



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 125 OF 2017

GOLF RANGE LIMITED.....PLAINTIFF

=VERSUS=

REGISTERED TRUSTEES OF NATIONAL OLYMPICS COMMITTED

KIPCHOGE KEINO

TOM O'MWOMBO

FRIDAH SHIROYA.....DEFENDANTS

JUDGMENT

Introduction

1. On 30/3/2017, the plaintiff, Golf Range Limited, took out on Amended Originating Summons dated 21/2/2017 and amended on 29/3/2017 seeking a determination of the following questions:

a. Whether the plaintiff has acquired title to, and ownership of the parcel of Land Number 209/15290 (Original Number 14151) Southern Bypass, by virtue of adverse possession.

b. Whether the plaintiff/applicant has upon expiry of the 12 years from the year 2003 acquired the title of the Land Reference Number 209/15290 Southern Bypass.

c. Whether the defendant's/respondent's title has become extinguished by law and the defendant holds the title in land on trust for the plaintiff.

d. Whether the defendant's/respondent's title to Land Reference Number 209/15290 should be cancelled for reasons set out in the plaintiff's/applicant's affidavit annexed hereto and other reasons to be adduced as the hearing of this summons.

e. Whether the defendant/respondent should execute transfer and all documents necessary to convey the said title to the plaintiff/applicant as the rightful proprietor and in default, the deputy registrar to be authorised to execute the relevant documents on behalf of the defendant upon determination of this summons.

f. Whether the plaintiff is entitled to costs of the suit.

2. The originating summons is supported by an affidavit sworn on 29/3/2017 by Trevor Kanja. The respondents oppose the originating summons through a replying affidavit sworn on 9/5/2017 by Kipchoge Keino. The originating summons was canvassed through affidavit evidence and written submissions.

Plaintiff's Case

3. The Plaintiff's case is that it is the proprietor of Land Reference Number 11746 comprised in Grant Number IR 39471. The said parcel of land abuts the defendants' property, Land Reference Number 209/15290 (Original Number 14151). Since 1985, the plaintiff leased its said piece of land to the proprietors of Carnivore Restaurant. The plaintiff further contends that it has been in continuous open occupation of the defendants' property. It adds that it has developed the defendants' said land by building thereon an exquisite restaurant. He asserts that the Carnivore Restaurant and Bar sits on the defendants' land and it has been on the said land for over 30 years. It is the plaintiff's case that it has acquired title to the said land under the doctrine of adverse possession. Consequently, the plaintiff seeks a determination of the questions in its favour.

Defendants' Case

4. The defendants' case is that the originating summons herein is fatally defective because a certified extract of the title to the suit property was not attached to the summons. Secondly the defendants contend that at all material times, the defendants have always resisted encroachment onto their land. Secondly, from the year 2004, the defendant were in discussion with the Ministry of Lands and Settlement regarding surrender of part of their land and resurvey of the land to cater for the Southern Bypass. The defendants add that the plaintiff has not identified any particular portion, size and location of the suit property over which it has had exclusive possession.

Plaintiff's Submissions.

5. The plaintiff submitted that it has been in continuous open occupation of the defendant's land, LR No. 209/15290 measuring 1.723 hectares for a period in excess of 12 years without the defendants' permission. The plaintiff added that it has built on the suit property a hotel popularly known as Carnivore Restaurant which sits on the defendants' land and the defendants have neither opposed nor interrupted the possession in any way. The plaintiff argued that arising from the occupation, the defendants have lost their right to the land and their title to the land has been extinguished by the law of adverse possession.

Defendants' Submissions

6. The defendants submitted that the originating summons herein is fatally defective because it does not have a certified copy of title in respect of Land Reference Number 209/15290. They further submitted that owing to the encroachment on the suit property by the Southern Bypass, the defendants and the Ministry of Lands undertook a resurvey of the suit property. They added that the plaintiff had failed to discharge the burden of proving and specifically identifying the portion, size and location of the property against which it is laying a claim of adverse possession. The defendants added that they had surrendered the title for the purpose of resurveying hence they were not the current title holders. They argued that a claim of adverse possession cannot lie against a surrendered title.

7. The defendants added that the plaintiff had not demonstrated exclusive physical possession of the land and unequivocal intention to disposes the plaintiff of the land.

Determination

8. I have considered the originating summons together with the affidavits in support thereof, the response thereto, and the parties' respective submissions and authorities. I have also considered the legal framework on the doctrine of adverse possession, the common law principles on adverse possession, and the relevant jurisprudence on the subject. Two issues fall for determination in this suit. The first issue is whether the originating summons herein is fatally defective on account of the plaintiff's failure to attach a certified extract of the title to the land in question. The second issue is whether the applicant has satisfied the criteria for acquisition of title under the doctrine of adverse possession.

9. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **TITUS KIGARO MUNYI v PETER**

MBURU KIMANI, CA NO 28 OF 2014, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

10. The doctrine of adverse passion has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA v KAHINDI NGALA MWAGANDI, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the Constitution of Kenya 2010 on protection of the right to property.

11. Under Section 38 of the Limitation of Actions Act, an adverse possessor is entitled to initiate court proceedings in the appropriate court for an order that he be registered as the proprietor of the subject land in place of the registered proprietor against whom the claim of adverse possession is made. Order 37 rule 7 (1) (2) and (3) of the Civil Procedure Rules provide the following mandatory legal framework on how the application under Section 38 of the Limitation of Actions Act is to be made:

Adverse possession (Order 37, rule 7)

1. An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

3. The court shall direct on whom and in what manner the summons shall be served.

12. The rationale informing the above mandatory framework is that an order of adverse possession under Section 38 of the Limitation of Actions Act only issues against a registered proprietor of land. It does not issue against any other person. Secondly, an order of adverse possession under Section 38 relates to a specific registered and defined piece of land. Thirdly, an order of adverse possession under Section 38 serves to land register by altering the ownership. The mandatory requirement for a certified extract of the title is intended to ensure that the above two parameters are satisfied before the order is granted.

13. The orders sought in the present originating summons relate to Land Reference Number 209/15290. However, exhibit number **TK 5(a)** which the plaintiff presented as a certified extract of the title of the suit property relates to Land Reference Number 209/14151 comprised in Grant Number 85089 registered on 13/12/2000. No certified copy of the title in respect of the suit property, Land Reference Number 209/15290, has been attached to the originating summons. In my view, this omission is fatal. It is fatal because, existence of a land register relating to the alleged piece of land cannot be vouched. An order of adverse possession would not issue under Section 38 of the Limitation of Actions Act unless the court is satisfied that the suit property has been registered and a title exists in the name of the respondent. An order under Section 38 is intended to alter the land register. In the present suit, the need for a certified copy of the title is made more imperative because of the uncontroverted defence of surrender, resurvey and re-parcelling which has been pleaded by the defendant. Consequently, the court's finding on the first issue is that the amended originating summons herein is fatally defective for non-compliance with the mandatory requirements of Order 37 rule 7 (1), (2) and (3) of the Civil Procedure Rules.

14. I now turn to the question as to whether the plaintiff has satisfied the criteria for acquisition of title under the doctrine of adverse possession. The plaintiff's contention is that it has been in adverse possession of the suit property since 1980 and that it has built an exquisite restaurant on the suit property which it has leased to the proprietor of Carnivore Restaurant. This contention is contested by the defendants.

15. Parties to this suit elected not to lead oral evidence and opted for affidavit evidence and written submissions. I have examined the materials presented to the court in support of the originating summons. Exhibit number TK2 is a copy of Grant Number I.R 39471 in which Land Reference Number 11746 registered in the name of the plaintiff is comprised. Entry Number 4 on the Title relates to a 15 year lease in favour of Omnivore Limited. Besides this, there is no evidence of lease of any land registered in the name of the defendants. Similarly, there is no evidence of any developments erected on land belonging to the defendants. Neither of the party led evidence by a surveyor. Similarly, neither party led evidence on the actual situation on the ground in relation to the actual dimensions of the parties' respective parcels of land, developments thereon and the possession thereof. The plaintiff had contended in the originating summons that its land abuts the defendants' land.

16. Besides failure to demonstrate actual possession of the suit property subject matter of the originating summons, the plaintiff exhibited Grant Number 85089 in which a different piece of land, LR 209/14151 is comprised. The Grant was issued on 8/12/2000 and registered on the same day. The plaintiff's claim of adverse possession running from 1980 is therefore not correct because the subject Grant was issued in 2000 and there is no other evidence to the contrary.

17. Thirdly, the matter of surrender of title, resurvey and re-parcelling occasioned by the construction of the Southern Bypass cannot be swept under the carpet because a claim of adverse possession would stand disrupted by surrender of land to the state. It was the duty of the plaintiff to bring evidence to demonstrate that the title in respect of the suit property exists and has not been affected by the surrender,

resurvey and reparcelling. Only then, would an order of adverse possession under Section 38 of the Limitation of Actions altering the existing register issue.

18. In light of the foregoing, it is the court's finding that the plaintiff has not satisfied the criteria for acquisition of title under the doctrine of adverse possession.

19. Consequently, the court's answers to Questions (a), (b), (c), (d) and (e) of the Amended Originating Summons dated 29/3/2017 are all in the negative. The plaintiff's claim of title under the doctrine of adverse possession therefore wholly fails and the suit is dismissed for lack of merit. The defendants shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Keter holding brief for Mr Anisei Advocate for the defendants

Ms June Nafula - Court Clerk