



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 513 OF 2015**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CHAPTER 22**

**LAWS OF KENYA**

**AND**

**IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 LIMITATION OF ACTIONS ACT**

**BETWEEN**

**ADONIJA ONYANGO OLUOCH.....1<sup>ST</sup> PLAINTIFF**

**TOBIAS ONYANGO OLUOCH.....2<sup>ND</sup> PLAINTIFF**

**ZACHARIA ANYANGO OLUOCH.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**JACKSON LEELE MUSEKENYA (sued as the legal administrator of the**

**TIINI OLE MUSEKENYA (Deceased).....DEFENDANT**

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

**1. Introduction and the pleadings:**

The plaintiff commenced this action by way of an Originating Summons (OS) dated 20<sup>th</sup> November 2015 and filed in court on 23<sup>rd</sup> November 2015. The originating summons was supported on the affidavit of Adonija Onyango Oluoch (who the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff had given a written authority to plead and act on their behalf). To the supporting affidavit were annexed a bundle of documents in support of the facts deponed to. The plaintiffs claim is made pursuant to Section 38 of the Limitation of Actions Act, Cap 22 of the Laws. The plaintiffs aver that they have acquired title to half of land parcel number **Transmara/Olontare/140 (“the suit property”)** by prescription and/or adverse possession by reason of occupying and adversely possessing the same for period in excess of 12 years.

2. The plaintiffs through the originating summons seek the following orders:-

**1) A declaration that the defendant rights to recover half of LR No. Transmara/Olontare/140 is barred under the Limitations of Actions Act, Chapter 22 of Laws of Kenya, and her title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid portion of the parcel of land for a period exceeding 50 years.**

**2) There be an order that the plaintiffs be registered as the proprietor of half of LR No. Trans-Mara/Olontare/140, in place of Tine Ole Musekenya, now deceased, who is represented by the defendant herein by virtue of being the legal administrator thereof.**

**3) There be an order restraining the defendant either by himself, agents, servants and/or employees from interfering with the plaintiffs peaceful possession and occupation of the half portion of the suit property, that is LR No. Trans-Mara/Olontare/140, in any manner whatsoever and/or howsoever.**

4) **The deputy registrar and/or the executive officer of the Honourable High Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the half portion of LR No. Trans-Mara/Olontare/140 in favour of the plaintiffs, in the event of default by the defendant to execute the necessary transfer instruments.**

5) **Costs of this originating summons be borne by the defendant.**

6) **Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.**

3. The defendant upon being served with the originating summons and the affidavit in support filed a replying affidavit sworn on 23<sup>rd</sup> February 2016 in response to the originating summons to which various documents were annexed as annexures. The defendant denied the plaintiffs were adverse possessors and/or that they had become entitled to be registered as owners of half portion of the suit property by reason of having peacefully and quietly occupied the same for uninterrupted period in excess of 12 years as alleged by the plaintiff.

4. On 27<sup>th</sup> April 2016 the court gave directions that the originating summons be converted to a plaint and the response thereto be treated as the defence and that the evidence in the matter be taken viva voce. The 1<sup>st</sup> plaintiff testified as the sole witness in support of the plaintiffs' case. The defendant equally testified as the sole witness for the defence.

#### 5. Evidence of the parties;

The 1<sup>st</sup> plaintiff in his evidence before the court reiterated the contents of the affidavit he had sworn in support of the originating summons. The plaintiff testified that he and his family have resided on land parcel number **Transmara/Olontare/140** since 1962. He testified that when his father died in 1998 he was buried on this land but the defendant obtained an order for the exhumation of the body which the plaintiff stated they later buried on the boundary of land parcel number **Transmara/Olontare/140** and **141**. The plaintiff affirmed that land parcel number **Transmara/Olontare/141** was owned by his late father and measured 3.0hectares. The plaintiff stated that his late father had built on land parcel **140** and that he (plaintiff) and his brothers have also constructed their houses on the suit property and reside thereon but they cultivate on land parcel **Transmara/Olontare/ 141**.

6. It was the plaintiff's further evidence that land adjudication in the area was done in 1998 and that his late father had a dispute with the father of the defendant and that he filed an objection before the Land Adjudication officer but the objection was dismissed as per the objection proceedings produced as "**PEX.2 (a) and (b)**". The plaintiff stated that his father lodged an appeal to the minister being Appeal No. 133 of 1998 but stated that the outcome of the appeal was never communicated to them.

7. The plaintiff further testified that ever since they settled on land parcel **140** and built their homes there, they have never been ordered to vacate and/or evicted and that they have continuously occupied a portion of land parcel **140** where they have built their homes and carry out cultivation. It was his estimation that they have occupied about 10 acres and not half (½) acre as claimed by the defendant. The plaintiff produced a set of photographs "**PEX.4**" showing the developments effected on the land including houses belonging to the plaintiffs.

8. The plaintiff stated that the defendant together with a group of people on or about 13<sup>th</sup> November 2013 invaded the land and constructed a house thereon where his brothers (the defendant's) now reside. The plaintiff made a report of the defendant's invasion on the land to the land adjudication officer who gave him a letter to take to the chief for necessary investigations and action. The plaintiffs also reported the matter to the police before instituting the present suit. The plaintiffs assert that they have by virtue of adversely occupying and possessing a portion of the suit property for a period well in excess of 12 years they have become entitled to be registered as the owners of the subject property.

9. In cross examination the plaintiff affirmed that land parcel **Transmara/ Olontare/140** was registered in the name of Tiini Ole Musekenye, the defendant's father while parcel **Transmara Olontare/141** was registered in the name of Herbert Oluoch Ogotu, the plaintiff's deceased father. The plaintiff further admitted that the defendant's deceased father sued him vide Migori SPMCC No. 419 of 1998 where he sought to bar the burial of the plaintiffs father on land parcel **Transmara/Olontare/ 140**. The court gave an order for the exhumation of the body from the defendant's land. The plaintiff said after the exhumation, they buried the body of their father on the boundary of the two parcels of land.

10. The plaintiff further affirmed that land parcels **140** and **141** were products of land adjudication that took place in 1988. The plaintiff's deceased father filed an objection to the award of parcel **140** to the defendant's father vide objection No. 16 of 1988 and the basis of the objection was that the defendant's father had been awarded a bigger portion of land than himself. The objection was dismissed and the plaintiff's father filed Appeal No. 133 of 1998 to the Minister. The plaintiff stated that he never got to know what became of the appeal and that as at the time the defendant invaded the land the appeal had not been determined. The plaintiff maintained they never got any notification of the outcome of the appeal. The plaintiff however stated that other than the altercation and fracas that arose in 1998 following the death of their father they have peacefully continued living and residing on land parcel **140** as depicted from the photographs produced as exhibits.

11. The defendant's evidence was to the effect that Tiini Ole Musekenya was his father (now deceased) and he was the registered owner of land parcel number **Transmara/Olontare/140** measuring 19.2Ha. following the process of land adjudication. He stated that his father was registered as owner in 1997 as per the abstract of title ("**DEX.2**") and that the plaintiff's father (now also deceased) was registered as owner of land parcel **Transmara/Olontrate/141** measuring 3.0Ha as per abstract of title ("**DEX.3**"). The respective parcels of land were adjudicated in 1988 but the plaintiffs' father filed an objection No. 16 of 1988 as per the objection proceedings ("**DEX.5**"). The objection was dismissed and the plaintiffs' father lodged an appeal against the dismissal with the Minister being Appeal No. 133 of 1998 but the appeal was dismissed. That although the appeal before the Minister was heard in 2001/2 the decision on the appeal was not communicated until 2015 after the defendant made a follow up to find out what became of the appeal.

12. The defendant testified that on 14<sup>th</sup> October 2013 the Land Adjudication and Settlement Officer wrote ("**DEX.6**") to them and notified

them to observe the status quo pending the determination of the appeal pending before the Minister. Further on 27<sup>th</sup> January 2014 the Director of Land Adjudication and Settlement wrote to the Deputy County Commissioner (“DEX.7”) urging him to ensure the parties maintained the status quo pending the outcome of the appeal before the Minister. The Director of Land Adjudication finally communicated the decision on the appeal vide a letter dated 15<sup>th</sup> September 2015 (“DEX.9”). Paragraph (g) of the said letter reads as follows:-

**(g) Action to be taken: Appeal dismissed restriction to be removed. Parcel No. 140 to remain as currently registered. Under Section 29(3) of the Land Adjudication Act, I certify that the Duplicate Adjudication Register of Olontare Adjudication Section relating to parcel No. 140 is final in all respects.**

The Chief Land Registrar communicated to the District Land Registrar, Kilgoris the decision of the Minister in the appeal vide the letter dated 16<sup>th</sup> September 2015 (“DEX.8”) for necessary implementation.

13. The defendant in his evidence admitted the plaintiffs have their houses and reside on land parcel **140** although they carry on their cultivation on land parcel **141**. The defendant explained that he did not seek to have them evicted since they were waiting for the decision on the appeal the that plaintiff’s father had made to the Minister.

#### **14. Submissions, Analysis and Determinations:**

The parties filed written submissions following the close of the trial. The plaintiff filed his submissions on 8<sup>th</sup> January 2018 where he reiterated the facts and the evidence as adduced by the plaintiff. The thrust of the plaintiffs submission was that the plaintiffs have occupied the suit land peacefully and continuously and uninterrupted for a period exceeding 50 years. The plaintiffs contention was that they have by reason of effluxion of time become entitled to be registered as owners of half portion of land parcel **Transmara/Olontare/140** by virtue of having possessed the land adversely. The plaintiff submitted that the evidence showed they had constructed houses as depicted by the photographs produced in evidence in which they have resided since the 1960s which was proof that they had adversely been in possession of the suit land. The plaintiff placed reliance on the following judgments of this court where the court had dealt with the issue of adverse possession:- **Damon Odero & 2 Others -vs- Alex Odero Kasongo, Kisii ELC No. 100 of 2011(OS) (unreported), Wilkister Ntaita Onyancha -vs- Baskaria Omosinga Omogwasi, Kisii ELC No. 38 of 20018 (OS) (unreported), Joseph R. Anganyo -vs- Agnes Anyango Akumu, Kisii ELC 603 of 2016 (OS) (unreported) and David Akongo Obilo -vs- Joyce Atieno Waga, Kisii ELC No. 79 of 2011 (OS) (unreported).**

15. The defendant in his filed submissions contended that the instant matter was *res judicata* considering that the matter was adjudicated to in accordance with the provisions of the Land Adjudication Act, Cap 284 of the Laws of Kenya where the plaintiffs’ father’s objection before the Adjudication Officer was dismissed and a subsequent appeal to the Minister was equally dismissed. The defendant also avers that his late father’s case vide Migori SPMCC No. 419 of 1998 against the plaintiffs was resolved in favour of the defendant’s father and the plaintiffs were ordered to be evicted.

16. The defendant further submits that the plaintiffs have not in any event proved the claim for adverse possession as against the defendant. For a party to succeed in an action for adverse possession the ingredients that constitute adverse possession must be established. The person against whom the adverse possessor claims must be the registered owner; the adverse possessor must have dispossessed the true owner and the adverse possessor must be using the land in a hostile manner which was inconsistent with the true owner’s enjoyment of the soil for the purpose for which he intended to use it. In the case of **Wambungu -vs- Njuguna [1983] KLR 172** the Court of Appeal stated as follows:-

**“For one to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.**

**The proper way of assessing proof of adverse possession would then be whether or not the title hold has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”**

17. Further the person claiming adverse possession must show and demonstrate the period of adversity has run against the person against whom the claim is made for a period of not less than the statutory period of 12 years and that such time could properly run against the person. The period must be for an interrupted period of 12 years. The defendant places reliance on Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 28, paragraph 768 where it states:-

**“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceased to be in possession of his land.”**

18. In the present matter the issues that arise for determination are as follows:-

**(i) Whether the plaintiffs have been in adverse possession of a portion of the defendants land for a period in excess of 12 years.**

**(ii) Whether the period of adversity could run during the process of land adjudication.**

**(iii) What reliefs, if any, should the court grant?**

19. Both the plaintiffs and the defendant admit that **Transmara/Olontare** was an adjudication section in 1988 and that the plaintiff's deceased father was adjudicated as proprietor of land parcel number **Transmara/Olontare/141** measuring 3.0Ha while the defendant's deceased father was adjudicated as proprietor of land parcel **Transmara/Olontare/140** measuring 19.2Ha. The plaintiff's father apparently was occupying part of what is now land parcel **140** and had constructed his homestead thereon. Being dissatisfied with the adjudication the plaintiffs' deceased father lodged an objection No. 16 of 1988 before the Land Adjudication and Settlement Officer and his claim was for ½ of parcel **140** which had been awarded to the defendant's late father by the adjudication committee. The objection was heard and was dismissed on 27<sup>th</sup> January 1988 ("**PEx.2**"). The plaintiffs' father lodged an appeal against the dismissal of his objection to the Minister and the appeal was equally dismissed and the decision communicated to the Chief Land Registrar by the Director of Land Adjudication and Settlement vide the letter dated 15<sup>th</sup> September 2015 ("**DEx.9**") for implementation.

20. The Land Adjudication Act, Cap 284 Laws of Kenya makes provision for adjudication of persons rights and interests in land and the registration of those rights and/or interests. The Act provides an independent dispute resolution mechanism and a party where the land is under adjudication can only get access to a court of law as provided under Section 30(1) of the Act with the consent of the Adjudication officer. Section 30(1) provides:-

**30(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.**

The preamble of the Act aptly captures the broad objective of the Act thus:-

**"An Act of Parliament to provide for the ascertainment and recording of rights and interest in Trust land, and for purposes connected therewith and purposes incidental thereto."**

21. The Act provides for an exhaustive and comprehensive mechanism for the ascertainment and recording of rights and interest in land. In the present case, the parties invoked the provisions of the Land Adjudication Act in resolving their dispute. From the record that process came to a close on 15<sup>th</sup> September 2015 when the Director of Adjudication and Settlement communicated the Minister's decision on the appeal by the plaintiff's father. The record further shows that when titles in respect to the Transmara/Olontare Adjudication Section became available to be issued a restriction was entered against land parcel **Transmara/Olontare/140** which had been adjudicated in favour of the defendant's father since there was an appeal pending before the Minister. Entry No. 3 in Part B – Proprietorship Section of the title provided as follows:-

**"3. 19.4.99 - Restriction unless by the order of the Chief land Registrar or the court no dealings shall be registered until the appeal to the Minister is finalized."**

22. Following the communication of the Minister's decision on the appeal the restriction was removed on 23<sup>rd</sup> September 2015 as per Entry No. 4 endorsed against the title. The inhibition of the title of parcel 140 by way of registration of the restriction by the Chief Land Registrar was to protect the process under the Land Adjudication Act until it was completed.

23. It is my considered view that notwithstanding the fact that the plaintiff may have been in occupation of land parcel 140 the same was under dispute that was being handled pursuant to the provisions of the Land Adjudication Act and that until the process under the Land Adjudication Act was completed no adverse possession could arise. My position is that the period of adversity in regard to land that was subject to the provisions of the Land Adjudication Act could only start running from the time the adjudication process was finalized. In the present matter as observed earlier in this judgment the process of adjudication under the Land Adjudication Act in regard to the suit property was finalized on 15<sup>th</sup> September 2015 when the Director of Land Adjudication issued a certificate of finalization under Section 29(3)(b) of the Act. Section 29(3)(b) of the Land Adjudication Act provides:-

**29.(3) When the appeals have been determined the Director of Land Adjudication shall-**

**(a) .....**

**(b) Certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.**

24. The occupation of the plaintiff and his family of a portion of land parcel 140 adjudicated in favour of the defendant's deceased father was therefore not adverse to the rights and interest of the defendant's father until the adjudication process was finalized. During the process of adjudication it is normal and usual for parties to be relocated from parcels that they have hitherto occupied to the land parcels allocated to them by the adjudication committee. Instead of the plaintiff's deceased father and his family relocating to the land parcel **141** allocated to them they opted to file an objection claiming ½ portion of land parcel **140** and after the dismissal of the objection, an appeal to the Minister which was rejected. The defendant could not have properly initiated action to evict the plaintiffs when the dispute had not been finally determined.

25. Although the defendant had in his submissions contended that the present action was *res judicata*, it is my view that the principle was inapplicable in the circumstances of this case. The issue raised in the present suit was whether or not the plaintiff had acquired title to a portion of the defendant's land by virtue of being an adverse possessor. This was not an issue in the Migori SPMCC No. 419 of 1998 and could not have been determined. In that suit the court held that the defendant's deceased father was the registered owner of land parcel **140** and barred the plaintiff's deceased father from being buried thereon which resulted in the exhumation of the plaintiff's deceased father's body which had been buried on the land. As relates to the objection filed before the Adjudication Officer and consequent appeal to the Minister that related to the adjudication of rights and interest to land under the provisions of the Land Adjudication Act and the issue of

adverse possession could not have arisen.

**26. Decision:**

In the circumstances, it is my determination that the plaintiffs though they have been in occupation of a portion of the defendant's land parcel **Transmara/Olontare/140** as established through the evidence, their occupation and possession was not as adverse possessors as the process of adjudication had not been completed. The claim of adverse possession cannot arise in regard to land that is under adjudication and that in regard to such land the period of adverse possession can only start to run from the time when the adjudication process is finalized. In the instant case, such period could only start to run from 15<sup>th</sup> September 2015 when from the record the process of adjudication was finalized.

27. The net result is that I hold and find that the plaintiffs have failed to prove their case on a balance of probabilities. The plaintiffs are not entitled to the orders sought in the originating summons and the same is ordered dismissed with costs to the defendant.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20<sup>TH</sup> DAY of JULY 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of :**

Mr. Momanyi for Ogutu for the plaintiffs

Mr. Abisai for the defendant

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**