



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 01 OF 2018**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**DISMAS OTELLA OSIKOYO ..... 1<sup>ST</sup> APPLICANT**

**BADI OMARI.....2<sup>ND</sup> APPLICANT**

**MARTIN MUKHWANA ODUOR..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**THOMAS BARASA KIMANAYI .....RESPONDENT**

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

**DISMAS OTELLA OSIKOYO, BADI OMARI and MARTIN MUKHWANA ODUOR (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs respectively) moved to this Court vide their Originating Summons dated 4<sup>th</sup> January 2018 seeking against THOMAS BARASA KIMANI - his name is actually THOMAS BARASA KIMANAYI (the defendant herein) a determination of the following issues: -**

**(a) That the defendant's right over land parcel NO WEST BUKUSU/NORTH MYANGA/386 now sub – divided into WEST BUKUSU/NORTH MYANGA/3168 and 3169 got extinguished upon expiry of 12 years when the plaintiffs have been in possession.**

**(b) A declaration that the beneficial ownership and use of the land parcel NO WEST BUKUSU/NORTH MYANGA/386 now sub – divided into WEST BUKUSU/NORTH MYANGA/3168 and 3169 was legal and appropriate parcel to be transferred to the plaintiffs and also that the defendant do execute the transfer in respect thereof in favor of the plaintiffs and in default, the Deputy Registrar of this Court to execute the transfer.**

**(c) A declaration that the defendant be permanently barred from taking, transferring and/or using the said parcel or any part thereof.**

**(d) A declaration that under Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, the plaintiffs be registered as proprietors of the entire land parcel NO WEST BUKUSU/NORTH MYANGA/386 now sub – divided into WEST BUKUSU/NORTH MYANGA/3168 and 3169.**

**(e) An order of permanent injunction to preserve the suit property.**

**(f) Any other relief that the Hon. Court may deem fit to grant in the circumstances hereof.**

**(g) Costs.**

Annexed to the Originating Summons are the supporting affidavits of the plaintiffs dated 4<sup>th</sup> January 2018 as well as the following documents: -

- 1. Green Card for the land parcel NO WEST BUKUSU/NORTH MYANGA/386.**
- 2. Sale agreement dated 17<sup>th</sup> June 1977 between KIMANAYI MARUMBU (as vendor) and DISMAS OTELA JOHN OSIKOYO (as purchaser) for land parcel NO WEST BUKUSU/NORTH MYANGA/386 measuring 7 acres.**
- 3. Acknowledgment of payment between KIMANAYI MARUMBU and DISMAS OTELA OSIKOYO.**
- 4. Sale agreement between DISMAS OTELA OSIKOYO and BADI OMARI for 2 acres of land out of parcel NO 386.**

The basis of the plaintiff's claim against the defendant as can be gleaned from their supporting affidavits and the documents filed herein is that by a sale agreement dated 17<sup>th</sup> June 1977, the 1<sup>st</sup> plaintiff purchased from **KIMANAYI MARUMBU** the whole of the land parcel **NO WEST BUKUSU/NORTH MYANGA/386** measuring 7 acres and took possession thereof. Then by another sale agreement dated 1<sup>st</sup> April 2000, the 1<sup>st</sup> plaintiff sold to the 2<sup>nd</sup> plaintiff 2 acres out of the said land at a consideration of Kshs. 96,000/=. The 2<sup>nd</sup> plaintiff also took possession of the said 2 acres where he has put up a permanent residence and has been doing farming and other activities openly, peacefully, continuously and un – interrupted since 2000.

The 3<sup>rd</sup> plaintiff took possession of 4 acres out of the said land parcel **NO WEST BUKUSU/N. MYANGA/386** following an exchange with the 1<sup>st</sup> plaintiff. The land parcel **NO WEST BUKUSU/NORTH MYANGA/386** originally belonged to **KIMANAYI MARUMBU**. That the 3<sup>rd</sup> plaintiff has a permanent residence on the suit land where he has been doing farming on 4 acres openly, peacefully, continuously and uninterrupted since 2000. That the defendant has never occupied the said portion of land whose boundaries are clearly demarcated. It is the plaintiffs' case that the land parcel **NO WEST BUKUSU/NORTH MYANGA/386** originally belonged to **KIMANAYI MARUMBU** now deceased and that the defendant conducted the succession process secretly and was registered as the owner thereof after which he sub – divided it to give rise to parcels **NO WEST BUKUSU/NORTH MYANGA/3168** and **3169**. However, his proprietary interest in the said parcels of land has now lapsed because of the plaintiffs' open, peaceful, continuous and un – interrupted occupation of their various portions thereof.

The Originating Summons is opposed and the defendant filed a replying affidavit dated 13<sup>th</sup> March 2018 in which he deponed, inter alia, that the plaintiffs are not entitled to the orders sought since no consent of the Land Control Board was obtained within 6 months from the date of the alleged sale. He confirmed that he is the son of the late **KIMANAYI MARUMBU** who gave him the land parcel **NO WEST BUKUSU/NORTH MYANGA/386** before his demise on 16<sup>th</sup> September 1997. That he has since sub – divided the said land to give rise to parcels **NO WEST BUKUSU/NORTH MYANGA/3168** and **3169** (hereafter the suit land) which measures approximately 6.6 Hectares. That he was brought up on the suit land and was registered as the proprietor thereof on 31<sup>st</sup> January 2012 when he obtained the title. That the plaintiffs and other third parties have been trying to grab the suit land and so he lodged a caution on it. That he and his larger family reside on the suit land and the plaintiffs have never been in actual possession of 7 acres and are not entitled to orders under adverse possession. That it is only one **PHILOS W. SIMIYU** whom he recognizes as the only purchaser who bought land from his late father. He deponed that the agreements produced by the plaintiffs especially the one dated 19<sup>th</sup> June 1977 (it's actually dated 17<sup>th</sup> June 1977) is fraudulent and his deceased father denied having sold any land to the 1<sup>st</sup> plaintiff and neither is he or the 2<sup>nd</sup> plaintiff in occupation of the suit land. That the 3<sup>rd</sup> plaintiff is a stranger to him and has forcefully constructed on a portion of the suit land and so his occupation has been full of interruptions and not peaceful. That the plaintiffs in cahoots with the area Chief want to invade his land purporting to have bought it from his later father. He therefore termed the application as misconceived, incompetent, vexatious, scandalous and in bad faith which ought to be dismissed.

The defendant filed the following documents in support of his case as annexed to the replying affidavit: -

- 1. Green Card for the land parcel NO WEST BUKUSU/NORTH NYANGA/386.**
- 2. Title deed for the land parcel NO WEST BUKUSU/NORTH MYANGA/386.**
- 3. Letter dated 17<sup>th</sup> February 2017 addressed to the defendant by the Chief Kimaeti location in respect of the land parcel NO WEST BUKUSU/NORTH MYANGA/386.**

The defendant also filed a written statement dated 13<sup>th</sup> March 2018 which is basically a rehash of his replying affidavit also dated 13<sup>th</sup> March 2018. He also filed the following additional list of documents: -

- 1. Death Certificate of KIMANAYI MARUMBU.**
- 2. Green Card for the land parcel NO WEST BUKUSU/NORTH MYANGA/386.**
- 3. Official Search for the land parcel NO WEST BUKUSU/NORTH MYANGA/3168.**
- 4. Letter dated 17<sup>th</sup> February 2017 addressed to the defendant from the Chief Kimaeti location.**

The hearing commenced on 21<sup>st</sup> November 2019 when the plaintiffs testified in support of their case. They adopted the contents of their respective affidavits and produced as their documentary evidence the list of documents annexed thereto.

The defendant testified on 22<sup>nd</sup> February 2021 and adopted as his evidence his replying affidavit and statement both dated 13<sup>th</sup> March 2018 as well as his further statement dated 12<sup>th</sup> December 2019. He also produced as his documentary evidence the list of documents dated 13<sup>th</sup> March 2018.

At the end of the plenary hearing submissions were filed both by **MR WEKESA** instructed by the firm of **AREBA ATANCHA & COMPANY ADVOCATES** for the plaintiffs and by **MS CHUNGE** instructed by the firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** for the defendant.

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

The plaintiff's claim is based on adverse possession. It is their joint case that vide a land sale agreement dated 17<sup>th</sup> June 1977, the 1<sup>st</sup> plaintiff purchased from the defendant's late father **KIMANAYI MARUMBU**, now deceased, a portion of land measuring 7 acres out of the land parcel **NO WEST BUKUSU/ NORTH MYANGA/386**. That the 1<sup>st</sup> plaintiff subsequently sold 2 acres to the 2<sup>nd</sup> plaintiff and gave the 3<sup>rd</sup> plaintiff 4 acres in exchange for another parcel of land and retained 1 acre for himself. That all of them have been in occupation of their respective parcels but following the demise of his father, the defendant secretly carried out the succession process and registered himself as the proprietor of the said land which he has now sub – divided into two parcels being **WEST BUKUSU/NORTH MYANGA/3168** and **3169** (the suit land).

While the defendant concedes that the land parcel **NO WEST BUKUSU/NORTH MYANGA/386** belonged to his late father **KIMANAYI MARUMBU** who passed away on 16<sup>th</sup> September 1997, he denied that the 1<sup>st</sup> plaintiff purchased 7 acres thereof from his late father and describes the sale agreement dated 17<sup>th</sup> June 1997 as fraudulent as there was no consent from the Land Control Board. He describes the plaintiffs as busy bodies who want to grab his land which was passed to him by way of transmission and he obtained title thereto on 31<sup>st</sup> January 2012. He also denies that the plaintiffs are in occupation of the suit land.

**Section 38(1)** of the **Limitation of Actions Act** allows a person to approach the Court for orders that he is entitled to land registered in the names of another person by way of adverse possession. 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.”*

A person 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 & COMPANY LTD 1980 KLR 10**.

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

*“In order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”*

And in **ROBERT SHUME & OTHERS .V. SAMSON KALAMA 2015 eKLR**, the same Court held that: -

*“By dint of Section 7 of the Limitation of Actions Act, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent's title for a period of twelve (12) and more years. Stated differently and bearing in mind that possession is a question of act, they were expected to show that their possession was nec vic nec clam nec precario, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without the permission of the owner.”*

And in **KWEYU .V. OMOTO 1990 KLR 790**, it was stated thus:-

*“By adverse possession is meant 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.”*

Finally, it is common ground that the concept of adverse possession was recognized both under **Section 30(f)** of the repealed **Registered Land Act** under which the title to the suit land was issued and also under **Section 28 (h)** of the new land **Registered Act 2012** and also **Section 7(d)** of the new land Act 2012.

Guided by the above, it is not in dispute that the suit land is the resultant sub – division of the land parcel **NO WEST BUKUSU/NORHT MYANGA/386** which was first registered in the names of **KIMANAYI MARUMBU** (the defendant's late father) and his brother **NAMUCHEBULE MARUMBU** on 17<sup>th</sup> June 1970. It was then transferred to the defendant on 11<sup>th</sup> May 2012 before the title was closed on 21<sup>st</sup> November 2012 following it's sub – division to give rise to titles **NO WEST BUKUSU/NORTH MYANGA/3168** and **3169**. It is also clear from the documents herein that whereas the titles **NO WEST BUKUSU/NORTH MYANGA/3168** measuring 6.2 Ha is registered in the names of the defendant who holds a title issued to him on 17<sup>th</sup> December 2014, the parcel **NO WEST BUKUSU/NORTH**

**MYANGA/3169** measuring 0.4 Ha is registered in the name of one **FAILOSI W. SIMIYU** who was not a party to this suit. I must therefore make it clear that this Judgment shall have no bearing on the title **NO WEST BUKUSU/NORTH MYANGA/3169** otherwise that would amount to a grave affront to both the property right and the right to a fair hearing to which the said **FAILOSI W. SIMIYU** is entitled by virtue of the provisions of **Articles 40 and 50 (1)** of the **Constitution**.

Although the 1<sup>st</sup> plaintiff produced a sale agreement between him and the defendant's late father **KIMANAYI MARUMBU** dated 17<sup>th</sup> June 1977 through which he purchased and took possession of 7 acres of land out of the parcel **NO WEST BUKUSU/NORTH MYANGA/386**, the defendant denies that his late father executed any such agreement. He adds that in any event, the 1<sup>st</sup> plaintiff did not obtain the consent of the Land Control Board for that transaction. The plaintiffs have not moved to this Court to enforce the agreement between the 1<sup>st</sup> plaintiff and **KIMANAYI MARUMBU** dated 17<sup>th</sup> June 1977. That agreement is only meant to demonstrate how the 1<sup>st</sup> plaintiff entered the 7 acres and thereafter sold 2 acres to the 2<sup>nd</sup> plaintiff and gave the 3<sup>rd</sup> plaintiff 4 acres in exchange for another parcel. The plaintiff's claim, as I have already stated above and as is also clear from their pleadings herein, is predicated on adverse possession. In any case, the consent of the Land Control Board is not necessary where a party is pursuing rights under Section 38(1) of the Limitation of Actions Act – **GATIMU KINGURU .V. MUYA GATHANGI 1976 KLR 253**.

The 1<sup>st</sup> plaintiff told the Court during the plenary hearing that although he does not live on the suit land since he has a home on another parcel of land being **WEST BUKUSU/NORTH MYANGA/995**, he has since 1977 been cultivating the 1 acre that he retained after disposing the other 6 acres out of the land parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. This is what he said when cross – examined by **MS CHUNGE** Counsel for the defendant: -

***“I have not put up a house on the 1 (one) acre but I only cultivate it. I have utilized it since 1977. I have not stayed on it because I have another parcel of land NO WEST BUKUSU/NORTH MYANGA/995 where I live but I occupy and plough on the 1 (one) acre out of WEST BUKUSU/NORTH MYANGA/386.”***

On his part, the 2<sup>nd</sup> plaintiff stated as follows when cross – examined: -

***“I bought the two (2) acres from the 1st plaintiff. He did not show me any title deed. The 1st plaintiff told me that the portion I bought belonged to a deceased person. The house that I put up on the land was demolished by the defendant last year.”***

The 3<sup>rd</sup> plaintiff stated as follows when cross – examined: -

***“The 1st plaintiff gave me a portion of the land NO WEST BUKUSU/NORTH MYANGA/386 in exchange for another parcel of land. He gave me four (4) acres and I live there since 2000. The defendant's father who is deceased was my neighbour. I don't have any other relationship with the defendant's late father. I live and cultivate on the suit land and even my brothers have their homes on the land.”***

Although the defendant was emphatic that the plaintiff do not occupy the suit land, he conceded that his late father was not buried there and that in fact, the 3<sup>rd</sup> plaintiff buried his brother on the land parcel **NO WEST BUKUSU/NORTH MYANGA /3168**. This is what he said when cross – examined by **MR WEKESA** Counsel for the plaintiffs: -

***“The plaintiffs are claiming 7 acres from the land parcel NO WEST BUKUSU/ NORTH MYANGA/3168 but they are not utilizing it at all. I am the one utilizing it. It is true that the 3rd plaintiff's brother was buried on parcel NO WEST BUKUSU/NORTH MYANGA/3168 when he passed away. I don't recall when he was buried there. It is true that my late father never evicted the plaintiffs when he was alive.”***

Adverse possession is about dispossessing the registered proprietor of his land. The 1<sup>st</sup> plaintiff testified that he took possession of the 7 acres in 1977 and later in 2000, he disposed off 2 acres to the 2<sup>nd</sup> plaintiff and 4 acres to the 3<sup>rd</sup> plaintiff. However, he has retained one (1) acre which he ploughs. The 2<sup>nd</sup> plaintiff stated that his house was demolished in 2020 while the 3<sup>rd</sup> plaintiff's brother still lives on the suit land while another brother was buried there a fact that was admitted by the defendant. Clearly therefore, the plaintiffs' occupation and possession of the suit land cannot be doubted in the circumstances.

As part of his evidence, the defendant produced a letter from the Chief Kimaeti Location dated 17<sup>th</sup> February 2017 addressed to him. Due to it's import, I shall reproduce it in extenso: -

**“OFFICE OF THE CHIEF KIMAETI LOCATION**

**P.O. BOX 2304**

**BUNGOMA**

**17.2.2017**

**TO THOMAS BARASA KIMANAI**

**TULUKUYI AREA**

Dear Sir,

REF: WEST BUKUSU/NORTH MYANGA/386

The above mentioned parcel of land was registered in the name of KIMANAI MARUMBU and NAMUECHEBULE MARUMBU both of them deceased. That you did succession being the son of the deceased and left out buyers.

In 1977, your father sold land to DISMAS OTELLA ID 7992789 who later on sold part of the same land to BADI OMAR ID 3438941 in the year 2000.

It has been reported in this office that on 10.2.17 you forced away workers belonging to BADI OMARI who reported to KIMAETI POLICE PATROL BASE and my office.

I am informed that you received letters of administration from the retired Chief HENRY MULIKHA who omitted the buyers.

On 10.2.17 and 17.2.17, I requested you to come in my office to shade light but all in vain.

Please with a copy of this letter you are requested to avail yourself in this office on 20.2.17 at around 10 a.m.

Be advised that behaving in a manner likely to cause a breach of peace is criminal, if you have a case with BADI OMARI you seek assistance from the law Court but not to fight.

CC DISMASS OTELLA to attend

CC BADI OMARI to attend

Yours faithfully.”

The name of the writer was inadvertently not captured when the document was photocopied but it bears the stamp of the **SENIOR CHIEF KIMAETI LOCATION**. What the letter demonstrates is that it took the defendant upto 10<sup>th</sup> February 2017 (a period of 40 years after the 1<sup>st</sup> plaintiff first took occupation and possession of the 7 acres and 17 years after the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs had taken occupation and possession of their 2 and 4 acres respectively) to attempt and make an entry and take occupation and possession of the suit land. Unfortunately, however, by that time, his right to the land parcel **NO WEST BUKUSU/NORTH MYANGA/3168** had long been extinguished by operation of the law and the plaintiffs' interest in the said land by way of adverse possession had long crystalized leaving the defendant as a mere trustee. What the defendant was required to do before the expiration of the 12 years was to file a suit against the plaintiffs – **GITHU .V. NDEETE 1984 KLR 776**. Therefore, other than the incident of 10<sup>th</sup> February 2017 which in any event came too late, there is nothing to suggest that the plaintiffs' occupation and possession of 7 acres out of the land parcel **NO WEST BUKUSU/NORTH MYANGA/3168** was not open, peaceful, notorious exclusive, un – interrupted and with the knowledge of the defendant. The transfer of the land parcel **NO WEST BUKUSU/NORTH MYANGA/386** from **KIMANAYI MARUMBU** to the defendant on 11<sup>th</sup> May 2012 did not interrupt the plaintiff's adverse possession thereof and neither did the resultant sub – division to create land parcels **NO WEST BUKUSU/NORTH MYANGA/3168** and **3169 – GITHU .V. NDEETE** (supra). The defendant's sub – division of the land parcel **NO WEST BUKUSU/NORTH MYANGA/386** could therefore only have been a futile attempt to defeat the plaintiffs' claim.

Having considered the evidence by all the parties herein, I am satisfied that the plaintiffs have proved their case against the defendant as required in law. There shall be Judgment for the plaintiffs against the defendants in the following terms: -

**1. The plaintiffs have acquired by way of adverse possession the following portions of land from the land parcel NO WEST BUKUSU/NORTH MYANGA/3168**

(a) **DISMAS OTELLA OSIKOYO – 1 (one) acre**

(b) **BADI OMARI – 2 (two) acres**

(c) **MARTIN MUKWANA ODUOR – 4 (four) acres.**

**2. The defendant's right to the above 7 (seven) acres of land out of the parcel NO WEST BUKUSU/NORTH MYANGA/3168 has been extinguished by operation of law.**

**3. The defendant shall within 30 days of this Judgment execute all the relevant documents to transfer to DISMAS OTELLA OSIKOYO, BADI OMARI and MARTIN MUKWANA ODUOR their respective portions of the land from parcel NO WEST BUKUSU/NORTH MYANGA/3168 as ordered in (1) above.**

**4. In default of (3) above, the Deputy Registrar shall be at liberty to execute any such documents on behalf of the defendant.**

**5. An order of permanent injunction is hereby issued restraining the defendant, his agents, servants or any other persons' action on his behalf from interfering with the plaintiffs' portions of land to be carved out of the land parcel NO WEST**

**BUKUSU/NORTH MYANGA/3168.**

**6. The defendant shall meet the plaintiffs' costs.**

**BOAZ N. OLAO.**

**J U D G E**

**19TH JULY 2021.**

Judgment dated, signed and delivered at **BUNGOMA** this 19<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**

**19TH JULY 2021.**