



**REPUBLIC OF KENYA**

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

**CASE NO. 146 OF 2015**

**JOHN NYABUTO.....PLAINTIFF**

**VERSUS**

**JAMES OMBAYE ORORI.....1<sup>ST</sup> DEFENDANT**

**KEREMENSIA ORORI.....2<sup>ND</sup> DEFENDANT**

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

1. The plaintiff commenced the instant suit by way of a plaint dated 13<sup>th</sup> April 2015 filed in court on 15<sup>th</sup> April 2015. The plaint was subsequently amended on 7<sup>th</sup> December 2015 and the 2<sup>nd</sup> defendant was dropped from the suit. Though the suit apparently was brought by the plaintiff on behalf of the estate of Michael Onsomu Mayiera the preambular part of the plaint does not indicate so. Where a suit is brought on behalf of a deceased estate by a legal representative it is necessary for the legal representative to indicate he/she is bringing the suit in that capacity on behalf of the deceased estate. However as I have noted from the plaintiff's bundle of documents the plaintiff on 22<sup>nd</sup> January 2015 obtained a grant of letters of administration Ad Litem limited only to the purposes of filing suit, I will hold the defect not to be fatal and proceed to determine the suit on merit.

2. By the plaint the plaintiff claims that his late father Michael Onsomu Mayiera (deceased) bought a piece of land measuring 1.5hectares from the 2<sup>nd</sup> defendant and her late husband Orori Orori for a consideration of 10 head of cattle. He states the land sold was part of land parcel **Nyaribari Masaba/Kiamokama/380**. He states that the deceased and his family have occupied the purchased portion from the date of the purchase in 1963 upto 2012 when the 1<sup>st</sup> defendant who is presently the registered owner of land parcel **Nyaribari Masaba/Kiamokama/795** which the plaintiff claims unlawfully annexed the portion of land sold to his deceased father. The plaintiff prays for judgment against the defendants for orders:-

**(1) A permanent injunction to issue restraining the defendants either by themselves, servants, agents, assigns, representatives, workmen, servant, and/or any other persons whatsoever acting under the defendant's directions from trespassing, annexing, cultivating, developing and/or dealing in any way with the plaintiff's piece of land from land parcel number Nyaribari Masaba/Kiamokama/795.**

**(2) An order declaring that the plaintiff as the legal owner of the land measuring approximately 1.5hectares and there follow an eviction of the 1<sup>st</sup> defendant either by himself, agents, assigns, representatives, worker men, servants or any other person from the plaintiff's part of land parcel number Nyaribari Masaba/Kiamokama/795.**

**(3) An order declaring t the plaintiff as the legal and rightful owner of the said land measuring approximately 1.5hectares compelling the executive officer to sign all relevant documents to facilitate the transfer of the suit land unto the plaintiff's name.**

**(4) Costs of the suit.**

**(5) Any other relief this honourable court may deem fit to grant in the circumstances.**

3. The defendants were served with summons to enter appearance as per the affidavit of service sworn by one Alice Mokeira Osero dated 9<sup>th</sup> June 2015 filed in court on the same date. The defendants did not appear or file any defence. Following the amendment of the plaint the 1<sup>st</sup> defendant who as per the amended plaint dated 7<sup>th</sup> day of December 2015 was now the sole defendant and was served with the amended plaint on 11<sup>th</sup> April 2016 as per the affidavit of service dated 15<sup>th</sup> April 2016 sworn by one William Morara Ogwara and filed in court on 27<sup>th</sup> April 2016.

4. The suit was fixed for formal proof hearing before me on 13<sup>th</sup> June, 2017 when the plaintiff and his witness (PW2) testified in support of the claim by the plaintiff. The plaintiff John Nyambuto testified that his father Michael Onsomu Mayiera (now deceased) purchased a portion of land from the defendant's father Onyori Onyori (also now deceased) in 1963 pursuant to which the plaintiff's family occupied the land and have been in occupation ever since. That the land the subject of the sale was land parcel **Nyaribari Masaba/Kiamokama/380** but the same has since been subdivided and the portion purchased by the plaintiff's late father is now comprised in land parcel **Nyaribari Masaba/Kiamokama/795** registered in the defendant's name. The plaintiff stated that his father died in 1992 and was buried on the land (now parcel **975**). The plaintiff stated he was born and brought up on this land and that he had constructed four houses on the suit property but that sometimes in 2011 the defendant forcibly destroyed and demolished the plaintiff's houses and chased the plaintiff away from the land.

5. The plaintiff stated that the defendant's actions were precipitated by a decision made by the Keumbu Land Disputes Tribunal which had ruled that the suit land belonged to the defendant and that he should be evicted from the land. The plaintiff had lodged an appeal against the decision of the Tribunal to the Nyanza Provincial Appeals Committee but before the appeal could be heard and determined the plaintiff was evicted from the land and hence the proceedings before this court.

6. The plaintiff claims to have occupied the land the subject matter of the suit for a very long time and further states the defendant acted fraudulently in causing the land to be transferred to himself while he knew the plaintiff's father had purchased the land. The plaintiff sought orders from the court that he is entitled to be declared as the owner of the land. The plaintiff stated that the defendant after evicting him planted trees on the portion of the land that the plaintiff occupied.

7. PW2 Omangi Okemo Orori is the defendant's brother. He stated he is aged 37 years and had known the plaintiff since he was born. He confirmed the plaintiff's father had purchased a portion of land from his parents and that the plaintiff's family had all along occupied that portion of land. The witness stated that the defendant processed title to his land which incorporated the portion that had been sold to the plaintiff's father. The witness confirmed the plaintiff was evicted from the portion that he was occupying and his houses were demolished by the defendant who claimed the portion belonged to him. The witness further stated the defendant has planted trees in the portion previously occupied by the plaintiff's family.

8. One has to sympathize and feel sorry for the plaintiff. While there may be evidence that indeed the plaintiff's father may infact have purchased land from the defendant's father in 1963 the question may nonetheless be posed. Why the transaction was not completed over all the year? The plaintiff states his father died in 1992 which was nearly 30 years since the alleged sale of land in 1963. The plaintiff alleges the portion purchased by his father was part of land parcel **Nyaribari Masaba/Kiamokama/380**. No evidence was tendered to show who was the registered owner of the parcel of land. Was it the defendant's father or someone else? The plaintiff states that land parcel **Nyaribari Masaba/Kiamokama/795** registered in the defendants name was a subdivision from land parcel **380** yet

from the copy of official search dated 27<sup>th</sup> March 2015 annexed to the plaintiff's bundle of documents accompanying the plaint it is indicated that land parcel 795 was registered in favour of the defendant on 18<sup>th</sup> June 1986 and a title issued to him on 5<sup>th</sup> August 1986. It is further noted on the search certificate that this was a subdivision of land parcel No. 779. Thus there is no evidence of ownership of parcel 380 if at all it existed and/or how it was parceled out.

9. It is common ground that following the attainment of independence in 1963 the Kenya Government rolled out a programme of demarcating and consolidating parcels of land for purposes of issuing of title deeds. The demarcation process entailed adjudication of persons interests in land pursuant to the provisions of the Land Adjudication Act, Cap 284 of the Laws of Kenya. It is not clear why, if the plaintiff's father had acquired a portion of land from the defendant's father, such land was not adjudicated to him under the adjudication process. This puts to question whether infact there was any such acquisition. No evidence of the alleged sale transaction has been tendered. PW2 who testified to the effect that his father had sold a piece of land stated that he was aged 37 years meaning that he was born about 1979/1980 long after the alleged sale took place in 1963. He possibly could not have been privy to or a witness to the alleged sale.

10. The plaintiff's case is premised on the alleged sale that took place in 1963 and the fact of long occupancy of the portion of land by his deceased father and his family. As I have observed no agreement has been proved that would be capable of being enforced. There is no evidence to support the existence of any agreement as is alleged by the plaintiff. Occupancy alone notwithstanding how long it has been cannot create a right of entitlement if the occupancy is through the permission of the owner. The occupier cannot acquire any interest or right adverse to the owner's rights of ownership if the occupation was with the permission and consent of the owner. However, if the occupation and possession is adverse to the interest and rights of ownership of the real owner, then the adverse possessor may acquire title to the land adversely possessed after 12 years of continuous and uninterrupted possession. Where the owner asserts his ownership rights and retakes possession, the adverse possessor cannot claim adverse possession after he has been evicted from the land. For the doctrine of adverse possession to be applicable, the adverse possessor must commence proceedings to be declared as owner whilst he is still in possession.

11. In the instant case, the plaintiff has not directly founded his claim on adverse possession even though he has pleaded longevity of occupation of the portion of the land he claims. Even if the plaintiff would have predicated his suit on the doctrine of adverse possession, he would have failed. In his pleadings and evidence he makes admission that he and his family were infact totally evicted from the suit land in 2011. This meant that even if they had been in adverse possession that possession was interrupted and whatever period he had been in possession cannot now count.

12. Having considered the pleadings and having evaluated the evidence adduced in support of the plaintiff's claim, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. I accordingly dismiss the plaintiff's suit but make no order for costs.

**Judgment dated, signed and delivered at Kisii this 29<sup>th</sup> day of September, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Plaintiff present

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**