



Adverse possession: S. 38 of Limitation of Actions Act, Cap 22; SS.30 (f) and 163 of the Registered Land Act Cap 300; and Section 3(1) of the Judicature Act, Cap 8; Mortgage or charge does not interrupt the running of time in adverse possession; what amounts to an assertion of title by the proprietor for the purpose of interrupting the running of time in adverse possession.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL CASE NO. 124 OF 2004(O.S)

KIPKOECH ARAP LANGAT.....1ST
PLAINTIFF

RICHARD KIPNG'ENO MUTAI2ND
PLAINTIFF

VERSUS

KIPNG'ENO ARAP
LABOSODEFENDANT

JUDGMENT

The two Plaintiffs commenced the suit herein on 7th December, 2004 against the Defendant claiming to have become entitled to be registered as the Proprietors of the land known as **Kericho/Kapsimbiri/527** pursuant to **Section 38** of the **Limitation of Actions Act, Chapter 22** of the laws of Kenya by virtue of their adverse possession to the title of the Defendant who is registered as the proprietor thereof. **Section 38(1)** of the **Limitation of Actions Act, Cap 22** stipulates.

S.38. (1) where a person claims to have become entitled by adverse possession to land registered

under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

The suit land in this case is registered under the **Registered Land Act Cap 300**. The 1st Plaintiff and the original 2nd Plaintiff, Francis Kimutai Langat were brothers and they alleged in the Originating Summons that the 1st Plaintiff purchased the suit land from the Defendant to whom he paid the full purchase price following which the 1st Plaintiff and his brother Francis Kimutai Langat took possession and occupation of the Land in 1973. The Plaintiffs averred that the Defendant subsequently reneged on the contract and refused to transfer the suit land to the 1st Plaintiff.

In his defence, the Defendant denied having sold the suit land to the 1st Plaintiff. He alleged that the 1st Plaintiff and his brother were not in possession adversely to his title as claimed.

In evidence, the 1st Plaintiff told the court that he bought the suit land No. **Kericho/Kapsimbiri/527** measuring about ten (10) acres from the Defendant in July 1973 and paid Shs. 10,350/=. He then moved in and took possession of it pursuant to the sale whereupon the Defendant moved to Nairobi. The 1st Plaintiff got his brother, Francis Kimutai Langat to occupy the suit land with him. Francis Kimutai Langat died on 17th August, 2008. He was replaced in this suit by Richard Kipngeno Mutai, his legal representative, now the 2nd Plaintiff. The 1st Plaintiff told the court in evidence that since 1973, he and his late brother continuously occupied the suit land without interruption but the Defendant completely refused to transfer it to him. The Defendant caused the title deed to be issued to him in 1979 but he parted with its possession to the 1st Plaintiff. Exhibit No. P2 produced by the Plaintiff shows that the Defendant took a loan of Shs. 190,000/= from the Agricultural Finance Corporation (AFC) while Exhibit P6 also produced by the Plaintiff shows that the loan was repaid and notification of discharge was registered in the land Registry on 2nd February, 2004. The Plaintiff testified that he is the one who repaid the loan to prevent the land from being auctioned for non-repayment of the loan. He produced receipts to prove the payments (**See exhibits Nos. P5 (a), to (f)**). The Plaintiff further testified that he kept the title deed in his possession throughout and produced it in court. It was claimed by the Plaintiff in his evidence that the Land Control Board would have granted its consent to the sale of the land but for the Plaintiff's failure to incorporate. Defendant, he said, refused to submit his identity card to the Land Control Board.

PW2, Francis Kimutai Langat, who was the Plaintiff's younger brother, testified and gave his age as 59 years and told the court that he lived on the suit land with the 1st Plaintiff from 1973. He built a house on the suit land, he said, as did his brother, the 1st Plaintiff, and planted tea bushes and other crops. He also kept livestock. He was married and his family still lives on the suit land. PW2 also testified that the Defendant has never since 1973 gone back to the suit land although he took a loan from Agricultural Finance Corporation (AFC) on its security.

Kipkurui Mosonik who testified as PW3 told the court that he knew the Plaintiffs and that they lived on the suit land which the 1st Plaintiff had purchased from the Defendant.

On his part, the Defendant denied having sold the land to the 1st Plaintiff. He claimed that he had leased it to the brother of the 1st Plaintiff and that the latter was a stranger to him. He told the court that he was the owner of the land and that that is why he had charged it to Agricultural Finance Corporation (AFC). He further told the court that he had found the 1st Plaintiff in possession of the land in 1989 and that as a result he had sued him in NKU HCCC.NO. 31 of 2001 seeking orders for the 1st Plaintiff's eviction. He told the court that he had also sued the 2nd Plaintiff seeking similar orders in Kericho HCCC.NO. 122 of 2006.

The Defendant called a witness, **Philemon Laboso(DW2)** who confirmed that the Plaintiffs have occupied the suit land from the time the Defendant left the land. He told the court that the 1st Plaintiff has been on the suit land for about 33 years. He further told the court that he was a neighbour of the Plaintiffs

and that the suit land and his own land are contiguous.

The Defendant's 3rd witness was **Samuel Kipkurui Sigilai** who confirmed that the Plaintiffs were in occupation of the land and that they had built houses on it and planted orange trees and effected other developments.

As stated above, **Francis Kimutai Langat**, the 1st Plaintiff's brother, died on 17th August, 2008 and substitution was effected on 21st April, 2010 when he was replaced as the 2nd Plaintiff by **Richard Kipng'eno Mutai**, his legal representative.

The Defendant submitted written submissions on 10th January, 2011 which the court perused. He denied in his submissions that the Plaintiffs had been in occupation and possession of the suit land or that he had sold it to the 1st Plaintiff. His contention was that the Plaintiffs had leased the land and that the Plaintiffs had become trespassers. But these submissions were matters in respect of which evidence needed to be adduced to buttress them.

In Bomet RM.C.C. NO. 34/2001, the Plaintiff had sought to compel the Defendant to transfer the suit land to him. The Resident Magistrate in that case (*Hon. G.M.A. Ong'ondo*) rightly struck it out as incompetent for want of jurisdiction on his part.

It seems from the exhibits produced and the evidence adduced that on 13th September, 1981, or thereabouts, the Defendant obtained a loan of Kshs. 190,000/= from AFC which the Plaintiff repaid as a result of which Notification of Discharge (Exh. P6) was registered on 2nd February, 2004.

The Plaintiffs claim that under **Section 38** of the **Limitation of Actions Act Cap 22**, they have, by reason of adverse possession of more than 12 years of open and uninterrupted continuous occupation and possession of the suit land become entitled to be registered as the proprietors of the suit land in place of the Defendant. They pray for an order that the suit land be transferred to them.

This action is premised on the doctrine of adverse possession which is legislated in **Section 38** of the **Limitation of Actions Act** and **Section 28(f)** of the **Registered Land Act Cap 300** and is amplified by common law by dint of **section 163** of the **Registered Land Act** and **Section 3(1) (c)** of the **Judicature Act, Cap 8**.

Section 163 of the **Registered Land Act** stipulates.

Subject to this Act and except as may be provided by any written law for the time being in force, the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges registered under this act and interests therein, but without prejudice to the rights, liabilities and remedies of the parties under any instrument subsisting immediately before the application.

Section 30(f) of the **Registered Land Act Cap 300** stipulates

S.30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

The application of common law and doctrines of equity is governed by **Section 3(1)** of the **Judicature Act, Cap 8**, of the laws of Kenya. The section provides

Section 3(1). The jurisdiction of the High Court, the Court of Appeal and all subordinate courts shall

be exercised in conformity with-

(a) the Constitution

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule.

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date;

but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

It is patent that for one to succeed in an action for land under the doctrine of adverse possession one must prove on the balance of probabilities that one has openly been in possession and occupation of the land continuously and without interruption for a period of over 12 years adversely to the title of the proprietor with the latter's knowledge.

In the case of **Amos Weru Murigu –vs- Marata Wangari Kambi & another, High Court of Kenya at Nairobi (Civil Suit No. 33 of 2002(O.S))** this court held that

“...where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve (12) years, the trespasser is entitled to apply to the High Court under section 38(supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. For these propositions of the law, see GATIMU KINGURU V. MUYA GATHANGI (1976) KLR 253; HOSEA V. NJIRU [1974] E.A. 526; SOSPETER WANYOIKE V. WAITHAKA KAHIRI (1979) KLR 236; WANJE V. SAIKWA (NO. 2) (1984) KLR 284; GITHU V. NDEETE [1984] KLR 776; NGUYAI V. NGUNAYU(1984) KLR 606; KISEE MAWEU V. KIU RANCHING (1982-88) IKAP 746...”

In this case, the evidence shows that the Plaintiffs went into possession and occupation of the suit land in 1973 with the knowledge of the Defendant following a sale. As the land is agricultural, the sale required the consent of the Land Control Board under the provision of the Land Control Act which, at that time,

required that consent be procured within three months of the sale failing which the transaction would become void *ab initio*. The parties in this case never procured consent of the Land Control Board. Consequently the sale of the suit land to the 1st Plaintiff became void *ab initio*. The effect of this was to constitute the Plaintiffs trespassers on the land. In his evidence, the Defendant purported that he had leased, and not sold the land. The evidence, however, clearly shows that the Defendant could not be telling the truth. A sale agreement marked as exhibit P1 clearly shows that a contract of sale was entered into although it became void for want of consent of the Land Control Board. This, coupled by the evidence of the witnesses, clearly proves the point that the Defendant knew that the Plaintiffs were in possession and occupation of the suit land from 1973. The evidence that the 1st Plaintiff built permanent dwelling houses on the suit land and extensively developed it puts paid the Defendant's allegation that the Plaintiff had not bought the land or occupied it.

The period of 12 years from 1973 expired sometime in 1985 or 1986. But just prior to the expiry of this period, the Defendant in 1981 mortgaged the suit land to the Agricultural Finance Corporation and took a loan of Shs. 190,000/= which the 1st Plaintiff repaid in the year 2004. Did the act of mortgaging the land in law interrupt the running of time in adverse possession so as to stop or prevent adverse possession from crystallizing? It is accepted in common law that the filing by the proprietor of a suit to evict a trespasser interrupts time from running in adverse possession. It seems clear that for an act on the part of the proprietor to amount to interruption of time in adverse possession, the act must be a deliberate act of assertion of title. It is accepted that the writing of a letter by the proprietor or his advocate requiring the trespasser to vacate the land does not interrupt time in adverse possession. Clearly for the proprietor's act to amount to an assertion of title, it must have legal consequences. Where, therefore, action is threatened by the proprietor, without institution of a suit, the act falls short. In taking a loan on the security of the title to the suit land, the proprietor does not address himself to the trespasser and it cannot be said that he is asserting his title to the trespasser on the land. After all, the act of mortgaging or charging is not done openly. It is privately done and it remains a matter between the proprietor as chargor/mortgagor and the Lender as Chargee/mortgagee. Clearly, also, the loan sought or borrowed is not intended to assert the title to the trespasser who is in any case unaware of it.

The Defendant tried to defraud the 1st Plaintiff and he seemed intent on using every trick in the book to cause the land to revert to him and the Plaintiffs to be ejected from it. But even his own witness, **Samuel Kipkurui Sigilai (DW3)** conceded that the Plaintiffs were in possession while the Defendant's 2nd witness **Philemon Laboso (DW2)** also testified that the Plaintiffs have been on the land for 30 or 33 years. The Defendant alluded in his evidence to NKU HCCC.NO. 31 of 2001 in which he sought to evict the 1st Plaintiff. He also alluded to Kericho HCCC.NO. 122 of 2006 which he had filed ostensibly seeking eviction of the 2nd Plaintiff from the suit land. It was futile on his part as he was trying to lock the stable door after the horse had already bolted. His title had become extinguished sometime in 1986 by the Plaintiffs' adverse possession of over twelve (12) years.

I hold that where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession. Time for adverse possession continues to run. Such adverse possession is an overriding interest acquired or in the process of being acquired by virtue of **Section 38** of the Limitation of Actions Act. It must be noted that where the proprietor transfers the land, the act of transfer does not interrupt the running of time in adverse possession. In both cases of transfer and mortgage of land on which a trespasser is in adverse possession, the running of time in adverse possession is not interrupted. As adverse possession is an overriding interest (*acquired or in the process of being acquired*) under **Section 30 (f)** of the **Registered Land Act, Cap 300**, the mortgagee or transferee takes subject to such overriding interest.

In this case, nothing turns on the mortgaging of the suit land or the fact that the 1st Plaintiff repaid the loan to AFC which the Defendant had taken. The period of adverse possession run from 1973 up to 1985 or 1986. The adverse possession crystallized in 1985/1986. By 1986, the title of the Defendant to the suit land had been extinguished by the Plaintiffs' adverse possession of over twelve (12) years and the

Plaintiffs had become entitled to be registered as the proprietors in the place of the Defendant.

It is my finding in this case that the Defendant's title to the suit land became extinguished in 1985/1986 by the Plaintiffs' adverse possession of over twelve (12) years. It is my further finding that the charging of the suit land by the Defendant did not interrupt the running of time in adverse possession. **I hold** that the Plaintiffs have proved that they are entitled under **section 38** of the **Limitation of Actions Act, Cap 22** of the laws of Kenya to be registered as the proprietors of the suit land in place of the Defendant. I hereby give a declaration to that effect and **enter judgment in favour of plaintiffs** on these terms.

I order that the name of the Defendant, **Kipngeno Laboso** be deleted forthwith from both the register and the title of the suit land No. **Kericho/Kapsimbiri/527** and the Plaintiffs, **Kipkoech Arap Langat** and **Richard Kipng'eno Mutai**, be registered as joint proprietors thereof instead of the Defendant.

The costs of this suit shall be borne by the Defendant.

DATED at **KERICHO** this 17th day of **February**, 2011

G.B.M. KARIUKI, SC

RESIDENT JUDGE

COUNSEL APPEARING

Mr. F.O. Koko Advocate for Mr. B. Magare Advocate for the Plaintiffs

No appearance for the Defendant

Court Clerk – Mr. Bett