



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1825 OF 2000 (O.S.)**

**BIDCO OIL REFERIES LINTIED ..... PLAINTIFF**

**VERSUS**

**ROSSLYN DEVELOPMENTS LIMITED ..... DEFENDANT**

**JUDGMENT**

The plaintiff Bidco Oil Refineries Limited took out this originating summons under Order XXXVI Rule 3D of the Civil Procedure Rules for the determination of the following questions:-

- (a) Whether the applicant is in adverse possession of a portion of all that property known as L.R. No. 7788/21/R;
- (b) Whether the applicant having purchased a portion of L.R. No. 7788/21/R has acquired all the rights that had accrued to the previous registered owner of the suit property;
- (c) Whether the applicant should be registered as the owner of a portion of the property; and
- (d) Whether a permanent injunction should issue restraining the defendant from trespassing, remaining at or in any way interfering with the plaintiff's quiet enjoyment and developments of that parcel of land known as L.R. No.7788/21/R.

The summons is supported by an affidavit sworn on 16.10.2000 by Vimal Shah, a director of the plaintiff company.

The defendant who opposes the originating summons has filed a replying affidavit sworn on 28.11.2000 by Montague Charles Ruben, a director of the defendant company annexed to which are two further affidavits sworn by Mrs. Beckmann (MCR 3(a)) and Franscesco Stame (MCR 3(c)).

The affidavits filed herein reveal that the plaintiff company purchased a property known as L.R. 7788/36 in 1995 from a couple known as Franscesco Stame and Maria Vittoria Stame. The property was adjacent to another property known as L.R. 7788/21/R owned by the defendant a portion of which is the subject matter of this originating summons.

According to the plaintiff, at the time of purchasing the property, there was a wire fence around the property he purchased, which said fence had allegedly been in place for quite some time; but as to how long, the plaintiff does not seem to know because clearly it was not in occupation of the property until the time of its purchase in 1995.

The plaintiff further claims that since the purchase it occupied all the property enclosed by the wire fence but when it later commenced to put up a stone wall around it, the defendant objected to the fencing of a portion of the property and informed the plaintiff that the lower end of the property was not in fact part of what the plaintiff had purchased; the defendant is said to have further informed the plaintiff that the portion was an integral part of L.R. 7788/21/R which belonged to it.

As will be apparent from the originating summons, the plaintiff's claim to the portion of land now the subject of this suit is based on adverse possession and is founded on the following alleged facts.

(a) That the disputed property was fenced within L.R.7788/36. The fencing is said to have been done by the previous owner of L.R. 7788/36.

(b) That the previous owners of L.R. 7788/36 had planted trees on the disputed portion. The trees are now said to be over 30 years old.

(c) That the disputed portion had for a long time been treated as part of L.R.7788/36 and since 1968, each successive owner of L.R. 7788/36 had occupied the disputed property as part of L.R.7788/36.

(d) That the defendant's right to the disputed portion has been extinguished and consequently it held the land as trustee for the person in adverse possession; and

(e) That the plaintiff had acquired certain rights which all the previous owners of the property had enjoyed and consequently be registered as the proprietor of the disputed portion of land.

A claim to land made on the basis of adverse possession springs from the provisions of Section 7 of the Limitations of Actions Act. That section enacts that:-

***“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”***

If my reading of the section is correct, then for the plaintiff to succeed in this action, it must be able to show that it has been in adverse possession of the disputed portion of land for an interrupted period of 12 years prior to the time when it took out this originating summons. It can of course do so also through some other person through whom it claims. The plaintiff attempted to do so by deponing (through Mr. Shah) that the previous owners of L.R. 7788/36 had openly and without any secrecy occupied the disputed portion of land. The evidence contained in the affidavits sworn herein shows that those owners are Franscesco Stame and Maria Vittoria Stame. But if prior to the sale of the suit property to the defendant those two individuals had not acquired any rights to the disputed portion of land, either through adverse possession or otherwise, then it follows that the claim by the plaintiff to the disputed portion is untenable. In view of that, the contents of the affidavit sworn by Mr. Stame in support of the defendant's position in this matter are of crucial importance. Mr. Stame depones:-

(a) whereas there was a fence consisting of random and broken wire and sisal plants and trees extending from L.R. No. 7788/36 towards the disputed portion of land, nonetheless he did not at any time occupy the said portion of land nor did he consider the portion as part of his property as he always knew that the portion belonged to the defendant, who were his neighbour.

(b) at the time they bought the land from the Administrator of the Estate of Sardavllal Ganpartrai Kohli the said portion of land was not given to them as part of their property. Similarly, at the time they sold the land to Bidco Oil Refineries Ltd, they did not represent the same to be part of the property and nor was any consideration taken of it in the negotiation leading to the transfer.

(c) on their part, they have never claimed entitlement nor considered themselves entitled to the disputed portion of property L.R. No. 7788/21/R as is claimed by Bidco Oil Refineries Ltd. and

they deny that they told Bidco that the portion was part of their property.

(d) further at no time did they promise to purport to sell to Bidco Oil Refineries Ltd. any bigger portion of land than was set out in the Agreement for Sale, the Transfer and Certificate of Title.

Because its alleged occupation of the disputed portion of land has lasted for only 5 or so years, it is obvious the plaintiff's claim to the suit property on the basis of adverse possession cannot succeed unless it be pursued through the occupation of the portion by the previous owners of L.R. 7788/36, Mr. Franscesco Stame and Maria Vittoria Stame. As shown above those two individuals have categorically denied having had any claim or having acquired any right to the disputed property. Consequently since the Stames could not have conferred upon the plaintiff any rights to the property which they had not acquired by the time of the sale, and it is a fact that they had not acquired any right to the disputed portion of land, it follows that the plaintiff's claim to the disputed property is unfounded.

For the above reasons, I am of the opinion that the plaintiff has failed to establish degree required by law, i.e. on a balance of probabilities, that it has acquired any rights to the disputed portion. Accordingly, the suit lacks substance and is dismissed with costs.

Dated at Nairobi this 5th day of June, 2001.

**T. MBALUTO**

**JUDGE**