



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA**

**Civil Suit 64 of 2006(O.S)**

**WILFRED NYONGESA WEKESA                   : PLAINIFF**

~VRS~

**FRANCIS NASIUMA                               : DEFENDANT**

**JUDGMENT**

The Plaintiff Wilfred Nyongesa Wekesa brings this suit in way of originating summons against the Defendant Francis Nasiuma. It is the claim of the Plaintiff that he has acquired title to a 3.56 acres portion out of Malakisi/South Namwela/229 through adverse possession having lived on the land in quiet and undisturbed for over twelve (12) years. The Defendant denies the claim in his replying affidavit stating that the Plaintiff has not been in peaceful occupation of the premises as alleged.

The Plaintiff testified that in the year 1977, he bought a portion of land measuring 3.56 acres from one Sungura Bwayo. The portion was to be excised from land parcel number Malakisi/S. Namwela.229. The Plaintiff took possession of the land in the same year. He paid the purchase price through installments and completed payments in 1978. The deceased fell sick and died in 1982 before transfer was executed. It is the Plaintiff's case that the deceased had no son and he left his land to the Defendant who was his nephew. The Defendant was later to acquired the title to the land. The Plaintiff approached the Defendant who was a witness to the land sale agreement in 1977. The Defendant commenced the process of obtaining the relevant land board consent but later changed his mind. The Plaintiff continued in occupation of the land and has developed it by planting trees 550 coffee plants and other crops. He also has a home on the land in which he lives todate. The Plaintiff has now subdivided the parcel into two equal portions of 3.3 hectares each namely Malakisi/South Namwela/609 and 610. Parcel no.609 consists of the parcel claimed by the Plaintiff and is in the name of the Defendant.

PW2 is the daughter of the deceased Sungura Bwayo. She testified that she witnessed her late father selling land to the Plaintiff and took possession of the land and resides there todate. Her father sold 1 ¼ acres to the Plaintiff and marked boundaries.

The Defendant indeed admitted in his testimony that the Plaintiff bought some portion of land from the late Sungura Bwayo, the Defendant's uncle. It is the Defendant's case that the deceased did not transfer the land to the Plaintiff in the lifetime. The deceased later

bequeathed the land Malakisi/S. Namwela/229 to the Defendant in 1980.

The Defendant says that at the time he took possession and ownership of the land, the Plaintiff was not living there. He bought his two sons to live on the land about five years later. The defendant then issued the Plaintiff with quit notices. The Defendant was at one time willing to transfer to the Plaintiff the one and a quarter portion he bought from the deceased but the Plaintiff refused.

The Plaintiff produced a land sale agreement dated 28/8/1977 for sale of 3.56 acres of Ksh.4,350/= from one Sungura Bwayo. The agreement was reduced in writing by the Defendant himself as he admitted in his evidence. The village elder **"Omukasa"** also signed the said agreement. PW2 the daughter of the vendor Sunguma Bwayo was present when the agreement was made. From the evidence of both parties, it is not disputed that the Plaintiff bought land from the deceased Sungura Bwayo. The deceased had no son except six married daughters. He later transferred his land Malakisi/S. Namwela/229 to the Defendant as a gift. The Defendant admitted applying for land board consent for sub-division to separate the 3.5 acre portion. The Plaintiff has laid basis of the Plaintiff entering the portion of 3.5 acres. PW2 seems not to have been sure of the acreage sold. She said it was 1 ¼ acres which the Defendant supports when he said that he was ready to transfer that portion to the Plaintiff. The Plaintiff produced documentary evidence being the land sale agreement and the application for and letter of consent. These documents all signed by the Defendant show that the portion bought and intended to be separated from the land malakisi/s.Namwela/229 was 3.5 or 3.56 acres and not 1 ¼ acres. The Plaintiff has proved to the court that he bought 3.56 acres.

Under the provisions of the Land Control Act, the agreement in question became null and void on 28/02/1980 for failure to obtain the relevant Land Control Board consent. It could not be legally enforced even during the lifetime of the deceased.

The claim of the Plaintiff is based on adverse possession. The issue for the court to decide is whether the Plaintiff entered and occupied the portion of 3.56 acres and whether he has stayed there in quiet and undisturbed possession for the period prescribed by the law of twelve (12) years in order to acquire title by adverse possession.

The Plaintiff testified that he occupied the portion in 1977 soon after execution of the land sale agreement. His evidence was confirmed by that of PW2. The Defendant at first denied that the Plaintiff has ever occupied the land. It was the Defendant's evidence that the Plaintiff brought his two sons to the land to stay there five years after the Defendant had obtained registration of the land in his name. From the dates given by the Defendant, this must have been the year 1986.

The Defendant later contradicted himself. He said that the Plaintiff has used the land for twenty years to-date but argued that the Plaintiff did so illegally since he had not acquired any title. In cross-examination, the Defendant reiterated the same statement. The statement supports the evidence of the Plaintiff that he has been on the portion in question for over 20 years. The Defendant further agreed that the deceased had marked the boundaries of the respective portion and are still intact. It was the Plaintiff's case that he has planted 550 stems of coffee and other crops on the land. He has a home on the land. PW2 supported this evidence that the Plaintiff has extensively developed the land. The evidence on record is that the Defendant was the author of the land sale agreement. When he was given the land as a gift by his deceased uncle, he found the Plaintiff in occupation of the portion he had bought. Before the death of the deceased in 1981, the Plaintiff entered into negotiations with the Defendant to transfer to him his portion. The Defendant by applying and obtaining land board consent for sub-division made an attempt to execute transfer of the said portion. All this is an indicator that the parties had no serious problem or dispute about the portion the deceased had sold to the Plaintiff. After becoming the proprietor of the land, the Defendant did not institute any legal proceedings against the Plaintiff in opposition of the occupation of the portion of land. There is no evidence that the Defendant tried to evict the Plaintiff from the land. The purported quit notice dated 27/9/1981 was designed to suit this case. The Defendant did not in any way disturb or disrupt the quiet and peaceful possession of the Plaintiff from the land. At the time this suit was filed in 2006, the Plaintiff had lived on the land in undisturbed possession for over twelve (12) years.

The Plaintiff referred this court to two decisions in this matter. In the case of **GITHU –VRS- NDETTE CIVIL APPEAL NO.24 OF 1970** it was held by Madan JA, Law JA and Potter, JA that:

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

The judges said that when the possession has already began, the rights of the person in occupation are overriding interests to which the new registered purchasers title will be subject to. In this case, the Plaintiff rights had already began and the transfer of the land to the Defendant does not affect those interests. It is important to note that even after the Defendant became the registered owner, the Plaintiff stayed on the land peacefully and uninterrupted for twenty nine (29) years. This period was of course much more than what the law has prescribed.

In the second decision of **PUBLIC TRUSTEE -VRS- WANDUNI CIVIL APPEAL NO.73 OF 1982 COURT OF APPEAL, NAIROBI**. It was held that time begins to run from the time the person in adverse occupation entered the land. I find the two decisions relevant to this case and I am guided accordingly.

The Plaintiff in this case has proved on the balance of probabilities that he has acquired title through adverse possession to the 3.56 acre portion out of Malakisi/South Namwela/609 (new number after sub-division done on 28/3/88). The title is indefeasible by virtue of the Plaintiff being in a continuous uninterrupted and exclusive possession of the portion for the twelve years prescribed by the law. I enter judgment in favour of the Plaintiff against the Defendant for the orders sought in the Originating Summons. Given the unique circumstances of this case, that the Defendant was not the vendor of the land, each party will meet their own costs of this suit.

**F. N. MUCHEMI  
JUDGE**

Judgment dated and delivered on the 8th day of June 2010 in the presence of Mr Situma for Ikapel for the plaintiff.

**F. MUCHEMI  
JUDGE**