



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1425 OF 1996 (O.S)**

KIRIT BABULAL BAKRANIA..... PLAINTIFF

VERSUS

CHAMPPUBEN W/F

GOVINDI MUWI DODHIA & 2 OTHERS..... DEFENDANT

**RULING**

This originating summons is brought under Order XXXVI Rule 3 and 3(d) of CP Rules, Section 37 and 38 of the limitation of Actions Act and sections 52 and 53 of Transfer of property Act.

The applicant seeks the following orders:

1. A declaration that plaintiff is entitled by adverse possession to land little no. L.R. 209/103/7 Nairobi together with all buildings and improvements erected and being there on.
2. A declaration that the 2nd and 3rd defendants are not bona fide purchasers of the above piece of land for value.
3. A declaration that defendants hold the said property on trust for plaintiff
4. An order for transfer of the said property to plaintiff
5. An order extinguishing the 2nd and 3rd defendants registration as proprietors of the said suit premises
6. A declaration that plaintiff has been in occupation since 1967 as a purchaser in possession and that the purchase price was paid in full in 1974
7. An Order that plaintiff be registered as the sole proprietor in place of Champuben wife of Govindji Mulji Dodhia, the first defendant herein
8. An order that 1st defendant do execute and deliver to plaintiff the transfer of the said property lying in her possession since 1969 and in default the Registrar of this court do execute the said transfer.

The applications case as stated in his supporting affidavit is briefly as follows

Applicants father Mr. Babulal Trikam Bakrania, herein after, referred to, as Bakrania, was regularly

doing various works on contract for Mr. Govindji Mulji Dodhia (herein after referred to as Dodhia) - husband of the first defendants. By a letter dated 5.5.67 Bakrania requested Dodhia to buy the suit property for Bakrania. Bakrania offered to repay Dodhia "slowly" Alternatively he requested Dodhia to retain payments due to him until Bakrania has paid for the property. By a letter dated 27.5.67, by Bakrania, a copy of which was signed by Dodhia, Bakrania confirmed the discussion already held. According to that letter, Dodhia had agreed to purchase the suit property in his wifes name (first defendant) and later transfer it to Bakrania son ( plaintiff ) for shs 90,000 upon plaintiff reaching the age of over 18 years. The letter also shows that Mr. Dodhia would either deduct payments due to Bakrania until the whole purchase price was paid. Lastly, the letter shows that Dodhia and Bakrania agreed that Bakrania would move into the property when the tenant vacates. On 15.7.67 the suit property was purchased and registered in the name of first defendant.

By 1974 Bakrania had paid the whole purchase price and the fresh Agreement dated 1.7.74 was entered into and signed by Bakrania, Dodhia, plaintiff and first defendant. By that agreement, Dodhia acknowledged full payment of shs 90,000 and agreed to transfer the suit land and from his wife (first defendant) to plaintiff. On 19.3.93, Dodhia and plaintiff entered into a written agreement by which Dodhia agreed to transfer the suit property to plaintiff. Bakrania died in April, 1981 and Dodhia died in June 1993. In breach of the agreement, first defendant purported to transfer the suit premises to the 2nd and 3rd defendants on 5.12.95 for a consideration of shs 2 million. The property is valued shs 12 million and the purported transfer was made with intent to defraud plaintiff for consideration which, if paid at all, was grossly inadequate,. The transfer is void and illegal because first defendant was holding the property in trust for plaintiff and could not dispose of the property without plaintiff's consent. The suit premises comprise of 2 flats and plaintiff has occupied one flat since 1967 while 2nd and 3rd defendants, who are father and son, have similarly occupied the other flat. The second defendant was initially an employee of the late Mr. Dodhia and first defendant but 2nd first defendant and first defendant now run a business called Sarce Palace as equal partners. Upon the the 2nd and 3rd defendants buying the property, they have called upon plaintiff to deliver vacant possession and are also claiming mesne profits.

First defendant has filed a replying affidavit. She states that she was the registered owner of the suit property until she sold the property to the 2nd and 3rd defendants for shs 2 million she denies entering into any agreement with Bakrania:- plaintiffs father. She states that she was not aware of any arrangement between Dodhia and Bakrania and that she did not permit Dodhia to enter into any arrangement or agreement with Bakrania in connection with the suit property. She denies signing the agreement dated 1.7.74 and states that the alleged signature of her husband on the agreement is not his . Lastly, she states that she permitted Bakrania to occupy the suit premises as a licensee.

The second defendant has also filed a replying affidavit . He states inter alia, that first defendant permitted him to occupy one flat in 1972; that first defendant also permitted plaintiff to occupy one flat in 1972; that he bought the suit premises in 1995 for shs 2 million. That he paid the purchase price which value was also in consideration of long standing relationship in business between him and first defendant; and that he did not know of any interest in the suit property by plaintiff or his father.

On 15.10.96 Aganyanya J. ordered, by consent, that hearing of the originating summons do proceed by way of affidavits.

Mr. Oraro for the defendants submitted, inter alia, that plaintiffs case is brought on the basis of a contract and that the suit based on fraud cannot be brought by an originating summons.

It is clear from the supporting affidavit that plaintiffs suit is based on the contract between his father Bakrania and Dodhia. The supporting affidavit has 12 material paragraphs 11 of which deal with the alleged contract and breach of that contract. Plaintiff deposes in para 7 that, first defendant breached the contract on 5.12.95 when he transferred the suit premises to the 2nd and 3rd defendants. He states in para 10 that, transfer was with an intention to defraud and further that the consideration was grossly inadequate. He claims in para 11 that first defendant was holding the property in trust for him. Prayers no. 2, 3, and 5 of the application further show that plaintiff is challenging the 2nd and 3rd defendants title and that he is relying on trust.

The first defendant refutes the material facts in plaintiff's affidavit. The suit is not brought by plaintiff as an administrator of his father's estate. The first defendant is not sued as an administratrix of her husband's estate. Pertinent issues arise from the plaintiff's and first defendant's affidavit. Did Dodhia buy the suit property? If so, did he buy the property as a gift to first defendant or for Bakarania? Was first defendant registered as a trustee for Dodhia? Was the sale to 2nd and 3rd Defendants fraudulent: Is there privity of contract between plaintiff and Dodhia and between plaintiff and first defendant?

Those are some of the relevant issues which arise from the affidavits. Those issues cannot be determined in this originating summons. Oral evidence is obviously required. Parties agreed that the originating summons be determined on the basis of the affidavits. Court was not asked to convert the originating summons into a plaint under order XXXV Rule 1(1) CP Rules.

In any case, the dispute based on the contract and fraud cannot competently be brought by originating summons. Order XXXVI CP Rules specifies the disputes which can be brought by originating summons. As Court of Appeal held in Lali Swalele Lali & three others versus Stephen Mathenge and two others CIVIL Appeal No.132/93 (unreported) before the an originating summons can be converted into a plaint:

“the originating summons must not, in the first instance, be on a matter that is specifically accepted by order XXXVI of the Rules, otherwise it would not only be improperly be under the said order but it would also be in open defiance to the order and therefore illegal”

Although claim to the land by adverse possession, has mandatorily, to be brought by the originating summons, plaintiff has included other claims in the originating summons which cannot competently be brought by originating summons. Plaintiff did not seek to amend the Originating Summons The claim for adverse possession is so inextricably interwoven with the other claims as to make the entire Originating Summons incompetent.

Lastly, plaintiff occupied the plot by virtue of the agreement. He has remained in possession of one flat in the belief that the agreement would be honoured. The previous agreement between his father and Dodhia was reexecuted between plaintiff and Dodhia on 19.3.93. So up to 1993, he was still occupying the flat under an agreement. He has never repudiated the agreement so that his status could change from that of a purchaser in possession pending transfer to that of a person in adverse possession so that time can start running in his favour. The case of Hyde versus Pearce (1982) 1 ALL ER 1029 which states the law, was cited with approval by the Kenya Court of Appeal in Sisto Wambugu versus Kamau Njuguna (1982 - 88 ) 1 KAR 217.

As plaintiff has shown in his affidavit and in prayer 6 of Originating Summons, he believed that the contract of sale was still subsisting until 1995 when he discovered that it had been breached. He has never occupied the land as an adverse possessor.

In the circumstances plaintiff has not proved adverse possession.

For the above reasons, I dismiss the application with costs.

E. M. Githinji

Judge

3.11.2000

Miss Kuluo for plaintiff present

Miss Oluoch for defendant present

Miss Kichuo

I apply for stay for 30 days pending appeal I also apply for leave to appeal

Miss Oluoch

I do not object to her application

Order: There will be stay of execution for 30 days. Leave to appeal if necessary is granted. Ruling to be typed and copy supplied to both advocates as prayed

E.M. Githinji

Judge