



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KAKAMEGA**

**ELC CASE NO. 526 OF 2014**

**JOSEPH MBATI OTINGA.....PLAINTIFF**

**VERSUS**

**MARGARET AJUANE MAYABI.....DEFENDANT**

**JUGDEMENT**

This case was brought by way of originating summons on the application of Joseph Mbatu Otinga the plaintiff herein who claims to be entitled to the portion of Land Parcel No. South Wanga/Buchifi/1224 measuring 4.0 acres in area by way of adverse possession for the determination of the following questions; The ownership of the portion of Land Parcel No. South Wanga/Buchifi/1224 measuring 4.0 acres in area together with all the developments thereon claimed by the applicant for reasons set out in his affidavit and upon other reasons as may be adduced at the hearing of this summons. And for the award of the following orders;

- (a) A declaration that the respondent's right over the portion of land parcel No. south Wanga/Buchifi/1224 measuring 4.0 acres in area got extinguished by operation of law (adverse possession upon expiry of twelve (12) years when the applicant was in possession.
- (b) A declaration that the respondent registration on land parcel No. South Wanga/Buchifi/1224 was as a trustee and to hold the same in trust for the applicant's portion measuring 4.0 acres.
- (c) A declaration that upon the expiry of twelve (12) years from the date of the applicant's occupation the portion 4.0 acres of land parcel No. south Wanga/Buchifi/1224 was held and is currently held in trust for the applicant.
- (d) An order that 4.0 acres of land parcel No. South Wanga/Buchifi/1224 vests in the applicant and that the applicant should be registered as owner thereof under section 38 of the Limitation of Actions Acts Cap 22 Laws of Kenya.
- (e) An order that the respondent do sign all relevant documents including application for consent forms, transfer and attend relevant Land Control Board Meetings to facilitate the transfer of the 4.0 acres of land parcel No. South Wanga/Buchifi/1224 to the applicant and that in default the Deputy Registrar of this honourable court do sign the same.
- (f) An order condemning the respondent to pay the costs of this suit.
- (g) Such further orders of relief as this honourable court may deem just and reasonable to grant.

The applicant's case is that the Land Parcel No. South Wanga/Buchifi/1224 is currently registered in the names of Magaret Ajuang Mayabi the respondent herein. The suit land parcel No. South Wanga/Buchifi/1224 is his family land on which he has stayed since 1972 to-date. The suit land parcel No. South Wanga/Buchifi/1224 was bought by his late father Otinya Abwota from Julius Mayabi Oyata the respondent's husband in 1972 and mutation forms were duly drawn and filed (PEX1 is a copy of the mutation). That his father did pay for transfer of the purchased land (PEX2 a copy of the receipt) but was not registered for unknown reasons. Consequently, he moved onto the suit land the same year and put up a home as did his father the late Otinya Abwota. He subsequently put up a permanent house on the suit land in which he has stayed to-date. Upon his father's death in 1985, he continued staying and using the 4 acres of land to-date. That he has since planted sugarcane on the suit land contracted to M/s. Mumias Sugar Company Limited vide Mumias Sugar Account No. 796417 (PEX4 is a copy of the sugarcane farming contract). That the original land purchased by his father for their family was Land Parcel No. South Wanga/Buchifi/1224 which was divided into 1067 and 1068 of which 1068 was demarcated and designed for his father. He also planted maize, bananas, beans and vegetables and many trees of different species on the suit land (PEX5a&b). Later the respondent's husband through fraud re-subdivided Land Parcel No. South Wanga/Buchifi/204 and retained land parcel No. 1224 which is the subject matter herein. That despite the defendant/respondent being registered as the owner she has never ever lived on or used his land parcel No. South Wanga/Buchifi/1224 measuring 4 acres. His possession of the suit land parcel No. South Wanga/Buchifi/1224 has been open, notorious, continuous and exclusive of the defendant/respondent and/or the registered owner. His possession has been peaceful and as of right and he has continued to exercise all rights of ownership of the suit land. The defendant/respondent secretly commenced succession cause in Butere SRM No. 111 of 2004 and excluded him from the same yet he occupies the 4 acres that he claims. He filed South Wanga Division Land dispute Case No. 7 of 2007 which was dismissed by the High Court for lack of jurisdiction.

PW1, the plaintiff testified that his father died in 1985 and left him still in possession of the suit land (PEX3 a copy of the certificate of death). That from 1985 is a period of twelve (12) years he has been in peaceful possession and occupation of the suit land and the respondent's rights over the suit land got extinguished by operation of law. He acquired the land by adverse possession.

DW1, the defendant testified that the suit land was owned by her husband Julius Mayabi Oyata who died in the year 1996. While her husband was alive, the applicant/plaintiff never laid any claim to the land and also his father who died ahead of her husband never laid any claim. That upon her husband's death in the year 1996, she filed succession proceedings before Butere Senior Resident Magistrate being cause No. 111 of 2004 to succeed her husband on the said land. That the first time she heard of the claim to the suit land by the plaintiff was through a letter dated 4<sup>th</sup> June, 2007 from the D.O. Mumias division written to the court in the Succession Cause where a copy was availed to her. The plaintiff never laid any claim to the suit and the estate was duly distributed amongst the beneficiaries. That if the plaintiff genuinely had any claim to the land there is no reason as to why he did not file it through the succession court which ignored the D.O's letter as no agreement or evidence was forwarded to court to prove the alleged purchase of her land by the plaintiff's father. That after the confirmation of the grant in the Butere Court, the plaintiff filed a claim at the tribunal in Butere in the year 2007 but the tribunals proceedings were quashed on an appeal by herself by this honourable court in Appeal Case No. 43 of 2009. That to this date the plaintiff has produced no agreement to support his claim that his late father bought land from her late husband. That the plaintiff's encroachment to the suit land only begun in 2004 when she filed the succession and the portion he had forcefully occupied is less than ½ acre and not 4 acres as he claims. The land remained undistributed as per the succession proceedings on account of these cases. That the plaintiff did not occupy her land in the year 1972 as he claims but in 2004 and portion involved is not 4 acres but less than ½ acre. He encroached from his father's land in the neighbourhood. That for reasons explained, the plaintiff has no legitimate claim to her land based on adverse possession or at all for what he is out to do is to harass her as a widow over the suit land and wants to disinherit her since she have no sons.

The plaintiff submitted that Land parcel No. South Wanga/Buchifi/1224 is currently registered in the names of Margaret Ajuang Mayabi the defendant/respondent herein. That the suit Land Parcel No. South Wanga/Buchifi/1224 was brought by his late father Otinya Abwoya from Julius Mayabi Oyata the

defendant/respondent's husband in 1972 and mutation forms were duly drawn and filed. That his father did pay for transfer of the purchased land but was not registered for unknown reasons. The plaintiff has planted sugarcane on the suit land contracted to M/s. Mumias Sugar Company Limited vide Mumias Sugar Account No. 796417. He did file South Wanga Division Land dispute Case No. 7 of 2007 which was dismissed by the High Court for lack of jurisdiction. That he has been in possession of the suit land since his father died in 1985.

This court has considered both the plaintiff's and the defendant's case and the submissions herein. It has been established that the defendant is the registered owner of Land parcel No. South Wanga/Buchifi/1224 the subject matter herein having acquired by way of transmission from her late husband Julius Mayabi Opata. It is the plaintiff's evidence that he has stayed on the suit land since 1972 to-date. It has also been established the portion of land claimed is 4 acres out land Parcel No. South Wanga/Buchifi/1068 which was designated as the plaintiff's father's land but registration did not take place until his death (PEx1 & 2). That the plaintiff has used the 4 acres of land exclusively which is buttressed by the defendant's own admission that she has never used the 4 acres occupied by the plaintiff. That later land parcel No. South Wanga/Buchifi/204 was sub-divided to create inter alia land parcel No. South Wanga/Buchifi/1224 within which the plaintiff's portion falls.

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of **Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR** while referring to the case of **Wambugu v Njuguna (1983) KLR** page 172 the Court of Appeal held as follows;

*1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued 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 for which he intended to use it. The respondent could and did not prove that the appellants had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.*

*2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. 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 the claimant has proved that he has been in possession for the requisite number of years.*

*3. Where a claimant pleads the right to land under an agreement and in the alternative seeks 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 installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.*

In applying these principles to the present case, it is a finding of fact in that the suit land parcel No. South Wanga/Buchifi/1224 is the land on which the plaintiff's family has stayed since 1972 to-date. The suit land parcel No. South Wanga/Buchifi/1224 was bought by his late father Otinya Abwota from Julius Mayabi Opata the respondent's husband in 1972 and mutation forms were duly drawn and filed (PEx1 is a copy of the mutation). The plaintiff has planted sugarcane on the suit land contracted to M/s. Mumias Sugar Company Limited vide Mumias Sugar Account No. 796417. He did file South Wanga Division Land dispute Case No. 7 of 2007 which was dismissed by the High Court for lack of jurisdiction. That he has continued to be in possession of the suit land since his father died in 1985. The plaintiff must succeed under adverse possession as he has stayed in occupation for over 12 years. The plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the defendant/respondent's right over the portion of land parcel No. south Wanga/Buchifi/1224 measuring 4.0 acres in area got extinguished by operation of law (adverse possession upon expiry of twelve (12) years when the plaintiff/applicant was in possession).
2. That 4.0 acres of land parcel No. South Wanga/Buchifi/1224 vests in the plaintiff/applicant and

that the plaintiff/applicant should be registered as owner thereof under section 38 of the Limitation of Actions Acts Cap 22 Laws of Kenya.

3. That the defendant/respondent do sign all relevant documents including application for consent forms, transfer and attend relevant Land Control Board Meetings to facilitate the transfer of the 4.0 acres of land parcel No. South Wanga/Buchifi/1224 to the plaintiff/applicant and that in default the Deputy Registrar of this honourable court do sign the same.

4. The defendant/respondent to pay the costs of this suit.

It is so ordered

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 22<sup>ND</sup> DAY OF NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**