REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND CASE NO. 485 OF 2017

JACKTON ADHOLA

OJINA.....PLAINTIFF

VERSUS

LUCAS OWINO MAGAKA.....1ST DEFENDANT

PHELEMON ALOO ONIALA.....2ND DEFENDANT

OTIENO DAVID MAGAK.....3RD DEFENDANT

JULIANA ACHIENG CHARLES.....4TH DEFENDANT

ELISHA OPIYO ACHOLA.....5TH DEFENDANT

JUDGEMENT

1. By way of an Amended Originating summons dated 16th November 2021 and further Amended on 31st March 2022, the Plaintiff seeks, in a nutshell, to be declared the proprietor of land parcel reference no. **SUNA/EAST/KAKARAO 499** now **SUNA/EAST/KAKARAO/6145** and now further sub divided into **SUNA/EAST/KAKARAO/8721** and **SUNA/EAST/KAKARAO/8722**,**SUNA/EAST/KAKARAO/6146** now further sub divided to **SUNA/EAST/KAKARAO/7911** and **SUNA/EAST/KAKARAO/7912** and **SUNA/EAST/KAKARAO/6147; SUNA/EAST/KAKARAO/4515** and **SUNA/EAST/KAKARAO/4516.**

2. The 2nd defendant filed a Replying Affidavit dated 6th November 2023 where he urged that he is the registered owner of land parcel no. SUNA EAST/KAKRAO/4515 which he purchased from the 1st defendant. He annexed copies of the sale agreement and certificate of official search. He denied all of the allegations by the Plaintiff.

3. The matter then proceeded to full hearing.

4. **PW1** was the Plaintiff, **Jackton Adhola Ojina**, who testified that the 1st defendant sold him a portion of land measuring 7 Acres situated in Kakrao, land parcel No. 499. However, the vendor later sold the land to another person and when he asked about it he was ignored. Further, that he then went to the land office and placed a caution on any dealings on the land. He further stated that the 1st defendant has been summoned to court severally but has never come to court and he died while the suit was pending in court.

5. During cross examination, he stated that the person who sold him the land, Lucas Magaka, is deceased. That he later found the 2nd defendant's name from a search that he had conducted. He further stated that the 2nd defendant had planted crops on the land, and he (PW1) could not use the other parcel that he bought.

6. The plaintiff closed the case and the 2nd Defendant testified as DW1.

7. He adopted his witness statement as evidence in chief and proceeded to testify. He stated that he bought the suit land Reference No. Suna East/Kakrao/4516 from Lucas Owino Magaka as per the agreement attached to replying affidavit.

Further, that he obtained title to the suit land as per certificate of official search dated 08/2/2023 which he produced as D-Exhibit 2. He urged that the Plaintiff does not use the suit land since 2014 and further, that he himself cultivated it including planting cassava thereon to date. He produced 3 photos as (D-Exhibit 3 (a) to (c) that show cassava planted on the suit land. It was his testimony that the plaintiffs' testimony is false and he prayed the court dismiss the suit with costs.

8. In cross examination, he stated that PW1 is his neighbour and stays on his land on lower part of the area but he does not stay on the suit land. He urged that he carried out a search before he bought the suit land and PW2 had not placed a caution on it. He further stated that D-Exhibit 1 was entered into between Lucas Owino Magak and himself. He urged that DExhibit 2 shows that he got registered as owner of it on 28/1/2014. He also stated that it is true he registered the suit land in his name before he bought it but he had no Exhibit from the local land control board on the sale of the suit land. He urged that he bought the suit land and did not ask PW1 whether he bought it. That DExhibit 3 [a] [b] and [c] show that he cultivated maize and cassava.

9. The defence closed its case and the parties were directed to file submissions.

Plaintiff's' Submissions

10. Learned Counsel laid down the background of the case and the evidence produced in court. He submitted that section 7 of the limitations of actions Act provides Actions to recover Land cannot be brought after 12 years and section 17 of the

limitation of Actions Act further provides “At the expiration of 12 Years the title of that person owning the land is extinguished. He urged that the plaintiff also produced before court, the green card for Suna East/Kakrao/499 which clearly shows that at the time when Lucas Owino Magak was subdividing Suna East /Kakrao/499 on 22/01/14, the plaintiff had been in occupation of the portion 7 acres for 31 Years, such that the title of Lucas Owino Magak in Suna East/Kakrao /499 of 7 acres had been extinguished by effluxion of time. He could only transfer 1 acre which had remained from the sale agreement, and which was not in possession of the plaintiff. The 1st defendant had no title to transfer to Philemon Aloo Oniala or Otieno David Magak, Juliana Achieng Charles or even Elisha Opiyo Achola.

11. Learned Counsel urged that the titles acquired by the defendants were subject to the overriding interests at of the Adverse possessor the plaintiff herein. They could not defeat his title acquired by virtue of S 7 of the limitation of Actions Act as read with the provisions of the then section 30(f) of the registered land Act. He prayed the court order that the new titles created from Suna East/Kakrao/499 after 12 Years from December 1983 be cancelled and it reverts to the Original Suna East/Kakrao/499 measuring 3.2 Ha. Further this Hon court should order that the plaintiff's land of 7 acres be curved from the said Suna East Kakrao 499 leaving a balance of 1 acre to be shared by the respondents.

12. There were no submissions on record for the defendants. But it is worth noting that even though there weren’t any

submissions in that behalf, submissions do not constitute evidence. Therefore, this court still will determine the matter on merits.

Analysis and Determination

13. Upon considering the record of the court, testimonies of the witnesses and the evidence tendered in court, there are a number of issues that arise for determination. Notably, the issue of the death of the 1st and 3rd defendants arose at different points of this trial and consequently, the issue of abatement of the suit. It follows that the issues for determination are;

i) Has the suit abated against the defendants?

ii) And if not; Whether the Plaintiff's Claims to the suit land is valid

Whether the suit has abated against the defendants

14. Order 24 Rule 3 of the Civil Procedure Rules provides as follows:

> **"3 (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit".**
>
> **(2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the**

deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff."

15. The Plaintiff, during his testimony, intimated to the court that the 1st Defendant is deceased. Additionally, his learned counsel indicated to the court on 27th March 2025 that, indeed, the 1st defendant was deceased. On the same date, he also indicated to the court that the 3rd defendant had since died. When the matter came up for mention, on 23rd June 2025, the plaintiff indicated that he was aware that the 2nd defendant is deceased. But when the matter came up for the last mention on 28th July 2024, for the plaintiff to confirm the status of the parties said to have died, Counsel for the Plaintiff informed the court that only the 1st and 3rd defendant died in 2023: the 2nd Defendant was alive. Further, that they had advertised the Originating Summons for service on him.

16. However, when the court was preparing this judgment it carefully perused the court record. It noted that there was no proof of the advertisement having been made despite the fact that the court had issued orders to that effect. There was no evidence even of extraction of the Summons to Enter Appearance.

17. It follows that since the Plaintiff confirmed death of the two parties, the 1st and 3rd Defendants, he could not have stated or be heard to contend to the contrary, being that his suit against them could still be subsisting, without there being substitution

of these parties within one year of their demise. The suit against them, thus, abated.

18. Section 21 of the Evidence Act provides that;

> **Subject to the provisions of this Act, an admission may be proved as against the person who makes it or his representative in interest; but an admission cannot be proved by or on behalf of the person who makes it or by his representative in interest, except in the following cases—**
>
> **(a) when it is of such a nature that, if the person making it were dead, it would be admissible as between third persons under section 33 of this Act;**
>
> **(b) when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;**
>
> **(c) if it is relevant otherwise than as an admission**

19. What the plaintiff stated in court about the demise of the two parties was an admission, in terms of the above provision. It follows that it is clear that the Plaintiff admits that the 1st and 3rd defendant are deceased. Therefore, as found above, the suit against them abated.

20. In the case of **Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others Civil Appeal No.16 of 2015 [2015] eKLR** the Court of Appeal expressed this point as follows:-

“The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”

b) Whether the 4th and 5th defendant were served with the Summons

21. From the record of the court, an Application dated 18th July 2022 and filed on 22nd July 2022 sought orders for substituted service. The order for substituted service was made on 17th October 2022 and issued on 24th November 2022. There was no proof tendered that there was substituted service by way of publication in a newspaper of nationwide circulation, as ordered by the court. It therefore follows that the 4th and 5th defendants were never served with the Summons. The court cannot therefore issue orders against a party who has not been given an opportunity to be heard as it will be in contravention of the right to a Fair Hearing under Article 50 of the Constitution. To do so would mean condemning them unheard.

22. Additionally, there was no evidence that the Summons were ever collected by any of the defendants or served. The provisions of Order 5 Rule 2 of the Civil procedure rules provide guidance on the issuance and renewal of summons. It provides as follows;

> **(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.**
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> **(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.**
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> **There is no evidence that was tendered by the plaintiff to show that the summons were collected by any of the defendants or that the summons were renewed.**

23. Given the totality of the circumstances above, this court finds that the suit had abated against the 1st and 3rd defendants. Further, the 4th and 5th Defendants were never served hence the suit against them abated. It cannot, therefore, be a subject successfully of these proceedings. If judgment were to be entered against the latter two individuals they would be condemned unheard, and that would be contrary to the rules of natural justice.

24. The upshot of the foregoing is that the suit is dismissed as it has abated against the 1st and 3rd defendants and the Plaintiff failed to serve the 4th and 5th defendants.

25. Turning to the merits of the evidence adduced regarding the 2nd Defendant, the starting point is the law and case law on the issue before the court.

26. The law on adverse possession is governed by Section 38(1) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, as read with Sections 7, 13 and 17 of the Act. A claim for adverse possession succeeds when a party claiming the land proves the elements thereof. These elements are stipulated in the Limitation of Actions Act.

27. **Section 7** of the Act is couched on the following terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

28. The Act makes a further provision for adverse possession at **Section 13** as follows:

“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in

adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land."

29. Under section 38 of the Limitation of Actions Act, a party claiming land by adverse possession may approach the court for a declaration that the property devolved to him in accordance with the doctrine. Section 38(1) of the Act states as follows;

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as a proprietor of the land."

30. These provisions have been expounded by a number of authorities. The first one this Court wishes to be guided by is the *locus classicus* of **Mtana Lewa v Kahindi Ngala Mwagandi (2015) eKLR**, wherein the court said:-

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by

force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

31. The above decisions point to the legal principle that for a claim of adverse possession to succeed, certain conditions must be fulfilled. The Court of Appeal in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** stated as follows:-

> **"At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land.**
>
> **Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true**

owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See Littledale v Liverpool College (1900)1 Ch.19, 21.

32. This court thus needs to know whether the plaintiff has tendered evidence to prove the *nec vi, nec clam, nec precario* principle. In **Abdulkhall Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J. Mtila & another [2021] KECA 653 (KLR)** the Court of Appeal held,

> "The burden of proving adverse possession lay with the 1st respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1st and 2nd appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in **R. vs. Oxfordshire County Council**

ex p. Sunningwell Parish Council [2000] 1AC 335 at 350, **'not by force, nor stealth, nor the licence of the owner'.** See also **Kimani Ruchine vs. Swift Rutherford & Co.Ltd** [1980] KLR on this point."

33. Therefore, in the instant case, regarding the plaintiff's claim against the 2nd defendant, it was the plaintiff's evidence that he bought the land the deceased Lucas Magaka. He later learnt that the said owner had sold the land to the 2nd Defendant. Further, he admitted through his testimony that he was not in occupation of the parcel or a portion thereof as at the time the suit was instituted, and that actually the second defendant had planted crops on the land. Furthermore, his testimony and the defendant's evidence confirmed that, indeed, the plaintiff had been dispossessed of the suit land as at the time he filed the suit, and the 2nd Defendant was doing farming on it. Therefore, there was interruption of the period of occupation. Moreover, the plaintiff did not prove which portion of the land and its specific size that he was claiming by adverse possession. In those circumstances his case could not meet the parameters of a claim for adverse position. It is not merited and would, in the interest of justice, be dismissed. In sum, the entire suit did not succeed.

34. In the premises, the costs shall be payable only to the 2nd Defendant.

35. It is so ordered.

Judgment dated, signed and **delivered virtually** via the **Teams Platform** this **13th** day of **March 2026**

HON. DR IUR NYAGAKA

JUDGE

In the presence of,

Achola Advocate for the Plaintiff

Ms. Okunye holding brief for Kisera for the 1st Defendant