



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 21 OF 2011 (OS)...**

**IN THE MATTER OF TITLE NUMBER SUNA EAST/WASWETA I/14085**

AND

**IN THE MATTER OF SECTION 38 (1) OF THE LIMITATION OF ACTIONS ACT (CAP 22) LAWS OF KENYA**

AND

**IN THE MATTER OF REGISTERED LAND ACT (CAP 300) LAWS OF KENYA**

BETWEEN

ELIJAH ODENY OGEDA .....  
PLAINTIFF

VERSUS

SAMUEL ODOYO OKOYO

(Being sued as the personal representative and administrator of the estate of

HARRISON MAKUGE MAUCHA – Deceased).....1<sup>ST</sup> DEFENDANT

CHRISTIAN JUMA SIRATI .....2<sup>ND</sup> DEFENDANT

**JUDGMENT**

1. The plaintiff brought this suit by way of Originating Summons dated 9<sup>th</sup> February 2011 seeking the following reliefs against the defendants;-

**1) An interim injunction to restrain the 2<sup>nd</sup> defendant, his officers, employees, servants, and or agents and or any of them from assuming, encroaching, taking occupation and or evicting the plaintiff from and or otherwise alienating, interfering with or cultivating the plaintiff’s parcel of land reference number Suna East/Wasweta 1/14085 (hereinafter referred to as “the suit property”) pending the hearing and determination of this suit.**

**2) A permanent injunction to restrain the 2<sup>nd</sup> defendant, his officers, employees, servants and or agents and or any of them from assuming, encroaching, taking occupation and or evicting the plaintiff from and or otherwise alienating, interfering with or cultivating the**

**suit property.**

**3) A declaration that the plaintiff has become entitled by adverse possession of over twelve (12) years to the suit property.**

**4) Without prejudice to prayer 3 above, a declaration that the plaintiff is the legal and beneficial owner of the suit property by being the rightful purchaser thereof for value from the original owner thereof, the late Harrison Makuge Maucha.**

**5) An order that the plaintiff be registered as the proprietor of the suit property for the reason that the plaintiff has been openly and peacefully enjoying occupation thereof for over twelve (12) years preceding the presentation of this summons, and also because the plaintiff is the beneficial owner of the said property, having bought the same for valuable consideration from the original owner, the Late Harrison Makuge Maucha.**

**6) A declaration that by reason of the plaintiff's said occupation and purchase of the suit property, the 1<sup>st</sup> and the 2<sup>nd</sup> defendant's titles to the said property have been extinguished.**

**7) A declaration that the title of the suit property in the name of the 2<sup>nd</sup> defendant, Christian Juma Sirati, is null and void, for the reason that the same is tainted with illegality and fraud.**

**8) An order that the 1<sup>st</sup> defendant do execute a transfer and perform all acts necessary to convey good title over the suit property to the plaintiff as the rightful proprietor thereof and to enable him to be registered as such and in default the Deputy registrar of this court be authorized to sign the relevant papers for that purpose.**

**9) An order that the Officer Commanding Station (OCS), Migori Police Station, or the Officer Commanding Administration Police, Migori District does assist in the enforcement of these orders.**

**10) The District Land Surveyor, Migori District, does assist in the enforcement of these orders by registering the plaintiff as the legal owner of the suit property.**

**11) An order compelling the 2<sup>nd</sup> defendant to pay general and special damages.**

**12) The costs.**

2. The Originating Summons ("O.S") was supported by the affidavit of the plaintiff sworn on 9<sup>th</sup> February 2011. The plaintiff's case against the defendants as set out in the said affidavit is as follows. On or about the year 1974, the plaintiff purchased from one, Harrison Makuge Maucha (hereinafter referred to as "the deceased") a portion of all that parcel of land then known as LR No. Suna East Wasweta 1/8263 (hereinafter referred to as "Plot No. 8263") at a consideration of Kshs. 2,000/=. The said portion of Plot No. 8263 shall hereinafter be referred to as "the disputed property" where the context so admits. The plaintiff paid the purchase price to the deceased in instalments between 17<sup>th</sup> March 1974 and 13<sup>th</sup> January 1979. Upon payment of the 1<sup>st</sup> instalment of the purchase price to the deceased on 17<sup>th</sup> March 1974, he took possession of the disputed property, fenced the same and put up there on residential houses which he rented out to tenants. He also planted trees on the property. As at the time of filing this suit, he had occupied the disputed property for over 34 years. The deceased did not transfer the disputed property to him during the deceased's life time although he was recognized as the owner of the disputed property by the deceased and his family. The deceased died in the year 1992 and the family of the deceased undertook to sub-divide Plot No. 8263 and transfer the disputed property to him.

3. The 1<sup>st</sup> defendant who is the son and an administrator of the estate of the deceased sub-divided Plot

No. 8263 into two portions namely, LR No. Suna East/Wasweta 1/14084 and LR No. Suna East/Wasweta 1/14085. The disputed property fell within LR No. Suna East/Wasweta 1/14085 (hereinafter referred to as “the suit property”). Contrary to the undertaking that was made to him by the family of the deceased, the 1<sup>st</sup> defendant did not transfer the suit property to him. Instead, he sold and transferred the same to the 2<sup>nd</sup> defendant. The plaintiff has contended that the transfer of the suit property to the 2<sup>nd</sup> defendant was carried out fraudulently and without just cause. The plaintiff continued to occupy and use the suit property even after the same changed hands from the deceased to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup> defendant. His occupation of the suit property has been exclusive, continuous, uninterrupted and notorious. Neither the deceased nor the administrator of his estate interfered with or interrupted his occupation of the suit property. On account of his occupation of the suit property for uninterrupted period of over 34 years, he has acquired title to the same by adverse possession and he is entitled to be registered as the proprietor thereof. The plaintiff has contended further that by virtue of the agreement for sale that he entered into with the deceased, the deceased and subsequently the administrator of his estate held the suit property in trust for him as the beneficial owner thereof and as such were not entitled to sell the same to a third party. The sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was carried out in breach of his equitable interest in the property. The plaintiff has contended that the deceased and the administrator of his estate having failed to take steps to recover the suit property from him within a period of 12 years, their rights or interests in the property stood extinguished. In the circumstances, the 1<sup>st</sup> defendant had no right or interest in the suit property that he could transfer or pass to the 2<sup>nd</sup> defendant.

4. The plaintiff has contended that the transfer of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was tainted with fraud, misrepresentation and illegality and as such is untenable in law. The plaintiff has contended that after being registered as the owner of the suit property, the 2<sup>nd</sup> defendant moved onto the property, pulled down his fence and started erecting his own fence. The 2<sup>nd</sup> defendant also demolished some of the buildings that he had put up on the property and evicted the tenants who were residing therein. It is on account of the foregoing that he was constrained to institute this suit. The plaintiff annexed to his affidavit several documents which are said to have been executed by the deceased in acknowledgement of payment of the purchase price that the plaintiff had made to him for the suit property. The plaintiff also annexed to his affidavit copies of the register for the suit property that was certified by the land registrar on 7<sup>th</sup> January 2011 and a certificate of official search on the register of the suit property dated 22<sup>nd</sup> September 2010.

5. The plaintiff’s suit was defended by both defendants. The defendants filed separate replying affidavits both sworn on 30<sup>th</sup> April 2012 in opposition to the Originating Summons. In his affidavit, the 1<sup>st</sup> defendant contended that he acquired Plot No. 8263 from the deceased through transmission pursuant to a Grant of Letters of Administration that was issued to him in Migori Senior Resident Magistrate’s Court Succession Cause No. 152 of 2003. After acquiring the said property, he proceeded to sub-divide the same into two portions namely, LR No. Suna/East/Wasweta 1/14084 and LR No. Suna East/Wasweta 1/14085 (“the suit property”). He thereafter sold the suit property to the 2<sup>nd</sup> defendant through an agreement for sale dated 13<sup>th</sup> May 2003. After the suit property was sold to the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant took possession and occupied the same peacefully until September, 2010 when the plaintiff entered thereon and started destroying the 2<sup>nd</sup> defendant’s properties. The plaintiff was arrested and charged with the offence of causing malicious damage to property of which offence he was acquitted. He denied that the plaintiff has acquired title to the suit property by adverse possession. The 1<sup>st</sup> defendant annexed to his affidavit; a copy of a certificate of confirmation of Grant of Letters of Administration dated 6<sup>th</sup> November 2009 and a copy of agreement for sale dated 13<sup>th</sup> March 2003.

6. In his affidavit, the 2<sup>nd</sup> defendant contended that he is the registered proprietor of the suit property which he purchased from the 1<sup>st</sup> defendant on 13<sup>th</sup> May, 2003. He contended that he took possession of the suit property soon after entering into an agreement for sale with the 1<sup>st</sup> defendant and has occupied the same ever since without any interference from anyone. His occupation was only interrupted on 3<sup>rd</sup> September 2010 when the plaintiff invaded the suit property and started destroying his properties for

which act the plaintiff was arrested and charged with the offence of malicious damage to property. The 2<sup>nd</sup> defendant denied that the plaintiff has acquired title to the suit property by adverse possession. He annexed to his affidavit; a copy of certificate of official search on the register of Plot No. 8263, a copy of certificate of official search on the register of the suit property, a copy of the register of the suit property, a copy of a letter of consent of the Land Control Board dated 2<sup>nd</sup> June 2006, a copy of Mutation Form dated 14<sup>th</sup> November 2006, a copy of the title deed for the suit property dated 26<sup>th</sup> April 2010, a copy of the proceedings and judgment in Migori SPM Criminal case No. 726 of 2010, Republic –vs- Elijah Odeny Ogeda and a copy of the petition of appeal in Kisii HC. Criminal Appeal No. 59 of 2012 dated 14<sup>th</sup> March 2012.

7. On 30<sup>th</sup> April 2012, directions were given that the Originating Summons shall be deemed as a plaint and the defendants replying affidavits as the defendants' statement of defence and, that the matter shall be heard by way of viva voce evidence. The suit was thereafter set down for hearing. At the trial, the plaintiff gave evidence and called one witness. On their part, the defendants gave evidence but did not call any witness. In his evidence, the plaintiff (PW1) reiterated the contents of his affidavit in support of the Originating Summons. In summary, the plaintiff testified that, he purchased the suit property which is a portion of Plot No. 8263 from the deceased in the year 1974 at a consideration of kshs. 2,000/= which he paid in full. He took possession of the property soon after purchase in 1974 and developed the same by putting up residential houses thereon for renting. The deceased died in 1992 before transferring the suit property to him. He occupied the suit property peacefully from 1974 until the year 2010 when the 2<sup>nd</sup> defendant entered the suit property and started fencing it. He uprooted the fence that had been put up by the 2<sup>nd</sup> defendant around the suit property an act which led to his arrest and arraignment in court in Criminal Case No. 726 of 2010 in which he was acquitted. Following his arrest and arraignment in court, he carried out a search on the register of Plot No. 8263 that revealed that the 1<sup>st</sup> defendant had sub-divided Plot No. 8263 and sold a portion thereof which is comprised in the suit property to the 2<sup>nd</sup> defendant. The plaintiff stated that he has been in occupation of the suit property since 1974 and urged the court to grant the prayers that he has sought in the Originating Summons. In cross-examination, he stated that the suit property is the portion of Plot No. 8263 that was sold to him by the deceased and that the same was not transferred to him by the deceased during his lifetime because he (the plaintiff) was working far from the area where the suit property is situated. He stated further that the suit property is occupied by his tenants.

8. The plaintiff's witness, Macela Site Makuge (PW2) is the widow of the deceased. The deceased had two wives. PW2 was his second wife. PW2 told the court that the deceased sold a portion of Plot No. 8263 to the plaintiff in 1974. The plaintiff took possession of the said property and put up rental houses thereon which houses have been rented to tenants. The family of the deceased did not have any dispute with the plaintiff until the 1<sup>st</sup> defendant who is her step son re-sold the said parcel of land to the 2<sup>nd</sup> defendant. PW2 stated further that the plaintiff has occupied the suit property from 1974 and that the houses standing on the suit property belong to him.

9. After the close of the plaintiff's case, the 2<sup>nd</sup> defendant gave evidence and was followed by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant (DW1) told the court that; he purchased the suit property from the 1<sup>st</sup> defendant in the year 2003 after doing the necessary due diligence. Before entering into agreement for sale with the 1<sup>st</sup> defendant, he carried out a search on the register of the property that was on sale which revealed that the same was registered in the name of the deceased. The 1<sup>st</sup> defendant who was selling the property told him that he was in the process of taking out letters of administration in respect of the estate of the deceased. The 1<sup>st</sup> defendant sold to him a portion of Plot No. 8263. The 1<sup>st</sup> defendant thereafter obtained Grant of Letters of Administration in respect of the estate of the deceased, sub-divided Plot No. 8263 and transferred to him the portion thereof that he had purchased which is the suit property. Before the suit property was transferred to him by the 1<sup>st</sup> defendant, he did a search on the register thereof which confirmed that the same was registered in the name of the 1<sup>st</sup> defendant. The property was transferred to him after the necessary consent of the land control board was sought in respect of the transaction and was duly issued. After the transfer of the property in his name, he was issued with a title deed. In the year

2010, he fenced the suit property with the intention of developing the same when the plaintiff came and had the fence brought down. He reported the matter to the police and the plaintiff was arrested and charged in court. When he purchased the suit property, the same was not occupied by anyone else apart from the 1<sup>st</sup> defendant. He denied the plaintiff's claim that the plaintiff is the owner of the suit property. He denied further that the plaintiff has been in possession of the suit property. He produced in evidence copies of; certificate of official search on the register of Plot No. 8263 dated 13<sup>th</sup> May 2003, Mutation Form dated 26<sup>th</sup> July 2006, Consent of the Land Control Board dated 2<sup>nd</sup> June 2006, title deed for the suit property dated 26<sup>th</sup> April 2010 and proceedings and judgment in criminal case No. 726 of 2010.

10. The 1<sup>st</sup> defendant (DW2) corroborated the evidence of the 2<sup>nd</sup> defendant (DW1). He confirmed that he sold the suit property to the 2<sup>nd</sup> defendant in the year 2003. He told the court that the suit property is a portion of Plot No. 8263 that was registered in the name of the deceased and that he transferred the same to the 2<sup>nd</sup> defendant after he had obtained Grant of Letters of Administration in respect of the estate of the deceased. DW2 told the court that the suit property was vacant when he sold the same to the 2<sup>nd</sup> defendant. He denied that the plaintiff was in occupation of the same at the material time. He stated that the structures that were standing on the suit property when the same was sold to the 2<sup>nd</sup> defendant were put up by the deceased. He was categorical that the plaintiff is not residing on the suit property and has never resided thereon. He told the court that he applied for Grant of Letters of administration in respect of the estate of the deceased after obtaining consent of the other members of the deceased's family.

11. After the close of the defence case, the parties agreed to make closing submissions in writing. The plaintiff filed his submissions on 17<sup>th</sup> December 2014 while the defendants did so on 23<sup>rd</sup> January 2015. I have considered the parties' pleadings and the evidence that was tendered in proof of their respective cases. I have also considered their respective submissions and the authorities cited in support thereof. The parties did not agree on the issues for determination by the court. Upon review of the pleadings and the evidence tendered by the parties, the following in my view are the issues that arise for determination in this suit;

**(i) Whether the plaintiff has acquired title to the suit property by adverse possession and as such entitled to be registered as the proprietor thereof?**

**(ii) Whether the plaintiff is the legal and beneficial owner of the suit property by virtue of the agreement for sale that the plaintiff had entered into with the deceased in respect thereof and as such is entitled to be registered as the proprietor thereof.**

**(iii) Whether the plaintiff is entitled to the reliefs sought in the Originating Summons?**

**(iv) Who is liable to pay the costs of the suit?**

12. **Issue No. I:**

The first limb of the plaintiff's case is that he has acquired title to the suit property by adverse possession and as such he is entitled to be registered as the proprietor thereof. For one to acquire title to land by adverse possession, he has to prove that he has had continuous, open and uninterrupted possession of the land concerned for a period of not less than 12 years. In the case of **Salim vs. Boyd and Another [1971]E.A. 550**, it was held that, a person who seeks to be registered as proprietor of land on account of adverse possession thereof must prove that he has had exclusive uninterrupted possession of the land for 12 years without fraud. The plaintiff led evidence that he entered into an agreement with the deceased in the year 1974 for the purchase of a portion of Plot No. 8263 at a consideration of kshs. 2,000/=. The deceased gave him possession of the said portion of Plot No. 8263 on 17<sup>th</sup> March 1974 when he paid the first instalment of the purchase price. He thereafter constructed houses on the said property which he rented out to tenants. The deceased was to sub-divide Plot No. 8263 and transfer to him the portion

thereof that had sold to him. The deceased had not transferred the said portion of Plot No. 8263 to him as at the time of the deceased's death in 1992. He however continued to occupy the said parcel of land until the year 2010 when he received information that someone who turned out to be the 2<sup>nd</sup> defendant had knocked down a fence that he had put up around the said property and erected his own fence. He pulled down the said fence that had been put up by the 2<sup>nd</sup> defendant an action that led to his arrest and arraignment in court to face a charge of malicious damage to property. When he was confronted with this charge, he carried out a search on Plot No. 8263 which revealed that the said parcel of land had been subdivided into two portions by the 1<sup>st</sup> defendant and a portion thereof that had been sold to him by the deceased had been transferred by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. That portion is the suit property. The plaintiff testified that he has occupied the suit property since 1974 and that it is currently occupied by his tenants.

13. The plaintiff's evidence was corroborated by PW2. PW2 is the widow of the deceased. She confirmed that the deceased sold the parcel of land which is now comprised in the suit property to the plaintiff in the year 1974. She further confirmed that the plaintiff did put up rental houses on the said parcel of land which he has rented out to tenants. PW2 told the court that the plaintiff occupied the suit property peacefully from 1974 until the year 2010 when the 1<sup>st</sup> defendant re-sold the suit property to the 2<sup>nd</sup> defendant.

14. The defendants have denied that the plaintiff purchased the suit property from the deceased. They have also denied that the plaintiff has been in occupation of the suit property from the year 1974 as he has claimed. The 1<sup>st</sup> defendant has contended that he had every right to sell the suit property to the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant on the other hand has contended that he acquired the suit property lawfully.

15. I have carefully considered the evidence that was tendered by the plaintiff and his witness on the issue of his purchase and occupation of the suit property against the evidence that was tendered by the defendants on the same issue. I am inclined to believe the evidence that was tendered by the plaintiff and his witness. The plaintiff's evidence that, he purchased the suit property from the deceased in 1974, took possession in the same year and put up residential houses thereon was corroborated by PW2 who is the deceased's widow. His evidence that he occupied the suit property peacefully from 1974 upto the year 2010 when the 1<sup>st</sup> defendant purported to transfer the same to the 2<sup>nd</sup> defendant was also corroborated by PW2. PW2 stated that she was present when the suit property was sold to the plaintiff by the deceased and witnessed the deceased receiving payment of part of the purchase price from the plaintiff.

16. I have found the evidence that was tendered by the defendants inconsistent and incredible. In his evidence in chief, the 2<sup>nd</sup> defendant (DW1) testified that when he purchased the suit property, there was no one in occupation thereof apart from the 1<sup>st</sup> defendant. He also contended that the plaintiff has never been in possession of the suit property. In cross-examination however, he admitted that when he purchased the suit property there was an old building standing thereon which had several rooms, which building he claimed was unoccupied. When asked whether he made inquiries about the ownership of the said building, his answer was that he did but he did not receive "a straight forward answer" and that made him conclude that the said building belonged to the deceased. This evidence is inconsistent with the evidence that the 2<sup>nd</sup> defendant (DW1) had given in Migori SPMC Criminal Case No. 726 of 2010, R -vs- Elijah Odeny Ogeda the proceedings of which he produced as Dexh. 7.

17. In the said case in which he was the complainant, he had stated in cross-examination that when he purchased the suit property, he found a semi -permanent house standing thereon and on making inquiries about its ownership, he was told that **"the same belonged to one Maucha Magugu (sic)"** (deceased). In his evidence before this court, the 1<sup>st</sup> defendant (DW2) testified that when he sold the suit property to the 2<sup>nd</sup> defendant, the same was vacant. He also contended that the building that was standing thereon was put up by the deceased. He stated as follows: **"Plot No. 14085 was unoccupied when I sold it to the 2<sup>nd</sup> defendant. It is not true that the plaintiff had occupied Plot No. 14085 at the time I sold the same. It is not true that the plaintiff had structures on the said parcel of land. The structures that were**

**standing on the land were constructed by my father. PW2 lied to the court. It is not true that the structures on Plot No. 14085 were put up by the plaintiff.”** In cross examination, the 1<sup>st</sup> defendant (DW2) reiterated that the plaintiff did not erect the structures that are standing on the suit property. He was even more emphatic. He stated that **“I am sure that the plaintiff did not put up any structure on Plot No. 14085”**. The 1<sup>st</sup> defendant also denied that the deceased sold land to the plaintiff. In his testimony in Migori SPMC Criminal Case No. 726 of 2010 aforesaid, the 1<sup>st</sup> defendant who gave evidence in that case as PW3 stated as follows:-**“The said parcel of land had a semi-permanent structure one house with corrugated iron sheets which structure was erected by the accused person who had verbally agreed with my father on his intention (sic) to buy the parcel of land but later reneged on the agreement.”**

18. In cross-examination in that case, the 1<sup>st</sup> defendant admitted that the deceased had entered into an agreement with the plaintiff for the purchase of the suit property. It is clear from the foregoing that, the evidence that the 1<sup>st</sup> defendant gave before this court is inconsistent with the evidence that he had given in the criminal case mentioned above. In view of these inconsistencies in the evidence that was tendered by the defendants before this court and in the criminal case at Migori concerning the same subject matter, I find the defendants to be unreliable witnesses whose evidence no weight can be attached. On the other hand, I have found the evidence that was given before this court by the plaintiff and PW2 consistent with the evidence that they gave in the criminal case.

19. I am satisfied on the material before me that the plaintiff had purchased a portion of Plot No. 8263 from the deceased in 1974. The deceased was to sub-divide the said parcel of land and transfer a portion that the plaintiff had purchased to him. He took possession of the portion of the said parcel of land that was sold to him in 1974 and put up semi -permanent residential houses thereon which he let to the tenants. The deceased died in 1992 before sub-dividing Plot No. 8263 and transferring to the plaintiff the portion of that parcel of land that he had purchased. The plaintiff however continued occupying the said portion of land. In the year 2003, the 1<sup>st</sup> defendant who was aware that the deceased had sold a portion of Plot No. 8263 to the plaintiff purported to sell the same portion of land again to the 2<sup>nd</sup> defendant together with the developments that the plaintiff had undertaken thereon. In re-examination in the criminal case, the 2<sup>nd</sup> defendant stated that: **“I bought the parcel of land together with a semi-permanent house.”**It appears from the evidence on record that the 2<sup>nd</sup> defendant did not take possession of the said portion of Plot No. 8263 immediately after the same was purportedly sold to him until the year 2010 when the 1<sup>st</sup> defendant sub-divided Plot No. 8263 and transferred the said portion which is comprised in the suit property to him. The plaintiff was not aware of this sale until September, 2010 when the 2<sup>nd</sup> defendant moved in and fenced the suit property.

20. In the case of **Githu –vs- Ndeete [1984] KLR 776** it was held among others that a title to land by adverse possession can be acquired to a part of the parcel of land in respect of which the owner holds title. I am of the view that by the time the 1<sup>st</sup> defendant purported to re-sell the portion of Plot No. 8263 that the deceased had sold to the plaintiff, the plaintiff had already acquired title to the said portion of Plot No. 8263 by adverse possession. The deceased title to the said portion of Plot No. 8263 had become extinguished by virtue of section 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya and as such the 1<sup>st</sup> defendant as the deceased’s administrator had no interest or title in the said portion of Plot No. 8263 that he could transfer or confer upon the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant has contended that he carried out due diligence before purchasing the suit property from the 1<sup>st</sup> defendant who was the registered owner thereof before the same was transferred to him. The 1<sup>st</sup> defendant may have been the registered owner of the suit property. However, the plaintiff’s right over the suit property although not registered against the title of the same was protected under section 30 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) and could neither be defeated on account of non-registration or by the transfer of the property from the deceased to the 1<sup>st</sup> defendant and from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. In the case of **Githu –vs- Ndeete (Supra)** it was held that **“the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”**In the same case, it was held that: **“Where the person in possession has**

**already began and is in the course of 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 interest to which the new registered purchaser’s title will be subject”.**

21. Due to the foregoing, it is my finding that the plaintiff has acquired title to the suit property by adverse possession and is entitled to have the same registered in his name. He is also entitled to an injunction to restrain the defendants from interfering with his possession and occupation of the said parcel of land.

**22. Issue No. II;**

The plaintiff has not convinced me that he has acquired legal and/or beneficial interest in the suit property by virtue of the agreement for sale that he entered into with the deceased. From the material on record, it is not disputed that the suit property is agricultural land. There is no evidence before me that consent of the Land Control Board was sought and obtained by the deceased with respect to the sale transaction that he had with the plaintiff. Under the provisions of sections 6 and 8 of the Land Control Act, Cap 302 Laws of Kenya, the agreement for sale that the plaintiff entered into with the deceased became null and void for all intents and purposes after the expiry of 6 months from the date when it was made. The plaintiff cannot therefore derive any benefit from the said agreement. It is my finding therefore that the plaintiff has not acquired any legal or beneficial interest in the suit property by virtue of the said agreement for sale that he entered into with the deceased. In the case of **Scott vs. Brown, Doering, Mc Nab & Co. Ltd (3) (1892) 2 QB 724 at 728**, the court stated that:-

**“No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court...”**

**23. Issue No. III;**

This issue concerns the reliefs that the plaintiff is entitled to. The plaintiff has sought a number of reliefs in his Originating Summons. As I have held above, the plaintiff has proved that he has acquired title to the suit property by way of adverse possession. The plaintiff is therefore entitled to the reliefs that would enable him realize the said interest. The plaintiff would therefore be entitled to prayers 3, 4, 6, 7 and 9 in the Originating Summons.

**24. Issue No. IV;**

Costs normally follow the event. There are no circumstances that have been brought to my attention that would make me deny the plaintiff costs. The plaintiff is therefore entitled to the costs of this suit. The cost shall however be paid to the plaintiff by the 1<sup>st</sup> defendant only. In my view, he is the one who brought about this suit.

**25. Conclusion**

In conclusion, I am satisfied that the plaintiff has proved his claim against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendants jointly and severally for;

(i) A declaration that the plaintiff has acquired title to all that parcel of land known as LR No. Suna East/Wasweta I/14085 (“the suit property”) by adverse possession.

(ii) A declaration that the rights and interests that the defendants had in the suit property have been extinguished.

(iii) An order that the 2<sup>nd</sup> defendant shall transfer the suit property to the plaintiff within thirty (30) days from the date hereof failure to which the deputy

registrar of this court shall be at liberty to execute such documents or instruments as may be necessary to convey the suit property to the plaintiff.

(iv) An order of permanent injunction to restrain the 2<sup>nd</sup> defendant by himself or through his servants, agents or employees from entering, occupying, evicting the plaintiff from or in any other way interfering with the plaintiff's occupation and enjoyment of the suit property.

(v) The cost of the suit to be paid by the 1<sup>st</sup> defendant.

**Delivered, Dated and Signed at Kisii this 26<sup>th</sup> day of June, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Ondieki for Mr. Omwoyo for the plaintiff

N/A for the defendants

Caroline Obura Court Assistant

**S.OKONG'O**

**JUDGE**