

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MOMBASA
(Coram: Omolo, Owuor & O'Kubasu, JJ.A.)
CIVIL APPEAL NO. 10 OF 2000
BETWEEN**

**MANSUKHLAL SHANTILAL
PATEL.....APPELLANT**

AND

**1. BRIAN HUME NAYLOR
2. SARA NJERI NJOROGE
3. LUCY
PRAGASSA.....
..RESPONDENTS**

**(An appeal from the ruling and orders made by the High
Court of Kenya at Mombasa (Mrs. J. Khaminwa Comm.) dated 9/11/1999**

**in
H.C.C.C. NO. 336(O.S.) OF 1999)**

JUDGMENT OF THE COURT

The appeal before us is of an interlocutory nature and that being so, it is not necessary and it would not be right for us to make definitive conclusions on facts and issues which have not been canvassed in the superior court and are yet to be ventilated and canvassed there. But the undisputed facts are that the appellant M.S. Patel, holds a lease of thirty-three years over the property known as Mombasa/Block XLIII/151 and that property appears to be owned by Kenya Ports Authority who therefore, is the landlord of the appellant. Brian Hume Naylor and his two co-respondents claimed in the superior court that they have acquired the property through adverse possession, and by their originating summons lodged in the superior court on the 28th July, 1999, they asked the superior court to decree that Patel's title to the property had been extinguished and they were entitled to be declared the owners of the same.

Simultaneously with the originating summons the respondents also filed a chamber summons under Order 39 rules 1,3 and 9 of Civil Procedure Rules praying for an order for injunction restraining the appellant, his servants and or agents from interfering in any way with the possession by the applicants of the disputed property. It is obvious to us that the appellant must have asked the respondents to move out of the property though this is not very clear from the record before us. The application was heard by Commissioner Khaminwa, a Commissioner of Assize in Mombasa, and on the 9th November, 1999 she granted a temporary injunction in the terms proposed by the respondents in their chamber summons.

It is against the grant of the temporary injunction that the appellant appeals against.

Mr. Lumatete who argued the appellants' appeal before us, contended, first that a temporary injunction could not have been granted in this case because there was no prayer for such relief in the originating summons. According to Mr. Lumatete an interim injunction can only be granted where there is an equivalent prayer in the main suit. We can find no basis, either in law, or in common sense, for that proposition. In their originating summons, the respondents were claiming ownership of the disputed property by way of adverse possession. That is a claim specifically provided for by our law. The purpose

of an interim or interlocutory injunction is to reserve a disputed property and if the court were powerless to prevent their alienation or disposal during the pendency of litigation, claims by way of adverse possession would be simply defeated by alienating the property. That is contrary to common sense.

Claims for adverse possession are brought to court under Order 36 Rule 3D of the Civil Procedure Rules and such claims are required to be brought to court by way of originating summons. Form No 13 at page 248 of the Civil Procedure Act and Rules made thereunder sets out what is to be contained in an originating summons. We agree with Mr. Gikandi for the respondents that only the nature of the dispute is to be set out in the originating summons and there is no provision for setting out a prayer for an interim injunction or any other form of injunction.

Again Order 39 Rule 1 of the Civil Procedure Rules simply provides that:-

"Where in any suit it is proved by affidavit or otherwise....." "Suit is defined in section 2 of the Civil Procedure Act as.....all civil proceedings commenced in any way prescribed." and "prescribed" is defined as meaning ".....prescribed by rules."

Under these definitions an originating summons is a "suit" and

Order 39 does not state anywhere that an interim or interlocutory injunction can only be granted where there is a prayer for an injunction in the main suit. Mr. Lumatete did not show us any authority for his proposition on this point. We reject that proposition as being unsupported by either authority or common sense.

On the other aspects of the matter, it is possible, from the material placed before us, that the respondents stopped paying rents to the Kenya Ports Authority in 1986 and if that were to be proved as true during the main trial of the suit, adverse possession might be established. But as we have said, we are not required to make conclusions on these points as that is not our function at this stage. We note that each of the three respondents, specifically swore in their respective affidavits that they stopped paying rent in 1986; the replying affidavit of M/s Muthoni Gatere does not specifically deny that the respondents' assertions and state that rents were paid upto 1988 or 1989. On the material before her, we think the learned Commissioner was entitled to come to the conclusion that the respondents had made out before her a prima facie case with a probability of success. But the Commissioner went further and held that if she had been uncertain on the issue of prima facie case with a probability of success she was prepared to hold that the balance of convenience tilted in favour of the respondents. Once again, we respectfully agree with her. The respondents had lived on the property for a long time and they had erected houses on it. To destroy those houses in the manner that the house of their neighbour was destroyed before their claim was heard and adjudicated upon would have been clearly unjust. We are satisfied the Commissioner of Assize correctly directed herself on these points.

Finally there is the point that Kenya Ports Authority is not a party to these proceedings and in their absence the respondents claim is unlikely to succeed. We however note that it was the appellant, not the Kenya Ports Authority which had threatened the respondents with eviction. Mr. Gikandi conceded that it was to leave out the Kenya Ports Authority as party to the dispute. We think the respondents would be foolish to proceed with their claim in the absence of Kenya Ports Authority. We note that the plaint can still be amended. Having considered all the grounds of appeal and the submissions made in support and in opposition to those grounds, we are satisfied the learned Commissioner exercised her discretion correctly and we are not entitled to interfere with her exercise of discretion. We accordingly order that this appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Mombasa this 26th day of January,

2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL