



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Civil Case 8 of 2001

ELIJAH IKOHA IKANZOAPPLICANT

V E R S U S

JOSEPH NGAIRA ASUTSARESPONDENT

J U D G M E N T

ELIJAH IKOHA IKANZO, the Applicant, instituted the suit herein by way of Originating Summons dated 25-1-2001 supported by his own affidavit sworn on that date. The Respondent named in the suit was *JOSEPH NGAIRA ASUTSA* (who was sued as the administrator of the estate of the late *LIVOMBOLO ASUTSA*).

The Applicant's claims against the Respondent was premised on section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya and Order XXXVI Rule 3 D of the Civil Procedure Rules. The claims were for declarations (1) that the Applicant had acquired the land known as ISUKHA/KAMBIRI/808 (the suit land) by adverse possession of more than 12 years and (2) that the Respondent held the suit land on trust for the Applicant and (3) that the title of the Respondent had been extinguished and (4) that the Applicant was entitled to be registered as the proprietor of the suit land in the place of the Respondent who was the registered proprietor as evidenced by the extract of the title to the suit land annexed to the affidavit of the Applicant in support of the Originating Summons. That extract of title shows that the suit land is registered under the Registered Land Act Chapter 300 of the Law of Kenya and was on 17.6.76 first registered in the name of *LIVOMBOLO ASUTSA* as the proprietor but on 28.11.88, the title was transmitted to the Respondent as the administrator of the estate of Livombolo Asutsa.

The Originating Summons seeks only declarations but does not seek any order.

When the suit came up for hearing on 21.3.06, the Applicant attended court with his advocate but the Respondent who had been served did not. The Applicant gave evidence that he was a farmer at Kambiri and that he knew the Respondent who is a distant cousin. He told the court that he bought the suit land from *LIVOMBOLO ASUTSA* who was the father of the Respondent and who has since died. He told the court that he paid Shs.3,500/= for the suit land. He produced the sale agreement dated 5.2.79 entered into between him and the Respondent's said deceased father which bears these facts as correct. He told the court that he took possession of the suit land in 1980 and has been using it as his own since. He told the court that the suit land is contiguous to his other land and that there is no boundary separating the two parcels of land. It was the Applicant's evidence that the deceased died before transferring the suit land to him. The Respondent, he said, was registered in 1989 in place of his father and in the year 2001, the Applicant filed the suit herein.

The Applicant called two witnesses. PW2, Shiemo Musonyi, a farmer from Ivakale Sub-location, told the court in his evidence that he knew both the Applicant and the Respondent and the suit land. He told the court that the Applicant lives on the suit land and has had its possession for the last 20 years. He told the court that he knew that the Applicant had bought it from the father of the Respondent, now deceased, whom he knew. He was, he said, a witness to the agreement of sale. He testified that the Respondent has never had possession of the suit land and that the Respondent and the Applicant have had problems relating to the suit land. He did not explain the nature of the problems.

PW3, Wilson Kokosi Igare, a farmer from Ivakale Sub-location and a retired village elder, told the court in evidence that he is a neighbour of both the Applicant and the Respondent and that he knows the suit land and the fact that the father of the Respondent, Libombolo Asutsa, now deceased had sold it to the Applicant for Shs.3500/= in 1979. He told the court that he was also a witness to the sale and had signed the sale agreement as a witness. He told the court that the Respondent's father died two years after the sale of the land to the Applicant. In his evidence, PW3 told the court that the Applicant has used the suit land as his own since 1979.

The Respondent did not attend the court during the hearing of the suit and offered no evidence in defence. 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 owner for a period of twelve 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. That this is what the doctrine of adverse possession means was stated in *Amos Weru Murigu v. Marata Wangari Kambi & Another in Nairobi HCCC No.33 of 2002 (OS)* in which the court also stated:- *“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 identical. 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 this proposition 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 the instant suit, the Applicant has shown that he has been in occupation and possession of the suit land openly, and continuously and without interruption with the knowledge of the Respondent for a period upwards of twelve (12) years immediately preceding the institution of the suit herein. The Applicant bought the suit land in 1979. The seller died two years later and since 1981 the Applicant has occupied and used the suit land as his own. As the land is ostensibly agricultural land, and as the Applicant did not obtain consent of the Land Control Board as required by the Land Control Act, Chapter 302 of the Laws of Kenya, the sale became void ab initio, and the Applicant's occupation and possession of the suit land became adverse to the title of the Respondent from the third month after the sale as the law then required consent of the Land Control Board to be obtained within 90 days. By the time the suit was instituted in 2001, the Applicant had been on the land for twenty years continuously and without interruption and with

the knowledge of the Respondent.

It is my finding that the Applicant's occupation and possession of the suit land was adverse to the title of the Respondent. It is also my finding that the title of the Respondent to the suit land was extinguished by the Applicant's adverse possession. It is further my finding that the Respondent holds the title to the suit land in trust for the Applicant. It is also my finding that the Applicant is entitled to be registered as the proprietor of the suit land in place of the Respondent. So that the interests of justice are met, I order that the name of the Respondent be deleted from the title of the suit land No. Isukha/Kambiri/808 and the Applicant be registered as the proprietor thereof. There will be no order as to costs.

Delivered, dated and signed at Kakamega this 7th day of June, 2006.

G. B. M. KARIUKI

JUDGE