



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 140 OF 2017 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTION ACT

AND

IN THE MATTER OF LAND PARCEL NO. WEST BUKUSU/SOUTH MYANGA/1496

JAMES WABWIRE WANYAMA.....PLAINTIFF

VERSUS

JAMES MAKOKHA WANJALA.....DEFENDANT

J U D G M E N T

By an Originating Summons dated 19th September 2017 and filed herein on 3rd November 2017, **JAMES WABWIRE WANYAMA** (the plaintiff herein) sought a determination of the following questions as against **JAMES MAKOKHA WANJALA** (the defendant herein) with respect to the land parcel **NO WEST BUKUSU/SOUTH MYANGA/1496** (the suit land): -

- 1. Whether the defendant is the registered proprietor of the suit land.**
- 2. Whether the plaintiff has been in peaceful, open and continuous occupation of the suit land.**
- 3. Whether the defendant's title to the suit land has been extinguished by the plaintiff's adverse possession.**
- 4. Whether the plaintiff should be declared to have become the legal owner of the suit land by adverse possession for over 12 years.**
- 5. Whether the plaintiff should be registered as the sole proprietor of the said portion of land in place of the defendant in whose name the suit land is currently registered.**
- 6. Whether the last original title deed in respect of the suit land which is with the defendant be dispensed with.**
- 7. Who should bear the costs of this application.**

The Originating Summons is supported by the plaintiff's affidavit also dated 19th September 2017. Annexed to the said affidavit are the following documents: -

- 1. Limited Grant Ad Litem issued to the plaintiff in respect to the Estate of WANYAMA SARAWE OKABO.**
- 2. A document dated 6th December 1972 written in KIBUKUS LANGUAGE (it was abandoned during the plenary hearing on 17th February 2020).**
- 3. Grant of Letters of Administration issued to ALBINA NAFULA BARASA in respect to the Estate of BENJAMIN BARASA MWANZA.**
- 4. Confirmation of the Grant.**
- 5. Green Card in respect of the land parcel NO WEST BUKUSU/SOUTH MYANGA/688.**

6. Mutation form and diagrams for land parcel NO WEST BUKUSU/SOUTH MYANGA/1296.

7. Green Card for the suit land.

8. Proceedings in BUMULA LAND DISPUTES TRIBUNAL between WANYAMA SARAWE (Claimant) and ALBINA BARASA NAFULA with respect to the land parcels NO WEST BUKUSU/SOUTH MYANGA/1495 and 1297.

9. Order in BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE No 59 of 1999.

10. Proceedings in KAKAMEGA PROVINCIAL APPEALS TRIBUNAL CASE No 96 OF 1999 between ALBINA BARAZA NAFULA (Appellant) and JAMES WABWIRE WANYAMA (Respondent).

The plaintiff also filed his statement on 11th June 2018 as well as statements from his witnesses CHARLES WANJALA (PW 2), ESTHER NAMUKURU BARASA (PW 3) and ALBINA NAFULA BARASA (PW 4).

The gist of the plaintiff's testimony as contained in his supporting affidavit and witness statement is that his late father WANYAMA SARAWE who died on 17th March 2004 had on 6th December 1972 purchased a portion of land measuring 1¼ acres from the late BENJAMIN BARASA MWANJE out of the land parcel NO WEST BUKUSU/SOUTH MYANGA/688. In paragraph 3 of his supporting affidavit however, he says that the said 1¼ acres was in fact given to him by the said BENJAMIN BARASA MWANJE as the equivalent of 3 heads of cattle being refund of bride price. That his late father WANYAMA SARAWE occupied that portion until the time of his death but the same was not registered in his names.

When BENJAMIN BARASA MWANJE died on 3rd June 1982, his wife ALBINA NAFULA BARASA (PW 4) succeeded him and was registered as the proprietor of the said land which she later sub – divided to create several other portions including the suit land which she however sold to the defendant. In 1999, the late WANYAMA SARAWE had filed a case at the BUMULA LAND DISPUTES TRIBUNAL against ALBINA NAFULA BARASA claiming the 1¼ acres and an award was made in his favour and an appeal by ALBINA NAFULA BARASA was dismissed. By that time, however, ALBINA NAFULA BARASA had already sold the suit land to the defendant. The plaintiff adds that his late father WANYAMA SARAWE had exclusive, continuous and uninterrupted use of the suit land from 1972 until the time of his death in 2004 a period of over 12 years. Therefore, the defendant's title in the suit land has been extinguished by operation of the law and the same should be transferred to the plaintiff.

In his statement dated 22nd March 2018 and filed herein on 11th June 2018, CHARLES WANJALA (PW 2) who is a brother to the plaintiff states that he was given a portion of land measuring 1¼ acres out of the land parcel NO WEST BUKUSU/SOUTH MYANGA/688 which he utilized for planting sugarcane for the Mumias Sugar Company.

ESTHER NAMUKURU BARASA (PW 3) in her statement dated 12th November 2018 and filed on 15th November 2018 states that she is the daughter of the late BENJAMIN BARASA MWANJE who sold 1¼ acres of his land to the plaintiff's father the late WANYAMA SARAWE. That the said portion is contained in the suit land which is registered in the names of the defendant. She denied that her mother ALBINA NAFULA BARASA (PW 4) had sold the suit land to the defendant and added that it forms part of the Estate of the late WANYAMA SARAWE.

ALBINA NAFULA BARASA (PW 4) states in her statement dated 24th June 2019 and filed herein on 25th June 2019 that she is the widow of the late BENJAMIN BARASA MWANJE who prior to his death in 1982 owned the land parcel NO WEST BUKUSU/SOUTH MYANGA/688. That the late WANYAMA SARAWE the father to the plaintiff used to grow sugar – cane on the said land having purchased a portion thereof measuring 1¼ acres. Following the death of her husband, she was chased away from the land in 1983 by one PETER WABWILE WABUTO a son of her brother in law who then sold the land to the defendant. That the portion which her late husband had sold to WANYAMA SARAWE was subsequently registered as parcel NO WEST BUKUSU/SOUTH MYANGA/1496 which the plaintiff and his brother continued to utilize until 21st May 2019 when the defendant forcefully invaded and ploughed it. That the suit land should be registered in the names of the plaintiff.

In opposing the Originating Summons, the defendant filed a replying affidavit dated 27th September 2018 as well as a witness statement dated 31st September 2019. He also annexed to his replying affidavit the documents to be relied on in his defence. A second list of document was also filed on 27th November 2019 together with the statement of his witness GEORGE MABUKA (DW 2).

His evidence as can be gleaned from both his replying affidavit and statement is that on 17th July 1991 he purchased from ALBINA NAFULA BARASA (PW 4) a portion of land measuring 4.5 acres at a consideration of Kshs. 45,000/= which he paid in full out of the land parcel NO WEST BUKUSU/ SOUTH MYANGA/688 then registered in the names of her late husband BARASA MWANJE. After the death of her husband, ALBINA NAFULA BARASA (PW 4) filed a succession cause at BUNGOMA COURT and transferred to him his portion which became land parcel NO WEST BUKUSU/ SOUTH MYANGA/1297. Then in 1998, ALBINA NAFULA BARASA (PW 4) sold to him the suit land at a consideration of Kshs. 60,000/= which he has been utilizing to plant sugar cane on contract to MUMIAS SUGAR COMPANY after which he started planting maize, sorghum, millet, potatoes, cassava and soya beans. He denied that the plaintiff's late father WANYAMA SARAWE occupied the suit land until his demise in 2004 adding that he is the one who has been in occupation of the suit land from 1998 to date. He added that he was not a party in the proceedings at the BUMULA LAND DISPUTES TRIBUNAL CASE No 1 of 1999 or the subsequent WESTERN PROVINCIAL LAND DISPUTES APPEAL CASE No 96 of 1999 where the subject in dispute was land parcel NO WEST BUKUSU/SOUTH MYANGA/1495 and 1297 and not the suit land. That if the plaintiff has any claim, it should be directed against ALBINA NAFULA BARASA (PW 4) since the suit land has never been occupied by anyone else other than himself. That the plaintiff has no cause of action against him and his claim does not meet the test of *nec vi nec clam ne precario* (no force, no secrecy nor persuasion).

In his statement dated 31st September 2019 **GEORGE MABUKA (DW 2)** states that he is the brother to the defendant who has been sending him to supervise casuals ploughing the suit land and planting various crops thereon. That in 2019 he supervised as casuals ploughed and planted maize and soya beans thereon and it is a well-known fact in the neighbourhood that the suit land belongs to the defendant. That neither the plaintiff nor his agents have stepped on the suit land since 1998 to-date and that the plaintiff has his land far away from the suit land.

Directions having been taken in the matter on 24th April 2019, the trial commenced 17th February 2020 when the plaintiff testified and called his witnesses **CHARLES WANJALA (PW 2)**, **ESTHER NAMUKURU BARASA (PW 3)** and **ALBINA NAFULA BARASA (PW 4)**. That all adopted as their evidence their witness statements contents of which I have already summarized above.

The defendant similarly adopted as his evidence his replying affidavit and witness statements and so too did his witness **GEORGE MABUKA (DW 2)**.

Submissions were thereafter filed both by **MR KHAKULA** instructed by the firm of **J. S. KHAKULA & COMPANY ADVOCATES** for the plaintiff and by **MR WANYONYI** instructed by the firm of **EMMANUEL WANYONYI & COMPANY ADVOCATES** for the defendant.

I have considered the evidence by the parties including the documents filed and the submissions by Counsel.

The plaintiff's case is that he is entitled to the suit land which measures 1 ¼ acres by way of adverse possession. He claims that the suit land is a resultant sub – division of the land parcel **NO WEST BUKUSU/SOUTH MYANGA/688** and was first given to his late father **WANYAMA SARAKWE** by the late **BENJAMIN BARASA MWANJA** (husband to **ALBINA NAFULA BARASA (PW 4)**) in 1972 being a refund of bride price. It is not clear in his supporting affidavit or witness statement why his late father was being refunded bride price as averred in paragraph 3 of his supporting affidavit. In paragraph 4 of the same affidavit and also in paragraph 6 of his witness statement, he says his late father purchased the suit land from **BENJAMIN BARASA MWANJA**. It is not therefore clear whether his late father purchased the suit land or it was infact given to him as a refund of bride price. What is clear, however, is that the plaintiff lays his claim to the suit land from 1972 when he says his late father took possession thereof and utilized it until his demise in 2004 after which the plaintiff continued with that occupation and possession until the time this suit was filed. He then supports his claim by producing the proceedings in **BUMULA LAND DISPUTES TRIBUNAL CASE No 1 of 1999** which he says his late father filed against **ALBINA NAFULA BARASA** who, as Administratrix of the Estate of **BENJAMIN BARASA MWANJA**, refused to transfer the suit land to his late father but instead sold it to the defendant fraudulently even after the Tribunal had made an award in favour of his late father.

All the above have been rebutted by the defendant who has averred that not only did **ALBINA NAFULA BARASA (PW 4)** sell to him the suit land and other parcels being the sub – divisions of the original land parcel **NO WEST BUKUSU/ SOUTH MYANGA/688** voluntarily but further, that neither the plaintiff nor his late father have ever been in occupation of the suit land.

Section 38(1) of the Limitation of Actions Act allows a party to move to Court for an order that he be registered as the proprietor of land or a lease in place of the person registered as proprietor thereof. In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a party claiming land by way of adverse possession must prove. It held that: -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of 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.”

It is now well settled that the combined effect of the relevant provisions of **Sections 6, 13 and 17** of the **Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL No 2136 of 1996**.

Similarly, the new Land Laws promulgated after the **2010 Constitution** recognize the doctrine of adverse possession. **Section 28(h)** of the **Land Registration Act 2012** identifies some of the overriding interests in land as: -

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

Section 7 of the **Land Act 2012** provides as follows: -

“Title to land may be acquired through –

(a) –

(b) -

(c) -

(d) Prescription.”

A party claiming land by way of adverse possession must prove that his occupation of the land in dispute is not by force, secrecy or

persuasion (nec vi nec clam nec precario) – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**. Such occupation must be open, peaceful, continuous un – interrupted and with the knowledge of the owner. In a recent exposition of the doctrine of adverse possession, the Court of Appeal stated the following in the case of **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No 56 of 2014 [2015 eKLR]**: -

“Adverse possession is essentially 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 in – action of the owner. The essential pre – requisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

A party claiming land by way of adverse possession has the duty of providing sufficient evidence to prove that claim. In **ROBINSON KIPLAGAT TUWEI .V. FELIX KIPCHOGE LIMO LANGAT C.A CIVIL APPEAL No 110 of 2019 [2020 eKLR]** the Court stated thus: -

“To succeed, a person claiming to be entitled to be registered owner of a parcel of land by adverse possession must adduce cogent evidence. A property owner is not to be deprived of their property unless in the clearest of cases.” Emphasis added.

And in **PETER NJAU KAIRU .V. STEPHEN NDUNGU NJENGA & ANOTHER C.A CIVIL APPEAL No 57 of 1997**, the Court held as follows: -

“In order that a registered owner of land may be deprived of his title to such land in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary.” Emphasis added.

It must be remembered that the concept of adverse possession is concerned with the dispossession of the registered proprietor of his land. It is therefore important that the party claiming land belonging to another person by way of adverse possession must be specific as to which land he is claiming. There should be no room for conjecture or any uncertainty with regard to the identity of the land in dispute.

A perusal of the plaintiff’s witness statement dated 5th February 2018 as well as his supporting affidavit dated 19th September 2017 makes it clear that his claim to the suit land is hinged on the fact that his late father **WANYAMA SARAWE** had purchased it (or obtained the suit land in return for bride price) from **BENJAMIN BARASA MWANJA** the late husband to **ALBINA NAFULA BARASA (PW 4)**. He then goes on to state that the dispute over the suit land was determined in favour of his late father at the **BUMULA LAND DISPUTES TRIBUNAL** in case No 1 of 1999 and the subsequent appeal by **ALBINA NAFULA BARASA (PW 4)** was dismissed by the **APPEALS COMMITTEE**. Those proceedings have been produced as part of the documentary evidence herein. However, it is clear that the case at the **BUMULA LAND DISPUTES TRIBUNAL** between the plaintiff’s father **WANYAMA SARAWE** and **ALBINA NAFULA BARASA (PW 4)** did not involve the suit land. This is obvious from the award of the said **TRIBUNAL** which reads as follows in so far as is relevant for purposes of this Judgment: -

“AWARD

This panel of Tribunal member has reached decision of giving claimant WANYAMA SARAWE ID 4396947 1¼ acres of land part of parcel NO W/BUKUSU/S MYANGA/1495 and 1297 which was formerly W/BUKUSU/S. MYANGA/688 from the objector WABWILE PETER WABUTO who is said to have sold part of these parcel Nos.” Emphasis added.

That award was made on 2nd March 1999. A copy of the title to the suit land shows that it was registered in the names of the defendant on 14th September 1998 and was therefore in existence by the time the plaintiff’s late father and **ALBINA NAFULA BARASA** were litigating at the **BUMULA LAND DISPUTES TRIBUNAL**. What is clear, therefore, is that the suit land was not the subject of the proceedings at the **TRIBUNAL** between the plaintiff’s late father and **ALBINA NAFULA BARASA (PW 4)**. What the plaintiff’s late father was claiming at the **TRIBUNAL** was a completely different parcel of land. If he was claiming the suit land, the person whom he ought to have filed his claim against was the defendant who already had the title thereto issued in his names. In paragraphs 11 and 12 of his statement dated 5th February 2018 and which he adopted as part of his evidence during the plenary hearing, the plaintiff has asserted as follows: -

11 “In 1999 the late WANYAMA SARAWE filed a claim against ALBINA in the BUMULA LAND DISPUTES TRIBUNAL claiming title to his 1 ¼ acres. The Tribunal decided in his favour.”

12 “The Tribunal award was adopted by the Court in BUNGOMA CMC MISC APPLICATION No 59 of 1999.”

The plaintiff then goes on to add that **ALBINA NAFULA BARASA**’s appeal was dismissed. He then states in paragraph 15 of the statement that: -

15: “I want the Court to assist me to get from the Respondent a separate title for WANYAMA SARAWE’s portion of land measuring 1¼.”

As it must now be clear from the preceding paragraph of this Judgment and the award of the **BUMULA LAND DISPUTE’S TRIBUNAL**, in so far as the plaintiff’s claim to the suit land by way of adverse possession is hinged on what his late father **WANYAMA SARAWE** was claiming from **ALBINA NAFULA BARASA**, then his claim to the suit land by way of adverse possession is clearly misplaced for the simple reason that the suit land was never the subject of the litigation between his late father and **ALBINA NAFULA BARASA**.

The plaintiff has however gone further to claim that he has continued to occupy the suit land even after the demise of his late father in 2004. In paragraph 7 of his supporting affidavit dated 19th September 2017, the plaintiff has averred as follows: -

7 “That my late father had the exclusive, continuous and un – interrupted use of the said portion of land from 1972 until his death in 2004 a period of more than 12 years and I have continued to have the exclusive use of the same upto now.”

In rebuttal, however, the defendant has averred in paragraphs 13 and 15 of his replying affidavit dated 27th September 2018 as follows: -

13 “That I purchased land parcel NO W/BUKUSU/S MYANGA/1496 when it was vacant nobody was utilizing the same in anyway.”

15 “That the late WANYAMA SARAWE, the Applicant herein nor any other person has never occupied parcel of land W. BUKUSU/S. MYANGA/1496 through residential occupation nor through crop or trees occupation.”

When he was cross – examined by MR WAMALWA Counsel for the defendant during the trial, the plaintiff stated the following: -

“I don’t live on the land in dispute. It is my brother HENRY NYONGESA who lives on the land parcel NO WEST BUKUSU/SOUTH MYANGA/1496. It is true that they don’t live on the land. My brother MAKOKHA also doesn’t live on the land in dispute.”

And this is what he said when cross – examined by the Court: -

“I have not lived on the land. My father died in 1972. I started using it after his death in 2004. I have no home there.”

On his part, the plaintiff’s brother CHARLES WANJALA (PW 2) had the following to say when cross – examined by MR WAMALWA: -

“I know HENRY NYONGESA and MAKOKHA WANJALA. They are my brothers. HENRY NYONGESA lives on a different parcel of land. HENRY NYONGESA is alive. Nobody utilizes the land in dispute as of now. It is not true that the defendant is utilizing the land. The land in dispute has remained fallow since 1999.”

The plaintiff’s other witness ESTHER NAMUKURU BARASA (PW 3) said as follows when re – examined by the plaintiff’s Counsel MR KHAKULA: -

“I know the defendant was utilizing the land in dispute upto 2019.”

ALBINA NAFULA BARASA (PW 4) had the following to say when cross – examined by MR WAMALWA: -

“I left the land in dispute in 1982. Since then, I have never gone back there so I don’t know who is utilizing the land in dispute.”

Among the documents filed by the defendant on 27th November 2019 and produced as part of his documentary evidence are photographs of himself standing in a crop of maize. I did not hear the plaintiff deny that the crop of maize is not on the suit land. More importantly, there was no dwelling structure of any kind visible in the said photograph. Yet when he testified in chief on 17th February 2020, the plaintiff said: -

“I wish the Court to know that I have lived on the suit land for 27 years peacefully and without interruption either by the defendant or any other person.”

Surely if either the plaintiff or his brother HENRY NYONGESA or indeed any other person has lived on the suit land, then at least evidence of their homes would have been produced as part of the plaintiff’s evidence. It is unlikely that the plaintiff could have lived on the suit land for such a long period and not even have temporary structure to show for it. The only plausible conclusion that this Court can arrive at based on the evidence before it is that neither the plaintiff nor, prior to him, his late father WANYAMA SARAWE were ever in occupation and possession of the suit land. Whatever land they occupied could only have been a different parcel of land and not the suit land. If at all they were in occupation and possession of the suit land, the next question would be at what point in time did the defendant dispossess them of the suit land and what action did they take?

In her oral testimony, ALBINA NAFULA BARASA (PW 4) denied having sold any land to the defendant. When she was cross – examined by MR WANYAMA, she said: -

“It is not true that I sold any land to the defendant.”

In paragraphs 8 and 9 of her statement dated 24th June 2019, she states as follows: -

8: “The Respondent transferred the entire land to himself and thereafter sub – divided it severally. The portion which my late husband had sold to WANYAMA SARAWE eventually received title NO W. BUKUSU/S. MYANGA/1496 and continued to be used by the Applicant and his brother until 2019 when the Respondent forcefully invaded and ploughed it.”

9: “The Respondent’s name in land title NO W. BUKUSU/S. MYANGA/1496 should be cancelled and the same registered in the name of the Applicant.”

However, among the documents filed by the plaintiff in support of his case is the copy of Register with respect to the suit land showing that it was transferred to the defendant by **ALBINA NAFULA BARASA (PW 4)** on 14th September 1998 having been earlier registered in her names on 7th January 1998. If that transaction was fraudulent, she did not tell the Court what action she took to address that fraud and re – claim her property. This can only mean that **ALBINA NAFULA BARASA (PW 4)** was not being honest when she denied having sold the suit land to the defendant whose evidence was that infact the said witness sold to him the suit land in 1998 when it was vacant and he has been utilizing it since then.

The record of 8th July 2019 also shows that when the parties appeared before me on the plaintiff’s application seeking to injunct the defendant from ploughing the suit land pending the hearing of this suit, they agreed to maintain the status quo. The status quo prevailing then was that the defendant was in possession having grown a crop of maize on the suit land and which the Court allowed him to tend. Therefore, between the plaintiff and the defendant, it is the latter, rather than the former, who has placed before the Court cogent evidence of occupation and possession of the suit land. Yet, as was held by the Court of Appeal in **SISTO WAMBUGU .V. KAMAU NJUGUNA 1983 KLR** citing **LINDLEY M. R in LITTLEDALE .V. LIVERPOOL COLLEGE [1900] 1 CH 19** at page 21: -

“In order to acquire by the statute of Limitations of title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.”

This Court therefore expected the plaintiff to lead evidence demonstrating that he has had exclusive occupation, possession and control of the suit land having dispossessed the defendant of the same for the statutory period of twelve (12) years. He had however fallen short of that. From the evidence before me, the land which the plaintiff’s late father **WANYAMA SARAWE** litigated over with **ALBINA NAFULA BARASA (PW 4)** and which the plaintiff claims to have continued occupying even after his father’s demise and now seeks to be registered in his names by way of adverse possession is clearly not the suit land. If the plaintiff is in adverse possession of any parcel of land, it must be another portion of land and not the land parcel **NO WEST BUKUSU/SOUTH MYANGA/1496**. His claim must therefore fail.

The up – shot of all the above is that the plaintiff’s suit is dismissed with costs.

Boaz N. Olao.

J U D G E

3rd June 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF JUNE 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES AS WAS ADVISED TO THE PARTIES. Right of Appeal explained.

Boaz N. Olao.

J U D G E

3rd June 2021.