



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 27 OF 2019 (OS)

IN THE MATTER OF LAND PARCEL NO. NORTH MALAKISI & NAMWELA/162

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 OF CIVILPROCEDURE RULES

ROBAI NAMISI SIMIYU.....PLAINTIFF

VERSUS

ELKANA NYONGESA WAKHABU.....DEFENDANT

J U D G M E N T

1. ROBAI NAMISI SIMUYU (the plaintiff) moved to this Court vide the Originating Summons dated 25th September 2019 in which she impleaded **ELKANA NYONGESA** (the defendant) sued as the registered proprietor of the land parcel **NO MALAKISI NORTH & CENTRAL NAMWELA/162** (the suit land) and sought a determination of the following questions: -

- 1. Whether the said ELKANA NYONGESA is the registered owner of the land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162.**
- 2. Whether the plaintiff has been in open and notorious possession of the land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162 measuring 2.0 acres for a period exceeding twelve (12) years continuously and without interruption be declared the absolute owner of the 2.0 acres of land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162.**
- 3. Whether the defendant's title to the said 2.0 acres of land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162 extinguished upon the expiry of twelve years from the time the plaintiff went into occupation and possession of the parcel.**
- 4. Whether the plaintiff has now acquired title to the said 2.0 acres of land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162 by virtue of adverse possession and that the plaintiff be registered as the absolute owner of the said parcel.**

The plaintiff sought the following orders: -

- 1. That the defendant's right over the 2.0 acres of land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162 got extinguished by way of adverse possession upon expiry of 12 years (statutory years) and the plaintiff be declared the absolute owner of the said land parcel.**
- 2. That the defendant and whoever may be claiming through him be barred and restrained from interfering with the said parcel of land.**
- 3. That the costs of this Originating Summons be borne by the defendant.**

Together with the Originating Summons, the plaintiff filed both a supporting affidavit and statement all dated 25th September 2019. She also filed the statements of the following witnesses: -

1. **BRAMWEL WANGWA BUKANIA (PW 2).**
2. **JOYCE SAZILI SHIVAJI (PW 3) and**
3. **JOSEPH MASINDE LUTUKAI (PW 4).**

She annexed to the Originating Summons the following documents: -

1. **Photograph of a ploughed parcel of land.**
2. **Copy of a letter dated 12th April 2019 and addressed to the plaintiff by the Chief Namwela location.**

The gist of both her supporting affidavit and statement is that since 1969, she has been cultivating the suit land until March 2019 when the defendant without any colour of right trespassed thereon and up – rooted her crop of maize. She reported the incident to her Chief who advised her to place a caution on the suit land. She also reported the matter to the **CHWELE POLICE STATION** on 14th April 2019 who summoned the defendant but he has continued to plough the suit land and now wants the plaintiff to vacate.

2. BRAMWEL WANGWA BUKANIA (PW 2) was previously the Assistant Chief of **MENU SUB – LOCATION** of **NAMWELA LOCATION** from 1998 to 2004 when he became the Chief. In his statement dated 25th July 2020, he confirms that he knows the plaintiff whose late husband **PETER SIMIYU** was a retired teacher. That the plaintiff and her family have utilized the suit land peacefully and without interference and no complaint was made at his office. That to the best of his knowledge, the land belongs to the family of the late **PETER SIMIYU**.

3. JOYCE SAZILI SHIVAJI (PW 3) states in her statement dated 25th September 2019 that she has known since 1982 that the plaintiff and her husband **PETER SIMIYU** have been ploughing the suit land.

4. JOSEPH MASINDE LUTUKAI (PW 4) recorded a statement on 25th September 2019 in which he confirmed that the plaintiff is her neighbour and in 1968, he was a witness when the plaintiff's husband **PETER SIMIYU** purchased the suit land from one **FESTUS WAKHABU CHELOTI** (now deceased) who then moved to the Settlement Scheme and never returned to the land. That in early 2019, the plaintiff ploughed the suit land but persons claiming to be sons of the late **FESTUS WAKHABU CHELOTI** up – rooted her maize crop despite being warned by the witness. That the only conflict which he is aware of was in 1989 involving **PETER SIMIYU** and one **PATRICK WAKHABU SAWA** over a boundary but which was settled by village elders. That to the best of his knowledge, the suit land belongs to the family of the late **PETER SIMIYU** and that even during the **LUFU CEREMONY**, no – one claimed it from his family.

5. The Originating Summons is opposed and the defendant filed both a replying affidavit and witness statement dated 16th February 2021. He describes the Originating Summons as devoid of merit, scandalous and an abuse of the process of this Court. He confirms that he is the son of the late **FESTO WAKHABU CHELOTI** alias **FESTO WAKHABU** and is the current registered proprietor of the suit land which he holds in trust for the family of the said **FESTO WAKHABU CHELOTI** who prior to his death in 2016, had held a family meeting on 30th April 2016 and distributed his property including the suit land. That nobody claimed the suit land during the life – time of his late father until 2019 when he was surprised to learn that the plaintiff was alleging that her deceased husband had purchased the suit land which is not true. That the plaintiff's late husband was only allowed to utilize the suit land by the defendant's father since it was fallow. That the plaintiff and his family have never established a home on the suit land and had in fact promised to hand it over to the defendant should he need it. That the Chief's letter filed herein as part of the plaintiff's documentary evidence is misplaced and the plaintiff first laid a claim to the suit land by filing **ELC CASE No 61 of 2019** which was later withdrawn. That the plaintiff has not met the threshold for granting the orders sought and even the purported sale agreements between **PETER SIMIYU** and the defendant's father are not true and do not pass the test of sale agreements and neither can they nullify the defendant's right to the suit land which he holds in trust having been appointed as the Administrator to his father's Estate. That other than cultivating the suit land, the plaintiff has never lived thereon. The Originating Summons should therefore be dismissed with costs.

Annexed to the replying affidavit are the following documents: -

1. **Certificate of Official Search for the land parcel NO MALAKISI NORTH & CENTRAL NAMWELA/162.**
2. **Memorandum of sale of Land Agreement in respect of land parcel NO BUNGOMA/KABISI/420 between FESTO WAKHABU CHELOTI (as vendor) and MOSES WASIKE SOITA (as purchaser) dated 26th December 2013.**
3. **Agreement for sale of land in respect of land parcel NO BUNGOMA /KABISI/3061 between FESTO WAKHABU CHELOTI (as vendor) and MARGARET KELUS WEKESA (as purchaser) dated 28th May 2015.**
4. **Memorandum of Sale of Land Agreement in respect of land parcel NO 420 KABISI between FESTO WAKHABU CHELOTI (as vendor) and MOSES SOITA WASIKE (as purchaser) dated 2nd April 2014.**
5. **Pleadings and annexures in BUNGOMA ELC CASE No 61 of 2019 between ROBAI NAMISI SIMIYU .V. ELKANA NYONGESA, HUMULTON MARIA WAMBEYE & PATRICI WAKHABU.**

I must at this stage point out that some of the annexures in **BUNGOMA ELC CASE No 61 of 2019** were very faint and illegible while others were in **KIBUKUSU** dialect with no **ENGLISH** translation. They were therefore of no useful purpose to this Court. **KIBUKUSU** dialect is not among the Official languages of this Court and a party seeking to rely on any documents which are written in vernacular language must avail a certified translation in English language.

6. The defendant also filed the statements of his following witnesses: -

1. **HUMULTON MARIKIA WAMBEYE (DW 2)**

2. **PATRICK WAKHABU (DW 3)**

In his statement dated 16th February 2021, **HUMULTON MARIKIA WAMBEYE (DW 2)** states that he knows both the plaintiff and defendant. That the plaintiff is widow to the late **PETER SIMIYU** while the defendant is a son and among the beneficiaries of the Estate of the late **FESTO WAKHABU CHELOTI** alias **FESTUS WAKHABU** the proprietor of the suit land. That the said **FESTO WAKHABU CHELOTI** migrated to **MBAKALU** in 1975 with his family leaving the suit land fallow for some time. That **FESTO WAKHABU CHELOTI** permitted his friend **PETER SIMIYU** to utilize the suit land and at no time did he sell it to **PETER SIMIYU**. Therefore, **PETER SIMIYU** who died in 2009 was only holding the suit land in trust for the family of **FESTO WAKHABU**. That in 2019 after concluding the succession process of his deceased father, the defendant fenced and cultivated the suit land and this provoked the plaintiff to file **BUNGOMA CM ELC CASE No 61 of 2019** claiming a purchaser's interest but later withdrew the case. That this suit should therefore be dismissed with costs because upto the time **FESTO WAKHABU CHELOTI** died in 2016, no one had claimed any interest in the suit land.

7. In his statement also dated 16th February 2021 **PATRICK WAKHABU (DW 3)** confirms that he is a brother to the late **FESTO WAKHABU CHELOTI**. That the plaintiff who is a widow to **PETER SIMIYU** is his neighbour. That the defendant acquired possession of the suit land following succession proceedings in **BUNGOMA CM SUCCESSION CAUSE No 571 of 2017** and holds it in trust for the family and beneficiaries of the Estate of the late **FESTO WAKHABU CHELOTI** who relocated to **MBAKALO** and left **PETER SIMIYU** his close friend and church member to hold it in trust for his children. That the plaintiff continued utilizing the suit land even after her husband died in 2009. That in 2019, the defendant fenced the suit land and started cultivating it and that was when the plaintiff filed **BUNGOMA CM ELC CASE NO 61 of 2019**. That at no time did **FESTO WAKHABU CHELOTI** inform him that he had sold the suit land to **PETER SIMIYU** and even during the **LUFU CEREMONY**, the plaintiff did not make any claim to the suit land. That other than growing crops on the suit land, the plaintiff has not put up a home thereon and this suit is brought in bad faith to intimidate the beneficiaries to the Estate of **FESTO WAKHABU CHELOTI** alias **FESTO WAKHABU** and should be dismissed with costs.

8. The plenary hearing commenced and ended on 21st September 2021 when the parties testified and called their witnesses. Led by their Counsel **MR MAKOKHA** for the plaintiff and **MR JUMA** for the defendant, they adopted as their evidence their respective affidavits and statements and also produced the documents filed herein as their documentary evidence. Contents of their affidavits and statements have already been summarized above.

9. I have considered the evidence by both parties and their witnesses together with the documents filed in support of their cases. I have also considered the submissions filed by Counsel.

10. The plaintiff's claim to the suit land is premised on adverse possession. It is her case, as supported by her witnesses, that her late husband **PETER SIMIYU** purchased the suit land from **FESTO WAKHABU CHELOTI** in 1968 who moved to the Settlement Scheme and that they took possession and have been ploughing and planting crops thereon until 2019 when the defendant who is a son to **FESTO WAKHABU CHELOTI** invaded it and stopped her from ploughing it. The defendant's case is that infact his late father never sold the suit land to **PETER SIMIYU** but only permitted him to utilize it as a caretaker. The thrust of the defendant's case therefore is that the plaintiff and her late husband were in occupation of the suit land with the permission of his late father in which case, a claim for adverse possession cannot be maintained. The plaintiff did not annexe to her Originating Summons the document of title to the suit land as is required in cases of this nature. I drew this anomaly to the attention of both parties and their Counsel during the trial. However, it is common ground that the suit land is registered in the names of the defendant who infact produced as part of his documentary evidence the Certificate of Official Search which shows that he was registered as the proprietor thereof on 23rd January 2019 to hold it in trust for the family of the deceased. Therefore, the failure to produce the document of title to the suit land is not fatal to the plaintiff's case.

11. **Section 38(1)** of the **Limitation of Actions Act** allows a person who is in occupation and possession of land registered in the names of another person to approach the Court for a declaration that he has acquired ownership of the said land by way of adverse possession. It reads:

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 proprietor of the land."

Section 7 of the same 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 occurred to him, or, if it first accrued to some person through whom he claims, to that person."

In **MATE GITABI .V. JANE KARUBU MUGA & OTHERS C.A CIVIL APPEAL No 43 of 2015 (NYERI)** the Court said: -

"For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly,

that is without force and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin maxim nec vi, nec claim, nec precario. See also ELIVA NYONGESA LUSENEKA & ANOTHER .V. NATHAN WEKESA OMACHA – KISUMU CIVIL APPEAL No 134 of 1993 and KASUVE .V. MWAANI INVESTMENTS LTD & 4 OTHERS [2004] KLR 184

In **KASUVE .V. MWAANI INVESTMENTS LTD** (supra), the Court held that: -

“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA (N0 2) 1984 KLR 284” Emphasis mine.

In **JOSEPH KITHINJI M’ERINGO .V. CHRISTINE N. MBITI [2021 eKLR]** the Court cited with approval the position stated in **HALSBURY’S LAWS OF ENGLAND 3RD EDITION VOL 24 PAGE 252** thus: -

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by a person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of surface without fencing off has been held sufficient to prove possession” Emphasis mine.

And in **KAIRU .V. GACHERU 1986 – 1989 EA**, the Court held that: -

“The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 Limitation of Actions Act.”

The fact that the late **PETER SIMIYU**’s family has been in occupation and possession of the suit land since 1968 is not really disputed. Indeed, it is conceded by the defendant and his witnesses. In paragraph 6 of his replying affidavit dated 16th February 2021, the defendant has averred as follows: -

6: *“That it is true that the plaintiff/Applicant has been using the subject land which my late father one **FESTO WAKHABU** permitted the plaintiff/Applicant’s late husband **PETER SIMIYU WAFULA** (deceased) who was his close friend to use the same until we grow up and take over thus he was only but using the subject land herein as a caretaker under permission.”* Emphasis added.

It is also common ground that **FESTO WAKHABU** left the suit land and went to live in the Settlement Scheme at **MBAKALO**. The plaintiff says that was in 1969 after he had sold the suit land to her husband **PETER SIMIYU**. The defendant says it was in 1975 as per paragraph 8 of his replying affidavit where he says; -

8: *“That our family had settled at **MBAKALO** where my late father relocated to as from 1975 to his demise.”*

That was also confirmed by **PATRICK WAKHABU (DW 3)** a brother to **FESTO WAKHABU** and uncle to the defendant. That is clear confirmation that the said **FESTO WAKHABU** had been dispossessed of the suit land by his own volition as far back as 1969 (according to the plaintiff) or 1975 (according to the defendant). Whichever year it was, it is clear that by the time this suit was filed in 2019, the plaintiff and her family had been in occupation and possession of the suit land for between 50 to 44 years well in excess of the 12 years’ statutory period to entitle her to orders in adverse possession. The only way that the said occupation and possession could have been interrupted was by **FESTO WAKHABU** or the defendant filing a suit against the plaintiff or making an effective entry – **GITHU .V. NDEETE 1976 KLR 776**. **FESTO WAKHABU**, by the testimony of the defendant, died *“sometime in 2016.”* There is no evidence that prior to his death, he had filed any suit seeking to evict **PETER SIMIYU** and his family from the suit land or that he even attempted to make a re – entry. The plaintiff and her family have therefore enjoyed peaceful, open, continuous and exclusive occupation and possession of the suit land and with the knowledge of the defendant and his family.

12. In his submissions, **MR JUMA** Counsel for the defendant has suggested that the plaintiff infact had no locus standi to file this suit without a Grant of Letters of Administration in respect to the Estate of her husband **PETER SIMIYU**. This is how Counsel has put it: -

“The suit property could have been in the circumstances the husband’s property and the plaintiff only had equitable interest in the suit land as a spouse. According to the testimonies on record in Court, she inherited the husband’s activities after his demise in 2009.”

Counsel then adds: -

“From there (sic) foregoing there arise a million questions as to whether adverse possession is capable of being inherited. Our answer is also in the negative as explained below.

*According to **GABRIEL MBIU .V. MUKINDIA MARANYA** (supra) one cannot inherit adverse possession. When the husband died, his Estate needed to go under Succession. As a general rule, time does not run against a person who is under some legal disability. See **GABRIEL MBIU .V. MUKINDIA MARANYA** (supra). It follows then that until she takes up Letters of Administration that time shall begin to run which she has not.”*

The short answer to that submission is that the plaintiff has approached this Court in her own capacity as the person in occupation and

possession of the suit land. She has not approached this Court as the legal representative of the Estate of her late husband. If there was any doubt, it was clarified in paragraph 2 of her supporting affidavit where she has deponed as follows: -

2: “That in the year 1969, I started cultivating on land parcel NO NORTH MALAKISI N & C NAMWELA/162 measuring 2.0 acres continuously to date without interruption for the past 51 years. See photographs marked RNS – 1(a) and (b) respectively.”

I have perused the lengthy Judgment of **KULOBA J** (as he then was) in the case of **GABRIEL MBIU .V. MUKINDIA MARANYA 1993 eKLR** and it cannot be cited for the proposition which Counsel for the defendant has put forward that **“one cannot inherit adverse possession.”** As already stated above, the plaintiff is not trying to inherit anything. She is the person who has been in occupation and possession of the suit land since 1969 and is claiming it in her own right. In any event, the suit land was never part of the Estate of her deceased husband because by the time he died on 29th November 2009, he had neither filed for adverse possession nor any other suit to have the suit land vested in his names. There would be no basis therefore upon which the plaintiff could move this Court as the Administratrix of the Estate of **PETER SIMIYU** even if she wanted to do so.

13. In her oral testimony, the plaintiff stated that her deceased husband purchased the suit land from **FESTO WAKHABU** in 1968 and they took possession in 1969. This is what she said: -

“I wish to state that my husband PETER SIMIYU bought the land parcel NO MALAKISI/NORTH & CENTRAL NAMWELA/162 in 1968 and took possession in 1969 from FESTO WAKHABU who is the father of ELKANA NYONGESA the defendant herein. FESTO WAKHABU moved away to the Settlement Scheme. The purchase price was 70/= per acre. It was an oral agreement as per the Quaker tradition. It is not true as suggested in the defence that the defendant only allowed us to take care of the land. We lived there peacefully until 2019 March when the defendant came and fenced the land.”

She was supported in that regard by **JOSEPH MASINDE LUTUKAI (PW 4)** who said he witnessed **FESTO WAKHABU** sell the suit land to **PETER SIMIYU** in 1968. The defendant refuted all that and said in paragraph 5 of his replying affidavit as follows: -

5: “That the plaintiff/Applicant’s deceased husband one PETER SIMIYU WAFULA never bought the subject suit land from my late father at any time as alleged as he was only permitted to use the subject land as it had remained fallow for some time as he was personally un – able to utilize the same having settled in MBAKALU with his entire family including myself.”

He was supported by his uncle **PATRICK WAKHABU (DW 3)** a brother to **FESTO WAKHABU** who in his statement says: -

“That there is no time during the life – time of my brother alluded having sold the subject to any one including PETER SIMIYU – deceased.”

There was similar testimony from **HUMULTON MARIKIA WAMBEYE (DW 2)** who also states in his statement as follows:

“That PETER SIMIYU WAFULA and FESTO WAKHABU being friends, he (FESTO WAKHABU CHELOTI alias FESTO WAKHABU) permitted PETER SIMIYU WAFULA to utilize the subject suit property for farming instead of the same being fallow.”

The thread which runs in the defence case is that **PETER SIMIYU** and his family were in fact occupying the suit land simply as care – takers and with the permission of **FESTO WAKHABU**. If indeed **PETER SIMIYU** and his family which includes the plaintiff were in occupation and possession with the permission of **FESTO WAKHABU** as care – takers, then the plaintiff’s claim to the suit land by way of adverse possession cannot succeed. A claim by adverse possession cannot succeed if the party asserting the claim is in possession with the permission of the owner – **JANDU .V. KIRPAL 1975 E.A 225**. But does the evidence in this case support the defendant’s assertion that **PETER SIMIYU** and his family were mere care – takers? I am not persuaded that that is the position for the following reasons: -

14. Firstly, there is evidence from the defendant himself and his witnesses which support the plaintiff’s case that **FESTO WAKHABU** re – located to **MBAKALO** Settlement Scheme with his family. If he wanted a care – taker for the suit land, there could be no better person than his own brother **PATRICK WAKHABU (DW 3)** whom he left behind and whose land in fact neighbours the suit land. This is what **PATRICK WAKHABU (DW 3)** has said in his statement:-

“That the Applicant is my immediate neighbour and the widow to PETER SIMIYU WAFULA – deceased. That my land is in between the home of the Applicant/Plaintiff and the subject suit land.”

Given the proximity of his own brother to the suit land, there is no reason why **FESTO WAKHABU** could not assign him the responsibility of care – taker to the suit land. I did not hear any evidence of bad blood between the two siblings that would compel **FESTO WAKHABU** to leave the care of the suit land to his friend **PETER SIMIYU** rather than to his own brother **PATRICK WAKHABU**. The only irresistible conclusion and which supports the plaintiff’s case is that **FESTO WAKHABU** had in fact relinquished any claim to the suit land to **PETER SIMIYU** through a sale and had relocated his family elsewhere. He could not therefore have left his brother **PATRICK WAKHABU** as care – taker of the land over which he had no interest. When he was cross – examined by **MR MAKOKHA**, this is what the defendant said on this issue: -

“My father moved from the land in 1975 but told the plaintiff and her husband to take care of it. The plaintiff and her husband were not our relatives. It is true that my father had other relatives living near the suit land. He did not leave the suit land under the care of those relatives. I don’t know why. All I know is that the plaintiff and her late husband have been utilizing the suit land since then upto 2019 when she filed this suit. Nobody stopped her from utilizing the suit land from 1975 upto 2019.”

PATRICK WAKHABU (DW 3) himself confirmed as much when cross – examined. He said: -

“I am aware that FESTO WAKHABU left the suit land in 1975. He did not leave the suit land under my care or that of my brothers. He moved to the scheme.”

I am satisfied from all the above that **FESTO WAKHABU** left the suit land to **PETER SIMIYU** not as a care – taker as the defendant would like this Court to believe, but rather, as a person to whom he had transferred his interest therein through a sale. Indeed, when she was cross – examined by **MR JUMA**, the plaintiff suggested that her later husband had tried to get **FESTO WAKHABU** to transfer the suit land to him. She said: -

“We tried to register the land in our names but FESTO WAKHABU kept promising my husband that he would do so. It is true that my late husband never took FESTO WAKHABU to Court over the land.”

15. Secondly, whereas the plaintiff’s case is that in fact her late husband purchased the suit land from **FESTO WAKHABU**, the defendant and his witnesses were emphatic that **FESTO WAKHABU** did not sell the said land to **PETER SIMIYU** and could not have done so without their knowledge. However, the issue of whether or not **PETER SIMIYU** took occupation and possession of the suit land through a purchase is debunked by the defendant’s own evidence which appears to confirm that there was indeed a sale agreement which however does not meet the threshold of a contract for the transfer of land. This is what the defendant has deponed in paragraph 14 of his replying affidavit.

14: “That ever since the plaintiff/Applicant started to claim that his late husband one PETE4R SIMIYU bought the subject land from my deceased father one FESTO WAKHABU in the years respectively 11th August 1968, 31st August 1968 and 1st April 1969 which correspondences am advised by my Advocates on record not to be true and or denied as agreements in question do not bear any provisions in laws.” Emphasis added.

And among the documents annexed to the defendant’s replying affidavit are pleadings filed in **BUNGOMA CM ELC CASE No 61 of 2019** including an affidavit filed by the plaintiff in that case and dated 17th June 2019. In that affidavit which was filed in support of an application for injunction, the plaintiff herein deponed as follows in paragraph 4: -

4: “That the years respectively 11.8.1963, 8.1.1968 and 1.4.1969, my late husband entered into a written land agreement with one FESTUS WAKHABU (deceased) to have him sell land parcel NO MALAKISI N. &C. NAMWELA/62 registered in the names of FESTO WAKHABU (deceased) measuring 2 acres and MALAKISI/N. NAMWELA/236 registered in the names of CHELOTI TENGE (deceased) father to one FESTO WAKHABU (Deceased) measuring 1.4 acres. See copy of written agreements marked RNS — 11(a)(b). ”

Copies of those agreements dated 11th August 1963, 8th January 1968 and 1st April 1969 were annexed. These are the agreements that I referred to earlier in this Judgment as having been written in **KIBUKUSU** dialect but with no **ENGLISH** translation. I also said that such documents serve no useful purpose. However, the challenge that this Court had in understanding those agreements has now been made easy by the defendant himself who suggests that although they purport to be sale agreements executed by **PETER SIMIYU** and **FESTO WAKHABU** in respect of the suit land they do not meet the requirements of the law. I agree that a casual look at those documents shows that they cannot qualify as agreements for the selling and buying of land as known in law. Indeed, all of them are only signed by **FESTO WAKHABU** and whereas they cannot be enforced as land sale **“agreements,”** their import is that **PETER SIMIYU** certainly did not enter the suit land as a care - taker as suggested by the defendant.

16. The above finds support in the submission by the defendant’s Counsel when he states thus: -

“The husband of the plaintiff to whom the plaintiff claims through, came into the suit land vide a purchase agreement. In an affidavit in support and witness statement, the plaintiff stated that they purchased the suit land from the defendant’s father. We submit therefore that the plaintiff having testified to have come and/or acquired interest in the suit land as purchaser does not qualify as an adverse possessor and on this limb the claim by the plaintiff is misplaced and should be dismissed (sic) with costs: -

The plaintiff is not seeking to enforce the sale agreements between her late husband and **FESTO WAKHABU**. The hurdles which she would meet in trying to do so would be insurmountable. But the existence of those agreements which the defendant acknowledges though with a rider that they have no legal basis, certainly serve another purpose which is to rebut the defendant’s own assertion that **PETER**

SIMIYU was only a care = taker occupying the suit land with the permission of **FESTO WAKHABU**.

17. In opposing the plaintiff’s claim, the defendant asserted that other than cultivating the suit land, the plaintiff has never lived there. This is what he has deponed in paragraph 22 of his replying affidavit: -

22: “That the plaintiff/Applicant has never lived on the subject land save to cultivating. ”

That is true. Indeed, the plaintiff’s case is not that she has established a home there. Her claim is that she has been cultivating the suit land measuring 2 acres since 1969 and even the photograph which she produced shows land which has been ploughed and not homes. But as is clear from **HALSBURY’S LAWS OF**

ENGLAND as cited in **JOSEPH KITHINJI M’ERINGO .V. CHRISTINE N. MBITI** (supra), cultivation of land is sufficient evidence of possession. Similarly, in **DANIEL KIMANI RUCHINE & OTHERS .V. SWIFT RUTHERFORD**

CO LTD & ANOTHER 1977 eKLR the Court said: -

"Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land because these are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time, see generally, WEST BANK ESTATES LTD . V. ARTHUR [1966 3 V.L.R 750]." Emphasis added.

In the circumstances of this case, there is cogent evidence that since 1969, the plaintiff has been ploughing the suit land measuring 2 acres the previous owner having been dispossessed of the same. That occupation and possession has been open, continuous, exclusive, peaceful, uninterrupted and with the knowledge of both the defendant and **FESTOS WAKHABU** his predecessor in title until 2019 when the defendant made a forceful re - entry. That was rather late in the day because by 2019, the defendant's title to the suit land had long been extinguished by operation of the law. It is of course true that the defendant only acquired ownership of the suit land on 23rd January 2019. However, that was always subject to the plaintiffs overriding interests protected by **Section 28(h)** of the **Land Registration Act** which provides that: -

28: "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 -

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."

The change of ownership of the suit land from **FESTO WAKHABU** to the defendant did not interrupt the plaintiff's adverse possession of the same -**GITHU .V. NDEETE** (supra). The defendant simply remained a trustee holding the title to the suit land in trust for the plaintiff. I am satisfied from the totality of the evidence herein that the plaintiff has proved her case as required in law and is entitled to orders that she has acquired the suit land by way of adverse possession.

18. Before I make my final disposal orders, I need to point out that although both parties have in their pleadings referred to the suit land as **NORTH MALAKISI/N & C NAMWELA/162**, the Certificate of Official Search issued on 15th March 2019 describes it as **MALAKISI N. C NAMWELA/162**. I shall therefore refer to it in the manner described in the Certificate of Official Search.

19. Having considered the evidence by both parties, there shall be Judgment for the plaintiff against the defendant in the following terms: -

- 1. The plaintiff has acquired ownership of the land parcel NO MALAKISI N. C. NAMWELA/162 by way of adverse possession.**
- 2. The defendant's ownership of the land parcel NO MALAKISI N. C. NAMWELA/162 has been extinguished by operation of the law.**
- 3. The plaintiff shall be registered as the proprietor of the land parcel NO MALAKISI N. C. NAMWELA/162.**
- 4. The defendant shall within 30 days of this Judgment execute all the relevant documents for the transfer of the land parcel NO MALAKISI N. C. NAMWELA/162 in the names of the plaintiff.**
- 5. In default of (4) above, the Deputy Registrar shall be at liberty to execute all such documents on behalf of the defendant and the Land Registrar Bungoma shall amend the records of the land parcel NO MALAKISI N. C. NAMWELA/162 to reflect the new ownership.**
- 6. The defendant, his agents, servants or any other person claiming through him are permanently enjoined from interfering with the plaintiff's occupation and possession of the land parcel NO MALAKISI N. C. NAMWELA/162.**

7. The defendant shall meet the plaintiff's costs of this suit.

Boaz N. Olao.

JUDGE

1st February 2022.

Judgment dated, delivered and signed at **BUNGOMA** this 1st day of February 2022 by way of electronic mail in keeping with the **COVID — 19** pandemic guidelines.

Right of Appeal explained.

Boaz N. Olao.

JUDGE

1st February 2022.