



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO.68 OF 2008

THIKA WAX WORKS LIMITED.....PLAINTIFF

VERSUS

LAMECH OMONDI & 27 OTHERS

(Sued on their own behalf and in respective capacity on behalf of all

Embakasi dwellers occupying LR NO.9042/574 EMBAKASI NAIROBI.....DEFENDANTS

JUDGEMENT

1. The Plaintiff is the registered owner of LR No.9042/574 (suit property) which is at Embakasi Nairobi. In or around 1994, the Plaintiff applied for allocation of land in Embakasi area which was granted. The Plaintiff then proceeded to process title which was obtained on 3rd November 1995. The suit property measures 1.017 hectares.
2. In 2004, the suit property was invaded by some persons who begun putting up temporary structures. The Plaintiff tried to ask the people to get out but they were adamant. In 2006, the Plaintiff engaged an advocate who wrote a demand letter asking the trespassers to move out or face legal action. The occupants did not move out. In February 2008, the Plaintiff moved to court and filed an application dated 29th February 2008 which sought to bring a representative suit against the occupants. The leave sought was granted on 2nd July 2008. A suit was subsequently filed against the illegal occupants on 29th February 2008. The Plaintiff moved to court and obtained injunction orders against the Defendants in 2009 when it became clear that the Defendants had started constructing permanent structures.
3. The plaintiff states that the Defendants have since refused to move out of the suit property. A fictitious suit was filed against the Plaintiff in 2008 at the **City Court being Civil Case No. 11 of 2008 (Council of Nairobi Vs Thika Wax Works Limited)** . In 2009, while the present suit was pending, a senior Resident Magistrate allegedly issued a vesting order which purported to vest the suit property upon a company called Block Seven Developers Limited where some of the Defendants are directors and shareholders. It was alleged in that suit that the Plaintiff had failed to pay rates to the City council of Nairobi and that the suit property was sold in a public auction whereby Block Seven Developers Limited purchased the same.
4. The Plaintiff's directors complained to the police who conducted investigations and found out that the suit was fraudulent and that the transfer of the suit property to Block Seven Developers Limited on the basis of a vesting order was fraudulent. The Registrar was asked to cancel the fraudulent entry of transfer in the register which was done.
5. The Defendants through two witnesses testified that the defendants have been in occupation of the suit property since 1980. The witnesses testified that they settled in the suit property upon being allocated portions of the suit property by elders in the area. The occupants initially began by putting up simple structures of polythene and iron sheets but some have upgraded and built permanent buildings. The Defendants state that they have peacefully stayed on the suit property for over a period of twelve (12) years and that they have therefore acquired the same through adverse possession.
6. I have carefully considered the evidence adduced by the Plaintiff and that of the Defendants. I have also considered the submissions of the parties herein. The issues which emerge for determination are as follows;-

i. Is the Plaintiff's suit statute barred?

ii. Have the Defendants acquired the suit property by adverse possession?

iii. Is the Plaintiff entitled to the reliefs in the plaint?

iv. Which order should be made on costs?

7. The Defendants filed a notice of preliminary objection on 6th March 2019 claiming that the plaintiff's suit is statute barred. In their submissions, the defendants argue that as the Plaintiff became owner of the suit property in 1995, the Plaintiff cannot file a suit in 2008 claiming the suit property. The Defendants argue that the twelve year period expired in 2007 and that therefore this suit is statute barred.

8. It was upon the Defendants to adduce evidence to show that they were on the suit property as at 1995 for the court to make a finding that the Plaintiff's suit is statute barred. *Section 107(1) of the Evidence Act* provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that the facts exist”

9. The Defendants testified that they had been on the suit property since 1980. The Plaintiff's evidence is that the first invasion of the suit property by a few people occurred in 2004. It was upon the Defendants to convince the court that they indeed entered the suit property in 1980. The Defendants produced photographs of the structures on the suit property. The photographs show buildings which are under construction and the rest of the structures appear to have been recently put up. There is no single structure which appears to have been there for over a decade. Most of the structures are still undergoing construction and even the debris have not been cleared from the construction site.

10. The evidence of the Plaintiff disproves that of the Defendants. A fictitious suit was filed in 2008 at the City Court. The Defendants were behind a scheme to take away the suit property on the ground that they had purchased the same at a public auction which was conducted after the plaintiff allegedly failed to pay rates. The Plaintiff proved that it had been paying rates and rent regularly. The persons behind the scheme are the 1st Defendant and DW1 Kenneth Capher Oriasa who during cross examination conceded that he was a director and shareholder of Block Seven Developers Limited, the company which was behind the fraudulent transfer of the suit property.

11. Despite the 1st Defendant being present in court and having recorded a witness statement, he did not testify. This is because he feared being cross examined on the activities of the company which was behind the attempted takeover of the suit property. It is therefore clear that the Defendants invaded the suit property in 2004 and they cannot claim to have been there since 1980. There is evidence that a demand letter was sent by the Plaintiff's advocates in 2006 asking the Defendant's to move out of the suit property. I therefore find that the suit is not statute barred.

12. The Defendants are contending that they have acquired the suit property through adverse possession. This is because they allege to have been on the suit property since 1980. While dealing with the issue of whether this suit is statute barred, I have demonstrated that the Defendants did not enter the suit property in 1980. A person can only be declared to have acquired a property if there is credible evidence that the person has been in peaceful and uninterrupted possession for a period of over twelve years preceding the filing of the suit.

13. In the instant case, the Defendants have raised a defence of adverse possession. This court is obliged to consider this defence. Though the procedure for suits claiming adverse possession have been through originating summons, the law has been developed to an extent that the plea of adverse possession can even be raised through a counter-claim or in a defence. See the case of **Gulam Mariam Noordin Vs Julius Charo Karisa, Civil Appeal No.26 of 2015, Wabala Vs Okuman (1997) LLR 609 (CAK) and Bayete Co.Ltd Vs Kosgey (1998) LLR 813.**

14. I have already demonstrated hereinabove that the Defendants have not adduced evidence that they have been in the suit property since 1980. The Plaintiff obtained title in 1995. Prior to 1995, the property was government land and time could not run against the government. If time was to run, it could only run as from 1995. I have already found that the Defendants first invaded the suit property in 2004. This suit was filed in 2008. The Defendants had therefore not been in the suit property for the statutory period of twelve years to enable them claim the same under the doctrine of adverse possession. Besides this, the Defendants acknowledged the title of the Plaintiff. This is why they attempted to fraudulently take the suit property on allegation that they had purchased it in a public auction. The law of adverse possession is clear that where a person has acknowledged title of the owner, he cannot again claim the same land through adverse possession. I therefore find that the Defendants have not acquired the suit property by way of adverse possession.

15. The Plaintiff's position is that the Defendants are trespassers on the suit property. The Defendants have themselves conceded that they are on the suit property. The Court having found that the Defendants' occupation cannot be sustained on grounds of adverse possession, it therefore follows that their occupation is without any lawful basis. This being the case, the Defendants are therefore trespassers.

16. A trespasser ought not to be left to enjoy a property where he/she is not entitled to the same. The trespasser has to give way to the lawful owner. The Plaintiff has proved that there is trespass to the suit property. The Defendants have produced photographs showing storey buildings on the suit property among others. Once the Plaintiff has proved trespass, damages follow as a matter of course and are to be assessed by the Court. I therefore find that the Plaintiff has proved its case on a balance of probabilities. The Plaintiff has been prevented from its property since 2004. This is a period of over two decades. The Plaintiff is therefore entitled to general damages for trespass which I assess at Kshs.5,000,000/= (Five Million). In the final analysis, I enter Judgment for the Plaintiff against the Defendants jointly and severally in terms of Plaint filed on 8th December 2009 in addition to general damages for trespass of Kshs.5,000,000/= as aforesaid.

Dated, signed and delivered at Nairobi on this 7th day of May 2020

E.O.OBAGA

JUDGE

In the absence of parties who had been notified of the date of delivery of Judgement.

Court Assistant: Hilda

E.O. OBAGA

JUDGE