



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. E004 OF 2021(O.S)**

**IN THE MATTER OF: SECTIONS 7, 17 & 38 OF THE LIMITATION OF ACTIONS ACT**

**IN THE MATTER OF: LAND PARCEL NO. W. BUKUSU/N.MYANGA/3550**

**IN THE MATTER OF: ADVERSE POSSESSION**

**BETWEEN**

**FRANCIS MAKOKHA WABWILE ..... PLAINTIFF**

**AND**

**TITUS WABWILE SIRENGO ..... DEFENDANT**

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

1. Old age is a great blessing. It should be a time for one to take the slow lane while reflecting on the life behind. Not a time to learn new tricks. I am reminded of this quote by **OSCAR WILDE**: -

*“With age comes wisdom, but sometimes, age comes alone.”*

**FRANCIS MSKOKHA WABWILE** (the plaintiff) is now 76 years old and should be ageing gracefully. This case shows, however, that he needs to reconsider the company which he keeps. More on that later.

2. This is yet another of those land disputes involving siblings litigating over land which previously belonged to their father. Whereas the Courts have the mandate to resolve such disputes, the toxic atmosphere that is usually generated by the Judicial process only succeeds in dividing families. Yet, as provided under **Article 45(1)** of the **Constitution**: -

*45(1) “The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.”*

Courts will therefore not tire from encouraging litigants and especially family, to embrace alternative dispute resolution initiatives including conciliation, mediation and even traditional dispute resolutions mechanisms as a first point of call before resorting to the Judicial process. Authority for that is found in **Article 159(2)(c)** of the **Constitution**, **Section 20** of the **Environment and Land Act** and **Section 3(2)** of the **Judicature Act**. In the realm of family disputes, I do not subscribe to the “**LET’S MEET IN COURT**” attitude. And as I stated recently in **SAMSON MACHESO MASAI & ANOTHER .V. JOTHAM MAFUNGA & ANOTHER BUNGOMA ELC CASE No 83 of 2016**, the Bar in Bungoma has been very supportive in that regard. I commend them for that. But when parties insist that the Court hears and determines their disputes, then we must perform our Constitutional duty.

3. The parties herein are brothers. At the time of the trial **FRANCIS MAKOKHA WABWILE** (the plaintiff) gave his age as 76 years and said that his brother **TITUS WABWILE SIRENGO** (the defendant) was born in 1968 and was therefore 53 years old. They are sons to the late **DAUDI WABWILE SIRENGO** the original proprietor of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/561** which was sub – divided to give rise to the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3550** (the suit land) and which has since 29<sup>th</sup> June 2005 been registered in the names of the defendant.

4. By his Originating Summons dated 10<sup>th</sup> May 2021 and filed herein on 12<sup>th</sup> May 2021, the plaintiff sought a determination of the following questions: -

1. Whether the plaintiff has been in open, continuous, peaceful, exclusive and adverse possession of 0.40 Hectares of land comprised in the land parcel NO WEST BUKUSU/SOUTH MATEKA/3550.
2. In view of or consequent upon the answer in paragraph (1) above, whether the plaintiff is entitled to be registered as the proprietor of 0.40 Hectares of land parcel NO WEST BUKUSU/SOUTH MATEKA/3550.
3. Whether the defendant being the registered owner should transfer the land parcel NO WEST BUKUSU/SOUTH MATEKA/3550 to the plaintiff.
4. Whether the defendant is merely holding in trust for the plaintiff 0.40 Hectares of land comprised in the land parcel NO WEST BUKUSU/ SOUTH MATEKA/3550.
5. Whether in default of the defendant executing the relevant documents to vest 0.40 Hectares comprised in land parcel NO WEST BUKUSU/ SOUTH MATEKA/3550 in the plaintiff's names the Executive officer or any other duly appointed Officer of this Court should do so on his behalf.
6. Whether the defendant's title in the said 0.40 Hectares of land has been extinguished by operation of the law.
7. Whether the costs of this summons should be borne by the defendant.
8. Whether this Court should grant any other alternative or further relief.

Arising out of the above, the plaintiff sought Judgment as follows: -

- a. The plaintiff has become entitled to 0.40 Hectares out of land comprised in the land parcel NO WEST BUKUSU/SOUTH MATEKA/3550 by way of adverse possession and/or by acquiring prescriptive rights thereon.
- b. That the defendant do forthwith transfer 0.40 Hectares comprised in land parcel NO WEST BUKUSU/SOUTH MATEKA/3550 to the plaintiff and in default thereof, the Deputy Registrar and/or any lawfully authorized Officer of this Court do execute all the relevant documents for the said land on behalf of the defendant.
- c. That costs of this suit be borne by the defendant.

In support of the Originating Summons, the plaintiff also filed an affidavit in which he averred, inter alia, that the defendant is the legally registered owner of the suit land which arose following a sub – division of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/561**. That at the time of filing this suit, he had been in occupation of 0.40 Hectares comprised in the suit land peacefully, quietly and exclusively for a period exceeding 16 years. That the defendant has never lived on nor used the said portion of land which is occupied by the plaintiff's family. That the defendant's title to the said 0.40 Hectares has therefore been extinguished by operation of the law and the defendant holds the title thereto in trust for him. That the defendant should therefore be ordered to transfer the said 0.40 Hectares to the plaintiff.

5. In support of his claim, the plaintiff filed the following documents: -

1. Copy of his Identity Card No xxxx.
2. Certificate of Search for the land parcel NO WEST BUKUSU/SOUTH MATEKA/3550.
3. Green Card for the land parcel NO WEST BUKUSU/SOUTH MATEKA/3550.
4. Mutation Form for the land parcel NO WEST BUKUSU/SOUTH MATEKA/561.

5. Photographs.

The plaintiff also filed a statement dated 4<sup>th</sup> June 2021 and statements of his witnesses **PAUL WANJALA KHAEMBA (PW 2)** and **JOHN WAFULA WANGILA (PW 3)** both dated 4<sup>th</sup> June 2021.

6. In his statement, **PAUL WANJALA KHAEMBA (PW 2)** states that the plaintiff who is his maternal cousin occupies a portion of the suit land measuring 0.40 Hectares and the title thereof was issued to the defendant on 13<sup>th</sup> July 2004 following the sub – division of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/561** which belonged to the plaintiff's late father **DAUDI WABWILE SIRENGO**. That the plaintiff and his family have utilized the said portion of land peacefully quietly, exclusively and un – interrupted. That the defendant has never occupied the said portion of land which the plaintiff has extensively developed by erecting thereon both permanent and semi – permanent building as well as planting trees and food crops. That it is therefore fair and just that the plaintiff be registered as the proprietor of the said 0.40 Hectares parcel of land comprised in the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3550** having acquired it by way of adverse possession.

7. The same sentiments are repeated in the statement of **JOHN WAFULA WANGILA (PW 3)**.

8. The Originating Summons is opposed and the defendant, acting in person, filed a replying affidavit dated 2<sup>nd</sup> June 2021 in which he

deponed as follows: -

- That he is the registered proprietor of the suit land and the plaintiff is illegally occupying the same.
- That the plaintiff's occupation of the suit land has not been peaceful at all as there have been boundary disputes between the two which have been handled by the Deputy County Commissioner, the Local Administration and the Land Disputes Tribunal.
- That the original land parcel NO WEST BUKUSU/SOUTH MATEKA/561 was registered in the names of their late father DAUDI WABWILE SIRENGO and went through the Succession process.
- That each of the sons of the late DAUDI WABWILE SIRNEGO was given his share of the land.
- That this suit is fatally and incurably defective and is also an abuse of the process of this Court and a Preliminary Objection would be raised at the earliest opportunity as plaintiff is fond of filing frivolous cases.

The defendant filed the following documents in support of his case: -

1. Order in BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No 233 of 2004 between FRANCIS MAKOKHA WABWILE .V. MARK WABWILE SIRENGO.
2. Letter dated 9<sup>th</sup> November 1999 from the CHIEF KABULA LOCATION and addressed to the Deputy Registrar BUNGOMA HIGH COURT confirming that the beneficiaries to the Estate of the late DAUDI WABWILE SIRENGO who included his widow MARGARET NANYAMA SIRENGO and her four children including the parties herein had agreed to share the Estate.
3. Grant issued in BUNGOMA HIGH COURT SUCCESSION CAUSE No 7 of 1999 in respect to the Estate of DAUDI WABWILE SIRENGO confirming that MARGARET NANYAMA SIRENGO was the Administratrix with a life interest in the land parcel NO WEST BUKUSU/SOUTH MATEKA/561 to be shared equally among the children including the parties herein.
4. Order issued in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 49 of 2011 – TITUS WABWILE SIRENGO .V. FRANCIS MAKOKHA WABWILE directing the District Surveyor and Land Registrar Bungoma to rectify the boundary between land parcels NO EAST BUKUSU/SOUTH MATEKA 3549 and 3550.
5. Letter from ASSISTANT COUNTY COMMISSIONER'S OFFICE KABULA DAVISION dated 5<sup>th</sup> March 2021 addressed to the LAND SURVEYOR BUNGOMA referring to a boundary dispute between the parties herein and advising that the Surveyor assists in determining it.
6. A Notice of Determination of Boundary Dispute dated 28<sup>th</sup> August 2008 addressed to the defendant.

The trial commenced and ended on 23<sup>rd</sup> September 2021 with the plaintiff adopting as his evidence, the contents of his affidavit. He also produced as his documentary evidence the documents referred to above and also called his two witnesses **PAUL WANJALA KHAEMBA (PW 2)** and **JOHN WAFULA WANGILA (PW 3)** who also adopted as their evidence the contents of their statements referred to above.

9. The defendant was the only witness in support of his case. He too adopted as his evidence the contents of his replying affidavit and produced the documents annexed thereto as his documentary evidence.

10. Submissions were thereafter filed both by **MR OTSIULA** instructed by the firm of **J. B. OTSIULA & ASSOCIATES ADVOCATES** for the plaintiff and by the defendant acting in person.

11. I have considered the evidence by both parties as well as the submissions filed.

12. In view of the fact that some of the documents filed herein make reference to a boundary dispute, I have considered whether this suit is infact caught up by the provisions of **Section 18(2)** of the **Land Registration Act**. That provision states: -

***18(2) "The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section."*** Emphasis added.

It is clear from the above that boundary disputes are the preserve of the Land Registrar unless the boundaries have already been determined in accordance with the provisions of **Section 18** of the **Land Registration Act** as well as the relevant provisions of the **Survey Act CAP 299**. The dispute before me is not a boundary dispute. Indeed, none of the witnesses in this case made any reference to a boundary dispute in the course of their testimony. This case is essentially a dispute over the ownership of the suit land. And although the issue of my jurisdiction was not raised by the parties, I have found it prudent to raise and answer it suo motto because without jurisdiction, this Court must down it's tools – **OWNERS OF MOTOR VEHICLE 'LILLIANS' .V. CALTEX OIL KENYA LTD 1989 KLR 1**.

13. In the circumstances of this case, my jurisdiction has not been questioned. I am also satisfied that I am seized of the requisite jurisdiction to determine this dispute.

14. The plaintiff's case is that he has been in quiet, peaceful, open, exclusive and un-interrupted occupation of a portion measuring 0.40 Hectares out of the suit land for at least 16 years by the time he filed this suit on 12<sup>th</sup> May 2021. He is therefore entitled, pursuant to the provisions of **Section 38(1)** of the **Limitation of Actions Act**, to seek orders that he be registered as the proprietor of that portion of the suit land.

**Section 38(1)** of the **Limitation of Actions Act** provides that: -

*38(1) "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."*

In **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal had the following to say as to how a claim to land by way of adverse possession must be proved: -

*"And in order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA (No 2) 1984 KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see GITHU .V. NDEETE 1984 KLR 776)." Emphasis added.*

The Claimant must also prove that he has been in occupation and possession of the land which he claims **without force, without secrecy and without permission/licence** – *nec vi nec clam nec precario* – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & COMPANY LTD 1980 KLR 10 [1986 – 80 KLR 1500]**.

15. The occupation and possession must also be **peaceful**. In **GRACE WAIRIMU SORORA .V. CHAKA LTD & OTHERS 2017 eKLR**, the Court of Appeal reiterating the importance of peaceful occupation said: -

*"What the Appellant needed to prove was that her occupation was continuous, open and peaceful without permission of the owner." Emphasis added.*

The same Court said as follows in the case of **ROBERT SHUME & OTHERS .V. SAMSON KALAMA 2015 eKLR**: -

*"By dint of Section 7 of the Limitation of Actions Act, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent's title for a period of twelve (12) and more years. Stated differently, and bearing in mind that possession is a question of fact, they were expected to show that their possession was *nec vi nec clam nec precario*, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without the permission of the owner." Emphasis added.*

16. It is not in dispute that the suit land is registered in the names of the defendant. And although the plaintiff claims that the defendant obtained the title to the suit land on 13<sup>th</sup> July 2004, the copy of the Green Card shows that the suit land was transferred to the defendant on 20<sup>th</sup> June 2005 and the title was issued on 22<sup>nd</sup> September 2006. In paragraph 11 of his supporting affidavit, the plaintiff has averred as follows: -

*11 "That I have lived on the 0.40 Ha parcel of land peacefully, openly exclusively and uninterrupted having planted several trees and food crops to – date. See annexures marked FMW 4 being copies of assorted photographs."*

The plaintiff has been, from his supporting affidavit, rather cagey as to when exactly he went into occupation of the suit land. This is what he has deponed in paragraph 5 of his supporting affidavit: -

*5: "That I have been in occupation of the 0.40 Ha parcel of land comprised in land parcel number W. BUKUSU/S. MATEKA/3550 for a period of over 16 years todate to the exclusion of the Respondent."*

This suit was filed on 12<sup>th</sup> May 2021 and during the plenary hearing, the plaintiff said: -

*"I have been living on the land parcel NO WEST BUKUSU/ SOUTH MATEKA/3550 since 2004. The defendant has never lived there. He lives in REMWA. It is not true as per his replying affidavit that I have had a case without him over the land in dispute. He had never interfered with my occupation of the land."*

In paragraph 3 of his replying affidavit, the defendant has made it clear that the plaintiff's occupation of the suit land has never been peaceful. This is what he has deponed therein: -

*3 "That the alleged occupation by the Applicant herein has not been peaceful at all since all attempts by the Respondent herein to have boundary dispute solved through Deputy County Commissioner, A.C.C KABULA, Land and Dispute Tribunal and Local Administration, the Applicant have (sic) been always found to be condemned and or a causer (sic) herein are copies of letters and directions from several offices attached for your perusal TI."*

Among the documents produced by the defendant is a letter dated 5<sup>th</sup> March 2021 from the **ASSISTANT COUNTY COMMISSIONER KABULA** and addressed to the **LAND SURVEYOR BUNGOMA**. The letter requests the said **SURVEYOR BUNGOMA COUNTY** to get a surveyor to resolve the boundary dispute between the parties. Paragraph two of the letter is instructive. It reads: -

***“The parcel NO W. BUKUSU/S. MATEKA/3550 is registered to MR TITUS SIRENGO WABWILE while the other parcel NO W. BUKUSU/S. MATEKA (sic) is registered to FRANCIS MAKOKHA WABWILE. The two parties have had a long standing dispute over the boundary in my office where it was agreed that a government land surveyor should assist determine and fix boundary once and for all.”***

That is clear evidence that the plaintiff's occupation of the suit land has not been peaceful. To quote the words of the **ASSISTANT COUNTY COMMISSIONER KABULA DIVISION**, the parties have been engaged in **“a long standing dispute over the boundary.”** In those circumstances, the plaintiff's claim to the portion of the suit land measuring 0.40 Ha must collapse for not meeting the threshold of adverse possession as the occupation is not peaceful.

17. Secondly, it is now also obvious that the plaintiff's occupation of the suit land was interrupted by **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 491 of 2011 TITUS WABWILE SIRENGO .V. FRANCIS MAKOKHA WABWILE**. That suit was of course filed by the defendant herein against the plaintiff and from the orders issued on 15<sup>th</sup> December 2011, it was a boundary dispute involving the land parcels **NO EAST BUKUSU/SOUTH MATEKA/3549 and 3550**. In his own oral testimony, the plaintiff says he has been living on the suit land since 2004. That being the case, it means that **BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE No 491 of 2011** in which he was sued by the defendant herein was filed seven (7) years into his occupation of the suit land thus interrupting his adverse possession of the suit land, if at all there was any such possession.

18. Finally, I may now re – visit the comments which I made at the commencement of this Judgment and which go to the credibility of the plaintiff. It must be clear by now that the plaintiff was not a truthful witness. He is determined to grab the defendant's land through falsehoods. The Mutation Forms produced herein and signed by the **LAND REGISTRAR** show that the original land parcel **NO EAST BUKUSU/SOUTH MATEKA/561** and which belonged to the parties' father **DAUDI WABWILE SIRENGO** was divided into the following seven (7) portions being **EAST BUKUSU/SOUTH MATEKA/3545, 3546, 3547, 3548, 3549, 3550 and 3551**. It is also clear that as per the Certificate of Confirmation of Grant issued on 13<sup>th</sup> July 2000 in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 7 of 1999**, the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/561** being the only known asset of the parties' late father was distributed equally between his widow and four (4) children. It cannot therefore be true for the plaintiff to allege, as he did in his oral evidence in chief, when he said that: -

***“The land was infact given to me in 1967 by my father before it was sub – divided. It was land parcel NO WEST BUKUSU/SOUTH MATEKA/561.”***

That cannot factually be correct because as is clear from the Mutation Form, the land parcel **NO WEST BUKUSU/SOUTH MATEKA/561** was sub – divided in 2004.

19. It cannot also be correct for the plaintiff to allege that the original land parcel **NO WEST BUKUSU/SOUTH MATEKA/561** was given to him in 1967. The Certificate of Search dated 21<sup>st</sup> September 2000 shows that it was registered in the names of his mother **MARGARET NANYAMA SIRENGO**. And it was she who applied to the **BUMULA LAND CONTROL BOARD** for it's sub – division in 2004.

20. With regard to **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 491 of 2011** in which he had been sued by the defendant, this is what the plaintiff said when re – examined by his Counsel **MR OTSIULA**: -

***“There was a case No 491 of 2011 but I was not served. But I can see the order issued on 15<sup>th</sup> December 2011 and it is my evidence that the District Surveyor and Land Registrar did not attend as directed.”***

Again, that is not correct. The record of **HON. ONDIA SENIOR PRINCIPAL MAGISTRATE** dated 15<sup>th</sup> December 2011 clearly shows that the plaintiff who was the defendant in that case was duly served. The relevant part of the order reads: -

***“This application coming up this 19.12.2011 before the HON M. ONDIA SPM in the presence of the Plaintiff/Applicant and in the absence of the Defendant/ Responent although duly served and UPON READING the application together with the supporting affidavit dated 18.8.2011.”***

The plaintiff was therefore duly served with the application in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 491 of 2011**. He is therefore not being sincere when he claims not to have been served.

21. All the above says a lot about the credibility and reliability of the plaintiff. Clearly, he was not a truthful witness.

22. The up – shot of all the above is that the plaintiff has failed to prove that he is entitled to a portion of land measuring 0.40 Hectares out of the land parcel **NO WEST BUKUSU/SOUTH MATEKA/3550** by way of adverse possession. His occupation has not been peaceful and was interrupted by the filing of a case against him by the defendant in 2011 before the statutory 12 years had run out. He is not deserving of the orders sought in his Originating Summons.

23. With regard to costs, the parties are siblings. The order that commends itself on that issue is that each party meets their own costs.

24. The Court therefore makes the following disposal orders: -

1. **The plaintiff's suit is dismissed.**
2. **Each party to meet their own costs.**

**Boaz N. Olao.**

**J U D G E**

**14<sup>th</sup> February 2022.**

14/2/2022

Coram: Hon. Boaz N. Olao JUDGE

Court Assistant: Joy

Language: English/Kiswahili

Judgment dated, delivered and signed in Open Court this 14<sup>th</sup> day of February 2022

Mr Okaka for Mr Otsiula for plaintiff present

Defendant – Absent

Right of Appeal Explained.

**Boaz N. Olao.**

**J U D G E**

**14<sup>th</sup> February 2022.**