



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 293 OF 2013 (OS)**

**IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT (CAP 22)**

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTION ACT**

AND

**IN THE MATTER OF ORDER 37 RULE 3 OF THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF THE LAND PARCEL NO. WEST KASIPUL/KODERA/ KARABACH/390**

AND

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION OF 3.8HA COMPRISED IN LAND  
PARCEL NO. WEST KASIPUL/KODERA/KARABACH/390**

AND

MARTIN GUYA OUKE .....APPLICANT

VERSUS

AGUNGA ADUNDO .....1<sup>ST</sup>RESPONDENT

RICHARD OTIENO NDIGA .....2<sup>ND</sup>RESPONDENT

ABAYO MIRIAM OCHIENG .....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The applicant brought this suit by way of Originating Summons dated 1<sup>st</sup> July 2013 in which he sought the following orders;-

- (i) A declaration that the respondents' right to recover land parcel No. West Kasipul/Kodera/ Karabach/390 measuring 3.8ha. from the applicant is

**barred under the Limitation of Actions Act (Cap 22 Laws of Kenya) and their title thereto has been extinguished on the grounds that the applicant has openly, peacefully, continuously and actively occupied and possessed the said parcel of land for a period of 43 years, from the year 1970.**

**(ii) An order that the applicant be registered as the proprietor of land parcel No. West Kasipul/Kodera/Karabach/390.**

**(iii) An order restraining the respondents by themselves, their agents, servants, workers and/ or employees from interfering in any manner with the applicant's quiet enjoyment and occupation of the said parcel of land measuring 3.8hectares.**

**(iv) Any other order that the court may deem fit and expedient to grant.**

**(v) Costs of the summons to be borne by the respondents.**

2. The Originating Summons was brought on the grounds that were set out on the face thereof and in the supporting affidavit of the applicant. The applicant contended that land parcel No. West Kasipul/Kodera/ Karabach/390 (hereinafter referred to as "the suit property") was initially owned by his uncle one, **Joseph Ndiga Abok** who gave him the same as a gift in the year 1970. He took possession of the same in the same year and has been in occupation thereof since then. The applicant contended that the suit property was unlawfully registered in the name of the 1<sup>st</sup> respondent sometimes in the year 1979. The 1<sup>st</sup> respondent transferred the same to the 2<sup>nd</sup> respondent in the year 2010. The 2<sup>nd</sup> respondent subsequently transferred the property to the 3<sup>rd</sup> respondent in the year 2013. The applicant contended that all these transactions were carried out while he was in possession of the suit property and with the intention of defeating his interest therein. The applicant contended that none of the respondents has occupied the suit property. The applicant contended that he has been in continuous, open and uninterrupted occupation of the suit property for over 12 years and as such the respondents' right over the same has been extinguished.

3. The respondents were served with summons to enter appearance but failed to do so. The Originating Summons was therefore not defended. When the same came up for hearing on 2<sup>nd</sup> December 2014, the applicant gave evidence and called one witness. In his evidence, the applicant reiterated that; the suit property belonged to his uncle, Ndiga Abok, deceased. The deceased was not married and the applicant took up the responsibility of caring for him. In consideration of the care that the applicant had given to him, the deceased gave to the applicant the suit property as a gift in the year, 1970. The applicant told the court that Ndiga Abok, deceased (hereinafter referred to only as ("**the deceased**") died in the year 1988 and was buried on the suit property. The applicant stated that the respondents are not related to the deceased in any way. He stated that he has occupied the suit property continuously without any interruption from 1970 up to the time he was giving evidence. He told the court that he has his homestead on the suit property and that he is using a portion of the suit property for cultivation. The applicant stated that when he went to the land registry to obtain a title deed for the suit property, he learnt that the suit property had been registered in the name of the 1<sup>st</sup> respondent who had transferred the same to the 2<sup>nd</sup> respondent who in turn transferred the same to the 3<sup>rd</sup> respondent. The applicant stated that in the year 2013, the 3<sup>rd</sup> respondent's agents entered the suit property and damaged the crops that he had planted thereon. The incident was reported to the Ministry of Agriculture. The damage that was done by the said agents of the 3<sup>rd</sup> respondent was assessed on 28<sup>th</sup> March 2013 at Kshs. 72,200/=. The applicant stated that the 3<sup>rd</sup> respondent has never occupied the suit property.

4. The applicant produced in evidence a copy of a letter dated 25<sup>th</sup> February 2013 from the assistant chief of Karabach sub-location in which the said chief confirmed that the applicant has occupied the suit property for over twenty (20) years. The applicant also produced in evidence; a copy of the certificate of death for Joseph Ndiga Abok dated 15<sup>th</sup> June 2006, a copy of certificate of official search on the title of

the suit property dated 22<sup>nd</sup> February 2013, a copy of the register for the suit property certified on 22<sup>nd</sup> February 2013, crop damage assessment report by the Ministry of Agriculture dated 28<sup>th</sup> March 2013 and photographs said to have been taken on the suit property following the destruction of the crops that the applicant had planted thereon by the 3<sup>rd</sup> respondent's agents.

5. The applicant's witness, Silvanus Juma Odeny (PW2) corroborated the evidence of the applicant. He told the court that the suit property was given to the applicant by his uncle, Ndiga Abok who was not married. He stated that the applicant is in occupation of the suit property and that the respondents have never occupied the same. After the close of the applicant's case, the applicant's advocate, Mr. Okenye, opted to make closing submissions in writing. He filed his written submissions on 16<sup>th</sup> December 2014.

6. I have considered the applicant's case as pleaded and the evidence that was adduced in proof thereof. I have also considered the submissions by the applicant's advocates and the case law cited in support thereof. The applicant's claim against the respondents is based on adverse possession. As I have stated at the beginning of this judgment, the applicant's claim was not defended. What I need to determine is whether the applicant has acquired title to the suit property by adverse possession. In the case of **Salim –vs- Boyd [1971] E. A550** it was held that an applicant seeking to be registered as proprietor of land by adverse possession must prove that he has had exclusive uninterrupted possession of the land for 12 years. According to the register of the suit property (P.exh. 5), the suit property was registered in the name of the 1<sup>st</sup> respondent on first registration on 10<sup>th</sup> May 1979. The 1<sup>st</sup> respondent transferred the same to the 2<sup>nd</sup> respondent on 9<sup>th</sup> September 2010. The 2<sup>nd</sup> respondent in turn transferred the property to the 3<sup>rd</sup> respondent on 23<sup>rd</sup> November 2012. The applicant led evidence that he has occupied the suit property from the year 1970 and that the property was registered in the name of the 1<sup>st</sup> respondent and subsequently in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents while he was in possession thereof.

7. The applicant submitted that his occupation of the suit property has been open, continuous and uninterrupted since he took possession of the property in 1970. The applicant submitted that none of the respondents has occupied the suit property. The evidence that was adduced by the applicant concerning his entry and occupation of the suit property has not been challenged. His evidence as concerns the length of his occupation of the property and the developments that he has carried out thereon was also not controverted. The same also applies to his evidence that his occupation has been open, continuous and uninterrupted. The suit property was registered on 10<sup>th</sup> May 1979 under the Registered Land Act, Cap 300 Laws of Kenya (now repealed). As stated above, the same was registered in the name of the 1<sup>st</sup> respondent as the first registered owner. Under section 30 (f) of the Registered Land Act aforesaid, all land registered under the said Act is subject rights acquired or in the process of being acquired by virtue of any written law relating to Limitation of Actions or by prescription. The applicant has claimed that he entered the suit property in the year 1970 prior to the registration of the same in the name of the 1<sup>st</sup> respondent as aforesaid and that he has remained in occupation to date or at least as of the time he was giving evidence in court.

8. Whether the limitation period under section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya is reckoned from the year 1970 when the applicant claims to have entered the suit property or from 10<sup>th</sup> May 1979 when the same was first registered in the name of the 1<sup>st</sup> respondent, the applicant had occupied the suit property for a period in excess of the twelve 12 years limitation period by the time this suit was filed on 1<sup>st</sup> July, 2013. By the time the 1<sup>st</sup> respondent transferred the suit property to the 2<sup>nd</sup> respondent on 9<sup>th</sup> September 2010 the plaintiff had occupied the suit property for over 30 years and the 1<sup>st</sup> respondent's right to recover the property from the applicant had become extinguished by operation of law pursuant to the provisions of section 17 of the Limitation of Actions Act aforesaid. The 1<sup>st</sup> respondent's title over the suit property having become extinguished as aforesaid, the 1<sup>st</sup> respondent had no right left in the suit property that he could transfer to the 2<sup>nd</sup> respondent. Similarly, the 2<sup>nd</sup> respondent who had not acquired a valid title over the suit property had no title that he could confer upon the 3<sup>rd</sup> respondent. In the case of **Githu –vs- Ndeete [1984] KLR 776** that was cited by the applicant's

advocate, it was held that:-

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

It follows that the change of ownership of the suit property from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent and ultimately to the 3<sup>rd</sup> respondent, had no effect on the rights that the applicant had acquired on the suit property by adverse possession.

9. Due to the foregoing, I am satisfied that the applicant has proved his case against the respondents on a balance of probability. The applicant has proved that he has occupied the suit property openly for uninterrupted period of over 12 years. The applicant is therefore entitled to the reliefs sought in the Originating Summons. Consequently, I hereby enter judgment for the applicant against the respondents jointly and severally for:-

- (i) A declaration that the 3<sup>rd</sup> respondent’s right to recover land measuring 3.8ha. comprised in LR No. West Kasipul/Kodera Karabach/390 is barred under the Limitation of Actions Act, Cap 22 Laws of Kenya.
- (ii) An order that the applicant be registered as proprietor of all that parcel of land known as LR No. West Kasipul/Kodera Karabach/390.
- (iii) A permanent injunction restraining the respondents by themselves or through their servants, employees or agents from interfering in any manner with the applicant’s quiet enjoyment and occupation of LR No. West Kasipul/Kodera Karabach/390.
- (iv) Costs of the suit to be paid by the 3<sup>rd</sup> respondent.

A copy of this judgment shall be served by the applicant upon the 3<sup>rd</sup> respondent personally within seven (7) days from the date hereof if the 3<sup>rd</sup> respondent does not appear in court during the delivery of the same and an affidavit of service shall be filed in court. Service upon the 3<sup>rd</sup> respondent of a copy of this judgment as aforesaid shall be a condition precedent to any further proceedings in this matter at the instance of the applicant.

**Delivered, Dated and Signed at Kisii this 29<sup>th</sup> day of May 2015.**

**S. OKONG’O**

**JUDGE**

**In the presence of:**

Mr. Ogari h/b for Okenye	for the applicant
N/A	for the 1 <sup>st</sup> respondent
N/A	for the 2 <sup>nd</sup> respondent
N/A	for the 3 <sup>rd</sup> respondent
Bosire	Court Clerk

**S. OKONG’O**

**JUDGE**