



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 123 OF 2013**

**WILLIAM KOIPITAT MAYON.....PLAINTIFF/APPLICANT**

**VERSUS**

**SAMREU OEPAKI KUKU .....1<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANTHONY ATAGA KUTWA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JUDGMENT**

The plaintiff filed an Originating Summons under Order 37 Rule 7(1) and sections 3 and 3A of the Civil Procedure Act and section 7, 37 and 38 of the Limitation of Action Act. The Originating Summons is dated 24<sup>th</sup> January 2013 and filed on the same date together with a supporting affidavit sworn by William Koipitat Mayon, the plaintiff seeking:-

1. A declaration that the plaintiff/applicant is the proprietor of 20.23 Hectares of land being plot KAJIADO/KAPUTIEI-NORTH/3910 (hereinafter referred to as the “suit property”).
2. A declaration that the plaintiff is entitled to be registered as the owner of the suit property.
3. A declaration that the suit property belongs to the plaintiff/applicant by way of adverse possession and an order be issued to the Land Registrar Kajiado to register the plaintiff as the owner of the suit property.
4. Costs of this Originating Summons be borne by the defendants.

The Originating Summons was supported by the affidavit sworn by the plaintiff in which he averred that he is a resident of Lenchani near Kitengela Township on the suit property where he has been staying for more than 25 years. He further averred that prior to 1994, his mother who was illiterate was the registered owner of KAJIADO/KAPUTIEI-NORTH/663 measuring 215.3 Hectares having acquired the same from a group ranch and which was subdivided yielding, inter alia, the suit property. He further averred that even after the subdivisions and issuance of title to the 1<sup>st</sup> Respondent whom he does not know, he continued residing and grazing on the suit property. He pointed out that he is 30 years of age and that he had all his life grazed and been on the suit property. He further averred that he came to learn that the 1<sup>st</sup> respondent transferred the suit property to one Mr. Antony Atanga Kutwa, the 2<sup>nd</sup> respondent in the year 2007. He further averred that at the time of that transfer, he had been resident and grazed on the suit property for more than 18 years and does not know and has never seen the respondents. He further averred that his mother died in 2002 and was buried in the suit property. He further averred that he has continued to reside and graze on the suit property even after his mother’s death. He further stated that his

continued occupation on the suit property in the last 18 years has been open, peaceful and uninterrupted and has not experienced any hostility, claim or word from the registered owner. He further stated that today more than 200 cows and 350 goats of his graze on the suit property unhindered. He stated that he together with his siblings and their families have no other land which to call home except the suit property.

The respondents were served by way of substituted service through a newspaper advertisement and failed to enter appearance. They also failed to file any response to the Originating Summons leading to interlocutory judgment being entered against them upon the plaintiff's request. The matter then proceeded for formal proof.

The matter proceeded for formal proof on 25<sup>th</sup> February 2014 when the only witness being the Plaintiff testified confirming the facts stated above. He confirmed that he has a wife and children, all who live on the suit property together with his brothers, Joseph Mayon and Benson Mayon as well as his sister Jane Mayon and their families. He confirmed that they all live on the suit property where he grazes his cows and goats. He stated further that he has been on the suit property for over 15 years. He confirmed that he does not know the respondents but stated that the green card for the suit property shows the registered proprietor of the suit property as being Mr. Anthony Ataga Kutwa who bought the same from Olepaki Kuku, the 1<sup>st</sup> respondent. He produced a copy of the green card as his exhibit no. 1. He confirmed that he grazes his livestock on the suit property openly over all those years and that no one has ever come there to request them to vacate.

At the close of the plaintiff's case, Counsel for the plaintiff filed his written submissions which have been read and taken into account in this judgment.

Against the above background, the question that arises for determination is whether or not the plaintiff has acquired the suit property by adverse possession as provided by *section 38* of the **Limitation of Actions Act**. The section provides that:-

**“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 or 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.”**

The suit property is registered under the now repealed Registered Land Act which is one of the Acts listed under section 37 of the Limitation of Actions Act. A claim by adverse possession may therefore be made on the suit property.

To prove a claim under adverse possession, all that a plaintiff has to do is to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years. In this particular case, the plaintiff does not say that he was born on the suit property but states that he has been in occupation of the same for the past 15 years together with his family, his siblings and their families. He testified that he buried his mother in the suit property in the year 2002. His further evidence was that he has been aware in whose name the suit property was registered and even knew of the change of ownership of the suit property from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent in the year 2007. He however stated that he has never seen or known either of the two respondents over the period he has been in possession of the suit property. There can therefore be no question that the plaintiff's occupation of the suit property was adverse to the respondent's title.

Upon review of the evidence adduced in this case, I am satisfied that the plaintiff has satisfied all the conditions to acquire the suit property by way of adverse possession. It would appear to me that though the suit property has changed hands during the time in which the plaintiff has been in possession, this does not in any way interrupt the running of time of the plaintiff's possession of the same. This principle was enunciated in the case of **Githu vs Ndeete (1984) KLR** when on appeal Madan, Law and Porter JJA

held that-

**“1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.**

**2. Where the person in possession has already began and is in the course of acquiring rights under section 7 of the Limitation of Actions Act (Cap 22) and by virtue of section 30(f) of the Registered Land Act (Cap 300) those rights are overriding interests to which the new registered purchaser’s title will be subject”**

In light of the fore going, I am satisfied that the plaintiff has proved his case that he is entitled to be registered as the owner of the suit property by adverse possession. I therefore enter judgment as prayed by the plaintiff and award him costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2014.**

**MARY M. GITUMBI**

**JUDGE**