



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC APPLICATION NO. 55 OF 2018 (O.S)**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012 (CAP 284) LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION ACT 2012 (CAP 22) LAWS OF KENYA**

**BETWEEN**

**GEORGE OHALO OPOT.....PLAINTIFF**

**VERSUS**

**JAMES AWIMBO OSOMA.....1<sup>ST</sup> DEFENDANT**

**RULING**

1. The Respondent filed a preliminary objection dated 18/2/2019 whose gravamen is that the entire suit was incurably defective and should be struck out and that the plaintiff lacks locus standi to institute proceedings against the 2<sup>nd</sup> Defendant.
2. The plaintiff's response is that the Preliminary Objection does not disclose how the suit is defective and does not explain how the plaintiff lacks locus standi to sue the 2<sup>nd</sup> Defendant.
3. A glimpse at the proceedings shows that the Plaintiff brought the suit herein by way of originating summons for determination of the following issues:

**1. Whether the Plaintiff purchased a portion of land parcel NORTH GEM/MALUNGA/658 measuring 1 acre and a portion of land parcel NORTH GEM/MALUNGA/657 measuring 2.5 acres from JAMES AWIMBO OSOMA the 1<sup>st</sup> Defendant herein which upon subdivision was created to form land parcel NORTH GEM/MALUNGA/2235 and NORTH GEM/MALUNGA/2234.**

**2. Whether the Plaintiff had an overriding interest under section 28 (c), (e) and (j) of the Land Registration Act, 2012 (Cap 284) Laws of Kenya of 2.5 acres of the land parcel known as NORTH GEM/MALUNGA/657 before its subdivision to NORTH GEM/MALUNGA/2235 and NORTH GEM/MALUNGA/2234 and also another overriding interest of 1 acre of NORTH GEM/MALUNGA/658.**

**3. Whether the plaintiff is an adverse possessor of the parcel of land known as NORTH GEM/MALUNGA/2235 and NORTH GEM/MALUNGA/2234 measuring 1 acre and 2.5 acres respectively originally being a portion of NORTH GEM/MALUNGA/648 and NORTH GEM/MALUNGA/657.**

**4. Whether the honourable court should direct the Siaya County Land Registrar to cancel the transfer of NORTH GEM/MALUNGA/2235 to the 2<sup>nd</sup> Defendant and the respective subdivisions creating NORTH GEM/MALUNGA/2235 and NORTH GEM/MALUNGA/2234 and the land to revert back to NORTH GEM/MALUNGA/657 and 658.**

**5. Whether the honourable court ought to vest a portion measuring 1 acre of the suit land measuring 1 acre of the suit land NORTH GEM/MALUNGA/658 and 2.5 acres of NORTH GEM/MALUNGA/657 to the plaintiff.**

**6. If (1,2,3 & 4) above are in affirmative, whether the Siaya County Land Registrar should be directed to register the rights**

**and interests to the plaintiff upon 1 acre and 2.5 acres respectively on NORTH GEM/MALUNGA/657 and NORTH GEM/MALUNGA/658.**

**7. Whether the plaintiff is entitled to costs of this application.**

4. The originating summons is based on grounds that:

**a) The parcel of land was sold to the plaintiff on 26<sup>th</sup> December 1993.**

**b) The plaintiff has been staying on the said parcel of land without secrecy, permission and interruption since 1993.**

**c) The plaintiff has continued to benefit from the same without interruptions for 25 years.**

**d) By the time of the subdivision the plaintiff had already acquired overriding interests in 1 acre of North Gem/Malunga/657 and 2.5 acres of North Gem/Malunga/658.**

5. The respondent argues that a claim based on adverse possession cannot be made in the same pleadings with a claim on purchaser's rights. The respondent further argues that the matter revolves on boundaries and titles over the mentioned properties.

6. On locus standi the respondent submits that there is no agreement between the plaintiff and the 2<sup>nd</sup> defendant and therefore no basis for the plaintiff to sue the 2<sup>nd</sup> Defendant.

7. The plaintiff argues that the preliminary objection is ambiguous and misplaced and is meant to delay the fair and expeditious hearing of the suit. Most importantly that though the plaintiff was a purchaser, he is entitled to the land by virtue of adverse possession.

8. I have considered the preliminary objection and rival submissions and do find that it is based on misapprehension of the law and facts.

9. To begin with, the plaintiff is not claiming purchaser's rights but has merely stated that he purchased the land from the 1<sup>st</sup> Defendant who did not transfer it to him. He claims to have been in possession for more than 12 years. The Defendant also purchased the land in 2013 but is not in possession. This is purely a claim based on adverse possession. I say no more about it.

7. On locus standi, the plaintiff has capacity to sue the 2<sup>nd</sup> defendant because the latter is the registered owner of the suit property but the said property is in the plaintiff's possession. Prescriptive rights can only be claimed against the registered proprietor as they run against the title.

8. This Preliminary Objection has no basis and is dismissed with costs. Orders accordingly.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**In the presence of:**

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**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**