



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 15 (A) OF 2013 (O.S)**

**IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF TITLE BY**

**ADVERSE POSSESSION OF THOSE PARCELS OF LAND DESCRIBED AS UYOMA/KATWENGA/828**

**AND**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**BETWEEN**

**SILIPA OCHIENG MOLO.....1<sup>ST</sup> PLAINTIFF**

**JOSPINE ODONGO OBAT.....2<sup>ND</sup> PLAINTIFF**

**PETER OCHOLA OWUOR.....3<sup>RD</sup> PLAINTIFF**

**DAVID MOLO OWUOR.....4<sup>TH</sup> PLAINTIFF**

**MOLO NUDI.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JACOB OCHINO OGUNDO.....1<sup>ST</sup> DEFENDANT**

**GEORGE ARTHUR OLANG'O.....2<sup>ND</sup> DEFENDANT**

**JOSEPH OUKO OGUNDO.....3<sup>RD</sup> DEFENDANT**

**JAMES EDWIN ONYUKA.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. This suit was commenced by Silipa Ochieng Molo, Josphine Odongo Obat, Peter Ochola Owuor, David Molo Owuor and Molo Nudi, the Plaintiffs, against Jacob Ochino Ogundo, George Arthur Olang'o, Joseph Ouko Ogundo and James Edwin Onyuka, the Defendants, through the Originating Summons dated the 29<sup>th</sup> January 2013 and filed on the 30<sup>th</sup> January 2013. The Plaintiffs claim to have acquired title to Uyoma/Katwenga/828 through adverse possession and seek for an order directing the Defendants, who are the suit land's registered proprietors, to transfer it to them. The originating summons is supported by the affidavit sworn by the 2<sup>nd</sup> Plaintiff on the 29<sup>th</sup> January 2013, to which is annexed a copy of the suit land's register, among others. She depones as follows;

- That the suit land belonged to Molo Owuor, but was mistakenly registered with Jacob Ogundo after adjudication. That upon the death of Jacob Ogundo, the Defendants got registered with the land through transmission in 1997.
- That Jacob Ogundo had filed Bondo Land Case No. 48 of 1970 against Molo Owuor, and obtained injunction orders over the suit land. That Molo Owuor filed Bondo Land Appeal No. 33 of 1972 but lost. That the judgment in Bondo Land Case No. 48 of 1970 has never been executed, and that Molo Owuor and his family had continued to reside and cultivate the suit land todate.

- **That the Defendants have never resided on, or used the suit land.**

2. The Plaintiffs' claim is opposed by the Defendants through the replying affidavit sworn by Jacob Ochino Ogundo, the 1<sup>st</sup> Defendant, on the 17<sup>th</sup> April 2013, deponing to the following, among others:

- **That the Defendants became the registered proprietors of the suit land on the 28<sup>th</sup> April 1997 after inheriting it from their late father, Jacob Ogundo Arunda, who died in 1977.**
- **That the Plaintiffs have not been living on the suit land uninterrupted as the parties have from the time of adjudication been in and out of courts, including in Bondo Land Case No. 48 of 1970, Land Appeal No. 35 of 1972, Kisumu HCCA No. 14 of 1973, Bondo Land Dispute Tribunal Claim No. 881 of 2001 and Bondo SRMCC Misc. Civil Case No. 11 of 2007.**
- **That even after the Plaintiffs lost in all the cases, they refused, neglected and or failed to move out of the suit land despite numerous requests by Jacob Ogundo Arunda.**
- **That the Plaintiffs own land parcel Uyoma/Katwenga/881, yet they are claiming the suit land.**
- **That the Defendants had enlisted the assistance of the chief to get the Plaintiffs out of the land. That the Plaintiffs were last summoned by the chief in March 2012 but they declined to attend.**
- **That on or about 22<sup>nd</sup> March 2012 the Defendants filed Bondo PMCC No. 20 of 2012 seeking eviction order against the Plaintiffs but was struck out on the 8<sup>th</sup> June 2012, upon a preliminary objection on jurisdiction being raised. That the Plaintiffs herein filed Kisumu Civil Appeal No. 86 of 2012 on costs and that it is still pending.**
- **That they were served with suit papers in this case as they prepared to institute a fresh suit against the Plaintiffs.**
- **That they have been using part of the land by cultivating and had buried their deceased relatives on it until four years ago when the Plaintiffs built houses thereon.**
- **That part of the suit land was given by their late father to P.C.E.A church who occupy it todate.**
- **That the Plaintiffs have not been in continuous and uninterrupted possession of the suit land for the period prescribed by the law, to base a claim under adverse possession on it.**
- **That the Plaintiffs were using the land with permission of the defendants as clans-mates.**

3. The hearing of the Plaintiffs' case commenced on the 30<sup>th</sup> May 2016 when Josephine Achieng Odongo Obat, the 2<sup>nd</sup> Plaintiff, testified as PW1. Thereafter John Charles Ogwango and Joshua Akungo Molo, testified as PW2 and PW3. Their testimony was that the family of Molo Owuor, who includes the Plaintiffs herein, have been living on the suit land exclusively of the Defendants since before the land adjudication process of the 1970s. That though there has been several court cases between Molo Owuor and Jacob Ogundo, and the parties herein, over the suit land, Molo Owuor and his family have never been evicted from the suit land and hence the title held by the Defendants over the land has been extinguished and the same should be registered in the Plaintiffs' names.

4. The Defendants called Jacob Ochino Ogundo, the 1<sup>st</sup> Defendant, who testified as DW1. He told the Court that the suit land was in the 1960s occupied by Molo Owuor, Gabriel Molo, Obara Ongoo and his father. That during the land adjudication, his late father asked those people residing on the land to move out. That the others moved out but Molo Owuor and his family declined. The witness told the court of the various court cases between Molo Owuor, his late father and their families. He further testified that after completion of the adjudication exercise, the suit land was registered in his late father's name in 1977, but due to a subsequent appeal to the Minister by Molo Owuor, the Defendants stopped using the half portion of the land which was in their occupation. That after the restriction was removed on the 25<sup>th</sup> February 1997, the Defendants got registered with suit land, through transmission, and then moved to court for eviction order against the Plaintiffs in Bondo Misc Civil App. No. 11 of 2007, but the suit was dismissed for want of jurisdiction. That as they were preparing to move to the court, they were served with the suit papers in this case.

5. The Learned Counsel for the Plaintiffs and Defendants filed their written submissions dated the 30<sup>th</sup> October 2017 and 5<sup>th</sup> March 2018 respectively.

6. The following are the issues for the court's determinations;

- a) Whether the Plaintiffs have been in exclusive and quiet possession of land parcel Uyoma/Katwenga/828, the suit property, for more than 12 (twelve) years continuously by the time this suit was filed.**
- b) Who pays the costs of the suit.**

7. The court has carefully considered the grounds on the Originating Summons, the affidavit evidence, the oral evidence tendered, written submissions, the cited superior court decisions and come to the following determinations;

- a) That the issue of ownership of the land, that was after adjudication process registered as Uyoma/Katwenga/828, the suit property,

started during the adjudication process. That according to the Defendants, the land was then occupied by their family, that of Molo Owuor and three others. That the Defendants' father namely Jacob Ogundo Arunda, asked Molo Owuor and those others using the land to move out of the land during the adjudication process but Molo Owuor and his family declined.

b) That after adjudication, the land was registered on the 19<sup>th</sup> October 1977, as confirmed by the copy of the green card attached to the Plaintiffs' supporting affidavit. The first registered proprietor is indicated as Jacob Ogundo Arunda, the late father to the Defendants, who DW1 disclosed passed on in 1977.

c) That while the evidence tendered by the Plaintiffs and Defendants confirms that there has been several litigations over the ownership and use of the land before the Land Disputes Tribunal, Bondo Magistrates Courts, the High Court Kisumu and an appeal before the Minister, and that an eviction order had been issued against Molo Owuor in Bondo Land Case No. 48 of 1970, the said Molo Owuor and his family members, who includes the Plaintiffs herein, have never been removed or evicted from the said land. That even the Defendants last suit in Bondo PMCC No. 20 of 2012, in which they sought injunction and eviction orders against the Plaintiffs, was not successful. That the court therefore finds that Molo Owuor's family has been in occupation and possession of the suit land from before the land adjudication that resulted in the registration of the suit land in 1977 in the name of Jacob Ogundo Arunda.

d) That the Defendants claim to have had possession of half of the suit land upto and until the restriction by the Chief Land Registrar was registered. The copy of the green card confirms that the restriction was registered under entry No. 2 of 1<sup>st</sup> February 1978. The 1<sup>st</sup> Defendant confirmed that the Defendants have not gone back to the land, or used the land, since that time while the Plaintiffs continued residing and cultivating on it.

e) That the Plaintiffs have brought this suit in their own names and from the available evidence adduced by PW1, (2<sup>nd</sup> Plaintiff), she has lived on the land since 1980 when she got married by a son of Molo Owuor. The testimony of PW1, PW2 and PW3, which is uncontroverted by the Defendants, shows that Molo Owuor and his family has been on the suit land even before the land was registered in 1977. The litigations that have taken place between the late Molo Owuor, who died in 1978, and Jacob Ogundo Arunda, who died in 1977, and their families thereafter, leads the court to conclude that the entry onto the suit land by Molo Owuor and his family members, including the Plaintiffs, and their continued possession and occupation todate, has not been with permission of the Defendants or their late father. The Plaintiffs occupation and possession of the suit land has been hostile to the title of Jacob Ogundo Arunda and that of the Defendants.

f) That the change of the suit lands proprietorship from the late Jacob Ogunda Arunda to the Defendants on the 28<sup>th</sup> April, 1997 did not interrupt the running of time in favour of the Plaintiffs whose occupation and possession of the suit land was adverse to the title of the then registered proprietor. That from April 1997 to January 2013 when this suit was filed, a period of about 16 (sixteen) years had lapsed, which is above the 12 (twelve) years required for adverse possession principle to be invoked to extinguish the title of the title holder under **Sections 7 and 17 of the Limitation of Actions Act Chapter 22 of laws of Kenya.**

g) That despite the numerous litigations by and against the Plaintiffs and their late father, Molo Owuor, their possession of the suit land has remained exclusive and uninterrupted. The court finds that the Plaintiffs have established their claim over the suit land under adverse possession principle against the Defendants in accordance with the law.

8. That the court enters judgment for the Plaintiffs against the Defendants in the following terms;

**a) That prayers 1, 2 and 3 of the Originating Summons dated 21<sup>st</sup> January 2013 are granted.**

**b) That the Defendants are ordered to take steps to transfer the suit land to the Plaintiffs in 90 (ninety) days, and in default the Deputy Registrar to execute all necessary documents to give effect to the order of the court.**

**c) That in view of the long history on litigations over the suit land, the fact that parties are clans-mates and neighbours, each party is to bear their own costs so as to encourage and promote harmony between them and their future generations.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2019**

**In the presence of:**

Plaintiffs Absent

Defendants Absent

Counsel Mr. Onsongo for Ragot for Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

JUDGE