



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.17 OF 2010(O.S)

MUTUNE TRADING CO. LTD.....PLAINTIFF

VERSUS

MANJI KUNVARJI PATEL.....DEFENDANT

J U D G M E N T

The suit herein was commenced by way of Originating Summons under order XXXVI rule 3d (1) and (2) of the *Civil Procedure Rules* as it then was (**but now order 37 rule 7 of the Civil Procedure Rules 2010**) and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Section 37 of Limitation of Actions Act and Section 30 of the Registered Land Act.

The Originating Summons was for the determination of issues namely;

1. *Whether the plaintiff has been in peaceful, continuous, and uninterrupted use, occupation and possession of all that piece of land known as Nyeri/Municipality Block III/87 (for over 12 years with the full knowledge of the defendant.*
2. *If, the answer to question No.1 above is in the affirmative,whether the plaintiff has become entitled by way of adverse possession to the ownership of all that parcel of land known as Nyeri/Municipality/Block III/87.*
3. *If the answer to question 2 above is affirmative, whether the plaintiff has become entitled to be registered as owner of Land parcel No.Nyeri/Municipality/Block III/87.*
4. *If the answer to question 3 above is affirmative,whether the respondent can be ordered to execute transfer documents in respect of all that parcel of land known as Nyeri/Municipality/Block III/87 in favour of the plaintiff, failure to which, the Deputy Registrar, High Court at Nyeri be empowered to sign the necessary transfer documents in place of the defendant .*
5. *Who shall bear the costs of this suit?*

The Originating Summons was premised on the affidavit of Isaac Githuthu who stated that the plaintiff is the registered owner of parcel of land No.Nyeri/Municipality/Block III/92 which is adjacent to the defendant's parcel of land No.Nyeri/Municipality/Block III/87. On 9th May 1991 the plaintiff erected on its parcel of land known as Nyeri/Municipality/Block III/92 measuring 0.0465 ha. a hotel. In the year 1996, the plaintiff entered upon the defendant's parcel land known as Nyeri/Municipality/Block III/87 and started to use all the land as a car park for the hotel where he has been in peaceful, open, continuous and uninterrupted use, occupation and possession of the land with the full knowledge and acquiescence of the registered owner, the respondent herein and has therefore, been in continuous open and uninterrupted occupation and use of the land for a period of over 12 years. The Defendant has by himself or his agents

neither evicted the plaintiff from the land nor restricted its use and occupation of the land since then to date.

The plaintiff's possession of all that parcel of land No.Nyeri/Municipality/Block III/87 has been adverse to the title of the defendant and the said plaintiff has had a continued and uninterrupted use of the said land for a period of over 12 years resulting in the respondent's title thereto being extinguished as provided in Section 17 of the Limitation of Actions Act. He was advised by the applicant's advocates on record, Sichangi & Co. Advocates which information he verily believed to be true that in the circumstances the applicant is entitled to protection and to be registered as the legal owner of the respondent's parcel of land No.Nyeri/Municipality/Block III/87. He was further advised by the applicant's advocates on record, which advise he verily believed to be true, that in view of the matters deponed to therein above, the applicant has acquired title to the portion of the said parcel of land by virtue of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

The replying affidavit to the Originating Summons was deponed by Manji Kunvarji Patel who states that the applicant through its director and shareholder deponent to the application, is abusing the court process and the applications are not merited at all and should be dismissed. That to the best of his knowledge, the deponent director of the plaintiff is also a director and major share holder in the company by the name Batian Grand Hotel Limited. That while the two companies thus Batian Grand Hotel Ltd and Mutune Trading Co. Ltd, may be separate legal entitles, their owners are basically the same and they operate interchangeably where situations allow; a fact well known to the plaintiff. Contrary to all the averments, in the said applications, the defendant is now purporting to juxtapose itself into the position earlier pleaded as occupied by the Batian Grand Hotel Ltd for matters pleaded and deponed. In the year between 1990 and 1994, Batian Grand Hotel Ltd aware of his proprietary rights over the said plot, and with the directors use of political and other influences entered onto his land and purported to literally annex it to be the parking bay of the Batian Grand Hotel which stands on the land adjacent to his.

That he did cause a notice to vacate to issue to the said Batian Grand Hotel Limited on 6/10/1994. Due to their refusal to vacate and their continued trespass he instituted Civil Suit No.Nyeri HCC No.360 of 1994 as per plaint and the defendant in that case did file a defence. That from the defence filed, it is clear that the issue of adverse possession or otherwise was never raised and or a counterclaim made whatsoever but they they pleaded a licence. It is all too clear that Batian Grand Hotel Ltd admitted that it is indeed them and not anybody else that had entered upon and built on the defendants land. On his mind and knowledge Mr. Issac Githuthu the deponent to the supporting affidavit in the application was and is still a director in Batian Grand Hotel Ltd as well as the plaintiff.

The defendant avers that he was advised by his counsel on record which advice he verily believed to be true that the applicant is guilty of material non-disclosure and through its director had abused the court process gravely and should not be granted any orders as sought. His suit was botched up by his advocates and it was dismissed for want of prosecution. That based on the above facts, he is aware of any occupation made and or procure by the plaintiff herein as against his title. That it is note worthy that the plaintiff through its other subsidiary and or sister company the Batian Grand Hotel ltd has literally been annexing and purporting to take possession of all lands surrounding the said hotel business for matters deponed.

The said Batian Grand Hotel Ltd had also gotten involved in a suit with the owner of the adjacent plot Nyeri United Club and the Municipal Council of Nyeri vide HCC No.19 of 2006, Batian Grand Hotel Ltd -VS- Mathew Rubia, Mr. Ngunjiri being sued in his capacity as Chairman of United Social Club, Anthony Mwangi Kibui and Agim holdings Co. Ltd. The suit by the said Batian Grand Hotel Ltd was dismissed on 28/9/2009 as per copy of the decree. He verily believed that the plaintiff's company has only erected this suit with a view to perpetuate that which it's sister company had failed to succeed in. Even before the matters herein were heard, He had sought leave to cross-examine the director of the plaintiff company Mr. Isaac Githuthu on his material deponents to shed more light to the matter. By way of counterclaim, he reiterates that the defendant is a recent trespasser dressed in the clothes erstwhile worn by Batian Grand Hotel Limited and is therefore a trespasser who should be evicted and pay damages for trespass. He is the one who had been paying the rates for the said plot. The defendant had at a point

attempted to influence the Municipal Council of Nyeri and the defendant herein to agree to an exchange of plots. That from the foregoing, the issue of adverse possession does not arise as the plaintiff has never been in possession and the suit herein should be dismissed forthwith.

On the 19/1/2012, the suit was dismissed for want of prosecution. Thereafter the same was slated for the hearing of the counterclaim.

Mr. Manji Kanvarji Patel testified that he is a contractor and who has been in Nyeri for over 50 years. He knew a company by the name Mutune Trading that occupied his plot No. Block 3/87 situated next to Batian Grand Hotel in Nyeri town.

The plaintiff in the Originating Summons dated 5/2/2010 sued the defendant, in respect of the plot that was occupied by Batian Grand Hotel. In the year 1990 the defendant was out of the country and when he came back he found a perimeter wall and a gate on the suit property. He has a lease certificate obtained in his name in 1990.

The property was initially owned by George Mugambi before he took occupation. On the 6/10/1994, he wrote to Batian Grand Hotel Ltd asking them to vacate the plot. He then filed a suit against Batian Grand Hotel in HCCC No.360 of 1994 at Nyeri and applied for general damages among others. The defendant filed a defence dated 16/1/1995. The suit was not determined but was dismissed for want of prosecution. He was later served with the current suit on 18/2/2010. Mutune Trading Company the current plaintiff has a schedule of directors as per plaintiff exhibit 5. The defendant stated that he is the owner of the said plot and has been paying rates and rents. He obtained a rate clearance certificate dated 6/1/2010 upto 31/12/2010. He prays for vacant possession and costs.

This court finds that the defendant is the registered proprietor of No. Nyeri/Municipality/Block III/87 for a term of 99 years from 11/3/1971. He is registered as the proprietor of the leasehold interest subject to the agreements and other matters contrary in the registered lease and such overriding interests set of in Section 30 of the Registered Land Act (repealed).

The defendant has been paying rates in respect to the property to the Municipal council of Nyeri. He produced the rate clearance certificate dated 31/12/2010.

The defendant has established that he is the legal owner of the suitland and therefore entitled to protection under Sections 24 to 30 of the Land Registration Act that provide for the effect of registration.

Section 24 of the Land Registration Act which provides for Interest conferred by registration stipulates that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

The rights of a proprietor are protected by section **25. (1) of the Act** which states that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

The Defendant produced the certificate of official search of title No Nyeri Municipality Block 111/ 87 as conclusive evidence of proprietorship. Section **26. (1)** provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the

absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The proprietor's interest can only be defeated by overriding interests such as spousal rights over matrimonial property, trusts including customary trusts rights of way, rights of water and profits subsisting at the time of first registration under this Act natural rights of light, air, water and support rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription; electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and any other rights provided under any written law.

The plaintiff never testified in court hence the defendants evidence was not controverted and therefore no evidence of prescriptive rights was offered by the plaintiff. The upshot of the above is that the counter claim is allowed and therefor the court finds that Mutune Trading Co. ltd is a trespasser into parcel of land Nyeri/Municipality Block III/87 and is hereby ordered evicted.

Secondly, restraining orders are issued against Mutune Trading Company ltd from entering, continuing to enter, use, occupying and or conduct any form of alienation of parcel No. Nyeri Municipality/Block III/87. Costs of the suit and counterclaim to the defendant.

Dated, signed and delivered at Nyeri this 18th day of July 2014.

A. OMBWAYO

JUDGE