Yanda v Wakhwaku & 2 others; Wakhwaku (Petitioner) (Civil Case 72 of 2008) [2022] KEELC 15724 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEELC 15724 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE 72 OF 2008

BN OLAO, J

JUNE 28, 2022

[FORMERLY KAKAMEGA HCCC NO. 82 OF 2006]

BETWEEN

EDWARD WAFULA YANDA ..... PLAINTIFF

AND

BOAZ MUSUCHA WAKHWAKU ..... 1ST DEFENDANT

MARK MUFUMU WAKHWAKU ..... 2ND DEFENDANT

MOSES MWAMI WAKHWAKU ..... 3RD DEFENDANT

AND

HELLEN WANJALA WAKHWAKU ..... PETITIONER

JUDGMENT

1. Land parcel No Bokoli/KitunI/1796 (the suit land) is registered in the names of Edward Wafula Yanda (the plaintiff). He holds a title deed thereto issued to him on 3rd October 2005. It is a resultant sub – division of the land parcel No Bokoli/Kituni/121 which originally belonged to the plaintiff's late father Yanda Nandwa.

2. The plaintiff moved first to Kakamega High Court where he filed Civil Suit No 82 of 2006 on 7th September 2006 which was subsequently transferred to this Court. He impleaded Boaz Musucha Wakhwaku, Mark Mufumu Wakhwaku and Moses Mwami Wakhwaku (the 1st, 2nd and 3rd defendants respectively) seeking against them, Judgment in the following terms with respect to the suit land: -

    a. An Order of eviction against the defendants, their servants or agents from the plaintiff's parcel of land No Bokoli/Kituni/1796.

b. A permanent injunction restraining the defendants or their servants from interfering with the plaintiff's use of the said land in any way whatsoever.

c. Mesne profits over Bokoli/Kituni/1796.

d. Costs of this suit together with interest at Court rates.

e. Such further or other relief this Honourable Court deems fit to grant.

3. The basis of the plaintiff's claim is that he is the registered proprietor of the suit land which measures 12.07 Hectares (29.8 acres). That vide Kakamega High Court Civil CASE No 330 of 1988, the defendants had sought orders that they were entitled to part of the suit land by way of adverse possession. That suit was however dismissed on 6th September 2001. The defendants have however refused to vacate the suit land notwithstanding the fact that their claim thereto was dismissed and inspite of notices being issued against them. That the only other suit filed with respect to the suit land was Kakamega High Court Civil Case No 330 of 1988 which had been filed by the defendants' brother one Dickson Marango.

4. Together with the plaint, the plaintiff filed his statement and that of his witness Martin Kundu Yanda (PW 2) both dated 22nd June 2015.

5. He also filed the following documents in support of his case: -

1. Copy of title deed for land parcel No Bokoli/Kituni/1796.

2. Green Card for the land parcel No Bokoli/Kituni/1796.

3. Certificate of Search for the land parcel No Bokoli/Kituni/1796.

4. Certificate of Confirmation of Grant issued to the plaintiff in respect to the Estate of Yaanda Nandwa.

5. Grant of Letters of Administration issued to the plaintiff in respect of the Estate of Yaanda Nandwa.

6. Land Certificate in respect to the land parcel No Bokoli/Kituni /121 in the names of Yahand Nandwa.

7. Green Card in respect of the land parcel No Bokoli/Kituni/121.

8. Application by plaintiff to be registered as proprietor by transmission of land parcel No Bokoli/Kituni/121.

9. Transfer Form signed by the plaintiff to be registered as proprietor of the land parcel No Bokoli/Kituni/121 as personal representative.

10. Judgment in Kakamega High Court Civil CaseNo 330 of 1988 Dickson Marango .v. Edward Wafula.

11. Plaint and verifying affidavit.

6. The plaintiff filed a further list of documents on 16th July 2018 containing the following: -

1. Plaint in Webuye RMCCC No 184 of 2007 Martin Kundu Yanda .v.A – G & Moses Mwami– A claim for malicious prosecution.

2. Plaint in WebuyeRMCCC No 185 of 2007 – Also a claim for malicious prosecution.

7. It is not clear if the two cases WebuyeRMCC No 184 of 2007 and No 185 of 2007 have been heard and if so, with what results.

8. In his statement dated 22nd June 2015, the plaintiff states that he is the registered proprietor of the suit land having acquired the same by way of transmission following the death of his father Yanda Nanda and which he occupies since 1962. That he and his family have occupied the suit land peacefully and uninterrupted.

9. That in 1981, the defendants' mother complained to the Chief that the land belonged to her family. She then filed at the Bungoma Court Civil CaseNo 2 of 1986. However, she passed on before the case was heard.

10. Then in 1988, one Dickson Marango moved to Kakamega High Courtand filed Civil CaseNo 330 of 1988 claiming ownership of the suit land on his own behalf and on behalf of the defendants. He however passed on and was substituted by Boaz Musucha Wakhwakuthe 1st defendant herein. That suit was dismissed on 6th September 2001. As the proprietor of the suit land, he has prevailed upon the defendants to vacate the same but in vain. He therefore filed this suit seeking the orders set out herein.

11. Martin Kundu Yanda(PW 2) is the younger brother to the plaintiff and confirmed that the suit land belonged to their late father. That their family has occupied the suit land peacefully until 1981 when Rebah Bukhoyathe defendants' mother claimed that she had bought it. The dispute was taken to the Chief and District Officer and was determined in the plaintiff's favour. Reba Bukhoyothen filed a case being Bungoma Civil CaseNo 2 of 1986 but she passed on before the case was heard.

12. In 1998, Dickson Marangofiled Kakamega High Court Civil CaseNo 330 of 1988 claiming the suit land on behalf of the defendants. He passed on and was substituted by his brother Boaz Musucha Wakhwakuthe 1st defendant herein. That suit was dismissed on 6th September 2001. The suit land rightfully belongs to the plaintiff.

13. The defendants filed a defence and Counter – Claim in which they denied knowledge of the fact that the suit land belongs to the plaintiff. They denied having filed Kakamega High Court Civil CaseNo 330 of 1988 through their brother Dickson Marangoclaiming the suit land by way of adverse possession. They admitted however that the said Dickson Marangofiled the said suit by way of Originating Summons claiming by adverse possession 15 acres out of the land parcel No Bokoli/Kituni/121 but not the suit land. They denied that they are in occupation of the suit land adding that infact they occupy 15 acres out of the land parcel No Bokoli/Kituni/ 121. That if Kakamega High Court Civil CaseNo330 OF 1988 was dismissed, that cannot be the basis for their eviction from the suit land because that case involved the land parcel No Bokoli/Kituni/121 and not the suit land. And in any event, the said suit was only dismissed for being premature. The defendants pleaded that no notice to sue had been served upon them and they would seek the striking out of the plaintiff's suit because the verifying affidavit is defective.

14. In their Counter – Claim, the 3rd defendant as Administrator of the Estate of their late mother Rebah Bukhayo Wakhwaku pleaded that their deceased mother who passed away on 8th March 1988 had purchased the suit land from the plaintiff's father Yanda Nandwa at a consideration of Kshs. 6,000/= and their family has been in occupation thereof since then. By virtue of that occupation, the defendants have acquired by way of adverse possession 15 acres out of the suit land and the previous suit being Kakamega High Court Civil Case No 330 of 1988 was only dismissed for being premature.

15. The defendants therefore sought the dismissal of the plaintiff's suit and that their Counter – Claim be allowed as prayed.

16. The defendants also filed their witness statements dated 10th October 2014 in support of their case.

17. In his statementBoaz Musucha Wakhwaku(the 1st defendant – DW 1) stated that their late mother Reba Bakhayo purchased 15 acres out of the land parcel NO Bokoli/Kituni/121 from Yanda Nandwa for which she was paying in instalments. However, she passed away before she completed paying for the same or obtaining title for the said 15 acres. That following the demise of their mother, their brother Dickson Marango filed a suit claiming the land by adverse possession but lost the case.

18. In his statement Mark Mufumu Wakhwaku(DW 2) reiterated the contents of the 1st defendant's statement. He added that since 1973, the defendants have considered 15 acres out of the suit land as their property because their late mother had purchased it from Yanda Nandwa although she died before obtaining the title thereto.

19. The 3rd defendant died before he could testify and on 25th May 2021, the suit against him was by consent marked as having abated.

20. The defendants filed the following documents in support of their case: -

    1. Grant of Letters of Administration issued to Moses Mwami Wakhwaku, the 3rd defendant, in respect to the Estate of their mother Rebah Bakhayo Wakhwaku on 12th July 2007.

    2. Copy of Land Sale Agreement dated 28th May 1973 between Reba Bakayo as purchaser and Yanda Nandwa as seller for 15 acres out of land parcel No Bokoli/Kituni/121.

    3. Certificate of Confirmation of Grant issued to the plaintiff in respect to the Estate of Yanda Nandwaon 20th April 1988.

    4. Land Certificate for land parcel No Bokoli/Kituni/121.

    5. Transfer by personal representative to person entitled under a will or intestacy in respect of land parcel No Bokoli/Kituni/121 from Yanda Nandwato the plaintiff.

    6. Green Card in respect of land parcel No Bokoli/Kituni/121.

    7. Green Card in respect of land parcel NoBokoli/Kituni/1794.

    8. Green Card in respect to land parcel NoBokoli/Kituni/1795.

    9. Green Card in respect to land parcel NoBokoli/Kituni/1796.

    10. Proceedings and Judgment in KakamegaHCCC No 330 of 1988.

21. The plaintiff filed a reply to defence and defence to the Counter – Claim joining issues with the defendants and denying the claim for adverse possession.

    The plaintiff testified before MukunyaJ on 11th May 2017 adopting as his evidence the contents of his statement dated 22nd June 2015 whose contents I have already summarized above. He also produced as his documentary evidence the documents filed herein.

22. Following the demise of the 3rd defendant, there was a lull in the proceedings as Counsel tried to have him substituted. It would appear that the substitution was not successful and eventually after a long delay, the suit against the 3rd defendant was on 26th May 2021 marked by consent as having abated. No mention was made with regard to the defendants' Counter – Claim following the 3rd defendant's demise. However, as will become clear later in this Judgment, the demise of the 3rd defendant did not prejudice the defendants' Counter – Claim.

23. The proceedings continued on 8th November 2021 when the plaintiff's witness Martin Kundu Yanda (PW 2) testified and also adopted as his evidence the contents of his statement dated 22nd June 2015 which I have already referred to above.

24. The 1st and 2nd defendants were the only witnesses who testified in support of the defendants' case. They too adopted as their evidence the contents of their respective statements which I have already summarized above. They also produced as their documentary evidence the documents filed on 13th July 2017.

25. Submissions were thereafter filed both by Mr Wekesainstructed by the firm of Amani Wekesa & AssociatesCounsel for the plaintiff and by Mr Kunduinstructed by the firm of Bulimo & Company Advocates for the defendants.

26. I have considered the evidence by the parties and the submissions by Counsel.

27. The plaintiff's case is that he is the registered proprietor of the suit land which he acquired by way of transmission from his late father. His claim is that the defendants are trespassers thereon and therefore seeks their eviction therefrom.

28. On the other hand, the defendants' claim that their late mother purchased a portion measuring 15 acres from the plaintiff's late father out of the land parcel NO Bokoli/Kituni/121 which they occupy. They therefore claim that they are entitled to the suit land by way of adverse possession.

29. It is common ground that the plaintiff is the registered proprietor of the suit land and holds a title thereto issued on 3rd October 2005. And although the defendants pleaded in paragraph 4 of their defence and Counter – Claim that they were not aware about that fact, the production of the title deed must have put that to rest. As the registered proprietor of the suit land, the plaintiff is therefore vested with all the rights and privileges belonging and appurtenant thereto by virtue of being the absolute owner. Section 24 of the *Land Registration Act* 2012 makes that very clear in the following terms: -

> 24: "Subject to this Act –
>
> a. 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;
>
> and
>
> b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease." Emphasis mine.
>
> Those rights and privileges include the right to eject trespassers from the suit land, injuncting them permanently from further trespassing thereon and demanding from them the payment of mesne profits. That is what the plaintiff seeks against the defendants.

30. However, that registration is only "prima facie evidence" that the plaintiff is the absolute and indefeasible owner of the suit land. It is subject to challenge if obtained through fraud,

misrepresentation, illegally, unprocedurally or through a corrupt scheme as set out in Section 26(1) of the *Land Registration Act*.

31. For purposes of this case, Section 25(1)(b) and (2) of the Land Registration is relevant. It provides that: -

> 25(1) "The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
>
> a. .....
>
> b. to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register unless the contrary is expressed in the register."

(2) "Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as trustee."

Section 28(h) of the same Act then provides as follows: -

> 28: "Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-
>
> (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription." Emphasis mine.

On the other hand, Section 7(d) of the *Land Act* 2012 states as follows: -

> 7: "Title to Land may be acquired through
>
> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) Prescription." Emphasis mine.

It is these rights in the nature of overriding interests and prescriptive rights which the defendants are seeking with respect to the suit land. If the Court finds in their favour in that regard, then it will mean that the plaintiff is only a trustee holding the suit land in trust for the defendants. This is the basis of their Counter – Claim in which they claim a portion measuring 15 acres out of the suit land by way of adverse possession. That is the claim that this Court must now interrogate.

32. Before I do so, however, I must first address an issue raised by the plaintiff's Counsel in his submissions that infact the defendants have not pleaded any claim for adverse possession in their Counter – Claim. This is how Counsel has addressed the matter: -

> " Finally, a close perusal of the Counter – Claim shows that whereas the defendants pleaded adverse possession, they never made any claim to this honourable Court. The Counter – claim does not show what orders the defendants are seeking from this honourable Court.

Therefore, if it has not been claimed, then the same cannot be granted. The Counter – Claim is incomplete and incurably defective."

33. The concerns raised by Counsel for the plaintiff are not entirely without any merits. The defendants' pleadings are not what can be described as elegant. For instance, the commencement of their Counter – Claim seems to suggest that it is only pleaded by the 3rd defendant whose claim, as is now clear, abated. It reads:-

" Counter Claim

14: The 3rd defendant reiterates the contents of paragraph No 1 – 3 of the defence.

15: The 3rd defendant states that he is the Administrator of the Estate of Rebah Bukhayo Wakhwaku who passed away on 8th March 1988.

16: That the 3rd defendant states that the late Rebah Bukhayo Wakhwaku bought land from Yonda Nandwa at an agreed price of Kshs. 6,000/=."

A reading of those paragraphs on their own would appear to suggest that only the 3rd defendant was laying a claim to the suit land by way of adverse possession. And since the suit against him abated, it means that his Counter – Claim suffered the same fate. However, a reading of paragraph 19 of the Counter – Claim makes it clear that the claim for adverse possession was made jointly by all the three defendants. Further, that it is a claim for 15 acres out of the suit land. That paragraph reads: -

19: "That the defendants have acquired title by adverse possession of the said 15 acres of land."

A reading of the defence and Counter – Claim clearly shows that the drafting could have been better. After all, that is what the defendants engaged Counsel to do. I must again remind Counsel that proper pleadings supplement a good case. Having said so, however, there is no doubt in my mind that the defendants made a joint Counter – Claim to the suit land by way of adverse possession. Further, that the plaintiff fully understood that claim because in his reply to the defence and defence to the Counter – Claim, he pleaded in paragraph 7 as follows: -

7: "The plaintiff vehemently denies the contents of paragraph 19 of the Counter – Claim or at all and specifically denies that the defendants have acquired title by adverse possession to the 15 acres of land and the plaintiff avers that the claim contravenes the law, does not meet the threshold stipulated by the law the same is res – judicata since on the 6th September 2001 the High Court sitting at Kakamega vide Kakamega HCCC No 330 of 1988 dismissed the defendants' brothers suit claiming adverse possession against the plaintiff herein and the defendant is put to strict proof thereof."

There is no doubt therefore that the plaintiff knew that the defendants were claiming 15 acres out of the suit land by way of adverse possession.

34. The plaintiff has pleaded in paragraph 7 of his defence to the defendants' Counter – Claim that the same is infact res – judicata because a claim by the defendants' brother seeking the suit land by way of adverse possession was dismissed in KAkamega High Court Civil CaseNo 330 of 1988. That is a plea that touches on the jurisdiction of this Court. I must therefore determine it even though the parties did not address it both in their testimony or Counsel's submissions.

35. Res – judicata is provided for in Section 7 of the *Civil Procedure Act* as follows: -

> 7: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

Res – judicata can therefore be pleaded by way of estoppel to protect parties from endless litigation over the same subject matter or issue which has been previously determined by a competent Court. It serves to bring litigation to an end and also ensures that the judicial process is not inundated with disputes which not only waste the parties' resources but also judicial time.

(36) I have carefully looked at the proceedings and Judgment in Kakamega High Court Civil CaseNo 330 of 1998. It involved Dickson Marangoas plaintiff against Edward Wafulaand who is the plaintiff herein, as defendant. The claim was also for adverse possession of a parcel of land measuring 15 acres but the land was Bokoli/Kituni/121. That claim was dismissed by B. K. TanuiJ (as he then was) on 6th September 2001 principally on the basis that the period of 12 years had not lapsed. However, the defendants herein were not parties in that previous suit. And, most importantly, although Dickson Marango was the late brother to the defendants herein, the previous suit involved the land parcel No Bokoli/Kituni /121. The "matter directly and substantially in issue" in this suit is the land parcel No Bokoli/Kituni/1796 which, as per the Green Card produced herein, was only created on 14th April 2004 following the sub – division of the land parcel No Bokoli/Kituni/1794. That was some 3 years after Judgment had been delivered in Kakamega High Court Civil Case No 330 of 1988. For Res – judicata to apply, the following must be proved: -

1. The issue in dispute in the former suit between the parties must be directly and substantially in dispute between the parties in the suit where the plea of res – judicata is raised.
2. The former suit must be between the same parties or those under whom they or any of them claims litigating under the same title.
3. The former suit must have been heard and finally determined.
4. The Court or Tribunal which determined the former suit must have been competent.

See *Karia .v. A G* 2005 I E A 83.

37. The ownership of the suit land was not and could not have been an issue in dispute in Kakamega High Court Civil CaseNo 330 of 1988. It did not exist then. Therefore, no matter how much it is stretched, the plea of res – judicata cannot be invoked in the circumstances of this case to defeat the defendants' Counter – Claim with respect to a claim in the land parcel NNo Bokoli/Kituni/1796. That plea is therefore unfounded. I dismiss it.

38. I shall now proceed to consider the merits of otherwise of the defendants' Counter – Claim by way of adverse possession.

39. Although a claim to land by way of adverse possession is ordinarily instituted vide an Originating Summons, it is now settled that a claim to land by adverse possession can still be made through a plaint or Counter – Claim – see MAriba .v. MaribaC.A Civil AppealNo 188 of 2002, *Wabala .v. Okumu* 1997 LLR 609 (CAK), *Gulam Mariam Noordin .v. Julius Charo Karisa* C.A Civil Appeal No 26 of 2015 and also *Chevron (k) Ltd .v. Harrison Charo Wa Shutu* C.A Civil Appeal No 17 of 2016 [2016 eKLR].

40. Since the defendants are seeking 15 acres out of the land parcel No Bokoli/Kituni/1796 by way of adverse possession, they were required to prove that they have been in continuous possession of the said portion of land for a period of 12 years and more. Further, that the possession has been open, notorious, peaceful, exclusive, un – interrupted and with the knowledge but without the consent of the plaintiff as the registered proprietor thereof. Adverse possession therefore contemplates two concepts; possession and discontinuance of possession – *Wambugu .v. Njuguna* 1983 KLR 173. The Court of Appeal described the concept recently in the case of *Mtana Lewa .v. Kahindi Ngala Mwagandi* C.A Civil Appeal No 56 of 2014 [2015 eKLR] where Makhandia J.A said: -

> " Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years."

41. The fact that the defendants are in occupation and possession of the suit land is not disputed. Indeed, it is admitted by the plaintiff and that is why in his plaint, he seeks the main remedies that they be evicted therefrom and be injuncted from interfering with the same and further, they be ordered to pay mesne profits for it's use.

42. It is also clear that the defendants first entered the suit land in 1973 when their late mother RebahBukhayoWakhwaku purchased 15 acres out of the original land parcel No Bokoli/Kituni/121 from the plaintiff's late father Yonda Nandwa. A copy of the sale agreement was produced as part of the defendant's documentary evidence. Counsel for the plaintiff has in his submissions cast doubt on the veracity of the said agreement questioning why, for example, it is dated 28th May 1975 yet the land was purchased in 1973 and why it was not witnessed by family members. Counsel for the plaintiff therefore concludes as follows in his submissions: -

> " Coupled with the fact that this is the first time such an agreement is being produced, despite their (sic) having existed previous suits involving this land, no original agreement was also availed to Court, it is our humble submission that the veracity of the document cannot be ascertained as it is tainted with a lot of discrepancies and we urge this honourable Court therefore to reject the same and not include it in evidence.
>
> As such it is our submission that no sale and/or purchase of land ever took place."

The answer to the above submission is that although the defendants first entered the suit land in 1973 following a sale agreement between their late mother and the plaintiff's late father, they are not seeking to enforce that agreement by way of specific performance. Rather, they are seeking an order that they are entitled to 15 acres out of the suit land by way of adverse possession. And as I have already stated above, the defendant's occupation and possession of the suit land is conceded by the plaintiff. Indeed, when he testified before MukunyaJ on 11th May 2017, the plaintiff said: -

> " The defendants entered the suit land in 1973."

Counsel for the plaintiff has in his submissions questioned the locus standi of the defendants. He argues that they should first have obtained Letters of Administration in respect to their mother's Estate. However, the defendants' Counter – Claim is premised on the fact that they have continued to occupy the suit land from 1973 when their late mother purchased it to – date. They are therefore pursing their own personal interest in the suit land, not their mother's.

43. Counsel also took the view that the sale agreement was vitiated by the fact that although the defendants allege that their mother purchased the suit land in 1973, the agreement is dated 28th May 1975 and since the balance of the purchase price was paid in 1977, the agreement "was over – taken by events."

44. Again, the taking of possession of the 15 acres out of the suit land is not really in doubt. It is clear from the decision in *Samuel Miki Waweru .v. Jane Njeri Richu* C.a Civil Appeal No 122 of 2001 [2007] eKLR that even where a sale agreement for land could be terminated by operation of law, continued possession by the purchaser thereafter becomes adverse to the title of the owner. It is no longer referable to the sale agreement.

45. As to whether or not the defendants' occupation of the suit land has been open, peaceful and un – interrupted, Counsel for the plaintiff submits that it has not. Counsel has put it. This way: -

> " The question one asks themselves therefore is, has this cultivation been open, unforced and un – interrupted?
>
> Your Lordship, the answer to that is negative. We say so because of the numerous Court cases pilling the parties herein since 1973 when the defendants allegedly purchased the land. On top of the Court cases, there is testimony to their being various dispute over the land at the local administrative level."

46. Notwithstanding the submission by Counsel about "the numerous Court cases pilling the parties herein since 1973" and the "various disputes over the land at the local administrative level," other than the proceedings and Judgment in Kakamega High Court Civil CaseNo 330 of 1988, no evidence has been placed before this Court as proof of "numerous Court cases" or "disputes over the land at the local administrative level." Yet, under the provisions of Section 107 of the *Evidence Act*: -

> " Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The only way in which the plaintiff, or before him, his late father Yanda Nandwa, could have interrupted the defendants' occupation of the suit land would have been by filing a suit against them or making an effective entry before the lapse of the 12-year period. That was not done. In *Githu .v. Ndeete* 1984 KLR 776, it was held that: -

> " Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land."

Neither the plaintiff nor his late father did any of the above. And Kakamega High Court Civil CaseNo 330 of 1988 was infact filed by the defendants' late brother and not by the plaintiff or his later father. By the time this suit was first filed as Kakamega High Court Civil CaseNo 82 of 2006 before being transferred to this Court, the defendants had been in occupation of the suit land for 33 years way in excess of the 12 years statutory period.

47. Finally, I need to determine whether the defendants are entitled to the 15 acres which they claim out of the suit land or if, as submitted by the plaintiff's Counsel, they are only in occupation of 7 acres. This is how the plaintiff's Counsel has submitted on that issue: -

> " Though the defendants alluded to the sale agreement, their claim is not based on it but rather on the adverse possession. The defendants claim 15 acres but on cross – examination DW 2

only accounted for 10 acres being under their use. Specifically, he stated that he cultivates on 3 acres, DW 1 cultivates on 4 acres whilst DW 3 now deceased used to cultivate on 3 acres.

Your Lordship, the suit by the 3rd defendant abated as he was never substituted. Putting this into consideration, this reduces the defendants claim further to only 7 acres."

It is true that the suit against the 3rd defendant was, by consent of the parties, marked as having abated on 25th May 2021. The record shows that when he was cross – examined by Mr Wekesa, Mark Mufumu Wakhwaku (DW 2) the 2nd defendant said: -

" I plough 3 acres out of parcel No Bokoli/Kituni/121. I know that the 1st defendant ploughs 4 acres. Even the 3rd defendant who is deceased used to plough 3 acres out of parcel No Bokoli/Kituni/121."

It is of course now common knowledge that the suit land is a resultant sub – division of the land parcel No Bokoli/Kituni/121 which no longer exists. Therefore, Mark Mufumu Wakhwaku(DW 2) could only have been referring to the suit land.

48. Counsel's submission sounds attractive. However, it cannot be supported either by the facts or the law. It is important to appreciate that from their Counter – Claim, the defendants were not laying individual claims to specific portions of the suit land. They made a joint claim of 15 acres out of the suit land which, as per the Green Card, measures 12.07 Hectares i.e. 29.8 acres. If each of the defendants was seeking a specific acreage out of the suit land, nothing would have been easier than making such a claim. It is also not lost to this Court that the genesis of their claim has always been that their late mother purchased and took possession of 15 acres of land which they have continued to occupy and utilize.

49. Secondly, and as is now clear, the plaintiff's interest in 15 acres out of the suit land was infact extinguished by operation of the law in 1985. His claim to the 15 acres is statutorily barred by Section 7 of the *Limitation of Actions Act* which reads: -

7: "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."

Even if time for purposes of adverse possession is computed from 1977 when the defendants' mother paid the balance of the purchase price, it is still obvious that the plaintiff was hopelessly out of time when he filed this suit in 2006 seeking to evict the defendants from the suit land. Therefore, the plaintiff's interest has already been extinguished in the whole 15 acres out of the suit land and not only some portions thereof. Indeed, the record shows that on 21st January 2020, the Court was informed by MS Gatimbu, then acting for the defendants, that the 3rd defendant had passed away on 3rd January 2018. Therefore, by the time the suit against the 3rd defendant was being marked on 25th May 2021 as having abated, the plaintiff infact had no enforceable interest in the 15 acres out of the suit land. Instead, he was basically a trustee holding it in trust for the defendants. Indeed, he became a trustee as far back as 1985 at the end of the 12-year limitation period which was long before the demise of the 3rd defendant on 3rd January 2018. Any interest in land which has been extinguished by the operation of the law cannot be resurrected. To do so would amount to a violation of the same law. It will therefore be absurd for this Court to take the route suggested by the plaintiff's Counsel and order that the defendants are only entitled to 7 acres out of the suit land. The moment the plaintiff's right in the 15 acres out of 29.8 acres comprised in the suit land was extinguished by operation of the law, the defendants interest therein crystalized. All that the defendants needed thereafter was a formal

Judicial recognition of their interest therein by registering them as the proprietors thereof. That is why Section 38(1) of the *Limitation of Actions Act* provides that whenever an adverse possessor claims to have become entitled to land: -

> " 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." Emphasis mine.

Therefore, all that was required of the defendants after the 12 years, as a matter of course, was to simply seek judicial intervention to have the whole 15 acres out of the suit land registered in their names rather than in the plaintiff's name. That is what they have done.

50. It is common ground that the suit land is a resultant sub – division of the land parcel No Bokoli/ Kituni/121 which was first registered in the names of the plaintiff's father on 18th January 1967. Change of ownership of the land occupied by the adverse possessor does not stop time from running – Githu .v. Ndeete (supra). Adverse possession is also a fact to be observed upon the land. It is not to be seen in a title – *Maweu .v. Liu Ranching & Farming Co – operative Society* 1985 eKLR. That fact, as I have already stated above, has been conceded by the plaintiff and is the basis of his suit.

51. Having considered the evidence by both parties, I am persuaded that although the plaintiff is the registered proprietor of the suit land which measures 29.8 acres, his right in 15 acres therein has been extinguished by operation of the law due to the defendants' adverse possession thereof. The 1st and 2nd defendants have proved that they have acquired by way of adverse possession 15 acres out of the suit land. The plaintiff cannot therefore evict them, their families, agents or any persons claiming through them, from the said 15 acres comprised in the land parcel No Bokoli/Kituni/1796 nor injunct them, their families, agents or any other persons claiming through them, from utilizing the said 15 acres. The plaintiff is similarly not entitled to any orders of mesne profits which, in any event, being a special damages claim, was neither specifically pleaded nor proved.

52. On the other hand, the 1st and 2nd defendants have proved that they have been in occupation and possession of 15 acres of land comprised in the land parcel No Bokoli/Kituni/1796 peacefully, exclusively, openly, un – interrupted without force or secrecy and with the knowledge of the plaintiff for the required statutory period. The plaintiff has been dispossessed of the said 15 acres and the 1st and 2nd defendants are entitled to orders that they have obtained that portion of land by way of adverse possession whose title the plaintiff only holds in trust for them.

53. Ultimately therefore, there shall be Judgment for the 1st and 2nd defendants against the plaintiff in the following terms: -

    1. The plaintiff's suit is dismissed.

    2. The 1st and 2nd defendants have acquired by way of adverse possession a portion measuring 15 acres out of the land parcel No Bokoli/ Kituni/196.

    3. The plaintiff shall within 30 days of this Judgment surrender the original title to the land parcel No Bokoli/Kituni/1796 for cancellation by the Land Registrar Bungoma.

    4. The Land Registrarand Land Surveyor Bungomashall thereafter sub – divide the land parcel No Bokoli/Kituni/1796 and register a portion measuring 15 acres in the names of Boaz Musucha Wakhwakuand Mark Mufumu Wakhwakuto hold in trust for the family of Rebah Bukhayo Wakhwaku.

    5. The plaintiff shall also within 30 days of this Judgment execute all the necessary documents to facilitate the registration of 15 acres out of the land parcel No Bokoli/Kituni/1796 in the

names of Boaz Musucha Wakhwakuand Mark Mufumu Wakhwakuand in default, the Deputy Registrarof this Court shall be at liberty to do so.

6. The plaintiff shall meet the costs of the dismissed suit and the Counter – Claim.

BOAZ N. OLAO.

JUDGE

28TH JUNE 2022.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 28TH DAY OF JUNE 2022 BY WAY OF ELECTRONIC MAIL.

Right of Appeal explained.

BOAZ N. OLAO.

JUDGE

28TH JUNE 2022