



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPL. NO. 304 OF 1991

NJEKA OCHUNYI.....PLAINTIFF

VERSUS

MOHAWLAL GIRDHA SHAH.....DEFENDANT

J U D G M E N T

This suit is by way of Originating Summons under Order 36 Rule 3(d) of the Civil Procedure Rules, section 38 of the Limitation of Actions Act and Section 3A of the Civil Procedure Act.

The applicant Njoka Ochunyi sought the following orders against the administrators of the Estate of Mohanlal Girdhar Shah, the respondent.

1. THAT the Applicant be registered as proprietor of all that piece or parcel of land comprised in Land Reference Number 209/1539 in place of Mohanlal Girdhar Shah(deceased).
2. THAT this Honourable Court be pleased to make such alternative or further order as it may deem just and equitable in exercise of its inherent powers and jurisdiction.
3. THAT the costs of this application be awarded to the applicant.

In support of his suit, the plaintiff has sworn an affidavit the pertinent paragraphs of which read as follows:

- “2. THAT I personally came to know the deceased M.G. Shah in 1961 as his tenant in respect of the suit premises.
3. THAT on or around the year 1972, through one KK Shah who was the agent of the respondent. I agreed to purchase the suit premises which I was occupying as a tenant and to that end I deposited part of the purchase price with the respondents Advocates Messrs. Khanna and company.
4. THAT thereafter I ceased to pay rent to KK Shah and I have since then been in occupation of the suit premises without any interruption and nobody has ever asked me to vacate or apply rent for over 12 years.
5. THAT what I knew was that the property belonged to M.G. Shah as per the annexed abstract of title marked “No 1” and have through out the years occupied the property paid all the outgoings like rates and Land Rent in the deceased’s name as per the annexed copies marked” No.2”.
6. THAT it is only lately that I have been receiving Land Rent demands in my own name as per the

annexed copy marked "NO.3."

7. THAT around the year 1980 I desired to have the legal title of the property in my name and to this end I requested Messrs Munikah and Company Advocates to write to M.G. Shah's Advocates for documents of title to complete the transfer in my favour but the said advocates said that they had no instructions and they did not know the legal representatives.

8. THAT I am advised by my advocates and verily believe the same to be true that the deceased's Shah's title has been extinguished by virtue of my having occupied uninterrupted the suit premises for a spell of over 12 years."

Upon service (which was disputed) of the originating summons a memorandum of appearance and defence were filed under protest. The substance of the defence was that these proceedings have to proceed as normal plaint if they do proceed; and on the applicants own showing, he is not in adverse possession and the proceedings are therefore misconceived.

The record shows that directions were taken on 26th June, 1992 but for various reasons the wheels of justice moved very slowly thereafter. On 2nd December, 1997, the following facts were agreed and admitted by consent:

1 That the applicant entered into the suit premises L.R. NO. 209/1539 in 1961 as a tenant by the consent of the owner and has since been in occupation to date.

2 In 1972 the applicant commenced buying the suit premises and paid a sum of Kshs. 15,000/- Khanna & Company Advocates through KK Shah who was the agent of M.G. Shah the owner of the property.

3 The purchase price was Kshs. 55,000/-

4 The applicant has not paid the balance of the purchase price to date.

5 After the contract was entered into the applicant ceased to pay rent.

6 In 1990 in H.C.C.C NO. 288 of 1990(O.S) the applicant brought a suit for adverse possession of the same property against the owner who was at the time deceased.....

Both learned counsel for the parties have made their respect submissions and several authorities have been cited. I have taken all that into consideration.

From the pleadings and admitted facts if the applicant entered the suit premises in 1961 and continued to pay rent up to 1972, during all that time he cannot claim to have been in adverse possession. This is because by paying rent per se, the applicant was recognising the title of the owner of the property.

In 1972 he started purchasing the suit property. The applicant paid Kshs. 15,000/-. To date the balance of the purchase price has not been paid. If his possession of the suit premises was therefore that of a purchaser, time does not start to run adversely until the last instalment has been paid. (See Sisto Wambugu -v- Kamau Njuguna (1982-88) 1 KAR 217 and Sospeter Wanyoike -v- Waithaka Kahiri (1979) K.L.R. 236).

As late as 12th July, 1980, the Applicants then advocates wrote to M/s Khanna & Company Advocates in respect of the suit premises and suggesting to complete the purchase price. Once again the applicant through his counsel recognised the title of the owner of the property.

The filing of the suit H.C.C.C NO. 288 of 1990 by the plaintiff is also instructive. The cause of action was adverse possession. By so doing he was in effect recognising the title of the owner and in effect saying the property was not his. That suit was dismissed.

The present suit is defended. Again time cannot start to run adversely against the respondent.

I accept the averments that the applicant has lived on the suit premises for many years. However the facts and the law applicable do not support the prayers he has sought from the court.

Accordingly I find, as I must in the circumstances of this case, that the applicants suit must fail. The same is hereby dismissed.

I know costs follow the event but in the peculiar circumstances of this case I order that each part shall be his own costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of March, 2000

A. MBOGHOLI MSAGHA

JUDGE