



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CIVIL CASE NO.16 OF 2000 [O.S]**  
**FWAMBA MUKULE MUCHENJA.....PLAINTIFF**  
**VERSUS**  
**1. KEFA WASIKE MUKHWANA**  
**2. KIKA SENGENCE**  
**3. JENNIFER BARASA MULAHA**  
**4. DANIEL OKUMU WATAKO .....DEFENDANTS**

**JUDGMENT**

1. In this originating summons taken out by Fwamba Mukule Muchenja (hereinafter referred to as the plaintiff) on 10<sup>th</sup> February 2000 against Kefa Wasike and Jennifer Barasa (herein after referred to as the defendants) and later amended on 19<sup>th</sup> November 2002 by an order of the court issued on 24<sup>th</sup> October 2002, the plaintiff sought for:

i. An order to be declared the owner of the whole of land parcelnumber W. Bukusu/S. Mateka/968 which he occupied uninterrupted since the year 1969 after he bought it from the late father of KEFA WASIKE MUKHWANA (1<sup>st</sup> defendant) who fraudulently registered it in the name of JENNIFER BARASA MULAHA.

ii. An order that the plaintiff be registered as the owner of the parcel no. W. Bukusu/S. Mateka/968.

iii. The court to grant such further or other reliefs as it may deem fit to grant.

2. The defendants each filed replying affidavits opposing the orders sought in the summons. Thereafter parties framed issues for determination and took out summons for directions. Directions were taken for the matter to proceed by way of adducing viva voce evidence and the suit set down for hearing. The plaintiff called two witnesses. The defendants gave their testimonies and did not call any witness. The evidence of all the witnesses were taken by the learned F. Muchemi, Judge but unfortunately she was transferred before concluding this matter as the defendants had sought an adjournment to call further witnesses which in the end they never did. I did not therefore have the opportunity of seeing any of the witnesses who testified. Be that as it may, I have read through the typed proceedings and was able to come up with this determination.

3. The plaintiff testified as PW1. He told the court that he lives at Tarita and is a farmer aged 78 years old. He bought a portion of land from Sasita Mukhwana measuring 8 acres comprised in L.R. W. Bukusu/S. Mateka/968 in 1969 and paid 16 heads of cattle as the agreed purchase price. He produced a copy of the register (pex. 1) for the suitland showing Kefa Wasike – the 1<sup>st</sup> defendant was the registered owner who was to transfer the land to him. He said the 2<sup>nd</sup> defendant filed a claim in court for this land in 1998 claiming she had bought it. That suit was referred to the Land Disputes Tribunal who after hearing it awarded the plaintiff the land. He said that on this land he has planted 6000 eucalyptus trees, crops like cassava, bananas and others. He has also constructed three semi-permanent houses and a recent building for his children. He has also been cultivating sugar cane on it.

4. PW1 continued that the 1<sup>st</sup> defendant vacated the land as soon as he had sold it to him and does not know where the 1<sup>st</sup> defendant currently lives. The 1<sup>st</sup> defendant took him to the land board and they obtained consent to transfer. 1<sup>st</sup> defendant re-appeared later to say he sold the same land to the 3<sup>rd</sup> defendant. The witness produced application for Consent form, the letter of consent dated 27<sup>th</sup> October 93, transfer form, vesting order, application for registration form dated 16<sup>th</sup> Nov 1983 as Pex. 2 (a) (b) & (c) respectively. He knew the 1<sup>st</sup> defendant appealed the tribunal's decision to the high court which quashed that decision. He maintained that the 2<sup>nd</sup> defendant does not and has never lived on this land. He lives on the suitland with his 9 sons and 16 daughters. He prayed for his case to be allowed with costs.

5. In cross examination, he said he did not have any other land except the one he is claiming. That both Kefa and his father sold to him the land. He could not tell whether W. Bukusu/S. Mateka/835 was his land. Shown copy of the register showing the land is registered in his name and measures 1.7 ha. He also did not know that L.R. 968 and 835 are neighbours to each other. He said he disagreed with that map (DMF 1 & 2) which showed the plots were neighbouring each other. He also denied he and the two defendants appeared before the land board. He continued that he was sued in 1998 and not 1989 as claimed by the 2<sup>nd</sup> respondent–shown the plaint reading 1989 (DMFI-4). He denied the 2<sup>nd</sup> defendant's parcel was different from his. Initially he sued 4 defendants but amended his pleadings to delete the names of 2<sup>nd</sup> and 4<sup>th</sup> defendants therefore he had no claim over LR. 1602.

6. PW2 is Vincent Juma Muchenje. He is an uncle to the plaintiff and comes from South Wanga location. He knows the plaintiff lives on L.R. 968 and knows he bought it on 6<sup>th</sup> October 1969 from Sasita Mukhwana since he was present. He confirmed taking the first five (5) heads of cattle as deposit. They paid another seven (7) heads of cattle and later the balance to make a total of sixteen (16) heads of cattle. He also helped the plaintiff to build a house on this land measuring 8 acres the same year. That the plaintiff had sold his clan land and used the money to come and settle here. The witness met Kefa (1<sup>st</sup> defendant) in 1972 when he sold the plaintiff 3 ½ acres. He said the land sold was never transferred to the plaintiff. He said there are mature trees on the land and the semi-permanent houses built by the plaintiff are very old with rusted iron sheets. He later learnt the 2<sup>nd</sup> defendant was claiming this land.

7. The witness was cross – examined and in answer to questions put to him said he lives at their original home in Wanga. The land the plaintiff bought was 968 and showed his name as a witness in the sale agreement produced as exhibit in court. The parcel number was not indicated in the agreement. That L.R. 835 was registered in plaintiff's name on 10<sup>th</sup> July 1973, but denied the plaintiff lives on it. PW2 said the 2<sup>nd</sup> defendant has never cultivated the land the plaintiff occupies. He visits the plaintiff more than four (4) times in a year. He said that both parcels 968 and 835 belong to the plaintiff and he has removed the boundaries between the two parcels and cultivates both. In re-examination, he said there is no marked boundary between parcel no.835 and 968. Parcel no. 835 belongs to Wasike Sasita as at 1981 and the register does not show title has been issued to the plaintiff. The plaintiff then closed his case.

8. The 1<sup>st</sup> defendant took the stand as DW1. He stays at Kiminini, moved there five (5) years ago. Before then, he lived at Kabula on his father's land S.Mateka/968. He sold the land to Jennifer Barasa on 2nd October 1987 at Kshs. 40,000/= with all the developments and moved out. The 2<sup>nd</sup> defendant has

obtained title in her name. The plaintiff was his neighbour as he had earlier bought from his father a piece of land comprised in L.R. 835. He denied the plaintiff was using this land before he sold it to Jennifer (2<sup>nd</sup> defendant). He denied selling his land to the plaintiff. He asked the court to evict the plaintiff from this land as the plaintiff has his home located on L.R. 835.

9. During cross examination, DW1 said he was born in 1941 son to Sasita Mukhwana who died several years ago. During his father's lifetime, he sold 4 acres of land to the plaintiff in 1969 which the plaintiff took possession of immediately. The land had been demarcated in the area in 1960 and therefore all land had numbers. He did not know about Pex. 2 (b). He denied the plaintiff ever staying on parcel L.R. no.968 at all. He was not aware of Douglas Wanjala (his brother) selling land to the 2<sup>nd</sup> defendant. He also denied moving from this land in 1979. He knows the suit land belongs to the 2<sup>nd</sup> defendant. In re-examination, he said when the plaintiff bought the land, it had a new number as the register for all the numbers subdivided from the original number was opened on 10<sup>th</sup> July 1973. He said the plaintiff had never sued him to transfer the suit land to him. He does not know the situation on the ground as he lastly visited the land three (3) years ago. The plaintiff had by then demolished his house.

10. Jennifer Mulaha Barasa the 2<sup>nd</sup> defendant testified as DW2. She is a retired school teacher. She knew the 1<sup>st</sup> defendant who sold to her land in 1987. She did a search which confirmed the 1<sup>st</sup> defendant as the registered owner at the time. They entered into a written sale agreement for the 20 mature trees, crops on the land and a mud house. DW2 said the 1<sup>st</sup> defendant lived on this land with his wife Rose and their 4 children. She referred to the agreement produced as Dex. 1. The 1<sup>st</sup> defendant's mother was a witness to their agreement. DW2 got title to the suit parcel in her name and produced a copy as Dex 5 and green card as Dex. 6. The green card showed the 1<sup>st</sup> defendant obtained title to the suit land in 1981. She took possession immediately. However when she sent her workers to work on the land, they were chased away by the plaintiff. The plaintiff lodged a complaint against her buying his land with the Land Registrar. She was summoned by the Land Registrar on 20<sup>th</sup> February, 1989. According to her, the plaintiff stays on a neighbouring parcel no. 835. She urged the court to dismiss this suit and enter judgment as per the counter-claim in her favour with costs.

11. In cross examination, DW2 said she did not know the 1<sup>st</sup> defendant before 1987. She was introduced to him by one Pius Wataka. There was only one mud house with grass thatched roof on the suitland which Pius told her belonged to the 1<sup>st</sup> defendant. She was not aware of any case between the 1<sup>st</sup> defendant and the plaintiff regarding the suitland. That the plaintiff refused to appear before the Land Registrar when summoned but he kept harassing her. She produced the letters summoning the plaintiff to appear before the land registrar as Dex. 7. She also produced as Dex. 9 plaintiff in Bungoma CMCC no. 87 of 1989 where she had sued the plaintiff seeking eviction orders. She also produced as Dex. 10 order of the High Court quashing the tribunal's award. She denied the plaintiff is entitled to the orders of adverse possession as she bought the land in 1987, got title in 1988 and sued him in 1989.

12. She also referred to Dex. 4 (a map) which showed the plaintiff has a plot neighbouring hers. She admitted the tribunal members came to hear the case on the site and ruled the land belonged to the plaintiff. The plaintiff has put up structures on the land after demolishing the existing house. In re-examination, she said she later learnt 1<sup>st</sup> defendant's father sold to the plaintiff land comprised in L.R. no. 835 many years back. She stated that she would not have bought this land if she knew it had been sold. She visited the land in December 2010 when she found the plaintiff had a house built when this case was still pending.

13. Directions were taken on 25<sup>th</sup> April 2013 before me that the case to proceed from where it had reached and fixed for further hearing on 24<sup>th</sup> June 2013. When the matter came up on that date, the defendants opted to close their case without adduction of further evidence. The matter was fixed for mention on 23<sup>rd</sup> July 2013 to confirm filing of submissions. However the parties advocates did not file submissions within the timelines as agreed. The court wrote a reminder to them on 17<sup>th</sup> June 2014. The plaintiff did file his submissions on 3<sup>rd</sup> July 2014 while the defendants filed none. The reason why this judgment

delayed is because of the delay in filing submissions with file kept in the registry. I have considered the submissions put in by the plaintiff and I will refer to the relevant parts in the course of this judgment. Having read through the pleadings, evidence and submissions, I have, formed opinion that there are four questions arising for determination by this court;

1. Has the plaintiff been in open continuous occupation of L.R. no. 968 and therefore entitled to the orders of adverse possession sought?
2. Was this occupation interrupted by the filing of Bungoma CMCC 87 of 1989?
3. Is the 2<sup>nd</sup> defendant entitled to eviction orders as prayed in the counter-claim?
4. Who should bear the costs of the suit?

#### 14. **Occupation:**

The plaintiff avers that he took possession of the suitland in 1969 immediately after purchasing it. PW2 also stated that he helped the plaintiff construct a house on the said land. The plaintiff's further evidence is that he bought 8 acres from the 1<sup>st</sup> defendant's father in 1969 and 3 ½ acres from the 1<sup>st</sup> defendant himself in 1972. If the two are added, the plaintiff would therefore have claimed for 11.5 acres of land but has chosen to claim 8 acres only. Since the size of land occupied is not in dispute, I will go no further on what size was sold. The first question to be determined is whether he is in full occupation of the land comprised in L.R. W.Bukusu/S. Mateka/968. The 1<sup>st</sup> defendant denied the plaintiff occupied this land as he was the one in occupation having inherited the same from his father. The 2<sup>nd</sup> defendant also averred that when she purchased the land, only the 1<sup>st</sup> defendant and his family lived on it. In a plaint produced as Dex. 9, she pleaded that the plaintiff herein entered the land after she acquired title (1988) and began constructing houses on it without her permission. In that suit 87 of 1989, she prayed for eviction orders to issue against the present plaintiff. There was no defence statement in that suit produced as exhibit to enable this court understand the plaintiffs response to those allegations. That suit CC 87 of 1989 was referred to the land disputes tribunal which heard and determined it in favour of the current plaintiff.

15. I have weighed the evidence adduced by both sides, I am convinced that the plaintiff was in occupation as at the time the 2<sup>nd</sup> defendant purchased this land in 1987. This is because had he began construction when 2<sup>nd</sup> defendant acquired this land, the 2<sup>nd</sup> defendant would have sought for temporary injunction to obtain restraining orders and not make permanent prayers of eviction only. Paragraph 5 of that plaint read thus

***“Immediately after obtaining the title deed, the defendant without any reasonable cause entered the said parcel and started building houses which he has entered into and is occupying them illegally and without permission of the plaintiff.” (Underline mine for emphasis).***

The defendants contend the plaintiff's home is on L.R. 835 and not 968. If this was so, then a prayer for eviction would not have been made. The inference I draw from the evidence on record and as stated by PW2 that the plaintiff is using both L.R. 835 and 968 probably with boundaries between the two parcels destroyed on the ground. The plaintiff is lying to say he does not know the existence of parcel no 835. I am satisfied that the plaintiff is in occupation of the suit parcel. The next question is whether the right to claim adverse possession is still available to the plaintiff or it has been terminated.

#### 16. **Was occupation interrupted?**

The plaintiff in his evidence stated that the 2<sup>nd</sup> defendant sued him in 1998 and not 1989 as alleged. In his submissions, Mr. Murunga also said that litigation began in 1998 which was 30 years from the time the plaintiff took possession. This suit was filed in the year 2000. The counsel selected not to comment on the effect of the filing of the earlier suit whether it was filed in 1989 or 1998 on his client's right to file a claim for adverse possession. In the case of **Githu vs. Ndeete (1984) KLR 776** cited by

this plaintiff in the submission, the court held in paragraph no. 3 thus, “ ***Time ceases to run under the Limitation of Actions Act (cap 22) either when the owner takes or asserts his right. Assertion occurs when the owner takes legal proceedings or makes effective entry onto the land.***” Also in the case of **Sospeter Wanyoike vs. Waithaka Kahii [1979] KLR 236** Todd J held that “..... furthermore, the action filed in 1974 had interrupted the period of adverse possession.”

17. The Plaintiff was aware of this suit because after the same was transferred to the Land Disputes Tribunal, the award was given in his favour. The award was adopted as a decree of the court as provided in law. He made attempts to execute that decree demonstrated by the transfer forms signed by the executive officer of the court as per his exhibits no. 2c. He was also aware that the award was quashed on an application made by the 2<sup>nd</sup> defendant to the high court. It appears He had earlier sued the 1<sup>st</sup> defendant vide Bungoma RMCC no. 103 of 1981 (pex 2 (a) and (b) ) where he obtained vesting orders to get 11.5 acres of land. It is not clear why he did not complete the execution process of this earlier decree which awarded him the suitland as he even had the executive officer of the court signing both the transfer and consent forms transferring the land to him. It is also not true for the plaintiff to say the 1<sup>st</sup> defendant took him before the Land Control Board as he got the Land Control Board consent using court decree in Bungoma RMCC 103 of 1981.

18. In my opinion, although the suit was transferred to the Land Disputes Tribunal which made an award in favour of the plaintiff, that award was set aside and/ or quashed by the high court vide Bungoma HC Misc. appl. no. 206 of 1999 (Dex. 10). Therefore by the time of filing this Originating Summons the 30 years plus the plaintiff was claiming to have been in continuous and peaceful occupation of the suitland was interrupted by the proceedings of Bungoma CMCC no. 87 of 1989. His claim would only lie if he waited for another 12 years to elapse from either the time of filing of suit no. 87 of 1989 or the date of its determination. Taking into account provisions of case and statute law it is my finding that the 2<sup>nd</sup> defendant's suit and subsequent legal proceedings in the High Court Misc civ app no 206 of 1999 terminated the plaintiff's right to claim adverse possession over parcel no. W.Bukusu/S.Mateka/968. By that suit, the defendants asserted their right over the suitland.

19. **Is the 2<sup>nd</sup> defendant entitled to eviction orders;**

The 2<sup>nd</sup> defendant counter- claimed in her replying affidavit seeking orders to be granted possession of the suitland and for eviction orders to issue against the plaintiff Fwamba Mukule Muchenja. Currently the 2<sup>nd</sup> defendant is the registered owner of suit land W. Bukusu/S. Mateka/968. The plaintiff's claim to the land was for adverse possession. This claim as I have found above has failed given the period of his occupation was interrupted by the suit filed before the current suit. It is trite to say therefore that him on the suitland is illegal. The 2<sup>nd</sup> defendant being the title holder does have a right to exclusively occupy and use it. It follows therefore and I do make a finding that the 2<sup>nd</sup> defendant is entitled to the orders of eviction against the plaintiff. However given the circumstances that the plaintiff has settled on this land for a long period, I shall order that he gives up vacant possession of L.R. W. Bukusu/S. Mateka/968 within four (4) months from the date of this judgment. In default eviction orders do issue.

20. **Costs:**

Costs usually follow the events as provided in Section 27 (1) of the Civil Procedure Act. Having found that the plaintiff's claim failed and taking into consideration that he has enjoyed the use of the suitland to the exclusion of the defendants since the institution of the suit, It is only fair that the defendants are compensated by way of costs. Consequently, I dismiss the plaintiff's suit with costs to the defendants. The counterclaim as stated in the preceding paragraph is allowed.

**DATED, SIGNED and DELIVERED** this 17<sup>th</sup> day of September 2014.

**A. OMOLLO**

**JUDGE.**