



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ENVIRONMENT CASE NO. 72 OF 2012.**

**CHARLES WASIKE MAKOKHA.....PLAINTIFF**

**VERSUS**

**STEPHEN LUMUNYASI.....1<sup>ST</sup> DEFENDANT**

**MARTIN WANJALA.....2<sup>ND</sup> DEFENDANT**

**FRANCIS WAFULA.....3<sup>RD</sup> DEFENDANT**

**JOHN WEKHOMBA.....4<sup>TH</sup> DEFENDANT**

**PIUS NALIANYA.....5<sup>TH</sup> DEFENDANT**

**VINCENT MAKOKHA.....6<sup>TH</sup> DEFENDANT**

**JOHN MURUNGA.....7<sup>TH</sup> DEFENDANT**

**PASTOR MURUNGA.....8<sup>TH</sup> DEFENDANT**

**ANTONY MAKARI.....9<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

**CHARLES WASIKE MAKOKHA** the plaintiff herein is acting in person and filed this suit on 29<sup>th</sup> July 2010 seeking Judgment against the defendants in the following terms:-

- 1. An order that the defendants un-conditionally vacate the land parcel NO. W.BUKUSU/E.SIBOTI/413 or in the alternative and without prejudice to the foregoing, they be evicted.**
- 2. Mesne profits.**
- 3. Cost of the suit.**
- 4. Interest**

The basis of the plaintiff's claim is that he is the absolute registered proprietor of the land parcel **NO. W. BUKUSU/E.SIBOTI/413** (herein the suit land) but on diverse dates between the year 1985 and 2009, the defendants took advantage of his absence and encroached thereon. They have evicted dwellings, structures and are also ploughing the suit land for crops. And despite demand and notice of intention to sue, the defendants have ignored and refused to vacate thus necessitating the filing of this suit.

The defendants filed a joint defence denying the plaintiff's claim adding that the suit land was sub-divided on 6<sup>th</sup> November 1989 and the title closed.

The 1<sup>st</sup> defendant **STEPHEN LUMANYASI** pleaded that on 22<sup>nd</sup> August 1991 he purchased 2 1/3 acres from one **DESTERIO WAMAYA**

**NYOLA** at a consideration of Kshs. 53,000/= and a further 1¼ from one **TITUS WARABA WAMAYA** at a consideration of Kshs. 56,000/= and took possession.

The 2<sup>nd</sup> defendant **MARTINE WANJALA** pleaded that in 1990, he bought 3 acres from one **DESTERIO WAMAYA NYOLA** at a consideration of Kshs. 35,000/= which he paid and obtained title being **W. BUKUSU/E. SIBOTI/1556** and took possession.

The 3<sup>rd</sup> defendant **FRANCIS WAFULA** pleaded that on 24<sup>th</sup> February 1985 he purchased 5 acres from **PETER WAFULA MAKOKHA** and on 4<sup>th</sup> October, 1990, he purchased 2½ acres from **DESTERIO WAMAYA NYOLA** at a consideration of Kshs. 35,000/=. That he fully paid the purchase price and took possession.

The 4<sup>th</sup> defendant **JOHN WEKHOMBA** pleaded that on 7<sup>th</sup> March 1976 he purchased from one **WEPUKHULU MUMALASI** 6 acres at a consideration of Kshs. 3,750/= and in 1984, he purchased 1 acre from one **PETER WAFULA** and obtained his title on 6<sup>th</sup> November 1989.

The 5<sup>th</sup> defendant **PIUS NALIANYA** pleaded that on 30<sup>th</sup> March 1984, he purchased 2 acres from one **WAMAYA NYOLA WAMBA** at a consideration of Kshs. 13,062/= .

The 6<sup>th</sup> defendant **VINCENT MAKOKHA** pleaded that on 22<sup>nd</sup> August 2004, he purchased 5 acres from one **TITUS WANJALA** at a consideration of Kshs. 245,000/= and in 2006, he purchased a further ½ acre from one **PETER WAFULA MAKOKHA** at a consideration of Kshs. 24,500/=. He then obtained the title to his parcel which is **W. BUKUSU/E.SIBOTI/1751** which he farms to-date. He denied having encroached onto the suit land.

The 7<sup>th</sup> defendant **JOHN MURUNGA** stated that on 20<sup>th</sup> April 2004, he purchased 1 ½ acres from one **JOHN BARASA WEKHOMBA** and has since obtained his title being **W. BUKUSU/E. SIBOTI/1749** which he has taken possession.

The 9<sup>th</sup> defendant **ANTONY MAKARI**'s name appears in the statement of defence dated 25<sup>th</sup> August 2010 but there is no pleading made on his behalf. The same case applies to the 8<sup>th</sup> defendant **PASTOR WAFULA**. Their witness statements are expunged.

The plaintiff testified and closed his case before **OMOLLO J** on 25<sup>th</sup> July 2014. However, for various reasons which are clear from the record, the defence case was not heard. Part of the reason is that the Court had summoned the Land Registrar to produce the record of the suit land and the resultant sub – divisions thereof. It was not until 30<sup>th</sup> July 2018 that the defendants were able to testify after directions were given that the suit proceeds from where **OMOLLO J** had left.

For reasons that will become clear at the end of this Judgment, the failure by the 8<sup>th</sup> and 9<sup>th</sup> defendants to file any defences is not really of any consequences.

The plaintiff testified before **OMOLLO J** on 25<sup>th</sup> June 2014 and his testimony was very brief. He told the Court that he is the registered proprietor of the suit land but while he was away in Uganda, the defendants took advantage of his absence and invaded it. He therefore sought their eviction therefrom.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants adopted as their evidence, their witness statements dated 10<sup>th</sup> December 2011 together with their list of documents dated 2<sup>nd</sup> April 2014 and filed on 3<sup>rd</sup> April 2014.

The 1<sup>st</sup> defendant denied having trespassed on the suit land adding that he bought land parcel **NO. W. BUKUSU/E.SIBOTI/1450** from one **TITUS WARABA WAMAYA** and **SILAS BARASA WAMAYA** in 1991 and 1994 respectively.

The 2<sup>nd</sup> defendant testified that he bought his land parcel **NO. W.BUKUSU/ E.SIBOTI/1556** from one **WAMAYA NYOLA** in 1993.

The 3<sup>rd</sup> defendant testified that in 1985, he bought parcel **NO. W. BUKUSU/E.SIBOTI/1849** from one **PETER WAFULA**.

The 4<sup>th</sup> defendant testified that in 1976, he bought 6 acres of land now known as **W. BUKUSU.E SIBOTI/1451** from one **WEPUKHULU MUMALASI** who is a brother to the plaintiff. That his parcel was carved out of the suit land and he has the title thereto. He added that even the plaintiff was aware about the transaction.

The 5<sup>th</sup> defendant is now deceased.

The 6<sup>th</sup> defendant testified that he bought land parcel **NO. W. BUKUSU/E. SIBOTI/1449** from one **TITUS WANJALA** and has the title deed. He added that he did not know the plaintiff or the suit land.

The 7<sup>th</sup> defendant adopted as his evidence his witness statement dated 10<sup>th</sup> December 2011 in which he has stated that he bought ½ acre of land from one **JAMES MANDA NABIE** on 5<sup>th</sup> August 2008 at a consideration of Kshs. 33,000/= which he paid in two instalments. That he was in the process of obtaining the title when the plaintiff sued him. He denied having encroached onto the plaintiff's land.

The 8<sup>th</sup> and 9<sup>th</sup> defendants were not named in the joint defence dated 25<sup>th</sup> August 2010 and although the 9<sup>th</sup> defendant **ANTONY MAKARI** testified as **DW 10**, his testimony is really of no consequence in as far as the claim against him is concerned.

The defendants also called as their witnesses **JACKLINE NABANGALA NALIANYA (DW 9)** and **WAMAYA NYOLA WARABA (DW 8)**.

**WAMAYA NYOLA WARABA** similarly adopted as his evidence his statement dated 1<sup>st</sup> September 2015 in which he has stated that in 1976, he purchased the suit land measuring 13 acres from the plaintiff at a consideration of Kshs. 4,450/=. That he processed the title deed which was issued on 7<sup>th</sup> November 1989 and started living thereon. However, his health started deteriorating and he sold it to the following defendants:-

(a) 1<sup>st</sup> defendant – **STEPHEN LUMANYASI** – 4 ½ acres

(b) 2<sup>nd</sup> defendant – **MARTIN WANJALA** – 3 acres

(c) 4<sup>th</sup> defendant – **JOHN WEKHOMBA** – 3 acres

(d) 5<sup>th</sup> defendant – **PIUS NALIANYA (deceased)** – 2 acres

(e) **JAMES NABIE** – 1 ¼ acres

Thereafter, he relocated to **MAYANJA KIBUKE** where he lives. He added that the plaintiff is being stubborn and sold his share to the witness and no longer has any land in **WEST SIBOTI** and has since moved to **TRANS – NZOIA**.

**JACKLINE NABANGALA NALIANYA** the widow to the 5<sup>th</sup> defendant also relied on her witness statement dated 2<sup>nd</sup> May 2017 in which she states that the deceased bought 2 acres from **WAMAYA NYOLA WARABA** on 30<sup>th</sup> March 1984.

No submissions were filed by the parties at the end of the trial.

I have considered the evidence by all the parties as contained in their statements as well as the documents filed.

Although the plaintiff produced as part of his documentary evidence a copy of the title deed to the suit land issued on 30<sup>th</sup> April, 2010, that title was infact closed many years ago and the suit land no longer exists, perhaps only on paper. According to the evidence of **WAMAYA NYOLA WARABA (DW 8)**, he bought the suit land measuring 13 acres from the plaintiff at a consideration of Kshs. 4,450/= way back in 1976 and was issued with a title deed on 7<sup>th</sup> November 1989. He then sold the suit land to the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants as well as one **JAMES NABIE** before relocating to **MAYANJA KIBUKE** where he lives. This witness did not produce as his documentary evidence, any agreement between him and the plaintiff for the purchase of the suit land. It is clear however that **WAMAYA NYOLA WARABA (DW 8)** and the plaintiff were both holding titles to the suit land. According to the Green Card to the suit land, it was first registered in the names of one **MAKOKHA** (the second name is not very visible) on 6<sup>th</sup> February 1973. The registration in the names of the plaintiff was on 23<sup>rd</sup> February 1988. In the absence of any evidence as to how he purchased the suit land from the plaintiff, the only conclusion that this Court can arrive at is that **WAMAYA NYOLA WARABA (DW 8)** obtained the suit land fraudulently. Unfortunately however, the said **WAMAYA NYOLA WARABA (DW 8)** is not a party to this suit and therefore orders cannot be made against him. It is not clear why the plaintiff did not file a suit against him yet it must have been obvious to him as far back as 2012 when the defendants filed their statements herein that they had derived their respective titles from the said **WAMAYA NYOLA WARABA (DW 8)**. For instance, in paragraph four of his statement dated 10<sup>th</sup> December 2011, the 2<sup>nd</sup> defendant states as follows:-

**4: “On the 29/8/1993 I bought 3 acres from one WAMAYA NYOLA at a purchase of Kshs. 49,300/= for the 3 acres of land which I fully paid.”**

A perusal of the documents herein show that the land parcels **NO. W. BUKUSU/E. SIBOTI/1558, 1556, 1449, 1751, 1749, 1450, 1451, 1559, 1555, 1748, 1750, 1751 and 1752**, which are all registered in the names of the defendants and others who are not parties herein, were resultant sub-divisions of the suit land. Indeed parcel **NO. W. BUKUSU/E. SIBOTI/1449** which was registered in the names of one **PETER WAFULA MAKOKHA** was later sub – divided into parcels **NO. W. BUKUSU/E. SIBOTI/1750, 1751 and 1752** which are all registered in the names of the said **PETER WAFULA MAKOKHA** who is not a party in this case. Having failed to enjoin **WAMAYA NYOLA WARABA (DW 8)** in these proceedings, it is difficult to challenge the titles of the defendants herein. It is also instructive to note that the plaintiff, as per his plaint dated 29<sup>th</sup> July 2010, is not even questioning the defendants’ titles. He seeks the eviction of the defendants from the suit land which no longer exists. With proper legal advice, the plaintiff would also have filed this suit against **WAMAYA NYOLA WARABA (DW 8)** pleading fraud in the manner in which he obtained title to the suit land and sold the resultant sub – divisions to the defendants herein. These are some of the unfortunate challenges that litigants acting in person face.

But that is not the only hurdle that the plaintiff has been un-able to surmount. The plaintiff’s suit has been caught up by **Section 7 of the Limitation of Actions Act** which provides that:-

**7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”**

The plaintiff filed this suit on 29<sup>th</sup> July 2010. However, as is clear from the witness statements of the defendants herein, they purchased their various parcels of land which are resultant sub – divisions of the suit land as far back as 1976. For instance, the 1<sup>st</sup> defendant purchased his portion from one **SILAS BARASA WAMAYA** on 22<sup>nd</sup> August 1991, 2<sup>nd</sup> defendant purchased his portion from **WAMAYA NYOLA** on 29<sup>th</sup> August 1973, 3<sup>rd</sup> defendant purchased his two portions from **PETER WAFULA MAKOKHA** on 24<sup>th</sup> February 1985, 17<sup>th</sup> March 1991

and a third portion from **WAMAYA NYOLA WARABA** on 4<sup>th</sup> October 1990, 4<sup>th</sup> defendant purchased two portions the first being 6 acres from **WEPUKHULU MUMALASI** on 7<sup>th</sup> March 1976 and 1 acre from **PETER WAFULA MAKOKHA** in 1984. By the time the 6<sup>th</sup> defendant purchased land parcel **NO. W. BUKUSU/E. SIBOTI/1449** in 2002, it had long been registered in the names of **PETER WAFULA MAKOKHA**. Most importantly however, it is clear from the title deed to the land parcel **NO. W. BUKUSU/E. SIBOTI/1451** that it had been hived from the suit land as far back as 6<sup>th</sup> November 1989 which is some 21 years before this suit was filed. The plaintiff told the Court in his evidence in chief on 25<sup>th</sup> June 2014 that although the suit land originally belonged to his grandfather, the defendants invaded it when he was away and they are now in occupation. In his own plaint, he had pleaded at paragraph 4 that the invasion took place between 1985 and 2009.

From the evidence on record, it is obvious that this suit is statute barred. The suit land ceased to exist as far back as 1989. There is also no land known as **W. BUKUSU/E. SIBOTI/413** which I can order the defendants to be evicted from.

This suit is dismissed with no orders as to costs.

**Boaz N. Olao.**

**J U D G E**

**11<sup>th</sup> July 2019.**

Judgment dated, delivered and signed in Open Court this 11<sup>th</sup> day of July 2019 at Bungoma.

Mr Kundu for defendants present

Plaintiff present in person

Defendants all present

Gladys – Court Assistant present

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**11<sup>th</sup> July 2019.**