



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 849 OF 2015**

***(FORMERLY HIGH COURT CASE NO. 81 OF 2011) (O.S.)***

**CAREN ANYANGO NYAKENO.....PLAINTIFF**

**VERSUS**

**ELISHA OMBUJO TUNGA.....DEFENDANT**

**JUDGMENT**

**CAREN ANYANGO NYAKENO** (the Plaintiff herein) filed her Originating Summons on 27<sup>th</sup> May 2011 against the Defendant (**ELISHA OMBUJO TUNGA**) claiming to be entitled to be registered as the proprietor of all that/or a portion of the parcel of land known as **KISUMU/KADERO GOT NYABONDO/2159** (hereinafter the suit land) measuring approximately 0.07 Ha by adverse possession in place of the Defendant who is presently the registered proprietor thereof. The Plaintiff therefore sought the determination of the following:

- 1. Whether the Plaintiff has occupied, used and enjoyed peaceably and openly as of right and without interruption the whole of and/or a portion of land known as KISUMU/KADERO GOT NYABONDO/2159 measuring approximately 0.07Ha for a period of over 12 years.***
- 2. Whether the Plaintiff has thereby acquired and is entitled by adverse possession to the said portion measuring 0.07Ha.***
- 3. Whether the Plaintiff should be registered as the proprietor of the whole of and/or part of the said parcel of land known as KISUMU/KADERO GOT NYABONDO/2159 measuring 0.07Ha in the place of the Defendant presently registered as the proprietor.***
- 4. Whether a permanent injunction should issue restraining the Defendant, his servants, agents, heirs and assignees and/or any other persons acting on his behalf from interfering with the Plaintiff's enjoyment and use of the said portion.***

The Originating Summons is accompanied by the Plaintiff's supporting affidavit and statement, Certificate of Search and Green Card showing that the suit land is registered in the names of the Defendant as well as several correspondences. In her supporting affidavit, the Plaintiff has deposed, inter alia, that sometime in 1983 her husband **REUBEN NYAKENO AGONO** (the deceased) constructed for her a house on a portion of the suit land and that apart from the portion on which her house stands, she has been cultivating the other portion for her up-keep from 1983 to-date. That sometime in 1985, the deceased abandoned her and went to live and work in Tanzania where he stayed for 25 years only to return in March 2010 while not in very good health. He died on 7<sup>th</sup> June 2010 without informing her that he had sold her home to the Defendant yet that is where she has always lived and with the knowledge of the Defendant. That her occupation of the suit land has been open, peaceful, un-interrupted and with the knowledge of the Defendant. That her advocate wrote to the Defendant demanding that he transfers the portion to her but he declined thus giving rise to this suit.

The Defendant resisted the claim through his replying affidavit dated 19<sup>th</sup> July 2013 in which he deposed, inter alia, that the home which the deceased constructed in 1983 was not on the suit land but was on a portion of land adjoining the said plot and bearing a different title number. Further, that the Plaintiff has been cultivating a very small portion of the suit land and not the whole portion.

He denied that the deceased never informed the Plaintiff that he had sold a small portion of the suit land to him adding that save for a small portion, he purchased the suit land from one **SAMUEL MBUYA WANDA** on 4<sup>th</sup> April 2006 as per the annexed agreement marked "**EOT 1**". That prior to that, the small portion was purchased by the deceased from **NELSON OLALE WANDA**. That the deceased was ill and needed fees for his son **JOSEPH REUBEN** and so he sold a small portion to the Defendant on 10<sup>th</sup> June 2010 for Ksh.80,000 as per the agreement marked "**EOT 2**".

That on 7<sup>th</sup> July 2010, the Plaintiff took him to the **ELDERS COURT AT EAST KAJULU LOCATION** claiming the small portion out of the suit land and after hearing their dispute, the **ELDERS** decided that as per the title deed and the agreement between him and the deceased, the small portion belonged to the Defendant. Copy of the proceedings before the **ELDERS COURT** are annexed “**EOT 3**”. That on 10<sup>th</sup> July 2010, the Plaintiff requested him to allow her a portion measuring 5 feet to enable her erect a house and he accepted out of compassion and sympathy towards the Plaintiff. He annexed a copy of the said **EXTENSION AGREEMENT – Annexure “EOT 4”**.

Directions having been taken in the matter on 22<sup>nd</sup> July 2013, it was placed before me for hearing during the service week in Kisumu on 30<sup>th</sup> October 2018.

The Plaintiff relied on her supporting affidavit, statement and list of documents all dated 25<sup>th</sup> May 2011 and further the list of documents dated 15<sup>th</sup> October, 2018 and called as her witness **JUDITH AUMA AGONO (PW2)** who also adopted as her evidence her statement dated 8<sup>th</sup> October 2018.

The Defendant similarly asked the court to adopt as his evidence the replying affidavit dated 19<sup>th</sup> July 2013 and the annexures thereto.

Submissions were thereafter filed both by **MR. P. D. ONYANGO ADVOCATE** for the Plaintiff and **M/S MIDIA** instructed by **KISHORE NANJI ADVOCATE** for the Defendant.

I have considered the evidence by the parties as contained in their respective affidavits and list of documents as well as the submissions by Counsel.

This is a claim for land by adverse possession. It is anchored under **Section 38(1)** of the **Limitation of Actions Act** which provides as follows;

***38(1) “where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 on land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.***

In **KASUVE V. MWAANI INVESTMENT LTD & OTHERS 2004 1 K.L.R. 184** the Court of Appeal set out what a party claiming land by adverse possession has to prove and said:-

***“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.***

And in **KIMANI RUCHINE & ANOTHER V. SWIFT RUTHERFORDS & CO. LTD. 1978 – 80 1 KLR 1500** it was held that the onus is on the person or persons claiming land through adverse possession:-

***“..... to prove that they have used this land which they claim as of right: NEC VI, NEC CLAM NEC PRECARIO (no force, no secrecy, no evasion)”.***

It is also now well established that a party who is on the land with the consent of the owner cannot claim it is adverse possession – **WAMBUGU V. NJUGUNA 1983 KLR 172**. The combined effect of the provisions of **Sections 7, 13 and 17** of the **Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of the adverse possessor of the same at the expiry of 12 years of the adverse possession of the land in dispute – **BENJAMIN KAMAU & OTHERS V. GLADYS NJERI C.A. CIVIL APPEAL NO. 2132 OF 1996**. The new land laws promulgated after 2010 also recognize the doctrine of adverse possession. **Section 28(h)** of the **Land Registration Act 2012** states that among the overriding interests in land are:

***28(h): “rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of action or by prescription”.***

Similarly, **Section 7(d)** of the **Land Act 2012** provides that:

***7 “Title to land may be acquired through –***

***(a)***

***(b)***

***(c)***

***(d) Prescription.”***

I shall now consider the merits or otherwise of the Plaintiff’s claim to the suit land guided by the above judicial precedents among others.

To begin with, it is clear from the Green Card to the suit land that it was first registered in the names of **NELSON OLALE** on 9<sup>th</sup> November

1992 before it was registered in the Defendant's names on 24<sup>th</sup> May 2016. The Plaintiff's case is that the deceased constructed a home on a portion of the suit land in 1983 and up to the time of filing this suit, she has been using and occupying that portion and the remaining portion which she cultivates. She claims that her occupation of the suit land has been peaceful, open, continuous, un-interrupted and with the full knowledge of the Defendant even when the deceased went to Tanzania in 1985. This is captured in paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of her supporting affidavit in which she has deposed as follows:

2. *"That sometimes in 1983, my husband the late REUBEN NYAKENO AGONO constructed for me a house on a portion of land title No. KISUMU/KADEROGOT NYABONDO/2159 measuring approximately 0.07Ha (126 feet by 48 feet).*

3. *"That apart from my house occupying a part of this portion, I have been cultivating the remaining portion of 0.07 for my up-keep from 1983 to-date."*

4. *"That sometime on or about the year 1985 my husband abandoned me and went to work and live in Tanzania."*

5. *"That he stayed there for over 25 years when he returned in March 2010 while not in very good health."*

6. *"That my husband REUBEN NYAKENO passed on 7<sup>th</sup> July 2010 and never informed me he had sold my home to the Respondent."*

7. *"That this (sic) where I have always lived and if at all the*

*Respondent bought this land including my portion, then he did so with full knowledge of my continuous and un-interrupted occupation."*

8. *"That in any event, my husband having left/abandoned me and having not acquired title to the portion where my house stands, he had nothing to sell to the Respondent."*

9. *"That my occupation has been open, peaceful and un-interrupted with the Respondent's knowledge even at the time when he acquired title. Annexed and marked as 'CAN 1' is copy of search."*

Most of the above averments are rebutted by the Defendant and paragraphs 4, 4, 6, 7, 8, 9, 10, 11 and 12 of his replying affidavit are relevant:

4. *"That I do not accept as true the statements made in paragraphs 2 and 3 of the said affidavit. The house that the Plaintiff's late husband constructed sometime in 1983 was not on the portion of land title No. KISUMU/KADERO/GOT NYABONDO/2159 (the said plot) but was on a portion of land adjoining the said plot which portion has a different title number. Also the portion on which the Plaintiff had been cultivating was not the whole portion of the said plot but a very small portion thereof (the small portion). I do not know since when she was so cultivating."*

5. *"That I accept as true the statements made in paragraph 4, 5 and 6 of the said affidavit save and except that allegation (which I do not accept) that the Plaintiff's late husband never informed her that he had sold the small portion to me."*

6. *"That I do not accept as true the statements made in paragraphs 7 and 9 on the said affidavit. The portion of land on which the Plaintiff had always lived was the adjoining portion of land to her said plot."*

7. *"That I also do not accept as true the statement made in paragraph 8 of the said affidavit to the effect that the Plaintiff's house stood on the said plot. I repeat the said home stood on the adjoining portion of land to the said plot."*

8. *"That the true facts of this matter are that save for the small portion, I purchased the said plot from one SAMUEL MBUYA WANDA on 4<sup>th</sup> April 2006. I annex hereto in a bundle and collectively mark as Exhibit 'EOT 2' a true copy of the purchase agreement in respect thereof together with a true copy of the title deed in respect of the said plot."*

9. *"That I understand that the small portion was purchased by REUBEN NYAKENO AGONO from NELSON OLALE WANDA prior to me having purchased the same plot."*

10. *"That as REUBEN NYAKENO AGONO was sick and also had a problem of fees for his son (JOSEPH REUBEN) who was in Form 3, he sold the small portion to me on 10<sup>th</sup> June 2010 for Kshs.80,000. I duly paid that sum to REUBEN NYAKENO AGONO. I annex hereto in a bundle and collectively mark as Exhibit 'EOT 2' a true copy of the agreement for sale in respect thereof in Luo language together with a true copy of my son's (GEORGE CLINTON OMBUTO) translation of the same in English."*

11. *That on 7<sup>th</sup> July 2010 the Plaintiff took me to the Elders Court at EAST KAJULU location claiming the small portion and after hearing all the evidence the court found that the small portion belonged to me according to the title deed and the agreement between REUBEN NYAKENO AGONO and me. I annex hereto in bundle and collectively mark as 'EOT 3' true copies of the proceedings of the ELDERS COURT in Luo language together with a true copy of my son's translation of the same in English."*

12. *"That on 10<sup>th</sup> July 2010, the Plaintiff requested me to allow her 5 feet (normal 5 steps) of the small portion to enable her to*

***erect a house thereon. I acceded to this request out of compassion and sympathy to the Plaintiff. I annex hereto a true copy of the 'EXTENSION AGREEMENT' and mark the same Exhibit 'EOT 4'.***

It is therefore clear that whereas the Plaintiff claims the suit land by having lived on a portion and cultivates the other portion since 1983 openly, continuously, peacefully, un-interrupted and with the knowledge of the Defendant, the Defendant's case is that in fact the Plaintiff's house is on a different parcel of land and that in any event, having purchased the suit land, he only permitted the Plaintiff to bury the deceased on a small portion thereof. Indeed that is the thrust of the submissions by his Counsel who has stated that whereas the Plaintiff's possession was open, it was because it was permitted by the Defendant who allowed her to bury the deceased on a small portion in accordance with a customary practice. This, according to the submissions by the Defendant's Counsel, is demonstrated by the Extension Agreement which was duly executed by the Plaintiff. Therefore, citing **WAMBUGU V. NJUGUNA** (supra) Counsel for the Defendant has submitted that the Plaintiff's occupation of a small portion of the suit land cannot be adverse since it was with the Defendant's consent. Further, citing **MTANA LEWA V. KAHINDI NGALA MWAGANDI [2015 eKLR]** and also **THE BLACK'S LAW DICTIONARY 9<sup>TH</sup> EDITION page 59**, Counsel for the Defendant has submitted that the Plaintiff has not been in possession of the suit land.

My understanding of **paragraph 4** of the Defendant's replying affidavit is that whereas he concedes that the deceased constructed a house for the Plaintiff sometime in 1983, he denies however that the said house was on the suit land. Instead, he claims that the house was on a portion adjoining the suit land and with **"a different title number"**. He does not tell us which this **"different title number"** is. From the evidence herein, however, I am satisfied that the house that the Plaintiff has occupied since 1983 is on the suit land and not on any other **"different title"** as alleged by the Defendant. This is because, in Paragraph 9 and 10 of his replying affidavit as cited above, the Defendant states that the small portion which he purchased from **SAMUEL MBUYA WANDA** on 4<sup>th</sup> April 2006 had previously been purchased by the deceased from **NELSON OLALE WANDA**. And a perusal of the agreement between the Defendant and **SAMUEL MBUYA WANDA** dated 4<sup>th</sup> April 2006 clearly states in Paragraph 1 and 2 as follows:

***"TODAY 4<sup>TH</sup> APRIL 2006, I HEREBY WITNESS THE SALE (SIC) OF LAND AGREEMENT BETWEEN ELISHA OMBUJO TUNGA ID 11089470 OF POST BOX NUMBER 4408 KISUMU AND SAMUEL MBUYA WANDA ID NO. 2541540 OF THE SAME BOX NUMBER BEING THE SELLER.***

***IT IS A PORTION OF THE PARCEL OF LAND REGISTER (SIC) UNDER KADERO GOT NYABONDO/P/N 2159. THE PURCHASE PRICE OF THE PARCEL IS (KSH 68,000) SIXTY EIGHT THOUSAND SHILLINGS ONLY."***

I am also satisfied from the evidence herein that the agreement between the deceased and the Defendant dated 10<sup>th</sup> June 2010 could only have been in respect to a portion of the suit land. The agreement itself which is part of the Defendant's documents reads:

***"THE AGREEMENT OF BUYING LAND BETWEEN REUBEN NYAKENO AGONO WITH ELISHA OMBUJO TUNGA (10.6.2010)***

***I REUBEN NYAKENO AGONO, I HAVE AGREE (SIC) TO SELL TO ELISHA OMBUJO TUNGA THE PIECE OF LAND WHICH IS BEHIND MY HOUSE AND IS BETWEEN THE LAND OF ELISHA OMBUJO AND AMWAYO'S LAND. I AM SICK AND ALSO A PROBLEM OF FEES FOR MY SON JOSEPH REUBEN WHO IS IN FORM 3."***

Although the agreement does not identify the land from which the Defendant was purchasing a portion, it can only have been part of the suit land going by Paragraphs 8 and 9 of the Defendant's own replying affidavit dated 19<sup>th</sup> July 2013. In any case, there is no evidence that the deceased occupied any other land and he could therefore only have been selling the portion behind his house and which was the suit land. Therefore, the submission by the Defendant's Counsel that the Plaintiff has not been in possession of the suit land cannot be true for the simple reason that the deceased could not have been selling what he did not occupy. But as I will demonstrate shortly, even as the deceased purported to sell a portion of the suit land to the Defendant, he did not own it although he believed that he did and notwithstanding the fact that he and his family occupied it.

That the Plaintiff occupied the suit land is also confirmed by the report of **PATRICK ODIYO ADERO** a licensed Surveyor which report dated 13<sup>th</sup> October 2018 was filed through the Plaintiff's further list of documents dated 15<sup>th</sup> October 2018. That report reads:

***"FREEHOLD TITLE KISUMU GOT NYABONDO/2159 The family of the late REUBEN NYAKENO AGONO (deceased) lives/occupies the plot marked A1 12 13 and A4 (see the attached diagram). The family has occupied this plot since the year 1983 (source CAREN ANYANGO NYAKENO and GEDION AGONO AGONO). They built a house and a kitchen within the plot. The remains of the late REUBEN NYAKENO AGONO were interned within this plot. Recently, they noticed that the plot is depicted as two parcel numbers on the Registry Index Map (RIM). On the RIM a portion of it is depicted as Parcel No. KISUMU GOT NYABONDO 2159 while the other portion is KISUMU GOT NYABONDO 2160. Hence this report."***

The report has a diagram attached to it showing parcels No. 2159 and 2160 and concludes as follows:

***"According to the RIM AI-RI-R2-A3 is part of 2159 and***

***R1-A4-A3-R2 is Parcel No. 2160."***

According to that diagram, the house and grave are on Parcel No. 2159 and the kitchen is on Parcel No. 2160. That report was prepared by a licensed Land Surveyor who gave his number as 174 and is therefore an expert whose evidence the court must admit unless there is evidence to the contrary. It is clear therefore that the deceased constructed a house for the Plaintiff on the suit land in 1983 and not on Parcel No. 2160 or any other parcel as the Defendant would like this court to believe. The deceased and his family have therefore since 1983 been in

possession and occupation of the suit land.

According to the Green Card to the suit land, and as I have already shown above, it was first registered in the names of **NELSON OLALE** on 9<sup>th</sup> November 1992 before it was registered in the names of the Defendant on 24<sup>th</sup> May 2006 and the title deed thereof issued to him on 25<sup>th</sup> May 2006. Those are the only two entries on the Green Card and clearly, the suit land was never registered in the names of the deceased or **SAMUEL MBUYA WANDA**. It is therefore not clear how the two were able to transfer the suit land to the Defendant. However, I must caution myself that the validity or otherwise of the Defendant's title is not before me for determination. What I need to determine is whether the Plaintiff's claim to have acquired the said title by adverse possession is justified.

I am satisfied from the evidence that the Plaintiff has lived in a house on one portion of the suit land and utilized the other portion since 1983. This occupation has been open, exclusive, peaceful, un-interrupted and with the knowledge of the Defendant who, by Paragraph 4 of his own replying affidavit, knew about the house that the deceased had constructed for the Plaintiff although his claim, which I have already found to be incorrect, is that the house was not built on the suit land. Since the land was first registered in the names of **NELSON OLALE** on 9<sup>th</sup> November 1992, that is the date when time started running for purposes of adverse possession because such a claim is against the registered proprietor of the land in dispute. The change of ownership of the suit land from **NELSON OLALE** to the Defendant in 2006 did not interrupt time for purposes of adverse possession – **GITHU V. NDEETE 1984 KLR 776**. Even as the Defendant believed that he was being compassionate to the Plaintiff by allowing her a portion to bury the deceased through the “**extension agreement**” dated 10<sup>th</sup> July 2010 (annexture EOT 4), the truth of the matter is that by that time, his right to the suit land by registration had been extinguished some 6 years earlier because the 12 years limitation period commenced in 1992 and ended in 2004. The Defendant therefore no longer had any interest in the suit land through which he could give to the Plaintiff by lease, gift, transfer or otherwise, a portion measuring five feet on which to construct a house for the deceased. Citing **WAMBUGU V. NJUGUNA 1983 KLR 172**. Counsel for the Defendant has submitted that the Plaintiff is on the suit land with the leave and licence of the Defendant and therefore adverse possession cannot arise. Further, that “**there was a valid agreement allowing the Plaintiff into a small portion of the suit land**”. However, as I have already found above, any interest that the Defendant may have on the suit land having been extinguished in 2004, he was incapable of giving any consent to the Plaintiff or any other party to utilize the suit land or any portion thereof. The “**extension agreement**” dated 10<sup>th</sup> July 2010 is therefore inconsequential and while this court must admire the Defendant's act of magnanimity towards the Plaintiff, it was really all in vain in my view.

The up-shot of the above is that the Plaintiff has proved her case against the Defendant as required in law and is entitled to the orders sought in the Originating Summons filed herein on 27<sup>th</sup> May 2011.

There shall therefore be judgment for the Plaintiff against the Defendant in the following terms:

- 1. The Plaintiff has acquired title to the whole of the land parcel No. KISUMU/KADERO GOT NYABONDO/2159 by way of adverse possession.**
- 2. The Plaintiff should be registered as the proprietor of the whole land Parcel No. KISUMU/KADERO GOT NYABONDO/2159 and the Defendant to execute such transfer documents within 30 days of this judgment failure to which the Deputy Registrar of this court be at liberty to do so.**
- 3. A permanent order of injunction is issued restraining the Defendant, his servants, agents, heirs and assigners and/or any other person acting on his behalf from interference with the Plaintiff's enjoyment of the land parcel No. KISUMU/KADERO GOT NYABONDO/2159.**
- 4. In the circumstances of this case and taking into account the Defendant's conduct, Justice will best be served by ordering that each party meet their own costs.**

Judgment Dated, Signed and Delivered this 30th day of November, 2018 in Open Court at Kisumu

Mr. Otieno Onyango for Kishore Nanji for Defendant

Mr. Onyango for Plaintiff – Absent

Plaintiff – Present

Defendant – Absent

Right of Appeal

B. N. Olao

Judge

30<sup>th</sup> November, 2018