



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 544 OF 2017**

**(Formerly Kisii ELCC NO. 438 OF 2013)**

**ORITA KEMUNTO OBARA.....PLAINTIFF**

**-versus-**

**HAMISI OMARI BOGE.....DEFENDANT**

**JUDGMENT**

1. The plaintiff namely **ORITA KEMUNTO OBARA** through learned counsel, Mr. J.O. Soire filed an originating summons dated 4<sup>th</sup> November 2013 under **Order 37 Rule 7 of the Civil Procedure Rules 2010 and Sections 37 and 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya**. She sued the defendant namely **HAMISI OMARI BOGE** for adverse possession in respect of land parcel **No. Suna East/Wasweta 1/3325** which was a sub division of land parcel **No. Suna East/Wasweta 1/2997** (the suit land). The plaintiff termed the title of defendant over the suit land extinguished, sought its cancellation and in lieu thereof the same be registered in her name.

2. Briefly the plaintiff's claim is that in the year 1974, she bought the suit land measuring 100 feet by 70 feet from one Ochieng Orwa (deceased) who put her in possession and occupation of the land. However, the deceased passed on before transferring the suit land to the plaintiff. Upon the death of the deceased, his son one Obuya Ochieng took out letters of administration of the estate of the deceased. The said son of the deceased sold and transferred to the defendant, an adjoining portion of land which mistakenly included the suit land without the knowledge of the plaintiff who has lived on the suit land openly and uninterruptedly since the year 1974. The defendant and the son of the deceased refused to rectify the anomaly after request made by the plaintiff hence precipitating the instant suit.

3. The defendant did not file a statement of defence in this suit. On 13<sup>th</sup> June 2017, the court directed that the Originating Summons to be treated as a plaint and the suit be heard through viva voce evidence.

4. Consequently on 15<sup>th</sup> March, 2018, the suit was heard ex-parte. The plaintiff (PW1) testified and relied on her 11 paragraphed supporting affidavit sworn on 4<sup>th</sup> November 2013 and a certificate of official search dated 11<sup>th</sup> July 2012 (PExhibit 1). PW 1 told the court that she stays on the suit land which she has developed peacefully and continuously. She stated that the defendant has not processed title deed for her in regard to the land.

5. The plaintiff's counsel did not submit herein. He failed to file submissions as indicated to the court on 15<sup>th</sup> March 2018.

6. I have considered the entire plaint and the evidence of PW1. In the case of **Great Lakes Transport Co. (U) Ltd – V- Kenya Revenue Authority (2009) KLR 720**, it was held that issues for determination arise from the pleadings or such issues as the parties had framed for the court's determination. In the instant suit, the issues for determination as entailed in the Originating Summons are:

**i. Has the applicant herein been in open and an uninterrupted occupation of land parcel No. Suna East/Wasweta 1/3325 aforesaid for a period of more than 12 years?**

**ii. If so, has the said open and an uninterrupted occupation and /or possession been adverse to the title of the said land parcel No.Suna East/Wasweta 1/3325?**

**iii. Has the applicant therefore acquired title to the said land parcel No. Suna East/Wasweta 1/3325 by adverse possession under the Law of Limitations of Actions Act, against the registered proprietor?**

**iv. Can the respondents now be compelled to transfer the said land parcel to the applicant herein and in default can the Deputy Registrar of this court be authorized to transfer the same on behalf of the respondent to the applicant?**

**v. Who bears costs of this suit?**

7. By the originating summons, PW1 claimed that she has acquired title to the suit land by adverse possession. She averred that she bought the suit land from the deceased in 1974. That she has been in occupation of the land uninterrupted, openly and without the permission and or consent of the defendant for a period exceeding 12 years by operation of the law.

8. In his testimony, PW1 stated, inter alia;

**“My stay on the land has been peaceful and continuous since 1974 to date.”**

9. The plaintiff’s actions is for recovery of the suit land. Such actions are governed by Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) which reads:-

**“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 the person.”**

10. The sale of the suit land between the deceased and PW1 was entered into in the year 1974. Since then the plaintiff has been in possession of the land. It is a transaction affecting agricultural land and required consent from the Land Control Board for the land control area or division in which the land is situated as provided under **Section 6 (1) of the Land Control Act (Cap 302 Laws of Kenya)**. The purported sale became void in or about year 1975 due to lack of consent from the area Land Control Board hence the continued occupation of the suit land by PW1 became adverse. In **Titus Ong’ang’a Nyachio – V- Martin Okioma Nyauma & 3 others (2017) eKLR**, the Court of Appeal held, inter alia:-

**“This court has severally held that when a purchaser of land in a controlled transaction is permitted to be in possession of the land by the vendor pending completion of the transaction, the intended sale becomes void, and the permission to occupy the land is terminated by operation of the law. Any continued occupation becomes adverse from the time the transaction became void, see Samuel Miki Waweru –v- Jane Njeri Richu [2004] eKLR.” (Emphasis provided).**

11. It is not challenged that PW1 has been in open, peaceful and continuous possession and occupation of the suit land for a period in excess of 12 years. The title of defendant as proprietor of the suit land stand extinguished. The plaintiff is entitled to be registered as the proprietor of the land in place of the defendant so registered.

12. In the case of **Gatimu Kunguru –v- Muya Gathangi (1976) KLR 253**, the late Madan J (as he then was ) remarked:

**“The defendant’s possession was open and notorious. Upon partition or subdivision of the land the plaintiff ceased to be in possession of the well-defined portion taken over and occupied by the defendant in whose favour the period of limitation could run. There has been no discontinuance of possession by the defendant since 1959. There is also no evidence of entry by the plaintiff upon the portion occupied by the defendant during all this period. There was ouster of the plaintiff from the land followed by adverse possession, occupation, development and cultivation of the land by the defendant. The defendant claimed ownership of portion of the land which was given to him by the family and clan elders as his land by an open assertion of a hostile title to the plaintiff which necessarily meant a denial of the plaintiff’s title to the portion taken over by the defendant. The defendant did acts which were inconsistent with the enjoyment of soil by the person entitled, ie the plaintiff, for the purposes for which he had a right to use it. Planting a boundary of tufts or napier grass is the best evidence of adverse possession like fencing off, and cultivation of land even without fencing off has been held sufficient to prove adverse possession (see 24 Halsbury’s Laws of England (3<sup>rd</sup> Edition) page 252). The plaintiff has notice of all these matters. (Emphasis added).”**

13. Borrowing from the foregoing authorities and bearing in mind the unchallenged pleadings and evidence in this suit, I find that PW1 has been in open, continuous and uninterrupted occupation and possession of the suit land since year 1974. She has proved her case against the defendant on a balance of probability

14. In the result, I enter Judgment for the plaintiff against the defendant for:-

**a) A declaration that the plaintiff has acquired by adverse possession an absolute and indefensible title to the suit land LR. No. Suna East/Wasweta 1/3325 which is in her possession and occupation.**

**b) A declaration that the plaintiff is entitled to an order under section 38 of the Limitation of Actions Act (Cap 22) to be registered as an absolute and indefeasible owner of the suit land in place of the defendant who shall execute a valid transfer in favour of the plaintiff free from any encumbrances, in default the executive officer of the court shall execute the transfer instrument accordingly.**

**c) A declaration that the defendant holds the suit land in trust for the plaintiff and that the plaintiff’s name shall be entered in the land register accordingly.**

**d) The plaintiff shall have costs of the suit.**

**DELIVERED, DATED and SIGNED at MIGORI this 16<sup>th</sup> day of MAY 2018.**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :-**

Tom Maurice - Court Assistant