



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 159 OF 2017 (O.S)

IN THE MATTER OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)

AND

IN THE MATTER OF THE LAND ACT (NO. 6 OF 2012)

AND

IN THE MATTER OF THE LAND PARCEL NO: KIMILILI/KIBINGEI/2633, 5357, 5358

BETWEEN

MARTIN LUSWETI WAFULA.....PLAINTIFF

VERSUS

JOHN WEKESA SIPENJA.....1ST DEFENDANT

FRED REUBEN MIMA.....2ND DEFENDANT

J U D G M E N T

MARTIN LUSWETI WAFULA (the plaintiff herein) filed this Originating Summons on 11th December 2017 against **JOHN WEKESA SIPENJA** and **PETER SIMIYU WECHULI** (the 1st and 2nd defendants respectively) claiming that he has acquired by adverse possession 9 acres of land comprised in titles **NO KIMILILI/KIBINGEI/2633, 5358 and 5357** registered in the names of the defendants. He sought a determination of the following issues: -

- 1. Whether the plaintiff has acquired title by adverse possession of the land comprised in titles NO KIMILILI/KIBINGEI/2633, 5358 AND 5357 for reasons set out in the supporting affidavit.**
- 2. Whether the defendants are the absolute registered proprietors of part of that parcel of land comprised in titles NO KIMILILI/ KIBINGEI/2633, 5358 and 5357.**
- 3. Whether the plaintiff has been in occupation of land or in possession of 9 acres of land comprised in titles NO KIMILILI/KIBINGEI/2633, 5358 and 5357 for a period of over 12 years openly, peacefully continuously and without force and has established a home and planted permanent crops herein.**
- 4. Whether the defendants have refused, failed and/or neglected to give/transfer titles to the plaintiff to the said 9 acres of land comprised in the titles aforesaid.**
- 5. Whether the defendants' titles to the said 9 acres of land comprised in titles NO KIMILILI/KIBINGEI/2633, 5358 and 5357 has now been extinguished by operation of law.**

Arising out of the above, the plaintiff sought the following orders: -

- a. A declaration that upon expiry of 12 years, the plaintiff should be registered as proprietor of the said 9 acres comprised in the titles aforesaid.**

b. That under Section 38 of the Limitation of Actions Act, the plaintiff should be registered as proprietor of the said 9 acres of land comprised in the titles NO KIMILILI/KIBINGEI/2633, 5358 and 5357.

c. A declaration that the defendants should be ordered to execute all the necessary land transfer documents to vest 9 acres of land comprised in titles NO KIMILILI/KIBINGEI/2633, 5358 and 5357 in the name of the plaintiff failure to do so the Deputy Registrar of this Court to be empowered to do so.

d. A declaration that the plaintiff herein be registered as the proprietor absolutely of the said 9 acres of land comprised in titles NO KIMILILI /KIBINGEI/2633, 5358 and 5357.

e. That this Honourable Court be pleased to grant any other relief it deems fit to grant in the circumstances.

The Originating Summons is supported by the plaintiff's affidavit dated 8th December 2017 to which are annexed the following documents: -

1. Plaintiff's statement.

2. Certificate of Search in respect of land parcel NO KIMILILI/ KIBINGEI/5357 registered in the name of the 1st defendant since 27th April 2016.

3. Certificate of Search in respect of the land parcel NO KIMILILI/ KIBINGEI/5358 registered in the names of the 2nd defendant since 27th April 2016.

4. Copy of title deed in respect of the land parcel NO KIMILILI/ KIBINGEI/2633 registered in the names of BENEDICT WAFULA KANISIO since 25th November 1997.

5. Summons dated 22nd June 2016 and addressed to LUSWETI WAFULA and MARGARET WAFULA requiring them to appear before the ASSISTANT COUNTY COMMISSIONER KIMILILI with respect to the land parcel NO KIMILILI/KIBINGEI/5357.

6. A letter dated 27th June 2014 and addressed to the DEPUTY REGISTRAR HIGH COURT BUNGOMA by the SENIOR CHIEF KIBINGEI LOCATION with regard to the dependants of BENEDICT WAFULA KANISIO (deceased).

7. A letter dated 23rd October 2017 and addressed to the CHAIRMAN OF KAKWANGWA CLAN by the 1st defendant directing how the land parcels NO KIMILILI/KIBINGEI/5358 and 5357 should be shared between some named individuals.

The basis of the plaintiff's claim is that the land parcel NO KIMILILI/ KIBINGEI/2633 and which gave rise to the land parcels NO KIMILILI/ KIBINGEI/5358 and 5357 (hereinafter the suit land) was ancestral land registered in the names of his late father BENEDICT WAFULA KANISIO (KANISIO) who died in 2014. That the plaintiff has since 1982 been in occupation of a portion of land measuring 9 acres out of the parcel NO KIMILILI/KIBINGEI/2633 which he has therefore acquired by way of adverse possession having lived there for over 20 years. However, he carried out an official search in 2016 and discovered that the defendants had registered themselves as the absolute owners of the suit land on 27th April 2016 and obtained titles thereto. That on or about 23rd October 2017, the elders served him with a notice to sub – divided the suit land where he lives with his family including his mother and brother.

The Originating Summons is opposed. The 1st defendant swore a replying affidavit dated 6th May 2018 in which he deponed, inter alia, that the suit land is registered in his names and that of the 2nd defendant who is his brother. That he has made several efforts to resolve the dispute herein and in March 2018, he asked the DEPTUY COUNTY COMMISSIONER KIMILILI to intervene and have the plaintiff deliver vacant possession of a portion of land that he is wrongfully in occupation of. However, the plaintiff declined saying he had already filed a case in BUNGOMA COURT. He visited the Court registry and found that this suit had already been filed and so he sought legal advice. That the plaintiff has not been in exclusive and un – interrupted possession of the suit land for over 12 years to warrant orders in adverse possession and this Originating Summons is a deliberate distortion of facts.

That in the 1970's, their late father JOSPEH WECHULI SILENGE purchased 12 acres out of an un – surveyed parcel of land in KIBINGEI KIMILILI from one KANISIO WAKHUNGU NAMACHE who had three sons two of whom migrated and settled in CHERANGANYI and KWANZA. The third son KANISIO who is the father of the plaintiff's remained behind and settled on 4 acres of the land which was then thought to be 16 acres. Later, when the land was surveyed, it was found to be only 12 acres and not 16 acres as had been assumed. KANISIO WAKHUNGU NAMACHE died before he could transfer the 12 acres to JOSEPH WECHULI SILENGE and following his death, his son KANISIO obtained Letters of Administration in respect to his father's Estate but did not disclose that JOSEPH WECHULI SILENGE had purchased 12 acres. JOSEPH WECHULI SILENGE therefore moved to the LAND DISPUTES TRIBUNAL which, after hearing the dispute ordered that 2 acres be awarded to KANISIO and 9 acres to JOSEPH WECHULI SILENGE. KANISIO did not appeal that award which was subsequently adopted by the KIMILILI COURT and 9 acres (3.6 Ha) was transferred to JOSEPH WECHULI SILENGE and 3 acres (1.3 Ha) to KANISIO. However, when the title deeds were issued both parcels were registered in the names of KANISIO. The error was however rectified vide Gazette Notice NO 6805 dated 19th December 1997. JOSEPH WECHULI SILENGE thereafter sought and obtained an eviction order against KANISIO who however had the same stayed. Following their father's death, the defendants sought and obtained a Grant of Letters of Administration and became the registered proprietors of the 9 acres by transmission. When KANISIO died in 2014, the defendants obtained an order of injunction to restrain his family from burying him on the suit land but his family forcefully went ahead and buried him thereon.

Meanwhile, the 1st defendant's son developed a brain tumor which kept him busy in various hospitals and this financially drained him from

prosecuting **BUNGOMA HIGH COURT CIVIL CASE No 38 of 2010** against the plaintiff. The outcome of that case remains unknown to the 1st defendant. That there have been previous Court cases between the plaintiff and the 1st defendant over the same subject matter and in order to find an amicable solution, the 1st defendant approached the plaintiff's clan with an offer of 2 acres which was rejected by the plaintiff even after the **DEPTY COUNTY COMMISSIONER** intervened. It is the defendant's case that his late father owned the suit land and the plaintiff is wrongfully claiming a small portion over which he has no right.

In support of their case, the defendants produced the following documents: -

- a. **Land Disputes Tribunal award made in 1997 in favour of their father (JWS 1).**
- b. **Eviction order issued in KIMILILI COURT CASE No 19 of 1997 (JWS 2).**
- c. **Instrument of transfer of land executed by the Executive Officer BUNGOMA COURT on 28th October 1997 (JWS 3).**
- d. **Mutation form that created parcel NO KIMILILI/KIBINGEI/2632 and 2633 (JWS 4).**
- e. **Kenya Gazette Notice notifying registration of Instrument of Transfer (JWS 5).**
- f. **Kenya Gazette Notice correcting the previous Gazette Notice (JWS 6).**
- g. **Register of title for parcel NO KIMILILI/KIBINGEI/2633 (JWS 7).**
- h. **Title deed for the land parcel NO KIMILILI/KIBINGEI/2633 issued to KANISIO on 24th November 1997 (JWS 8).**
- i. **Land Registrar's letter dated 28th November 1997 requesting KANISIO to deliver up the title to the Lands Officer (JWS 9).**
- j. **Eviction Order issued on 25th October 2000 against KANISIO in BUNGOMA CMCC No 403 of 1999 (JWS 10).**
- k. **Grant of Letters of Administration issued to JOH WEKESA SILENGE in the Estate of JOSEPH WECHULI SILENGE in BUNGOMA HIGH COURT SUCCESSION CAUSE No 91 of 2004 (JWS 11).**
- l. **Letter dated 28th March 2011 by the DISTRICT SURVEYOR asking the CHIEF to notify the parties to come and witness the exercise of establishing the boundary between land parcels NO KIMILILI/ KIBINGEI/2633 and 2632 (JWS 12).**
- m. **Injunction order issued on 9th May 2014 in BUNGOMA CMCC No 185 of 2014 restraining against the burying of KANISIO on the suit land (JWS 13).**
- n. **Letter by the ASSISTANT CHIEF confirming service of the Injunction Order (JWS 14).**
- o. **Letter by the CHIEF dated 27th June 2014 confirming that the 1st defendant is a son to KANISIO (JWS 15).**
- p. **Certificates of Search for land parcels NO KIMILILI/KIBINGEI/5357 and 5358 (JWS 16).**
- q. **Letter dated 23rd October 2017 making a settlement offer to the Chairman of the plaintiff's clan.**

The plaintiff filed a Supplementary affidavit dated 25th January 2019 in which he deponed, inter alia, that **KANISIO** was registered as the proprietor of the suit land by transmission from his father **KANISIO WAKHUNGU NAMACHE** following **KAKAMEGA HIGH COURT SUCCESSION CAUSE No 81 of 1996** but the defendants fraudulently obtained registration of the same in their names without any sale agreement. That the defendants sold part of the land to **BISHOP MOSES NYONGESA NAFULA**, **SOSPETER NYONGESA** and **DORIS NEKESA KHAEMBA** and are under pressure to refund the purchase price since they have no land. That the defendants had filed **BUNGOMA HIGH COURT CIVIL CASE No 38 of 2010** which was however dismissed for want of prosecution and the plaintiff would therefore be seeking the consolidation of this suit and **BUNGOMA HIGH COURT CIVIL CASE No 38 of 2010**. That the defendants should produce the land sale agreement and although their father had filed **BUNGOMA CMCC No 403 of 1999** seeking eviction orders, those orders were stayed.

Annexed to that supplementary affidavit are the following documents: -

1. **Gazette Notice No 2308 dated 6th March 1996 in respect of the Estate of CANISIO W. NAMACHI in respect of KAKAMEGA HIGH COURT SUCCESSION CAUSE No 81 of 1996 filed by KANISIO.**
2. **Pleadings in KAKAMEGA HIGH COURT CIVIL CASE No 38 of 2010 between JOHN WEKESA SIPENJA & PETER SIMIYU SIPENJA .V. BENEDICT WAFULA KANISIO.**
3. **Letter dated 27th June 2014 from the SENIOR CHIEF KIBINGEI LOCATION continuing that the plaintiff is the son of**

KANISIO.

4. Photograph.

The hearing commenced on 27th October 2020 when the plaintiff testified and adopted as his evidence his two affidavits and the annexures thereto contents of which I have already summarized above.

The 1st defendant testified on behalf of the defence and similarly adopted as his evidence the contents of his replying affidavit contents of which I have also already summarized. He also produced as his documentary evidence the documents annexed thereto.

At the end of the trial on 27th October 2020, it was agreed both by **MR WEKESA** holding brief for **MR OKWI** Counsel for the plaintiff and **MR WASILWA** Counsel for the defendants that the plaintiff's submissions would be filed and served within 14 days after which the defendants would file and serve their submissions within 7 days of service. The case would then be mentioned on 24th November 2020 to confirm compliance and take a date for Judgment. However, by the time the case was mentioned on 24th November 2020, only the plaintiff's Counsel had complied. I have therefore not had the benefit of the defendant's submissions in drafting this Judgment.

I have considered the evidence by the plaintiff and the 1st defendant who are the only witnesses who testified as well as the submissions by Counsel for the plaintiff.

I must start by confirming that although in paragraph 8 of his supplementary affidavit the plaintiff avers that he would be requesting this Court to consolidate this case with **BUNGOMA HIGH COURT CIVIL CASE No 38 of 2010 – JOHN WEKESA SIPENJA & PETER SIMIYU SIPENJA .V. BENEDICT WAFULA KANISIO**, it is clear from paragraph 7 of the same affidavit that the said suit was in fact dismissed for want of prosecution. The 1st defendant in paragraph 15 of his replying affidavit averred that the suit was determined in his absence and he does not know the outcome. Since he and the 2nd defendant were the plaintiffs in that case filed against **KANISIO**, this Court can safely conclude that the said case was indeed dismissed for want of prosecution as deponed by the plaintiff in his supplementary affidavit. It is important that the record with regard to that case is clarified so as to allay any fears that this suit may be sub – judice.

Having confirmed that this suit is not in violation of the sub – judice rule as set out in **Section 6** of the **Civil Procedure Rules**, I shall now examine the merits or otherwise of the plaintiff's claim.

It is not in dispute that the suit land is a resultant sub – division of the original land parcel **NO KIMILILI/KIBINGEI/2633** which, as per the title deed produced herein, was first registered in the names of **KANISIO** on 25th November 1997. It is also not in dispute that the suit land has since 27th April 2016 been registered in the names of the defendants. Parcel **NO KIMILILI/KIBINGEI /5357** is registered in the names of the 2nd defendant while parcel **NO KIMILILI/ KIBINGEI/5358** is registered in the names of the 1st defendant. The plaintiff seeks orders that he is entitled to those two parcels (the suit land) by way of adverse possession having lived thereon since 1982. He claims a portion measuring 9 acres. Parcel **NO KIMILILI/KIBINGEI/5357** measuring 2.2 Ha (5.4 acres) while parcel **NO KIMILILI/KIBINGEI/5358** measures 1.4 Ha (3.4 acres).

Section 38 (1) of the Limitation of Actions Act allows a person who is in possession of land belonging to another to approach the Court to declare him the owner of the said land in place of the registered proprietor. It reads: -

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

In **TITUS KASUVE .V. MWAANI INVESTMENT LTD C.A CIVIL APPEAL No 35 of 2002 (2004 1 KLR 184)**, the Court of Appeal stated that a person claiming land registered in the names of another through adverse possession must prove: -

“..... that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA (NO 2) 1984 KLR 284. A title by adverse possession can be acquired under Limitation of Actions for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession cannot interrupt such person's adverse possession – GITHU .V. NDEETE 1984 K.R 776.”

The claimant must also prove that he has been in occupation and possession of the land which he claims **nec vi nec clam nec precario** i.e. without force, without secrecy and without persuasion – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & COMPANY LTD 1976 – 80 1 KLR 1500 (1980 KLR 10)**. The occupation must also be peaceful. In **GRACE WAIRIMU SOROMA .V. CHAKA LTD & OTHERS 2017 eKLR**, the Court of Appeal stated the following: -

“What the Applicant needed to prove was that her occupation was continuous, open and peaceful without the permission of the owner.” Emphasis added.

A person claiming land by adverse possession must also show that his possession is hostile to the title of the owner. In **KWEYU .V. OMUTO 1990 KLR 709** the Court of Appeal stated at page 716 that: -

“By adverse possession, is meant a possession which is hostile, under a claim or colour of title, actual open, uninterrupted,

notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor.” Emphasis added.

In **SISTO WAMBUGU .V. KAMAU NJUGUNA C.A CIVIL APPEAL No of 1982 [1983 eKLR]**, **CHESON Ag J.A** (as he then was) cited with approval the following words of **LINDLEY MR in LITTLEDALE .V. LIVERPOOL COLLEGE [1900 1 CH. 19]**.

“In order to acquire by the Statute of Limitations 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” Emphasis added.

Therefore, in a claim for adverse possession, the claimant must have dispossessed the true owner of the land which he claims and proceeded to use it as the owner would.

Guided by the above principles, the plaintiff’s case is that he has been in occupation of a portion of the original land parcel **NO KIMILILI/KIBINGEI /2633** measuring 9 acres since 1982 and has constructed houses and planted crops thereon. That is not really in dispute. He has produced as part of his documents the title deed to the above land parcel showing that it was first registered in the names of his father **KANISIO** on 24th November 1997. The titles to the suit land were created on 24th April 2016 and registered in the names of the defendants. Therefore, for purposes of adverse possession thereof, time could not run in favour of the plaintiff from 24th November 1997. This is because on that date, the original land parcel was still registered in the names of his father **KANISIO** and obviously the plaintiff was in occupation and possession of the portion that he is now claiming with the permission of his father. It cannot be said under those circumstances that he had asserted any hostile claim against his father or that he had dispossessed his father of the same. In my view, for purposes of adverse possession, and as long as land parcel **NO KIMILILI/KIBINGEI/2633** was registered in the names of **KANISIO**, time could only start running from 28th November 1998 as I shall demonstrate shortly.

The term dispossession is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as follows: -

“Deprivation of or eviction from rightful possession of property; the wrongful taking or withholding of possession of land from the person lawfully entitled to it.”

The term dispossess is defined in the same **DICTIONARY** as follows: -

“To take property or land away from; to oust or evict (someone) from property.”

Having said so, however, and although the plaintiff produced as part of his documents the title deed to the original land parcel **NO KIMILILI/KIBINGEI /2633** showing that it was registered in the names of his father **KANISIO** on 25th November 1997, the defendants have produced evidence that infact that title was subsequently cancelled by the Land Registrar vide Gazette Notice No 6805 issued on 19th December 1997 following orders from the **KIMILILI MAGISTRATE’S COURT IN CIVIL CASE No 19 of 1997**. And although the new title deed issued in the names of the defendant’s father **JOSEPH WECHULI SILENGE** was not produced, the Gazette Notice No 6805 issued on 19th December 1997 is very clear. Due to it’s relevance, I shall reproduce it in full: -

“GAZETTE NOTICE NO 6805

THE REGISTERED LAND ACT

(CAP 300 SECTION 33)

REGISTRATION OF INSTRUMENT.

Whereas Benedict Wafula Kanisio of Kibingei in the Republic of Kenya is registered as proprietor of that piece of land known as KIMILILI/KIBINGEI/2633 situate in the district of BUNGOMA, and whereas the Magistrate’s Court at KIMILILI in civil suit No. 19 of 1997 has ordered that the said piece of land be transferred to Joseph Wechuli Silenge of P.O. Box 499 BUNGOMA, and whereas the Executive Officer of that Court has in pursuance to an order of the said Court executed a transfer of the said piece of land in favour of Joseph Wechuli Silenge of P. O. Box 499 BUNGOMA, and whereas all efforts made to compel the registered proprietor to surrender the land title deed issued in respect of the said piece of land to the Land Registrar have failed, notice is given that after the expiration of thirty (30) days from the date hereof provided no valid objection has been received within that period, I intend to dispense with the production of the said land title deed and proceed with the registration of the said instrument of transfer and issue a land title deed to the said Joseph Wafula Kanisio and upon such registration, the land title deed issued earlier to the said Benedict Wafula Kanisio shall be deemed to be cancelled and of no effect.

Dated the 19th December 1997

D. M. MUHANJI

LAND REGISTRAR

BUNGOMA/MT ELGON DISTRICTS.”

Despite the slight typographical error in the above Gazette Notice where **JOSEPH WECHULI SILENGE** is wrongfully referred to as **JOSEPH WAFULA KANISIO** towards the end, it is clear that the title deed in respect to land parcel **NO KIMILILI/KIBINGEI/2633** issued to **BENEDICT WAFULA KANISIO** on 25th November 1997 was in fact cancelled one month later and although the title deed issued to **JOSEPH WECHULI SILENGE** has not been availed for this Court's perusal, the defendants produced among their documents the Register of title for the said land parcel showing that on 28th November 1998 **JOSEPH WECHULI SILENGE** was registered as the proprietor of the land parcel **NO KIMILILI/KIBINGEI/2633**. The copy of Register is duly certified by the Land Registrar Bungoma and was also produced by the defendants. It is instructive to note that **BENEDICT WAFULA KANISIO** did not appeal the decision of the Tribunal which was adopted by the **KIMILILI COURT** leading to the issuance of a new title deed in the names of **JOSEPH WECHULI SILENGE**. Under **Section 37(1)** of the **repealed Registered Land Act** under which the title was issued, that copy of the register is prima facie evidence of the contents thereof. A similar provision is found in **Section 35(2)** of the new **Land Registration Act**. This Court is of course not seized of any appeal from the decision of the Tribunal. Indeed, any appeal from the decision could only have been filed in the first instance to the Appeals Committee as provided under **Section 8(1)** of the **repealed Land Disputes Tribunal Act** and thereafter to this Court on a point of law. Therefore, for all practical purposes, the land parcel **NO KIMILILI /KIBINGEI/2633** was in fact properly registered in the names of the defendants' father **JOSEPH WECHULI SILENGE** from 28th November 1998. In my view, whereas the plaintiff could not mount a successful claim in adverse possession for a portion of that land so long as it was still registered in the names of his father **KANISIO**, the situation changed when, as it has now been shown by the defendant's own evidence, the original land parcel **NO KIMILILI/KIBINGEI /2633** was subsequently registered in the names of the defendants' father **JOSEPH WECHULI SILENGE** on 28th November 1998 following a Court order. Time for purposes of adverse possession therefore runs from 28th November 1998 because as unlike against his father **KANISIO**, the plaintiff could assert a hostile title against the defendant's father **JOSEPH WECHULI SILENGE** being the registered proprietor of the land parcel **NO KIMILILI/KIBINGEI/2633**.

As the registered proprietor of the land parcel **NO KIMILILI/KIBINGEI /2633**, there is no evidence that **JOSEPH WECHULI SILENGE** took any action to assert his ownership thereof by evicting the plaintiff from the portion that he occupies. In his replying affidavit, the 1st defendant refers in paragraph 16 to previous Court cases involving him and the plaintiff over the suit land. I must at this stage mention that some of the documents produced by the defendants were not very legible. Be that as it may, the Tribunal's award of 1997 and the subsequent eviction orders did not involve the plaintiff and the defendants. Instead, that award and the **KIMILILI COURT CASE No 19 of 1997** involved **JOSEPH W. SILENGE** and **BENEDICT WAFULA KANISIO** the fathers to the parties herein. There is no evidence that **JOSEPH W. SILENGE** filed any suit against the plaintiff after he was registered as the proprietor of the land parcel **NO KIMILILI/KIBINGEI/2633** in assertion of his rights thereto. And even after the defendants were registered as proprietors of the suit land on 24th April 2016, they too did not take any such action. It must be remembered that the plaintiff has filed this suit in his own capacity as the party in occupation and possession of the suit land and not as a representative of the Estate of his late father **KANISIO**. The only way that the defendants' father **JOSEPH WECHULI SILENGE** could have asserted his right to the original land parcel **NO KIMILILI/KIBINGEI/2633** would have been by filing a suit against the plaintiff or by making an effective re – entry. He did none of the above and neither did the defendants after the said land had been sub – divided to give rise to the suit land – **GITHU .V. NDEETE 1984 KLR 776**. The injunction order issued by **BUNGOMA CHIEF MAGISTRATE'S COURT CIVI9L CASE No 185 of 2014** on 9th May 2014 restraining the family of **BENEDICT WAFULA KANISIO** from interring his remains on the land parcel **NO KIMILILI/KIBINGEI/2633** could not have interrupted the adverse possession by the plaintiff as it came too late. By 9th May 2014, the plaintiff and his family had been in occupation and possession of a portion of the original land parcel **NO KIMILILI/KIBINGEI/2633** for a period of 16 years (1998 – 2014) well in excess of the 12 years statutory period that allowed the defendants to claim the land. By 2014, the rights of the defendants' father **JOSEPH WECHULI SILENGE** to the land parcel **NO KIMILILI/KIBINGEI /2633** had already been extinguished by operation of the law.

The defendants acquired ownership of the suit land being resultant sub – divisions of the original land parcel **KIMILILI/KIBINGEI/2633** on 24th April 2016 when titles were issued to them for their respective parcels. However, the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such a person's adverse possession – **GITHU .V. NDEETE** (supra). The defendants' registration as owners of the land parcels **NO KIMILILI/KIBINGEI/5358** and **5357** in 2016 was therefore always subject to the plaintiff's overriding interests in the said land parcels as recognized by **Section 28(h)** of the **Land Registration Act** which reads: -

“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: -

(a) –

(b) –

(c) –

(d) –

(e) –

(f) –

(g) –

(h) Rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription.”

The plaintiff seeks to be registered as the proprietor of 9 acres comprised in the suit land. The Certificate of Search for the suit land shows

that the total acreage is 3.6 Ha (KIMILILI/KIBINGEI/5357 measures 2.2. Ha while KIMILILI/KIBINGEI /5358 measures 1.4 Ha). The title deed for the original parcel NO KIMILILI/ KIBINGEI/2633 shows that it measures approximately 3.6 Ha which is 8.89 acres. And although the 1st defendant averred in paragraph 19 of his replying affidavit that the plaintiff is wrongfully claiming **“a small portion of land over which he has not right whatsoever,”** the plaintiff’s assertion is that he and his family have always occupied the 9 acres which belonged to his late father KANISIO. It is clear from the title deed to the land parcel NO KIMILILI/ KIBINGEI/2633 that it was a resultant sub – division of land parcel NO KIMILILI/KIBINGEI/941. Given the fact that the defendants’ father had filed BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 403 OF 1999 and obtained eviction orders against KANISIO with respect to the land parcel NO KIMILILI/KIBINGEI/941 lends credence to the plaintiff’s case that indeed he and his family have been in occupation of the 9 acres now comprised in land parcels NO KIMILILI/KIBINGEI/5357 and 5358 and registered in the names of the defendants.

The plaintiff also annexed to his supplementary affidavit dated 25th February 2019 the pleadings in BUNGOMA HIGH COURT CIVIL CASE No 38 of 2010 in which the defendants were seeking against KANISIO the main remedy of eviction from the land parcel NO KIMILILI/KIBINGEI/2633 as per paragraph 10(a) thereof. That is the case whose determination remains unknown. What is important, however, is that the defendants could not have been seeking the eviction of KANISIO from the land parcel NO KIMILILI/KIBINGEI/2633 yet at the same time plead, as the 1st defendant has done in paragraph 19 of his replying affidavit dated 6th may 2018, that the plaintiff and his family is only claiming **“a small portion of land.”** The veracity of the evidence before me suggests that what the plaintiff and his family have always occupied since 1997 to – date has always been the land parcel NO KIMILILI/KIBINGEI/2633 now sub – divided since 2016 to give rise to the land parcels NO KIMILILI/KIBINGEI/5358 and 5357 which he now claims through this suit.

The up – shot of the above is that there shall be Judgment for the plaintiff against the defendants in the following terms: -

1. An order that the plaintiff has acquired by way of adverse possession the land parcels NO KIMILILI/KIBINGEI/5358 and 5357.
2. An order that the defendants’ titles to the land parcels NO KIMILILI/KIBINGEI/5358 and 5357 have been extinguished by operation of the law.
3. The defendants shall within 30 days of this Judgment execute all the relevant documents to facilitate the transfer of the land parcels NO KIMILILI/KIBINGEI/5358 and 5357 into the names of the plaintiff.
4. In default of (3) above, the Deputy Registrar shall be at liberty to execute such documents on behalf of the defendants.
5. The defendants shall meet the costs of the suit.

Boaz N. Olao.

J U D G E

21st January 2021.

Judgment dated, signed and delivered at BUNGOMA this 21st day of January 2021 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.

Boaz N. Olao.

J U D G E

21st January 2021.