



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**Civil Suit 38 of 2003**

**IN THE MATTER OF SECTION 7, 17 & 38 OF LIMITATION OF ACTIONS CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 28 & 30 OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION IN RESPECT OF LAND PARCEL NO.KIMILILI/KIMILILI/561**

**BETWEEN**

**EMMANUEL**

**NYONGESA.....APPLICANT**

**~VRS~**

**JOINA NABANGALA**

**MASASABA.....RESPONDENT**

**JUDGMENT**

The Plaintiff filed this suit on 27/5/2003 by way of originating summons under sections 7, 17 and 38 of the Limitation of Actions Act (Cap.22) and Order 36 rule 3D of the Civil Procedure Rules claiming to have acquired 5 acres of land of parcel no.Kimilili/Kimilili/561 registered in the name of the Defendant by adverse possession. He claimed that he has been in occupation and/or possession of the 5 acres openly, peacefully and continuously for a period of over 12 years and therefore that the Defendant's title to the portion has become extinguished. He asked to be registered as the proprietor of the 5 acres. The Defendant filed a replying affidavit in which she denied that the Plaintiff had occupied 5 acres of the suit

land, or any part of it. She stated that she and her family are the ones who have always occupied all the land comprised in the title, whereas the Plaintiff was staying on his land at Kibingei. She further stated that the suit land has since been subdivided into Kimilili/Kimilili/942 and 943.

The Plaintiff tendered evidence and called two witnesses PW2 George Obondo Ongutu (District Land Registrar, Bungoma) and PW3 William Amutala who was chief of Kimilili location between 1983 and January, 1996. He was the chief of the area in which the suit land is located. The Defendant gave evidence and did not call any witness.

Following the evidence, Mr. Makali for the Plaintiff and Mr. Wanyama Wanyonyi filed written submissions. I have considered the evidence and the submissions.

The Plaintiff's evidence was that on 16/9/1973 he bought 5 acres (Exhibit 2) of the suit land from Cain Masasabi Wabule at Ksh.2750/= which he fully paid. There is no dispute that Cain was the Defendant's husband and he was then the registered proprietor of the suit land. The Plaintiff testified that the suit land was in total 10 acres prior to the agreement for sale. Cain sold the balance to one Henry Mulubi. He demarcated 5 acres for each buyer who went into occupation. The boundary for each 5 acres was marked by sisal plants. Cain moved from here and went to settle on his other land, Kimilili/Kimilili/963. There is no dispute that Cain was at the time the registered proprietor of 963.

Further evidence was that the Plaintiff had two wives. He settled one on the five acres and the other was left at Misikhu when he had earlier settled. In 1984, the Defendant filed a claim against him and her husband (Cain) at the Office of PW3 complaining about the sale of land. PW3 heard the claim and dismissed it (exhibit 3). The Defendant was claiming that as a result of the sale she and her children had nowhere to stay. Further, that she had not been consulted before the sale. The Plaintiff continued to stay on the 5 acres until 2003 when Cain died. The Defendant and the family forcefully buried his remains on the land. In 2005 the Defendant filed **SRM CC no.326 of 2005** at **Bungoma** against James Maliekhe Kokonya and Phillip Mululu Kokonya seeking their eviction from the suit land (D Exhibits 1 and 2). The Plaintiff stated that Phillip was his brother in-law (married to Plaintiff's sister) and that he was living on the 5 acres on his invitation.

There is no dispute that just before Cain died he transferred the entire suit land to the Defendant. This was in 2003.

The Defendant gave evidence to deny that her husband (the deceased) sold any land to the Plaintiff. She stated that she knew the Plaintiff when he sued him in this case. She denied that he has occupied any portion of the suit land. She stated that the only people on the land are James and Phillip whom she has sued in the suit above. She said that Phillip came on the suit land in 1983. Her case is that she has always lived on this land with her family. The evidence of the Plaintiff was that she came to settle on this land in 2003 following the burial of the deceased here. Prior to this she was living with the deceased on 963. The Defendant denied this, but when she was cross-examined she admitted that following the deceased's death they had to construct a small hut on the suit land in which the body had to stay overnight. She stated that the body was brought on Friday and buried on Saturday. That would be evidence that the couple was staying elsewhere before the deceased's death.

Although the Defendant denied this, the evidence of the Plaintiff was supported by an agreement in writing and the evidence of PW3 who was their chief that he was sold 5 acres by the deceased and he settled thereon between 1973 and 1984. That was for 11 years. The stay was interrupted by her complaint to PW3. I accept that evidence.

The Defendant's defence was that Phillip came on the land in 1983. That would support the Plaintiff's testimony that he is the one who invited Phillip here and that since then he stays on the 5 acres with him. The fact that the Defendant is seeking the eviction of Phillip is evidence that he is still on the land. The Plaintiff stated that he has settled on the 5 acres. I accept that evidence. Even if the Plaintiff was not personally staying on the land he had settled Phillip on the same. Either way, the Plaintiff was in occupation and in possession of the 5 acres.

Between 1984 and 2003, there was a period of 19 years of continuous, peaceful and uninterrupted stay on the suit land by the Plaintiff. I find that by 2003 when the Defendant became the registered owner of the suit land the title of the deceased to the same had been extinguished by the operation of the law (**Kairu v. Gacheru [1988] KLR 297**). He held the title in the 5 acres in trust for the Plaintiff. The Plaintiff had been in continuous and uninterrupted possession of the 5 acres between 1984 and 2003 and had acquired the land by adverse possession (**Lusenaka & Another v. Omocha [1984] KLR 490**). By the time the Defendant was burying the deceased on the five (5) acres she no longer had any legitimate claim, or proprietary interest, in the same.

I have observed in the foregoing that the deceased had, using sisal plants, marked the extend of the 5 acres he sold to the Plaintiff. I allow the claim and direct that the register in respect of Kimilili/Kimilili/561 (as subdivided into parcels Kimilili/Kimilili/942 and Kimilili/Kimilili/943, or any other subsequent titles) be cancelled so that the Plaintiff is registered in respect of the 5 acres of the same. The Defendant shall pay the costs of the suit.

Dated, signed and delivered at Bungoma this 11<sup>th</sup> day of July 2012.

**A. O. MUCHELULE**  
**JUDGE**