



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 42 OF 2003

JOHN MALIMWA AMUFWA
PLAINTIFF

VERSUS

1. THOMAS K. MATAYO ALIAS THOMAS MANGAU NYENDE

2. BENJAMIN SALANO MUNG'AHU DEFENDANTS

JUDGEMENT

The suit herein was commenced by Originating Summons date 2-6-03 filed in court on 27-6-2003 by the Plaintiff, John Malimwa Amufwa, and was supported by the Plaintiff's affidavit sworn on 2-6-03 to which (affidavit) was annexed, inter alia, a certified extracts of the titles to the land title Nos. Kakamega/Ileho/826, 828, and 829, the first two being the subject matter of the suit herein. The action was premised on Order XXXVI Rules 3 and 7 of the Civil Procedure Rules and although not stated by the Plaintiff's advocate, the action was founded on section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya and was for recovery of the suit land pursuant to the doctrine of adverse possession. The two defendants, Thomas Khasuti Matayo alias Thomas Mangau Nyende and Benjamin Salano Mang'ahu were served but neither entered appearance or filed any replying affidavit.

When the suit came up for hearing before me on 28.11.05, the Plaintiff and his advocate attended court as did also the 1st Defendant but the 2nd Defendant did not. Not having entered appearance, let alone not having filed a replying affidavit, the 1st Defendant was not entitled to be heard. In the circumstances, the hearing proceeded ex-parte.

In his evidence, the Plaintiff, a farmer, told the court that the Defendants were brothers and that the 1st Defendant had sold to him the land title No. Kakamega/Ileho/826 while the 2nd Defendant had sold to him land title No. Kakamega/Ileho/828. The mother of the Defendants who is not a party to this suit had also sold to the Plaintiff her parcel of land No. Kakamega/Ileho/829. The Plaintiff told the court in evidence that the price of the three parcels of land was Shs.10,500/= and that he paid Shs.9,500/= on 4/11/77 and Shs.800 and a further Shs.200/= on 13/11/77 to the Defendants. He produced certified extracts of the titles to the three parcels of land and the sale agreements as exhibits. Exhibit No. P4 was the sale agreement for parcels Nos. Kakamega/Ileho/826, 828 and 829 and reflects the price of Shs.10,500/=. It also reflects the three payments as aforesaid.

The Plaintiff testified that he had since 1977 been in possession of the three parcels of land but in the suit herein, his claim was for plots Nos. Kakamega/Ileho/826 and 828. He told the court he had openly

occupied the 3 said parcels of land continuously and without interruption or any problem from the Defendants. He told the court he would file another suit to claim the third parcel No. Kakamega Ileho/829 but otherwise sought orders for the two parcels No. Kakamega/Ileho/826 & 828 to be registered in his name instead of the names of the defendants. He called no witnesses.

The Plaintiff's evidence stood alone. It was uncontroverted. The exhibits produced lend credence to the alleged sale. The evidence of continuous open and uninterrupted possession and occupation of the said three parcels of land was uncontroverted. The Plaintiff had as at the date of the hearing of the case on 28.11.05 been in open continuous and uninterrupted occupation of the three parcels of land for a period of nearly 28 years. No Consent of the Land Control Board appears to have been obtained in respect of the sale which under the Land Control Act, Cap 302, became void and the plaintiff's occupation became adverse to the titles of the Defendants.

The Plaintiff's claim was under section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya which entitles a person to be registered as a proprietor of land instead of the registered proprietor where such person (Plaintiff) establishes to court by evidence that he has become entitled to be so registered on account of his occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, when 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 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 12 years, the trespasser is entitled to apply under Section 38 (supra) to be registered as the proprietor of the land instead of the person so registered. That is the doctrine of adverse possession. 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 registered proprietor, 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 by the owner/proprietor, it is not enough for a proprietor of the land to merely write to the trespasser or tell the area chief. A letter by the proprietor even if it be through an advocate or the area chief does not amount to assertion of title in law and cannot therefore interrupt the passage of time in 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 time from running. This is what I stated in **AMOS WERU MURIGU versus MARATA WANGARI KAMBI AND THE LAND REGISTRAR, NYAHURURU (NBI HCCC. NO.33 OF 2002 (O.S.) (Unreported)**. For these propositions of the law, see:

1. **GATIMU KINGURU v. MUYA GATHANGI 91976) KLT 253.**
2. **HOSEA v. NJIRU (1974) E.A. 526.**
3. **SOSPETER WANYOIKE v. WAITHAKA KAHIRI (1979) KLR 236.**
4. **WANJE v. SAIKWA (NO.2) 1984) KLR 284.**
5. **GITHU v. NDEETE (1984) KLR 776.**
6. **NGUYAI v. NGUNAYU (1984) KLR 606. and**
7. **KISEE MAWEU v. KIU RANCHING (1982-88) IKAP 746.**

On the basis of the evidence of the Plaintiff, I am satisfied, and it is my finding, that the Plaintiff has been in adverse possession to the titles of the Defendants of the parcels of land Nos. Kakamega/Ileho/826 &

828 for a period of more than 12 years. I am satisfied that he is entitled to be registered as the proprietor of parcels of land Nos. Kakamega/Ileho/826 & 828 instead of the 1st and 2nd Defendants respectively.

Accordingly, I enter judgement for the Plaintiff against the Defendants and in terms of section 38(1) of the Limitation of Actions hereby order that the Plaintiff shall be registered as the proprietor of the parcels of land title Nos. Kakamega/Ileho/826 and Kakamega/Ileho/828 in the place of Thomas Mungau Nyende and Benjamin Isalano Mung'aho respectively. There shall be no order as to costs.

Dated at Kakamega this 11th day of May, 2006.

G. B. M. KARIUKI

J U D G E