



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**CIVIL SUIT NO.198 OF 2011**

**MICHAEL OWINY.....PLAINTIFF**

**VERSUS**

**ELIAKIM ONYANGO OITHE.....DEFENDANT**

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

1. In this suit, **Michael Owiny**, the Plaintiff, sued **Eliakim Onyango Oithe**, the Defendant, seeking for the following orders;

- a) Declaration that the Siaya District Land Disputes Tribunal claim **No.40 of 2011** that was adopted in Siaya P.M. C Land Tribunal Case **No.72 of 2011** between the parties herein was ultra vires the tribunal's jurisdiction and therefore unlawful, null and void.
- b) General damages for trespass to land.
- c) Permanent order of injunction restraining the Defendant and those claiming under him from entering occupying, remaining on, cultivating, developing or in any way interfering with the Plaintiff's title and use of land parcel **Siaya/Pap - Oriang/283**, the suit land.
- d) Costs and interests.

The Plaintiff avers that the Defendant encroached into a portion of the suit land in 2011 which he laid claim on and has been using it since. That the Defendant filed Siaya Land Disputes Tribunal claim **No.40 of 2011** against him and the Tribunal declared that the Defendant had a right of ownership of the suit land through purchase and adverse possession. That the award was adopted in **Siaya PMC Land Tribunal case No.72 of 2011** in which the court declined to order the transfer of the land for lack of jurisdiction.

2. The Plaintiff claim is opposed by the Defendant through the statement of defence and counterclaim dated 7<sup>th</sup> December 2011. The Defendant averred that he took possession of the suit land in 1983 after paying the purchase price to the vendor, **Paulus Owingo Otiato** (deceased), and that if the Plaintiff has always been registered as proprietor of the said land, then the registration was done through misrepresentation and fraud. That he filed the Siaya Land District Land Disputes Tribunal case **No.40 of 2011** after conducting a search on the suit land and realizing the names of the registered proprietor had been fraudulently changed from that of **Paulus**. In support of his counterclaim, the Defendant averred that he purchased the suit land through a sale agreement declaration dated 4<sup>th</sup> August 1983 from **Paulus Owingo Otiato** and that he took possession and has been using it since through agents and servants without any disturbance. That he is therefore entitled to the land through adverse possession. That on or about 8<sup>th</sup> January 2009, he discovered that the Plaintiff had fraudulently transferred the suit land to his

names and he (Defendant) lodged a caution on the 14<sup>th</sup> January 2009. That he also lodged the **Siaya Land Disputes Tribunal case No.40 of 2011** against the Plaintiff and a finding in his favour was made. That the tribunal referred the matter to this court and hence the counter claim in which he seeks the Plaintiff's title to the suit land be cancelled and the land be registered in his names.

3. The Plaintiff filed a reply to the defence and a defence to the counterclaim dated 3<sup>rd</sup> January 2012. The Plaintiff disputed that the Defendant had bought the suit land from **Paulus Owingo Otiato** or that he has been in occupation of the land from 1983. That alternatively, the sale agreement between the Defendant and **Paulus Owingo Otiato** became void for failure to obtain the Land Control Board Consent as required under **Section 6** of the Land Control Act Chapter 302 of Laws of Kenya. That the Defendant, not being the administrator of the estate of the late **Paulus Owingo Otiato**, has no capacity to speak for the deceased. That the Defendant's counterclaim should be dismissed with costs.

5. The hearing commenced on 23<sup>rd</sup> June 2015 when the Plaintiff testified as PW1. He told the court that he bought land parcel **Siaya/Pap-Oriang/283** from **Owingo Otiato** a long time ago and got registered as proprietor on 3<sup>rd</sup> August 2000. That the Defendant sued him before the tribunal which awarded the land to the Defendant. That as he was not satisfied he filed this suit. That there is a young man who has been using the suit land with the Defendant's permission and that he has declined to stop using it when he asked him to. That he did not know that the Defendant had also been sold the same land by the same seller **Paulus** until during the hearing of the Land Disputes Tribunal case. The Plaintiff was cross-examined and he stated that he cannot recall the date that he bought the land and that he does not have a written agreement of the transaction. He also stated that though they went to Siaya land control board he could not recall the date. He testified that he does not have the letter of consent from the Land Control board. He disclosed that the person who sold the land to him is the one who had inherited his mother after the death of his (Plaintiff's) father. He further stated that he has not used the suit land and that it was in the year 2005 that he had sent an elder to ask the young man using the land to stop. He further stated that after the tribunal decision, he did not prefer an appeal to the Appeals Committee but filed a judicial review proceeding whose outcome he does not know.

6. In his defence to the Plaintiff's claim and in support of his counter claim the Defendant testified as DW1. He told the court that he bought the suit land in 1978 from **Paulus Owingo Otiato** at Ksh.14000/= which he paid in installments. That after finishing the payment, the seller **Paulus Owingo Otiato**, made a sworn declaration dated 4<sup>th</sup> August 1983 before the magistrate who testified as DW3 in confirmation. That the Defendant had placed his brother, **Fredrick Meshack Omondi**, on the land and has been using it from the time he bought it to date. That he has also placed an employee on the land and that the Plaintiff has never used the suit land. That the suit land had been registered in the names of **Paulus Owingo Otiato** and his late brother, **Ombucho Munialo** who died on 5<sup>th</sup> November 1975. That **Paulus** later filed a succession cause for the estate of his late brother and got the suit land registered in his names before signing the transfer forms in his favour. That on 14<sup>th</sup> January 2009 he filed a caution on the suit land on discovering that the Plaintiff had transferred it to his names. He then filed the Land Disputes Tribunal case against the Plaintiff in 2011.

That the tribunal ruled in his favour but referred him to this court for orders on the title. That he has been in occupation of the land since 1978 without any disturbance and the Plaintiff title to the suit land should be cancelled and the suit land registered in his names. The Defendant was cross-examined by the Plaintiff's counsel and he stated that they had not made a written sale agreement in 1978 and that the declaration of 4<sup>th</sup> August 1983 was signed by his brother, **Fredrick**, on his behalf. That the seller (**Paulus**) had signed the transfer forms in his favour after the declaration but did not give them to him. DW2, a cousin to the Defendant, and also related to the Plaintiff in that their respective mothers had been inherited by the same **Paulus Owingo Otiato**, testified that the Defendant is the one in possession of the suit land. He added that he knew the Defendant bought the land from **Paulus Owingo Otiato** in 1978 and made the final payment in 1983.

7. Mr Orengo and Ocharo, learned counsel for the Plaintiff and Defendant respectively, filed written submission at the close of the trial. The submission for the Plaintiff dated 7<sup>th</sup> March 2016 and further

submissions dated 19<sup>th</sup> May 2016 were filed on the same dates. That of the Defendant dated 25<sup>th</sup> April 2016 was filed on 27<sup>th</sup> April 2016.

8. The following are the issues for the court's determination;

- a) Whether the Siaya District Land disputes Tribunal award in case No.40 of 2011, and adopted in Siaya P.M. C Land case no.72 of 2011, affected or interfered with the title to the suit land held by the Plaintiff. Alternatively whether the award was ultra vires the tribunal powers as limited under **Section 3(1)** of the Land Disputes Tribunal Act (repealed).
- b) Whether the declaration prayer on the tribunal award is available to the plaintiff.
- c) Whether the Defendant took possession of the suit land in 1983 or 2011 and whether the possession or occupation was adverse to the title of the registered proprietor(s).
- d) When the plaintiff became the registered proprietor of the suit land and whether his title has been extinguished by the Defendant's possession or occupation under Limitation of Actions Act.
- e) Whether the plaintiff is entitled damages for trespass and an order of permanent injunction against the Defendant or alternatively whether the Defendant has acquired title to the suit land through prescription.
- f) Whether the Defendant's counterclaim is fatally defective.
- g) Who pays the costs?

9. The court has carefully considered the claims as contained in the pleadings filed by both parties, the evidence adduced in support, the written rival submissions and come to the following conclusions:

- a) That both the Plaintiff and the Defendant claim to have bought the suit land from **Paulus Owingo Otiato**, now deceased, at different times. That the Plaintiff could not remember when he bought the land. He stated during cross-examination that, ***"I cannot recall when I purchased the land as it was long ago"***. That for the Defendant, he bought the land in 1978 and made the final payment on 3<sup>rd</sup> August 1983 when the seller, (**Paulus Owingo Otiato**) and **Eliakim Onyango** (Defendant's agent) made the declaration he produced as exhibit 1. That DW3 confirmed commissioning the said declaration.
- b) That though the Plaintiff contends that the Defendant entered onto the suit land and started claiming ownership in 2011, the evidence adduced by DW1, DW2 and the Plaintiff's evidence in cross examination shows that the Defendant had through agent's started using the suit land before 2005. That the Plaintiff stated the following during cross-examination; ***"At the time I bought the land, there was no one using it. It was a bush. Later on, a young man started using the land having been told to do so by the Defendant. I cannot recall exactly when the young man started using the land. I asked the young man to leave the land. I did that in year 2005....."***(emphasis mine). That going by the evidence adduced before the Siaya District Land Disputes Tribunal in case No.40 of 2011, as confirmed by the copy of proceedings adduced as exhibit by the Plaintiff and also relied upon by the Defendant, the Defendant started using the land through his workers and brother namely **Fredrick Omondi**, in 1984. That the evidence adduced by the Defendant outweighs that of the Plaintiff on the date the Defendant started using the suit land. The court agrees with the Defendant's version that he has been using the land since 1984, which was soon after the 3<sup>rd</sup> August 1983 declarations (evidence D1).
- c) That neither the Plaintiff nor the Defendant availed copies of the land sale agreements they made with **Paulus Owingo Otiato**. That they also did not avail copies of the letter of consent if any, that they obtained from the Land Control Board in accordance with **Section 6 of the Land Control**

## **Board Act Chapter 302 of Laws of Kenya.**

d) That the Plaintiff got registered with the suit land on 3<sup>rd</sup> August 2000. That there is no evidence adduced by the Plaintiff or the Defendant to confirm the date that **Paulus Owingo Otiato** died and the court is left wondering whether **Paulus** died before or after the suit land was transferred to the Plaintiff.

e) That a registered proprietor's title to a suit land is indefeasible unless successfully challenged under **Section 26(1) (a) and (b) of the Land Registration Act No.3 of 2011** on the following grounds:

**“a) on the ground of fraud or misrepresentation to which the person is proved to be a party;**

**b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”**

That the Defendant claimed that the Plaintiff caused the suit land to be registered in his names through fraud but failed to plead the particulars of fraud. That the requirement to set out the particulars of fraud cannot be said to be a mere procedural technicality. The particulars are necessary for they must be proved to a level between balance of probabilities and proof beyond reasonable doubt. [see **Ratilal Gorbhanbhai Patel –V- Lalji Makanji** [1957]E.A 317. That the Plaintiff having known that his title to the suit land was under challenge by the Defendant had an obligation to show that he obtained it legally, lawfully and procedurally as was held in the Court of Appeal case of **Munyu Maina –V- Hiram Gathina Maina** [2013] eKLR where the court held;

**“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from an encumbrances including any and all interests which would not be noted in the register.”**

That the Plaintiff herein had an obligation to show that he obtained title to the land procedurally but has not done so.

f) That the Defendant entered into the suit land in 1984 under the purchase agreement with **Paulus Owingo Otiato**, deceased, after making full payment. That he has remained in possession since then through his brother and workers to the exclusion of the Plaintiff and his predecessor in title, **Paulus Owingo Otiato**. That there is no evidence adduced to suggest that **Paulus Owingo Otiato** had objected to the occupation of the suit land by the Defendant and or his agents notwithstanding the obscene of their transaction obtaining the land control board consent within six months. That the court is of the view that the Defendant's occupation and possession of the suit land became adverse to the title of the registered proprietor on or about 3<sup>rd</sup> February 1984, which is the date six months lapsed from 3<sup>rd</sup> August 1983, the date of the declaration.

g) That further to (f) above, the period of 12 years limitations over the suit land lapsed on or about 3<sup>rd</sup> February 1996 when the right of **Paulus Owingo Otiato** to claim back the land became statute barred. That it follows that if the transfer of the suit land to the Plaintiff on 3<sup>rd</sup> August 2000 was effected by **Paulus Owingo Otiato**, then the transferor had no good title to pass to the transferee. That if **Paulus Owingo Otiato** did not participate in the transfer transaction, the transferee (Plaintiff) did not acquire good title as the title of **Paulus Owingo Otiato** to the suit land had become extinguished by operation of **Section 7 of the Limitation of Actions Act**, on or about 3<sup>rd</sup> February 1996.

h) That upon the Defendant learning that the Plaintiff had been registered as proprietor of the suit land he filed the Siaya District Land Disputes Tribunal case No.40 of 2011. That both the Plaintiff and Defendant seem to agree that the tribunal award bestowed the suit land on the Defendant. The Plaintiff was not happy with the award but did not file an appeal as required under **Section 8(1)** of the Land Disputes Tribunal Act (repealed) or seek for leave to apply to order of certiorari under **Order 53 of the Civil Procedure Rules**. That there is no explanation offered by the Plaintiff why neither of the two options were preferred. That instead the Plaintiff now challenges the tribunal's award through prayer (a) of the plaint dated 4<sup>th</sup> November 2011 by seeking to have the award declared ultra vires the tribunal jurisdiction and therefore null and void. The Plaintiff's counsel referred the court to the decided case of **Johana Nyakwoyo Buti –V- Walter Rasugu Omariba (suing through his attorney) Bentah Onsomu Rasugu & 2 others**, Kisumu C.A. No. 182 of 2006 in support of his submission that this court has jurisdiction to issue declaratory orders on the decision of tribunal in excess of jurisdiction. That suit was an appeal against the superior court order declining to allow a preliminary objection raised by Appellant against the suit for declaratory orders filed by the 1<sup>st</sup> Respondent who was not a party in the tribunal proceedings but whose title to the land had been adversely affected by the tribunal order. The court dismissed the appeal. That in the current suit, both the plaintiff and Defendant were parties and participated in both the tribunal hearing and lower court adoption proceedings and the obvious route for the aggrieved party to seek redress was through an appeal to the Appeals Committee under **Section 8(1)** of the Land Disputes Act (repealed) or judicial review proceedings under **Order 53 of Civil Procedure Rules**.

i) That the Defendant's step of filing the Siaya District Land Disputes Tribunal claim was a way of staking his entitlement to the suit land. That the tribunal award is as reproduced hereinbelow;

#### **“JUDGMENT**

**From the above findings ..... the District Land Disputes Tribunal has allowed the plaint made by Eliakim Oithe based on the following:-**

- i)The sale agreement was only made between Oithe and Owingo after payment of 14,000/= before a district Magistrate at Siaya on 4/8/83.**
- ii) And because of the above, the appearance of Michael Owiny smucks fraud because he did not have the courage to even question the presence of Eliakim on the land. It was Eliakim on going to process his deed that he discovered Owiny's name on it made in the year 2000.**

#### **ORDER**

**The District Land Disputes Tribunal court having made a decision in their view that Eliakim Oithe has a right to ownership of this land on account of sale agreement and adverse occupation. The case is referred to the High court Kisumu because it's the court which has the capacity to investigate how Owiny obtained the title deed since it's the High court which can cancel the ownership of the T.D. as it is at present”. [emphasizes mine]**

That while giving his testimony before the tribunal the Defendant had summarized his claim against the Plaintiff in the following words;

**“ I would request honorable court to assist me get my land which I initially bought by considering the saying that first come first served”.**

That the court's view on the tribunal award as set out above is that it was merely an expression of the tribunal's summation of the evidence before it and a declaration by the tribunal that it was not able to give

the Defendant the title to the suit land for reasons of lack of jurisdiction. The tribunal more or less dropped their tools as was required of it in accordance with the celebrated decision of Owners of **the Motor Vessel Lillian S “ V- Caltex Oil (Kenya) Ltd** [1989], but pointed out the direction to be taken, that is moving the superior court for the desired orders. That in view of the foregoing the tribunal award did not take away the title from the Plaintiff or confer title to the Defendant and therefore is incapable of execution.

j) That following the Siaya land Disputes Tribunal order directing the parties before it to escalate the matter to the superior court for determination, it was the Plaintiff who took the first step and filed this suit. That had it been the Defendant who had taken the matter to the superior court, he would have been required to do so through originating summons in accordance with **Order 37 Rule 7 of Civil Procedure Rules**. That the procedure adopted by the Defendant of raising a defence of adverse possession to the Plaintiff’s claim of damages for trespass to the suit land and permanent order of injunction from the suit land and further lodging his own claim through the counterclaim on the suit land based on adverse possession cannot be said to contravene **Order 37 Rule 7 of the Civil Procedure Rules**. The court of Appeal recently pronounced itself on this matter in the case of **Gulam Miriam Nordin –v- Julius Charo Karisa** [2015] eKLR in the following words;

**“This brings us to the question whether the learned Judge fell in error by declaring that the appellant was bared by statute of limitation to evict the respondent on the basis of a plea raised in the defence. The appellant contended that for the court to find for the respondent the claim ought to have been brought by way of originating summons. The counterclaim is based on the provision of Order 37 rule 7 of the Civil Procedure. It has been held that although that is the procedural requirement, a party is not precluded from articulating his claim by way of a plaint. See Mariba –V- Mariba Civil appeal No.188 of 2002. In Njuguna Ndatho –V- Masai Itumo & 2 others Civil Appeal No.221 of 1999, this court held that the respondent’s counter-claim for adverse possession was misconceived because it ought to have been brought by originating summons. The orders vesting the property in the respondent by the High Court was set aside. The court went further and held that the defence of limitation, would however succeed and the appellant’s suit in the High court would succeed but the respondent would have to take such action necessary to enable him obtain title to the property.**

**That position is no longer tenable, where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counterclaim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentions questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala –V- Okumu 1997 LLR 609 (CAK), which like this appeal, the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd –V- Kosgey [1998] LLR 813, where the plaintiff made no specific plea for adverse possession, the plea was nonetheless granted.**

**The court has in Teresa Wachika Gachira –V- Joseph Mwangi C.A 325 of 2003 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he had used the land he is claiming nec vi, nec claim, nec precario. It is clear that change in the court’s approach to this question has, by and by been dictated by the need to do substantive justice..... When the respondent elected to raise the defence of adverse possession without a counterclaim, he denied himself the opportunity to apply to be registered as the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from finding that the respondent’s occupation of the suit property was adverse to that of the appellant, and that the latter’s title was so extinguished”.**

The court went ahead to order that the suit land be registered in the names of the respondent (adverse possessor). That the above decision is binding on this court. The Defendant herein not only raised a defence of being an adverse possessor but also counterclaimed the suit land under the principle of adverse possession. That the Defendant has adduced evidence that shows that he took possession of the suit land after paying the seller, **Paulus Owingo Otiato**, the last payment on 3<sup>rd</sup> August 1984, by placing his brother and worker on the land. That the Defendant's action of placing his brother and worker on the land from 1983 to date is needlessly to say an affront to the interests and rights of the registered proprietor of the suit land. The Defendant has been using the suit land as of a right and **Paulus Owingo Otiato** and the Plaintiff have never interfered, terminated or interrupted his occupation. That the attempt by Plaintiff in 2005 to kick out the "young man" the Defendant had placed on the suit land did not succeed. That **Paulus Owingo Otiato** and the Plaintiff have never filed a suit to assert their proprietary rights or interests over the suit before the current one. That the court finds that the Defendant has proved that he took the suit land and has remained on it from 1984 to date without force, secrecy or permission (Nec vi, nec clam, nec precario), and became entitled to be registered as the proprietor at the expiry of 12 years on or about 3<sup>rd</sup> February 1996 through adverse possession.

k) That flowing from (j) above the Plaintiff's claim against the Defendant that he trespassed onto the suit land in 2011 has no merit as the Plaintiff has failed to establish it on a balance of probabilities. That the Plaintiff has also failed to prove that he is entitled to an order of permanent injunction against the Defendant over the suit land. That on the converse the Defendant has proved his counterclaim against the Plaintiff on a balance of probabilities that his right of an adverse possessor over the suit land had crystallized long before the Plaintiff got registered as the proprietor. That the act of having the suit land registered in the names of the Plaintiff on 3<sup>rd</sup> August 2000 has no effect on the Defendant's right of an adverse possessor as confirmed in the case of **Peter Thuo Kairo –V- Kuria Gachero** (1998) 2 KAR pages 111 to 116. That the Defendant's rights of an adverse possession had crystallized in 1996 and all that was remaining was either for the registered proprietor to transfer the suit land to him or for the Defendant to move the superior court to be so registered through originating summons in accordance with **Order 37 Rule 7 of Civil Procedure Rules**. That the Defendant took a wrong turn in filing the Siaya Tribunal case No.40 of 2011 but has now seized the opportunity by not only raising a defence based on adverse possession to the Plaintiff's claim but also initiating his own claim to the title of the suit land through the counter claim successfully.

10) That in view of the foregoing the court makes the following orders;

a) That the Plaintiff's claim against the Defendant under the plaint dated 4<sup>th</sup> November 2012 fails and is dismissed with costs;

b) That the Defendant's claim against the Plaintiff in the counter claim dated 7<sup>th</sup> December 2011 over the suit land under adverse possession is allowed and the following orders issued;

i) That the Plaintiff do transfer land parcel Siaya/Pap-Oriang/283 to the Defendant within the next 30 days.

ii) That in the event that the Plaintiff's fails to sign any or all the documents necessary to give effect to order (i) above, the Deputy Registrar of this court to sign all such documents legally necessary to transfer the said land to the Defendant.

c.) That each party will bear their own costs on the Defendant's counterclaim

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND- JUDGE**

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2016**

In presence of

Plaintiff Present

Defendant Present

Counsel Mr Luchuiya for Ocharo for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND- JUDGE**

**21/9/2016**

21.9.2016

S.M. Kibunja J

Oyugi assistant

Parties present

Mr Luchuiya for Ocharo for Defendant.

Court: Judgment dated and delivered in open court in presence of both parties and Mr. Luchuiya for Ocharo for Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND- JUDGE**

**21/9/2016**