



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1344 OF 1999.

SAMUEL MUGO KARANJA.....PLAINTIFF

VERSUS

CHIRO NJIRI.....DEFENDANT

J U D G M E N T

The Plaintiff filed an Originating summons on the 15.7.99 seeking an order under Section 38 of the Limitation of Auctions Act that he is entitled to L.R. No. 36/11/126 by way of adverse possession.

The defendant opposes the application on the grounds that he is the registered owner of the plot.

Subsequently on the 23.9.99 the Defendant in the Originating Summons filed a suit in this court being H.C.C.C. 1344/99 for an injunction restraining the Plaintiff from interfering with the Defendant's proprietary rights. The Plaintiff filed a defence and counterclaim in that suit which sought a declaration in the terms asked for in the Originating Summons.

Both suits are before this Court by virtue of an order made on the 7.10.99 transferring the originating summons to this court.

It was agreed that the matter would be disposed of in both suits by proceeding with the Originating summons.

The Plaintiff P.W. 4 is an elderly man who has difficulty in walking. As a result his evidence was heard at the suit premises. He gave evidence that he was in the army in Barmah during the last world war and in 1999 was shown the suit premises (called the plot) by a colour singer in 1955. The plot was vacant and the colour singer gave him the plot number as 126. The Plaintiff knew him as he was a sergeant in the 5th KAR and the colour singer repaired vehicles for the army.

The Plaintiff after moving into the plot sold charcoal from 1955 to 1960. He also sold tea. Thereafter he put up rooms from which he received rent. He applied for water in 1980 which was connected in 1989. He produced documents to show that he applied for the water.

He also gave evidence that the structures on the plot were burnt down in 1989 by a woman tenant and that he made a complaint to the police. As a result a number of his documents were burnt and couldn't be produced.

He did however have a hawkers licence which he produced.

The Plaintiff called other witnesses including P.W. 1, P.W. 2 and P.W. 3 who gave evidence that they knew the Plaintiff and that he was residing in the plot from 1958 on. Each one dealt with a different aspect of his occupation. None of them knew the Defendant and although pointed out in court said they had never seen him at any time on the plot.

Introduced into evidence was a High Court file being file No. 220/79 relating to an originating summons filed by the Defendant in respect of another property which had been registered in his name under the provisions of the Limitation Act.

The Defendant also called his son who corroborated his father's story and said he had never seen the Defendant.

Finally two witnesses were called from the Nairobi City Council to show that a rates receipt and rates clearance certificate obtained by the Defendant were forgeries.

The Defendant gave evidence that he had been in occupation of the plot since 1960 and that he was selling charcoal and later tea. He lived there for approximately 16 years. In 1978 he went to court and obtained a vesting order in H.C.C.C. 2262/79 to the plot of which he is now the registered owner. These proceedings were produced in Court.

He said he paid rates and produced the receipt to which I have referred. His explanation of the forgeries is that the City Council is in a mess and his advocate got the receipt and clearance certificate. In 1986 he wanted to rent the plot and looked for the Plaintiff who he claimed had approached him earlier to be a tenant to take the plot as a tenant. There was to be no rent and that he was merely to look after the plot. The Defendant said he was going to start a sawmill at Bogeti.

The Defendant further said that the Plaintiff was operating another tea kiosk in Eastleigh Section 2 but he couldn't remember the particular place.

He gave evidence that he wished to sell the plot and instructed his advocate to send a Notice to quit to the Plaintiff which precipitated these proceedings.

The Defendant's application for a vesting order is contained in Exh. 9 and is based on an affidavit drawn by Kamau & Co. Advocates. It is significant that the application in H.C.C.C. 2261/79 also drawn by Kamau & Co. Advocates and which was filed on the same day as the suit in H.C.C.C. No. 2262/79 are in all material respects identical. Both claim the defendant had been in occupation of the plot (in either case in question) since 1960 and that the Defendant had been using the premises as a depot for the sale of Charcoal and as a tea kiosk. How the Defendant could have been in two places at once and doing the same thing has not been explained.

The Defendant called one corroborating witness.

I have no hesitation in saying that I believed the evidence of the Plaintiff and his witness who struck me as being open and honest witness.

The Defendant on the other hand was evasive appeared to know few details and I did not believe what he said with regard to his occupation of the plot.

I am satisfied that the City Council Receipt and Clearance Certificate he produced were forged and not genuine.

Although the Defendant did get a vesting order the proceedings were not served on the Plaintiff but on an absentee owner who of course did not defend the suit.

The Plaintiff I believe has been in continuous and uninterrupted adverse possession of the plot since 1955. I do not believe the Defendant has been in occupation of the plot at all.

In the event I give Judgment for the Plaintiff for the order asked for in the Originating summons and the costs of this suit. I dismiss the Defendants suit in H.C.C.C. No. 1344 of 1999 and allow the counterclaim thereon so far as may be necessary and award the costs of that suit to the Plaintiff.

Dated and delivered at Nairobi this 10th day of May, 2000.

PHILIP J. RANSLEY
COMMISSIONER OF ASSIZE.