



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 533 OF 2017**

**(Formerly Kisii ELC Case no. 474 of 2014 (OS))**

**MILLICENT ACHIENG OBUOYO.....PLAINTIFF**

**VERSUS**

**JOHN OTIENO ORINGO.....DEFENDANT**

**JUDGMENT**

1. On 10<sup>th</sup> December 2014, the plaintiff namely Milicent Achieng Obuoyo through Abisai and Company Advocates filed the instant suit by way of an originating summons dated 8<sup>th</sup> December 2014 pursuant to sections 7 and 38 of the Limitation of Actions Act (Cap 22), sections 1A, 1B of the Civil Procedure Act (Cap 21 and Order 37 Rule 7 and 14 of the Civil Procedure rules, 2010. She claims to have acquired title to a portion of the land measuring 100 feet by 100 feet of **LR NO. SUNA EAST/ WASWETA I/3844** (the suit land) by prescription and/or adverse possession. Thus, she has sued the defendant, **JOHN OTIENO ORINGO** for determination of issues that:-

*i. This Honourable court be pleased to declare that the plaintiff and any other person claiming under her by way of Adverse Possession acquired title to part of LR.NO. SUNA EAST/WASWETA I/3844 (hereinafter referred to as the original parcel) measuring 100 feet by 100feet.*

*ii. This Honourable court be pleased to order for the transfer of the suit land area measuring 100 feet by 100 feet and the same be registered in the plaintiff's name.*

*iii. The defendant herein be ordered and/or directed to execute and/or sign all the necessary transfer instruments to facilitate the subdivision, transfer and registration of the suit land an area measuring 100 feet by 100 feet in the name of the plaintiff, in default, the Deputy Registrar to execute the same.*

*iv. This Honourable court be pleased to order the defendant to bear costs.*

*v. This Honourable court do make any other orders deemed expedient in the circumstances.*

2. The originating summons is premised on the plaintiff's supporting affidavit of even date and the accompanying documents namely a certified copy of the register of the suit land marked as "MAO-1" (PExhibit 1) and photographs of the suit land marked as "MAO-2"(PExhibit 2). The originating summons is also based on nine (9) grounds on it's face which include the following:-

*a) The plaintiff has been in long, open continuous and uninterrupted occupation of part of LR NO. SUNA EAST/WASWETA I/3844 measuring approximately 100ft by 100ft since the year 2000, built a house thereon and planted trees thereon.*

*b) The plaintiff's occupation and possession of the original parcel has been long,open continuous and uninterrupted for duration of over 13 years with full knowledge of the respondent.*

*c) The defendant has not taken and/or commenced any precipitate action to defeat and/or interrupt the plaintiff's occupation.*

*d) The plaintiff's occupation and/or possession of the portion now comprised in the suit land , constitutes overriding interest protected by Section 28 of the Land Registration Act (No. 3 of the 2012) Laws of Kenya.*

3. The gist of the plaintiff's case is that the original parcel of land is registered in the name of the defendant as shown in PExhibit 1. That

sometimes in the year 2000 the plaintiff and her deceased husband purchased, entered and settled on the suit land measuring 100 feet by 100 feet with the knowledge of the defendant. That they built a house, planted trees, maize, bananas, vegetables and erected boundaries in respect of the land. That since then they have been in open, continuous and uninterrupted occupation of the suit land hence acquired title to the suit land by way of adverse possession.

4. On 31<sup>st</sup> January 2019, this court gave directions, in the presence of counsel for the respective parties in the following terms:-

*a) The originating summons dated 8<sup>th</sup> December 2014 be treated as a plaint.*

*b) Any reply to the originating summons to be filed within 14 days from that date, be treated as a statement of defence.*

*c) The suit be argued by way of affidavit evidence and submissions to be filed and exchanged between the parties within 28 days from the date of service of reply to the originating summons.*

5. On 25<sup>th</sup> March 2019, Mr. Oguttu Mboya learned counsel holding brief for Sam Onyango learned counsel for the defendant, requested for an extension of 30 days to file and serve reply to the originating summons and the submissions as ordered on 31<sup>st</sup> January 2019. Mr. Singei learned counsel for the plaintiff also undertook to file submissions promptly. Pursuant to the said request and in line with **Articles 25 (c) and 50 (1) of the Constitution of Kenya, 2010**, order (c) in paragraph 4 herein above was extended for 30 days from that date.

6. Again, on 22<sup>nd</sup> July, 2019, Mr. Ken Okongo learned counsel holding brief for Sam Onyango learned counsel for the defendant requested for further seven (7) days to comply with Orders of 31/1/2019 and 25/3/2019. In the spirit of **Article 159 (2) (b) of the Constitution of Kenya, 2010** and in view of the orders of 25<sup>th</sup> March, 2019, the court extended the orders for another 14 days accordingly.

7. It is abundantly clear that the defendant was duly served with the originating summons. He only filed a memorandum of appearance dated 27<sup>th</sup> February 2015 on 27<sup>th</sup> February 2015. He neither replied to the originating summons nor complied with orders granted to him on 31<sup>st</sup> January 2019, 25<sup>th</sup> March 2019 and 22<sup>nd</sup> July, 2019.

8. Learned counsel for the plaintiff filed submissions dated 25<sup>th</sup> March 2019 wherein he provided the facts of the case, analysed evidence offered by the plaintiff, stated the relevant law and urged this court to grant the orders sought in the originating summons. Counsel cited the case of **Prime Bank Ltd –vs- Paul Otieno Nyamodi t/a V.A. Nyamodi and Company Advocates (2015) eKLR, Order 10 Rule 9 of the Civil Procedure Rules, (Supra) 2010** and **Article 64 of the Constitution of Kenya (supra)**, in support of his submissions.

9. Counsel further relied on Article 40 of the Constitution (supra), **section 7 of the Land Act, 2016 (2012)** and **section 28 of the Land Registration Act, 2016 (2012)**. Counsel also relied on **section 7 as read with 38 of the Limitation of Actions Act (supra)** and the Court of Appeal decision in the case of **Chevron (k) Ltd –vs- Harrison Charo Wa Shutu (2016) eKLR** regarding a claim for adverse possession.

10. I have duly considered the originating summons in its entirety and the plaintiff's submission herein. It is trite law that issues for determination in a suit either flow from either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Company Ltd –vs- Falcon Grounds Ltd (2000) 2EA 385** and **Independent Electoral and Boundaries Commission and another –vs- Stephen Mutinda Mule and 3 others (2014) eKLR**. In the instant suit, the issues for determination are numbers 1 to 5 as set out in the originating summons and I embrace them accordingly.

11. The plaintiff's claim is anchored on, inter alia, **section 38 of the Limitation of Actions Act (supra)** which provides that whenever an adverse possessor claims to have become entitled to land, he may apply to the High court (see **Article 162 (2) (b) of the Constitution of Kenya, 2010** and the decision in **Samwel K. Macharia and another –vs- KCB and 2 others (2012) eKLR** on a court's jurisdiction) for an order that he be registered as the proprietor.

12. Who is the registered owner of the suit land? It is pretty clear from PExhibit 1 that the defendant is registered as the proprietor of the suit land as at 24<sup>th</sup> June 1993 as shown in PExhibit 1.

13. **Section 28 (h) of the Land Registration Act, 2016 (2012)** provides for adverse possession as an overriding interest in registered land. The powers of the Land Registrar regarding registration of liabilities, rights and interests thereof are to be found at the provision to the section.

14. In **Tayabali Adamji Alibhai –vs- Abdul Hussein Adamji Alibhai (1938) 5 EAOA**, it was held that rights and registration to land can be challenged on the grounds of, among others, adverse possession; see also the decision by Kneller J in **Kimani Ruchine and another –vs- Swift Rutherford company Ltd and another (1976-80) 1 KLR**.

15. The plaintiff has sought to challenge the rights and registration of the defendant as the proprietor of the suit land. The defendant did not counter the challenge as he failed to comply with the court orders as stated in paragraph 7 hereinabove. So, I fully subscribe to the view expressed by Kiage JA in **Nicholas Kiptoo Arap Salat –vs- IEBC and another (2013) eKLR** cited in **Prime Bank case (supra)** in which he held, inter alia;

***“This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timeliness. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just certain and even-handed.”***

16. The plaintiff has demonstrated by way of PE Exhibit 2 that he has been in open and notorious occupation of the suit land as noted by Madan J (as he then was) in the case of **Gatimu Kinguru –vs- Muya Gathangi (1976) KLR 253** where he held thus:-

***“The defendant’s possession was open and notorious..... There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant.”***

17. It is abundantly clear that the plaintiff’s occupation of the suit land is adverse to that of the defendant. Therefore, the latter’s occupation of the land is extinguished thereby as held in **Chevron case (supra)**.

18. It is trite law that the burden is always on the plaintiff to prove his case on a balance of probabilities and such burden is not lessened even if the case was heard by way of formal proof; **see Kirugi and another –vs- Kabiya and 3 others (1987) KLR 347**.

19. In the instant suit, I find that plaintiff’s case steadfast and uncontroverted. It has been proved against the defendant on a balance of probabilities.

20. A fortiori, I enter Judgment for the plaintiff against the defendant in terms of issues or orders 1,2,3 and 4 sought for determination in the originating summons dated 8<sup>th</sup> December 2014 and filed in court on 10<sup>th</sup> December 2014.

21. It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 26<sup>th</sup> day of SEPTEMBER 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. R. Abisai learned counsel for the plaintiff

Tom Maurice – Court Assistant.