



**REPUBLIC OF KENYA**

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

**ELCC NO. 777 of 2017 (0.S)**

**(formerly Kisii HCCC No. 322 of 2012)**

**EDWARD OKODE ALUOCH.....PLAINTIFF**

**VERSUS**

**LEONIDA ORWA OINDO.....1ST DEFENDANT**

**DAN OTIENO OINDO (Sued as the legal Administrators of ANDREA OINDO**

**MILONDE- (Deceased).....2ND DEFENDANT**

**JUDGMENT**

1. On 27th August, the plaintiff through M/s Oguttu, Ochwangi, Ochwal and Company Advocates formerly M/S Oguttu Mboya and Company Advocates filed an originating summons dated 21st August 2012 under Order 37 Rules 7 and 14 of the Civil Procedure Rules, 2010 and Section 38 of the Limitation Actions Act (Cap 22). He is claiming that he has acquired title over a portion measuring 2 hectares of the suit land, LR No. Kamagambo/Kanyajuok/74 by way of adverse possession. Simply put, he is seeking the following substantive reliefs;

- i. A declaration that the Defendant's rights to recover a portion measuring 2 Hactares of LR. NO. KAMAGAMBO/KANYAJUOK/741 is barred under the Limitation of Actions Act, Chapter 22 of laws of Kenya, and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 35 years.
- ii. There be an order that the plaintiff be registered as the proprietor of the portion measuring 2 hactares of KAMAGAMBO/KANYAJUOK/741 in place of the deceased.
- iii. There be an order restraining the defendant either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said portion measuring 2 hactares of the suit land, that is KAMAGAMBO/KANYAJUOK/741, in any manner whatsoever and/or howsoever.

2. The originating summons is premised on the plaintiff's supporting affidavit of 21 paragraphs and documents annexed to the said affidavit and marked EOA 1 to 5, interalia, a copy of certificate of official search (PExhibit 3) and photographs (P Exhibit 7). The grounds of the originating summons include that;

- 1) The plaintiff's occupation of a portion measuring 2 ha of LR NO. KAMAGAMBO/KANYAJUOK/741 (herein referred to as the suit land) has been continuous and without interruption for a duration of over 35 years.
- 2) The deceased's and by extension the defendants' rights to recover the portion measuring 2 ha of a parcel of land herein, have been extinguished by effluxion of time.
- 3) That in the premises, the plaintiff has acquired prescriptive rights over and in respect of the portion measuring 2 hactares of the parcel of land herein.
- 4) That the plaintiff's rights and/or interest, are vindicated vide section 28 (h) of the Land Registration Act, No. 3 of 2012.

3. The defendants were duly served on various dates including 23rd January 2014, 6th November, 2017 and 5th December, 2018 as revealed in affidavits of service sworn on 20th March, 2014, 21st November, 2017 and 23rd February, 2019 respectively. They did not file and serve any reply to the originating summons or at all.

4. The court gave directions on 20th March, 2014 and restated the same on 15th March 2018. Further to the said directions, the suit was heard by way of viva voce evidence on 25th February 2019.
5. One Thomas Wasonga Okode (PW1) a son and attorney of the plaintiff adduced evidence in support of the plaintiff's claim. He relied on a copy of Power of Attorney registered on 17th July, 2018 (PEXhibit 1) and the plaintiff's bundle of documents dated 17th April, 2014 (PEXhibits 2 to 8).
6. The defendants' case was deemed closed on 25th February, 2019 further to their failure to either enter appearance or file defence herein.
7. Learned counsel for the plaintiff's filed submissions dated 22nd March 2019 in favour of the plaintiff's claim. Counsel gave the background of the claim, the plaintiff's evidence adduced herein and analyzed the same.
8. Counsel relied on three (3) authorities in support of the submissions. The authorities are :- (a) **Njuguna Ndatho-vs- Masai Itumo Mateo and Nguli Kyalo Civil Appeal No. 231 of 1999 at Nakuru (Court of Appeal), Githu-vs- Ndeete (1984) KLR 776 and Wanjiku Kinuthia and another-vs-Stephen Kinoro Kamau & another Nairobi HCCC No.2360 of 1995** regarding adverse possession.
9. I have carefully considered the entire originating summons, evidence of PW1 and the submissions on record. The points for determination are whether the plaintiff's claim has met the dictates of adverse possession doctrine; see the Court of Appeal decision in the **case of Wilson Kazungu Katana and 101 others-vs-Salim Abdallah Bakshwein and another (2015) eKLR**.
10. First, adverse possession dictates that the land in dispute be registered in the name other than the applicant. At paragraph 2 of his supporting affidavit, the plaintiff averred that Andrea Oindo Milonde (deceased) is the registered owner of the suit land as shown on the certificate of official search (P Exhibit 2 (a) ) and green card (P Exhibit 2 (b) ).
11. The deceased died on 21st April, 2000. The suit land was registered in the name of the deceased on 17th November 1977 and land certificate was issued to him on 10th February, 1982 as revealed in P Exhibits 2(a) and (b) respectively.
12. I am aware of the definition of the term "proprietor" under section 2 of the Land Registration Act, 2016 (2012). It is crystal clear that the suit land is registered in the name of the deceased under the repealed Registered Land Act (Cap 300 laws of Kenya); see also **Wainaina-vs-Murai and others (1976-80) I KLR 283 at 289 and 290**.
13. Adverse possession doctrine also dictates that the applicant must be in open and exclusive possession of the land in question in adverse manner to the title of the owner. In his supporting affidavit, the plaintiff stated that he has freely and continuously occupied and cultivated two (2) hectares of the suit land for over 35 years hence his occupation and possession of the same has been adverse to the interests of the deceased and by extension, the defendants in this matter.
14. The plaintiff (PW1) testified that his claim is for a portion measuring two (2) hectares of the suit land. In the **case of Muthuita-vs-Wanoe and 2 others (2008) 1KLR)G&F) 1024**, the court applied the decision in **Gatimu Kinguru-vs-Muya Gathangi (1976) KLR 253** and held inter alia, that it is essential that adverse possession should be of the whole or a defined portion of land. In the present suit, PW1 clearly stated that he has been in open and exclusive possession of the said portion of the suit land for over thirty five (35) years.
15. The concept of adverse possession further dictates that the applicant has been in occupation of the suit land for a period in excess of twelve (12) years having dispossessed the owner or discontinued the possession of the owner. The plaintiff's assertion that he has accrued adverse interests (overriding interests) over the portion of the land since 1973 as demonstrated by P Exhibits 4 and 6, has not been controverted by the defendants.
16. In the **case of Kirugi & another -vs- Kabiya & 3 others (1987) KLR 347**, the Court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof. In the instant suit, the plaintiff has discharged the burden of proof to the requisite standard.
17. It is the finding of this court that the plaintiff's claim for adverse possession is firm and proved on a balance of probabilities as recognized in **Ahmed Abdulkarim -vs- Member for lands and mines (1958) EA 436 at 441**.
18. Wherefore, judgment be and is hereby entered for the plaintiff, against the defendants jointly and severally in terms of orders (1) to (4) sought on the face of the plaintiff's originating summons dated 21st August, 2012.

**DELIVERED, SIGNED and DATE** in open court at **MIGORI this 24<sup>th</sup> day of JUNE 2019**

**G.M.A.ONGONDO**

**JUDGE**

In the presence of :

Ms. W. Ochwal learned counsel for the plaintiff

Tom Maurice – Court Assistant