



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Suit 855 of 2005 (O.S.)

JULIUS PETER MIGWI GICHIMU)

JOSEPH NDIANGUI MAINA).....PLAINTIFFS

VERSUS

FALCON PROPERTIES LTD.....DEFENDANT

IN THE MATTER OF TITLE NO. NAIROBI/BLOCK 97/367, 368, 369 & 370

J U D G M E N T

This action was commenced by Originating Summons dated 7th July, 2005 which was filed on 8th July, 2005. It was brought under ss.37 and 38 of the Limitation of Actions Act (Cap. 22) and Order XXXVI, rule 3D of the Civil Procedure Rules. The plaintiffs' prayers were for

(i) a declaration that the plaintiffs are entitled to be registered forthwith as

owners of Title No. NAIROBI/BLOCK 97/367, 368, 369 and 370 which they have held in adverse possession since 1988 and to-date, for a period of more than twelve years immediately preceding the filing of this suit, the same being land on which the plaintiffs have lived openly and

continuously as of right, and without any interruption from the defendant or its predecessors in title; and that the defendant's title to Parcel No. NAIROBI/BLOCK 97/367, 368, 369 and 370 has been extinguished in favour of the plaintiffs under Sections 37 and 38 of the Limitation of

actions Act (Cap. 22);

(ii) an order that the defendant do transfer Title No. NAIROBI/BLOCK

97/367, 368, 369 and 370 to the plaintiffs, and in default the Deputy

Registrar be authorized to do and/or sign all documents to effect transfer of Title No. NAIROBI/BLOCK 97/367, 368, 369 and 370 to the plaintiffs;

(iii) an order for costs and interest thereon.

Julius Peter Migwi Gichimu one of the plaintiffs, swore an affidavit dated 7th July, 2005 in support of the prayers. He avers that he has authority to make his depositions on behalf of the 2d plaintiff, apart from himself. He deposes that the plaintiffs are residents of Embakasi, in Nairobi. The two plaintiffs had

in 1988 come together to open a business selling building materials such as stones and hard-core. The place of business was along Outer Ring Road, in the neighbourhood of Tassia residential estate. This land which the plaintiffs came to occupy was vacant, for a stretch of about one kilometer, and the plaintiffs found it necessary to inquire who the owners were. However, nobody in the neighbourhood appeared to know the owners. The plaintiffs decided to use the road reserve adjacent to the suit land, while they attempted to locate the owners of the suit land. In June, 1988 the plaintiffs started operating a yard for building materials, on the road reserve. After three months the plaintiffs noted that there had been no complaint that they were causing an obstruction to access to anyone's land, and this led them to suspect that the suit land belonged either to the City Council of Nairobi, or the Government of Kenya. In October, 1988 the deponent took up the matter with the City Council, but he learned that the suit land was not owned by the City Council; he was advised to do a search in the Lands Office if he wanted to know who was the owner of the suit land. At this stage, the plaintiffs' business had expanded considerably, and for being conducted on the road reserve, was running into conflict with the operations of the City Council. This caused the plaintiffs to retreat further inside, into the suit land, where they erected a wire fence around their business establishment, for the purpose of ensuring security.

Sometime in April, 1989 the deponent visited the Lands Office and obtained a survey plan for the general area where the suit land was located. With the assistance of a surveyor he was able to identify the land on which the plaintiffs were plying their business, as Title Nos. NAIROBI/BLOCK 97/367, 368, 369 and 370. Subsequently the deponent carried out a search at the Lands Office, and established that the suit lands were owned by a company known as Falcon Properties Ltd. No action was taken immediately to trace the offices of Falcon Properties Ltd. And in the course of 1999 the plaintiffs erected temporary kiosks on part of the suit land, next to Outer Ring Road, and started leasing them out, while continuing to use the remainder of the suit land for business in building materials.

Due to increasing competition, the plaintiffs realized in the course of 2002 that the building materials business was no longer profitable. The plaintiffs decided to change the business, but because the suit land was not registered in their names, they sought legal advice. The advice received was this: having occupied the suit land adversely and continuously for more than 12 years, the plaintiffs now had rights of ownership and the registered owner was merely holding the titles in trust for them, the plaintiffs.

The deponent averred that the plaintiffs occupy the entire suit land and have constructed rental kiosks with a capacity for more than 50 tenants. He deposed that since the plaintiffs took possession of the suit land in 1989, they "have never [heard] any person complaining that the land is his"; and he averred: "we have been in continuous and uninterrupted occupation of the suit land". He added:

"even now we are in intensive use of the land". The deponent deposed that the plaintiffs have fully developed the suit land, and provided thereon such utilities as electricity, sewerage and water facilities. Pending the hearing of this suit the plaintiffs had moved the High Court by Chamber Summons dated 14th July, 2005 for certain interim orders; and on 14th July, 2005 Ransley, J ordered as follows:

"THAT a temporary injunction be and is hereby issued restraining the defendant, its directors, officers, employees, servants, agents or any person claiming through it from evicting the plaintiffs, their servants and/or agents from TITLE NO. NAIROBI/BLOCK 97/367, 368, 369 and 370 or from demolishing or fencing in the plaintiffs' buildings or from interfering

with the plaintiffs' possession of the said land, or alienating, transferring, disposing the suit land in any manner whatsoever pending hearing inter partes.....

Ransley, J further extended the above order on 27th July, 2005 pending the hearing and determination of the suit.

On 8th August, 2005 the Deputy Registrar fixed hearing date as 27th October, 2005 and a process server, Sylvester Okello, as shown in his affidavit of service dated and filed on 27th October, 2005 duly served hearing notice upon a manager of the defendant company. When the matter came up before me on

27th October, 2005 only the plaintiffs were represented. Hearing, however, did not proceed, and the Deputy Registrar then set the hearing date as 15th November, 2005. Counsel for the plaintiffs again served this new date, through the same process server, Sylvester Okello who swore an affidavit of service on 14th November, 2005.

On the hearing date, 15th November, 2005 learned counsel Mr. Gichigi appeared for the plaintiffs but the defendant was not represented.

Mr. Gichigi stated that the plaintiffs had two main prayers: for a declaration that the plaintiffs are entitled to be registered as owners of the suit land by virtue of adverse possession; and that the suit land be transferred in title to the plaintiffs.

Learned counsel submitted that the plaintiffs had exclusively occupied and developed the suit land since 1989, but the defendant has never bothered to obtain possession and that this showed that the defendant had no interest in the suit land.

It is clear that the plaintiffs had taken the care consistently to effect service upon the defendant. But the defendant chose not to respond. This must mean that the defendant did not care much for the suit land, and was wholly indifferent to the possibility that someone else might lay claim to this land, by the operation of the law relating to adverse possession. It is hardly surprising that for the entire period running from 1989 to 2005 - a total of some 16 years the plaintiffs were the sole and exclusive occupants of the suit land, doing upon it brisk business, developing that land, engaging in activities entirely consistent with the rights of a landowner; but never did the defendant raise a challenge. Had the defendant any answer at all to the plaintiffs' claim of ownership by adverse possession, it would have been inconceivable that the defendant should fail to have representation in Court, and to mount a determined legal challenge.

It follows that the doctrine of adverse possession applies to this case. So completely have the Plaintiffs asserted possession over the suit land, they bring along the radical moral force that this Court must hold to prevail over the dormant, registered title which has over the years been held by the defendant. On the facts of this case, the defendant has, by operation of law, assumed the possession of just a trustee, for the true, practical owners of the suit land, namely the plaintiffs.

I will, therefore, decree as follows:

- 1. It is hereby declared that the plaintiffs are entitled to be registered forthwith as owners of Land Title No. NAIROBI/BLOCK 97/367, 368, 369 and 370 which they have held in adverse possession since 1988, for a period of more than 12 years immediately preceding the filing of this suit; and also hereby declared that the defendant's title to land parcel No. NAIROBI/BLOCK 97/367, 368, 369 and 370 has been extinguished in favour of the plaintiffs under Sections 37 and 38 of the Limitation of Actions Act (Cap.22)**
- 2. It is hereby ordered that the defendant shall, within 30 days of the date hereof, transfer the land parcel, Title No. NAIROBI/BLOCK 97/367, 368, 369 and 370 to the plaintiffs, and in default the Deputy Registrar of the High Court is hereby authorized to do and/or sign all documents to effect transfer of the land parcel, Title No. NAIROBI/BLOCK 97/367, 368, 369 and 360 to the plaintiffs.**
- 3. The defendant shall bear the plaintiffs' costs in this suit.**

DATED and DELIVERED at Nairobi this 3rd day of February, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J
Court Clerk: Mwangi
For the plaintiffs: Mr. Gichigi /Burugu & Co., Advocates
The Defendant absent and unrepresented.