



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 259 OF 2014

KENPOL SERVICES LIMITED.....PLAINTIFF

VERSUS

BEACON TOWERS LIMITED..... DEFENDANT

JUDGMENT

The plaintiff, Kenpol Services Limited has brought this suit by way of an originating summons dated 6th March 2014 and filed in court on 7th March 2014. The plaintiff claims to be entitled to ownership and registration of the title in its favour by virtue of adverse possession of all that parcel of land known as **L.R. NO. 209/13559** registered as Grant Number **I.R.75461** and has sought the determination of the following questions:-

- a. Whether the plaintiff is entitled by virtue of adverse possession to all that parcel of land known as **L.R.NO.209/13559** registered as grant Number **I.R.75461** which is registered in the name of the defendant.
- b. If the answer to (a) above is in the affirmative, whether the court should make declarations and orders directed to the Land Registrar Nairobi to give effect to the said finding.
- c. Whether the plaintiff should be paid costs of this suit.

The originating summons is premised on the grounds set out on the face of the application and on the annexed supporting affidavit sworn on 6th March 2014 by one **John Ngugi** a director of the plaintiff. The plaintiff anchors its claim for adverse possession on the following grounds:-

- i. That the defendant is registered as owner as per the copy of title annexed and marked "**JN1**".
- ii. That the plaintiff has since 2001 been in continuous and uninterrupted possession and use of the suit land for more than 12 years.
- iii. That the defendant has had knowledge of the plaintiff's adverse possession of the suit land for all the aforesaid period.
- iv. That the plaintiff has developed and heavily invested in the suit land adversely to the defendant and with its knowledge.
- v. That the defendant has never used or stepped on the suit land at any time since the plaintiff took possession.

vi. That the plaintiff has therefore acquired title to the suit land and it is entitled to ownership.

The plaintiff by a Notice of Motion dated 11th March 2014 and filed in court on 12th March 2014 sought the leave of the court to serve the Defendant by way of substituted service by registered post at the Defendant's postal address since efforts to trace the Defendant to make personal service had been unsuccessful. The court heard the application on 16th May 2014 and though the court allowed the plaintiff to serve the Defendant by way of substituted service it ruled service through registered post inappropriate considering that the Defendant may have changed address and directed the Defendant to be served by way of advertisement in the Standard Newspaper and directed that the Defendant do appear within 15 days from the date of publication of the advert in the Newspaper.

The Defendant was served as directed and the plaintiff filed an affidavit of service on 1st July 2014. The Defendant did not enter any appearance and/or file any response to the originating summons. The matter was fixed for mention for directions on 29th September 2014 when the court directed that the originating summons be disposed on the basis of affidavit evidence and submissions. The plaintiff filed its submissions and list of authorities dated 13th October 2014 and on 23rd October 2014 the court reserved judgment for delivery on 23rd January 2015.

The plaintiff vide the affidavit sworn in support of the originating summons avers that it is currently in possession and occupation of the suit land described as **L.R.NO.209/13559** Nairobi which as per the copy of the grant annexed measures 4.731 hectares. The plaintiff deposes that it took possession of the suit property in October 2001 and has since then been openly in occupation and possession and has been utilizing the property adversely to the interests of the registered owner ever since taking possession. The plaintiff avers the possession, occupation and use of the suit land has been open, continuous and uninterrupted and the plaintiff asserts that it has acquired title to the land by virtue of being in adverse possession.

The plaintiff states that it has heavily invested on the land and has erected a permanent perimeter wall on part of the property as evidenced in the photographs annexed as "**JN2**" in the supporting affidavit. The plaintiff states that the Defendant as the registered owner has never taken any action to assert its rights as the registered owner and in particular has never questioned the occupation and possession by the plaintiff which has been open. In the circumstances the plaintiff claims that it has legally acquired ownership to the suit property by way of adverse possession and that the title of the Defendant has been extinguished. The plaintiff thus claims to be entitled to be registered as the owner of the suit property.

The plaintiff's counsel filed written submissions dated 13th October 2014 in support of the plaintiff's case. The only issue to determine in this case is whether the plaintiff has acquired title to the suit property by reason of being in adverse possession. The evidence by the plaintiff in the absence of any response from the Defendant has not been contraverted. The court in the premises accepts the evidence that the plaintiff is in possession of the suit property.

For a party to succeed on a claim for adverse possession such a party must demonstrate the following:-

- i. That they have been in open possession for a period of more than 12 years.
- ii. The occupation and possession must have been continuous and uninterrupted.
- iii. The possession or occupation must have been hostile and/or inconsistent to the owners interests and/or rights in regard to the use of the land.

The court of appeal elaborately considered the principles to be considered in cases where parties claim to be entitled to ownership by virtue of adverse possession in the case of **Wambugu –vs- Njuguna**

(1983) KLR 172 where the court held:-

“in order to acquire by the Statute Limitations 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 property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”.

The court in the same case went on to state that two concepts are contemplated by the limitation of Actions Act, Cap 22 Laws of Kenya for a claim in adverse possession to be actualized. These concepts are dispossession and discontinuance of possession.

The court stated thus:-

“the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed and 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.

It is my understanding that a claimant need not be physically in actual occupation of the suit property to succeed in a suit of adverse possession. All that a claimant needs to establish is that the possession of the rightful owner has been discontinued and this can be shown by demonstrating that the claimant has undertaken in the suit property acts that are inconsistent with the use by the rightful owner of the suit premises. The inconsistent and/or hostile acts by the claimant are the ones that illustrate discontinuance of possession of the rightful owner and assumption of possession by the claimant. Thus where a claimant commences the use of the suit land for his own benefit and without the consent or approval of the rightful owner, such a person becomes an adverse possessor and through his acts discontinues possession of the rightful owner. Where such acts last for a period more than 12 years, then the claimant acquires title to the land by adverse possession and is entitled upon application to the court to be declared as owner of such land. See the cases of Margaret **Gathoni –vs- Kinyanjui Mukuru (2012) eKLR** and **Abishai Nyamweya Mwebi –vs- Jones Abuto (2013) eKLR** where the court considered what constitutes possession and discontinuance of possession.

The court in applying the principles set out in the case of **Wambugu –vs- Njuguna** (Supra) in the circumstances of this case, is satisfied that the plaintiff has been in adverse possession of the suit property since October 2001. The plaintiff has openly been utilizing the suit property and its use of the property has not at all been interrupted by the registered owner. The plaintiff has in fact put a perimeter stone wall on part of the property and the registered owner has not protested these activities. In my view the plaintiff's activities and use of the property have been inconsistent to the rights of the registered owner and are consistent with the plaintiff having asserted its possession over the suit property and the possession by the registered owner being discontinued.

The possession by the plaintiff has been open, continuous and uninterrupted for a period of more than 12 years and consequently the plaintiff has acquired title to the suit property and the title of the Defendant over the suit property has been extinguished. In the premises I therefore find and hold that the plaintiff has proved its case on a balance of probabilities and I accordingly enter judgment in its favour in the following terms:-

- i. That the plaintiff is hereby declared to have acquired title to **L.R NO. 209/13559 of I.R. NO. 75461** situated in Nairobi by virtue of adverse possession.
- ii. That the title held by Beacon Towers Limited over **L.R. NO.209/13559 of I.R NO. 75461** is

hereby declared to have been extinguished in favour of the plaintiff.

- iii. The Land Registrar Nairobi be and is hereby directed to cancel the registration of Beacon Towers Limited as the owner of **L.R.NO.209/13559 of I.R.75461** and in place thereof register Kenpol Services Limited as the owner.
- iv. That there will be no order as to costs.

Judgment dated signed and delivered at Nairobi this...**23RD**.....day of.....**JANUARY**.....2015.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant



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