



**Makhanu v Wanjala (Environment & Land Case 18 of 2020)
[2022] KEELC 12595 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 18 OF 2020
BN OLAO, J
SEPTEMBER 19, 2022
IN THE MATTER OF LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF ENVIRONMENT AND LAND ACT
AND
IN THE MATTER OF ORDER 37 OF CIVIL PROCEDURE ACT**

BETWEEN

DISMAS WAKHULIA MAKHANU PLAINTIFF

AND

EUNICE NAKHUMICHA WANJALA DEFENDANT

JUDGMENT

- 1 Dismas Wakhulia Makhanu (the plaintiff herein) moved to this court *vide* an originating summons dated September 12, 2020 being ELC OS No 18 of 2020 seeking a determination of the following issues as against Eunice Nakhumicha Wanjala (the defendant herein) with regard to the land parcel No East Bukusu/North Kanduyi/665 measuring 11.4 acres (the suit land): -
1. Whether the said land parcel No East Bukusu/North Kanduyi/665 measuring 11.4 acres was owned by the deceased Prizika Nafula Wafula the mother to the defendant.
 2. Whether the defendant filed for succession of her deceased mother and is currently registered on the entire parcel namely East Bukusu/North Kanduyi/665 measuring 11.4 acres or 4.48 Hectares.



3. Whether the plaintiff entered and has remained in peaceful, notorious and open occupation of a portion measuring 6.1 acres out of the parcel number East Bukusu/north Kanduyi/665 from 1970 to date.
4. Whether the defendant's deceased mother Prizika Nafula Wafula had sold a portion measuring 5 acres out of the land parcel number East Bukusu/North Kanduyi/665 to Richard Situma who exchanged the same with Patrick Wekesa and the latter has settled on the same portion to date.
5. Whether the defendant's deceased mother Prizika Nafula Wafula moved to Trans – Nzoia where she bought another parcel of land and was buried there.
6. Whether the defendant moved away and got married and stays at her matrimonial home ever since and has never come back home.
7. Whether the defendant has moved to evict the plaintiff from the suit land upon registering herself as the proprietor of the land parcel number East Bukusu/North Kanduyi/665.
8. Whether the plaintiff's occupation of the 6.4 acres has been open, continuous and peaceful for over 30 years and is still in such occupation.
9. Whether the defendant is holding title to the portion measuring 6.1 (sic) acres part of land parcel number East Bukusu/North Kanduyi/665 in trust or in constructive trust in favour of the plaintiff.
10. Whether the plaintiff has acquired registrable rights and interest in the portion measuring 6.4 acres' part of the land parcel number East Bukusu/North Kanduyi/665 by adverse possession.
11. Whether the defendant should transfer the title to the portion measuring 6.4 acres of the said land to the plaintiff or in default, the executive officer of this honourable court to execute and transfer the said portion in favour of the plaintiff.
12. Whether the costs of this suit should be paid by the defendant.
13. Whether any other order should be made as the honourable court deems fit.

The originating summons was supported by the plaintiff's affidavit dated September 12, 2020 to which were annexed several documents.

- 2 In the said affidavit, the plaintiff avers that the defendant is a daughter to one Prizika Nafula Wafula and that as early as 1975 he entered the suit land and settled on a portion thereof measuring 6.4 acres which is registered in the defendant's name. That he has peacefully and openly lived on the said portion where he has put up a home and does cultivation and in 1992, the clan sub – divided the suit land and gave Prizika Nafula Wafula the deceased mother to the defendant 5 acres while he was given 6.4 acres. An agreement was made to that effect.
- (3) That Prizika Nafula Wafula thereafter sold her portion to one Richard Situma in 1995 who later exchanged it and gave the same to one Richard Patrick Wekesa who stays there to date. That the plaintiff has built various homes on the suit land where he co – exists with his neighbours and that is the place he knows as home having been in continuous, open, notorious and peaceful occupation of the 6.4 acres for over 30 years. That his efforts to obtain a title from Prizika Nafula Wafula were hampered by the fact that he moved away after selling her portion. He therefore seeks orders that the defendant is holding a portion measuring 6.4 acres of the suit land in trust for him and the same should therefore be transferred to him.



(4) Annexed to the said affidavit are the following documents: -

1. Copy of the title deed to the land parcel No East Bukusu/North Kanduyi/665 in the name of the defendant.
2. Certificate of Search for the land parcel No East Bukusu/North Kanduyi/665 dated February 24, 2020.
3. A document dated February 11, 1992.
4. An agreement dated September 17, 1995 between Prizika (Briska) Nafula Wafula and Richard Situma.
5. Photograph of houses.
6. Statement of the plaintiff dated September 12, 2020.

There is no record that the defendant filed any response to the originating summons.

5 On the other hand, the defendant moved to the Chief Magistrate's Court Bungoma and filed ELC case No 51 of 2020 and filed a plaint against the plaintiff seeking the following orders against the plaintiff with regard to the suit land: -

1. An order of permanent injunction restraining the plaintiff, his servants, agents and anybody acting under his instructions from encroaching, trespassing onto or interfering with the defendant's land parcel number East Bukusu/North Kanduyi/665.
2. An order of eviction to remove the plaintiff his agents, servants, relatives and properties from the defendant's land parcel number East Bukusu/North Kanduyi/665.
3. Costs of the suit.
4. Any other relief that this honourable court deems fit and just to grant.

The basis of the defendant's case is that she is the sole registered proprietor of the suit land since February 5, 2018. However, without any colour of rights, the plaintiff invaded the suit land and put up permanent structures thereon and continues with the trespass yet the defendant is desirous of developing it for the settlement of her family. That the plaintiff's occupation of the suit land is unlawful and an infringement of the defendant's proprietary rights. She pleaded also that her suit is neither res – judicata or sub judice.

6 The defendant also filed a statement and list of documents both dated July 21, 2020.

7 In her statement, she confirms that she is the only daughter of the late Joseph Wafula Maklufu and that the plaintiff is her cousin. That upon the demise of her father in 1973 she was appointed the administrator of his estate and the suit land was registered in her names. However, the plaintiff has put up permanent structures on the suit land thereby denying her the opportunity to utilize it hence this suit seeking the eviction of the plaintiff therefrom.

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

1. Copy of title deed for the land parcel number East Bukusu/South Kanduyi/665.
2. Copy of official search for the land parcel number East Bukusu/South Kanduyi/665.
3. Photograph of houses.



- 9 The plaintiff filed a defence dated August 10, 2020 in which he pleaded, *inter alia*, that the defendant did not follow the rightful process in acquiring the suit land and that he would file a proper suit for adverse possession. The plaintiff further pleaded that he is legally on the suit land and occupying the whole 4.48 hectares.
- 10 He filed a statement dated August 3, 2020 in which he states that he settled on the suit land and occupied 6.4 acres thereof way back in the 1970's. That he has lived peacefully and on February 11, 1992, their clan sub – divided the suit land between himself and Joseph Wafula Makhafu the father to the defendant. That he was given 6.4 acres while the defendant's mother Prizika Nafula Wafula was given 5 acres which she however sold to one Richard Situma on September 17, 1995 who then transferred it to his brother one Patrick Wekesa who has settled thereon. That Prizika Nafula Wafula later bought land near where the defendant has settled and it was there that she was buried. The he has lived peacefully on the suit land since 1992 to date and was shocked to be served with these pleadings.
- 11 The plaintiff filed the following documents: -
1. Document dated February 11, 1992.
 2. Photograph of houses.

On June 3, 2021 and with the consent of the parties, Bungoma ELC case No 18 of 2020 was consolidated with Bungoma Chief Magistrate's Court ELC Case No 51 of 2020 which had been transferred to this court for purposes of hearing. The originating summons in Bungoma ELC Case No 18 of 2020 became the plaint and the plaint in Bungoma Chief Magistrate's Court civil case No 51 of 2020 became the defence and counter – claim. The applicant in the originating summons became the plaintiff while the plaintiff in Bungoma Chief Magistrate's Court ELC Case No 51 of 2020 became the defendant.

- 12 The parties testified on February 15, 2022 and were the only witnesses in support of their respective cases. They adopted as their testimony the contents of their statements and/or affidavits and produced the documents filed as their documentary evidence.
- 13 Submissions were thereafter filed both by Mr Sichangi instructed by the firm of J. W Sichangi & Company Advocates for the plaintiff and by Mr Kundu instructed by the firm of Situma & Company Advocates for the defendant.
- 14 I have considered the evidence by the parties as well as the submissions by counsel.
- 15 I consider the following issues to be the only ones calling for my determination in resolving this dispute. And that is: -
1. Whether the plaintiff has acquired a portion measuring 6.4 acres out of the suit land by adverse possession or whether he is in fact occupying the said portion unlawfully and should be evicted.
 2. Who shall meet the costs?

It is not in doubt that the defendant is the registered proprietor of the suit land. She became the registered proprietor thereof on February 5, 2018 and it is clear from her testimony that the suit land previously belonged to her late father Joseph Wafula Maklufu before she acquired ownership thereof through transmission.

- 16 It is also not in doubt that the plaintiff is currently in occupation and possession of a portion measuring 6.4 acres out of the suit land where he has constructed houses and set up a home. Photographs of the houses were in fact produced by both parties. The defendant did not file any response to the originating summons but it is clear from her plaint in paragraph 6 (now her counter – claim) that her claim is that the plaintiff is a trespasser who has encroached onto the suit land without any justifiable reason.



- She therefore seeks his eviction therefrom and an order of permanent injunction restraining him, his servants, agents or anybody acting through him from encroaching onto the suit land.
- 17 As the registered proprietor of the suit land, the defendant is the absolute owner thereof and is entitled to all the rights and privileges belonging or appurtenant thereto as set out in section 24 of the [Land Registration Act](#) under which the title was issued. Those rights include the power to eject trespassers from the suit land which is among the remedies that the defendant seeks by her counter – claim. In response to the defendant’s counter – claim, the plaintiff suggested in paragraph 4 of his defence that the defendant “did not follow the laid down procedures to procure the title.” Apart from that bare allegation, the plaintiff did not offer any evidence to show in which manner the process of obtaining the title to the suit land may have been flawed. If it was done fraudulently, illegally or through any corrupt process, no evidence was led to impugn the defendant’s title to the suit land. I have no doubt in my mind that the defendant holds a good title to the suit land. Indeed, the fact that the plaintiff seeks a portion of the suit land by way of adverse possession is in itself a clear admission by the plaintiff that he recognizes the defendant’s title to the suit land.
- 18 The plaintiff’s claim, however is that he has been in open, continuous and peaceful occupation of a portion of the suit land measuring 6.4 acres since 1975 and the boundaries thereof were demarcated by the clan in 1992. He therefore seeks to be registered as the proprietor of that portion by way of adverse possession.
- 19 Notwithstanding the fact that the defendant is the registered proprietor of the suit land, that registration is still subject to the overriding interests set out in section 28 of the [Land Registration Act](#) which include under sub – section (h):-
- “rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”
- 20 Section 7 of the [Limitation of Actions Act](#) provides that: -
- 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.”
- 21 Section 38(1) of the same Act states: -
- 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 the proprietor of the land.”
- 22 In [Kasuve v Mwaani Investments Ltd & others](#) 2004 1 KLR 184, the Court of Appeal set out what a party seeking land by way of adverse possession must prove. It said: -
- “And in order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of land openly and as of right 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.” emphasis mine.
- 23 The plaintiff was also required to prove that his occupation of the suit land was “*nec vi nec clam nec precario*” i.e no force, no secrecy, no evasion – [Kimani Ruchine v Swift Rutherfords & Co Ltd](#) 1980



KLR 10. In a recent exposition on the doctrine of adverse possession, the Court of Appeal held as follows in *Mtana Lewa v Kabindi Ngala Mwangandi* CA civil appeal No 56 of 2014 [2015 eKLR]: -

“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, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential pre – requisite being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*

24 As stated earlier, the plaintiff’s occupation of a portion of the suit land measuring 6.4 acres is not really in doubt. Indeed, in her counter – claim, the defendant admitted as much and when she was cross – examined by Mr Sichangi counsel for the plaintiff, she confirmed that the plaintiff has constructed houses on the said portion. She even produced photographs of the houses as part of her documentary evidence. There is also no evidence that the plaintiff’s occupation and possession of the suit land has not been open, continuous, peaceful and with the knowledge of the defendant. In his submissions, counsel for the defendant Mr Kundu, tried to suggest that it has not been peaceful. Counsel submitted as follows: -

“Your lordship, for possession to be adverse, it must be actual open, notorious, register continuously interpreted (sic). Your lordship, the applicant herein has been in several times (sic) summoned by the chief when the respondent intervened he never called any witness to justify his agreements we will describe him as a trespasser, an advantage taker and one who has a zeal to dispose the respondent her right he had a chance to be listed as a beneficiary of the estate he has not contested the validity of the title deed your lordship.”

25 Counsel for the defendant has further submitted that: -

“Your lordship, *vide* Bungoma High Court succession cause No 208 of 2012, the respondent applied for succession of her father’s estate and a confirmation of grant was issued by Justice Abida Aroni on March 16, 2015 allocating the respondent the whole estate. Land parcel No East Bukusu/North Kanduyi/665. She later did transmission and got a title deed on February 5, 2018 in her name.

Your lordship, the process was never met by any objection by the applicant herein and the title is un – contested to – date.”

Counsel further takes issue with the fact that by an agreement dated February 11, 1992, the clan purported to set out the boundary between Prizika Nafula Wafula and the plaintiff yet it could not allocate land. I understand counsel to be urging the court to find that since the plaintiff had been summoned by the chief several times, his occupation of the suit land has not been peaceful. Further, that the plaintiff should have pursued his claim during the succession proceedings in Bungoma High Court succession cause No 208 of 2012 and that the plaintiff was infact allocated the suit land by the clan yet it had no such powers.

26 To begin with, other than a bare allegation that the plaintiff had been summoned by the chief, the defendant did not state when it was that the plaintiff was summoned. Further, no evidence was led showing what, if any, was the subject of those summons. The plaintiff made no mention of that in her oral testimony and this court cannot presume anything.



- 27 On the submissions that the plaintiff should have canvassed his claim to the suit land in the succession proceedings, the duty of a probate court is to distribute the estate of the deceased to the rightful beneficiaries. Such a court cannot entertain a claim in adverse possession and it would have no jurisdiction if it attempted to do so. That is why rule 41(3) of the *Probate and Administration Rules* allows the court distributing a deceased person's estate to set aside any property which is in dispute and await a determination of that issue in proceedings such as this one.
- 28 On the submissions that the clan purported to award the plaintiff the suit land yet that was not within its jurisdiction, counsel has referred to the document dated February 11, 1992 by which the clan purported to establish the boundary of the suit land as between the plaintiff and Prizika Nafula Wafula. The document is in Kiswahili language and should have been translated. However, the court agrees with counsel's interpretation of the document. It is true that the clan did not allocate the plaintiff any land and therefore, counsel is right when he submits that "you cannot transfer an interest that you don't own." Counsel is therefore right when he submits that the document "does not spell that the applicant was allocated land." What is clear, however, is that by the time the boundary was being set by the clan, the plaintiff had been in occupation and possession thereof since 1975 a period of 17 years. The role of the clan, in my view, was simply to recognize the various portions that were being occupied both by the plaintiff and Prizika Nafula Wafula and no more.
- 29 Counsel for the defendant has also submitted, citing the decision in *Alibhai v Alibhai* 1938 5 EACA 1, that the plaintiff's claim for the suit land by way of adverse possession could only run from February 5, 2018 when the defendant obtained the title to the suit land in her names. The green card to the suit land was not availed and so it is not clear when and in whose names it was first registered. What is clear from the proprietorship section of the title deed is that the defendant was the third owner and as is obvious from her own testimony, she acquired ownership by way of transmission from her late father who died in 1973. That means therefore that in 1973, the suit land was registered in the name of her late father Joseph Wafula Maklufu. It is now well settled that "the mere change of ownership of land which is occupied by another person under adverse possession doesn't interrupt such person's adverse possession" – *Githu v Ndeete* CA civil appeal No 24 of 1979 (1984 KLR 776). Therefore, when the defendant became the registered proprietor of the suit land, she acquired rights and interests therein but which were always subject to the plaintiff's overriding interests as a person in possession and which are protected by section 28(h) of the *Land Registration Act*.
- 30 Further, in a claim based on adverse possession, there must be evidence of discontinuation of possession by the owner. When she was cross – examined by Mr Sichangi, the defendant said: -

"The first registered owner of the land was called Wafula Maklufu. He was the first registered owner of the land in dispute. He was my father

My father never evicted the plaintiff from the land in dispute. It is true that the plaintiff has constructed houses on the land in dispute."

In *Wanje v Saikwa* No 2 civil appeal No 72 of 1982 [1984 KLR 284], the court said: -

"..... in order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it"

It is also clear from the plaintiff's supporting affidavit that the defendant's mother Prizika Nafula Wafula moved away from the suit land after selling her portion thereof to Richard Situma. She migrated elsewhere where she was married and buried. There is nothing to suggest that the defendant



has ever occupied the 6.4 acres which the plaintiff is claiming in this case. Therefore, both the defendant's deceased parents clearly discontinued their occupation and possession of the suit land long before she acquired registration thereof by way of transmission. And the plaintiff having entered the suit land in 1975, it is clear that any interest which the defendant may have had in the suit land had long been extinguished by operation of the law by the time she moved to the Chief Magistrate's Court Bungoma and filed ELC Case No 51 of 2020 seeking, inter alia, orders to evict the plaintiff from the suit land. On the other hand, the plaintiff's overriding interest in a portion of the suit land measuring 6.4 acres had long crystallized and all that was required of him was to move to this court and seek orders that he has acquired that portion of land by way of adverse possession and should be registered as the proprietor thereof. And that is what he did by filing this originating summons.

- 31 With regard to costs, they follow the event unless the court, for good reasons, decides otherwise. The parties herein are a family. The defendant said the plaintiff is her cousin. The order that commends itself in the circumstances of this case is to order that each party meets their own costs.
- 32 Ultimately therefore and having considered all the evidence herein, this court makes the following disposal orders: -
1. The defendant's counter – claim is dismissed.
 2. Judgment is entered for the plaintiff as follows: -
 - a. The plaintiff has acquired by way of adverse possession a portion measuring 6.4 acres out of the land parcel No East Bukusu/ North Kanduyi/665.
 - b. The defendant shall within 30 days of this judgment surrender to the land registrar Bungoma the original title deed to the land parcel No East Bukusu/North Kanduyi/665 for purposes of cancellation so that the plaintiff can be issued with his title for a portion measuring 6.4 acres.
 - c. The defendant shall also within 30 days of this judgment execute all the relevant documents to facilitate the registration of the plaintiff as the proprietor of a portion measuring 6.4 acres out of the land parcel No East Bukusu/North Kanduyi/665.
 - d. In default of (c) above, the Deputy Registrar of this court shall be at liberty to do so on behalf of the defendant.
 - e. The plaintiff shall meet the costs of that registration.
 - f. Each party shall meet their own costs of this suit.

Boaz N. Olao.

J U D G E

19th September 2022.

Judgment dated, signed and delivered at **BUNGOMA** on this 19th day of September 2022 by way of electronic mail.

Right of Appeal explained.

Boaz N. Olao.

J U D G E



19th September 2022.

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