



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 446 OF 2017 (OS)

OPERA EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

KAMITI TANNERS (K) LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by way of an originating summons dated 27th November, 2017. The plaintiff seeks to be registered as the proprietor of all that parcel of land known as PLOT NO. MN/V/682 CR NO.28291 measuring approximately 0.200 hectares in place of the defendant by reason of having acquired it by adverse possession after having uninterrupted and exclusive possession of the same for a continuous period of over 12 years.

2. In support of the claim, the plaintiff filed an affidavit sworn by Jimmy Askar, the plaintiff's director on 27th November, 2017 in which he deposes that the plaintiff has been in exclusive and continuous physical occupation and possession of the suit property for over 12 years carrying out commercial activities. That the plaintiff has constructed and developed the suit property for commercial use openly and without hindrance or interruption from the defendant for over 12 years. The suit property is registered in the defendant's name and a copy of the certificate of title has been annexed. The plaintiff avers that nobody has ever claimed the land in which the plaintiff has stayed openly and peacefully for the said period, and exercised proprietary rights such as clearing the land which was bushy and constructing a wall around it. The plaintiff has annexed copies of photographs showing the said developments. That in the circumstances, the defendant's interests in the suit property has been extinguished and the plaintiff has acquired title to it by adverse possession.

3. Pursuant to leave granted by the court on 22nd February, 2018, the defendant was served with a copy of the Originating Summons together with the supporting affidavit through advertisement in the Standard Newspaper on 15th March, 2019. The defendant did not enter appearance within the stipulated time or at all and the case proceeded ex-parte.

4. In his evidence, Jimmy Ibrahim Askar who testified on behalf of the plaintiff reiterated the contents of the affidavit in support of the originating summons and relied on his witness statement filed on 8th December, 2017. He stated that he is a director of Opera East Africa Limited, the plaintiff herein. That the plaintiff has been in physical occupation of the suit property for over 12 years and their occupation has been peaceful and without any hindrances from the defendant who has never been seen on the land. That ever since the plaintiff took possession of the suit property, it has developed and constructed buildings on it and is currently in the process of constructing a wall around the suit land. He produced a copy of the certificate of title in the defendant's name, copy of company's Resolution, Certificate of Incorporation, photographs showing the developments on the suit property, approval from the County Government of Mombasa for the construction of a boundary wall on the suit property and property rates statement, as exhibits 1-6. He urged the court to grant the reliefs sought in the Originating Summons.

5. I have considered the evidence on record. The law on adverse possession is well settled. The essential requirements that one has to meet in order to succeed in a claim for adverse possession have been discussed by the courts. In **Wambugu –v- Njuguna (1983) KLR 173**, the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

6. In the case of **Jundu –v- Kirplal & Another (1975) EA 225**, it was held:

“.....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious .”

7. The ingredients were recently discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR** where Makhandia, JA stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years.”

8. It is also a well settled principle that a party claiming adverse possession ought to prove that his possession was ‘nec vi, nec clam, nec precario; that is, peaceful, open and continuous. This being a claim for adverse possession, the plaintiff must show that it has been in continuous possession of the suit land for twelve (12) years or more; that such possession has been open and notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property.

9. It is the plaintiff’s evidence that it has been in occupation of the suit property for over 12 years. That the plaintiff has constructed commercial buildings and is in the process of constructing a perimeter wall. The plaintiff produced photographs showing the said structures. I have no doubt in my mind that such developments must have been undertaken over time and openly. The plaintiff’s evidence is uncontroverted. Considering the evidence availed in this case, and applying the legal principles of adverse possession, it is clear that the plaintiff has proved its case on a balance of probabilities and has brought itself within the limits of the doctrine of adverse possession.

10. In the result, the suit by way of originating summons dated 27th November, 2017 is allowed and I enter judgment as follows:

1. That the defendant’s interest in the property known as PLOT NUMBER MN/V/682 CR NO. 28291 measuring approximately 0.200 hectares situated in Changamwe North within Mombasa County have been extinguished.

2. That the plaintiff herein be registered as the proprietor of all that parcel of land known as PLOT NO.MN/V/682 CR. NO 28291 measuring approximately 0.200 hectares situated in Changamwe North within Mombasa County, in place of Kamiti Tanners (K) Limited.

3. That the Registrar of titles, Mombasa do issue certificate of title for parcel of land known as PLOT NO. MN/V/682 CR NO. 28291 measuring 0.200 hectares situated in Changamwe North within Mombasa County in the name of Opera East African Limited.

4. Because the defendant did not participate, I order that each party bears its own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February, 2020.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Kyalo holding brief for Shimaka for applicant

No appearance for respondent

Yumna Court Assistant

C.K. YANO

JUDGE