



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 39 OF 2017(O.S)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22,7,17 AND ORDER 37 OF THE PROCEDURE RULES

AND

IN THE MATTER OF THE LAND PARCEL NO. E. BUKUSU/S. BUKUSU/S. NALONDO/1399

BETWEEN

JULIUS WATANGA WATAKAPLAINTIFF

VERSUS

THOMAS NAMASWA NYONGESA

(Sued as the Legal representative of the Estate of WILLIAM WANYONYI CHAAMI.....DEFENDANT

J U D G M E N T

The suit was first heard by **MUKUNYA J** ex – parte on 17th October 2017 after the defendant, though served, failed to appear for the hearing. The late Judge then reserved Judgment for 6th December 2017.

However, by an application dated 4th December 2017, the defendant's then Counsel **MR BWONCHIRI**, moved the Court under Certificate of Urgency seeking orders to stay the ex – parte proceedings and delivery of the pending Judgment to enable the defendant file his defence. That application was not opposed and the defendant filed his defence by way of a replying affidavit dated 13th December 2017.

Directions were subsequently taken on 1st July 2019 that the Originating summons herein be the plaint and the replying affidavit be the defence. Meanwhile, by an application dated 11th November 2019, **MR BWONCHIRI** sought and was granted leave to cease acting for the defendant. Though served for the hearing of the suit on 25th January 2011, the defendant did not attend Court. This is therefore the second time that this suit is proceeding against the defendant in his absence. It will be interesting to hear what explanation he will offer for failing to attend the Court for trial when, as he most likely will, he moves the Court again to have this Judgment set aside.

JULIUS WATANGA WATAKA (the plaintiff) moved to this Court by way of an Originating Summons dated 9th March 2017 and filed herein on 9th March 2017 seeking against **THOMAS NAMASWA NYONGESA** (the defendant herein and sued as the legal representative of the Estate of **WILLIAM WANYONYI CHAAMI**) a determination of the following questions with regard to the land parcel **NO EAST BUKUSU/SOUTH NALONDO/1399** (the suit land): -

1. That the plaintiff be declared as the owner of the piece of land measuring approximately 4.6 Hectares to be curved out of the land parcel NO EAST BUKUSU/SOUTH NALONDO/1399 which they are in adverse possession of having occupied the same for over 34 years.
2. That an order be made that the plaintiff herein has become entitled to be registered as the owner of a parcel measuring approximately 4.6 Hectares to be curved out of the land parcel NO EAST BUKUSU/SOUTH NALONDO/1399 by operation of the law viz Sections 7, 17 and 38 of the Limitation of Actions Act (CAP 22 LAWS OF KENYA) in place of the defendant.
3. That the defendant's names to the said parcel of land be removed and cancelled on the 4.6 Hectares curved out of the said land parcel NO EAST BUKUSU/SOUTH NALONDO/1399 and be replaced with the names of the plaintiff.
4. That the filing of BUNGOMA H.C.C.C No 52 of 2005 did not affect the proprietary rights acquired by the plaintiff on the land because the plaintiff had already been in possession of the 4.6 Hectares of the land for over 20 years as at the time of

filing the said suit.

5. That in the alternative and without prejudice to the averments 1, 2, 3 and 4, a declaration that the defendant holds the title to a portion of land measuring 4.6 Hectares out of the land parcel NO EAST BUKUSU/ SOUTH NALONDO/1399 in trust for the benefit of the plaintiff.

6. That costs of this summons be borne by the defendant.

I must at this stage pause and remind litigants and their Counsel of the importance of proper pleadings especially when it comes to the description of the property in dispute. The Originating Summons herein describes the suit land as “**BUKUSU/S. NALONDO/1399**” when it is clear from the Certificate of Search that it is infact **EAST BUKUSU/SOUTH NALONDO/1399**. The Court had to amend the pleading on it’s own motion. Even where Counsel delegate the drafting of pleadings to their Assistant, it is their responsibility to confirm that the pleadings are properly drawn before they are filed. I doubt if the wide powers granted to this Court by **Article 159(2)** of the **Constitution** include the powers to draft pleadings for the parties or their Counsel.

The Originating Summons is supported by the plaintiff’s affidavit also dated 9th March 2017 to which are annexed several documents.

The basis of the claim is that the defendant is the Administrator of the Estate of **WILLIAM WANYONYI CHAAMI** (hereinafter **CHAAMI**) who was at all times the registered proprietor of the suit land. That in 1983, the plaintiff purchased from **HENRY SIMIYU CHAMI** a parcel of land measuring 4.6 Hectares which was curved out of the suit land and immediately took possession thereof. That the plaintiff has extensively developed the said parcel of land by constructing permanent and semi – permanent houses and also cultivates crops thereon. The said parcel is clearly demarcated on the ground and distinctly separated from the rest of the land. However, in the year 2002, the defendant sued him vide **BUNGOMA HIGH COURT CIVIL CASE No 52 of 2005** but the suit was withdrawn by consent and the plaintiff was allowed to continue occupying the land. By that time however, the plaintiff had already occupied the land for a period of over 20 years and so that suit did not affect his rights. That his occupation of the suit land has been **nec vi nec clam nec precario** for now over 34 years and the defendant’s title to the suit land should now be cancelled and the same be registered in the names of the plaintiff.

The plaintiff also filed the following documents in support of his claim: -

1. **Grant of Letter of Administration issued to the defendant in respect to the Estate of CHAAMI.**
2. **Certificate of Search for the land parcel NO EAST BUKUSU/SOUTH NALONDO/1399.**
3. **Agreement for sale dated 12th May 1983 for 4.6 Hectares comprised in the land parcel NO EAST BUKUSU/SOUTH NALONDO/1399 between HENRY SIMIYU CHAMI as vendor and plaintiff as purchaser.**
4. **Order issued in BUNGOMA HIGH COURT CIVIL CASE No 52 of 2005.**
5. **Green Card for the land parcel NO EAST BUKUSU/SOUTH NALONDO/1399.**

The plaintiff also filed his witness statement and those of his two witnesses namely **SIMON WEKESA WAMWAYA** and **FLORIAN MUKHWANA NYAPARA**. However, only **SIMON WEKESA WAMWAYA** testified in support of the plaintiff’s case.

In his witness statement dated 9th September 2019, **SIMON WEKESA WAMWAYA (PW 2)** confirms that in 1983 he saw **CHAAMI** and his younger brother **PATRICK** demolish a house on the suit land and when the asked them why they were doing so, they informed him that the plaintiff had purchased it. He states further that the plaintiff has put up a house on the suit land where he has lived peacefully since 1983.

The defendant filed a replying affidavit dated 13th December 2017 in response to the Originating Summons in which he denied that the plaintiff has been in occupation of the suit land since 1983. He stated that the suit land is still registered in the names of the late **WILLIAM WANYONYI** and that the interim grant issued to the defendant in **BUNGOMA CHIEF MAGISTRATE SUCCESSION CAUSE No 441 of 2016** does not warrant the plaintiff to file this suit against him. That apart from filing this suit, the plaintiff has also moved the **SUCCESSION COURT** to revoke the grant issue to the defendant. That this suit must therefore be dismissed with costs.

Though personally served with a hearing notice on 16th December 2020 following the withdrawal of his then Counsel **MR BWONCHIRI**, the defendant did not turn up in Court on 25th January 2021 for the hearing.

The plaintiff and his witness **SIMON WEKESA WAMWAYA (PW 2)** testified and adopted as their evidence, their respective supporting affidavit and witness statement respectively. The plaintiff also produced his list of documents as his documentary evidence. His Counsel **MR WERE** opted not to make any submissions at the end of the trial.

The plaintiff’s case is that he is entitled to be registered as the proprietor of the 4.6 Hectares comprised in the suit land by way of adverse possession having been in occupation of the same since 1983 when he purchased it from **HENRY CHAAMI** who thereafter migrated to **TONGAREN**. From the documents filed herein read together with the plaintiff’s affidavit, his statement and that of his witness **SIMON WEKESA WAMWAYA (PW 2)**, it is clear that although the plaintiff purchased 4.6 Hectares comprised in the suit land from **HENRY SIMIYU CHAAMI** on 12th May 1983, the suit land is registered in the names of **CHAAMI** whose Estate is represented by the plaintiff.

Section 38(1) of the **Limitation of Actions Act** provides as follows: -

“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 **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a person claiming land by way of adverse possession must prove. It said: -

“In order to be entitled to land by adverse possession, the claimant must prove that he had 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 discontinuation of possession by the owner on his own volition.”

A person claiming land through adverse possession must also demonstrate that his occupation of the land is not by force, secrecy or persuasion (**nec vic nec clam nec precario**) – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**. That occupation of the land must also be open, peaceful, continuous, notorious and with the knowledge but without the permission of the owner – **ROBERT SHUME & OTHERS .V. SAMSON KAZUNGU KALAMA 2015 eKLR**.

It is not in dispute that the suit land is registered in the names of **CHAAMI** whose Estate is represented by the defendant herein having been issued with Letter of Administration vide **BUNGOMA CHIEF MAGISTRATE’S COURT SUCCESSION CAUSE No 441 of 2016**. The Grant issued to the defendant was not interim as alleged in paragraph 7 of his replying affidavit. And it well settled that a claim to land by way of adverse possession can be made against the Estate of a deceased person – **KARUNTIMI RAIJI .V. M’MKINYA M’ITUNGA 2013 eKLR**.

The defendant did not attend Court for trial and therefore the averments contained in the plaintiff’s supporting affidavit and statement which he adopted as his evidence together with the evidence of his witness **SIMON WEKESA WAMWAYA (PW 2)** were not really challenged. The plaintiff having entered the suit land in 1983 after he purchased the whole 4.6 Hectares through a sale agreement with **HENRY SIMIYU CHAAMI** is not really in doubt. There is nothing to rebut his testimony that his occupation of the 4.6 Hectares has been exclusive, open, peaceful, continuous and un-interrupted with the knowledge of the defendant. And since the plaintiff took possession and occupied the 4.6 Hectares comprised in the suit land in 1983, it means that by 1995, the defendant’s interests in that portion had been extinguished by operation of law. Therefore, the suit in **BUNGOMA HIGH COURT CIVIL CASE No 52 of 2005** did not interrupt the plaintiff’s adverse possession as it was filed 10 years late. In any event, that suit was filed by the plaintiff herein and not by the defendant. A claim for adverse possession can only be interrupted when the owner of the land files a suit to assert his rights over the land or when he makes an effective entry or his ownership is admitted by the plaintiff – **GITHU .V. NDEETE 1984 KLR 776**.

The plaintiff produced as part of his documents the sale agreement dated 12th May 1983 which shows that he paid **HENRY SIMIYU CHAMI** Kshs. 26,000/= as purchase price for 4.6 Hectares out of the suit land. His testimony, which was not controverted because the defendant did not appear for the hearing, is that he took possession of the portion, put up houses and has been cultivating crops thereon to-date. The plaintiff therefore entered the suit land as a purchaser having paid the purchase price. He is therefore entitled to by a claim to the portion that he purchased by way of adverse possession. In the case of **PUBLIC TRUSTEE .V. WANDURU 1984 K.R 314**, **MADAN JA** (as he then was) stated that a purchaser in possession of land after having paid the purchase price is a person in whose favour the period of limitation can run as against the vendor. That position has been affirmed by other Courts and in **PETER MBIRI MICHUKI .V. SAMUEL MUGO MICHUKI 2014 eKLR** the Court of Appeal held that: -

“It is our considered view that when the Appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the Appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property.”

The plaintiff herein took occupation and possession of the suit property in 1983 after paying the purchase price, He cannot therefore be described as a licensee who was on the suit land with permission of the proprietor. He is a person in whose favour the period of limitation started to run from the time he entered the suit land in 1983. And by the time he filed this suit on 9th March 2017, the plaintiff had been in occupation and possession of the suit land, which measures 4.6 Ha as per the Certificate of Search, for a period of 34 years. He is clearly entitled to the suit land by way of adverse possession as sought in his Originating Summons.

Ultimately therefore, and having considered the plaintiff’s un-controverted evidence, I am satisfied that he has established his case as required in law.

Judgment is accordingly entered for the plaintiff against the defendant in the following terms: -

- 1. An order is made that the plaintiff has acquired ownership of the land parcel NO EAST BUKUSU/SOUTH NALONDO 1399 measuring 4.6 Hectares by way of adverse possession.**
- 2. The interest of the registered proprietor WILLIAM WANYONYI in the land parcel NO EAST BUKUSU/SOUTH NALONDO/1399 has been extinguished by operation of the law.**
- 3. The LAND REGISTRAR BUNGOMA shall cancel the name of WILLIAM WANYONYI from the register of land parcel NO EAST BUKUSU/SOUTH NALONDO/1399 and issue a new title in the names of JULIUS WATANGA WATAKA.**
- 4. The plaintiff shall have costs of the suit.**

Boaz N. Olao.

J U D G E

23rd February 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 23rd day of February 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic rules.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

23rd February 2021.