



**REPUBLIC OF KENYA**

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

**CASE NO. 786 OF 2016**

**(FORMERLY HCC NO. 115 OF 2012)**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CHAPTER 22**

**AND**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT**

**BETWEEN**

**FRED OKEYO OLANDE.....PLAINTIFF**

**VERSUS**

**RUTH OTIENO OTIANGO (sued as the legal administrator of**

**SIMON ONDIGO WAKAYA (deceased).....DEFENDANT**

**J U D G M E N T**

1. Fred Okeyo Olande, the plaintiff herein took out an originating summons dated 26<sup>th</sup> March 2012 against Ruth Atieno Otiango (as the legal administrator of the estate of Simon Odingo Wakaya) the defendant in this matter. In the originating summons, the plaintiff sought the following orders and declarations:

**1) A declaration that the defendant rights to recover the whole of LR No. Central Karachuonyo/Konyango/2511 is barred under the Limitation of Actions Act Chapter 22 of Laws of Kenya and her title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continually been in occupation and possession of the aforesaid parcel of land for a period exceeding 20 years.**

**2) There be an order that the plaintiff be registered as the proprietor of the whole of LR No. Central Karachuonyo/Konyango/2511, in place of the deceased.**

**3) There be an order restraining the defendant either by herself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said parcel of land, that is LR No. Central Karachuonyo/Konyango/2511, in any manner whatsoever and/or however.**

**4) Costs of this originating summons be borne by the defendant.**

**5) Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.**

2. In support of the originating summons, the plaintiff averred that on or about January 1991, one Simon Odindo Wakaya (the deceased) approached him with a request to purchase his parcel of land LR No. Central Karachuonyo/Konyango/2511, "the suit land". The plaintiff after verifying that the deceased was the owner of the land on 1<sup>st</sup> February 1991 entered into a sale agreement with the deceased for the purchase of the suit land as per the sale agreement and affidavit attached and marked "F002(a) and (b)", whereupon he took possession of the suit land, fenced it and planted trees along the boundaries.

3. The plaintiff further stated that before he had purchased the suit land, one, Stephen Otianga Mosi had trespassed onto a portion of it which prompted the deceased to raise a complaint to the Land Adjudication and Settlement Officer respecting the trespass. The plaintiff further

stated that the deceased never obtained the Land Control Board consent for the transaction but the plaintiff took and remained in occupation and possession of the suit land upto the time of instituting the suit which was a period of over 20 years.

4. The plaintiff further stated that the defendant applied for and obtained grant of Letters of Administration in respect of the estate of the deceased as per the copy of the Kenya Gazette attached and marked as **"F005"**. The plaintiff contended that the defendant was in the process of seeking transfer and registration of the suit land into her name with the intention of selling the same to a third party. As a result of the said actions by the defendant, the plaintiff registered a caution against the title of the suit land dated 14<sup>th</sup> September 2009 to protect his interests in respect of the suit land. The plaintiff asserts that he has been in continuous and uninterrupted occupation of the suit land for over 20 years. He avers the occupation and possession has been adverse and that he has therefore become entitled to be registered as the owner thereof.

5. The defendant on her part opposed the Originating Summons vide a replying affidavit dated 23<sup>rd</sup> October 2012. The defendant averred that on 13<sup>th</sup> August 1987, her late husband Stephen Mosi Otinga entered into a sale agreement with the deceased whereby her husband purchased the suit land from the deceased (copy of the sale agreement marked **"RA0-1"**). She further stated that on 17<sup>th</sup> March 1991, the deceased without the knowledge of her husband entered into a second sale agreement with the plaintiff and the deceased further swore an affidavit to that effect. Copies of the sale agreement and the affidavit attached and marked as **"RA0-2"** and **"RA0-3"** respectively. As a consequence, the defendant's late husband raised an objection with the land adjudication officer Kendu Bay vide a letter dated 22<sup>nd</sup> March, 1991. A copy of the said letter was attached and marked as **"RA0-4"**.

6. The defendant further stated that the deceased complained to the Land Adjudication and Settlement Officer, Kendu Bay Division that her husband was trespassing on the suit land prompting the Land Adjudication Officer to request the Assistant Chief, Konyango sub-location to investigate. The defendant further stated that her husband reacted immediately to the said letter and wrote to the adjudication officer and explained that he had purchased the land from the deceased. Further, the defendant stated her husband lodged a restriction on the suit land to protect his interest on the suit property. That the defendant's husband and the deceased died without the matter having been settled. The defendant subsequently took out letters of administration for her late husband's estate and the deceased estate and initiated the process to have the suit property transmitted to her as the beneficiary entitled. The defendant denied that the plaintiff had at any time occupied the suit land and thus refuted the claim by the plaintiff as an adverse possessor.

#### **7. The Evidence by the Parties;**

PW1, Fred Okeyo Olande, the plaintiff herein, told the court that in January 1991, he was introduced to the deceased by one, Benjamin Onyango Abel. That apparently, the deceased had requested the said Benjamin Onyango to find him somebody who could buy his commercial plot in Kendu Bay. The plaintiff stated that he met the deceased in the company of Benjamin and the deceased showed him the plot he wanted to sell which plot was within Kendu Bay Township. The plot at the time was vacant and he conducted an official search which revealed the same was registered in the deceased names and produced a copy of the search certificate as **"Pexh.2"**. He stated he agreed to purchase the property and he entered into a land sale agreement dated 1<sup>st</sup> February 1991, the purchase price as per the agreement was kshs. 20,000/= but he later renegotiated the price to kshs. 16,000/=. He produced the sale agreement as **"PEXh.3"**. He further stated that Assistant Chief Okoth and an elder one, Hezekiah Kilori Ngoto executed the sale agreement as witnesses and the deceased put his thumb print on the sale agreement.

8. The plaintiff further testified that the deceased swore the affidavit dated 25<sup>th</sup> March 1991 affirming that he had sold the suit land to him and explained that the subsequent agreement dated 17<sup>th</sup> March 1991 was made to acknowledge the varied price of kshs. 16,000/=. He produced the said subsequent agreement as **"Pexh.4"** and the affidavit sworn on 25<sup>th</sup> March 1991 as **"Pexh.5"**. He further stated that he paid the full purchase price of kshs. 16,000/= to the deceased and the said amount was fully acknowledged in the sale agreement dated 17<sup>th</sup> March 1991. That afterwards, he took possession of the suit land by fencing the plot, constructed a pit latrine and dug a bore hole. He acknowledged that he encountered resistance from defendant's husband who claimed that the suit land was ancestral land and could therefore not be sold to a non clan member.

9. The plaintiff further stated that the deceased wrote a letter on 3<sup>rd</sup> May 1991 to the Adjudication Officer concerning an alleged trespasser on the suit land and seeking confirmation of ownership of the land. The adjudication officer responded vide a letter dated 13<sup>th</sup> June 1991 confirming the deceased was the owner (**"PEX.8"**). The plaintiff stated that he continued developing the suit land but after the deceased died and his representatives filed succession as per gazette notice No. 1150 on 30<sup>th</sup> October 2009 the clan members started threatening him claiming the suit land was ancestral land and that he ought not to have bought the same. The plaintiff stated he decided to lodge a caution against the title of the suit land to protect his interest and when the defendant applied for removal of the caution and the land registrar notified him on 24<sup>th</sup> January 2012, he objected to the removal of the caution vide a letter from his lawyers dated 16<sup>th</sup> February 2012 and paid objection fees of kshs. 2,000/=. He stated he wrote to the land registrar seeking a hearing of the objection to no avail. He further contended that he was still in possession of the suit land and that he sued the defendant as she was the one who took out grant of letters of administration on behalf of the estate of the deceased. He further termed the defendant's allegation that he sought for the refund of the purchase price for the suit land as false and stated that he was not refunded the purchase price and that he had not authorized his mother to receive the said refund on his behalf.

10. On cross examination by defendant's counsel, he conceded that he had not built a house on the suit land but maintained that when he took possession of the suit land, it was vacant and he put a perimeter fence around the suit land, dug a pit latrine and built a store for a watchman. In reference to the sale agreement dated 17<sup>th</sup> March 1991, he stated that he paid kshs. 15,000/= on execution of the agreement and a sum of kshs.1,000/= was to be paid on obtaining consent of the Land Control Board. He stated that he paid the kshs. 1,000/= a month later but he had no documentary proof. In reference to the agreement dated 1<sup>st</sup> February 1991, at clause 2, he clarified that the purchase price of kshs. 20,000/= was paid and acknowledged but in fact the sum of kshs. 20,000/= was not paid. He also maintained that the defendant's husband was not on the suit land. In reference to the letter dated 3<sup>rd</sup> May 1991 (**"PEXh.6"**), he admitted it indicated that there was another party on the suit land and the seller was seeking assistance from the adjudication officer to file suit. In reference to the letter from the adjudication officer dated 13<sup>th</sup> June 1991 **"PEXh.8"**, the plaintiff stated it was a warning to the defendant's husband who by the time was occupying the

suit land and was building structures thereon. The plaintiff further stated that he has had a caretaker in the suit land called Stephen Okeyo who lives in the store house he had constructed.

11. PW2 Benjamin Oliech Onyango testified that in December 1990, the deceased father approached him to find a person to purchase the suit land. It was his evidence that he showed the plaintiff the suit land and introduced him to the deceased and the deceased father on 22<sup>nd</sup> February 1991 for negotiations regarding the sale. PW2 stated that he accompanied the plaintiff and deceased to the Assistant Chief where the parties signed a land sale agreement and he also signed the said agreement as a witness of the plaintiff. It was PW2's further evidence that at the time the plaintiff purchased the suit land, it was vacant and nobody was living there. He stated that the plaintiff took possession of the suit land, fenced it, dug a pit latrine and put up a structure. On cross examination, PW1 denied that the defendant's husband had fenced the suit land and put up structures on the suit land as at the time the plaintiff entered into the agreement with the deceased.

12. DW1 Ruth Atieno Otiango, the defendant herein testified that the deceased and her husband were cousins. In reference to the suit land, she told the court that she was aware of its existence since 1986 as it was sold to her husband then and they fenced it and her husband paid kshs. 3,000/= to the deceased. She produced a copy of the sale agreement dated 16<sup>th</sup> January 1987 between the deceased and her husband as "**Dexh.1**". She stated that they took full possession of the suit land, fenced it, dug a pit latrine, planted some trees and cultivated the land every year. She further told the court that at the time of purchasing the land, her husband had carried out a search and confirmed the land to be in the name of the deceased. She further stated that at the time they took possession of the land, nobody came to raise any complaint.

13. That after her husband's death in 1992, she took out letters of administration in 1993. She further stated that the deceased died in 2002 and that he had no wife or children and his father had died earlier. She produced the death certificates for her husband and the deceased "**Dexh.2(a) and (b)**" respectively. She also produced grant of letters of administration for her husband's estate and the deceased estate as "**Dexh.3(a) and 3(b)**" respectively. She confirmed that the suit property is now registered in her name following transmission from the deceased to herself. She produced a copy of the transfer by transmission as "**Dexh.4**". She further stated that in 1991, her husband received a telegram from his brother one, Jacob Mose that the suit land had been sold to another person. As a result, her husband filed an objection with the Land Adjudication Officer ("**DExh.6**"). After lodging the complaint with the Adjudication Officer, she stated her husband started re-fencing the suit land with barbed wire. The Land Adjudication Officer contacted her husband after receiving a complaint from the deceased who had complained that somebody was interfering with the suit land which he had already sold to the plaintiff. She termed the deceased complaint as unjustified as he was the one who had sold the suit land to her husband and that the deceased already knew that they had taken occupation and possession of the suit land.

14. The land Adjudication Officer vide a letter dated 29<sup>th</sup> May 1991 requested the Chief to verify the allegation by the deceased. Afterwards, the Land Adjudication Officer wrote a letter dated 13<sup>th</sup> June 1991 indicating that her husband was trespassing. She produced the letter as "**Dexh.7**". That in turn, her husband responded to the Land Adjudication Officer in a letter dated 18<sup>th</sup> June 1991 explaining that he had been on the suit land for 4 years before the allegations were made. A copy of the said letter was produced as "**Dexh.8**". Thereafter, her husband placed a restriction on the suit land in October 1992 to protect his interest on the suit land; but unfortunately he died in a road accident in the same month a few days later. She produced a copy of certificate of search dated 20<sup>th</sup> July 2009 showing the restriction as "**Dexh.9**".

15. The defendant insisted that in 1991 and 1992, the plaintiff was not on the suit land and that he never entered in the suit land at all. That when the issue of the second buyer arose, her brother-in-law spoke to the plaintiff during her husband's funeral and that was when the plaintiff indicated that he be refunded the purchase price. She then refunded the purchase price in two instalments of kshs. 8,000/= and kshs. 7,000/= through the plaintiff's mother and paid the last instalment in August 2009. That the plaintiff had indicated to her brother in law that the refund could be made through his mother as he was usually not available. She produced acknowledgement by the plaintiff's mother as "**Dexh.10**". She stated that up to 2009 when she made the refund, she was still using the suit land and she re-fenced it again.

16. The defendant further stated that after she obtained grant of letters of administration, she caused the restriction to be removed and was registered as the proprietor. She produced copies of the removal of restriction and a copy of the certificate of search as "**Dexh. 11 and 12**". Thereafter, the plaintiff registered a caution over the suit land in August 2012 and she immediately made an effort to have the same removed by the land registrar. She testified that the plaintiff had put no structure on the suit land and produced pictures which showed the status of the suit and as "**Dexh. 13(a) and (b)**" respectively. She further stated that there was no work man who stayed on the suit land and that the plaintiff had never entered into the suit land.

17. On cross examination, the defendant stated that she was not present when the sale agreement between her husband and the deceased was entered into. She however maintained that her husband fenced the suit land in 1987, constructed a pit latrine and that they used to cultivate the piece of land. She insisted that she paid the refund to Sophia Obiero (the plaintiff's mother) though she conceded there was no written authority from the plaintiff to make the refund to her. She stated that she had been cultivating the suit parcel all along but since the fence was removed/vandalized in 2011 she had not cultivated. She stated that the fence her husband put up on the suit land in 1991 was destroyed and that the one she placed in 2009 was equally vandalized. She stated that when she was not around, her brother-in-law, Jacob Ochieng looked after the suit land.

18. DW2, Jane Adoyo Tindi testified that she has been the Assistant Chief Konyango Majeiri sub location since 26<sup>th</sup> November 2001. She stated that she was familiar with both the plaintiff and the defendant as they hailed from her sub-location. In reference to the suit land, she stated that the plaintiff reported a matter concerning the suit land to the chief one, Jack Ouma Kawere of Karachuonyo sometime in 2009. That in the report, he indicated that some people had fenced off his land. The plaintiff was then advised to come back to the chief's office when all parties concerned in the case were present for hearing and determination of the matter. However, the plaintiff never went back to see the chief nor fix a date for the parties to have a sitting. The witness stated that ever since she started working as an assistant chief in Konyango sublocation, she had not seen or witnessed anybody living on the suit plot except for Mr. Jacob Ochieng Mosi (defendant's brother-in-law) whom she witnessed fencing off the place sometime in 2009 and that up to date, there was no structure or activity on the suit land. On cross examination, she stated that when the plaintiff made the complaint before the chief, she was also present.

19. DW3, Reuben Oyoo Mosi is a first cousin to the deceased and a brother in law to the defendant. In reference to the suit land, he stated that the suit land belonged to the deceased but was succeeded by the defendant. He stated that initially the suit land formed part of the estate

of his late grandfather one Nduri Kilori. That the suit land was subdivided from the original land owned by his great grandfather Nduri Kilori which he caused to be subdivided to his four sons; and amongst them was the deceased father who in turn bequeathed the same to his only son the deceased herein. He further stated that the deceased sold the land to the defendant's husband (who was his late brother) on the 16<sup>th</sup> day of January 1987. That by 1991, the defendant's husband and the defendant were already in possession and occupation of the suit land and that they had built a pit latrine which has now collapsed. The witness stated that when the plaintiff expressed the intention of purchasing the land from the deceased, they cautioned him against entering into any transaction with the deceased since the suit land had already been sold to the deceased husband. DW3 further stated that the plaintiff took advantage of the deceased who was an alcoholic and a drug addict and convinced him to sell the suit land to him notwithstanding that the suit land had already been sold to the defendant's husband who was using the same with the defendant. The witness corroborated the defendant's testimony that the plaintiff was subsequently refunded the money which he had paid to the deceased as deposit towards the purchase price through his mother on his instructions in the year 2009.

20. DW3 further stated that after the money was refunded to the plaintiff, he stopped harassing the defendant and advancing claims over the suit land and as a family they genuinely thought that the issue regarding the suit land had been resolved. The witness said he was surprised in 2012 when the plaintiff filed the instant suit against the defendant advancing claims of adverse possession and making false allegations that he was in occupation and use of the suit land herein. He maintained that the plaintiff has never entered, occupied, cultivated possessed or used the suit land herein at any material time and that the toilet on the suit land constructed by the defendant's husband, was the only development on the suit land. He identified the photographs appearing (on page 43 and 44 of the defendant's bundle of documents) and identified the suit land as the empty ground beside the built up area which is Lake View Hotel. In reference to "Pexh.15" (the letter by the deceased) he stated that the deceased could not write hence the letter could not be genuine and/or the same was written for him.

#### 21. Submissions by the Parties;

Counsel for the plaintiff in his written submissions reiterated the facts and the evidence and submitted that the plaintiff's occupation and possession of **LR No. Central Karachuonyo/Konyango/2511** had been continuous and without interruption for a duration of over 20 years and hence the defendant's right to recover the whole of parcel of land had been extinguished by effluxion of time. That the plaintiff had continuously, openly and without interruption occupied and cultivated the whole of the suit land without interference by the deceased and/or the defendant and that the plaintiff's entry into the said parcel of land was pursuant to a sale agreement dated 1<sup>st</sup> February 1991 made between the plaintiff and one Simon Odingo Wakaya, now deceased. The plaintiff submitted further that as no consent of the land control board was obtained within 6 months of the making of the agreement the same became void and the possession and occupation by the plaintiff of the suit land became adverse to the interest of the deceased. Therefore, the title and/or interest of the deceased and by extension the defendant herein in the suit land had lapsed and was extinguished upon the expiry of 12 years and that it was thus counsel's submission that the plaintiff has consequently acquired prescriptive rights over the parcel of land and is entitled to be registered as the owner thereof.

22. The plaintiff's counsel submitted that on 3<sup>rd</sup> day of May 1991, Simon Odindo Wakaya, now deceased wrote a letter to the District Land Adjudication and Settlement Officer confirming that indeed he sold the suit land to the plaintiff. Counsel thus submitted that since the defendant's husband bought the suit land on the 16<sup>th</sup> day of January 1987, nothing stopped them from acquiring the title over the suit land during the lifetime of Simon Odindo Wakaya now deceased as the defendant's husband never took any legal action against the deceased when he sold the said parcel of land to the plaintiff.

23. The defendant's counsel in his filed submissions summarized the evidence adduced by the plaintiff and the defendant in the suit and further made submission on the applicable law. It was the defendant's counsel's submission that the plaintiff had not proved and established that he was an adverse possessor of the suit property. It was the defendant's submission that the plaintiff had not proved and/or satisfied the ingredients of adverse possession to be entitled to be declared an adverse possessor of the property. To illustrate what constitutes adverse possession the defendant referred the court to the cases of, **Fortunatus Charles Kamau -vs- Administrators of the Estate of the late Serah Njeri Kangethe [2009]**, **Wambugu -vs- Njuguna [1983] KLR 172** where the court considered and laid down principles governing adverse possession. Notably in the case of **Wambugu -vs- Kamau** [supra] the court inter alia stated thus:-

**1. Possession in law follows the right to possess.**

**2. In order to acquire by the statute of limitations, title to land, which has a known owner, that owner must have lost have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. The dispossession that defeats his title are acts which are inconsistent with his enjoyment of the suit property for purposes for which he intended to use it. The respondent could and did not prove that the applicant had either been disposed the land or had discontinued possession of the suit land for a continuous statutory period of twelve years as it entitle him, the respondent the title to that land by adverse possession.**

**3. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the document has proved that he has been in possession for a requisite number of years.**

**4. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is, the claimant's possession is deemed to have become adverse to that of the owner, after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for the last twelve years after payment.**

24. In the case of **Kweyu -vs- Omutut [1990] KLR 709** the Court of Appeal expressed itself as to what would constitute adverse possession. In the case **Gicheru J. A** at page 716 stated as follows:-

**"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an**

**indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients: the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim or right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”**

25. Counsel submitted that the plaintiff has not satisfied the conditions for the grant of the orders sought in the originating summons since he has not proved that he has been in peaceful, continuous, open and uninterrupted occupation and use of the suit land for a period of 12 years. Counsel further submitted that as the plaintiff’s suit is hinged on adverse possession, the plaintiff must prove the requisite ingredients for adverse possession as set out in the **Wambugu -vs- Njuguna** and **Kweyu -vs- Omutut** cases [supra] before he can be declared to be entitled to ownership of the suit property way of adverse possession as sought.

26. Counsel pointed out that the plaintiff’s own exhibits and the defendant’s exhibits demonstrated that as at the date when the plaintiff purchased the suit land, there was already the defendant and her husband in use and occupation of the suit property. This is evident from the letter dated the 3<sup>rd</sup> day of May 1991 “**PEx.6**” where the deceased was affirming there was a third party in occupation and in possession of the suit land who he was referring to as a trespasser. This third party/trespasser was the defendant and her husband.

27. The defendant argues that from the content of this letter it was evident that the plaintiff did not enter and occupy the suit land in March 1991 as alleged as already there was an alleged trespasser on the land. The alleged trespasser, it is submitted, was the defendant and her late husband to whom the suit land had already been sold. The letter quite clearly must have been written on behalf of the late Simon Odindo Wakaya who it is conceded by both parties was illiterate. The indication is that the plaintiff may have been the author and the late Odindo merely thumb printed. Whatever the position, it is evident that the plaintiff was not able to assume possession and occupation because of the alleged “**trespasser**”.

28. The defendant’s counsel further submitted that the correspondences exhibited clearly demonstrate that the defendant and the late Stephen Otianga Mose, were firm that the land was theirs and they expressly told the Land Adjudication Officer and the complainants to follow the law as they were acting illegally. The defendant and her late husband by their stance clearly demonstrate that they would not have voluntarily given out the land to the plaintiff as the land rightfully belonged to the defendant and her husband unless they were evicted by legal process and hence the question that necessarily arises is when and how did the plaintiff gain entry onto the suit land taking account the hostility which was being displayed by the defendant and her late husband? It is clear from the plaintiff’s own exhibit that he did not immediately take possession of the suit land on the 1<sup>st</sup> February 1991 when the first agreement was done or 25<sup>th</sup> March 1991, when an affidavit was sworn by the late Simon Odindo Wakaya (“**PEXh.4**”) confirming he had sold the land to the plaintiff.

#### 29. **Analysis and determination;**

Having considered and reviewed the pleadings, the evidence and the submissions by the parties, the issues that arise for determination in the instant suit are as follows:-

**1. Whether the plaintiff was in possession and occupation of the suit property?**

**2. Whether the possession and occupation constitutes adverse possession such that the plaintiff has become entitled to be declared owner of the suit property by virtue of adverse possession?**

**3. What reliefs, if any should the court grant?**

**4. Who bears the costs of the suit?**

30. The law on adverse possession is now settled. Adverse possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession in twelve (12) years. According to Halsbury’s Laws of England, 4<sup>th</sup> Edition Volume 28, paragraph 768:

**“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”**

31. The Court of Appeal in the case of **Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui** [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamataka Board of Wakf -vs- Government of India & Others** [2004] 10 SCC 779 where the court stated thus:-

**“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non use of the property by the owner even for a long time won’t affect his title. but the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party**

**claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.** [Emphasis added].

32. The possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner. In the case of **Githu -vs- Ndeete [1984] KLR 776** the Court of Appeal held that:-

**“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner take legal proceedings or makes an effective entry into the land; (See Cheshire’s Modern Law of Real Property, 11<sup>th</sup> Edition at p. 894). Giving of notice to quit cannot be an effective assertion of right for purposes of stopping running of time under the Limitation of Actions Act.”**

As regards to what would constitute dispossession, it is stated in Volume 24 Halsbury’s Laws of England, 3<sup>rd</sup> Edition at page 252 thus:-

**“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”**

33. The sum total is that in order for the plaintiff to succeed in his claim in this suit, he has to prove that he has used the lands as of right: *nec vi, nec clam, nec precario* (with no force, no secrecy, no evasion) and his possession has been continuous and has not been broken or interrupted (See **Kimani Ruchine & Another -vs- Swift, Rutherford Co. Ltd & Another [1976-80] 1 KLR 1500.**)

34. In the case of **Wambugu -vs- Njuguna [1998] KLR 173** the Court of Appeal held thus:-

**“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”**

35. In the instant case, there is evidence that by the time the plaintiff purchased the suit land, already the defendant and her husband had purchased the land and were in use and occupation of the suit land. The plaintiff’s own exhibit **“PEX.6”** at page 12 of the originating summons acknowledges there was a person who was in occupation and possession of the suit land. Though in the letter this party is described as a trespasser there is no doubt it was the defendant and her husband. The letter dated 3<sup>rd</sup> May 1991 in part reads as follows:-

**“The said piece of land has now been fenced off and claimed by another party unknown to me as far as sale, transfer or transaction whatsoever in respect of the referenced land is concerned.**

**In view of the fact that somebody else has trespassed on the above land and consequently refused the new owner to develop it, I, as the current registered owner in your records, wish to seek your written approval to enable me file a case in a court of law against the trespassers to restrain them and thereby allow free access to the new owner.**

**I am also seeking your written confirmation that the above parcel of land is so registered in my name in your records. Please find herewith attached for your information the records of the sale agreement made between me and Mr. Fredrick Okeyo Olande and my sworn affidavit...”.**

36. The plaintiff’s exhibit **“PEX.7”** at page 13 of the originating summons is a letter from the Land Adjudication and Settlement Officer dated the 29<sup>th</sup> May 1991 which in part states as follows:-

**“It has been reported in this office by Mr. Simeon Odindo Wakaya, that Mr. Stephen Mosi has started working on his land mentioned above without his knowledge. Could you please, find out and if possible, stop him.”**

The Land Adjudication and Settlement Officer wrote to the defendant’s husband another letter dated 13<sup>th</sup> June 1991, at page 14 of the Originating Summons which was produced as **“PEX.8”** where it sated in part that:-

**“It has been brought to our attention that you have knowingly and deliberately trespassed on P/No. 2511-Konyango, which is lawfully registered in the name of Mr. Simon Odindo Wakaya. As if that is not enough, you have started erecting structures on the said parcel of land. You are strongly asked to desist from doing the same and vacate from the parcel of land in question, you are illegally and unlawfully staying on the above parcel of land against the Land Adjudication Act....”.**

It is clear from this correspondence that the defendant and her late husband are the persons who were in possession of the suit property at the time the plaintiff alleges to have purchased the same property.

37. The defendant stated that when they got information about the purported transaction between the plaintiff and the deceased relating to the sale of the suit land to the plaintiff her husband wrote to the Land Adjudication and Settlement officer signifying his interests and objecting to the said transaction as evidenced by “**DEx.6**” at page 38 of the defendant’s bundle of documents. The defendant’s husband in a further letter dated 18<sup>th</sup> June 1991 (“**DEx.7**”) which was in response to the Adjudication Officers letter dated 13<sup>th</sup> June 1991 rebutted the accusations that the plaintiff had given to the Land Adjudication and Settlement Officer. The said letter clarified that the defendant’s husband had the use and possession of the suit land since 16<sup>th</sup> January 1987 when he purchased the same and that he had used the suit land for 4 years as at the time the plaintiff and the deceased entered their transactions. The defendant’s husband was thus categorical that he was rightfully in occupation and was not vacating the suit land.

38. The defendant’s evidence that their possession, use and occupation of the suit land had never been dispossessed was never rebutted by the plaintiff. The defendant’s assertion that the structures which she had constructed on the suit land together with her husband collapsed owing to tear and wear was also not contravened. She showed the court photographs Exhibit D13 (a) and (b) which confirmed that currently the land was not being put to any use and there were no physical structures thereon.

39. DW2 the area sub chief was forthright and clear in her testimony. She was emphatic that the plaintiff has never occupied or used the suit property and that it was only in 2009 that the plaintiff complained that someone had trespassed onto his land. On being informed that the dispute would have to be arbitrated in the presence of both parties, the plaintiff never went back and afterwards when DW2 (the area assistant chief) met him the plaintiff informed her that the matter was now in court. DW3 equally affirmed that the plaintiff never used or occupied the land.

40. On the basis of the evidence and flowing from the analysis of the evidence and the applicable law, I am not satisfied that the plaintiff has proved on a balance of probabilities that he was in adverse possession of the suit property so as to be entitled to be declared as the owner thereof. There is no clear evidence as to when and/or how the plaintiff entered into possession of the suit property. To the contrary there is credible evidence that the defendant’s deceased husband was in possession and occupation of the suit property in March 1991 when the plaintiff purportedly purchased the property from Simon Odindo Wakaya (deceased). The correspondences exchanged with the Land Adjudication and Settlement Officer leave no doubt as to who was in occupation of the suit property in 1991 (March to June). It was the defendant’s late husband who the evidence points to having in fact fenced the property and not the plaintiff. There is no evidence that the defendant’s late husband was removed from the suit property before he died and even after his death there is no evidence that the plaintiff entered the land. The defendant in her evidence which was supported by DW2 and DW3 stated she continued to occupy and use the land even after her husband death. In 2009 the defendant stated she re-fenced the suit property since the earlier fence placed by her husband in 1991 had been damaged. In my view, the fact that the defendant could effectively fence the property in 2009 meant that she had retained possession of the land. If the plaintiff was in possession as he claims, it would not have been possible for the defendant to re-fence the suit property.

**41. Decision;**

In the premises, it is my finding and holding that the plaintiff has not discharged his burden of proof and that there is no proof that he was an adverse possessor of the suit property and cannot therefore be entitled to the reliefs sought in the originating summons. He has not proved his suit on a balance of probabilities and the same fails. I order the suit dismissed with costs to the defendant.

42. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 22<sup>ND</sup> DAY of JUNE, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Mireri for the Plaintiff

Mr. Kimaiyo for Otieno for the Defendant

Ruth Court Assistant

**J. M. MUTUNGI**

**JUDGE**