



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT CASE NO.79 OF 2011 (O.S)**

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

**AND**

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

**BETWEEN**

**DAVID AKONGO OBILLO ..... PLAINTIFF**

**VERSUS**

**JOYCE ATIENO WAGA Sued as the legal administratrix of**

**JOSHUA WAGA, DECEASED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced the instant suit by way of an originating summons dated 27<sup>th</sup> April 2011. The plaintiff claims that he has acquired title to land parcel **LR No. Kanyamkago/Kawere I/1369** by prescription and/or adverse possession and seeks the following orders:-

**1. A declaration that the defendant's rights to recover the whole of LR No. Kanyamkago/Kawere I/1369 (hereinafter referred as "the suit property") is barred under the Limitation of Actions Act, Cap 22 Laws of Kenya, and their title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 21 years.**

**2. There be an order that the plaintiff be registered as the proprietor of the whole of LR No. Kanyamkago/Kawere I/1369 in place of the deceased.**

**3. There be an order restraining the defendant either by herself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said parcel of land, that is, LR No. Kanyamkago/Kawere I/1369 in any manner whatsoever and/or howsoever.**

**4. Costs of the originating summons be borne by the defendant.**

**5. Such further and/or other orders be made as the court may deem fit and expedient in the**

**circumstances of the case.**

The plaintiff premises the originating summons on the grounds set out on the body of the application and on the supporting affidavit of **David Akongo Obillo** the plaintiff herein sworn on the 27<sup>th</sup> April 2011.

2. It is the plaintiff's case that he pursuant to an agreement of sale dated 20<sup>th</sup> April 1990 made between himself and one Joshua Waga (now deceased) entered into the suit property and that he has occupied and possessed the suit property continuously and without any interruption since the date of the agreement now over 24 years. The plaintiff states the agreement of sale constituted a controlled transaction within the meaning of Section 6 of the Land Control Act, Cap 302 Laws of Kenya. That no consent was sought and obtained from the appropriate land control board within the prescribed period with the result that after the statutory period of 6 months within which the consent of the Land Control Board ought to have been obtained lapsed without the consent having been obtained the occupation and possession of the suit property by the plaintiff became adverse to the defendant (deceased). The plaintiff contends the defendant's title became extinguished after the plaintiff remained in adverse possession for a period of 12 years and thus he is now entitled to be registered as owner of the suit property in place of the defendant and/or the defendant's personal legal representative.

3. The plaintiff on 20<sup>th</sup> May 2011 filed a Notice of Motion application dated 19<sup>th</sup> May 2011 against the defendant seeking an interlocutory injunction pending the hearing of the suit. The defendant had been served with the originating summons on 5<sup>th</sup> May 2011 and was served with the Notice of Motion on 30<sup>th</sup> May 2011. The defendant filed a replying affidavit to the Notice of Motion sworn on 18<sup>th</sup> July 2011 through the firm of J. O Magolo & Co. Advocates. The application was heard interpartes before **Hon. Lady Justice Sitati** and she delivered a ruling on the application on 28<sup>th</sup> February 2012 whereby she granted an injunction in favour of the plaintiff stating thus:-

**19. Accordingly, I grant an order of temporary injunction in terms of prayer 3 of the Notice of Motion dated 19<sup>th</sup> May 2011 to restrain the defendant/respondent either by herself, her agents, servants and/or anyone claiming under the defendant/respondent, from entering into, trespassing onto, cultivating, building structures, interfering with and/or in any other manner, whatsoever, dealing with the suit property, that is LR No. Kanyamkago/Kawere I/1369 and/or any portion thereof pending the hearing and determination of this suit. Costs of this application shall abide the outcome of the main suit.**

4. The defendant filed a reply to the originating summons vide an affidavit sworn on 29<sup>th</sup> July 2011 and a further replying affidavit sworn on the same date and filed in court on 4<sup>th</sup> August 2011. The defendant deposed in the affidavit that she is the widow of the late Joshua Waga who died on 18<sup>th</sup> June 2005 and that she is the legal administrator of his estate. The defendant deposes that the deceased has never sold the suit land to the plaintiff or anybody else but acknowledges that the deceased sold land parcel number **Kanyamkago/Kamwere I/1370** to the plaintiff. The defendant denies the agreement for sale dated 20<sup>th</sup> April 1990 and claims the same is a forgery. The defendant avers that the plaintiff could not have purchased the suit property as the property was charged to the Agricultural Finance Corporation (AFC) and was not free of encumbrances as the agreement states. The defendant states she is the one who paid the amount of kshs. 130,000/= outstanding as loan to the Agricultural Finance Corporation as evidenced by payment receipts annexed as "A-2". The defendant avers that the plaintiff is being opportunistic as he waited until the death of the deceased and after the defendant had paid the outstanding loan to Agricultural Finance Corporation and obtained a discharge of the property to stake a claim to the property.

5. The defendant denies that the plaintiff has been in occupation and possession of the suit property or that he has planted any sugarcane on the property as alleged. The defendant further states that indeed, if there was a sale of the suit property, which she denies, there was no consent of the Land Control Board granted in accordance with the provisions of the Land Control Act, Cap 302 Laws of Kenya and avers that the plaintiff's recourse is only for a refund of the purchase price.

6. The plaintiff filed a further supporting affidavit sworn on 15<sup>th</sup> September 2011 in response to the defendant's replying affidavit and further replying affidavit. In the further supporting affidavit the plaintiff deposes that the defendant was married to the deceased in 1995 after the deceased had already sold the suit land to the plaintiff vide the sale agreement of 20<sup>th</sup> April 1990. The plaintiff further reiterated he entered into a lawful agreement of sale with the deceased which was duly in writing and attested. The plaintiff avers that application for the Land Control Board's consent was duly completed but could not be lodged as the charge in favour of Agricultural Finance Corporation was still subsisting. The plaintiff asserts that he took possession of the suit property and was a contracted sugarcane farmer with **P. B Ogolla Jaggery Factory** who were harvesting his cane from the suit property. The plaintiff states he even filed a suit against P. B Ogolla Jaggery, Factory when they failed to pay him for the cane and annexes a copy of affidavit filed in Kisii CMCC No. 55 of 2001 marked "DA03" which under paragraph 3 shows the plaintiff's cane was grown at East Kanyamkago Plot No. 1369.

7. The originating summons was fixed for hearing before me on 24<sup>th</sup> November 2015 when only the plaintiff and his advocate attended. After satisfying myself that the defendant had been duly served with a hearing notice as per the affidavit of service sworn by one Joshua Otieno Okeyo on 23<sup>rd</sup> November 2015 and there was no reason offered for the absence of the defendant and/or her advocate. I allowed the plaintiff to proceed with the hearing ex parte.

8. The plaintiff testified as PW1 and called no other witness. The plaintiff testified that in April 1990 one Joshua Waga (deceased) approached him and explained that he had some financial problems and offered to sell his Plot No. 1369 to him. The plaintiff stated that before he agreed to buy the property he confirmed the same was registered in the deceased name. The copy of search dated 11<sup>th</sup> April, 2011 included in the plaintiff's bundle of documents shows Joshua Waga (deceased) was registered owner of the suit property in 1981. The plaintiff explained that the deceased and himself entered into the sale agreement dated 20<sup>th</sup> April 1990 which was witnessed by one R. O Odhiambo Advocate. The plaintiff stated that he paid the sum of Kshs. 85,000/- as the purchase price to the deceased whereupon he took possession of the land and started using the same.

9. The plaintiff stated that he started farming sugarcane and maize on the parcel of land and maintained that he had bought the entire parcel of land and was using the whole of it. He testified that for all the time since he entered into possession, his possession has been continuous and uninterrupted. He stated the defendant knew he had bought the land and that she at no time ever attempted to remove him from the land. He however testified that the defendant filed a succession cause being Migori CM Succession Cause No. 24 of 2010 where she included the suit land as part of her late husband's estate and that following the succession cause the defendant was registered as the owner of the suit land as beneficiary of her late husband. The plaintiff states that this discovery led him to lodge a caution against the title to the suit land and to institute these proceedings where he seeks to be declared as owner of the suit property.

10. The plaintiff on the directions of the court filed written submissions dated 18<sup>th</sup> January 2016 on 20<sup>th</sup> January 2016. I have reviewed the pleadings by the parties, the evidence by the plaintiff and the submission filed by the plaintiff and the issues for determination in this suit are:-

- (i). Whether the defendant has been in possession of land parcel LR No. Kanyamkago/Kawere I/1369 for a period of over 12 years.
- (ii). Whether the possession has been adverse to the rights and interests of the registered owner.
- (iii). Whether the plaintiff is entitled to the reliefs sought.

11. There is no dispute that Joshua Waga (deceased) was the registered proprietor of land parcel LR No. Kanyamkago/Kawere I/1369 having been registered as owner on 9<sup>th</sup> December 1981 and issued with a title on 10<sup>th</sup> December 1981 (see abstract of title). In April 1990 when the plaintiff claims to have purchased the suit property from the deceased, the deceased was the registered owner and hence could validly contract to sell the property to the plaintiff. I have reviewed the alleged sale agreement dated 20<sup>th</sup>

April 1980 which the defendant contests and states is a forgery. The defendant was not a party to the agreement and was not present when the same was entered into. The plaintiff states the defendant had not been married to the deceased at the time he purchased the property stating that the defendant was married to the deceased in 1995 and therefore had nothing to do with the agreement. The agreement between the plaintiff and the deceased was attested to by an advocate one R. O Odhiambo and it clearly shows the property the subject of the sale was the suit property. I see no reason to doubt the agreement and it is my finding and holding that the plaintiff entered the agreement for the purchase of the suit land with the deceased.

12. I accept the plaintiff's evidence that he took immediate possession of the suit land as was provided in the sale agreement and started farming sugarcane. There is evidence that the plaintiff was indeed farming on the suit land as attested to by the contract that was entered into between the plaintiff (as farmer) and M/s P. B Ogolla Jaggery Factory where the latter were to harvest the plaintiff's cane and deliver for milling. The breach of that contract by P. B Ogolla Jaggery Factory led the plaintiff to institute court proceedings against P. B Ogolla claiming payment for cane delivered through them to the millers.

13. On the evidence tendered by the plaintiff, I am satisfied the plaintiff was in possession of the suit property and was using the suit property as his own property. The agreement for sale to the extent that it was subject to the provisions of the **Land Control Act**, Cap 302 Laws of Kenya became null and void after the expiry of 6 months as the consent of the Land Control Board was not obtained as is required under the Act. The possession of the suit property by the plaintiff after the expiry of the 6 months became adverse to the rights and interests of the registered owner. The plaintiff states he continued in possession of the suit property without any interruption from the registered owner such that after the expiry of 12 years from 21<sup>st</sup> October 1990 when the statutory period of 6 months for obtaining the Land Control Board's consent expired the title of the registered owner became extinguished. Thus as at 18<sup>th</sup> June 2005 when the deceased died his title to the suit property had become extinguished in favour of the plaintiff by virtue of the doctrine of adverse possession.

14. There is no evidence of any disruption of the plaintiff's adverse possession of the suit property. The defendant was appointed the personal legal representative of the deceased on 21<sup>st</sup> May 2010 and on 24<sup>th</sup> February 2011 caused the suit land to be transferred to her as the beneficiary of the deceased. The defendant in the meantime had settled the loan monies owing to the Agricultural Finance Corporation to enable them to discharge the title. The plaintiff in his evidence stated that part of the purchase price of kshs. 85,000/= that he paid was to redeem the Agricultural Finance Corporation loan but he averred that the deceased instead of applying the money to redeem the loan went ahead to use the same to marry the defendant as the 2<sup>nd</sup> wife. Although it is the defendant who paid the monies owing to Agricultural Finance Corporation in 2009 that did not interrupt the adverse possession of the suit land by the plaintiff and as I have observed elsewhere in this judgment the title of the deceased had become extinguished by the year 2002 after the plaintiff had been in adverse possession for 12 years so that as at 18<sup>th</sup> June 2005 when the deceased died he had no title in the suit property. The defendant no doubt paid the outstanding Agricultural Finance Corporation loan with the object of being registered as owner of the suit property as the beneficiary of the deceased.

15. After the expiry of 12 years of being in adverse possession the plaintiff acquired a right of being registered as the owner of the suit property. The plaintiff's right became an overriding interest in terms of Section 30 (g) of the **Registered Land Act**, Cap 300 Laws of Kenya (now repealed) and replaced by Section 28 (h) of the **Land Registration Act, No. 3 of 2012**. The registration of the defendant as owner of the suit property on 24<sup>th</sup> February 2011 was in this regard subject to the plaintiff's overriding interest and to that extent the defendant could only hold the suit land in trust for the plaintiff. See the case of **Peter Thuo Kairu –vs- Kuria Gacheru [1988] 2 KAR pgs 111-116** where the court held that the title of a registered owner gets extinguished by prescription after the expiry of 12 years of adverse possession and further that the registered owner holds the title as a trustee for the adverse possessor who becomes entitled to apply to be registered as owner.

16. In the case of **Githu –vs- Ndeete [1984] KLR pgs 776-781** the Court of Appeal thus:-

**1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.**

**2. Where the person in possession has already began and is in the course acquiring rights under Section 7 of the Limitation of Actions Act (Cap 22) and by virtue of Section 30 (f) of the Registered Land Act (Cap 300), those rights are overriding interests to which the new registered purchaser's title will be subject.**

17. In the present case I have found and held that the plaintiff was in possession of the suit land as an adverse possessor as he had dispossessed the owner and was in active use of the suit land where he was farming cane. The deceased title had become extinguished in or about the year 2002 so that in 2011 when the defendant became registered as owner through succession there was really no land to inherit as it had ceased to belong to the deceased. The defendant thereof became registered owner of the land whose title had become extinguished and she could not acquire any title to the land in view of the fact that the deceased's title through whom she was claiming had lapsed. The defendant could only hold the title as a trustee of the plaintiff.

18. I have in my discussion/analysis answered issues (i) and (ii) which I set out earlier in this judgment in the affirmative and I consequently on the evidence and material placed before me find and hold that the plaintiff has proved his case on a balance of probabilities. I accordingly enter judgment in favour of the plaintiff on the following terms:-

**1. That the plaintiff be and is hereby declared to be entitled to be registered as the owner of LR No. Kanyamkago/Kawere I/1369 by virtue of having acquired title to the land through adverse possession.**

**2. That the land registrar Migori be and is hereby directed to register David Akongo Obillo, the plaintiff herein as the owner of land parcel Kanyamkago/Kawere I/1369 in place of Joyce Atieno Waga.**

**3. The Deputy Registrar to execute all necessary documents that may be required to be executed to give effect to this judgment.**

**4. The costs of the originating summons are awarded to the plaintiff.**

**Judgment dated, signed and delivered at Kisii this 22<sup>nd</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Ochwangi for the plaintiff

N/A for the defendant

**J. M. MUTUNGI**

**JUDGE**