REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NUMBER 125 OF 2014

MARGARET NELIMA ODHIAMBO.....PLAINTIFF

VERSUS

MARY AUMA MODOI.....DEFENDANT

CONSOLIDATED WITH ELC NUMBER 168 OF 2014

MARY AUMA MODOI (suing on behalf of herself and on behalf of the estate of

LINUS MODOI (hereinafter referred to as the (DECEASED).....PLAINTIFF

VERSUS

MARGARET NELIMA ODHIAMBO.....1ST DEFENDANT

DAVID FREDRICK DACHO OLUOCH.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff (Margaret Nelima Odhiambo) vide a Plaint dated the 5th of June, 2014 impleaded the Defendant in the suit praying for judgement against the Defendant for: -

a. Eviction from part of the land Bukhayo/Bugengi/3673.

b. A permanent injunction restraining the defendant, her servants, agents or any other person under her instructions from cultivating the suit land.

c. Costs of the suit.

d. Any other relief this Honourable Court deems fit to grant.

2. The Plaintiff averred that she bought land from one Margaret Masanga of Mundika area being parcel no. BUKHAYO/BUGENGI/3673 which was in the process of being transferred to Margaret by one John Joseph Lwagado Imbuza. She paid the agreed purchase price to the seller and the original owner transferred the land to her. The plaintiff decided to share out the land to her children and subdivided it into parcels BUKHAYO/BUGENGI/10497 to 10502. During the stage of subdivision, the defendant claimed that she had bought part of the land in question now being BUKHAYO/BUGENGI/10498 and now she occupies and uses part of the land by force.

3. The Defendant entered appearance and filed a statement of defence dated 10th July 2014 on 22nd July 2014. She averred that she stayed and utilized the entire land with her late husband from 1982 till her husband's death in 1997 and who was buried on the land without any issue being raised. She further averred that she has acquired ownership by adverse possession and as such Margaret Masanga or John Joseph Lwagado Imbuze's title had been extinguished by operations of the law to the extent that they do not have title to confer to the Plaintiff.

4. During the pendency of this suit, the Defendant took out Originating Summons dated 1st September 2014 amended Originating Summons dated 1st October 2018, against the plaintiff claiming to have acquired rights over BUKHAYO/BUGENGI/3673 through adverse possession. The Defendant/Applicant pleaded that she has acquired by way of adverse possession rights over all that parcel of land formerly known as

L.R NO BUKHAYO/BUGENGI/3673 measuring 0.57 HA and which has been subdivided into BUKHAYO/BUGENGI/10497, 10498, 10499, 10500, 10501 and 10502 or any other title derived therefrom as on the ground currently registered in the name of MARGARET NELIMA ODHIAMBO and DAVID FREDRICK DACHO OLUOCH. The Applicant posed the following questions for determination:

i. That the Applicant MARY AUMA MODOI be declared the absolute registered owner of all that parcel of land known as BUKHAYO/BUGENGI/3673 and now sub-divided into BUKHAYO/BUGENGI/10497, 10498, 10499, 10500, 10501 and 10502 all measuring 0.57 HA (approximately 1 ¼ acres) in which she has been in actual possession peacefully, notoriously, openly and uninterrupted for a period exceeding 32 years from 1982 to date and her late husband LINUS MODOI for a period of 15 years from 1982 to 1997 when he died.

ii. That the Respondent MARGARET NELIMA ODHIAMBO and DAVID FREDRICK DACHO OLUOCH be ordered to execute all documents of transfer in respect of the aforesaid land parcels in favour of the Applicant MARY AUMA MODOI failing which an authorized officer of this Honourable Court be empowered to execute the same in place of the Respondent and the Land Registrar to dispense with the production of the original title deed if the Respondent fails to comply and or produce the same.

iii. That an inhibition does issue restraining the Respondents from interfering with or in any manner transferring land parcel no. BUKHAYO/BUGENGI/10497, 10498, 10499, 10500, 10501 and 10502 pending the final determination of this matter.

iv. That the costs of this application be provided for.

5. The Originating Summons were supported by an affidavit sworn by the applicant on 1st September 2014 and annexing to the affidavit certified copies of the register for BUKHAYO/BUGENGI/3673, 10497, 10498, 10499, 10500, 10501 and 10502.

6. The Plaintiff entered appearance to the O.S. and filed their Replying Affidavit dated 24th September 2015. She deposed that the she visited the land and bought the same after checking at the lands office and finding the title clear and that she sub-divided the land and gave it to her children as they had no land anywhere. She stated that the applicant lives at the corner of the land in question and she did not know that her home was in part of the land until when the surveyors came for sub-division of the land. She further deposed that she has been using the land since she took possession in 2012 by planting food crops and it was not until early 2014 that the Respondent started interfering with his workers.

7. The plaintiff further deposed that the applicant and her family own and use part of Modoi family land, Modoi being her father-in-law. She stated that looking at the register of the land in question, the purported purchase of the land by the husband of the applicant cannot be true as the land has exchanged several hands before she came into the picture and that the applicant's claim of having peaceful possession for over 30 years is not true in light of the number of people who have owned the land since 1972 when registration was completed, the first registered owner being one Mulema Wanjala Ngaja.

8. The 2nd Respondent entered appearance and filed their Replying Affidavit dated 19th November 2018 on 20th November 2018. He deposed that he went to buy land with his mother sued as the 1st Respondent (plaintiff). That they were shown the land and at the corner was a homestead which they were made aware that they were purchasing the empty land excluding the homestead. He stated that when they got the map, it showed that the land they were buying included the homestead. He further stated that trouble started when the Applicant set loose pigs to eat and destroy the crops they had planted and when they complained, it was pointed out that the ownership of the land was in dispute and in court.

9. The hearing began on 10th March 2021 with MARGARET NELIMA ODHIAMBO giving her as Pw1 stating that she knew Mary Modoi in the year 2012 while looking for land to buy to settle her children. She informed the court that she met Margaret Masanga who had purchased land number BUKHAYO/BUGENGI/3673 from Joseph Inguza being and she showed her a copy of agreement dated 16/9/2006 which she produced as PEX 1. She accompanied Margaret to Inguza to consult him and thereafter entered into an agreement between her and Margaret on 6/9/2012 which agreement she produced as PEX 2. She conducted a search on the land and Joseph gave her the original title deed, copy of ID and PIN. Joseph further signed a transfer in her favour and she eventually got a title for her portion.

10. Pw1 stated that she called a surveyor to measure the land to enable her to get a title and it is the surveyor who informed her the home nearby was part of her land. She decided to visit that home and met the defendant and told her of interest in the land. That she took possession of the land and started farming it but she left the portion occupied by the defendant. She told the court that the problem began when the defendant was setting pigs on her crops and chasing her workers from working on the land. The subdivision created 7 plots being 10497-10502. She transferred L.R. 10499 to her first born son and was to transfer L.R. 10497 to Mary Modoi but the defendant refused to have it in her name. She testified that she followed due process in acquiring her land and asked the court to issue a permanent injunction to stop Mary Modoi from interference and also eviction. She asked for costs of the suit and she produced the documents as per the list as Pex 1-11. She denied that the defendant has lived on her land for 20 years and that she only occupies point A being L.R. 10497.

11. Upon cross-examination by Mr. Onsongo for the defendant, Pw1 testified that the person she bought the land from was not the registered owner and Joseph was living in Bumala A. She stated that she had been shown the land which was vacant before doing a search. When she took the surveyor, it is him who told her Mary's home was part of her land. she told the court that in 1982 she had not been to the land and according to the chief's letter dated 10/12/2015, the defendant bought the land from Steven Odoi in 1982. She stated further that she saw the agreement between Muleka and Linus Modoi. That in the fenced off part where Mary lives the witness was shown the defendant's husband and son's graves.

12. The plaintiff denied that the whole land was fenced and she denied drawing the mutation from the desk because they went with the surveyor to the ground. She confirmed that the defendant and her son were present during this process. On the ground, they were dividing and planting sisal boundaries on each portion. According to the defendant's agreement, the seller was Muleka Wanzala. She stated that the land she bought was 0.57HA and according to the mutation, the defendant occupies point A. She informed the court that the defendant's

house is an improved semi-permanent and two mud houses. On re-examination, the witness stated that when she was buying the land, the defendant was not using the whole land and she took over possession immediately and planted cassava.

13. PW2, DAVID DAKO OLUOCH, testified that the plaintiff is his mother and adopted his Replying Affidavit sworn on November 2018 as his evidence. He testified that he got parcel L.R. 10499 from his mother and it is registered in his name. He stated that he knows where his land is situated on the ground. On cross-examination by Mr. Onsongo, Pw2 stated that the map showed the land they bought included a homestead but he could not tell when it was put up. He told the court that there were completely no trees around the entire land except the gate of the defendant. The boundary marks around the land were sisal planted during the sub-division in late 2012. He stated that he had delegated the 1st plaintiff permission to use the land until he was ready to use it.

14. DW1, MARY AUMA MODOI, testified that she lives in Khungunyu and that Linus Modoi- deceased, was her husband. She adopted her witness statement dated 22/7/2014, further affidavit dated 6/4/2016 and an affidavit dated 1/8/2018 as her evidence in chief. She testified that she lives on the land owned by Linus which land was bought from Stephen in 1982. From 1982 to date she has never moved out of the land. Dw1 asserted that she did not know the parcel number but size is 1 ¼ acres. She stated that her two sons are married and built their own houses on this land. She added that her husband died in 1997 and her son in 2008 and they were both buried on the suit land.

15. The defendant continued in her evidence that she knew Margaret, the plaintiff, in the year 2012 when she came to her home and told her that the land she lives on is hers but she advised her to consult the person who sold her the land. Before 2012, no one had ever came to claim the land and she lived on one portion/part and the other open part, she left for grazing cattle and for planting food crops. She denied knowing THOMAS ODHIAMBO OBIERO and JOHN JOSEPH LWASADO MBURA whose names appear in the register and affirmed that no one has ever occupied her land. She produced the Chief's letter as DEX 1, Letters of grant as DEX 2, Agreement as DEX 3, Green card for L.R. 3673 as DEX 4 and Green cards for the sub-division as DEX 5. She denied that there are marks for the subdivision and no surveyor has come to the suit land and that the plaintiff has never cultivated it. She prayed that her claim be allowed with costs.

16. Upon cross examination by Mr. Okutta for the 1st Plaintiff, Dw1 stated that she did not know the parcel number and where she lives, the home is fenced. She stated that outside of the home is also fenced, boundaries planted in 1982. They bought the land from Steven Otemu Wangaja and Linus died before getting title in his name. She stated that the son of Steven stole the original title and sold to people.

17. Upon cross examination by Mr. Juma for the 2nd Plaintiff, she stated that Steven sold the entire land where she stays on being 1 ¼ acres and the entire 1 ¼ acres was in writing. She stated that without a surveyor, the 1 ¼ acres is known and the surveyor was also brought. Linus did not get title because the original had been stolen by the son of Steven called Oduori.

18. DW2, LAWRENCE MAKOKHA, testified that he knows Mary Mudoi who is his neighbour and he knew her husband, Linus. He denied knowing Margaret Nelima Odhiambo, the plaintiff. He adopted his witness statement dated 22/12/2014 and 22/7/2014 as his evidence in chief. He averred that the defendant lives on the land they purchased measuring 1 ¼ acres in 1982 and they took occupation and developed it with a permanent house and some temporary houses. He stated that the said land has boundaries and the defendant uses the whole land and her husband and son are buried on that land. That during their funerals, no one raised any objections. He stated that Mary and her sons lived on the land with their families and he has never seen Margaret Nelima use the land and there are no boundaries existing on the ground showing any subdivisions. He testified that paragraph 17 of his statement dated 22/7/2014 was a typing error. He stated that the suit land is known as owned by the late Linus Modoi and her family.

19. In cross examination by Mr. Juma for the 2nd Plaintiff, Dw2 expressed that Mary was married to Linus Modoi and he did not know if Linus got title for the land he bought. He told the court that he did not know who did the survey but the suit land is approximately 1¼ acres as per their estimate. He asserted futher that Linus bought the land from Mlekha Wanjala and Mlekha retained a portion for himself.

20. Upon cross examination by Mr. Okutta for the 1st plaintiff, he testified that Linus entered the land in 1982 after he purchased 1¼ acres and he did not know the parcel number of the defendant's land. He stated that Modoi's home was not fenced but there are trees on it and he did not know the suit parcel had four titles. He stated that he did not know that the register for the mother title was opened in 1992 and he did not have evidence that the land occupied by Mary 1¼ acres. Upon re-examination, he stated that the land is not subdivided on the ground and it exists as one plot.

21. DW3, ERICK MODOI, adopted his witness statement dated 22/7/2014. He testified that the defendant is his mother and L.R. 3673 is their land and it has houses. He stated that he got to know Margaret Nelima in 2012 and she never used the land as they were using the entire land. Upon cross examination by Mr Juma, Dw1 said that he was born on the suit land and they do not have a title for the land. He stated that Mzee Wanzala Mlekha died before they got a title deed and when his mother began the process through the chief, she discovered the land was registered in some other people's names.

22. In further cross examination by Mr. Okutta, the witness affirmed that the register for 3673 was opened in 1992. The witness said he did not know that the plaintiff had a title and the original owner Mlekha Wanzala is the one he recognized. He testified that he did not know if Mlekha sold land to other people but not their share. On re-examination, he confirmed that L.R. 3673 was a subdivision of L.R. NO. 113 and their land has not been subdivided as they were still using the whole 1 ¼ HA.

23. The parties agreed to put in written submissions. The 1st Plaintiff submitted that she has shown the root of the titles BUKHAYO/BUGENGI/10497 to 10502 traced to L.R. NO. 3673 which was initially owned by Joseph Imbusi who transferred it to her. She submitted that the law protects her interest against any interference by third parties including the defendant and that there is no evidence that what the defendant's husband purchased L.R. NO. 3673 or any parcel, since she named Wanzala Muleka as the seller which contradicts the letter by the chief. She further submitted that adverse possession can only be against a specific title and the only portion she has been occupying and living on is land parcel no. BUKHAYO/BUGENGI/10497 and not the whole portion which was BUKHAYO/BUGENGI/3673. She prayed for a relief of a permanent injunction and an order of eviction of the defendant.

24. The 1st Plaintiff relied on the decisions in **MUNYU MAINA…V HIRAM GATHITA MAINA, CIVIL APPEAL NO. 239 OF 2009, PROPWA COMPANY LIMITED V JUSTUS NYAMO GATONDO & ANOTHER (2020) eKLR**. The 2nd Plaintiff filed his submissions on 1st October 2021 and submitted that the defendant's claim of adverse possession be dismissed and a permanent injunction restraining the defendant, her servants, agents or any other person under her instructions from cultivating the said land.

25. The defendant filed their submissions on 24th September 2021 and submitted that the plaintiff's case as it is time-barred and prayed the defendant's originating summons be allowed. She relied on the decisions in **PUBLIC TRUSTEE V WANDURU NDENGWA (1984) eKLR, SYLVESTER JOSEPH MAKOMERE V JONATHAN NAKHALE AND TERESINA NYAFUA NAKHALE.**

DETERMINATION AND ANALYSIS

26. In consideration of the pleadings, submissions and the applicable law, the issues which in my opinion arise for determination are as follows:

> ***a. Whether the Plaintiff has proved her case against the defendant to warrant the order of eviction or;***
>
> ***b. Whether the Defendant's occupation of the Suit Land became adverse to that of the Plaintiff; and***
>
> ***c. Who bears the costs of this suit?***

27. On the first issue, the plaintiffs produced evidence confirming that she was the registered owner of the suit land formerly known as BUKHAYO/BUGENGI/3673 which she subdivided into BUKHAYO/BUGENGI/10497-10502. She produced the green card for L.R. NO.3673 as PEX 7 and it shows that she was the registered owner before the register was closed for subdivision. Section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 26 of the Land Registration shows that rights of a registered proprietor shall be upheld unless it is shown that the title was acquired by way of misrepresentation, fraud or unprocedurally.

28. The 1st Plaintiff has told the court that she bought the land from Margaret Masanga after they entered into a sale agreement which she produced as PEX 8 and that she had conducted a search and confirmed the land indeed existed. There is no doubt that the plaintiff was the registered owner of L.R. NO. 3673 before the register was closed and the subdivision done. Currently she is the registered proprietor of BUKHAYO/BUGENGI/10497, 10498, 10500, 10501 and 10502. She transferred BUKHAYO/BUGENGI/10499 to the 2nd plaintiff who is her son. On the basis of her registration as the proprietor she has prayed for eviction orders and a permanent injunction order against the defendant. Her suit is merited subject to proof of the defence of adverse possession advanced by the defendant. Therefore, before granting her request for eviction, this court shall determine merit of this defence.

29. The defendant by way of an originating summons claimed that she has acquired rights over land parcel formerly known as no. LR. 3673 and now subdivided into BUKHAYO/BUGENGI/10497-10502. The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, CAP 22 Laws of Kenya, which provides that:

> ***"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."***

30. To establish adverse possession of land, a claimant must demonstrate that he/she has been in peaceful, continuous, and uninterrupted occupation of the claimed parcel for a period of more than twelve (12) years. He must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

> "**Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances**".

31. The defendant statted that her husband bought the suit land from Muleka Wanzala in 1982 and produced an agreement dated 30/8/1982 as DEX 3 as proof. The agreement on its face stated that her husband was sold 1¼ acres. It is her evidence that she uses the entire parcel of land by way of cultivation, grazing her cattle and she has built a permanent house and semi-permanent houses. She asserted that she has stayed on the suit land for a period of 32 years which assertion was corroborated by DW2's testimony and the chief's letter dated 10 th Dec 2015. She admitted meeting the 1st plaintiff in 2012 when she came to her house to inform her that she had bought the suit land. The defendant contended that her occupation of the land has been peaceful, continuous and uninterrupted and no new boundaries have been incorporated on the suit land due to subdivisions.

32. Her claim of adverse possession of the entire parcel of land has been disputed by the plaintiffs who stated that the defendant has only occupied a portion of the land now comprised in L.R. NO. 10497 as per the subdivisions. The 1st plaintiff has also claimed that the defendant has told the court that her husband bought the parcel of land from Muleka Wanzala which contradicts the chief's letter which identifies the seller as Stephen Mudoi.

33. The Plaintiff does not deny possession of by the defendant but states it is only for a portion not the entire land. She also averred that the Defendant's claim cannot lie in light of the different in ownership as shown in the green card from the time the Defendant's alleged they took possession. It is trite law that change of ownership in title without taking over of possession does not stop time from running. This was the position taken by the Court of Appeal in the case of **Githu vs Ndeete [1984] KLR 776** where they held that:

> ***"Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.***
>
> ***The mere Change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession."***

And in the case of **Peter Gichuki Wanjohi v Juliah Mumbi Muturi [2021] eKLR** the Court of Appeal also stated that

> **We agree with the appellant that the running of time under the doctrine of adverse possession is cumulative against both the original owner and the successor(s) in title…"**

34. The Plaintiffs said Joseph Lwagado who had sold to Masanga Margaret and who then executed the transfer documents in her favour (Pex9, 10,11) lived in Bumala. There was no evidence adduced either from Joseph or Ms Masanga that they ever dispossessed the Defendants of the suit land when they purchased it in 1998 or 2006. The plaintiffs asserted that they took possession in 2012 after acquiring the title by planting cassava. The Court of Appeal in their decision in **PUBLIC TRUSTEE V WANDURU NDEGWA (1982) eKLR**, addressed the question as follows;

> **"…. that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run".**

35. From the lack of evidence on whether Mr Joseph ever dislodged the defendant of possession of the suit land in 1998 when he acquired registration from the previous owner to the year 2012 he executed a transfer in favour of the defendant, twelve (12) years had lapsed. His interests in the land had been extinguished by operation of law in favour of the Defendant. Thus the title received by the Plaintiffs were subject to the rights of the Defendant who was already in occupation. Secondly, the defendant denied that the Plaintiffs have ever taken possession. The Plaintiff ought to have proved that indeed she had planted cassava which were destroyed by the Plaintiff's pigs. This could have been easily demonstrated by annexing a report made to the Agricultural office for crop damage in her replying affidavit to the O.S.

36. I find and hold that the Defendant has proved on a balance of probabilities that she had acquired the suit parcel by operation of law when the Plaintiff was purchasing the suit land. Thus her right of action as against the Plaintiffs had accrued as at the time of filing these suits for the suit property to be said to have fallen into her possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

37. Having determined that the Defendant has proved her claim of adverse possession as is required by law, I find the Plaintiffs title to the suit lands have been extinguished in favour of the Defendant. I place reliance on the decision in **Titus Kigoro Munyi vs. Peter Mburu Kimani [2015] eKLR,** where the court of Appeal held as follows;

> *"It is stated that any man who buys land without knowing who is in possession risks his title. Just as he does, if he fails to inspect his land for twelve years after having acquired it."*

38. In the prevailing circumstance, although the Plaintiffs are holding title deed in respect of the suit titles, they are not entitled to the orders of eviction prayed for. Consequently, the Plaintiffs suit is dismissed and instead the Defendant's further amended Originating Summons dated 1st October 2018, succeeds in its entirety in the following terms;

> **a. That the Plaintiff (in the Originating Summons) has become entitled to be the registered as proprietor of Title No. formerly known as Bukhayo/Bugengi/3673 measuring 0.57 hectares and now subdivided and known as Bukhayo/Bugengi/10497, 10498, 10499, 10500, 10501 and 10502 by virtue of the doctrine of adverse possession.**
>
> **b. The Defendants (in the Originating Summons) shall execute the requisite transfer documents transferring all the suit titles to the Plaintiff (in the O.S) within 30 days from the date of this judgement.**
>
> **c. In default of compliance with (b) above, the Deputy Registrar of the Honourable Court shall execute all necessary documents to facilitate registration of the plaintiff (in the O.S.) as the absolute proprietor of Titles No. Bukhayo/Bugengi/10497, 10498, 10499, 10500, 10501 and 10502.**
>
> **d. Each party to bear their own costs.**

Dated, signed and delivered at BUSIA this 17th day of February 2022.

A. OMOLLO

JUDGE.