



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**ENVIRONMENT & LAND COURT**  
**CASE NO. 264 OF 2010(O.S)**

**JOHN OKUMU AYALO..... PLAINTIFF**

**VERSUS**

**1. MARY AKUMU OYUGI.....1<sup>ST</sup> DEFENDANT**

**2. BENJAMIN ODHIAMBO OSIANY.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background:**

The dispute between the parties herein goes back to the year 1973 during the land adjudication process at Kanyajuok Adjudication Section in the former South Nyanza District. The Plaintiff's father, Jairo Ayalo Oyoo, deceased and one, Martin Ogolla Malimu were residents of Kanyajuok. During the time of land adjudication in the area, the parcel of land then known as Kamagambo/Kanyajuok/832 (hereinafter referred to only as "Plot No.832") was demarcated and recorded in the name of the said Martin Ogolla Malimu (hereinafter referred to only as "Malimu"). The Plaintiff's father, Jairo Ayalo Oyoo aforesaid, (hereinafter referred only as "Ayalo") lodged an appeal to the Adjudication Committee against the said demarcation. He lost the appeal. Ayalo filed a second appeal to the Arbitration Board against the decision of the Arbitration Committee. Again he lost. After the adjudication register was completed and laid for inspection, the plaintiff herein purported to lodge an objection under section 26 of the Land Adjudication Act, Cap.284 Laws of Kenya against the demarcation and recording of Plot No. 832 in the name of Malimu. The plaintiff's objection was lodged while Ayalo was still alive and notwithstanding the fact that the plaintiff was not a party to the previous proceedings before the Adjudication Committee and Arbitration Board that pitted his father, Ayalo against Malimu. The Plaintiff won the objection and was awarded Plot No. 832 on 30/4/75. This time round, Malimu was dissatisfied with the decision of the adjudication officer and preferred an appeal to the Minister of Lands on 19/6/1975 against the same pursuant to the provisions of Section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya. Malimu's appeal was heard by the District Commissioner South Nyanza District on behalf of the Minister on 10/10/1985. In a ruling that was delivered on 11/10/1985, the said District Commissioner allowed the appeal and made an order that Plot No. 832 be registered in the name of Malimu. The said District Commissioner made a further order that another parcel of land namely; Kamagambo/Kanyajuok/944 (hereinafter referred to only as "Plot No. 944") that had been wrongly dragged into the dispute be separated from Plot No. 832 and registered in the name of the Plaintiff. At the time of this decision by the Minister, Plot No. 832 was already been registered in the name Ayalo. That registration took place on

17/11/1977. Following this decision by the Minister, the register for Plot No. 832 was rectified on 24/10/1989 by the registration of Malimu as the owner thereof in place of the Plaintiff's deceased father, Ayalo. Malimu was thereafter issued with a title deed for the property. From the record, the Plaintiff participated fully in the appeal before the Minister and even called a witness.

After Plot No. 832 was registered in his name, Malimu sub-divided the same into two portions on 9/2/1990 namely, LR No. Kamagambo/Kanyajuok/1427 and LR No. Kamagambo/Kanyajuok/1428 (hereinafter referred to only as "Plot No. 1427" and "Plot No. 1428"). Plot No. 1427 was sub-divided again by Malimu into two portions namely, LR No. Kamagambo/Kanyajuok/1438 and LR No. Kamagambo/Kanyajuok/1439 (hereinafter referred to as "Plot No. 1438" and Plot No. "1439"). He again sub-divided Plot No. 1438 into two portions namely, LR No. Kamagambo/Kanyajuok/1450 and LR No. Kamagambo/Kanyajuok/ 1451 (hereinafter referred to as "Plot No. 1450" and Plot No. "1451"). Malimu thereafter sold Plot No. 1428 and Plot No. 1439 to the 1<sup>st</sup> Defendant herein. The two parcels of land were subsequently consolidated to form, LR No. Kamagambo/Kanyajuok/1440 ("Plot No. 1440") which was registered in the name of the 1<sup>st</sup> Defendant on 21/3/1991. In the same year he sold Plot No. 1451 to the 2<sup>nd</sup> Defendant. Plot No. 1451 was registered in the name of the 2<sup>nd</sup> defendant on 19/6/1991. He also transferred Plot No. 1450 to one, Lucas Omolo Ogolla on 28/2/2000. Lucas Omolo Ogolla transferred the said parcel of land to the 2<sup>nd</sup> Defendant on 9/3/2000.

It is not clear from the record as to when the Plaintiff became aware that Plot No. 832 had been registered in the name of Malimu and that he had sub-divided the same and sold portions thereof to the Defendants in the manner set out above. There was no activity on the part of the Plaintiff between 1989 when Plot No. 832 was registered in the name of Malimu and the year 2002 when the Plaintiff started filing a series of suits in an attempt to recover what was formerly plot No. 832 from the Defendants herein. Between the year 2002 and 2008, a total of 6 cases were filed concerning Plot No. 832 and its subdivisions, 5 by the Plaintiff and 1 by the 1<sup>st</sup> Defendant. The particulars of the said cases are set out herein below;

i. Rongo SRMCC No. 148/2008

Mary Akumu Oyugi Vs. John Hezron Okumu.

ii. Migori Land Disputes Tribunal Case, John Hezron Okumu Ayalo Vs- Mary A. Oyugi & Benjamin Odhiambo Osiany.

iii. Rongo SRMC Misc. Application No. 13 of 2008

John Hezron Okumu Ayalo Vs. Mary Akumu Oyugi & Benjamin Odhiambo Osiany.

iv. Kisii HCCC No. 272, John Okumu Ayalo Vs. Benjamin Odhiambo Osiany, Omulo Ogolla and Anditi Ojwang

v. Rongo SRMC Land Misc. Application No. 44 of 2006, John Okumu Ayalo Vs. Lucas Omulo Ogola.

vi. Migori District Land Disputes Tribunal case, John Okumu Ayalo Vs. Lucas Omulo Ogolla.

Some of these cases are pending, some have been determined while the fate of others is unknown. The cases that were filed by the Plaintiff were brought on the basis that the Defendants had acquired Plot No. 1440 and Plot No. 1451 fraudulently in that Malimu who sold the same to the Defendants had no good title to pass to them. The suit by the 1<sup>st</sup> defendant against the plaintiff was seeking his eviction from the Plot No. 1440.

### **The present suit:**

The Plaintiff brought this suit by way of Originating Summons dated 23/9/2010 seeking the following

orders:-

- i. That the Plaintiff's possession of LR. Nos. Kamagambo/Kanyajuok/1440, 1450, 1451 is adverse to the Defendants by virtue of the fact that he had occupied LR No. Kamagambo/Kanyajuok/832 since his childhood.
- ii. That the Defendants be directed to transfer the LR. Nos. Kamagambo/Kanyajuok/1440, 1450 and 1451 to the Plaintiff whose father JAIRO AYALO OYOO was the first registered owner of LR. No. Kamagambo/Kanyajuok/832.
- iii. That if the Defendants fail to execute the documents of transfer then the court should be pleased to issue an order vesting LR. Nos. Kamagambo/Kanyajuok/1440, 1450, 1451 in the name of the Plaintiff and the said vesting order be treated as transfer of the said land.
- iv. That the court be pleased to direct the land registrar Migori/Kuria/Rongo Districts to register LR. Nos. Kamagambo/Kanyajuok/1440, 1450, 1451 in the name of the Plaintiff.
- v. That if the Defendants fail to transfer the said parcels of land to the plaintiff, the Executive Officer of the court be authorized to sign necessary documents to effect the transfer thereof.
- vi. That the Defendants be restrained by an order of injunction from interfering with the Plaintiff's peaceful possession of the said parcels of land pending the hearing of this suit.
- vii. A declaration that the Defendants are holding LR. Nos. Kamangambo/Kanyajouk/1440, 1450, 1451 in trust for the Plaintiff who is a son to the original registered owner.
- viii. Costs of the suit.

The Originating Summons was supported by the affidavit of the Plaintiff sworn on 23/9/2010. In his affidavit, the Plaintiff stated as follows. His deceased father, Ayalo was the first registered owner of Plot No. 832. Ayalo had a dispute with Malimu over the boundary of LR No. Kamagambo/ Kanyajuok/838 and LR No. Kamagambo/Kanyajuok/839 (**"Plot No. 838 and Plot No. 839"**). The two parcels of land belonged to Malimu. Through mistake, the register for plot No. 832 was altered and the said parcel of land registered in the name of Malimu. Malimu thereafter sub-divided Plot No. 832 into three portions namely Plot Nos. 1440, 1441 and 1451 which he sold to the defendants. The Plaintiff contended that Plot No. 832 was registered in the name of Malimu through an error on the part of the Chief Land Registrar. He stated that Ayalo died on 22/12/1979 and was buried on Plot No. 832. He urged the court to assist him recover the ownership of Plot No. 832 from the defendants.

The Originating Summons was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through replying affidavits sworn on 5/11/2010 and 9/11/2010 respectively. In her affidavit, the 1<sup>st</sup> Defendant stated that she acquired Plot No. 1440 in the year 1991 and from that time she had been ploughing the same without any problem until the year 2008 when the Plaintiff started interfering with her possession of the said property. She denied that the Plaintiff is in possession of the said parcel of land which resulted from consolidation of Plot No. 1428 and Plot No. 1439. The 1<sup>st</sup> Defendant contended that she is the registered and absolute owner of Plot No. 1440 and that the Plaintiff has no valid claim over the same. The 1<sup>st</sup> Defendant mentioned a number of previous cases in which the parties herein were involved some of which she claimed are still pending hearing and determination. On his part, the 2<sup>nd</sup> defendant stated that he purchased Plot No. 1451 and Plot No. 1450 from Malimu in the years 1991 and 2000 respectively. The 2<sup>nd</sup> Defendant denied that he is holding the two parcels of land in trust for the Plaintiff.

He stated that the Plaintiff had filed a number of suits against him previously on the same subject matter some of which were determined against the Plaintiff. He denied that the Plaintiff has acquired title to Plot No. 1450 and Plot No. 1451 by adverse possession.

The parties agreed that the Originating Summons be heard through affidavit evidence and written submissions. The Plaintiff filed his written submissions on 12<sup>th</sup> May, 2014, the 1<sup>st</sup> Defendant filed her submissions on 19<sup>th</sup> March, 2015 while the 2<sup>nd</sup> Defendant did so on 15<sup>th</sup> June, 2015. On 15<sup>th</sup> June, 2015, the advocates for the parties informed the court that they had all filed their submissions and that the court should proceed and determine the matter. I have considered the Originating Summons together with the affidavit that was filed in support thereof. I have also considered the Defendants' replying affidavits filed in opposition to the said Originating Summons. Finally, I have considered the respective submissions by the advocates for the parties and the case law cited in support hereof. From my analysis of the foregoing documents, the issues that arise for determination in this suit are as follows:-

- i. Whether the Plaintiff has acquired Plot Nos. 1440, 1450, and 1451 by adverse possession?
- ii. Whether the Defendants hold Plot Nos. 1440, 1450 and 1451 in trust for the Plaintiff?
- iii. Whether the Plaintiff is entitled to the reliefs sought?
- iv. Who is liable for the costs of the suit?

#### **The first issue:**

In the case of **Salim vs. Boyd and another (1971) E.A 550**, it was held that an applicant seeking to be registered as proprietor of land by adverse possession must prove that he has had exclusive uninterrupted possession of the land for 12 years without fraud. In **Wambugu vs. Njuguna (1983) KLR 173**, the Court of Appeal stated as follows:

**"In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."**

From what I have set out earlier in this judgment, Plot No. 832 was registered in the name of the plaintiff's father, Ayalo on 17/11/1977. Ayalo remained the registered proprietor of the said property until 24/10/1989 when the same was registered in the name of Martin Ogolla Malimu ("Malimu"). Between 17/11/77 and 23/10/89 when Plot No. 832 was registered in the name of the plaintiff's father aforesaid, the Plaintiff's interest in that parcel of land if he was in occupation thereof could not be adverse to that of his father, Ayalo in that, he must have been occupying the said parcel of land with the consent of his father. The limitation period for the purposes of adverse possession could therefore only start running in favour of the Plaintiff with effect from 24/10/89 when plot No. 832 was registered in the name of Malimu. Malimu however did not hold title to Plot No. 832 for long. On 9/2/1990, he subdivided the same into two portions namely Plot No. 1427 and Plot No. 1428. On 21/3/91, he subdivided Plot No. 1427 also into two portions namely Plot No. 1438 and Plot No. 1439. On 14/6/1991, he again subdivided Plot No. 1438 into two portions namely, Plot No. 1450 and Plot No. 1451. On 21/3/1991 or thereabouts Malimu sold to the 1<sup>st</sup> Defendant Plot No. 1428 and Plot No. 1439. The two parcels of land as I have stated above were consolidated and registered in the name of the 1<sup>st</sup> Defendant as Plot No. 1440 on 21/3/91. The period between the time when Malimu was registered as owner of Plot No. 832 on 24/10/89 and the time when he sold to the 1<sup>st</sup> Defendant the two portions of the said parcel of land on 21/3/91 was less than 2 years. The plaintiff had therefore not acquired any interest on Plot No. 1440 as at the time the same was sold and transferred by Malimu to the 1<sup>st</sup> Defendant. The limitation period therefore started running afresh on 21/3/91 when the 1<sup>st</sup> Defendant was registered as owner of Plot No. 1440 as far as the plaintiff's claim over that parcel of land by adverse possession is concerned. As concerns the other portions of Plot No. 832, namely, Plot No. 1450 and Plot No. 1451, Malimu sold and transferred Plot No.

1451 to the 2<sup>nd</sup> defendant on 19/6/1991 and Plot No. 1450 to one, Lucas Omolo Ogolla on 28/2/2000. Lucas Omolo Ogolla transferred Plot No. 1450 to the 2<sup>nd</sup> defendant on 9/3/2000.

For the Plaintiff to succeed in his adverse possession claim in respect of Plot No. 1440 which is registered in the name of the 1<sup>st</sup> Defendant, he had to prove that as at the time of filing this suit, he had been in possession of the said parcel of land for uninterrupted period of 12 years which period has to be reckoned from 21/3/91. For Plot No. 1450 and Plot No. 1451 which are owned by the 2<sup>nd</sup> Defendant, the 12 years limitation period would be reckoned from 9/3/2000 and 19/6/91 respectively. This suit was filed on 27/9/2010. If the Plaintiff was in occupation of Plot No. 1440 and Plot No. 1451 as at the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants became the registered owners thereof on 21/3/91 and 19/6/91 respectively and was still in such occupation by the time this suit was filed on 27/9/2010, he can be said to have occupied the said parcels of land for over 12 years and as such was entitled to claim the said parcels of land by adverse possession provided he met the other conditions for such claim. His adverse possession claim over Plot No. 1450 would however be premature because he would have been in occupation of the same for less than 12 years as at 27/9/2010 when this suit was filed from the time the 2<sup>nd</sup> Defendant acquired the same on 9/3/2000.

The question that I now need to consider is whether the Plaintiff was in occupation of Plot No. 1440 and Plot No. 1451 and whether his occupation was open and uninterrupted. From the evidence on record, Plot No. 1440 measures about 6.35 ha. while Plot No. 1451 measures about 0.8 ha. The Plaintiff did not place before the court any evidence of his occupation of any of these two parcels of land. The Defendants had contended in their replying affidavits that they are the ones in occupation of the said properties. Although the Plaintiff claimed that he had occupied the original parcel of land, namely, Plot No. 832 from his childhood, the Plaintiff placed no evidence before the court in proof of his occupation of the said parcel of land. I am also not satisfied that the Plaintiff's occupation of the said parcels of land if at all he was in such occupation which has not been proved, was uninterrupted. I have set out at the beginning of this judgment a number of cases in which the Plaintiff and the Defendants had been involved over the suit property prior to the filing of this suit. The first case in the list of the said cases was filed by the Plaintiff in the year 2002 while the last one was filed by the 1<sup>st</sup> Defendant in the year 2008. It is now settled law that the filing of a suit stops limitation period from running. The position of one of the suits namely, Kisii HCCC No. 272 of 2002, John Okumu Ayalovs. Mary Oyugi and 2 others is not clear. There is no evidence on record as to whether it was heard and determined. The 1<sup>st</sup> defendant has claimed which claim has not been denied by the Plaintiff that Rongo SRMCC No. 148 of 2008 is still pending. In the face of the numerous suits in which the parties were involved prior to the filing of this suit some of which are still pending, I am not satisfied that the Plaintiff's alleged occupation of Plot No. 1440 and Plot No. 1451 was uninterrupted. In view of this conclusion, it is my finding that the Plaintiff has failed to prove that he has acquired Plot Nos. 1440, 1450 and 1451 owned by the Defendants by adverse possession.

### **The second issue:**

The proviso to Section 28 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) and section 25 (2) of the Land Registration Act, 2012 provides that the right of a proprietor of land is subject to any duty or obligation such proprietor may have as a trustee. These provisions of the law finds support in the cases of **Njenga Chogera Vs. Maria Wanjiru Kimani and others (2005) eKLR**, **Gatimu Kinguru Vs- Muya Gathangi (1976) KLR 253** and **Kanyi Vs- Muthiora (1984) KLR 712**. See also a copy of the text which the Plaintiff has attached to his submissions. The onus was upon the Plaintiff to place evidence before the court on which the court could make a finding that a trust relationship exists between the Plaintiff and the Defendants in relation to the suit properties. No such evidence was placed before me. The evidence before me shows that Plot No. 832 was lawfully registered in the name of Malimu following a successful appeal to the Minister from the decision of the Adjudication Officer of Kanyajuok Adjudication Section. The Plaintiff annexed to his submissions a copy of the decision of the said Minister who was represented in the said proceedings by the District Commissioner South Nyanza District. The Plaintiff's claim that Plot No. 832 was registered in the name of Malimu through mistake or error has no support in the evidence on record. The letters that have been exhibited by the Plaintiff in support of this contention cannot overrule the decision of the Minister that was made in discharge of the

power that was conferred upon him under the Land Adjudication Act, Cap 284 Laws of Kenya. If the Plaintiff felt that the decision of the Minister was erroneous, the only option that was open to him was to challenge the same by way of judicial review in the High Court. This court cannot open up the said decision of the Minister for purposes of interrogating whether or not the same was validly reached. Section 29 of the Land Adjudication Act, Cap 284 Laws of Kenya bars this court from doing that in proceedings of this nature. As the lawful owner of Plot No. 832, Malimu had the right to deal with the said property as he deemed fit which right extended to the subdivision and sale of the same which he did in this particular case. I am satisfied that the Defendants acquired valid titles from Malimu. This court is unable to infer any trust relationship between the Plaintiff and the Defendants. It is my finding therefore that the Plaintiff's claim over the suit properties on account of trust is unfounded and baseless.

**The Third issue:**

Having held that the Plaintiff has failed to prove that he has acquired Plot Nos. 1440, 1450 and 1451 by adverse possession and that the Defendants hold the said parcels of land in trust for him, this issue must be answered in the negative. The Plaintiff is not entitled to any of the reliefs set out in the Originating Summons dated 23/9/2010.

**Conclusion:**

In conclusion, I have found the Plaintiff's claim against the Defendants unproven. The Originating Summons dated 23/9/2010 is accordingly dismissed with costs to the Defendants.

**Signed at Nairobi this.....day of November, 2015**

**S. OKONG'O**

**JUDGE**

**Delivered and Dated at Kisii this 4<sup>th</sup> day of December 2015**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

.....**for the Plaintiff**

.....**for the 1<sup>st</sup> Defendant**

.....**for the 2<sup>nd</sup> defendant**