



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 682 OF 2011

SALAMAT BIBI SHEIKH.....PLAINTIFF

VERSUS

REHMAT ALI.....1ST DEFENDANT

NOOR MOHAMED.....2ND DEFENDANT

ABDUL RASHID.....3RD DEFENDANT

HUSSEIN BIBI.....4TH DEFENDANT

MAUREN MUJERA.....5TH DEFENDANT

JUDGMENT

The Plaintiff, Salamat Bibi Sheikh, filed an Originating Summons on 30th November 2011 seeking the following reliefs:

1. A declaration that she is entitled to registered forthwith as owner of L.R. No. 209/3605 in South C, Malili Road (hereinafter referred to as the “suit property”); and,
2. An order that the Defendants do transfer the suit property to the Plaintiff and in default the Deputy Registrar be authorized to do and/or sign all documents to effect the transfer of the suit property to the Plaintiff.
3. An order for costs and interest thereon.

The Originating Summons was premised on the grounds appearing on the face of it together with the Plaintiff’s Supporting Affidavit sworn on 29th November 2011 in which she averred that the suit property is registered in the names of her grandfather Rehmat Ali and her grandfather’s sons being Noor Mohamed, Abdul Rashid and Hussein Bibi. She annexed a copy of the title document attesting to this assertion. She further stated that her grandfather left her with the original title to the suit property sometimes in 1972 while leaving for London together with his sons. She averred further that she has lived on the suit property from 1972 to date. She confirmed having paid the land rent, rates and other utilities in respect of the suit property and that she further paid off a loan which was outstanding with the Kenya

Commercial Bank. She further stated that the 5th Defendant has lodged a caveat on the suit property at the Lands Office ostensibly on behalf of one Khalid Jared Sheikh claiming beneficial interest thereto. She averred that the said Khalid Jared Sheikh is a stranger to her and not a beneficiary of the suit property as claimed. She further stated that the 5th Defendant had also been making calls to her and sending strangers to tell her to move out of the house failure to which they will come and evict her and her family. She stated that she stands to suffer irreparable harm if the threats become real as she has nowhere to go and has no source of income.

As the Defendants could not be traced, the court ordered for service upon them to be effected through an advertisement in the Daily Nation which was done. In the absence of their response, interlocutory judgment was entered against them and the Plaintiff was directed to proceed to formal proof.

When the matter proceeded for formal proof, the Plaintiff was the only witness who was called. She confirmed having lived on the suit property together with her husband and daughter since 1972 to date. She confirmed all the facts given above relating to the suit property. She sought the court's order to have the suit property transferred into her name on the basis of the principle of adverse possession.

The issue arising for my determination is whether the Plaintiff has proved that she is entitled to have the suit property transferred to her on the basis of adverse possession. The burden of proof lies with the person asserting adverse possession. Has the Plaintiff shown in her evidence that she is entitled to the prayers sought in her Originating Summons? According to the case of **James Mwangi & Others – v- Mukinye Enterprises Ltd. Nairobi Civil Case no. 3912 of 1986**, a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and an uninterrupted occupation for more than 12 years.

From the evidence adduced in this case, I am satisfied that the Plaintiff has demonstrated that she has had actual possession of the suit property for a period exceeding 12 years. Further, I am also persuaded that such possession has been uninterrupted. However, when it comes to the consent of the owner, the Plaintiff testified that the registered owners of the suit property, namely the 1st to 4th Defendants/Respondents gave her the original title to the suit property when they proceeded to the UK in the year 1972. It would appear to me that in doing so, the registered owners of the suit property actually consented to her continuing to live in the suit property. In **Wambugu v Njuguna (1983) KLR 172**, the Court of Appeal made a finding that,

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant (Owner) in pursuance to a valid 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”.

In the case of **Wanje versus Saikwa (No. 2) Civil Appeal No. 72 of 1982**, the Court of Appeal held as follows:

“A person who occupies another person's land with that persons consent cannot be said to be in adverse possession as in reality, he has not dispossessed the owner of the land and the possession is not illegal.”

In this suit, it seems to me that the Plaintiff had the permission or consent of the registered owners to occupy the suit property. Leaving the original title to the Plaintiff leads me to make this finding. Going by the precedents cited above, it is clear that the Plaintiff's occupation of the suit property was sanctioned by the registered owners thereof. At no point did the registered owners require the Plaintiff to move out. They did not demand any payment of rent from her. In these circumstances, I find that the occupation of the Plaintiff of the suit property was with the consent and permission of the registered owners and was therefore not adverse to their title. That being my finding, I conclude that the Plaintiff has failed to prove that she is entitled to the suit property under the doctrine of adverse possession.

This suit is hereby dismissed with no order as to costs.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE