



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 12 "A" OF 2014**

**CHARLES MUNGA KIPSANG.....PLAINTIFF**

**VERSUS**

**PATRICK TELEWA NABISWA.....1<sup>ST</sup> DEFENDANT**

**SAUL WEKESA NYONGESA.....2<sup>ND</sup> DEFENDANT**

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

By an amended Originating Summons dated 5<sup>th</sup> February 2020, **CHARLES MUNGA KIPSANG** (the plaintiff herein) sought Judgment against **PATRICK TELEWA NABISWA** and **SAUL WEKESA NYONGESA** (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) in the following terms: -

- (a) That the defendant's right over  $\frac{3}{4}$  of an acre out of title number **EAST BUKUSU/NORTH SANG'ALO/967** (now **EAST BUKUSU/NORTH SANG'ALO 6572, 6573 and 6574**) got extinguished by way of adverse possession upon the expiry of 12 years since the plaintiff took possession.
- (b) That a declaration that the beneficial ownership and use of the said parcel was legal and appropriate parcel to be transferred to the plaintiff and that the defendants do execute the transfer in favour of the plaintiff and in default thereof, the Deputy Registrar of this Honourable Court to execute the same.
- (c) That a declaration that the defendants be permanently barred by an order of this Honourable Court from taking, using and/or interfering with the parcels in any manner or any part thereof.
- (d) That a declaration that under Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, the plaintiff be registered as the proprietor of  $\frac{3}{4}$  of an acre out of title **NO EAST BUKUSU/NORTH SANG'ALO/967** (now **EAST BUKUSU/NORTH SANG'ALO/6572, 3573 and 6574**).
- (e) A declaration that the defendant be ordered to honour the terms of the sale agreement entered on 14<sup>th</sup> March 1980.
- (f) That the defendants be ordered to pay costs of this claim.
- (g) Any further or other relief.

In support of the Originating Summons, the plaintiff filed an affidavit dated 5<sup>th</sup> February 2020 in which he averred, inter alia, that on 14<sup>th</sup> March 1980 he purchased  $\frac{3}{4}$  of an acre from **RASIA MTESO** to be carved out of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** (now **EAST BUKUSU/ NORTH SANG'ALO/6572/6573 and 6574**) as per the agreement annexure **CMK 1**. That he immediately took possession of the said  $\frac{3}{4}$  acre which he occupies to-date and has developed it by building residential houses and planting various commercial trees. That the defendant's proprietary interest in the said  $\frac{3}{4}$  acre has been extinguished after 12 years. That the said  $\frac{3}{4}$  acre is clearly demarcated and the boundary can be seen. Annexed to the supporting affidavit is a copy of the sale agreement between him and **RASIA MTESO** dated 14<sup>th</sup> March 1980 (annexture **CMK 1**) and the Certificate of Search in respect of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** in the names of the 2<sup>nd</sup> defendant (annexture **CMK II**).

The plaintiff also filed a statement dated 26<sup>th</sup> October 2020 in which he added that **RASIA MATESO** had actually purchased the  $\frac{3}{4}$  acre which she sold to him from the 2<sup>nd</sup> defendant. That later, the family of the registered proprietor of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** (the late **NABISWA TELEWA WEKULO**) appointed the 1<sup>st</sup> defendant to be the Administrator of the Estate and carry out the succession. That the 1<sup>st</sup> defendant approached him and other purchasers to contribute towards the succession cause. That on that understanding, the 1<sup>st</sup> defendant undertook to transfer the  $\frac{3}{4}$  of an acre to him. That the sale agreement between him and

**RASIA MTESO** was witnessed by **MR WEKESA NABISWA** a brother to the 1<sup>st</sup> defendant.

Later, the plaintiff discovered that the defendants had colluded to deny him his land which they had fenced and prevented him from accessing. He filed a case at the **KANDUYI LAND DISPUTES TRIBUNAL** being case **No 28 of 2010** which was determined in his favour. In order to frustrate him further, the defendants sub – divided the original land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** into **EAST BUKUSU/NORTH SANG'ALO/6572, 6573 and 6574**.

The plaintiff also filed a further list of documents dated 26<sup>th</sup> October 2020 containing: -

- 1. Certificate of Search for parcel NO EAST BUKUSU/NORTH SANG'ALO/967 in the name of PATRICK TELEWA NABISWA.**
- 2. Certificate of Search for parcel NO EAST BUKUSU/NORTH SANG'ALO/6572 in the name of PATRICK TELEWA NABISWA.**
- 3. Certificate of Search for parcel NO EAST BUKUSU/NORTH SANG'ALO/6573 in the name of SAUL WEKESA NYONGESA.**
- 4. Certificate of Search for parcel NO EAST BUKUSU/NORTH SANG'ALO/6574 in the name of SAUL WEKESA NYONGESA.**
- 5. Green Card for parcel NO EAST BUKUSU NORTH SANG'ALO/967.**
- 6. Proceedings in KANDUYI LAND DISPUTE TRIBUNAL CASE No 28 of 2010.**
- 7. Estimates of damage on land parcel NO EAST BUKUSU/NORTH SANG'ALO/967.**

The defendants opposed the Originating Summons by filing both replying affidavits and statements.

The 1<sup>st</sup> defendant filed a replying affidavit dated 25<sup>th</sup> March 2014 and a statement dated 21<sup>st</sup> September 2015 in which he denied that the plaintiff had purchased  $\frac{3}{4}$  of an acre out of his land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967**. That the said land parcel belongs to him yet the plaintiff has annexed a sale agreement dated 14<sup>th</sup> March 1980 between him and **RASIA MTESO**. He further denied that the plaintiff has developed the land by constructing a house thereon adding that a different person is in occupation of the said land. He annexed to his replying affidavit the following documents: -

- 1. Sale agreement dated 14<sup>th</sup> March 1980 between the plaintiff and RASIA MTESO for  $\frac{3}{4}$  of an acre out of land parcel NO EAST BUKUSU/NORTH SANG'ALO/967 (then plot No 967).**
- 2. Certificate of Search for parcel NO EAST BUKUSU/NORTH SANG'ALO/967 in the name of PATRICK TELEWA NABISWA.**

The 1<sup>st</sup> defendant also filed a further statement dated 21<sup>st</sup> November 2016 in which he stated that the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** has been sub – divided to give rise to land parcel **EAST BUKUSU/NORTH SANG'ALO/6572** which is in his name and **EAST BUKUSU/NORTH SANG'ALO/6573 and 6574** which are in the name of the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant in response to the Originating Summons also filed a replying affidavit and statement both dated 10<sup>th</sup> March 2020. The two are basically a duplication of each other. He confirms that he is the registered proprietor of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/6573 and 6574** which he purchased from one **ALFRED MAINA WAMUKOTA** and the 1<sup>st</sup> defendant. That he is not aware that the plaintiff had purchased a portion measuring  $\frac{3}{4}$  of an acre curved from the land parcel **NO EAST BUKUSU/NORTH SANG'ALO /967**. That there is no development or demarcation on his land.

The hearing commenced on 26<sup>th</sup> May 2021 and the parties were the only witnesses who testified in support of their respective cases.

They adopted as their evidence their respective affidavits and statements whose contents I have already summarized above.

They also produced as their documentary evidence the list of documents filed herein.

Submissions were thereafter filed both by **MR BW'ONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the plaintiff and by **MR OLONYI** instructed by the firm of **AREBA ATANCHA & CO ADVOCATES** for the defendants.

I have considered the evidence by all the parties as well as the submissions by Counsel.

The plaintiff's case is that he has acquired by adverse possession a portion of land measuring  $\frac{3}{4}$  acre out of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** having purchased the same on 14<sup>th</sup> March 1980 from one **RASIA MTESO**. That parcel of land has now been sub – divided to create parcel **NO EAST BUKUSU/NORTH SANG'ALO/6572** which is registered in the names of the 1<sup>st</sup>

defendant and parcels **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** which are registered in the names of the 2<sup>nd</sup> defendant. The defendants' case is that the plaintiff did not buy the  $\frac{3}{4}$  acre from the 1<sup>st</sup> defendant and in any case, he did not build any house nor is he in occupation of the said portion of land.

The plaintiff is not seeking to enforce the sale agreement dated 14<sup>th</sup> March 1980 between himself and **RASIA MTESO**. The execution of that sale agreement was not in conformity with the law since the parties did not sign it. It only bore their names. The plaintiff has a signature as is clear from his verifying affidavit. No such signature appears on the agreement so there was no contract as known in law.

Most importantly, it is clear from the Green Card to land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** that it was first registered in the name of **NABISWA TELEWA WEKULO** on 3<sup>rd</sup> March 1969 before it was transferred to the 1<sup>st</sup> defendant on 27<sup>th</sup> March 2003. That title was subsequently closed on 5<sup>th</sup> November 2014 to create the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/6572**, **6573** and **6574**. Clearly therefore, **RASIA MTESO** had no interest in the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** which she could have transferred to the plaintiff or any other person for that matter because as at 14<sup>th</sup> March 1980, the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** was registered in the name of another person. It is one thing for parties to execute an agreement for sale of land but it is a completely different matter for such an agreement to be enforceable in law or to confer any interest in the land to the alleged purchaser. **MR BW'ONCHIRI** has submitted at page 47 of his submissions, citing the case of **MAMTA PEEUSH MAHAJAN .V. YASHWANT KUMARI MAHANJA 2017 eKLR** that: -

*“Your Lordship when the plaintiff testified he adopted his affidavit in support sworn on the 5.2.2020 where under paragraph 3, he states that he purchased  $\frac{3}{4}$  of an acre of land out of EAST BUKUSU/NORTH SANG'ALO/967 (now EAST BUKUSU/NORTH SANG'ALO/6572, 6573 and 6574).*

*Your Lordship from the above, it is clear that the plaintiff purchased land measuring  $\frac{3}{4}$  out of the suit parcel EAST BUKUSU/NORTH SANG'ALO/967 (now EAST BUKUSU/ NORTH SANG'ALO/6572, 6573 and 6574).*

*It is the submission of the plaintiff that the sale agreement he entered with the seller was a lawful and binding agreement.”*

As I have already stated above, it is common knowledge, which cannot be disputed, that on 14<sup>th</sup> March 1980, the plaintiff and **RASIA MTESO** purportedly entered into an agreement for the purchase of  $\frac{3}{4}$  of an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967**. The sale agreement speaks for itself. However, it did not comply with the law.

**RASIA MTESO** the purported seller was not the registered proprietor of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** when she agreed to sell  $\frac{3}{4}$  of an acre out of the said land to the plaintiff. The registered proprietor of the said land on 14<sup>th</sup> March 1980 was **NABISWA TELEWA WEKULO** the father to the 1<sup>st</sup> defendant. **RASIA MTESO** was basically an intruder meddling with the property of another person. She actually stole the  $\frac{3}{4}$  of an acre from the registered proprietor. In **JANE GATHECA .V. PRISCILLA GITUNGU 2008 eKLR**, the Court of Appeal held that: -

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

The case of **MAMTA PEEUSH MAHAJAN .V. YASHWANT KUMARI MAHAJAN** (supra) does not aid the plaintiff's case because in this case, **RASIA MTESO** had no interest in the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** which she could sell to the plaintiff.

Having said so, however, the plaintiff's case is that he is entitled to the  $\frac{3}{4}$  acre of it the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** by way of adverse possession. That is the claim that I shall now interrogate.

**Section 38(1)** of the **Limitation of Actions Act** allows a person who is in possession of land belonging to another to approach the Court to declare him as the owner of the said land in place of the registered proprietor. It reads: -

*“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 **TITUS KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal stated as follows with regard to what a person claiming land by way of adverse possession need to prove: -

*“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 a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA (No 2) 1984 KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see GITHU .V. NDEETE 1984 KLR 776.”*

The claimant must also prove that he has been in occupation and possession of the land which he claims without force, without secrecy and without permission – *nec vi nec clam nec precario* – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & COMPANY LTD 1980 KLR 10 [1976 – 80 KLR 1500]**. The occupation must also be peaceful – **GRACE WAIRIMU SOROMA .V. CHAKA LTD &**

In **KWEYU .V. OMUTO 1990 KLR 709**, the Court of Appeal stated as follows at page 716: -

**“By adverse possession in meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor.”**

Guided by the above, I shall now consider whether the plaintiff is indeed entitled to  $\frac{3}{4}$  of an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO /967** (now sub – divided into **EAST BUKUSU/NORTH SANG’ALO/6572, 6573 and 6574** by way of adverse possession.

In support of his claim to  $\frac{3}{4}$  of an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** (now **EAST BUKUSU/NORTH SANG’ALO/6572, 6573 and 6574**, the plaintiff averred in paragraphs 3, 4 and 5 of his supporting affidavit dated 11<sup>th</sup> June 2014 as follows: -

**3: “That on the 14.3.1980 I purchased  $\frac{3}{4}$  of an acre out of title number E. BUKUSU/N. SANGALO/967 (thereto annexed and marked CMK 1 is a true copy of the agreement dated 14.3.1980).**

**4: “That immediately I purchased the parcel I was put unto possession and to-date am in occupation having developed the same by planting various commercial trees. I also built residential houses thereof (sic).”**

**5: “That upon expiry of 12 years from the time of my purchase of the  $\frac{3}{4}$  of an acre out of the title NO E. BUKUSU/N. SANG’ALO/967, the Respondents’ proprietary interest got extinguished to the extent of the  $\frac{3}{4}$  of an acre purchased and occupied by myself.”**

In paragraph 10 of his further statement dated 26<sup>th</sup> October 2020, the plaintiff states as follows: -

**“That further I wish to state that by the time the 1<sup>st</sup> Respondent got registered as owner of the original parcel by way of transmission on 27.3.2003, I had occupied the portion sold to me of  $\frac{3}{4}$  of an acre out of land parcel N EAST BUKUSU/ NORTH SANG’ALO/967 for over 20 years.”**

All that has been rebutted by the defendants. In paragraphs 2, 3 and 4 of his replying affidavit dated 25<sup>th</sup> March 2014, the 1<sup>st</sup> defendant has deponed as follows:-

**2: “That I am the registered owner of land parcel known as E. BUKUSU/N. SANG’ALO/1967 (sic).”**

**3: “That the Applicant did not buy  $\frac{3}{4}$  of an acre from my parcel of land NO E. BUKUSU/NORTH SANG’ALO /1967 (sic).”**

**4: “That the Applicant has not constructed any house on my land.”**

In his statement dated 10<sup>th</sup> March 2020, the 2<sup>nd</sup> defendant states as follows: -

**“That I sub – divided the land I bought into two portions measuring 0.27 Ha and 0.05 Ha which were registered as BUKUSU/N. SANG’ALO/6573 and 6574 respectively.**

**That I don’t know the Applicant herein and/or whether he bought  $\frac{3}{4}$  of an acre from land parcel NO E. BUKUSU/N. SANG’ALO/967.**

**That there is no development and/or demarcation on my land as alleged by the Applicant. That the Applicant has attached sale agreement dated 14.3.1980 allegedly from one RASIA whom is not known to me either.”**

For reasons which I have already explained above, the plaintiff could not have acquired a valid title to the portion of land measuring  $\frac{3}{4}$  of an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** (now **EAST BUKUSU /NORTH SANG’ALO/6572, 6573 and 6574** by virtue of the sale agreement dated 14<sup>th</sup> March 1980 between him and **RASIA MTESO**. That notwithstanding, however, occupation and possession of land claimed by virtue of adverse possession is a matter of fact to be observed on the land. In **MWEU .V. KIU RANCHING & FARMING CO – OPERATIVE SOCIETY LTD 1985 KLR 430**, the Court of Appeal held that: -

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

**RASIA MTESO** may not have passed any clean title to the plaintiff through the sale agreement dated 14<sup>th</sup> March 1980. However, it is clear that the said agreement was the vehicle by which the plaintiff took occupation and possession of the said  $\frac{3}{4}$  of an acre out of the original land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** prior to it’s sub – division. Although the plaintiff has averred in his supporting

affidavit that he had constructed "permanent houses" on the said portion measuring  $\frac{3}{4}$  of an acre, I am not persuaded that any such "permanent houses" were constructed on the said land for two reasons. Firstly, photographic evidence should have been availed to prove that indeed such permanent houses were constructed on the said  $\frac{3}{4}$  of an acre. Secondly, I did not hear the plaintiff allege that his houses were demolished. And if they were, due to their "permanent" nature, surely some debris would have been left behind at the site. However, building of houses is not the only evidence that a party is in occupation and possession of the land which he claims by adverse possession. There can be no doubt that planting a crop or trees on the land in dispute is sufficient evidence of occupation and possession thereof and which can form the basis upon which such land can be claimed by way of adverse possession. It must be remembered that in adverse possession, the person claiming the land will have used it as the title owner would. Therefore, by planting crops and trees on the land in dispute, so long as it is not occasional, the claimant will have dispossessed the owner of the suit land. In this case, the plaintiff conceded that he last utilized the land by planting a crop in 1985. However, the plaintiff also produced as part of his documentary evidence the proceedings in **KANDUYI LAND DISPUTES TRIBUNAL CASE No LDT 28 of 2010** with respect to the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967** where he was the Claimant while the 2<sup>nd</sup> defendant and two others were the objectors. Among the findings of that Tribunal at page 26 is that the plaintiff, upon taking possession of the  $\frac{3}{4}$  of an acre from **RASIA MATESO** not only planted a crop of maize thereon for 3 years but also placed bricks and sand in 1990 in preparation for building. However, due to his duties as a Major in the Salvation Army, he was transferred from one place to another and could not develop it. Nonetheless, he planted trees on the said  $\frac{3}{4}$  of an acre. This is what he said at pages 1 and 2 when he testified before the Tribunal: -

***"I am CHARLES MUNGA KIPSANG. A resident of KABUCHAI VILLAGE IN KISIWA sub – location KABUCHAI LOCATION, KABUCHAI DIVISION BUNGOMA CENTRAL DISTRICT aged 63 years.***

***I bought land from RASIA MUTESO measuring  $\frac{3}{4}$  of an acre on 14<sup>th</sup> March 1980. In this land I planted gum trees (Eucalyptus) including the ones I bought from the parcel i.e. 10 cyprus trees, 10 pine trees and one mango tree. All trees were 1221 in total. I included one grass thatched house. I have been developing this parcel of land since I bought it. I have been growing maize after harvesting all the crops I have been storing them at MRS JULIANA NAMALWA MAINA. I have been leaving the parcel under the care of ALFRED MAINA and JULIANA.***

***In 1990 I bought sand 15 lorries of 7 ton, 18,000 bricks extra large and 7,500 pieces of broken bricks to this parcel of land for building.***

***In the year 2000, I was transferred from IKORELO – MARAGOLI TO UKAMBANI – YATTA. In the year 2009 I came back from UKAMBANI on transfer to KABUCHAI being near my land. After a short time, I received a call from both PATRICK TELEWA and JULIANA MAINA to meet them and discuss over the land ownership. All the land buyers including me were to pay Kshs. 600. On 20.10.2010 PATRICK TELEWA asked me if I had sent people to cut down trees and fenced the disputed land. The next day 21.10.2010 I went to the disputed land and found the trees cut down and the fence on the disputed land.***

***I reported the matter to the village elder MR ALFRED KATI then to the ASS. CHIEF MR MUNYIFU. The ASS. CHIEF sent the village elder to the site to see and make some findings. I accompanied the village elder to the site as he was making some findings from the neighbours. PENINA WEKESA said it was SAUL WEKESA NYONGESA who cut down the trees and fenced the disputed parcel of land. No sooner PENINA competed her statement then SAUL came in. He ordered both PENINA and the village elder to sit down. He struck me down. PENINA and her daughters assisted to raise me up and drove him out. I went to report to the Police Station Bungoma. He followed us behind to the Police Station with an intention of crushing us with vehicle. While in the Police office, he gave us a threatening warning to me from the Police Station. I sent a report to the ASS CHIEF NDENGELWA SUB LOCATION being in company of JULIANA MAINA and TERESA MAINA. However, TERESIA was not co – operative. We were summoned six times but TERESA never turned up. Ex 3 produced. From there, the ASS. CHIEF referred me to the LDT Ex 4. That is why I am here before you panel members. I am demanding my land back. I bought it long time ago."***

In his testimony before the Tribunal, the 2<sup>nd</sup> defendant said as follows: -

***"I am SAUL WEKESA NYONGESA. A resident of KHAOYA VILLAGE NDENGELEWA SUB – LOCATION BUKEMBE LOCATION KANDUYI DIVISION BUNGOMA SOUTH DISTRICT. Aged 50 years. Businessman as well as a farmer.***

***I bought the disputed land in 1996 from ALFRED MAINA measuring one acre. PB's Ex 1 – Land agreement at Kshs. 70,000. I have a balance to pay. I have owned it for 14 years. I have not experienced any problems over it.***

***On 17<sup>th</sup> October 2010 I got information that unknown person planted trees in it. I thought it was my person but when I asked him, he said he was not the one who planted thereon except those on the fence.***

***When we went further, we found trees scatterly planted all over. We up – rooted them. I had earlier fence it in 1996. I then fenced it again after this long duration. I set it on sharp look out.***

***On Thursday 21.10.2010 a village elder was seen with a strange person. I received a call that whoever planted the trees had come. I rushed quickly to meet with him. I went to PENINA's house and found four people. My thought told me that the stranger had trespassed so I was to arrest him to police. I asked them to tell me who planted trees in my parcel of land. The old stranger replied that it was him. When the village elder learned that I was tempered, he advised the stranger to go away. The stranger did so. I told him to go with me to Police Station in my car but he refused. He was given a lift to Police Station where I also went. The Police Officers stopped us from arguing. They sent us out of the office while waiting for the OCS to come. The Police Officers asked him what problem he has. He said he had been beaten by someone who had grabbed his land. He was asked if he had an OP number. They read it to me mentioning the bricks, sand and that I fenced his land. He further said I SAUL WEKESA***

**grabbed his land. The OCS asked him to say when he bought it. He said he bought it in 1980. The OCS asked me to say when I bought it. I answered in 1996. He was asked to say where he has been for all the 40 years. He said he was preaching the word of God. He answered in the year 2009. He was asked to say when he toured it. The answer was on 16<sup>th</sup> October 2010. The OCS said that this case must go back to the Provincial Administration. Before we went out of the office, the Claimant told the Police Officers that I am a thug. He said he was asking for protection.”**

During the trial at the **KANDUYI LAND DISPUTES TRIBUNAL**, the plaintiff’s wife **JESCA MUHONJA MUNGA** confirmed that after buying the  $\frac{3}{4}$  of an acre from **RASIA MTESO** they planted trees thereon and also maize. Since the plaintiff was engaged elsewhere, they requested **ALFRED MAINA** to take care of the land. However, in 1990, they baked bricks which they brought to the land in preparation of building. The defendant’s witnesses **ELIUD WEKESA MAINA** and **SIMON MUNYASIA NYONGESA** basically confirmed that the defendant purchased the land in dispute from **ALFRED MAINA** at a consideration of Kshs. 70,000/=.

That the 2<sup>nd</sup> defendant purchased the same land claimed by the plaintiff is not really in dispute. Indeed, that is why he was enjoined in the proceedings as a co – defendant. It is also clear however that after he purchased the  $\frac{3}{4}$  of an acre from **RASIA MTESO** in 1980, the plaintiff not only took possession of the said portion but that he also planted crops and trees. Then in 1990, he placed bricks and sand thereon for purposes of constructing a building. And during his absence due to church duties, **ALFRED MAINA** used to take care of the land while the harvest therefrom would be kept in the house of **JULIANA MAINA**. I am satisfied therefore that the plaintiff was in actual occupation and possession of the  $\frac{3}{4}$  acre from the time he purchased it from **RASIA MTESO**. It should be remembered that occupation and possession of land need not be direct. If a party enters into and takes possession of land which he then leaves under the care and occupation of his family, agent or caretaker, he is still in occupation and possession thereof for purposes of the doctrine of adverse possession. What is important is that the registered proprietor is dispossessed of the land in dispute and the claimant assumes exclusive, open notorious peaceful and un – interrupted occupation and possession thereof. The 2<sup>nd</sup> defendant told this Court that he first purchased one acre of land from **ALFRED MAINA WAMUKOTA** on 5<sup>th</sup> September 1996 at a consideration of Kshs. 70,000/=. It was later discovered that the portion transferred to him measured 0.27 Ha instead of one acre. Later on, the 1<sup>st</sup> defendant transferred another parcel to him and so he became the registered proprietor of the land parcels **NO EAST BUKUSU/NORTH SANG’ALO/6573** and **6574**. By 1996 however, the plaintiff had already been in open, peaceful, exclusive notorious and un – interrupted occupation of his  $\frac{3}{4}$  acre of land for 16 years and on which he had placed bricks and sand 6 years earlier in 1990 in preparation for construction. It is also instructive to note that in 1996, the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** was still registered in the names of **NABISWA TELEWA WEKULO** the father to the 1<sup>st</sup> defendant and there is no evidence to suggest that he had filed any suit to evict the plaintiff from the said  $\frac{3}{4}$  of an acre which he had taken possession thereof from 1980. The only way that the plaintiff’s occupation and possession of the  $\frac{3}{4}$  acre of land out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** could have been interrupted would have been by the registered proprietor **NABISWA TELEWA WEKULO**, or his legal representative, making a re – entry or filing a suit against the plaintiff to assert his right – **GITHU .V. NDEETE 1984 KLR 776**. None of the above happened and it is trite that the only person who was entitled to do so was **NABISWA TELEWA WEKULO**. Neither of the defendants could have done so because it was not until 27<sup>th</sup> March 2003 that the 1<sup>st</sup> defendant was registered as the proprietor of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** and it was not until 4<sup>th</sup> November 2014 that the 2<sup>nd</sup> defendant became the proprietor of two of the resultant sub – divisions of the said land being parcels **NO EAST BUKUSU/NORTH SANG’ALO/6573** and **6574**. It is also trite law that change of ownership of land for which time has started running does not interrupt the adverse possession – **GITHU .V. NDEETE** (supra). In the circumstances of this case, time for purposes of adverse possession started running on 14<sup>th</sup> March 1980 when the plaintiff took possession of  $\frac{3}{4}$  of an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** upon payment of Kshs. 3,500/= being the full purchase price. Therefore, by 27<sup>th</sup> March 2003 when the 1<sup>st</sup> defendant acquired the said land by way of transmission, the interest of his late father in a portion measuring  $\frac{3}{4}$  of an acre had long been extinguished as far back as 15<sup>th</sup> March 1992 upon the expiry of 12 years. The 1<sup>st</sup> defendant became simply a trustee of that portion on behalf of the plaintiff. Any dealing with the portion occupied by the plaintiff was always subject to his overriding interest therein. **Section 30(f)** of the repealed **Registered Land Act** which was the law applicable then provided that: -

**30 “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register**

**(a)**

**(b)**

**(c)**

**(d)**

**(e)**

**(f) rights acquired or in the process of being acquired by virtue of any written law relating to limitation of action or by prescription.”**

A similar provision is found in the new **Land Registration Act 2012**.

The plaintiff is laying claim to  $\frac{3}{4}$  of an acre out of the resultant sub – divisions arising out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/967** which are **EAST BUKUSU/NORTH SANG’ALO/6572**, **6573** and **6574**. The sizes of these parcels are as follows: -

**1. EAST BUKUSU/NORTH SANG’ALO/6572 – 9.48 Ha registered in the name of the 1<sup>st</sup> defendant.**

**2. EAST BUKUSU/NORTH SANG'ALO/6573 – 0.27 Ha registered in the name of the 2<sup>nd</sup> defendant.**

**3. EAST BUKUSU/NORTH SANG'ALO/6574 – 0.05 Ha registered in the name of the 2<sup>nd</sup> defendant.**

It is clear from the events that transpired on the land on 20<sup>th</sup> and 21<sup>st</sup> October 2010 that the  $\frac{3}{4}$  of an acre which the plaintiff took possession of are the two parcels **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** registered in the names of the 2<sup>nd</sup> defendant. This is because of the following reason: Firstly, those are the parcels on which the plaintiff planted trees which the 2<sup>nd</sup> defendant, by his own admission up – rooted leading to the alteration that took place between the plaintiff and 2<sup>nd</sup> defendant on 21<sup>st</sup> October 2010 and which ended up at **BUNGOMA** Police Station with each of them accusing the other of trespass to their land. Secondly, the plaintiff has maintained all along that he took possession of  $\frac{3}{4}$  of an acre out of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/967**. When the mathematics is done, the two portions registered in the names of the 2<sup>nd</sup> defendant and which he too says he purchased from the 1<sup>st</sup> defendant and **ALFRED MAINA** being parcels **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** add upto 0.32 Ha.  $\frac{3}{4}$  of an acre is 0.304 Ha just slightly less than the combined size of the two parcels registered in the names of the 2<sup>nd</sup> defendant. It is also not lost to this Court that the transfer of the land parcels **NO EAST BUKUSU/NORTH SANG'ALO /6573** and **6574** was done in November 2014 in the course of these proceedings. The only inevitable conclusion that this Court can arrive at in the circumstances is that, being cognizant of the fact that the plaintiff had mounted this case claiming  $\frac{3}{4}$  acre out of the land registered in the name of the 2<sup>nd</sup> defendant, the transfer of the land parcels **NO EAST BUKUSU/NORTH SANG'ALO/6573** and **6574** could only have been done to frustrate the plaintiff's claim to the  $\frac{3}{4}$  acre of land which, as is now clear, falls within the above two parcels.

A claim for land by adverse possession is usually directed at the registered proprietor of the land in dispute. In this case, the  $\frac{3}{4}$  acre of land which the plaintiff seeks is registered in the names of the 2<sup>nd</sup> defendant. The claim as against the 1<sup>st</sup> defendant must therefore be dismissed. However, the 1<sup>st</sup> defendant precipitated this suit through his conduct and even went further to transfer the land when this suit was in progress. He is not entitled to any costs.

Having considered all the evidence herein, I am satisfied that the plaintiff has established his case against the 2<sup>nd</sup> defendant as required in law.

This Court therefore makes the following disposal orders: -

**1. The claim against the 1<sup>st</sup> defendant is dismissed with no orders as to costs.**

**2. There shall be Judgment for the plaintiff against the 2<sup>nd</sup> defendant in the following terms: -**

**(a) The plaintiff has acquired by way of adverse possession  $\frac{3}{4}$  of an acre out of the land parcels NO EAST BUKUSU/NORTH SANG'ALO /6573 and 6574.**

**(b) The 2<sup>nd</sup> defendant shall within 30 days of this Judgment being delivered execute all the relevant documents to facilitate the transfer of  $\frac{3}{4}$  of an acre out of the land parcels NO EAST BUKUSU/NORTH SANG'ALO/6573 and 6574 in the name of the plaintiff.**

**(c) In default of (b) above, the Deputy Registrar of this Court shall sign all relevant documents on behalf of the 2<sup>nd</sup> defendant.**

**(d) The defendants, their agents, servants or any other person acting through them are further permanently restrained from interfering in any manner with the said  $\frac{3}{4}$  of an acre.**

**(e) The 2<sup>nd</sup> defendant shall meet the plaintiff's costs.**

**Boaz N. Olao.**

**J U D G E**

**28<sup>th</sup> July 2021.**

Judgment dated, signed and delivered at **BUNGOMA** this 28<sup>th</sup> day of July 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**28<sup>th</sup> July 2021.**