



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**ENVIRONMENT AND LAND COURT**  
**ELC CASE NO. 99 OF 2018 (O.S.)**

**TOBIAS ORENG RONOWINNIE AKOTH ABONGO.....**  
**PLAINTIFF**

**VERSUS**

**PETALIS OKUSA NYAMOLO.....1<sup>st</sup>**  
**DEFENDANT**

**WILLIAM ODHIAMBO NYAMOLO.....2<sup>nd</sup>**  
**DEFENDANT**

**JUDGEMENT**

**Introduction**

1. The matter before this Court arises from an Originating Summons dated 5<sup>th</sup> July 2018 initially filed by the late Tobias Oreny Bono (the Plaintiff/Applicant), and subsequently prosecuted by his widow, Winnie Akoth Abongo, upon substitution. The suit is brought under Order 37 Rules 1, 2 and 7 of the Civil Procedure Rules, Section 38 of the Limitation of Actions Act, Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, and all other enabling provisions of the law.

**The Plaintiff's Case**

2. The Plaintiff claims to have acquired title to a portion measuring three quarters ( $\frac{3}{4}$ ) of an acre out of land parcel SUNA EAST/WASWETA 1/6174, which was later subdivided into parcels 10286, 19092, and ultimately 24243,

by way of prescription and/or adverse possession. He contends that he entered into possession in 1993 upon purchase from the 1<sup>st</sup> Defendant.

3. The Originating Summons seeks the following orders:

- a) A Declaration that the Defendants' right to recover a portion of 3/4 of an acre of the suit land known as SUNA EAST/WASWETA1/6174 is barred under the Limitation of Actions Act and the Defendants' Title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in Occupation and Possession of the aforesaid land for a period exceeding 25 years.
- b) There be an Order of sub-division of SUNA EAST/WASWETA1/24243 and a portion of 3/4 of an acre be registered in the name of the plaintiff.
- c) There be an Order restraining the Defendants by themselves, their Servants, Agents or otherwise howsoever from interfering with the Plaintiff's peaceful possession and occupation of a portion of 3/4 of an acre of the suit land namely SUNA EAST/WASWETA1/24243 in any manner howsoever and whatsoever.
- d) The Deputy Registrar and/or the Executive Officer of this Honourable Court be directed and or ordered to execute the Transfer documents and all attendant documents to facilitate the sub-division and transfer of 3/4 of an acre from the Title namely SUNA EAST/WASWETA1/24243 in favour of the Plaintiff.
- e) Costs of this Originating Summons be borne by the Defendants.
- f) Such further and or other Orders be made as the Court may deem fit and expedient in the circumstances of this Case.

4. In his Supporting Affidavit sworn on 5<sup>th</sup> July 2018, the Plaintiff averred that he purchased a portion measuring three-quarters ( $\frac{3}{4}$ ) of an acre from land parcel SUNA EAST/WASWETA 1/6174 in 1993 from the 1<sup>st</sup> Defendant, and annexed a written sale agreement ("TOB1"). He stated that he was immediately put into possession, after which he continuously cultivated the portion and constructed a pit latrine, demonstrating uninterrupted occupation from 1993.
5. He further deposed that the 1<sup>st</sup> Defendant later subdivided parcel 6174 into 10286 and 10287 in 1995 ("TOB2"), and that in 2013, parcel 10286 was transferred to the 2<sup>nd</sup> Defendant without his knowledge ("TOB3"). Subsequent subdivisions occurred between 2013 and 2018, yielding parcels 19092, 19093, 19094, 19095, and eventually 24243 and 24244 ("TOB4"), with his interest now lying in parcel SUNA EAST/WASWETA 1/24243 ("TOB4B").
6. The Plaintiff further averred that in 2013 the 2<sup>nd</sup> Defendant issued a demand letter alleging trespass arising from the construction of a pit latrine ("TOB5"), and that the 1<sup>st</sup> Defendant also filed Migori SPMC ELC No. 11 of 2018 on allegations of trespass ("TOB6"). He contended that these steps were taken in an attempt to defeat his long-standing occupation. He asserted, however, that he has been in open, peaceful, exclusive and uninterrupted possession of the  $\frac{3}{4}$  acre portion for over 25 years, thereby extinguishing the Defendants' title under Sections 7, 13 and 38 of the Limitation of Actions Act. He therefore claims entitlement to be registered as proprietor under Section 28(h) of the Land Registration Act.

### **The Defendants' Response (Replying Affidavit)**

7. In opposition, the Defendants filed a Replying Affidavit sworn on 12<sup>th</sup> February 2019 by William Odhiambo Nyamolo, the 2<sup>nd</sup> Defendant, who stated that he had authority to swear the affidavit on behalf of the 1<sup>st</sup> Defendant. He

contended that the Originating Summons is bad in law and sub judice, given the existence of Migori SPMC ELC No. 11 of 2018 involving the same parties and subject matter.

8. He further asserted that the Plaintiff was improperly attempting to raise adverse possession as a defence to trespass, which he argued is legally impermissible. He deposed that parcel 6174, which forms the basis of the Plaintiff's claim, is no longer in existence due to subdivision, and that the alleged claim over a  $\frac{3}{4}$ -acre portion within parcel 24243 is vague and undefined.
9. The 2<sup>nd</sup> Defendant further averred that the Plaintiff is merely a neighbour residing on parcel SUNA EAST/WASWETA 1/5041, and that his limited entry onto the disputed land amounted to sporadic trespass, which was resisted and reported to Migori Police Station under OB No. 51/02/02/2015 as well as to local authorities.
10. He stated that the Plaintiff never occupied the suit land openly or continuously for 12 years and that any attempts at construction were promptly challenged. He dismissed the alleged sale agreement as a forgery, not written in the language of the Court, lacking Land Control Board consent, and being statutorily barred. He argued that adverse possession cannot be invoked after litigation had already been initiated against the Plaintiff. The Defendants therefore maintain that the Plaintiff has not met the legal threshold for adverse possession and urge the Court to dismiss the suit.

### **Hearing**

11. On mention dates beginning 4<sup>th</sup> March 2019, the matter proceeded by consent to a series of interlocutory mentions and directions. By order dated 16<sup>th</sup> July 2019, the Court allowed the motion dated 15<sup>th</sup> July 2019 and fixed the matter for pre-trial directions; subsequent mentions were held on

29.10.2019, 19.2.2020, and throughout 2020–2021 (including the COVID-19 period).

12. During this period, the record shows that the original Plaintiff died and, by leave of Court, his widow, Ms. Winnie Akoth Abongo, was substituted as Plaintiff. Counsel later applied to cease acting and procedural issues were addressed. The Registrar and Judges issued repeated directions for compliance with Order 11, filing of witness statements and documents, and ordered that the file in Migori CMC ELC No. 11 of 2018 be availed for perusal and was later stayed pending this Court's determination.
13. Following compliance, the matter was gradually prepared for hearing and various dates 3.5.2023, 28.6.2023, and 12.7.2023 were fixed and adjourned for various reasons until the case ultimately proceeded to full hearing on 5<sup>th</sup> October 2023 before me. At the commencement of the hearing, counsel for the Plaintiff indicated readiness with one witness, while counsel for the Defendants confirmed they had two witnesses.
14. The Court then heard PW1, Ms. Winnie Akoth Abongo, who adopted her witness statement dated 9.2.2022 and produced key documents including the sale agreement dated 18.4.1993, its certified English translation, and four (4) green cards as exhibits. She testified that her late husband took possession of the land in 1993, cultivated it, and constructed a pit latrine, asserting continuous occupation of approximately  $\frac{3}{4}$  acre.
15. The defence case proceeded with DW1, Mr. William Odhiambo Nyamolo, who adopted his Replying Affidavit sworn on 12.2.2019, together with annexures including pleadings in Migori ELC No. 11 of 2018, as his evidence-in-chief. He testified that he had reported alleged trespass by the Plaintiff in 2015 and denied that the Plaintiff or her late husband had ever occupied the suit land for twelve (12) years, stating that any attempted occupation was resisted.

16. Under cross-examination, DW1 confirmed the historical transfers of titles within his family but denied knowledge of the 1993 sale agreement and maintained that no long-standing occupation existed. PW1 was also cross-examined regarding the absence of a survey report, lack of photographic evidence of the pit latrine, and the existence of previous disputes.
17. After both parties closed their cases, the Court directed that written submissions be filed, with the Plaintiff to file within 14 days and the Defendants within 14 days thereafter. Submissions were duly filed, and on 21<sup>st</sup> November 2023, both counsels confirmed compliance.

### **Submissions**

18. Via submissions dated 23<sup>rd</sup> October 2023 the Plaintiff submitted that by the Originating Summons dated 5<sup>th</sup> July 2018, she seeks 3/4 of an acre out of SUNA EAST/WASWETA I/24243 by adverse possession, relying on the declaration, injunction, subdivision, transfer and costs orders set out in the Summons. She argued that her late husband bought the land in 1993, took possession immediately, paid the purchase price in full, cultivated the land, and constructed a pit latrine, remaining in continuous, open, peaceful and uninterrupted occupation for over 25 years, thereby extinguishing the Defendants' title under Sections 7, 13 and 38 of the Limitation of Actions Act.
19. She emphasised that change of proprietorship, including the transfer from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant, does not interrupt adverse possession, relying on **Githu v Ndeete [1984] KLR 776** and **John Mwangi Ndegwa v Eliud Macharia Maina (2015) eKLR**, which held that mere change of ownership cannot defeat an accrued claim. She noted that the 1st Defendant, who allegedly sold the land, was in court and did not dispute the sale agreement.

The Plaintiff therefore urged the Court to allow the claim with costs.

20. The Defendants submitted that the Plaintiff lacks locus standi, arguing that she substituted herself in place of her deceased husband but not as a legal representative of his estate, hence she cannot rely on any rights flowing from him, including alleged occupation from 1993. They maintained that the Plaintiff failed to prove the elements of adverse possession, citing **Samwel Kihamba v Mary Mbaisi (2015) eKLR**, which requires possession to be nec vi, nec clam, nec precario with clear animus possidendi.
21. They argued that the Plaintiff provided no survey evidence showing that the claimed 3/4 acre lies within parcel 24243, admitted that she resides on parcel 5041, and failed to prove actual occupation beyond an unverified claim of a pit latrine. They relied on police reports (OB 51/02/02/2015) and letters to local authorities to show that alleged trespass in 2015–2017 was resisted, meaning possession was not peaceful nor uninterrupted. They further argued that the sale agreement is a forgery, lacked Land Control Board consent, and is statutorily void, and that time stopped running when they filed Migori SPMC ELC No. 11 of 2018. They therefore asked the Court to dismiss the suit with costs.

### **Issue for Determination**

22. The court finds the following issue for determination: Whether the Plaintiff has proved acquisition of the  $\frac{3}{4}$  acre portion by adverse possession, and whether the subsequent subdivisions and changes in proprietorship interrupted or defeated that possession.

### **Analysis and Determination**

23. The Plaintiff's case is that her late husband entered the disputed  $\frac{3}{4}$  acre portion in 1993 immediately after purchasing it from the 1<sup>st</sup> Defendant, and that from that year, her family took possession, cultivated the land, and

constructed a pit latrine which remains in use.

24. She asserts that this possession has been open, peaceful, exclusive and uninterrupted for over 25 years, despite the parent land SUNA EAST/WASWETA 1/6174 undergoing successive subdivisions into 10286, then 19092, and ultimately 24243, the current title. She maintains that although the numbers changed on paper, the physical portion they occupy has never changed, and the Defendants never recovered possession at any time prior to 2005.
25. The legal framework governing adverse possession is settled. Section 38(1) of the *Limitation of Actions Act* entitles a person claiming to have acquired land through adverse possession to apply to be registered as proprietor in place of the current registered owner. The Court of Appeal in **Kasuve v Mwaani Investments Ltd [2004] 1 KLR 184** stated that a claimant must prove exclusive, open, continuous and uninterrupted occupation for at least twelve (12) years, either by dispossessing the owner or after the owner voluntarily discontinues possession. Further, Sections 6, 13 and 17 of the Act collectively provide that after the lapse of the statutory period, the registered owner's title is extinguished by operation of law, as affirmed in *Benjamin Kamau & Others v Gladys Njeri [1996]*.
26. Post-2010 land laws continue to recognize adverse possession. Section 28(h) of the Land Registration Act classifies rights acquired or being acquired by prescription as overriding interests, while Section 7(d) of the Land Act expressly recognizes acquisition of land by prescription. Additionally, as held in **Kimani Ruchine v Swift Rutherford [1980] KLR 10**, possession must be *nec vi, nec clam, nec precario* without force, without secrecy, and without permission. The Court of Appeal in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** clarified that adverse possession requires continuity, publicity, and extent sufficient to demonstrate that the possession

is adverse.

27. Applying these principles to the facts, the Plaintiff's evidence demonstrates that entry occurred in 1993, supported by the sale agreement whose authenticity the 1<sup>st</sup> Defendant despite attending court did not challenge. The Plaintiff testified credibly that cultivation commenced immediately, and the pit latrine, constructed in the same year, has been in continuous use.
28. These are classic acts of actual possession and are consistent with assertion of ownership. The Defendants produced no evidence that they or anyone else in their family occupied the disputed  $\frac{3}{4}$  acre at any time between 1993 and 2005, the crucial twelve-year period. The first recorded objection police reports in 2013 and 2015, and the suit in 2017 arose long after the limitation period had crystallized. By then, under Section 17, the Defendants' title had already been extinguished.
29. The Court is equally satisfied that the multiple subdivisions and changes of proprietorship did not interrupt the Plaintiff's possession. The law is clear that *a change of ownership does not interrupt time for adverse possession* **Githu v Ndeete [1984] KLR 776.**
30. The Plaintiff remained on the same identifiable portion on the ground through all mutations and transfers. The Defendants did not produce a survey report or boundary evidence to contradict her occupation or to show that the  $\frac{3}{4}$  acre claimed does not lie within parcel 24243. The assertion that she resides on parcel 5041 does not negate the unchallenged evidence that the disputed portion where cultivation and the pit latrine sit lies within the chain of subdivisions from the original parcel.
31. On the requirement of peacefulness, the evidence shows that from 1993 to at least 2005, no action was taken by the Defendants to evict or challenge the Plaintiff. Their reaction only came after the statutory period had elapsed,

which cannot defeat a right already perfected by law. As held in Mtana Lewa, adverse possession arises when the title holder “omits or neglects to take action” within the limitation period.

32. In sum, the Plaintiff has demonstrated continuous, open, exclusive, peaceful and uninterrupted possession of the  $\frac{3}{4}$  acre portion for a period far exceeding twelve years. She has also demonstrated that the subsequent subdivisions and transfer to the 2<sup>nd</sup> Defendant did not interrupt nor defeat her possession. The legal requirements of adverse possession have therefore been fully satisfied.

### **Final Disposition**

33. Having carefully considered the pleadings, evidence and submissions of the parties, and in view of the Court’s findings above, the Court makes the following final orders:

- a) A declaration is hereby issued that the Plaintiff, WINNIE AKOTH ABONGO, has acquired by adverse possession a portion measuring *three-quarters* ( $\frac{3}{4}$ ) of an acre out of land parcel SUNA EAST/WASWETA I/24243.
- b) The 2<sup>nd</sup> Defendant’s title to the said  $\frac{3}{4}$  acre portion is hereby extinguished pursuant to Sections 7, 13 and 17 of the Limitation of Actions Act.
- c) The  $\frac{3}{4}$  acre portion shall be surveyed, excised and registered in the name of the Plaintiff.
- d) The Deputy Registrar of this Court is authorized to execute all necessary documents to give effect to this judgment in the event the Defendants fail, neglect or refuse to do so.

e) An order of permanent injunction is hereby issued restraining the Defendants, their agents or assigns from interfering with the Plaintiff's peaceful occupation of the said  $\frac{3}{4}$  acre portion.

f) Costs of the suit are awarded to the Plaintiff.

It is so ordered.

**DATED, SIGNED and DELIVERED virtually at NAIROBI on 27<sup>th</sup> day of November, 2025.**

**MOHAMMED N. KULLOW**  
**JUDGE**

**Judgment delivered in the presence of: -**

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendants

..... for the 2<sup>nd</sup> Defendants

**Philomena W.**..... Court Assistant