



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 2802 OF 1977

SOSPETER WANYOIKE.....PLAINTIFF

VERSUS

WAITHAKA KAHIRI.....DEFENDANT

JUDGMENT

The plaintiff, Sospeter Wanyoike, claims a declaration that he has become entitled by adverse possession for over twelve years to all that piece or parcel of land registered under the Registered Land Act and being in title number Limuru/Bibirioni T536 situated at Bibirioni in Limuru district and comprising 0.116 of a hectare or thereabouts and to be registered as the sole proprietor of the piece or parcel of land in place of the presently registered proprietor, the defendant Waitthaka Kahiri.

There is no dispute as to the facts of the case upon the evidence which are that in 1962 the defendant allowed the plaintiff into his land as the plaintiff had no land of his own. Then in 1965 it was orally agreed between the plaintiff and the defendant that the defendant would sell his land at Bibirioni to the plaintiff for Shs 800 (the defendant was the first registered owner.)

From 21st August 1965 to 10th March 1969 instalments of varying amounts, but totalling Shs 800, were paid by the plaintiff to the defendant; and there is documentary evidence of the defendant having received from 21st August 1965 to 22nd December 1967 a total of Shs 746, while there is the undisputed sworn evidence of the plaintiff that he paid the final balance of Shs 54 to the defendant on 10th March 1969.

Thereafter the plaintiff and defendant went to Kiambu to effect the transfer of the land from the defendant to the plaintiff and, after certain difficulties, the transfer forms were completed and they were told to appear before the land control board at Limuru; but on the appointed day the defendant did not turn up, and so the plaintiff went to Kiambu where he was told that the transfer forms which had been completed were late since the three months period allowed by the Land Control Act had expired and that fresh transfer forms were required to be completed. Since then, and into 1970, the plaintiff had tried to persuade the defendant to complete the sale of the plot of land to him without success; and so there has never been any land control board consent to the sale of the plot of land in question from the defendant to the plaintiff.

In 1974 the plaintiff filed a suit against the defendant in the Resident Magistrate's Court at Kiambu (Civil Case No 33 of 1974) claiming to have the land in question transferred to him from the defendant, but the plaintiff's suit was dismissed on 6th May 1975.

It may be observed that in the Kiambu Resident Magistrate's Court the plaintiff said: "I have sued the defendant so that he could effect the transfer of a plot he sold me in 1969". The magistrate in his judgment found that the registered owner of this plot had been and still was the defendant; he found that the defendant had agreed to sell the plot in question to the plaintiff in 1969; but he dismissed the plaintiff's suit (as I have said) because there was no land control board consent to the transaction.

This suit was filed on 14th December 1977.

In the affidavit of the plaintiff (attached to the originating summons) he claims that the oral agreement of sale between himself and the defendant for the sale of the plot of land was made in (or about) 1963, whilst in his evidence before me he said that the agreement was made in 1965. I do not think anything turns on this. Furthermore, in the same affidavit it is stated that Shs 54 was paid on 3rd October 1968, whilst before me the plaintiff said that the Shs 54 was paid on 10th March 1969; and he confirmed this during his cross-examination by Mr Gatimu, counsel for the defendant. I will accordingly take the date as 10th March 1969 (and not 3rd October 1968); not that I think that it makes any difference.

It is Mr Mitra's argument for the plaintiff that the agreement for the sale of the plot of land on 21st August 1965 became void for all purposes three months after its making, because there had been no land control board consent to the transaction; and the right of action to recover the land first accrued on the date of the agreement and continued uninterrupted for twelve years (ie to 22nd August 1977).

In support of this argument Mr Mitra referred to 24 *Halsbury's Laws of England* (3rd Edn) page 244, paragraph 462:

Entry under void lease. If a person enters on land under a lease which should be, but is not, under seal, a tenancy at will may be created. If, however, a person enters on land under a lease which is void *ab initio*, and pays no rent, such person is not a tenant at will, but is in possession without title, and the statute runs in his favour from the date of his entry; but if any rent, however small, is reserved by the lease and paid by him, the statute will not run as long as such payment is made.

The authority for the above-quoted proposition is *Magdalen Hospital (Governors) v Knotts* (1897) 4 App Cas 324.

Mr Mitra went on to argue that the payments made by the plaintiff to the defendant did not constitute any acknowledgement of title since there was nothing in writing signed by the plaintiff (see section 23 of the Limitation of Actions Act). In support of this argument he referred to the recent decision of this Court delivered by Scriven J on 28th March 1979 *Jason v Kamatt Gachugu* (unreported) in which reference is made to the *Magdalen Hospital* case.

According to the Lord Chancellor (Earl Cairns LC) in the *Magdalen Hospital* case (at page 334):

My Lords, holding, as I do, that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever; and not having paid rent to the appellants, or in any other way entered into the relation of tenants, there is nothing to prevent the full operation of section 2 of the Statute of Limitations and the right of the appellants to recover the land is, in my opinion, effectually barred.

And in the judgment of Lord Selbourne (at page 335):

If any rent had been reserved and received, however small, the legal relation of a tenancy from year to

year would have been created, and the Statute of Limitations could not have run

and in the judgment of Lord Gordon (at page 336) :

... and as they have not paid rent to the appellants, or in any other way entered into the relationship of tenants, think that section 2 of the Statute of Limitations applies and that all rights on the part of the appellants are effectually barred.

It appears to be therefore that there are two matters to be taken into account, namely that the contract of sale (or lease makes no difference) was absolutely void and that in the *Magdalen Hospital* case no rent was paid.

Scriven J appears to have taken into account payments made subsequent to the date of the original agreement which became void but he held that such payments were unlawful as they were made under an agreement which was void and they did not postpone the accrual dates; but I have had the advantage of consulting and perusing *Hosea v Njiru* [1974] EA 526 and the judgment of Simpson J at page 30:

His possession became adverse on 22nd June 1957, the date on which the last payment of the purchase price was made. A right of action accrued to the first defendant on that date. The second defendant claims through the first defendant, and his right of action accordingly accrues on the same date.

Simpson J also referred to *Bridges v Mees* [1957] 2 All ER 577 where it was held that, on payment of the purchase price by a purchaser in possession of land sold to him, his possession of the land became adverse to that of the vendor; the headnote in the All England Report of that case reads:

After the company had received full payment of the purchase price in 1937, [the contract was in April 1936] it became a bare trustee of the legal fee simple for the plaintiff and its title was barred under the Limitation Act 1939, section 10(1), by the plaintiff's subsequent possession for twelve years.

(but the contract made in 1936 was not void).

I find that the subsequent payments in this case are analogous to what was said in the *Magdalen Hospital* case, and are not acknowledgements as referred to in section 24 of the Limitations of Actions Act but recognitions of the defendant's title to the land; and so the period of limitations to afford an action for adverse possession did not accrue until after the last payment had been made and so, of course, sections 23 and 24 of the Limitations of Actions Act are (in my opinion) irrelevant.

I accordingly find that the period of limitation did not arise in this case until after 10th March 1969 and so the twelve-year period would not expire until 11th March 1981. Since this suit was filed on 14th December 1977, it is premature and should be dismissed with costs; and so I dismiss it with costs.

However, yet another argument was advanced by Mr Gatimu: since the plaintiff instituted the suit in the Resident Magistrate's Court at Kiambu in 1974 in which he asked that Court to substitute himself as the registered owner of the land in question, he must be taken to have accepted that the defendant was the registered owner. I think that this could be so and I am fortified in my opinion by what is said in 24 *Halsbury's Laws of England* (3rd Edn) page 302, paragraph 597:

... but an acknowledgement within the twelve years, although not expressly admitting title at the time when the acknowledgement is made, is, it seems, sufficient.

I interpret the word “acknowledgement” to remove it from section 24 of the Limitations of Actions Act to recognition of the defendant’s registered title to the land within the twelve-year period which interrupts the plaintiff’s required period of adverse possession.

The plaintiff’s suit is dismissed with costs.

Action dismissed with costs.

Dated and delivered at Nairobi this 13th day of July 1979.

J.H.S TODD

JUDGE



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