



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

**ENVIRONMENT AND LAND COURT CASE NO. 31 OF 2010**

**JACOB HOLMES DALMAS ASETO.....1<sup>ST</sup> PLAINTIFF**

**Suing as the legal administrator of**

**DALMAS ONDIEK OKOT, DECEASED**

**JON NYANJWA OIMA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HARRISON ASETO KOLA.....1<sup>ST</sup> DEFENDANT**

**JACTON OTIENO KOLA.....2<sup>ND</sup> DEFENDANT**

**RICHARD ABEKA KOLA.....3<sup>RD</sup> DEFENDANT**

**Suing as the legal administrator of KOLA NYAKINDA, DECEASED**

**JUDGMENT**

1. The plaintiff filed the instant originating summons on 9<sup>th</sup> February 2010 and seeks the following orders:-

**1. A declaration that the defendants right to recover a portion of LR No. South Karachuonyo/Kamenya/1498 measuring approximately 8 acres is barred under the Limitation of Actions Act, chapter 22 Laws of Kenya, and their title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid portions of the parcel of land herein for a period exceeding 12 years.**

**2. That there be an order that the plaintiffs be registered as the proprietors of the portions measuring 4 acres, respectively, of LR No. South Karachuonyo/Kamenya/1498 in place of the defendants.**

**3. That there be an order restraining the defendants by themselves, agents, servants and/or employees from interfering with the plaintiffs' peaceful possession and occupation of the said portions of the parcel of land, that is LR No. South Karachuonyo/Kamenyi/1498 in any manner whatsoever and/or howsoever.**

#### **4. Costs of the originating summons be borne by the defendants.**

The originating summons was supported on the annexed supporting affidavit sworn on 9<sup>th</sup> February 2010 by Jacob Holmes Dalmas Aseto the 1<sup>st</sup> plaintiff herein. The 1<sup>st</sup> defendant, Harrison Aseto Okola swore a replying affidavit dated 29<sup>th</sup> March 2010 in opposition to the plaintiffs originating summons.

2. Directions were given on 17<sup>th</sup> May 2010 that the Originating Summons be heard by way of viva voce evidence. Hearing commenced before Hon. Justice Makhandia on 1<sup>st</sup> November 2010. The 1<sup>st</sup> plaintiff testified as PW1 and it was his evidence that his late father, Dalmas Ondieki Okoth purchased a parcel of land measuring 4 acres from one Kola Nyakinda out of a parcel of land known as **South Karachuonyo/Kamenya/744** on 5<sup>th</sup> October 1972.

3. PW1 claimed to have been present when his late father bought the parcel of land and stated that the agreement was reduced into writing as per the agreement document produced as PEx. 2. He testified that his father took possession planted trees and remained in uninterrupted possession until his death on 28<sup>th</sup> March 2005. The 1<sup>st</sup> plaintiff stated he was still using the 4 acres that his father bought from Kola Nyakinda who he stated died in the 1990's. In 2009 the 1<sup>st</sup> plaintiff stated the defendant cut down the fence that demarcated their land and he testified they reported the incident to the police and to the local chief who gave them a letter dated 8<sup>th</sup> December 2009 produced as PEx4. PW1 further testified that the original land parcel 744 changed to parcel 1498 and produced the abstract of title (green card) as PEx 3 and affirmed that the land is still registered in the name of Kola Nyakinda. PW1 testified for and on behalf of the 2<sup>nd</sup> plaintiff on the basis of the authority given to him by the 2<sup>nd</sup> plaintiff.

4. In regard to the 2<sup>nd</sup> plaintiff's claim PW1 testified that the 2<sup>nd</sup> plaintiff also purchased 4 acres from Kola Nyakinda and paid 6 head of cattle as the consideration and produced an agreement of sale dated 10<sup>th</sup> May 1978 as PEx. 6. PW1 stated the purchased portions were adjacent to each other and that the 2<sup>nd</sup> plaintiff was also cultivating his portion of 4 acres and had planted trees. PW1 stated that he and the 2<sup>nd</sup> plaintiff had been occupying their respective parcels of land peacefully and openly with the knowledge of the defendants until 2009 when the defendants moved into the land and destroyed their boundary fences and trees. The plaintiff's averred that the defendants had not at any time before this incident in 2009 when they reported to the chief chased them away from the land.

5. In cross examination PW1 stated that in the year 2010 (when he was testifying) he had not cultivated anything on the land. He affirmed that he does not reside on the land and that his homestead is on another parcel of land about 4 kms away. He stated he knew one Phoebe Asiyo but did not know she was the one who was cultivating the land and had planted crops on the land. He denied the defendants had evicted him from the land stating that they merely destroyed the fencing. In re-examination the witness stated that after the fence was pulled down he stopped cultivating the land.

6. The plaintiffs called one John Onuda N. Aon the Chief South Karachuonyo location as PW2. He testified that he knew the 1<sup>st</sup> plaintiff's father, Dalmas Odieki Okolla, who passed away before the year 2000. PW2 stated he became chief on 1<sup>st</sup> June 1997 and that he had known Kola Nyakinda from 1972 when he relocated to Ndiwa but he has since passed away. PW2 testified the plaintiffs bought two parcels of land of 4 acres each from the said Kola Nyakinda's Plot No. 744 as per Ex 2 and 3. He said the plaintiffs planted trees and the boundaries of the parcels of land were marked by sisal plants. He stated the plaintiffs used to cultivate maize, millet and cotton. He confirmed the plaintiffs had not physically occupied the parcels but only used to cultivate until 2006 when a dispute arose and the defendants damaged the boundary marks. The witness stated he gave letters to the plaintiffs for them to obtain assessment of damage. Following this incident the witness stated the defendants leased the 2 parcels of land of the plaintiffs to another person. It was PW2 evidence that the plaintiffs occupied the parcels of land from 1972 and 1978 respectively until 2006 when the 1<sup>st</sup> defendant stopped them from cultivating any more.

7. The witness in cross examination confirmed that the plaintiffs after the dispute arose in 2006 never cultivated the land anymore. He further affirmed the 1<sup>st</sup> defendant leased out the land to Richard Asiyo Genga who is husband of Hon. Phoebe Asiyo. The 3<sup>rd</sup> defendant, Richard Abeka Kola testified as DW1 and denied knowledge that his late father sold the suit land to the plaintiff. He testified that the plaintiffs were evicted from the land in 2006 by the 1<sup>st</sup> defendant and the land was leased to Phoebe Asiyo who upto the time the witness was testifying cultivating the land. The witness stated he has never been to or cultivated the suit land himself.

8. The 1<sup>st</sup> defendant, Harrison Aseto Kola, testified as DW2. He stated that land parcel South Karachuonyo/Kamonya/1498 was registered in the name of his father. He denied that the plaintiffs have been in occupation of the parcel of land for over 12 years and averred that the plaintiffs have never had a homestead on the suit land. DW2 denied that the plaintiffs have ever cultivated the land stating that it was one John Ouso Andele who had been in occupation and had been cultivating the land. He stated that in 2006 the said John Ouso Andele informed him that the plaintiff had planted a sisal boundary on the land and upon getting that information DW2 stated that he and his children went and removed the sisal plants which were about 1 week old. DW2 stated that he thereafter handed over the land to Phoebe Asiyo who continues to occupy and cultivate the land to date.

9. In cross examination DW2 denied that his father had sold any land to the plaintiff stating that his deceased father only sold 1 acre to John Andele. The witness reiterated that the plaintiff had never occupied the suit land. DW2 stated that the plaintiff had purported to sell a portion of 1 acre of the land to a third party and that is when the sisal boundary markings which DW2 removed were planted. The witness emphasized that after thwarting occupation of the suit land by the plaintiff by removing the sisal plants he handed over the land to Phoebe Asiyo who has been cultivating on the property ever since. DW2, stated that his mother was buried on the suit land although his father was buried at Ndhiwa.

10. DW3, Jackton Otieno Kola, who is a step brother of the 1<sup>st</sup> defendant testified that his deceased father had 3 wives amongst whom he divided the suit land. According to the witness the 1<sup>st</sup> defendant's mother as the eldest wife got 7 acres, DW3's mother as the 2<sup>nd</sup> wife got 5 ½ acres and the 3<sup>rd</sup> wife got 3 acres. DW3 testified that the 1<sup>st</sup> defendant wanted his father to share the 7 acres given to his mother with his younger brother which his father did and the 1<sup>st</sup> defendant was given 4 acres and his brother 3 acres. DW3 stated that the 1<sup>st</sup> defendant requested their late father to sell his portion for him so that he could use the sale proceeds to pay dowry and buy land at Kanyamwa, Ndhiwa. The witness stated their father sold the portion that was to be the 1<sup>st</sup> defendant's to the plaintiffs' father and the portion that belonged to the 3<sup>rd</sup> wife was sold to the 2<sup>nd</sup> plaintiff. It was DW3's evidence that it is only the portion that was to go to his mother that remains out of his late father's land in Karachuonyo. The witness testified further that the portion that was to go to the 1<sup>st</sup> defendant's brother was sold to the 2<sup>nd</sup> plaintiff and that the sales took place in 1972 and 1978 respectively.

11. Questioned by the court, DW3 stated that the 1<sup>st</sup> plaintiff had been using the land and the 2<sup>nd</sup> plaintiff used the land for sometime before he was chased away by the 1<sup>st</sup> defendant. DW3 stated he did not know who was using the property at the time he was testifying.

12. John Ouso Andele testified as DW4. He stated that the defendants father, Kola Nyakinda, was his uncle and that when he migrated to Kanyamwa, Ndhiwa he left him (DW4) to take care of his plot No. 1498. The witness testified that he lives on his plot which is nearby and that he has been cultivating a portion of Plot No. 1498. He denied any knowledge of the plaintiffs having purchased the said plot. The witness further testified that the plaintiffs have never occupied the suit land and neither have they been cultivating the same. DW4 stated that the land had remained fallow from the time Kola Nyakinda migrated until 2005 when Phoebe Asiyo cleared the bush and started cultivating the same and has been so cultivating to date without any interference. DW4 stated that the 1<sup>st</sup> defendant on one occasion chased the plaintiffs from Plot No. 1498 when they had come to mark some boundary on the suit plot.

13. In cross examination DW4 stated that he was sold a portion of 3 acres out of land parcel 1498 in 1982

but no formal agreement was made in writing. The witness further stated in 1972 when the 1<sup>st</sup> plaintiff claim to have purchased the land he was already cultivating Plot No. 1498. The witness denied being aware of the alleged agreements entered with the plaintiffs in 1972 and 1978 respectively.

14. The parties filed their respective final submissions to articulate their positions in regard to the suit. The plaintiff filed his submissions dated 30<sup>th</sup> November 2015 on the same date. The 1<sup>st</sup> defendants submissions dated 12<sup>th</sup> November 2015 were filed on 24<sup>th</sup> November 2015 while the 2<sup>nd</sup> defendant's submissions dated 17<sup>th</sup> February 2016 were filed on 18<sup>th</sup> February 2016.

15. Having reviewed the pleadings, the evidence adduced by the parties and the submissions filed by the parties the issues that stand out to be determined may be stated thus:-

**1. Whether the plaintiffs were in adverse possession of land parcel South Karachuonyo/Kamenya/1498 following the sale agreements stated to have been entered into in 1972 and 1978 respectively;**

**2. Whether the possession by the plaintiffs (if at all it was adverse) was interrupted by the actions of the 1<sup>st</sup> defendant in 2005/2006 when he effectively chased them away from the land.**

**3. Whether the plaintiffs are entitled to the reliefs sought in the originating summons.**

16. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' evidence is that they purchased portions of land parcel South Karachuonyo/Kamenya/1498 from one Kola Nyakinda, deceased father of the defendants. The 1<sup>st</sup> plaintiff produced a purported agreement of sale made between him and Kola Nyakinda (deceased) dated 5<sup>th</sup> October 1972 as PEx 2 and agreement made between the deceased and the 2<sup>nd</sup> plaintiff dated 10<sup>th</sup> May 1978 as PEx. 6. The plaintiffs stated they entered into possession and occupation of the portions they purchased and started cultivating the same until sometime in 2009 when the 1<sup>st</sup> defendant came and chased them away. The defendants deny the sale agreements and all that the plaintiffs occupied and were cultivating the portions of land since 1972 and 1978 respectively. The 1<sup>st</sup> defendant state that the person who had been sold a portion of the suit land was DW4 and that he is the one who had been permitted to cultivate the land. The 1<sup>st</sup> defendant claims that the portions that the plaintiffs' claim to have been cultivating had remained fallow and were only cleared and cultivated by one Phoebe Asiyo to whom the plaintiffs had leased the land in 2006.

17. The 1<sup>st</sup> defendant stated that the 1<sup>st</sup> plaintiff had in 2006 invaded the land and purported to demarcate the land using sisal plants and upon the 1<sup>st</sup> defendant being notified by DW4 of the actions of the plaintiffs the 1<sup>st</sup> defendant came and uprooted the sisal plants and from that time he handed over the land to Phoebe Asiyo who has been cultivating the same ever since. The witness PW2 called by the plaintiffs was the chief of the area and basically confirmed that he knew Kola Nyakinda, the father of the defendants and that he had sold portions of land to the plaintiffs as per the agreements produced as exhibits. The witness stated the plaintiffs had been cultivating the land until 2006 when the defendants chased the plaintiffs away and damaged the boundary marks. The chief stated that the plaintiffs reported the matter to his office and he gave them a letter which the plaintiffs used to have a caution registered against the title on 24<sup>th</sup> February 2006 as per the abstract of title produced as PEx.3. The chief further issued the plaintiffs with the letter dated 8<sup>th</sup> December 2009 produced as PEx. 4 where he confirms the plaintiff were indeed chased away from the land by the defendants in 2006.

18. The plaintiffs had not built on the suit land and only claim to have been cultivating on the land. DW4 whose land neighbours the suit land testified that the plaintiffs had not been cultivating on the land and stated that the same had remained fallow and that it was Phoebe Asiyo who cleared the bushes when the land was leased to her by the 1<sup>st</sup> defendant. While it may be true that the late Kola Nyakinda may have sold some land to the 1<sup>st</sup> plaintiff's and the 2<sup>nd</sup> plaintiff as claimed those agreements being in regard to

land that would fall within the provisions of the Land Control Act, Cap 302 of the Laws of Kenya by virtue of Section 6 (1) of the Act became null and void as no consent of the relevant land control board was sought and obtained within the prescribed period under the Act. The agreements therefore are unenforceable for being void.

19. The plaintiffs suit is predicated on the fact that the plaintiffs have been in continuous and uninterrupted possession of the suit land in circumstances that were adverse to the rights and interest of the registered owner and consequently the title of the registered owner has been extinguished such that the plaintiffs have become entitled to be registered as the owners of the portions of the suit land that they have been in adverse possession of. The issue is whether the plaintiffs have proved that they have been in adverse possession of the suit land and their possession has been uninterrupted. Whether or not a party is in adverse possession is a matter to be proved by evidence and cannot be presumed. For a party to be held to be in adverse possession such party must openly be in occupation and possession of the land and his actions on the parcel of land must be hostile and/or inconsistent with the interest and rights of the registered owner. Fencing of the land and constructing a building thereon and/or cultivation would constitute acts that are inconsistent with the interest and rights of the registered owner and therefore adverse.

20. The plaintiffs have never built on the suit land and have never resided thereon. The plaintiffs claim that they have been cultivating the land is denied by the defendants and PW4, John Ouso Andele, who resides near the suit land and has been using a part of the land testified that the plaintiffs were not cultivating the land and that when in 2006 the plaintiffs demarcated the land using sisal plants the 1<sup>st</sup> defendant came and uprooted the sisal plants and handed over the land to one Phoebe Asiyo who presently is cultivating the land. The adverse act of the plaintiffs demarcating the land was resisted by the 1<sup>st</sup> defendant. Taking the totality of all the evidence adduced, I am not satisfied that the plaintiffs have proved that they were in adverse possession of the suit land.

21. Section 38 (1) of the **Limitation of Actions Act**, Cap 22 Laws of Kenya, presupposes that at the time a person is making a claim for adverse possession such person is in possession of the subject land. I do not consider that where the registered owner has retaken possession and the “adverse possessor” has acquiesced, such person can bring an action based on adverse possession such possession having been interrupted. In the instant case, I accept that whatever possession the plaintiffs may have had on the suit property was completely and terminally interrupted and/or disrupted by the 1<sup>st</sup> defendant in 2006 when he destroyed the boundary demarcation of the sisal plants and proceeded to lease the land to one Phoebe Asiyo who has been cultivating the same since 2006. The plaintiffs were therefore not in possession of the suit land on 9<sup>th</sup> February 2010 when they filed suit having been chased away from the land 4 years earlier and the land having been leased to a third party.

22. I have answered the first and second issues in the negative in my above analysis of the evidence and in regard to issue number three, it follows that the plaintiff cannot be entitled to the reliefs sought in the originating summons. I therefore have come to the conclusion that the plaintiffs have failed to prove their case on a balance of probabilities and in the result I dismiss the originating summons with costs to the defendants.

23. It is so ordered.

**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 for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs

N/A for defendant for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

**J. M. MUTUNGI**

**JUDGE**