



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 186 OF 2012(OS)

HADEV KALSI SINGH.....APPLICANT

VERSUS

ILAM DIN S/O UMAR DIN.....1ST RESPONDENT

MOHAMED ASLAM S/O ILAM DIN.....2ND RESPONDENT

ASGIRI D/O ILAM DIN.....3RD RESPONDENT

MOHAMED AKHTAR.....4TH RESPONDENT

MOHAMED AZHAR S/O MOHAMED AKRAM.....5TH RESPONDENT

JUDGEMENT

The Applicant instituted this suit vide an originating summons dated 5th April 2012 and sought the following orders:-

- a. A declaration that a portion of land situate on LR 209/4931/21 Nyuki close Nairobi (herein after referred to as the suit property) be deemed to belong to the Applicant under adverse possession.
- b. An order that the Applicant be registered as owner of the suit property.
- c. An order that the Respondents their servants, agents or whomsoever be permanently restrained from levying distress or trespassing onto the suit property in breach of the Applicant's rights as owner in adverse possession.
- d. An order directing the Land Registrar to register the suit property in the Applicant's favour.
- e. Costs of this suit.
- f. Such other relief or further remedy and orders as this Court may deem fit to grant in the circumstances of this case.

The summons is premised on grounds set out on the face of the application and is supported by an affidavit sworn by the Applicant on 5th April 2012. The Applicant avers that when he moved into the suit property in 1987, it was registered in the name of Ilam Din son of Umar Din, Mohamed Aslam son of Ilam Din, Asgiri daughter of Ilam Din, Mohamed Aslam in his capacity as trustee of Mohamed Akhtar (a

minor), Ilam Din son of Umar Din in his capacity as trustee of Mohamed Azhar son of Mohamed Akram (a minor).

The Applicant contends that the suit property is currently registered in the names of Ilam Din son of Umar Din, Mohamed Aslam son of Ilam Din, Asgiri daughter of Ilam Din, Mohamed Akhtar son of Mohamed Akram and Mohamed Azhar son of Mohamed Akram as per the annexed copy of certificate of title dated 25th August 2008. It is the Applicant's case that he has been in possession of the suit property since 1987 when he forcefully moved into the premises after Mohamed Aslam failed to pay back monies owed to him. The Applicant avers that since moving into occupation, he has been paying all rates and utility bills as evidenced by attached receipts and bills.

While stating that he has had sole occupation without disturbance until January 2012 when the 5th Respondent tried to forcefully occupy the property, the Applicant contends that he had never had prior dealings with the 5th Respondent. According to the Applicant, the 5th Respondent has filed a suit in the Business Premises Rent Tribunal (BPRT) Case No. 147 of 2012 seeking *inter alia*, rent amounting to Kshs 15,000,000/- for the last 25 years and copies of the pleading have been exhibited.

The Applicant avers that despite knowing that he was in possession of the suit property, the 5th Respondent instructed his lawyers on 29th March 2012 to levy distress for Kshs 31,470,000/- being purported rental arrears from 1988 to March 2012. It is the Applicant's averment that on 30th March 2012, Muhatia Pala Auctioneers trespassed on the suit property and levied distress on his goods. The Applicant states that from 1987 to date, he has been in continuous and exclusive possession of the suit property and has exercised the rights of an owner of the property with the knowledge of the Respondents.

The 5th Respondent filed a replying affidavit sworn on 3rd June 2013 opposing the summons where he stated that he is an equal share owner of the suit property. He averred that there is existing ELC case no. 188 of 2012 between him and the Applicant where the Applicant is seeking injunctive orders to restrain him from accessing the suit property. Further, the 5th Respondent avers that on 10th April 2012, the Applicant filed ELC No. 188 of 2012 where he swore an affidavit stating that he had filed a suit in 3490 of 2012(OS) seeking to be declared the owner of the property.

The 5th Respondent contends that he was never served with the suit papers and that enquiries from the Nairobi High Court Civil Division revealed that no such case existed. It is the 5th Respondent's case that he has severally either personally or through his advocate written to the Applicant seeking either rent or vacant possession of the suit premises and he annexed evidence of correspondences.

The 5th Respondent stated that the Applicant insisted that the 2nd Respondent who was one of the owners owed him money and that he would not move out of the property until he was paid the money. The 5th Respondent further averred that he always believed that the Applicant was brought to the property as a tenant by the 2nd Respondent. According to the 5th Respondent, the Applicant used to pay rent to the 2nd Respondent and recently through the daughter, Shamim though no such evidence of payment of rent was furnished. The 5th Respondent stated that the 2nd Respondent had been deported from Kenya over a decade ago and that they were not in communication.

It is the 5th Respondent's contention that ever since the Applicant took possession and after the 2nd Respondent left the country, he persistently sought for rent or vacant possession from the Applicant to no avail. He averred that sometimes in 2006, he suffered stroke and was bedridden until 2011 when he slightly recovered and once again started demanding rent from the Applicant.

The 5th Respondent avers that on 27th February 2012, he moved to the Business Premises Rent Tribunal and filed Tribunal Case No. 147 of 2012 seeking to recover rent from the Applicant. He contended that since his right to levy distress had accrued under the Distress for Rent Act, he instructed Muhatia Pala Auctioneers to levy distress against the Applicant for rent arrears and a copy of the proclamation has been

annexed as evidence. The 5th Respondent states that it was after taking the said step that the Applicant rushed to file ELC 188 of 2012 where he obtained injunctive orders against him.

The 5th Respondent annexed a copy of a disposal permit dated 23rd February 1987 as well as a funeral announcement dated 24th February 1987 issued in respect to the 1st Defendant and contended that adverse possession cannot be granted against a dead person unless succession proceedings are instituted and a legal representative duly appointed.

The submissions

Following directions given by the court with the concurrence of the participating parties the Originating Summons was canvassed by way of written submissions. The Applicant in submissions dated 23rd October 2014 reiterated the facts as pleaded and submitted that the possession envisaged under section 7 of the Limitation of Actions Act is a question of fact and that the claimant must show that he made physical use of the property in question. Counsel contended that as had been admitted by the Respondent, the Applicant had been in possession of the suit property since 1987.

It was submitted that contrary to the Respondent's allegations and the demands written to the Applicant authored by Mohamed Aslam and Mohamed Azhar, no action had been taken by the Respondent to lay claim to the suit property for over twenty five years. Counsel argued that it was inconceivable that a property owner who was reliant on the property would allow continuous occupation of a non paying tenant for so many years to allow an alleged defaulting tenant accrue rental arrears of over 15,000,000/- but still remain in possession of the property.

It was further submitted that the alleged demands did not prevent time from running and reference was made to the case of **Njuguna Ndatho vs. Masai Itumo & 2 others (2002) eKLR** for the submission that time which has began to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. The Applicant argued that no legal proceedings had been instituted for over quarter a century and further, that no attempt to take effective possession of the land was ever made.

While stating that the 5th Respondent only took deliberate steps in 2012 when they filed a claim at the Business Premises Rent Tribunal vide Cause No. 147 of 2012, the Applicant submitted that this step came after more than twenty five years after he had been in possession of the suit property and had invested time and effort to establish a name, presence and business on the property. Counsel submitted that the alleged efforts taken by the Respondent to recover the suit property were insufficient to stop the passage of time under the Act and at any rate title to the property had accrued to the Applicant by virtue of prescription.

The Applicant made reference to the case of **Virginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau (2013) eKLR** where the court set out the conditions that necessarily must be established to prove adverse possession. Counsel submitted that there was no dispute that the Applicant had been in continuous and exclusive use of the property for over 25 years and further that he had been in actual possession of the land as attested to by the years of utility payments.

The Applicant submitted that although the Respondent had alleged that the occupation was permissive owing to a lease agreement signed with the 2nd Respondent, no agreement or affidavit from the other Respondents or their relatives had been produced to corroborate this allegation. Counsel argued that the Respondents had claimed a monthly rent of Kshs 50,000/- and had in BPRT cause no. 147 of 2012 claimed outstanding rent for Kshs 15,000,000/- indicating that if their claim was factual, they would not have received payment from the suit property from the time the Applicant took possession in 1987. It is probable that the applicant was a tenant and for 25 years had not paid any rent and if so would such rent be recoverable? Save for recovery of rent say for the last 6 years from the date of demand the rent for the period up to the commencement of the last 6 years would by virtue of the statute of Limitation of Actions, cap 22 Laws of Kenya be not recoverable.

Reliance was placed on **Harlsbury's Laws of England 5th edition volume 68 paragraph 1078** for the proposition that so as to stop time from running against the owner, the factual possession should be sufficiently exclusive and that the claimant should have intended to take possession on his own behalf and for his own behalf.

The Court was also referred to the case of **Hardev Singh Kalsi vs. Mohamed Azhar, Nairobi ELC No. 188 of 2012** and Counsel submitted that all indications point to the fact that there was never a tenancy relationship and therefore, that the Applicant was in non permissive use of the property. Reference was made to the case of Isabel **Chelangat vs. Samuel Tiro Rotich & 5 others (2012) eKLR** that title to the suit property was indicative that ownership amongst the five Respondents was in equal shares and therefore tenancy in common. It was submitted that the claim against the 1st, 2nd, 3rd and 4th Respondents was undefended and should be entered against the said Respondents.

Counsel argued that there was no indication that the 5th Respondent had authority to make a claim on behalf of the other Respondents. It was further contended that in the absence of an affidavit from the estate of the 1st Respondent to corroborate the 5th Respondents assertions about his death, a notice of a radio announcement was insufficient proof of the 1st Respondent's death. Counsel stated that the death of the 1st Respondent notwithstanding, the claim as against the other Respondents would subsist and not be defeated by the alleged death.

The Applicant argued that he had presented a prima facie case where the balance of convenience was in his favour. Counsel made reference to the case of **American Cynamid Company vs. Ethicon Ltd (1975) 1 All ER 504** and the equity maxim that equity acts for the vigilant and not the indolent and contended that it would be a near impossible task to recompense the Applicant for a quarter of a century's worth of toil put into the suit property. The Applicant submitted that for the 27 years he has been in possession, he has placed effort in ensuring that the property was maintained and that he had met the threshold and all the requirements for adverse possession.

The 5th Respondent in submissions dated 23rd September 2013 stated that the issues for determination were:

- a. Whether the Applicant had acquired title over the suit property by reason of adverse possession against the Respondents
- b. Whether the Applicant should be registered as the proprietor of the suit property
- c. Whether the Applicant is entitled to the injunctive orders against the Respondents
- d. Whether the Applicant is entitled to costs of the suit

On the first issue, Counsel reiterated the history of proprietorship of the suit property as set out in the Summons and submitted that the Applicant's occupation was not adverse to the 5th Respondent's title over the suit property for reasons that the 5th Respondent had never known the Applicant and could thus not acquire prescriptive rights. Reference was made to section 38(1) of the Limitation of Actions Act and the case of **Wambugu vs. Njuguna (1983) KLR 173** and **Benjamin Kochwe Nangeleka vs. Fwamba Nangeleka & anor (2004) eKLR** for the proposition that adverse possession contemplates two concepts, dispossession and discontinuance of possession.

The 5th Respondent submitted that for a claim of adverse possession to succeed under section 38 of the Limitation of Actions Act, a claimant must prove that he was using the land in a manner that was inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. Counsel relied on the case of **Harrison Ngige Kaara vs. Gichobi Kaara & anor (1997) eKLR** and submitted that the Applicant had alleged in an affidavit sworn in ELC No. 186 of 2012 that he forcefully took over possession of the suit property due to a purported private debt that the 2nd Respondent owed him.

The 5th Respondent submitted that possession of the suit property by the Applicant was not hostile and

does not therefore support the claim for adverse possession. Counsel argued that the 5th Defendant had always believed that the Applicant was brought to the suit property by the 2nd Respondent as a tenant and that he used to pay rent through the 2nd Respondent and thereafter, through his daughter. It is the 5th Respondent's submission that the Applicant took possession of the suit property after the 2nd Respondent was deported from Kenya over a decade ago and reference was made to the case of **Harrison Mbaria Mbogo & another vs. Mbutu Ngungi(1997)eKLR** for the proposition that limitation is a defence by a person in possession of land adversely to the owner's rights and that an owner is obliged to take steps to re-enter the land by using peaceful means or by instituting action to exert his rights over the land.

While stating that he had persistently either personally or through his erstwhile advocates written to the Applicant demanding payment of rent or vacant possession, the 5th Respondent submitted that he moved to the Business Premises Rent Tribunal and filed case no. 147 of 2012 seeking to recover rent. It was further submitted that the 5th Respondent instructed a firm of auctioneers to levy distress against the Applicant for rent arrears and therefore, that the 5th Respondent had over the years instituted action to exert his rights over the suit property.

It was further submitted that the 1st Respondent was dead and that a claim of adverse possession cannot succeed against a dead person unless succession proceedings were undertaken and a legal representative duly appointed. The 5th Respondent referred the Court to the case of **Latifa Yakub & 4 others vs. Shamshudin M. Kassam (2006) eKLR** and submitted that a suit instituted against a dead person was a nullity. Counsel argued that the Applicant had not made an application to amend its application to seek orders against the administrators of the estate of the deceased 2nd Respondent.

In respect to the 2nd issue for determination, it was submitted that the Applicants' occupation of the suit premises had not been undisturbed and that the Applicant had failed to prove his claim that he had been in occupation without disturbance for 12 years. Counsel submitted that the suit property should therefore not be registered in the Applicant's name because he had not been in actual, open, exclusive and continuous possession for 12 years as required by law.

As to whether the Applicant was entitled to the injunctive orders sought, it was submitted that the Applicant had not satisfied the principles for grant of injunction as set out in the case of **Giella vs. Cassman Brown & Company (1973) EA 358** which are to be applied sequentially. Lastly, it was submitted that the Applicant should bear the costs of the summons for bringing forth evidence that disproves his claim for adverse possession against the Respondents.

Determination

The issue before the Court for determination is whether adverse possession of the suit property by the Applicant has been proved on a balance of probabilities. The Court of Appeal in **Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & anothe, Malindi CA No. 11 of 2014** interrogated what amounts adverse possession and rendered itself thus:-

"...what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

The Applicant stated that he moved into the suit premises in 1987. The 5th Respondent in his replying affidavit did not particularize when the Applicant took possession and averred that it was after the 2nd Respondent was deported from Kenya over a decade ago. The Applicant however annexed in his supporting affidavit, an affidavit sworn in Tribunal case no. 147 of 2012 by the 5th Respondent where he contended that the Applicant in this case had refused and/or neglected paying rent for over 25 years.

It is therefore the Court's findings that the Applicant has been in actual, open and exclusive occupation of the suit property for a period of more than 12 years envisaged by section 7 of the Limitation of Actions Act.

As to whether the Applicant's occupation was continuous, the 5th Respondent stated that he had over the years either through his erstwhile advocates written to the Applicant demanding rent or vacant possession to no avail. The 5th Respondent also stated that he instituted proceedings in BPRT case No. 147 of 2012 seeking to recover rent and further instructed auctioneers to levy distress against the Applicant.

Were the steps taken by the 5th Respondent sufficient to assert the Respondents title to the suit property and to stop time from running in favour of the Applicant? The Court of Appeal stated in the case of **Githu vs. Ndete (1984) KLR 776**, that time ceases to run under the Limitation of Actions Act either when the owner asserts his rights or when his right is admitted by the adverse possessor and that assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. In the case of **Baber Alibhai Mawji vs. Sultan Hasham Lalji and Green Fields Investments Limited Nairobi CA No. 269 of 2001**, the Court stated as follows:-

"In our view, the assertion of right must involve either the regaining of entry to the land by the owner or the commencement of a suit whose substance is to regain possession and any other suit by the owners would, in our view, be ineffective in stopping the running of time."

The BPRT case instituted by the 5th Defendant to recover rent is not a suit to regain possession and would therefore be ineffective to stop the running of time. The correspondences annexed by the 5th Defendant in his replying affidavit as "MA 4" could also not stop time from running in favour of the Applicant in light of the decision in the case of **Githu vs. Ndete (1984) KLR 776** that giving notice to quit cannot be effective assertion of right for purposes of stopping the running of time under the Limitation of Actions Act. At any rate as at the time the 5th Respondent commenced the actions to reassert his ownership or right to the suit property the period of 12 years had lapsed and the applicant had acquired a right to the property through adversity.

The next issue is for consideration is whether the Applicant's occupation was permissive. The Court of Appeal stated in the case of **Samuel Miki Waweru -vs- Jane Njeri Richu (2007) eKLR**, as follows:-

"It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise."

The Applicant stated that he forcefully moved into the suit premises in 1987 after the 2nd Respondent failed to pay back monies that he had lent to him. On the other hand, the 5th Respondent submitted that he believed that the Applicant was brought to the property as a tenant of the 2nd Respondent and that he paid rent to the aforesaid Respondent. The 5th Respondent did not bring any evidence to substantiate the allegation that the Applicant was a tenant of the 2nd Respondent and that his occupation was therefore permissive. I find that the Applicant's occupation was without the consent of any of the co-owners of the suit property.

In any event, even if the 5th Respondent's contention that the Applicant was a tenant of the 2nd Respondent was to be given any credence, under section 12 of the Limitation of Actions Act, time began to run against the Respondents when the Applicant defaulted in paying rent. I am persuaded by the finding in the case of **Kenneth Njoroge Kamau vs. Macson Githumbi Kariuki & 2 others Nairobi ELC No. 209 of 2008(OS)** where the Court stated as follows:-

" Effectively, even if I was to take the Defendants position that the Plaintiff entered the suit premises as rent paying tenants then on the Defendant admission, the Defendants were dispossessed in the year 1966 when the Plaintiff's father stopped paying rent. Section 12 of the Limitation of

Actions Act is to the effect that where a person is in possession of land by virtue of a lease by which rent is reserved then if no rent is subsequently received by the owner of the property the right to action accrues at the date when rent is due but not received. In other words, when there is default the owner is deemed for the purposes of the Act to have been dispossessed and the right of action to recover possession accrues then. By the Defendant's own admission consequently, the Defendants' possession was discontinued in 1966...Time then begun to run."

The 5th Defendant also raised the issue that the claim for adverse possession should fail having been instituted against the 1st Respondent who was deceased and was therefore a nullity. I am of the view that the cause of action survived the 1st Respondent and the fact that his legal representative was not joined in these proceedings cannot defeat the Applicant's claim. The upshot of this judgement is that the Originating summons dated 5th April 2012 is allowed and I make the following orders:-

- a. The plaintiff /applicant is declared to have acquired title to **L.R.NO.209/4931/21** Nyuki Close Nairobi by virtue of being in adverse possession for a period in excess of 12 years.
- b. The Registrar of Titles be and is hereby directed to register **L.R.NO.209/4931/21** Nairobi in the name of the Plaintiff **Kalsi Singh** in place of the Respondents.
- c. The Deputy Registrar of the Court be and is hereby authorized to execute all the appropriate documents necessary to the vest the suit property in the name of the plaintiff.
- d. Each party to bear their own costs of the suit.

Judgment dated, signed and delivered this.....23RDday of.....JULY.....2015.

J. M. MUTUNGI

JUDGE

In presence of:

.....For the Applicant

.....For the Respondents