one Expedito Mwebe***
4. ***That Mr. Expedito Mwebe and his family were tenants of the first Defendant;***
5. ***That Mr. Expedito Mwebe and his family have been paying rent to the first Defendant;***
6. ***That Mr. Expedito Mwebe and his family including the Plaintiff have never had exclusive possession of any part of the suit premises and/or for a continuous period of twelve years without the first Defendant's consent and***
7. ***That the suit in the circumstances is a gross abuse of the Court process is embarrassing frivolous and meant to interfere with the first Defendant's quiet enjoyment of the property.***

There was a supporting affidavit in support of the application deposed to by one **Im Hwa Ock** who described herself as the Director of the first Defendant on 7th June 2006 and filed in Court together with the application on 8th June 2006.

This affidavit explained in detail the grounds included on the application and in particular emphasized the relationship between the first Defendant and one Expedito Mwebe and that the later was the husband to the Plaintiff/Applicant herein.

The 1st Defendant in particular talks of a tenancy agreement between the Defendant and the Plaintiff through Expedito Mwebe.

That in fact Expedito Mwebe started by living in the main house belonging to the first Defendant on rental basis before being asked to move to the outer house also on rental basis.

The application was placed before me on 26th February 2007 for hearing when Counsel for both parties submitted thereon. **Mr. Gachuhi** for the Applicant repeated contents of the grounds supporting the application as shown on the application itself and also in the supporting affidavit and emphasized that the Applicant was the registered proprietor of the suit land and that the relationship between the Plaintiff and the Defendant is set out in paragraphs 3, 4 and 5 of the supporting grounds on the application by Chamber Summons.

That the Respondent/Plaintiff had sworn an affidavit in support of an application for injunction in which she showed she was a member of the family of Expedito Mwebe. That there had been a tenancy relationship between the first Defendant and Expedito Mwebe.

That by her own admission there was a tenancy relationship between her and the first Defendant in which event the claim of adverse possession cannot arise in law. That if this arose the Plaintiff cannot be in possession of or pay the utility bills for the 1st Defendant.

According to Counsel's submission there was consent of the 1st Defendant for the Plaintiff to remain on the land in which case the question of adverse possession cannot arise.

Counsel asked that the first Defendant's application be allowed with costs.

The Respondent opposed the application and referred the Court to the replying affidavit and a further affidavit sworn respectively on 14th June 2006 and 12th May 2006.

Counsel stated that there was no denial that the Plaintiff had been on the suit land since 1994 and that she had been there exclusively.

That for all this time, nobody, not even the Defendants had claimed ownership of the suit land from the Plaintiff.

According to the Plaintiff's Counsel, there has been no search certificate to show that the 1st Defendant were current owners of the suit land; thus this casts doubt on Defendants' ownership of plot.

According to counsel, the deponent to the supporting and further affidavit to the application has no authority to swear the same on behalf of the Applicant.

That the application is not supported by affidavit – hence it is defective.

According to Counsel for the Respondent the Respondent denies the Applicant's submissions that she is the wife of Expedito Mwebe.

That the house in Langata is not the property in dispute and also that Expedito Mwebe is not a party in this dispute and hence correspondence between Mwebe and the 1st Defendant should be disregarded.

That there was no document to establish a tenancy agreement between the parties. That the Applicant should not have kept quiet since 1994 without finding out who occupies its land and evicting him/her without any delay, and that it was too late for them to come to Court after fourteen (14) years to seek its assistance. Counsel prayed for the dismissal of the application.

In reply Counsel for the Applicant stated that since the Applicant in the Originating Summons filed that case against the Applicant herein, she had admitted the proprietary interest of the said Applicant in the suit land.

According to him between 1994-5 rent was being paid for the property rented to Expedito Mwebe, hence the question of evicting the occupants including the Respondent could not arise.

These are the submissions which have been advanced before this Court for consideration and decision.

Section 38(1) of the Limitation of Actions Act provides as follows:-

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Sections 37, or land empsized in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

And the manner in which, this application is to be made is provided for by **Order XXXVI** Rule 30 of the Civil Procedure Rules. The Plaintiff in the Originating Summons followed this procedure in filing this

claim to this Court.

I note that the disputed land is registered under the Registration of Titles Act Cap. 281 Laws of Kenya which Section 23 thereof provides as follows:

(23) – “The Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land is absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereof, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

There is actually no dispute that the absolute and indefeasible owner of the suit land is the first Defendant though the Plaintiff/Applicant in the originating Summons would like this Court to change that position by registering her as such owner due to her occupier and user thereof for twelve (12) years and more.

The Respondent/Defendant in the Originating Summons did not file any replying affidavit to this application so far as I can find from the record but instead filed an application under **Order VI** rule 13(1) (b), (c) and (d) and rule 16 and **Order XXXVI** rule 12 of the Civil Procedure Rules.

The application was for the striking out of the Originating Summons with costs to the Applicant.

Order VI rule 12(b), (c), (d) allows the Court to strike out or amend any pleading at any stage thereof on grounds that the pleading is scandalous, frivolous or vexatious, it may prejudice embarrass or delay the fair trial for the action or that it is otherwise an abuse of the process of the Court.

If the Court decides to take this course, it has the discretion to make an order to either stay or dismiss the suit or enter judgment accordingly as the case may be.

This is actually the task the Applicant wishes this Court to undertake by the application filed in this Court on 8th June 2006. Various reasons have been given on the face of the application, the supporting affidavit and in the submission.

Also on the supporting affidavit of the application have been annexed various documents to establish a tenancy relationship between the Applicants and one Expedito Mwebe – who the Applicant alleges was the husband of the Plaintiff in the Originating Summons.

I have also noted that quite a number of annexures on the Plaintiff’s affidavit in support of the application for injunction are similar to those annexed to the supporting affidavit to the application for striking out the Originating Summons.

But there is no explanation as to how the Plaintiff came to be in possession of documents either meant to be in possession of the first Defendant or Expedito Mwebe.

It is also clear that though the Plaintiff would like this Court to declare her as the adverse possessor of the suit land since she settled on it in 1994, she does not seem to have found out who the registered owner was through an official search at the Lands Registry until when this Court ordered her to make such search by order dated 16th May 2006.

And even after the Plaintiff reacted to that order, she did not find out the registered proprietor because the file in respect to this transaction was reported missing at the Lands Registry.

The question now begging is when did the Plaintiff know and from whom, that the 1st Respondent/Defendant was the registered proprietor of the suit land??

And given the answers to the above, was the Plaintiff occupying this portion of the land or whole of it through the consent or permission by the 1st Defendant? If so when did this consent or permission cease to have effect or was withdrawn?

Answers to these questions are not forth coming from the documents filed herein nor are they available from the submissions made on the application for striking out the Originating Summons.

If the answers were available this Court would have found it easy to determine the question of adverse possession and make an appropriate order as sought in the application filed herein on 8th June 2006.

The bundle of annexures on the supporting affidavit of the plaintiff's earlier application for an injunction are in form of water, electricity or telephone bills dated as far back as 1999. They were addressed to **Youth With A Mission Limited** – said in this application to be a precursor of the first Defendant herein. How the Plaintiff came into their possession or why she or Expedito Mwebe should have been paying these bills on behalf of the said Youth With A Mission Limited or the first Defendant for that matter, is not very clear from the submissions made herein.

What of the relationship between the Plaintiff and Expedito Mwebe, if any? Has it come out succinctly in the submissions made before me? My view is this has not been done.

Where then do we get satisfactory answers or explanations to the questions posed in this ruling? In my view all these answers or explanations might become clear if parties are given an opportunity to testify on the Originating Summons. Thus I am unable to allow this application and/or to strike out the suit. Instead I dismiss this application and order that costs thereof be costs in the cause.

Delivered and dated at **Nairobi** this 21st day of March 2007.

D. K. S. AGANYANYA

JUDGE