



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 52 OF 2016 (MISC. 667 OF 2009)

1. HANA KENYA LTD

2. GUNFIELD GERLINDE.....PLAINTIFFS

VERSUS

DHIREY MOHANLAN SHAH.....DEFENDANTS

JUDGMENT

1. The plaintiff brought this case via an amended origination summons dated 6th July, 2017 and filed on 11th July, 2017. The Plaintiff claims to be the owner in adverse possession of the freehold properties known as **SUBDIVISION NUMBERS 2108/1/MN AND 2124/1/MN** at Bamburi Mombasa against the defendant. The plaintiff seeks for determination the following questions:

i. Whether the plaintiff is entitled to adverse possession of the freehold properties known as SUBDIVISION NUMBERS 2108/1/MN AND 2124/1/MN, Bamburi Mombasa being Certificate of Title Numbers CR 15991 and CR 15992, respectively (the “properties”);

ii. Whether the plaintiff which has been under and by virtue of such adverse possession of the properties is entitled to be registered as the properties of the properties against the present registered owner, namely DHIREN MOHANLAL SHAH, the defendant herein;

iii. Under such circumstances should an order be granted that the Registrar of Title do rectify the title in respect of the properties by causing an entry to be made by registering the names of the plaintiff as the registered proprietor of the properties in adverse possession in place of the Defendant on the extract of title and both the said titles be issued to the plaintiff herein;

iv. Is the plaintiff entitle to an order that the said titles in the name of the defendant be extinguished and further whether the defendant be held to no buyer have any legal right, title or interest in the properties;

v. Is the plaintiff entitled to an order that the defendant herein by himself and/or his agents and/or servants and/or employees howsoever be restrained from removing or evicting the plaintiff or from charging, leasing or from dealing with or selling the properties in the suit properties and from interfering in any manner whatsoever with the adverse possession and occupation by the plaintiff of the properties;

vi. Vesting orders to issue to the plaintiff;

vii. Costs of and incidental to this application;

viii. Any further or other relief.

2. The summons is supported by the affidavit of Gunhild Gerlinde Oser sworn on 12th November, 2009 and a Supplementary sworn on 20th July, 2011. The Defendant filed a Replying Affidavit sworn on 21st April, 2010. The Amended Originating summons was filed by removing the 2nd Plaintiff who is a deceased was party to the original proceedings.

3. The hearing of the case initially proceeded before Kasango, J on 20th May, 2014 when the Plaintiff’s only witness, Herbert Wilfred Gunter testified and the Plaintiff closed its case. Prior to that, the court has insisted the site on two occasions, is on 7th December 2011 and

27th March, 2012. Both the judges who insisted the file made appropriate notes of the site visit which form the court record. The matter came up before me for defence hearing on 15th February 2017 when the defendant testified and the defence case was closed.

4. The Plaintiff's case is that by a lease dated 1st August, 1986, the defendant, his late further Mohanlal Nemchand Shah and his late mother Laximiben Mohanlal Nemchand Shah leased the suit premises to the Plaintiff for a period of three years from 1st August 1986 and that the said lease expired on 31st July 1989. That since the effluxion of the lease, it has not been renewed or extended and the plaintiff continued in possession of the suit premises openly and without interruption for period of over nineteen (19) years as the date of filing this suit in 2009. That by a written agreement made on or about 15th June, 1989 between the defendant and his deceased parents, the defendant agreed to sell and the Plaintiff agreed to buy the suit properties at a price of Kshs.1,200,000/= to be paid by installments as set out in the said agreement, and that a sum of Kshs.400,000/= was paid pm the date of agreement. The said agreement was however said to be lost.

5. According to the Plaintiff, the full purchase price was paid by the Plaintiff on or before 31st January, 1989. That since taking possession of the suit premises, the plaintiff has developed it and has constructed a hotel and restaurant known as Fontana Hotel and Restaurant which was opened on 7th June, 1987 with 12 double bedrooms with shower and toilet and one self-contained apartment with separate bedroom lounge and dining room where the plaintiff has been using since 1st February 1990. That on or about 1st December 2008, the name of the Hotel and Restaurant was changed to Papilion Garden Bar Villa.

6. It is the Plaintiff's contention that the defendant has failed to execute and handover the transfer in respect of the suit properties to the plaintiff for registration as agreed and that despite requests, he has refused to complete the transaction. This prompted the Plaintiff to institute civil proceedings for specific performance being **HCCC No.342 Of 1996, Hanos (Kenya) Limited –V- Mohanlal Nemchand Shah & 2 Others**. There was also **Miscellaneous Civil Application No.409 of 2003 (O.S) – Hanos (Kenya) Limited & Another – Mohanlal Nemchand Shah & 2 others** which was allegedly withdrawn.

7. The Plaintiff avers that since it took possession of the suit premises, a period of over nineteen (19) years have expired and the to date the defendant has not objected to the Plaintiff's possession of the suit premises nor has anyone else attempted to evict them or take any steps whatsoever to recover possession of the suit premises. The plaintiff contends that the period of prescription for adverse possession has fully accrued and that it has been in contends that the period of prescription for adverse possession has fully accrued and that it has been in continuous, open exclusive and uninterrupted adverse possession of the suit premises for a period of over nineteen (19)years. The plaintiff therefore asked the court to grant it the orders prayed for herein.

8. In his replying affidavit, the defendant avers that the suit properties are both registered are registered in the names of Mohanlal Nemchand Shah, Laxmiben Mohanlal Shah and Dhiren Mohanlal Shah as propertors in common in equal indvided shares. That he is the legal representative of the estates of the late Mohanlal Nemchand Shah who died on 10th June, 2004 and Laxmben Mohanlal Shah who died on 15th February 2008. The defendant admits that the suit properties were leased to the plaintiff with an option to purchase three months before the expiry of the lease. That the lessees did not take the necessary steps to pay the purchase price of Kshs.1,200,000/= on or before 1st May 1989 to enable the lessors as properties of the suit property to enter into a sale agreement. The defendant depones that no agreement was entered into between the lesser and the lessor towards the sale of the premises. He depones that the agreement marked "GG04" in the Plaintiff's supporting affidavit is neither dated nor executed by the parties and that the alleged and/or purported sale agreement did not conform to the terms and conditions of the lease agreement. It is the defendant's contention that the proposed purchasers failed to honour both the terms of the lease agreement and the drat sale agreement and continued to occupy the suit premises.

9. The defendant states that on or about 31st January, 1994 the deceased Plaintiff through his advocates Bryson, Inamdar & Boywer Advocates (in dissolution) sent a cheque for Kshs.634,900/= to the defendant's to the defendant's advocate Anil Suchak to be held in trust pending the completion of the transfer and requested to know the outstanding balance which they undertook to pay. That on or about 6th June 1994, the defendant's advocate on the defendant's instruction returned the said cheque to the Plaintiff because the plaintiff had failed to comply with the terms and conditions of the agreement; payment of the purchase price had delayed for an inexcusable long period and the transfer documents attached in the letter dated 31st January 1994 were for **PLOT NO.1/MN/1521** and **1/MN/1522** which plots were not the subject of any sale between the parties.

10. The defendant depones that pursuant to his failure to execute the transfer due to the reasons aforesaid, the Plaintiff filed suit namely Mombasa HCCC No.342 of 1996 for specific performance and damages for breach of contract which suit as deponed in paragraph 18 of the plaintiff's supporting affidavit is still pending in court. That the plaintiff further **filed Misc. Civil Application No.409 (OS) of 2003** on 26th June 2003 for adverse possession which application was withdrawn by consent on 14th October 2009.

11. The defendant avers that the Plaintiff registered a caveat dated 31st October, 1996 on 1st November 1996 against the suit properties claiming purchaser's interest which caveats have not been discharged or vacated by the plaintiff to date. The defendant contends that although the Plaintiff herein is claiming adverse possession of the suit premises, the suit is in effect a claim for specific performance based on transduction of contract which claim the defendant believes is time barred. Relying on legal advice, the defendant further contends that one cannot claim adverse possession over property where there has been consideration, entry into the property was by permission of the registered owner; entry into the property was in pursuance of an agreement for sale, lease or otherwise; and the alleged possessor has acknowledged the registered owner. Further, what the plaintiff have instituted proceedings for specific performance and lodged caveats against the suit properties claiming purchasers interest is estopped from claiming adverse possession.

12. The defendant avers that he has consistently been paying rates to the Municipal Council of Mombasa and that he had clearly demonstrated and asserted his right to the Suit Properties by petitioning for Grant of Letters of Administration Intestate in Succession Cause Numbers 23 of 2005 and 224 of 2008. The defendant states the he is the absolute and indefeasible owner of the property and that is title is not open to challenge on grounds set out in the originating summons and affidavit, and that any developments on the suit property by the plaintiff, if any, was done at their own peril as it was done without the defendant's approval.

13. The plaintiff also filed a Supplementary Affidavit dated 20th July 2001 in which it is deponed that the lease expired on 31st July 1989 and has not been extended save in respect of the payment terms of the purchase price of the plots which are currently in possession and occupation of the plaintiff allegedly in adverse possession. That the plaintiff which was incorporated on 12th September 1986 was assigned the said lease for its unexpired term. The plaintiff states that it duly exercised the option to purchase the said plots in accordance with the terms of the said lease and that the purchase price of Kshs.1,200,000/= was paid in full and a sale agreement which is said to have been misplaced, was duly executed between the plaintiff and the defendant and his deceased parents.

14. Regarding the allegation that no monies were paid for the agreed purchase price and arrears of rent, the plaintiff states that a demand would have been made by the defendant or his deceased parents and immediate steps would have been taken to evict the plaintiff from both the said plots, which has not been done. That the sum of Kshs.634,000/= related to a loan of Kshs.500,000/= plus interest thereon allegedly obtained from the late Mohanlal Shah on behalf of the plaintiff and does not refer to the agreed purchase price for the two plots which it is alleged had been paid in full. The plaintiff argues that the defendant is statutorily barred time barred by limitation to bring any action to recover possession of the suit properties from the plaintiff. The plaintiff avers that the earlier application for adverse possession was withdrawn due to a technicality in that a copy of the extract of title was not annexed to the affidavit in support. The Plaintiff avers that contrary to the defendant's averments, the plaintiff has been paying for the Municipal Council rates in respect of both the plots by cash and bankers cheques and the council has issued receipts in the name of Mohanlal Shah as on their records he is still the registered owner. The Plaintiff further avers that the constructions undertaken at its own cost during the term of the said lease had been approved by the defendant.

15. PW1, Herbert Wilfred Grunter who testified on behalf of the plaintiff told the court that the Plaintiff is a company they incorporated with his late wife, Gunther Gerlinger Oser who was the Plaintiff herein before the amendment. He stated that was the Plaintiff Company that entered into lease with the defendant. He added that they started to build Fontana (Hotel and Restaurant) immediately they entered into the lease up to April 1987. He stated that after the expiry of the lease in 1989, they continued staying at the suit premises waiting for transfer from the defendant. He further stated that the lease provided for an option to purchase which they exercised and paid the purchase price in full in three installments. PW1 stated that in 1989, divorced his wife and he moved to Nairobi leaving her to remain in the suit premises. Until her demise in 2013. It was his evidence that the plaintiff company was paying rates and land rent and produced copies of bankers cheques as plaintiff exhibit No.1.

16. When cross-examined by Mr. Sionik, Counsel for the defendant, PW1 admitted that they came into possession because of the lease agreement and that the lease agreement permitted them to construct. He also admitted that there was an option to purchase for Kshs.1.2 million which was to be exercised within two months before the expiry of the lease. PW1 also admitted that the building constructed would belong to the owner, that is the defendant if the Plaintiff failed to exercise the option to purchase. The witness stated that he did not recall **Case HCCC NO.342 of 1996**, though he also admitted that the case was still pending but agreed that there was a sale agreement between the plaintiff and the defendant which he stated the company complied with the terms but the defendant did not. He reiterated that the money forwarded by Bryson Inamdar advocate was a loan. PW1 stated that he built on one side of the plot.

17. When re-examined by Mr. Khanna learned Counsel for the plaintiff, PW1 agreed that the letter of the defendant's advocate talks of a loan of Kshs.500,000/= and that he built first plot all the building and a small bar was built on the second plot using local materials. He stated that the defendant has never asked for the land back nor done anything to recover it. He further stated that the defendant has not exercised their right under paragraph 6 of the lease.

18. Dhirey Mohanlal Shah the defendant, was the only defence witness. He adopted the contents of his replying affidavit and produced the annexures thereto as defence exhibits 1 (a) to 9 (b) respectively.

19. On being cross-examined by Mr. Khanna DW1 confirmed that the plaintiff is occupying the two suit properties. He added that the two properties are still in the names of Mohanlal Nemchand Shah, Laximiben Mohanlal Shah and the defendant himself. DW1 stated that he was not present when the lease agreement (defence exhibit no. 2) was executed. He agreed that the deceased plaintiff resided on **PLOT NO.2108/MN** and was carrying on business in both plots. The defendant averment that he has the original titles for the two plots. Though he stated that he was not present when the lease agreement was executed, he agreed that it was for three years period from 1st August, 1986 and was to expire on 31st July 1989. That among the lessees responsibility was payment of rates during the lease period. The witness stated that he did not know whether clause 6 of the lease which gave the lessees the option to purchase was complied with. He however stated that as far as he knew, no money was paid. He admitted that the plaintiff is still in possession.

20. The defendant stated that he has never taken any step because of case No.HCCC N.342 of 1996 and Misc. Civil Application No.403 of 2003 which were filed by the Plaintiff, though the latter case was later withdrawn. The defendant stated aware of the agreement for sale (p.exhibit 4) which he said is undated and unsigned and is not aware if it was executed. He stated that he is defendant the suit because he is the owner of the suit properties.

21. When re-examined by Mr. Ndegwa for the defendant, the witness stated that in the plaintiff's exhibit no.5, the name of the Hotel is Fontana Hotel and Restaurant which is not the Plaintiff in this case. He added that in **HCCC No.342 of 1996**, the Plaintiff's claim was for specific performance of the agreement for sale dated 15th June, 1989.

22. The parties filed written submissions which were also highlighted by their respective counsel. The plaintiff's counsel submitted that the defendant has failed to take any steps to recover possession of the said properties and that by his failure to have instituted any proceedings for the recovery of possession within 12 years from the date the lease expired, then in accordance with the provisions of Section 7 and 17 of the Limitation of Actions Act Cap 22 Law of Kenya, both the said titles to the suit properties registered in the name of the defendant are extinguished. Counsel relied on the case of **Kairu -v- Gacheru EA LR (1986 - 1989)EA p.215 and Civil Appeal No.29 of 2016** between Peter Kamau Njau and Emmanuel Chero Tinga. According to the plaintiff's counsel, the defendant has been setting on his rights and his failure to take any steps to recover possession of the suit properties has resulted in both the titles registered in his name or in the joint names of himself and his deceased parents becoming extinguished with effect from 1st August 2001. He further submitted that the plaintiff was during the period of 12 years in adverse possession and in exclusive possession of the suit properties openly, as of right and without interruption for the period of 12 years by discontinuation of possession by the owners on their own volition.

23. The Plaintiff's counsel further submitted that throughout the said period that the plaintiff has been in possession of the suit properties it has been paying all land rent and rates. He further submitted that by returning the cheque for Kshs.634,900/= the defendant effectively rescinded the agreement for sale dated 15th June 1989. Counsel relied on the case of **Wambugu- v- Njuguna Civil Appeal No.10 of 1982 P.172 and the case of Kimani –v- Kibogoro (1990) KLR 49; and Kimeu –v- Sylvia (1991)KLR 421.**

24. The defendant's counsel submitted that the plaintiff is not entitled to adverse possession of the suit properties because their entry and continued possession was by consent and that the plaintiff did not earn the right to sue or lodge a claim on adverse possession because time could not run in their favour as lessees or as buyers in possession. The defendant's counsel submitted that the order for injunction should not be granted as it is an equitable remedy which does not apply in favour of a person pleading adverse possession. He added that the request for vesting order must fail and urged the court to dismiss the suit with costs. Counsel cited the case of **Maheshchamd Sharma –v- Kumari Sharma (1996) 8 SCC 128 Ann Itumbi Kiseli –v- James Muriuki Muriithi (2013) eKLR, and J.A.Pye (Oxford) Ltd & Others –v- Graham and another**

25. The law of adverse possession is now settled. Adverse possession had been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of true owner for the period prescribed by state. The period prescribed by the Limitation of Actions Act Cap 22 Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years.

26. According to Halsbury's Laws of England, 4th Edition, Volume 28, paragraph 768, no right to recover land accrues unless the land is in the possession of some person in whose favour the period of Limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.

27. In the case of **Kweyu – v- Omuto (1990)KLR 709, the Court of Appeal** stated that:

“ By adverse possession is meant a possession which is hostile under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (colour of title is that which a title in appearance, but not in reality). Adverse Possession is made out by the co-existence of two distinct ingredients; the first, such title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however, long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously. ”

28. In the case of **Margaret Nyakinyua Murigu –v- Charles Wahome Kariuki (2014) eKLR, this court, (Sergon J) stated that:**

“Having set out in detail the evidence tendered let me now restate the ingredients needed to apply the doctrine of adverse possession. In Wambugu –v- Njuguna (1983)KLR 173, the Court of Appeal restated those principles when it held inter alia as follows:

1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the land for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.

3. The Limitation of Actions Act, on adverse possession contemplates two concepts: disposition and discontinuance of possession. The proper way of assessing proof of adverse possession would then 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 has been in possession for the requisite number of years.

4. Where the claimant is in exclusive possession of the land with the leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant, although the respondent's possession was exclusive and continuous but was not adverse; it only became adverse after the licence was determined.

5. The rule on “permissive possession” is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land. For the respondent's claim for adverse possession to succeed, he must have an effective right to make entry and recover possession. He could not have that effective right because the occupation was under a contract, or licence, which had been determined.

6. Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can

have time run in their favour. For example, time can run in favour of a tenant at will by virtue of Section 12 of the Limitation of Actions Act but time cannot run in favour of a licensee. A licensee therefore has no adverse possession (Hughes –v- Griffin (1996) 1 WLR 23).”

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

“Adverse possession is essentially a situation where a person takes possession of land and 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. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force of stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

30. Is the plaintiff entitled to the suit properties by virtue of adverse possession? It is not disputed that the Plaintiff came into the suit properties pursuant to a lease agreement between the defendant and one Guenther Herbert Oser and Hans Bruno Huse for a term of three (3) years from 1st August 1986. It was a term of the lease that lessee or their assignee shall have the option to purchase the suit premises for sum of Kshs.1,200,000/= which must be exercised three (3) months before the date of expiry of the lease. The lease expired on 31st July 1989. Since the effluxion of the said lease, it has not been renewed or extended and the plaintiff continues in possession of the suit premises.

31. On 15th June 1989 before the expiry of the said lease, the plaintiff and the registered owners of the suit properties entered into an agreement of sale. The said agreement of sale was not concluded. There is no however no agreement whether the said sale was executed or not. According to the plaintiff, the agreement of sale, whose original copy is said to have been misplaced or lost, was duly executed. The plaintiff avers that it paid the full purchase price but that the defendant has failed to execute and hand over the transfer.

32. The defendant on the other hand maintains that there was no agreement executed and that the plaintiff failed to pay the purchase price of Kshs.1,200,000/= within the completion date.

33. Clearly, from the pleadings, evidence and submissions, the plaintiff was initially in the suit properties by permissions of the registered owners, including the defendant. This was pursuant to the lease that however expired on 31st July, 1989. The lease provided for a sale which was later rescinded and or disowned by the defendant through his advocates letter dated 31st January 1994. It is over 12 years from 1994 up to 2009 when the suit herein was filed.

34. As earlier stated, in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

35. In this case the plaintiff occupied the suit properties originally under the lease agreement which was a licence from the defendant. In my view, their occupation became adverse after the licence was determined.

36. Adverse possession means that a person is in possession, in whose favour time can run. As was stated by the Court of Appeal in the case of **Mtans Lewa – v – Kahindi Ngala Murangandi (supra)**, “adverse possession is essentially a situation where a person takes possession of land and 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. The process springs into action essentially by default or inaction of the owner..... ”

37. In this case, there is no evidence that after the determination of the lease and or after for agreement for sale was rescinded that the plaintiff continued to pay rent. There is also no evidence that the defendant has ever demanded for payment of rent. Indeed there is no evidence that the defendant took any action to recover possession from the plaintiff when the licence was determined. Neither has the defendant taken any steps to recover possession. The plaintiff’s possession has been adequate in continuity, in publicity and in extent to show that possession is adverse to the title of the defendant.

38. In all the circumstances, and considering all the evidence on record on a balance of probabilities the plaintiff has made out this case. Accordingly, I answer all the questions set out in the amended originating summons dated 6th July 2017. That is (i), (ii),(iii), (iv) and (v) in the affirmative. Consequently, judgment is entered hereby for the plaintiff as prayed. The plaintiff shall have the costs of the suit.

It is so ordered.

DATED, DELIVERED and SIGNED at MOMBASA this 18TH day of October, 2018

C. YANO

JUDGE