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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 282 OF 2009(O.S)

WALTER ADEDE DAMBAPLAINTIFF

VERSUS

CHURCHIL OMONDI DAMBA.....1ST DEFENDANT

GEORGE OTIENO OYUKE.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit by way of Originating Summons dated 31st December, 2009. The Plaintiff sought an order that the Plaintiff be registered as the sole proprietor of all those parcels of land known as L.R. No. Kamagambo/Kabuoro/5022, 5023 and 5024 (hereinafter referred to as **“the suit properties”**) which are sub-divisions of the original land parcel known as Kamagambo/Kabuoro/ 3618 (hereinafter referred to as **“Plot No. 3618”**). The Plaintiff also sought an order that the titles for

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the suit properties in the names of the defendants be nullified and/or revoked. The Plaintiff’s suit was brought on the ground that the Plaintiff had occupied and used the suit properties which are registered in the names of the defendants for uninterrupted period exceeding 20 years and as such the Plaintiff had acquired ownership thereof by adverse possession.

2. The Plaintiff’s suit was brought on the grounds set out in the body of the originating summons and on the Plaintiff’s affidavit sworn on 31st December, 2009. In the said affidavit and on the body of the said originating summons, the Plaintiff contended that; at all material times, the Plaintiff had occupied and is still occupying a portion of land that was comprised in LR. No. **Kamagambo/Kabuoro/3618** (**“Plot No. 3618”**). Plot No. 3618 was a sub-division of the original parcel of land known as LR. No. **Kamagambo/Kabuoro/699** (hereinafter referred to as

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“Plot No. 699”). Plot No. 699 was registered in the name of one, **Damba Nyawala** (hereinafter

referred to as “**Nyawala**”). Nyawala who was polygamous decided to divide his land, Plot No. 699 among his wives. This led to the sub-division of Plot No. 699 into various portions. Plot No. 3618 was one of the portions that came from the sub-division of Plot No. 699 and the same was allocated by Nyawala to his wife, Paulina Obiero Damba (hereinafter referred to as “**Paulina**”). Paulina had no child and as such took in the Plaintiff herein who was his step son (the son of Nyawala by another wife) as a foster child. Plot No. 3618 seems not to have been registered in the name of Paulina although the same had been allocated to her by Nyawala. The Plaintiff started staying with Paulina on Plot No. 3618 as her foster child from his youth until the death of Paulina on 8th May, 2001. The Plaintiff continued to occupy Plot

No. 3618 after Paulina’s death and put up a home for himself

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thereon.

3. Unknown to the Plaintiff, the 1st defendant’s father who is the Plaintiff’s step brother had caused Plot No. 3618 to be registered in the name of the 1st defendant while the first defendant was a minor during the life time of Paulina. The 1st defendant was registered as the proprietor of Plot No. 3618 on 8th April, 1999. The registration of the 1st defendant as the proprietor of Plot No. 3618 was done without the knowledge of the Plaintiff. The Plaintiff claims that as the foster child of Paulina, he was the one who was supposed to be registered as the owner of Plot No. 3618 that was allocated to Paulina by Nyawala. Sometimes in the year 2007, the 1st defendant proceeded to subdivide Plot No. 3618. The said subdivision gave rise to the suit properties namely, **Plot Nos. 5022, 5022 and 5023**. Thereafter, the 1st defendant lodged a claim against the Plaintiff at the Migori District Land Disputes Tribunal. The

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1st defendant sought an order that the Plaintiff do vacate Plot No. 3618 which according to the 1st defendant belonged to him and which the Plaintiff was occupying without his permission. Migori District Land Disputes Tribunal heard the parties and their witnesses and made its decision on the dispute on 20th May, 2008. Migori District Land Disputes Tribunal found for the 1st defendant and ordered that the 1st defendant should sub-divide Plot No. 3618 and allocate the Plaintiff a portion thereof measuring 0.6 hectares. The said decision by Migori District Land Disputes Tribunal (the tribunal) was adopted by the Senior Resident Magistrate’s Court at Rongo as a judgment of the court on 4th December, 2008 in Misc. Appl. No. 16 of 2008. After that decision of the tribunal and its adoption as a judgment of the court, the 1st defendant proceeded to sell Plot No. 5024 to the 1st defendant and retained Plot No. 5022 and 5023 in his name. The Plaintiff claims that the said decision of

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the tribunal was in his favour and that the subdivision of Plot No. 3618 and the sale of a portion thereof to the 2nd defendant were illegal and fraudulent. It is on account of the forgoing that the Plaintiff sought the cancellation of the titles of Plot Nos. 5022, 5023 and 5024 in the names of the defendants and the registration of the said plots in the name of the Plaintiff as the proprietor thereof.

4. The Plaintiffs’ originating summons was opposed by the defendants. The defendants filed separate replying affidavits both sworn on 20th January, 2013 in opposition to the application. In his

affidavit, the 1st defendant contended that he sub-divided Plot No. 3618 pursuant to the decision of the Migori Land Disputes Tribunal (“the tribunal”) aforesaid and that he had reserved for the Plaintiff Plot No. 5022 measuring 0.6 hectares of the original parcel No. 3618 as ordered by the said tribunal which the Plaintiff has failed to have formally

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registered in his name. The 1st defendant contended further that he remained with Plot Nos. 5023 and 5024 as his share of the original Plot No. 3618 of which he sold to the 2nd defendant, Plot No. 5024 which had already been transferred and registered in the name of the 2nd defendant. The 1st defendant termed this suit as a belated attempt to challenge the decision of the tribunal which was not appealed. The 1st defendant annexed to his affidavit in reply, a copy of the tribunal’s proceedings and decision, a copy of the decree issued in Rongo SRMC Misc. Appl. No. 16 of 2008, a copy of certificate of official search dated 23rd November, 2009 with respect to Plot No. 5022, a copy of title deed for Plot No. 5022, a copy of certificate of official search for Plot No. 5024 dated 23rd November, 2009, a copy of a title deed for Plot No. 5024, a copy of a certificate of official search for Plot No. 5023 and a copy of title deed for Plot

No. 5023. In his brief reply to the application, the 2nd defendant

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contended that what he purchased from the 1st defendant was the 1st defendant’s share of the original Plot No. 3618 that was awarded to the 1st defendant by the tribunal. The 2nd defendant also annexed to his affidavit a copy of the proceedings and decision of the tribunal, a copy of a certificate of official search for Plot No. 5024 and a copy of the title deed for the said plot.

5. On 4th October, 2011, the advocates for the parties agreed by consent to have the originating summons heard by way of written submissions. The defendants filed their written submissions and supplementary written submissions on 24th November, 2011 and 14th June, 2012 respectively. The Plaintiff filed his written submissions on 20th December, 2011. In his submissions, the Plaintiff reiterated the contents of his affidavit in support of the originating summons. He maintained that he was a beneficiary of Plot No. 3618 having been an adopted son of Paulina. The Plaintiff contended that after the death of

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Paulina, the 1st defendant fraudulently and secretly colluded with the 2nd defendant and Migori Land registry staff to have the said parcel of land registered in the name of the 1st defendant. The Plaintiff submitted further that the 1st defendant did not obtain letters of administration of the estate of Paulina before he caused Plot No. 3618 to be registered in his name. The Plaintiff termed the registration of Plot No. 3618 into the name of the 1st defendant as null and void and prayed that the originating summons application be allowed. In their written submissions, the defendants first set out the facts of the case (I must say that much of what was set out as facts of the case in the submissions was not brought out in the affidavits filed by the parties) before proceeding to submit on the law. The defendants maintained that the 1st defendant grew up in the house of Paulina who had no child of her own and that is why the parcel of land that Nyawala had allocated to Paulina

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namely; Plot No. 3618 was registered in the name of the 1st defendant. The defendants submitted that the Plaintiff was the son of one, Peres Amolo Damba, one of the wives of Nyawala and got his due share of Nyawala's land from Plot No. 3616 that was allocated to his mother by Nyawala. On the law, the defendants submitted that adverse possession is acquired by "**a continuous, uninterrupted peaceful undisturbed occupation and possession of land registered in the name of another for a period of over 12 years**". The defendants submitted further that no right to acquire land by adverse possession can accrue unless the land is in the possession of some person in whose favour the period of limitation can run. The defendants submitted further that the right of action in adverse possession claim cannot arise unless and until adverse possession is taken of the land. In support of the foregoing submissions, the defendants cited the cases of, **Kisee Maweu & 19 others vs. Kiu Ranching &**

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Co-operative Society Limited (1982-88) KAR 746 and Ithongo vs. Thindiu (1981) KLR 197.

The defendants also cited, **Cheshire's Modern Law of Real Property, 11th edition at pages, 875 to 877.** The defendants submitted that the Plaintiff's possession of Plot No. 3618 could not be adverse to the 1st defendant who was the registered owner thereof because the Plaintiff had occupied the said property with the permission of Nyawala who had himself caused the property to be registered in the name of the 1st defendant who was a minor then. The defendants submitted further that the Plaintiff's occupation of the said property could not be said to have been peaceful and undisturbed as there were several court cases between the Plaintiff and the 1st defendant going back to the year 1999. The defendants submitted that the Plaintiff had failed to demonstrate that he had acquired Plot No. 3618 by adverse possession. The defendants submitted further that time could only start

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running against the 1st defendant when he became registered as the proprietor of Plot No. 3618 on 8th April, 1999. That time however stopped running when a claim was lodged by the 1st defendant against the Plaintiff at the tribunal in the year 2007 and thereafter when this suit was filed on 31st December, 2009. The defendants submitted that in the circumstances, the Plaintiff had not been in peaceful and undisturbed occupation of the suit properties for a period of 12 years prior to the date of bringing this suit so as to entitle him to the orders sought.

6. I have considered the originating summons together with the affidavit filed in support thereof. I have also considered the written submissions by the advocates for the Plaintiff. Equally, I have considered the affidavits filed by the defendants in opposition to the summons and the written submissions filed by the advocates for the defendants. The Plaintiff's claim against the defendants over the suit properties is based on

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adverse possession. As was held by Kneller J. in the cases of **Salim vs. Boyd (1971) E.A 550** and **Kimani Ruchine & another vs. Swift Rutherford Co. Ltd. & another (1976-80) 1 KLR 1500**, a person seeking to be registered as a proprietor of land on account of adverse possession must prove

that he has had exclusive uninterrupted possession of the land for 12 years without fraud. The Plaintiff claims that he had been in occupation of Plot No. 3618 that gave rise to the suit properties for over 20 years prior to the date of bringing this suit and as such he is entitled to be registered as the proprietor of the suit properties. On the basis of the principles set out in the two cases that I have cited above and in the cases that were cited by the defendants in their submissions, the onus was on the Plaintiff to prove that he had been in possession of the suit properties for a continuous uninterrupted period of 12 years. As submitted by the defendants, the Plaintiff also had a duty to

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prove that his occupation of the suit properties was adverse to the defendants. In the case of, **Wambugu vs. Njuguna (1983) KLR 172**, it was held that not all persons in possession can have time run in their favour. The facts of this case are contested. In view of the fact that the parties chose to have the originating summons heard through affidavit evidence, it is not easy to determine the truth of the position taken by each of the parties in the suit. The Plaintiff claimed that his father, Damba Nyawala (**Nyawala**) had several wives and that one of his father's said wives, **Paulina** had no child. The Plaintiff, whose real mother was one, **Peres Amolo Damba**, claimed that he was taken in and brought up by Paulina as his foster child. The Plaintiff claimed further that when Nyawala was dividing his ancestral land among his wives, Paulina was allocated Plot No. 3618. The Plaintiff had expected that as a foster child of Paulina, he would inherit Plot No. 3618 in the event of Paulina's demise. It is not

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clear from the record when the Plaintiff entered the suit property or when he started staying thereon with Paulina. It is not in dispute however that the Plaintiff stayed with Paulina on Plot No. 3618 until Paulina's death on 8th May, 2001. Although Plot No. 3618 was allocated to Paulina by Nyawala, the same was not registered in the name of Paulina. I have reached this conclusion because of the fact that the said plot was registered in the name of the 1st defendant on 8th April, 1999 when Paulina was still alive. The 1st defendant claimed that the said plot was registered in his name by Nyawala during his lifetime because Nyawala wanted the 1st defendant to inherit the same on the demise of Paulina who had no child. The Plaintiff on his part claimed that Plot No. 3618 was registered in the name of the 1st defendant by the 1st defendant's father who is the Plaintiff's step brother, one, **Tom Mboya Damba**. An extract of the register for Plot No. 3618 was not produced in evidence. Neither was

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the instrument of transfer through which the said plot was transferred to the 1st defendant. It is difficult in the circumstances to determine who the registered proprietor of Plot No. 3618 was prior to its transfer and registration in the name of the 1st defendant. It is most probable however that Plot No. 3618 was transferred to the 1st defendant by Nyawala who both parties had agreed to have owned the original parcel of land from which Plot No. 3618 originated. The dispute between the Plaintiff, the 1st defendant and the 1st defendant's said father, Tom Mboya Damba (**Mboya**) over Plot No. 3618 started in the year 1999. The evidence on record shows that in the year 1999, Mboya with the assistance of the area District Officer asked the Plaintiff to vacate Plot No. 3618 on the ground that the same belonged to the 1st defendant. The Plaintiff and Paulina went to court to challenge the 1st defendant's claim to the said plot. Paulina died before the said case was concluded.

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Nothing seems to have transpired between the parties until the year 2007 when the 1st defendant sub-divided Plot No. 3618 into three portions that gave rise to the suit properties. The 1st defendant thereafter went to the tribunal to have the Plaintiff evicted from the suit properties. The tribunal ordered the 1st defendant to sub-divide Plot No. 3618 and to allocate a portion thereof measuring 0.6 hectares to the Plaintiff. The tribunal's order was filed at the Senior Resident Magistrate's court at Rongo and adopted as a judgment of the court. No appeal seems to have been preferred by either party against the said decision of the tribunal. The 1st defendant who had already sub-divided Plot No. 3618 into three portions measuring 0.2, ha., 0.16 ha., and 0.6 ha., proceeded to sell the portion measuring 0.16 ha. to the 2nd defendant and has maintained in these proceedings that he has reserved the portion measuring 0.6 ha. for the Plaintiff.

7. I am not satisfied from the facts set out above that the Plaintiff

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has discharged the burden of proof placed upon him by law. It is not clear from the evidence placed before the court as to when the Plaintiff entered Plot No. 3618. It is also not clear from the evidence on record as to when Plot No. 3618 came into existence and whether or not it was at any one time registered in the name of Paulina. What is clear from the evidence on record is that Plot No. 3618 was registered in the name of the 1st defendant on 8th April, 1999 while Paulina was still alive. The Plaintiff claimed that Plot No. 3618 was registered in the name of the 1st defendant after the death of Paulina. This claim is not supported by the evidence on record by both parties. It is not in dispute that when Plot No. 3618 was registered in the name of the 1st defendant, the same was occupied by the Plaintiff and Paulina. That explains why the Plaintiff and Paulina went to court in 1999 to challenge the attempt by the 1st defendant and his father, Mboya to evict the

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Plaintiff from the said property. As submitted by the defendants, when the Plaintiff entered Plot No. 3618 to live with Paulina, he did so with the permission of Paulina to whom Nyawala had allocated the said property. The Plaintiff did occupy the said property therefore with the permission of Nyawala and Paulina. The Plaintiff's occupation could not therefore be said to have been adverse to the proprietary interest of either Nyawala or Paulina. In the circumstances, if Nyawala transferred Plot No. 3618 to the 1st defendant on 8th April, 1999 as claimed by the 1st defendant which I have found most probable, the said transfer was free of any adverse claims by the Plaintiff. It follows that for the purposes of adverse possession, the time could only start running against the 1st defendant as from 8th April, 1999 when the said plot was registered in his name. The Plaintiff has not proved that he has had exclusive uninterrupted adverse possession of Plot

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No. 3618 for 12 years prior to the date of bringing this suit. This suit was filed on 31st December, 2009 while the 1st defendant became registered as the proprietor of Plot No. 3618 on 8th April, 1999. The Plaintiff had therefore occupied Plot No. 3618 for a period of about 10 years only while the

same was registered in the name of the 1st defendant prior to bringing these proceedings which is short of the 12 years required for maintaining a claim to land by adverse possession. Furthermore, during the said 10 years, the Plaintiff was involved in two court cases with the 1st defendant, one in court and another one at the tribunal which must be taken to have interrupted the Plaintiffs occupation of the said plot. The Plaintiff's occupation of Plot No. 3618 cannot therefore be said to have been uninterrupted even for the said 10 years.

8. It is clear from the foregoing that the Plaintiff has failed to prove the necessary elements of adverse possession claim. The

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Plaintiff's claim herein cannot therefore succeed. The Plaintiff's claim cannot succeed also for another reason. The Plaintiff and the 1st defendant had a case before the tribunal over the suit properties. The tribunal ordered that the Plaintiff be given a portion measuring 0.6 hectares of Plot No. 3618. The said decision of the tribunal was filed in court and adopted as a judgment of the court. A decree was thereafter issued. As I have observed above, the decision of the tribunal was not appealed by either party. The same is therefore binding upon the Plaintiff and the 1st defendant. By the time the 1st defendant went to the tribunal, he had already sub-divided Plot No. 3618 into three portions, namely, Plot No. 5022, 0.60 hectares, Plot No. 5023, 0.20 hectares and Plot No. 5024, 0.16 hectares. After the said decision by the tribunal, the 1st defendant caused Plot No. 5024 to be transferred to the 2nd defendant. Plot No. 5022 and 5023 remained registered in the names of the 1st defendant. The 1st

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defendant stated in his affidavit filed herein in response to the Plaintiff's claim herein that he reserved Plot No. 5022 measuring 0.6 hectares for the Plaintiff in accordance with the decision of the tribunal. The 1st defendant intends only to retain Plot No. 5023 which measures 0.16 hectares. According to the 1st defendant, it is the Plaintiff who has refused to have the said Plot No. 5022 formally transferred to his name. The orders sought by the Plaintiff herein if granted would be contrary to the decree that was issued by the Senior Resident Magistrates Court at Rongo on 4th December, 2008 in Misc. Appl. No. 16 of 2008. If the orders sought are granted, the Plaintiff would have succeeded in overturning the decision of the tribunal without preferring an appeal against the same.

9. In conclusion, I find the Plaintiff's originating summons application to be without merit. To lay this matter to rest however, I will in exercise of the powers conferred upon this

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court under sections 3 (1) and 13 (7) of the Environment and Land Court Act, 2011 order that the 1st defendant should forthwith transfer Plot No. Kamagambo/ Kabuoro/ 5022 which measures approximately 0.60 hectares to the Plaintiff in accordance with the decree of the Senior Resident Magistrate's Court at Rongo referred to hereinabove. The Plaintiff shall meet all statutory fees and charges associated with such transfer. Save as ordered above, the Plaintiff's originating summons dated 31st December, 2009 is dismissed with costs to the defendants.

Signed, dated and delivered at KISII this 27th day of September, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the Plaintiff

G. S. Okoth for the Defendants

Mokua Court Clerk.

S. OKONG'O,

JUDGE.

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