



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 24 OF 2017.

MARYCELLA NAFULA SIMIYU (Suing as the personal and legal representative of the Estate of the late NICHOLAS SIMIYU SULULU - DECEASED).....PLAINTIFF

VERSUS

MARGARET WANGILA WANYISIA.....1ST DEFENDANT

SAMUEL BARASA WANYISIA.....2ND DEFENDANT

J U D G M E N T

By her amended plaint dated 11th October 2017 and filed herein on 2nd November 2017, the plaintiff (**MARYCELLA NAFULA SIMIYU** suing as the personal and legal representative of the Estate of the late **NICHOLAS SIMIYU SULULU**) sought Judgment against **MARGARET WANGILA WANYISIA** and **SAMUEL BARASA WANYISIA** (the 1st and 2nd defendants respectively) in the following terms with regard to the land parcel **NO BOKOLI/MUKUYUNI/1151** (the suit land): -

- 1. An order for the eviction of the defendants and a permanent injunction restraining them by themselves, their agents, servants or workers from interfering with the plaintiff's land comprised in title NO BOKOLI/ MUKUYUNI/1151 and an order for the exhumation of the remains of the body of the late HENRY WANYISIA MWAULIE from the said land at the defendants' costs.**
- 2. Costs of the suit.**
- 3. Any other relevant orders and reliefs that this Honourable Court may deem fit and just to grant.**

The basis of the plaintiff's suit is that she is the personal representative of the late **NICHOLAS SIMIYU SULULU (SULULU)** who prior to his death, was the registered proprietor of the suit land since 18th June 1991. That the 1st defendant is the widow of the late **HENRY MWAULIE WANYISIA (WANYISIA)** while the 2nd defendant is his brother or relative. That the title to the suit land was given to **SULULU** by the late **POCHI KHAEMBA** following an auction arising from a decree in **KIMILILI COURT** and was later transferred to **SULULU** by the late **WANYISIA MURACHI LUSWETI (LUSWETI)**. That the late **POCHI KHAEMBA** was paid the purchase price of Kshs. 800/=. That since **SULULU** was away on duty and later settled in **KHALABA** area, the suit land was put under cultivation but recently, **WANYISIA** started trespassing thereon and erecting structures. That has made it difficult for the plaintiff to access and use it and her attempts to get the defendants to vacate have been in vain.

On 24th December 2016 while inspecting the suit land in preparation for the next planting season, she discovered that the defendants had without any colour of right, consent or reasonable cause formed a funeral committee to plan for the burial of **WANYISIA** who was buried on 27th December 2016. The plaintiff's attempts to get County Administration to intervene were in vain as they wanted a Court order. The defendants have unlawfully erected structures on the suit land and have continued trespassing thereon hence this suit.

Together with the amended plaint, the plaintiff filed her statement and that of her witness **JOE MURACHI WASWA (PW 2)**. She also called as her witness the Assistant Land Registrar Bungoma **MR LEONARD WABWIRE (PW 3)**. The plaintiff had also filed together with her original plaint dated 14th February 2017 the following documents: -

- 1. Plaintiff's Identity Card.**
- 2. Limited Grant of Letters of Administration.**
- 3. Official Search and title deed for the land parcel NO BOKOLI/MUKUYUNI/1151.**

4. Land sale agreement between SULULU and POCHI KHAEMBA dated 19th January 1967 and the translation.

5. Demand letter.

The plaintiff's statement is basically a rehash of what is contained in her plaint.

In his statement dated 10th October 2017, the plaintiff's witness **JOE MURACHI WASWA (PW 2)** states that the plaintiff is the widow of his cousin **SULULU** while the 1st defendant is also a sister – in – law since she is the wife of his other cousin **WANGILA WANYISIA** deceased. That the 2nd defendant is also his cousin and so he is well conversant with the facts of this dispute. That the suit land belonged to **SULULU** who purchased it from **POCHI KHAEMBA** through a public auction. Prior to that, the suit land belonged to their grandfather **MOSES LUSWETI** who prior to his demise, had shared it out among his following sons: -

- (a) **NAMIRANDA LUSWETI**
- (b) **SUNGURA LUSWETI**
- (c) **SOLOMON WASWA**
- (d) **KHAEMBA POCHI and**
- (e) **WANYISIA LUSWETI who are all deceased.**

That in 1957 or thereabout, **WANYISIA LUSWETI** sold his portion and left for Uganda only to return in 1961 and on humanitarian grounds, **SOLOMON WASWA** and **KHAEMBA POCHI** both gave him 1.6 acres but he again sold the whole 3.2 acres to one **ISAAC SIMIYU** who later sold the same to **POCHI KHAEMBA** and **SAULO MUNIAFU** in 1965. In 1966, **POCHI KHAEMBA** sold his portion to **MUNIALO MATUNDA** for Kshs. 800/= but the deal did not go through and so **POCHI KHAEMBA** demanded the refund of the purchase price and the matter ended up in Court and **SULULU** eventually took possession of the suit land where he constructed his house and settled his family. That **SULULU** even buried his late mother **JESTIMORE KHAEMBA** and one **JACTONE NASONGO** thereon. That the suit land was registered in the names of **SULULU** in 1991 but the defendants encroached on it and the matter was reported to the area Chief one **BENSON WANYAMA** who arbitrated over the dispute and ordered the defendants to vacate but all in vain. That **SULULU** died before the defendants had vacated and during the **LUFU** ceremony held following his death, the defendants never complained that **SULULU** had fraudulently acquired the suit land. The suit land should therefore be given to **SULULU**'s family.

In his oral testimony during the plenary hearing, **LEONARD WABWIRE (PW 3)** and who is the Assistant Land Registrar Bungoma confirmed that the suit land was registered in the names of **SULULU** on 18th June 1991. Prior to that, the registered proprietor was **WANYISIA MURACHI** since 31st December 1964. He also confirmed that the documents filed by the plaintiff in support of her case are genuine.

In a joint statement of defence and Counter – Claim, the defendants denied that the said **SULULU** is the registered proprietor of the suit land. They added that even if he is, the registration was obtained through fraud. Particulars of fraud were pleaded in paragraph 4 of the defence and Counter – Claim as follows: -

- i. Obtaining transfer of the title from MURACHI WANYISIA WELIKHE (deceased) to himself using a forged land transfer form.**
- ii. Using a forged consent application form.**
- iii. Using a forged letter of consent of the Land Control Board.**
- iv. Forged agreement of sale.**
- v. Obtaining transfer of title from a deceased person without the Probate and Administration proceedings in general and Letters of Administration in particular.**
- vi. Purporting to obtain land from a Third Party namely (name not given) who had no legal interest in the land.**

The defendants pleaded further that **SULULU** could not have purchased the suit land in 1967 from **POCHI KHAEMBA** because the latter had neither legal nor equitable interest in the said land capable of being transferred to another person. The defendants further denied that the plaintiff has ever used the suit land as a homestead adding that she resides in **KHALABA** and that the said land has been in the defendant's occupation. The defendants added that they are the daughter in law and son respectively of one **MURACHI WANYISIA WELIKHE** who was the first registered proprietor of the suit land having obtained title thereto on 31st December 1964 and the 1st defendant moved onto the land in 1988 upon being married to **WANYISIA** a son of the first registered owner of the suit land. And that although **SULULU** purported to purchase the suit land, he never utilized it and it remained in the full possession of the first registered owner **MURACHI WANYISIA WELIKHE** who passed away on 28th July 1981 and upon discovery of the fraud, the defendants lodged a caution on the suit land. The defendants further pleaded that the plaintiff's suit is time barred and offends the mandatory provision of **Section 7** of the **Limitation of Actions Act** and should be struck out.

In their Counter – Claim, the defendants pleaded that even assuming that the plaintiff has a clean title, they have been in open, notorious, continuous peaceful and uninterrupted possession of the suit land for over 50 years having extensively developed it by constructing buildings where they have settled their families and also buried their dead. That the plaintiff has never entered nor taken possession of the suit land and all that she has is the title. The defendants have therefore acquired the title to the suit land by way of adverse possession and seek an order that the name of the plaintiff be cancelled from the register and replaced with the names of the defendants.

The defendants therefore sought the following orders: -

- 1. The plaintiff's suit be dismissed with costs.**
- 2. The Counter – Claim be allowed with costs.**

Together with their defence and Counter – Claim, the defendants filed their joint statement and those of their witness **BENARD MUKANDA WANYISIA (DW 3)**.

In their joint statement dated 7th April 2017, the defendants state that they are the daughter in law and son respectively of **MURACHI WANYISIA WELIKHE** the first registered proprietor of the suit land since 31st December 1964. That although **SULULU** obtained registration of the suit land in his names, that was done fraudulently and particulars thereof are stated as per the defence. That the plaintiff has never utilized the suit land as her home or for any purpose and instead resides in **KALABA** and **POCHI KHAEMBA** who purportedly sold the suit land to **SULULU** had no legal right to do so. And **SULULU** did not occupy the suit land which was always in the possession of the registered proprietor **MURACHI WANYISIA WELIKHE** and his family which includes the defendant for a period of over 50 years. The defendants state further that they have extensively developed the suit land by constructing their homes, cultivating crops and even buried their dead thereon and apart from holding the title deed thereto, the plaintiff has never utilized it. That upon discovering the fraud, the defendants lodged a caution on the suit land and put up spirited efforts to have the impugned entries in the register removed.

In his statement **BENARD MUKANDA MUNYASIA (DW 3)** who is the 1st defendant's son states that he was born in 1989 on the suit land and resides thereon to-date. That his parents and siblings have extensively developed the suit land by constructing houses thereon without any disturbance or interference from the plaintiff and even when his father **HENRY MWAULE WANYISIA** passed away, he was buried on the said land whose title was registered in the names of **SULULU** through a fraudulent process.

Together with the defence and Counter – Claim, the defendants filed the following list of their documents: -

- 1. Green Card for the land parcel NO BOKOLI/MUKUYUNI/1151.**
- 2. Identity Card for WANYISIA WELIKHE.**
- 3. Burial permit for WANYISIA WELIKHE.**
- 4. Caution lodged on the land parcel NO BOKOLI/MUKUYUNI/1151 on 22nd February 1993 by HENRY WANYISIA.**
- 5. Restriction letter dated 19th February 1993.**
- 6. Letter (un-dated) from the BASAKALI CLAN.**
- 7. Land Transfer Form dated 7th June 1991.**
- 8. Application for consent dated 1st November 1993.**
- 9. Consent letter dated 20th December 1990.**
- 10. Certificate of official Search dated 20th February 2017.**
- 11. Letter from the WANYISIA MURACHI FAMILY dated 16th February 1993 addressed to the District Officer SIRISIA.**
- 12. Letter from the Provincial Commissioner Western Province dated 27th June 1990.**
- 13. Burial permit for HENRY MWAULE WANYISIA dated 26th December 2016.**

The plaintiff filed a reply to the defence and a defence to the Counter – Claim dated 18th March 2019 in which they denied each and every allegation and reiterated that **SULULU** is the absolute registered proprietor of the suit land having obtained it legitimately. The plaintiff denied all the allegations of fraud adding that if indeed **POCHI KHAEMBA** had no interest in the suit land, then **SULULU** was an innocent purchaser and the plaintiff should not be prejudiced. The plaintiff denied that the defendants have had un – interrupted occupation of the suit land adding that she and her late husband **SULULU** have been cultivating it.

The trial commenced on 27th May 2019 when the plaintiff testified and called her witnesses **JOE MURACHI WASWA (PW 2)** and

LEONARD NABWIRE. The plaintiff and **JOE MURACHI WASWA (PW 2)** adopted as their evidence the contents of their statements which I have already summarized above while **LEONARD WABWIRE (PW 3)** who is the Assistant Land Registrar Bungoma confirmed that the suit land is registered in the names of **SULULU** and that the documents filed by the plaintiff are genuine.

The defendant's case commenced on 25th February 2020 and both the defendants and their witness **BENARD MUKANDA WANYISIA (DW 3)** also adopted their witness statements.

Submissions were thereafter filed both by **MR J. KHAKULA** instructed by the firm of **J. S. KHAKULA & COMPANY ADVOCATES** for the plaintiff and by **MR D. WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the defendants.

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

The plaintiff's case is that the defendants are trespassers on the suit land which is the property of her late husband **SULULU**. She seeks an order for their eviction therefrom, a permanent injunction to restrain them, their servants or agents from interfering with the said land and order for the exhumation of the body of the late **HENRY WANYISIA**. The defendants' case however is that in fact the plaintiff's late husband **SULULU** obtained the registration of the suit land in his names through a fraudulent process and that the said land has always been the property of **MURACHI WANYISIA**. That they have lived on the suit land for over 50 years peacefully openly, continuously and un-interrupted and have therefore acquired it by way of adverse possession and the name of **SULULU** should be cancelled from the register in favour of their names.

From the Green Card for the suit land, it is clear that it was first registered in the names of **WANYISHA MURACHI** on 31st December 1964. The pleadings refer to him as **MURACHI WANYISIA WELIKHE** but I am satisfied that those names refer to one and the same person and who was the father in law and father respectively of the 1st and 2nd defendants. I shall refer to him henceforth as **WANYISHA MURACHI** because that is the name appearing on the Green Card. The plaintiff's testimony is that her late husband purchased the suit land on 19th January 1967 from the late **POCHI KHAEMBA LUSWETI**. The title deed to the suit land shows that since 18th June 1991 to – date, it is registered in the names of **SULULU**. The plaintiff also mentioned that the sale was through a public auction. This is what she has stated in paragraph 5 of her statement dated 14th February 2017: -

*“That title documents of the said land were given to the late **NICHOLAS SIMIYU SULULU** my husband on willing buyer/purchaser between him and the seller on public auction. He purchased his portion of land on 19th January 1967 from the late **POCHI KHAEMBA LUSWETI**. That the purchase price was solely paid by her late husband in full and final payment.”*

In support of that assertion, the plaintiff produced a sale agreement dated 19th January 1967 between **SULULU** and **POCHI KHAEMBA**. The said agreement does not identify the parcel of land which was being transacted. It however states that the purchase price was Kshs. 2,000/=. However, the Green Card to the suit land shows that it was transferred to **SULULU** as the second proprietor on 18th June 1991 and under “**CONSIDERATION AND REMARKS**”, the sum of Kshs. 15,000/= is indicated. Most importantly, however, at no time was **POCHI KHAEMBA** ever the proprietor of the suit land. Therefore, he had no interest, equitable or otherwise, which he could have transferred to **SULULU** or any other person for that matter. That purported transfer could only have been fraudulent.

Essentially therefore, **POCHI KHAEMBA** was, for all intents and purposes, a thief and could not sell the suit land to **SULULU**. In an attempt to support the title of **SULULU**, the plaintiff's Counsel **MR KHAKULA** has made the following submission at page 2: -

*“It is the plaintiff's case that the suit land is registered in the name of **NICHOLAS SIMIYU SULULU** in pursuance of the sale agreement. The plaintiff has displayed the sale agreement (Documents No 5 and 6 of the plaintiff's list of documents). The sale is between **POCHI KHAEMBA LUSWETI** and **NICHOLAS SIMIYU SULULU**. The sale was overboard. It was witnessed by 4 people.”*

That sale cannot be described as having been overboard for the simple reason that the suit land did not belong to **POCHI KHAEMBA** at any time. He had no interest in the suit land capable of being transferred. As the Court of Appeal stated in **JANE GACHOKI GATHECA .V. PRISCILLA NYAWIRA GITUNGU & ANOTHER 2008 eKLR**: -

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

It is also unlikely that **SULULU** or the plaintiff could have properly invoked the principle of innocent purchaser. This is because **POCHI KHAEMBA** had no title to the suit land, apparent or otherwise – **KATENDE .V. HARIDAR & CO LTD 2008 2 E.A 173**.

Further, among the documents produced by the defendant are an application for consent of the Land Control Board form dated 15th December 1990 and a Transfer of Land form dated 17th June 1991 between **NICHOLAS SIMIYU SULULU** as purchaser and **WANYISHA MURACHI** as seller of the suit land. There was however un – controverted evidence from the 2nd defendant that **WANYISHA MURACHI** died in 1981. Clearly, therefore, the purported transfer on 17th June 1991 and the consent of the Land Control Board dated 15th December 1990 were fraudulent processes since by then, the registered proprietor of the suit land had died some 10 years earlier.

POCHI KHAEMBA was also basically an intermeddler in the Estate of a deceased person. **Section 45 (1)** of the **Law of Succession Act** provides that: -

(i) Except so far as expressly authorized by this Act or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession of or dispose of, or otherwise intermeddle with any free property of a deceased person.”

The provision goes to state in sub – paragraph 2 that a person intermeddling with the Estate of a deceased person shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment of upto one year or both.

The above notwithstanding, it is the defendant’s case that they have been in occupation of the suit land peacefully, openly, continuously and un – interrupted since 1988 having constructed their homes thereon where they live with their families and that neither the plaintiff nor before her, her husband **SULULU** utilized it. They therefore claim that they are entitled to the suit land by way of adverse possession having occupied it for over 50 years and the title of **SULULU** has been extinguished by operation of the law. That is the defendants’ Counter – Claim which I shall now consider.

It is now settled that a claim for land by way of adverse possession can be pursued through a Counter – Claim – **CHEVRON (K) LTD .V. HARRISSON CHARO WAS SHUTU C.A CIVIL APPEAL No 17 of 2016 [2016 eKLR]**. See also **GULAM MARIAM NORDIN .V. JULIUS CHARO KARISA CIVIL APPEAL No 26 of 2015 [2015 eKLR]**. Therefore, it is not fatal that the defendants have moved this Court for orders of adverse possession by way of a defence and Counter – Claim. Similarly, although the suit land is still registered in the names of **SULULU** who is now deceased, the plaintiff has moved to this Court as the Administratrix of his Estate. In the case of **KARUNTIMI RAIJI .V. M’MAKINYA M’ITUNGA 2013 eKLR**, the Court of Appeal held that a claim for adverse possession survives a deceased person and can be filed against the Estate.

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

“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 **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal stated thus: -

“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.”

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 persuasion – **nec vi nec clam nec precario** – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFOR & COMPANY LTD 1980 KLR 10**.

That occupation must also be peaceful. In **GRACE WAIRIMU SOROMA .V. CHAKA LTD & OTHERS 2017 eKLR**, the Court of Appeal reinforced that and stated: -

“What the Applicant needed to prove was that her occupation was continuous, open and peaceful without the permission of the owner.”

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

“By adverse possession is 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.”

The suit land was registered under the repealed Registered Land Act. **Section 30(f)** of the repealed law recognized that a claim for land by way of adverse possession was among the overriding interests that need not be registered on the title. It stated 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 process of being acquired by virtue of any written law relating to the limitation of action or by prescription.”

A similar provision exists under **Section 28(h)** of the new **Land Registration Act 2012**. Similarly, **Section 7(d)** of the **Land Act** provides that: -

“Title to land may be acquired through: -

(a)

(b)

(c)

(d) Prescription”

This Court shall be guided by the above legal provisions and precedents among others in considering whether or not the defendants are entitled to the suit land by way of adverse possession.

The 1st defendant stated that she moved to the suit land in 1988 after she got married to **HENRY MWAULE WANYISIA** (deceased) and a son to the then registered proprietor of the suit land **WANYISHA MURACHI**. The 2nd defendant was born there. At the time of filing this suit, they pleaded that their family had been in occupation and possession of the suit land for a period exceeding 50 years. That the defendants have been in occupation and possession of the suit land was indeed conceded by the plaintiff who confirmed that she does not live there. This is what she said when cross – examined by **MR WERE**: -

“I live at KAPICHAHAI in KALABA. I don’t live on the suit land. It is my co – wife who was living there but now it is the defendants who live there. I know the defendants went into the land in 1988 and they still live on the land.”

The plaintiff’s witness **JOE MURACHI WASWA (PW 2)** also confirmed that the defendants moved to the suit land in 1988. The defendant’s evidence that they have constructed homes on the suit land where they have settled their families and even buried their dead was not rebutted. That means that by the time this suit was filed by the plaintiff on 15th February 2017, the plaintiffs had been in occupation and possession of the suit land for some 29 years. It must also be remembered that even prior to 1988, the suit land was always in the possession of **WANYISHA MURACHI** who was the first registered proprietor thereof since 31st December 1964 and that means that cumulatively, the defendants’ family had been in occupation and possession of the suit land for some 53 years by the time this suit was filed in 2017. For purposes of adverse possession however, time can only be computed from 18th June 1991 because that is when **SULULU** was registered as the proprietor of the suit land. Time could not run between 31st December 1964 and 18th June 1991 because during that period, the suit land was the property of **WANYISHA MURACHI** and the defendants’ occupation and possession thereof could not have been described as adverse to his interest because they were there with his consent as a family. And if time is computed from 1991 when the land was registered in the names of **SULULU**, it is clear that by the time this suit was filed in 2017, the defendants and their families had been in occupation and possession of the suit land for 26 years well beyond the statutory period that entitles them to orders in adverse possession. In their joint statement, the defendants claim that even assuming the plaintiff’s husband **SULULU** had a clean title, they have utilized the suit land notoriously, continuously, peacefully and un – interrupted for over 50 years. However, the plaintiff denied that the defendants have lived peacefully on the suit land. When he was cross – examined, this is what her witness **JOE MURACHI WASWA (PW 2)** said: -

“What I want to tell this Court is that the defendants were not living on the land peacefully because there were many cases at the Chief. Letters were written to the defendants but they got burnt during the 1992 clashes.”

The plaintiff did not herself directly touch on that issue in either her statement or during the plenary hearing. It is well settled that adverse possession can only be interrupted when the registered owner of the land in dispute files a suit to evict the party claiming the land or makes an effective entry or when the owner’s right is admitted by the adverse possessor – **GITHU .V. NDEETE 1984 KLR 776**. No evidence has been placed before this Court to demonstrate that **SULULU** filed any suit against the defendants seeking to assert his right to the suit land or made any effective entry or that his title was admitted by the defendants. If anything, the defendants have all along complained that **SULULU** was fraudulently registered as the proprietor of the suit land. And although **JOE MURACHI WASWA (PW 2)** made reference to letters, none was produced. The witness added that the said letters were burnt during the 1992 clashes. It is also doubtful if the mere writing of letters would suffice to interrupt adverse possession – **NGUGUNA NDATHO .V MAASAI ITUMO & OTHERS C.A CIVIL APPEAL No NAI 231 of 1999 [2002 eKLR]**. The only suit that the plaintiff filed to assert her ownership of the suit land is this one and as it is now clear, it has come rather too late and is statute barred.

A claim of adverse possession to land is also usually premised on the fact that the registered proprietor is dispossessed of the land in dispute for the requisite number of 12 years **WAMBUGU .V. NJUGUNA 1983 KLR 712**. In the circumstances of this case, and as conceded by the plaintiff, the defendants have been in occupation and possession of the suit land since 1988. The defendants have developed it and buried their dead thereon including **WANYISHA MURACHI** the then registered proprietor and his son **HENRY MWAULE WANYISIA** the 1st defendant’s husband. Clearly therefore, the plaintiff’s claim that the defendants be evicted from the suit land and be permanently enjoined from interfering with the same and that an order be issued for the exhumation of the body of **HENRY WANYISIA** therefrom is not tenable. On the other hand, the defendants have placed cogent evidence before this Court to demonstrate that they are entitled to orders that they have acquired the suit land by way of adverse possession.

On the issue of costs, they follow the event unless the Court, "*for good reason*", orders otherwise. The events giving rise to this suit were not the making of the plaintiff. They were perpetrated by her late husband **SULULU** most probably even without her involvement. It would be harsh to condemn her to meet the defendants' costs. In an appropriate case, justice should be tampered with compassion. This is one such case in my view and the order that commends itself to make with regard to costs is that each party meets their own costs.

Ultimately therefore and having considered all the evidence herein, this Court makes the following disposal orders: -

1. The plaintiff's suit is dismissed.

2. Judgment is entered for the defendants against the plaintiff as per their Counter – Claim in the following terms: -

(a) The defendants have acquired the land parcel NO BOKOLI/ MUKUYUNI/1151 by way of adverse possession.

(b) The Land Registrar Bungoma to cancel the name of NICHOLAS SIMIYU SULULU from the register of land parcel NO BOKOLI/ MUKUYUNI/1151 and replace it with the names of MARGARET WANGILA WANYISIA and SAMUEL BARASA WANYISIA to hold in trust for the family of the late WANYISHA MURACHI in whose name it was first registered.

(c) MARYCELLA NAFULA SIMIYU the plaintiff herein shall execute all the necessary documents to facilitate the registration of MARGARET WANGILA WANYISIA and SAMUEL BARASA WANYISIA as the proprietors of the land parcel NO BOKOLI/ MUKUYUNI/1151 in trust within 30 days of the delivery of this Judgment.

(d) In default of (c) above, the Deputy Registrar shall execute all such documents on behalf of MARYCELLA NAFULA SIMIYU.

(e) Each party to meet their own costs.

Boaz N. Olao.

J U D G E

15th July 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JULY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

15th July 2021.