



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 90 OF 2004**

**JOSEPH IRIET MUTOGO.....PLAINTIFF**

**V E R S U S**

**HOSEA SHISOKO MANYASA.....DEFENDANT**

**J U D G M E N T**

On 25-10-2004, the Applicant, Joseph Iriet Mutogo, filed the suit herein by way of Originating Summons as provided by *Order 36 Rule 3 D (1) & (2) of the Civil Procedure Rules* seeking declarations whether he had acquired by adverse possession land title No. Butsotso/Shibeye/670 registered under the Registered Land Act Cap 300 and whether he should be declared the legal owner of two acres of the land comprised in the said title; and whether the Respondent held such two acres in trust for the Applicant; and whether the land comprised in said title should be subdivided and two acres transferred to the applicant; and who should pay the costs of the suit. Nowhere in the suit did the Applicant seek any order for the transfer of the land to him. He sought declarations. The court therefore can only give the declaratory orders sought if the Applicant establishes by evidence on the balance of probabilities that he is entitled in law to such declaratory orders.

The suit came up for hearing on 27-2-2007. The Respondent who had been served did not attend court, neither did his advocate, Mr. Bakhoya. The hearing proceeded ex-parte. The Applicant gave evidence in which he testified that he bought 2 acres of the land comprised in the title No. Butsotso/Shibeye/670 from the Respondent in 1986 and took possession of the same, put up his house on it, and immediately started developing the said 2 acres. He told the court that he has occupied the land from 1986 to date. He further told the court in his evidence that he has planted trees, bananas and crops. It was his further evidence that the Respondent attempted to remove him from the land in 1993 when the Respondent filed suit No. Kakamega HCCC NO.52 of 1993 seeking his eviction. He produced as exhibit No. P1, an order in the said suit showing that on 23<sup>rd</sup> July, 1993, the Respondent was ordered to refund to him the sum of Shs.18,400/=, ostensibly being the purchase price of the two acres. He told the court that he was entitled to the land and that that is the reason he filed the suit later.

His witness, Joram Ingutia (PW2) reiterated that the Applicant went into possession of the said 2 acres after purchasing it in 1986 from the Respondent.

On the basis of this evidence, is the Applicant entitled to the declarations sought? The suit herein was brought on 25-10-2004. The Applicant occupied the land in 1986 and the 12 years of adverse possession ended either in 1998 or 1999. However, by his own admission, the period of adverse possession was interrupted in 1993 when the Respondent asserted his title by suing the Applicant in suit No.52 of 1993 in which the Respondent was ordered to refund the purchase price. The fact of the Respondent instituting the suit against the Applicant meant that the period of adverse possession was interrupted in 1993. By that time, only seven years of adverse possession had run. The adverse possession had not therefore crystallized. It seems the Applicant continued to trespass on the land as he did not move out as his evidence in this regard was not controverted. But adverse possession must have started to run again either in 1993 or in 1994. By the time the suit herein was filed in 2004, the period of 12 years had not elapsed. The period of 12 years would have elapsed either in the year 2005 or 2006. It seems the suit was prematurely filed before the 12 year period of adverse possession had not run its course. In these circumstances, it cannot be said that the Applicant had become entitled under section 38 (1) of the

Limitation of Actions Act, Cap 22, to have become entitled by adverse possession to the 2 acres or to the declarations sought and consequently he was not entitled to apply when he did for the orders he sought. I had occasion to state in the case of AMOS WERU MURIGU v. MARATA WANGARI KAMBI and another [NBI H.C.C. SUIT NO.33 OF 2002 (O.S.)] the following with regard to adverse possession and interruption of time:-

*“.....he (the plaintiff) bases his claim, inter alia, on section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya*

*entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be so registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered proprietor for a period of 12 years or more adversely to the title of the registered owner. In other words, 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 years, the trespasser is entitled to apply 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 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 INGURU v. MUYA GATHANGI (1976) KLR 253; HOSEA v NJIRU [1974] EA 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) IKAR 746;”*

In the result I dismiss the suit with no order as to costs.

*Delivered, dated and signed at Kakamega this 24<sup>th</sup> day of May, 2007.*

G. B. M. KARIUKI

J U D G E