



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 18 OF 2010

JOHN WEFWAFWA MBAKAYA.....PLAINTIFF

VERSUS

MOSES WASIKE WABOMBA (Substituted by JUDITH MUYOKA WABOMBA).....DEFENDANT

J U D G M E N T

JOHN WEFWAFWA MBAKAYA (the plaintiff herein) moved to this Court by his plaint dated 14th July 2003 and filed herein on the same dated seeking Judgment against **MOSES WASIKE WABOMBA** the defendant herein (later substituted by his wife (**JUDITH MUYOKA WABOMBA**)) in the following terms: -

- 1. Eviction of the defendant from the land parcel NO BOKOLI/MUKUYUNI/1128.**
- 2. Costs of the suit.**
- 3. Interest at Court rates.**
- 4. Any other relief that this Honourable Court may deem fit to grant in the circumstances.**

The basis of the suit is that the plaintiff is the registered proprietor of the land parcel **NO BOKOLI/MUKUYUNI/1128** (the suit land) measuring 12 acres since 19th March 2003 having acquired the same through transmission from his father **ISAIAH MBAKAYA NAKOKONYA** who was the original registered proprietor. That on or about January 1974, the defendant wrongfully trespassed onto a portion of the suit land and has refused to vacate even after being ordered to do so by the **ASSISTANT CHIEF, CHIEF CHWELE LOCATION**, the **DISTRICT OFFICER CHWELE DIVISION** as well as the **OFFICER COMMANDING BUNGOMA POLICE STATION**.

The defendant filed a defence on 1st September 2003 denying those averments and pleading, inter alia, that he bought a portion of the suit land measuring 2½ acres from one **JOHNSTONE WEFWAFWA** who was a cousin to the plaintiff in 1962. That the suit land was by then still unregistered and the 2 ½ acres was the portion of the said **JOHNSTONE WEFWAFWA**. That the plaintiff could not have acquired any better right in the suit land than his predecessor in title. That the defendant is therefore not a trespasser but occupies a definite portion openly and with the knowledge of the plaintiff whose claim to the 2½ acres has been extinguished by prescription. The defendant pleaded further that a Preliminary Objection would be raised on the ground that this suit is barred by the statute of Limitation and should be struck out for being vexatious frivolous and a flagrant abuse of the Court process. That the plaintiff is therefore not entitled to any orders of eviction.

The plaintiff filed a reply to the defence reiterating the contents of his plaint and denying the defendant's claims.

Together with their pleadings, the parties filed their respective documents. The plaintiff filed the following documents: -

- 1. Title Deed for the suit land.**
- 2. Green Card for the suit land.**
- 3. Certificate of Search in respect of the suit land.**
- 4. Death Certificate of ISAIAH MBAKAYA NAKOKONYA.**

5. Certificate of Confirmation of Grant in BUNGOMA HIGH COURT SUCCESSION CAUSE No 21 of 2002 issued to the plaintiff in respect to the Estate of ISIAAH MBAKAYA KOKONYA

6. Minutes of meeting of 27th January 1984.

The defendant filed the following documents: -

1. Agreement dated 7th October 1962.

2. Limited Grant issued to JUDITH MUYOKA WABOMBA in respect to the Estate of MOSES WASIKE WABOMBA.

On 26th January 2005, the parties filed their joint agreed issues after which the trial commenced on 1st November 2010 before **MUCHEMI J** when the plaintiff testified.

In his testimony, the plaintiff told the Court that since 1964, the suit land originally belonged to his late father **ISIAAH MBAKAYA KOKONYA** who died on 21st January 1984. He produced a copy of the Death Certificate and the register to the suit land – plaintiff's exhibits 1 and 2. Following his father's death, the plaintiff filed **BUNGOMA HIGH COURT SUCCESSION CAUSE No 21 of 2002** and being the only beneficiary to his father's Estate, he acquired the suit land by way of transmission. He added that the defendant had entered the suit land in 1974 and his father reported the matter to the village elders. However, the defendant refused to vacate. The matter was also reported to the area **ASSISTANT CHIEF** but the defendant was still adamant.

When the **"LUFU"** ceremony was conducted after the death of the plaintiff's father, the defendant did not lay any claim to the suit land. The plaintiff produced the Minutes of the **"LUFU" CEREMONY** held on 27th January 1984. He denied the defendant's claim of having bought two acres from the plaintiff's father in 1962 stating that his father only acquired ownership of the suit land in 1964 two years after the alleged sale agreement was signed between the defendant and the plaintiff's father. He added that the defendant did not file any objection during the succession process although he continues to occupy 1¼ ACRES of the suit land, the plaintiff occupies the remainder.

For several reasons including the death of the defendant, it was not until 13th October 2020 that the defence case was heard after the defendant had been substituted with his wife **JUDITH MUYOKA WABOMBA**.

In her testimony, **JUDITH MUYOKA WABOMBA** adopted her statement filed herein on 10th May 2019. In the said statement, she states that she is the widow to the late **MOSES WASIKE WABOMBA** who died on 5th May 2012 leaving behind 10 children. That prior to his death, the deceased had purchased a parcel of land measuring 2 acres from one **JOHN WEFWAFWA** at a consideration of Kshs. 400/= via a sale agreement dated 7th October 1962. That the deceased developed the said portion where he and his family have lived for over 50 years being their only asset and source of livelihood.

Submissions were thereafter filed both by **MR BWONCHIRI** instructed by the firm of **OMUNDI BWONCHIRI & COMPANY ADVOCATES** for the plaintiff and by **MR KITUYI** instructed by the firm of **A. W. KITUYI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by both parties together with the documents filed and the submissions by Counsel.

The plaintiff's case is that the defendant is a trespasser on the suit land and should be evicted therefrom. The defendant's case is that in fact her deceased husband **MOSES WASIKE WABOMBA** purchased a portion of the suit land measuring 2 acres from one **JOHNSTONE WEFWAFWA** vide a sale agreement dated 7th October 1962 at a consideration of Kshs. 400/=. The defendant therefore denies being a trespasser. There are however some contradictions as to exactly how much land **MOSES WASIKE WABOMBA** purchased from **JOHNSTONE WEFWAFWA** in 1962. In the defence filed herein on 1st September 2003, it is pleaded in paragraph 3 that the portion measured 2½ acres. In her statement filed on 10th May 2019, the portion is described as measuring 2 acres and when she testified before me on 13th October 2020, she stated that the portion which her husband purchased measured 218 feet by 44 feet which is the same measurement in the sale agreement dated 7th October 1962. In his testimony, the plaintiff told the Court that the defendant resides on a portion measuring 1¼ acres. While there are contradictions as to the exact acreage of the parcel of land that the defendant occupies, it is common ground that the defendant and his family have since 1974 occupied a portion of the suit land and continues to do so to date. It is also not in dispute that the suit land was first registered in the names of the defendant's father **ISIAAH MBAKAYA NAKOKONYA** on 31st December 1964 before it was registered in the plaintiff's name on 19th March 2003. He holds the title thereto issued to him on the same day. It has not been suggested that the plaintiff obtained his title to the suit land fraudulently or through other illegal means. He obtained it through a succession process that has not been faulted. He therefore holds a good title to the suit land.

As the registered proprietor, the plaintiff enjoys all the rights and privileges belonging thereto but subject to any other rights and interests recognized by law. The interest conferred by registration includes the right to eject trespassers which is what the plaintiff herein seeks. **Sections 25 and 26** of the new **Land Registration Act** is clear on that. Similar provisions existed in **Sections 27 and 28** of the repealed **Registered Land Act** under which the title to the suit land was issued on 19th March 2003. The defendant however claims that he owns the portion of the suit land which he has occupied since 1962 having purchased it from one **JOHNSTONE WEFWAFWA** vide an agreement dated 7th October 1962. What this Court must therefore examine is whether in fact the defendant has any legal interest in the portion of the suit land that he and his family occupy.

In support of his claim to the portion of the suit land that he occupies, the defendant produced a sale agreement dated 7th October 1962 between him and one **JOHNSTONE WEFWAFWA**. I have perused the said agreement and apart from stating that the seller was

JOHNSTONE WEFWAFWA and the buyer **WASIKE WABOMBA** and that the portion measured 218 by 44 (it is not clear if it was feet or metres) at a consideration of Kshs. 400/=, there is nothing to show that what was being sold was a portion of the suit land. The plaintiff has testified that his father acquired ownership of the suit land in 1964 and could not have sold part of it in 1962. The sale agreement is infact between one **JOHNSTONE WEFWAFWA** and the defendant and not between the plaintiff's father and the defendant. The Green Card to the suit land shows that it was first registered in the names of the plaintiff's father on 31st December 1964 before the plaintiff acquired ownership thereof on 19th March 2003. It was therefore never the property of the said **JOHNSTONE WEFWAFWA** at any one time. He could therefore not transfer any portion thereof to the defendant in 1962 or at any time because he had no interest in the same. Even assuming that the sale agreement dated 7th October 1962 was in respect to a portion of the suit land, the said **JOHNSTONE WEFWAFWA** did not pass any title to the defendant. In **JANE GACHOKI GATHECHA .V. PRISCILLA NYAWIRA GITUNGU & ANOTHER C.A CIVIL APPEAL Nos 343 and 345 of 2002 [2008 KLR]**, the Court stated thus: -

“A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

For this Court to purport to enforce the sale agreement dated 7th October 1962 would amount to enforcing on illegality which a Court of law will not countenance – **MISTRY AMAR SINGH .V. KULUBYA 1963 E.A 408**. Therefore, if the defendant thinks that she can retain the land pursuant to that agreement, she must be disabused of that notion.

Both Counsel devoted much of their submissions on the issue of whether or not the plaintiff's suit is barred by the statute of limitation. Counsel for the defendant citing **Section 7 of the Limitation of Actions Act** submitted that since the defendant entered the suit land in January 1974, this suit was brought out of time and should be struck out pursuant to the provisions of **Section 7 of the Limitation of Actions Act** which reads: -

“An action may not be brought by a 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.”

Counsel for the defendant cited the cases of **KENYA CIVIL AVIATION AUTHORITY .V. HONOURABLE W K & OTHERS 2019 eKLR** and **NELSON MACHOKA KERARO .V. LAND REGISTRAR KISII & OTHERS 2019 eKLR** in support of his submission that the plaintiff's claim should be struck out for being statute barred.

On the other hand, Counsel for the plaintiff took the view that the plaintiff's claim being one of trespass, it is not barred by the provisions of **Section 7 of the Limitation of Actions Act** since the plaintiff's claim is based on a continuing trespass which arise from day to day so long as the trespass continues. In support of that proposition, Counsel cited my own decision in **PETER MWANGI KABUI .V. RURAL ELECTRIFICATION AUTHORITY 2016 eKLR**.

I have perused the record herein. The plea of Limitation was first raised before **W. KARANJA J** (as she then was) as a Preliminary Objection. The Judge however dismissed it by a ruling delivered on 26th September 2008 arguing that it did not meet the threshold set out in the case of **MUKISA BISCUIT MANUFACTURING CO LTD .V. WEST END DISTRIBUTORS LTD 1969 E.A 696** because there were disputed issues. Nonetheless, in the final paragraph of that ruling, the Judge stated as follows: -

“For this reason, though the Preliminary Objection appears cogent, I will disallow the same and order that the matter proceeds to hearing.”

For my part, all that I can say on the issue of limitation is that where an owner of land is in occupation and possession of land and another party enters it and proceeds to erect structures thereon, that is essentially a continuing trespass which will not be defeated by the statute of limitation. In my view, the case law on what amounts to a continuing trespass has been well covered in the submissions by **MR BWONCHIRI** Counsel for the plaintiff.

The law, as I understand it, is that for as long as the offending structures remain on another person's land, the trespass continues. It only ends when the structures are removed. In **ISAACK BEN MULWA .V. JONATHAN MUTUNGA MWEKE 2016 eKLR**, the Court of Appeal stated the following with respect to a continuing trespass: -

“It is a well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive act.” Emphasis added

The Court then went on to quote **WINFIELD AND JOLOWICZ ON TORT 11TH EDITION** at page 342 as follows: -

“Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be continuing and give rise to actions de die in diem son long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”

See also **PETER MWANGI KABUI .V. RURAL ELECTRIFICATION AUTHORITY 2016 eKLR** which was cited by the plaintiff's Counsel.

The defendant's Counsel cited the case of **NELSON MACHOKA KERARO .V. LAND REGISTRAR KISII & OTHERS 2019 eKLR** in support of his submission that the plaintiff's claim is barred by the Statute of limitation. I have perused that case and it is clearly distinguishable from this case. In the **KERARO** case (supra) the dispute involved the transfer of a parcel of land registered in the names of

the 2nd defendant and which the plaintiff pleaded had been illegally transferred. It was not a case of trespass per se.

Having said so, however, the plaintiff's interest in the suit land and his right to eject trespassers, which is what he is claiming in this case, can be defeated where it is established that that right has in fact been extinguished by operation of the law. The defendant in this case did not plead any Counter – Claim in his defence dated 1st September 2003. The law is that parties are bound by their pleadings. A Court will not award what has neither been pleaded nor proved. Pleadings are the foundation upon which a Court can proceed to grant any reliefs to a party. However, in appropriate cases, a Court may base its decision on an unpleaded or an inadequately pleaded issue if it appears from the conduct of the trial, that the issue has been left to the Court to decide. In the case of **ODD JOBS .V. MUBIA 1974 E.A 476**, the then Court of Appeal for Eastern Africa held that a trial Court may base its decision on an unpleaded issue where it appears from the course followed at the trial that the issue has been left to the Court for its determination. That authority has been followed in this country in many cases including in **NGUGI TICHA .V. KIRITU TICHA & OTHERS C.A CIVIL APPEAL No 40 of 2004 [2014 eKLR]** and also **VYAS INDUSTRIES .V. DIOCESE OF MERU 1982 KLR 114**.

Although the defendant was content in simply denying the plaintiff's claim and seeking its dismissal by his defence, the parties in the course of this case and as part of their pleadings, jointly signed and filed agreed issues dated 25th January 2005. Those are the issues that they desired this Court to address in determining their dispute. Those issues are: -

1. **Whether or not the plaintiff is the registered owner of the land parcel NO BOKOLI/MUKUYUNI/1128.**
2. **Whether or not the defendant is a trespasser on land parcel NO BOKOLI/MUKUYUNI/1128.**
3. **Whether or not the defendant bought 2½ acres of land out of land parcel NO BOKOLI/MUKUYUNI/1128 from one JOHNSTONE WEFWAFWA who was a cousin of the plaintiff in the year 1962 as stated in the statement of defence.**
4. **Whether or not the plaintiff has been deprived of the use of the enjoyment of the said portion occupied by the defendant.**
5. **Whether or not the defendant has been on land parcel NO BOKOLI/MUKUYUNI/1128 peacefully.**
6. **Whether or not the plaintiff's rights in land parcel NO BOKOLI/MUKUYUNI/1128 are subject to the defendant's existing interests or whether the same have been extinguished by prescription.**
7. **Whether the defendant took possession of the 2 ½ acres in land parcel NO BOKOLI/MUKUYUNI/1128 IN 1962 or 1974.**
8. **Whether or not the plaintiff's plaint is bad in law.**
9. **Whether or not this Court has jurisdiction over this matter.**
10. **Whether or not the plaintiff is entitled to the orders for eviction and interest as prayed in the plaint.**
11. **Who should pay costs.**

This Court will also be guided by the Court of Appeal's decision in **GALAXY PAINTS COMPANY LTD .V. FALCON GUARDS LTD C.A CIVIL APPEAL No 219 of 1998 [2000 eKLR]** where it held that: -

“It is trite law, and the provisions of O.XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial Court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce Judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court's determination.” Emphasis added.

Further, **Order 15 Rule 2 of the Civil Procedure Rules** allows a Court to frame issues from interrogatories and documents filed.

With regards to issues No 1, 2, and 9, there is no dispute that this Court has the jurisdiction to determine this suit. It is also common ground that the suit land has since 19th March 2003 been registered in the names of the plaintiff and that the defendant occupies a portion thereof without the consent of the plaintiff thus rendering him a trespasser thereon. However, a trespasser may be entitled to the same land if he can establish sufficient grounds for orders that he has acquired it by way of adverse possession. This is because, an adverse possessor to land is basically a trespasser whom the registered owner has failed to eject within a given time. In the case of **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No 56 of 2014 [2015 eKLR]**, the Court of Appeal stated as follows: -

“Adverse possession is 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 or under licence of the owner.”

I shall revert to that issue later because in my view, it is the crux of this dispute.

With regard to issue No 3, I have already addressed it in the preceding paragraphs of this Judgment. Irrespective of whatever portion of the suit land the defendant purchased from **JOHNSTONE WEFWAFWA** in 1962, the bottom line is that the said **JOHNSTONE**

WEFWAFWA has no interest in the suit land which he could legally transfer to the defendant or any other person for that matter. That agreement dated 7th October 1962 was null and void. It was an illegality which could only begate an illegality – **MACFOY .V. UNITED AFRICA CO LTD 1961 3. ALL. E.R 1169.**

Issues 4, 5, 6, and 7 of the agreed issues are the key, in my view, that will resolve this dispute. Read together, those issues basically question whether the defendant is entitled to a claim of the portion of the suit land which she occupies by way of adverse possession. The occupation by the defendant of a portion of the suit land is not ready in dispute. Indeed, the only remedy sought by the plaintiff against the defendant, other than the usual costs and interest, is the eviction of the defendant from the suit land. I have elsewhere in this Judgment stated that it is not clear exactly how much land the defendant purchased from **JOHNSTONE WEFWAFWA**. Indeed, it was that contradiction in the acreage of the land that informed **W. KARANJA J** (as she then was) in her ruling in which she declined to uphold – hold the Preliminary Objection. Having heard the parties' viva voce evidence, this Court is now in a position to resolve those contradictions. When he testified before **MUCHEMI J** on 1st October 2010, this is what the plaintiff said about the size of the land that the defendant occupied: -

“Defendant resides and cultivates a portion of 1¼ acres. No one has surveyed the land to know the exact acreage the defendant used.

I live and occupy the rest of the land. I have a home on the land where I reside and cultivate on that land.”

And when he was cross – examined by **MR KITUYI** Counsel for the defendant, he said: -

“The defendant is on the land without authority of the owner. He claimed he had bought the land. My father did not sell the land to the defendant.”

According to the title deed to the suit land which is part of the plaintiff's documents, it measures 12 acres in size. The plaintiff's own oral evidence is that the defendant occupies 1¼ acres thereof. This is an admission on oath by the registered proprietor of the suit land. It must be remembered that a claim to land by adverse possession is premised on the land that the Claimant actually occupies. As was held in **MWEU .V. KIU RANCHING & FARMING CO – OPERATIVE SOCIETY LTD 1985 KLR 430: -**

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under CAP 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

So not only has the plaintiff conceded to the fact that the defendant occupies a portion of the suit land measuring 1¼ acres but further, the filing of this suit seeking orders for the eviction of the defendant from the suit land is proof of that occupation. With regard to issue No 4, the plaintiff pleaded in paragraph 6 of his plaint as follows: -

“By reason of the matters aforesaid, the plaintiff has been deprived of the use of enjoyment of the said portion out of the said parcel and has thereby suffered loss and damage.”

By putting up homes on a portion of the suit land and cultivating thereon, the defendant has effectively dispossessed the plaintiff of the use and enjoyment of that portion of the suit land.

With regard to issue No 5, the plaintiff pleaded in paragraph 5 of his plaint that the defendant wrongfully entered the suit land on or about the month of January 1974. He denied the defendant's claim that he had entered the suit land in 1962 following the sale agreement dated 7th October 1972. The register for the suit land shows that it was first registered in the names of the plaintiff's father **ISAIAH MBACKAYA NAKOKONYA** on 31st December 1964 before it was registered in the plaintiff's names on 19th March 2003. The plaintiff's father died on 21st January 1984 as per the Death Certificate. There is no evidence that prior to his death in 1984, the plaintiff's father had filed any suit to evict the defendant from the land. The plaintiff only stated during his oral evidence that his father had reported to the Chief but the defendant refused to vacate. There was no evidence of such a report being made to the Chief. The plaintiff testified further that when he obtained title to the suit land, he filed a suit against the plaintiff before the Assistant Chief. This is what he said in his evidence in Chief: -

“When I took over the title to the land, I sued the defendant before the area Assistant Chief. The case was heard and the elders decided that the defendant vacates the land. He refused.”

Again no evidence of such suit before the area Assistant Chief was availed. The plaintiff further confirmed in his oral testimony that during his life – time, his father did not file any suit against the defendant. This is what he said in cross – examination: -

“My father never sued him in Court during his life time. It is not true that father did not disturb the defendant because he knew the portion he occupied belonged to him. I did not write to the defendant to vacate the land.”

The occupation and possession of an adverse possessor can only be interrupted when the registered proprietor of the land in dispute files a suit to recover the same or makes an effective entry thereon – **GITHU .V. NDEETE 1984 KLR 776**. Until the filing of this suit on 14th July 2003, there is no evidence that either the plaintiff or, before him, his late father had taken any such action against the defendant. There is no evidence to suggest that the defendant's occupation of the suit land was not peaceful.

Issues No 6 and 7 can be considered together. As to when the defendant entered the suit land, he pleaded in paragraph 8 of his defence that it was in 1962 following the sale agreement with **JOHNSTONE WEFWAFWA**. That has been repeated by his wife **JUDITH MUYOKA**

WABOMBA in her un – dated statement filed herein on 10th May 2019. The plaintiff has however refuted that claim arguing that infact the defendant entered the suit land in 1974. I have already stated elsewhere in this Judgment that **JOHNSTONE WEFWAFWA** who allegedly sold the suit land to the defendant had no interest that he could transfer to another person and so the agreement dated 7th October 1962 was a nullity. However, and as I have also already stated above adverse possession is all about the occupation and possession of land belonging to another person. It is a question of fact. Ordinarily, when a person purchases land in the rural area, the intention would be to use it for cultivation or for setting up a home. I find it highly un – likely that the defendant would have purchased the suit land in 1962 and only moved into it some 12 years later in 1974 as stated by the plaintiff. I am persuaded that notwithstanding the illegality of the sale agreement dated 7th October 1962, the defendant actually went into occupation of the suit land in 1962 and not 1974. In saying so, I take note of the fact that in paragraphs 5 and 6 of her statement, **JUDITH MUYOKA WABOMBA** states that the piece of land which she and her late husband have brought up their children and utilized is the **“only asset and source of our livelihood that we depend on.”** For purposes of adverse possession therefore, time should start to run from 31st December 1964 when the suit land was first registered in the names of the plaintiff’s father **ISAIAH MBACKAYA NAKOKONYA**. Therefore, by the time this suit was filed on 14th July 2013, the defendant and his family had been in occupation and possession thereof for 49 years well in excess of the statutory period of 12 years.

Even if the time is computed from 1974 which is the year the plaintiff has pleaded that the defendant trespassed onto the suit land, it will still mean that by 2013, the defendant and his family had been in adverse possession of the suit land for 39 years which is also well in excess of the statutory period of 12 years. And in view of the plaintiff’s own admission that the defendant and his family occupy 1¼ acres out of the suit land, this Court can only conclude that following that occupation which has been exclusive, peaceful and un – interrupted, the plaintiff’s interest in that portion of the suit land has been extinguished by operation of the law. It follows therefore that the defendant is entitled to be registered as the proprietor of 1¼ acres out of the land parcel **NO BOKOLI/MUKUYUNI/1128** having acquired the same by way of adverse possession.

Issues No 8 and 10 can also be considered together. The plaintiff may have been able to sustain a claim for trespass before the expiration of 12 years from the time when the defendant took occupation and possession of the portion of the suit land. However, he has effectively been dispossessed of the 1¼ acres of the suit land which the defendant and his family have occupied for a period in excess of 12 years. Any rights that he had to evict the defendant from that portion of the suit land have now dissipated and instead, the defendant’s rights have now crystalized from being a trespasser to an adverse possessor. His rights are now protected by **Section 38 of the Limitation of Actions Act** and **Section 28(h) of the Land Registration Act** which recognizes as among the overriding interests subsisting on land: -

“the rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Similar provisions exist in **Section 30(f)** of the repealed **Registered Land Act** under which the suit land was registered. At the expiration of 12 years, the plaintiff was no longer the owner of the 1¼ acres of the suit land that the defendant and his family occupy. He was simply a trustee holding the title thereto in trust for the defendant. He cannot therefore sustain any action to evict the defendant therefrom.

On the issue of costs, the defendant’s pleadings were not well crafted as I have already observed above. Secondly, the defendant took long to prosecute the defence and it was not until my ruling delivered on 4th July 2020 that these proceedings got back on track. Indeed, it took the plaintiff’s citation of **JUDITH MUYOKA WABOMBA in BUNGOMA HIGH COURT SUCCESSION CAUSE No 502 of 2013** to have her substituted in place of her deceased husband. Costs being in the discretion of the Court and in view of the conduct of the substituted defendant herein, I shall not award her costs.

Ultimately therefore, and having considered the parties’ pleadings and all the evidence herein together with the statement of agreed issues dated 25th January 2005 and filed on 26th January 2005 for my determination, there shall be Judgment for the defendant in the following terms: -

- 1. The plaintiff’s suit is dismissed.**
- 2. An order is made that the defendant is entitled to 1¼ acres out of the land parcel NO BOKOLI/MUKUYUNI/1128 having acquired the same by way of adverse possession.**
- 3. The plaintiff shall execute all the necessary documents and the BUNGOMA COUNTY LAND REGISTRAR AND SURVEYOR shall register a portion measuring 1¼ acres out of the land parcel NO BOKOLI/MUKUYUNI/1128 in the name of JUDITH MUYOKA WABOMBA within 45 days from the date of this Judgment.**
- 4. In default of (3) above, the DEPUTY REGISTRAR shall execute all the necessary documents on behalf of the plaintiff to facilitate such registration.**
- 5. Each party shall meet their own costs.**

Boaz N. Olao.

J U D G E

18th January 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 18th 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

18th January 2021.