

**THE REPUBLIC OF KENYA**

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

**ELC OS CASE NO. 26 OF 2020**

**YUNES BITUTU MAGETO .....PLAINTIFF**

**VERSUS**

**AMINA NASSIR ABDALLA**

**(Sued as administratrix of estate of Mariam Ali)..... DEFENDANT**

**JUDGMENT**

1. The Applicant moved the court by way of Originating summons dated 27<sup>th</sup> July, 2020 and subsequently amended on 10<sup>th</sup> February, 2025. She claims to have acquired title over a portion of land measuring 50 by 100ft out of L.R West Kitutu/Bugisero/2533. She posed the following questions for determination;

A. Declaration that the defendant's rights to recover a portion of land measuring 50ft by 100ft out of LR NO. WEST KITUTU/BOGUSERO/2533 and out of the estate of MARIAM ALI (Deceased) is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya and her 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 43 years

B. There be an order that the plaintiff be registered as the proprietor of the portions of land measuring approximately 50ft by 100ft out of the estate of MARIAM ALI (Deceased) in place of the said MATIAN ALI (Deceased)

C. The portion of land approximately 50ft by 100ft out of LR NO. WEST KITUTU / BOGUSERO / 2533 be sub-divided and the title in respect thereof be issued in favour of the plaintiff.

D. There be an order restraining the defendant either by her, agents, servants and./or anyone acting under the instructions of the defendant from interfering with plaintiff's peaceful possession and occupation of the said portion measuring approximately 50ft by 100ft out of LR NO. WEST KITUTU / BOGUSERO / 2533 registered in the name of MARIAM ALI (Deceased).

D1. The Deputy Registrar and/or the court administrator of the Honourable Court be directed and/or ordered to execute transfer instruments and/or attendant documents to facilitate the transfer and registration of the portion measuring Approximately 50ft by 100ft out

of LR NO. WEST KITUTU / BOGUSERO / 2533 registered in the name of MARIAM ALI (Deceased)

E. Costs of this amended originating summons be borne by the defendant

2. The Originating Summons is grounded on the Affidavit of the Plaintiff and on the grounds following inter alia: -

- a) The plaintiff entered into a land sale agreement with one MARIAM ALI (Deceased), measuring approximately 50ft by 100ft out of LR NO. WEST KITUTU / BIGUSERO/2533
- b) Upon entering into the said land sale agreement, the said MARIAM ALI (DEDCEASD) placed the plaintiff into possession of the said portion of land.
- c) The plaintiff's entry into the said parcel of land was pursuant to the sale agreement dated 10<sup>th</sup> day of January 1982 with the consent of the registered proprietor.
- d) The plaintiff has been in continuous occupation of the said portion of land for a period of 43 years.
- e) The transaction of selling the said portion of land did not attract the requisite land control board consent within 6 months statutory period.
- f) Neither the defendant herein nor the seller did take any precipitate steps to recover the said portion of land sold to the plaintiff herein.

- g) The plaintiff's right over the portion of land herein merits registration.
3. The summons is premised on the supporting affidavit of the Applicant sworn on 10<sup>th</sup> February, 2025. She deposes inter alia that she got into a sale agreement with Mariam Ali-deceased a copy of which was produced as YM-1. Soon after purchase, she was put into possession and she constructed a house on it. She presented a photo of the house annexed as YM-2 to this affidavit.
4. The Applicant states that she has remained in occupation from the time of purchase and has also planted bananas and avocados on it as evidenced by annex YM-3. In addition, the Applicant avers that she does the business of selling firewood on the said parcel. She produced a copy of the certificate of official search and title (YM-5 & 6), which confirms that Mariam Ali-deceased was the registered owner of the suit land. It is her case that the deceased did not take the necessary steps to transfer the sold portion to the Applicant's name.
5. Further, the Applicant asserted that the said Mariam Ali did not make any attempt to recover from her the suit parcel. The Applicant stated that the case was referred to the Land Disputes Tribunal, which on 10th December, 2008, ordered that the land belongs to her. The present defendant has been sued in her capacity as the administratrix of the estate of Mariam Ali-deceased. She produced a copy of the grant as **YM-8**.

6. The Defendant opposed the claim by filing a replying affidavit sworn on 18<sup>th</sup> February, 2025. She states that Mariam ali-deceased is her aunty (sister to the father). That Mariam died on 2<sup>nd</sup> March 2005 without any children. The Defendant confirm the deceased was the registered owner of L.R West Kitutu/Bugisero/2533.
7. She deposed that it is well known that at the time of Ms Ali's death, she had sold a portion of her land to the following;
  - i. James Oeri- 0.02ha
  - ii. Ombese Clement- 0.32ha
  - iii. Joseph Kerongo- 0.1062ha
  - iv. Joseph Ayiengo- 0.02ha
8. The Defendant denied the deceased sold any land to the Applicant. She also denied that the Applicant has been in open, peaceful and continuous use of the suit portion for 43 years. It is her assertion that Mariam Ali did not sign the purported sale agreement dated 10<sup>th</sup> January, 1982. Additionally, she avers that the applicant has not proved that she paid any purchase price to Mariam Ali-deceased.
9. The Defendant contended that the Applicant used to stay with the registered owner, keeping her company, and that, out of generosity, the deceased gave her a shop erected on a very small portion measuring less than 32 square metres. That the Plaintiff cannot take advantage of the

deceased's meekness, as a weakness, to claim the suit land under the doctrine of adverse possession.

10. She concluded that the Plaintiff having been invited to live on the suit land as a guest of the deceased, she is not entitled to lodge the claim against the estate. The Defendant urged the court to dismiss the case with costs.

11. After the pleadings closed, both parties took time to call witnesses in support of and in defence of the claim. The Plaintiff called two witnesses with her evidence as PW1 and the surveyor testifying as Pw2.

12. The Plaintiff reiterated the contents of her affidavit/witness statement asserting that she purchased the suit portion in 1982 from the deceased at a price of Kshs 2000. She made a down payment of Kshs 1000 when the agreement was signed and paid the balance when the deceased was hospitalised.

13. Pw1 asserted that she has been in peaceful occupation, living in the house she constructed, planted bananas and avocados and was carrying on the business of selling firewood in the same place. She produced photographs to corroborate her assertions. It is her case that when she bought the land, she believed it was measuring 25ft by 100ft.

14. During cross-exam by Mr Ochoki, learned counsel for the Plaintiff, Pw1 stated that none of the witnesses in the sale agreement of 1982 are still alive. That Mariam Ali died and was buried in the Nubian cemetery in

Dara-mbili. She admitted this is the third case she has filed over this case inter alia O.S 146 of 2001. She could not tell the status of this case as Mariam died before it was concluded. The Plaintiff asserted that in that case, she had claimed land measuring 25ft by 100ft.

15. The second case was the one filed before the Land Disputes Tribunal, where she also sought title to the land. She said she presented proceedings from the Tribunal, although what was produced was the order adopting the Tribunal's award. She repeated that she lives on the suit portion of the house shown in Pex3. She was not aware that Mariam had sworn an affidavit deposing that she was only entitled to land measuring 10 ft by 10 ft.

16. Shown a survey report dated 6<sup>th</sup> May, 2019, the witness stated she was aware of the report and that she knew Joseph Kerongo, who was also claiming that he bought the suit portion. That she has not sued Joseph Kerongo because Joseph did not sell her any land. She averred that Ombese Clement and James Oeri are also on the land, but they are not living on the land she is claiming.

17. Mr George Kevin Aganyo testified as Pw2 and introduced himself as an approved assistant surveyor working under J.R. Aganyo and Associates. He stated that he visited the suit premises in the year 2020 and prepared a report dated 10<sup>th</sup> June, 2020. He gave the estimate of the size of the Plaintiff's land as 50 by 100ft (0.04ha).

18. Under cross-examination, Pw2 stated that he used the RIM and the existing fence on the ground to identify the boundaries of the suit land. He confirmed that he did not survey the whole of L.R. West Kitutu/Bogusero/2533. The witness was referred to an earlier report filed in HC Succession Cause no. 195 of 2015, where the Plaintiff was claiming 230 square metres (0.023 ha). He stated that what he found on the ground was larger than the Plaintiff's claim.
19. According to this witness, the suit portion is fenced at the back, and on the front, the Plaintiff has built a house, as shown in the photographs produced in evidence. During re-examination, he reiterated that his mandate was limited to measuring the land occupied by the Plaintiff, so he could not tell whether there were other people interested in this land. With this evidence, the Plaintiff closed her case.
20. In her defence, the Defendant relied on the replying affidavit and witness statement filed as well as the documents which she produced as Dex 1-14. She also testified that Mariam Ali-deceased was a sister to her father and she is the legal administratrix of her estate. Dw1 said that she has known the Plaintiff since 1982, as she used to come and do casual work at her aunt's place.
21. It is the Defendant's case that the Plaintiff is not entitled to any land from the deceased, as her aunt had only assisted the Plaintiff in a small

portion to build a kiosk. The witness mentioned the cases filed by the Plaintiff against the deceased.

22. She continued that if the Plaintiff were to receive any land, the remainder would be a portion measuring 50 ft by 100 ft, which they could share with Joseph Okumu, and urged the court to decide justly. During cross-examination, the witness admitted that she had no document to support the claim that the Plaintiff was given land measuring 10 ft by 10 ft. She further stated that not five (5) were in occupation of the entire land. She denied that the part marked "F" in the sketch map belonged to the Plaintiff. She also wondered why the surveyor did not mention her as one of those interested in the remaining portion measuring 50 ft by 100 ft.

**Analysis and Determination:**

23. I have reviewed the evidence adduced and the submissions rendered and proceed to answer the questions as posed in the originating summons on whether the Plaintiff is entitled to the suit portion of L.R No. West Kitutu/Bugisero/2533.
24. From the evidence adduced by both sides, there is no dispute that the suit land, West Kitutu/Bugisero/2533, is registered in the name of Mariam Ali, who is deceased. There is also no dispute about the Plaintiff's presence on the land. The dispute is whether she is on the land with the permission of the registered owner and the size of the land she is in occupation of.

25. The Court of Appeal in the case of **Abdulkhalil Mohamed Abdulkhalik Mazurui & 2 Others versus Josiah Kafuta Mtila & another (2021) eKLR** held that:

**A claim of adverse possession can only be maintained against a registered owner, as set out in Chevron (K) Ltd vs. Harrison Charo Wa Shutu [2016] eKLR, and time as envisioned under Section 7 of the Limitation of Actions Act, can only run against a registered owner. Here time started to run when the suit property was transferred, first to William Nduva Makau and Beatrice Njoki Githii and continued uninterrupted when the 1<sup>st</sup> and 2<sup>nd</sup> appellants acquired the property on 22<sup>nd</sup> October, 1998. One of the important lessons to be drawn from the Court of Appeal's decision in Githu vs. Ndeete (1984) KLR 776 is that;**

26. In this instance, the Plaintiff has explained that she came into possession following a sale agreement executed with the deceased. The deceased's representative averred that the deceased did not sign the sale agreement. However, a close look at the copy of the sale agreement produced in evidence shows a thumbprint next to Mariam Ali's name. No evidence was led by the defence to affirm that this was not a signature of the deceased.

27. The Respondent argues that the Plaintiff was given a portion of the land measuring 10 ft by 10 ft as a gift for having kept the deceased's company

and/or her casual worker to put up a kiosk. She contended that the Kshs 2000 the Plaintiff paid was a token to the deceased and did not constitute the purchase price for any land sold.

28. This statement was expressed by the deceased in the deceased's replying affidavit filed in HCC OS 146 of 2001. Thus, as early as 2001, the deceased acknowledged that the Plaintiff had paid her Kshs 2000 and that she had allowed her to use the said portion by putting up a kiosk on it. Despite this assertion, the deceased or her representative did not take steps to verify the authenticity of the sale agreement that spoke to 25 ft by 100 as the size of land sold.

29. The Plaintiff demonstrated her occupation is more than the 10ft by 10ft alleged as she said she had planted bananas and avocado trees on part of this land and she has constructed a house. In cross-examination, the Defendant stated she did not know the owner of the banana plants shown in the photographs produced by the Plaintiff. In regard to the house, first she said it belonged to Mariam Ali but changed her story that the house belonged to Joseph Okumu Kerongo. How can she confuse how the picture of the deceased house looked like when it was her evidence that she had stayed with her severally?

30. Besides HCOS 146 of 2001 which seemed not to have been heard and determined, the Plaintiff subsequently sued the Mariam Ali before the Land disputes Tribunal. A copy of the proceedings before the Tribunal or

its award were not produced. However, the Plaintiff produced a copy of the order made in Kisii CMC Misc application no 33 of 2008 which adopted the award as a judgement of that court.

31.Paragraph (b) of the order stated that the Applicant was declared the purchaser of the disputed land. The Defendant confirmed that she was aware of the proceedings before the Land Disputes Tribunal, which were held under a tree outside the D.O's office. She was equally aware that the elders' report (Tribunal) was adopted. The registered owner of the land is stated to have died in 2019, some 10 years after the award was adopted as a judgment of the Court.

32. In the two suits quoted, the Defendant did not raise a claim to have the Plaintiff removed from the Land. The claims were initiated by the Applicant, meaning time did not stop running in her favour. In fact, by the time the first suit was commenced in the year 2001, the 12-year period had elapsed, noting that she took occupation in 1982.

33. Hence, it is my considered opinion that the Plaintiff has proved possession for a period in excess of 12 years. On the question of consent of the registered owner, the Defendant asserted that there was consent, but only for occupation of a portion measuring 10 ft by 10 ft. The Defendant affirms receipt of Kshs 2000, which, according to the deceased, was a token for the 10 ft by 10 ft. She did not have any documents to support this assertion.

34. However, the Plaintiff produced a sale agreement stating that the land she claims measures 25 by 100 ft, a claim the Defendant disputes. The Plaintiff's own evidence was that her claim was the land indicated in the sale agreement, which is 25 ft by 100 ft (0.02 ha). In an earlier survey report produced in Succession cause no. 195 of 2015, the Plaintiff's portion was described as 230 square metres (0.023 ha).
35. However, the pleading and the survey report stated that the Plaintiff was claiming a 50 ft by 100 ft (0.04 ha) plot, which contradicted the Plaintiff's oral testimony. Further, the Defendant urged that if the Plaintiff is to be awarded any land, she ought to share the remainder plot measuring 50 ft by 100 ft with one Joseph Okumu, who was also claiming land from the deceased.
36. I have no evidence of the claim by Joseph Okumu save for the mention of his interest before the succession court. But having reviewed the evidence on record, I am persuaded to find that the Plaintiff is entitled to the portion of 25ft by 100ft contained in the sale agreement and her oral testimony, not the 50 by 100 claimed in the originating summons. Further, the survey report is considered to the extent it confirms the Plaintiff's ground possession.
37. In the upshot, my finding is that the Plaintiff has proved her claim on a balance of probabilities. Consequently, I enter judgment in her favour against the Defendant and issue the following reliefs;

- a. **The Plaintiff be and is hereby declared that she has acquired by way of adverse possession a portion of L.R No. West Kitutu/Bugisero/2533 measuring 25ft by 100ft which portion she is already in occupation of.**
- b. **The said portion of land approximately 25ft by 100ft out of LR NO. WEST KITUTU / BOGUSERO / 2533 be subdivided and the title in respect thereof be issued in favour of the plaintiff.**
- c. **There be an order restraining the defendant either by her, agents, servants and./or anyone acting under the instructions of the defendant from interfering with plaintiff's peaceful possession and occupation of the said portion measuring approximately 25ft by 100ft out of LR NO. WEST KITUTU / BOGUSERO / 2533 registered in the name of MARIAM ALI (Deceased).**
- d. **The administratrix of Mariam Ali-deceased to all the requisite documents and also sign the requisite forms within 45 days of this judgment to facilitate the transfer of the hive portion in favour of the Plaintiff. The Plaintiff to meet the cost of subdivision and transfer of said 25ft by 100ft into her name.**

- e. In default of the Administrator not performing her part in obtaining the necessary documents and signing them, the Deputy Registrar of the court shall execute the transfer instruments and/or attendant documents to facilitate the transfer and registration of the portion measuring approximately 25 ft by 100 ft out of LR NO. WEST KITUTU / BOGUSERO / 2533, registered in the name of MARIAM ALI (Deceased)
- f. Costs of this amended originating summons be borne by the defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 23<sup>rd</sup> April, 2026.

A. OMOLLO  
JUDGE