



Njurukani & 2 others v Barasa (sued as personal representative of Barasa Waswa (Environment & Land Case 23 of 2016) [2021] KEELC 1 (KLR) (20 September 2021) (Judgment)

Joseph Ndafu Njurukani & 2 others v Emily Naliaka Barasa [2021] eKLR

Neutral citation: [2021] KEELC 1 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 23 OF 2016

BN OLAO, J

SEPTEMBER 20, 2021

IN THE MATTER OF LAND PARCEL NO WEST BUKUSU/WEST SIBOTI/607

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF LIMITATION ACT CAP 22 LAWS OF KENYA

BETWEEN

JOSEPH NDAFU NJURUKANI 1ST PLAINTIFF

SOSPETER JUMA NDAFU 2ND PLAINTIFF

TOBIAS WANGILA NDAFU 3RD PLAINTIFF

AND

**EMILY NALIKA BARASA (SUED AS PERSONAL REPRESENTATIVE OF
BARASA WASWA DEFENDANT**

JUDGMENT

1. As recently as 3rd March 2021, I delivered a Judgment in the case of *EAK.V. VKM* 2021 eKLR where I cautioned men against stealing from widows. In doing so, I even drew inspiration from the scriptures. Unfortunately for JOSEPH NDAFU NJURUKANI, SOSPETER JUMA NDAFU and TOBIAS WANGILA NDAFU (the 1st, 2nd and 3rd plaintiffs respectively), either they did not read that Judgment or, if they did, they did not think much of it. That notwithstanding, in the course of this trial it became



clear to me that it would be in the interest of all the parties, and particularly the plaintiffs, to try and make some concessions and accommodate the defendant. I therefore attempted to address the parties, off record, to see if they could strike some compromise as I am mandated to do by Article 159 (c) of the Constitution particularly in disputes involving family. I have always held the view that in family disputes, a win – win out – come is certainly better than a win – lose result.

2. However, the plaintiffs would hear none of it and my entreats fell on deaf ears. They continued whistling in the dark. Of course a party is entitled to pursue his claim in the Court however implausible and improbable his chances of success – *Yaya Towers Ltd .v. Trade Bank Ltd (in Liquidation)* C.A Civil Appeal No 35 of 2000 [2000 eKLR]. But as I always tell Counsel and parties, it is always good to read the Judge’s lips. As will soon become clear to the plaintiffs when the enormity of this Judgment sinks in, the chickens have finally come home to roost.
3. By an amended Originating Summons dated 28th July 2016, the plaintiffs moved to this Court seeking against EMILY NALIAKA BARASA (the defendant herein and sued as the Administratrix of the Estate of JONATHAN BARASA MBOTIKI) the main order that they have acquired by adverse possession, all that parcel of land measuring 8.4 acres comprised in title NO WEST BUKUSU/ WEST SIBOTI/607 (the suit land). They therefore sought a determination of the following questions: -

- “ 1. That JOSEPH NDAFU NJURUKANI, SOSPETER JUMA NDAFU and TOBIAS WANGILA NDAFU be declared the owners through adverse possession of land measuring 8.4 Ha comprised in land parcel NO WEST BUKUSU/WEST SIBOTI/607 which they have occupied un – interrupted from 1953, 1962 respectively.
2. That the Honourable Court do order that the plaintiffs be registered as owners and the proprietors of the portion of the said land parcel NO WEST BUKUSU/WEST SIBOTI/607 and the defendant herein to facilitate the transfer failure to which the Executive Officer BUNGOMA LAW COURTS to effect the same.
3. That in the alternative, the Honourable Court to order that the 1st plaintiff be registered as the owner and proprietor of the said land parcel NO WEST BUKUSU/WEST SIBOTI/607 holding the same in trust for the 2nd and 3rd plaintiffs and the defendant herein to facilitate the transfer failure to which the Executive Officer BUNGOMA LAW COURTS to effect the same.
4. That such further relief this Honourable Court deems fit to grant be also granted.
5. That the costs of this summons be borne by the defendant.

4. Together with the Originating Summons, each of the plaintiffs swore a supporting affidavit dated 3rd March 2016. The 1st plaintiff also filed a statement dated 17th October 2017 and which was adopted by the 2nd and 3rd plaintiffs in their own statements also dated 17th October 2017.
5. The 1st plaintiff annexed to his supporting affidavit dated 3rd March 2016 the following documents in support of their case: -

- “ 1. Copies of Green Cards for the land parcels NO WEST BUKUSU/WEST SIBOTI/524 and 607.
2. Copies of the Proceedings at the BUMULA LAND DISPUTES TRIBUNAL.
3. Copy of Grant of Letters of Administration issued to the plaintiff on 30th June 2016 in respect to the Estate of JONATHAN BARASA MBOTIKI.



4. Copy of the KENYA GAZETTE of 29th April 2016.
 5. Application for Grant.
 6. Certificate of Death for JONATHAN BARASA MBOTIKI.
6. The plaintiffs also annexed to their Originating Summons earlier filed on 3rd March 2016 the following documents: -
- “ 1. The Green Card to the land parcel NO WEST BUKUSU/WEST SIBOTI/607 in the name of BARASA WASWA.
 2. A letter dated 16th February 2016 addressed to the LAND REGISTRAR BUNGOMA from the CHIEF NAPARA LOCATION.
7. On 29th July 2016, the 1st plaintiff filed a further affidavit dated 28th July 2016.
8. As averred in those affidavits and statements, it is the plaintiffs’ case that the 1st plaintiff has been in occupation of the suit land since 1970 when he got married while the 2nd and 3rd plaintiffs have been there since 1962 and 1978 respectively. That their deceased father one MORRIS NDAFU MBOTIKI owned the land parcel NO WEST BUKUSU/WEST SIBOTI/524 measuring 66 acres which he bought in 1984. That their deceased father had 21 brothers 18 of whom were buried at their KABUCHAI ancestral home. That in 1960, his father allocated him part of the land which he has fully developed and is in occupation. That in 1978, his father allocated to his sons 8 acres each but upon his death in January 2016, some people went to the land and purported to buy it. It was then that he went to the Lands Officer and discovered that the suit land which he has been in occupation since 1960 was registered as parcel NO WEST BUKUSU/WEST SIBOTI/607 and is in the name of one BARASA WASWA. He therefore went to see the Chief who wrote a letter confirming that he, and not BARASA WASWA, is in occupation of the suit land. That he has been in occupation of the suit land since 1960 and has never heard of any one known as BARASA WASWA. He therefore filed this suit on 3rd March 2016 only to be threatened by the defendant who had obtained a Grant of Letters in respect of one JONATHAN BARASA MBOTIKI who was a brother to his deceased father and had been buried on the suit land on humanitarian grounds. That the said JONATHAN BARASA MBOTIKI had sold his ancestral land at KABUCHAI and the plaintiffs’ father had invited him to stay with them because he was sickly. That in 1987, the defendant who claimed to be the wife of JONATHAN BARASA MBOTIKI went to stay with them but left in 1993 after his death. That JONATHAN BARASA MBOTIKI was buried on the land parcel NO WEST BUKUSU/WEST SIBOTI /524 because he was only a licensee on the suit land. That during the hearing at the BUMULA LAND DISPUTES TRIBUNAL, the defendant was awarded 14 acres inspite of protests from the plaintiffs’ father and the defendant altered the TRIBUNAL’s proceedings to read land parcel NO WEST BUKUSU/WEST SIBOTI/607 instead of WEST BUKUSU/WEST SIBOTI/524. That together with the area Administration, the defendant alleged that her late husband was also known as BARASA WASWA which was a calculated move to defeat justice and the defendant is not entitled to any share in the suit land.
9. In his further affidavit dated 28th July 2016, the 1st plaintiff averred, inter alia, that the defendant never lived with them but only came to inter the remains of JONATHAN BARASA MBOTIKI claiming to be his wife.
10. As stated earlier, the 2nd and 3rd plaintiffs swore separate affidavits and also signed statements in which they associated themselves fully with the contents of the 1st plaintiff’s affidavit and statement.



11. In opposing the Originating Summons, the defendant acting in person filed a replying affidavit dated 15th August 2016 in which she described the contents of the Originating Summons as full of lies and an abuse of the Court process.
12. She deponed that she was married in 1977 to JONATHAN MBOTIKI alias BARASA WASWA and they lived together on the suit land upto 1993 when he passed away. They were not blessed with any children during their marriage and following his demise, she remained alone on the suit land until 2008 when her house was burnt down. With nowhere to go, she sought refuge at the REFORMED CATHOLIC CHURCH premises at NAKALILA VILLAGE. She however confirmed farming on and leasing the suit land until 2010 when her brother – in – law MAURICE NDAFU MBOTIKI and his sons the plaintiffs herein threatened to kill her. She claims that they are using short – cuts to acquire the suit land.
13. The defendant filed her list of documentary evidence on 1st September 2016 with the following documents: -
 - “ 1. NAPARA LOCATION CHIEF’s letter dated 29th August 2016 addressed to the DEPUTY REGISTRAR BUNGOMA HIGH COURT.
 2. NAPARA LOCATION CHIEF’s letter dated 26th September 2014 addressed to whom it may concern.
 3. NAPARA LOCATION CHIEF’s letter dated 16th April 2010 addressed to the Instructor MUMIAS SUGAR COMPANY.
 4. DISTRICT OFFICER SIBOTI DIVISION’s letter dated 13th May 2010 addressed to MUMIAS SUGAR COMPANY.
 5. DISTRICT OFFICER BUMULA DIVISION’s letter dated 19th December 2006 addressed to the DISTRICT COMMISSIONER BUNGOMA.
 6. ASSISTANT CHIEF KHASOLO SUB – LOCATION’s letter dated 8th September 2008 addressed to the OFFICER – IN – CHARGE KIMAETI PATROL BASE.
 7. DEPUTY COUNTY COMMISSIONER BUMULA’s letter dated 18th August 2015 addressed to the REGISTRAR BUNGOMA HIGH COURT.
 8. DEPUTY COUNTY COMMISSIONER BUMULA’s letter dated 4th August 2015 addressed to CHIEF NAPARA LOCATION and others including the 1st and 3rd defendants.
 9. CHIEF NAPARA LOCATIONS’s letter dated 13th February 2012.
14. Some other documents have been listed twice such as the letter dated 29th August 2016 while others have not been listed but have been produced such as the document from the EAST AFRICAN RESOURCE CENTRE dated 31st July 2013 and which appears to be a plaint drafted by the said centre on behalf of the defendant as plaintiff against MAURICE NDAFU MBOTIKI. To be fair to the plaintiffs, it would not be proper and justifiable to treat as part of the defendant’s documentary evidence such documents which do not appear on the list filed because it is not certain if they were served.
15. The hearing commenced on 29th July 2021 directions having been taken on 11th May 2017 and the parties were the only witnesses who testified in support of their respective cases. They adopted the



contents of their affidavits and statements and also produced their documentary evidence as filed herein.

- 16 At the end of the plenary hearing, neither MR WAMALWA S Counsel for the plaintiffs nor the defendant who was acting in person elected to file any submissions.
- 17 I have considered the evidence by all the parties including their oral testimonies and the documents filed.
- 18 The plaintiffs' claim is that they are entitled to be registered as the proprietors of the suit land by way of adverse possession. According to the 1st plaintiff's supporting affidavit dated 3rd March 2016 and his statement dated 17th October 2017 both of which were adopted by the 2nd and 3rd plaintiffs, they have been in occupation of the suit land since 1970, 1962 and 1978 respectively. That they have occupied the suit land peacefully and developed it and it was not until 2016 that they discovered it was registered in the names of one BARASA WASWA.
- 19 I shall therefore first set out the statutory and case law on adverse possession then consider whether on the evidence before me, the plaintiffs have made out a case to warrant the orders sought in their Originating Summons.
- 20 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 states: -

“38: “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.”

Section 7 of the same Act provides as follows: -

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

Section 17 of the same Act also provides as follows: -

“17 “Subject to Section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

- 21 It is now well established that the combined effect of the provisions of Sections 7, 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 twelve (12) years of the adverse possession of that land – *Benjamin Kamau & Others .v. Gladys Njeri* C.A Civil Appeal No 213 of 1996.
- 22 In *Kasuve v Mwaani Investment Ltd & Others* 2004 1 KLR, the Court of Appeal stated that: -

“ And in order to be entitled to the 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 the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa* No 2 1984 KLR 284.”

23 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 i.e.

24 *Nec vi nec clam nec precario – Kimani Ruchine & Another .v. Swift Rutherford & Company Ltd* 1980 KLR 10.

25 It is an ingredient of adverse possession that the occupation and possession of the land being claimed must be peaceful. Three cases will suffice to illustrate this requirement. In *Grace Wairimu Soroma .v. Chaka Ltd & Others* 2017 eKLR the Court of Appeal stated thus: -

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

26 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 fact, they were expected to show that their possession was *nec vi 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.” Emphasis added.

27 Finally, in *Mtana Lewa .v. Kabindi Ngala Mwangandi* C.A Civil Appeal No 56 of 2014 [2015 eKLR] the Court of Appeal emphasizing on the need for peaceful occupation stated as follows: -

“The essential pre – requisite being that the possession of the adverse possessor is neither by force or stealth or under license of the owner.” Emphasis added.

28 I shall now consider, guided by the above statutory provisions and precedents among others, whether the plaintiffs have proved that they are entitled to be registered as the proprietors of the suit land having acquired it by way of adverse possession.

29 Although the plaintiffs suggest that the suit land belongs to their late father one MORRIS NDAFU MBOTIKI who allocated them portions thereof during his life time, it is infact clear from both the Green Card and the Certificate of Search which both parties produced herein that the suit land has since 1st November 1972 been registered in the name of BARASA WASWA. It is also clear from the Green Card to the land parcel NO WEST BUKUSU/WEST SIBOTI/524 that the said land was also registered in the name of MORRIS NDAFU on 1st November 1972 the same time that the suit land was being registered in the name of BARASA WASWA. Registration of land in the name of a person is a matter of fact to be gleaned from the registration document itself. Given those facts, it is highly doubtful that the plaintiffs’ late father could have distributed the suit land among his sons when he had his own land and when the suit land was infact registered in the name of another person being BARASA WASWA. The registration of the suit land in the name of BARASA WASWA cannot be disputed and in any case, that is why the plaintiffs have moved to this Court to claim the said land by



way of adverse possession because such a claim is, as is provided under Section 38(1) of the Limitation of Actions Act, made against “the person then registered as proprietor of the land.”

30 The defendant has been sued as the Administratrix of the Estate of BARASA WASWA the registered proprietor of the suit land. It is trite law that a claim for adverse possession can be filed against the Estate of a deceased person – Karuntimi Raiji .v. M’makinya M’itunga 2013 eKLR. Although the plaintiffs have sued the defendant in her capacity as the Administratrix of the Estate of BARASA WASWA, they denied any knowledge of him. In paragraph 14 of his supporting affidavit dated 3rd March 2016, the 1st plaintiff averred as follows: -

“ 14: “That I have stayed on that (sic) peacefully since the year 1960 to-date and that I have never seen and heard of someone known as BARASA WASWA todate.”

31 On his part, the 2nd plaintiff averred in paragraph 13 of his supporting affidavit also dated 3rd March 2016 as follows: -

“ 13: “That I have been staying on the said land peacefully since 1976 todate and I have never heard of or seen anybody by name BARASA WASWA claiming the said land todate.”

32 And the 3rd plaintiff reiterated the same in paragraph 7 of his supporting affidavit also dated 3rd March 2016 in these terms: -

“ 7 “That I have never seen someone by the name BARASA WASWA since I was born or heard of him and have stayed there peacefully todate.”

33 An issue that engaged the Court during the plenary hearing was whether the names BARASA WASWA and JONATHAN BARASA MBOTIKI refer to one and the same person. When I put this question to the plaintiffs, they were categorical that BARASA WASWA and JONATHAN BARASA MBOTIKI are two different persons. And although in their affidavits they denied any knowledge of BARASA WASWA, it became clear during their oral testimony that the said BARASA WASWA was their uncle and husband to the defendant. This is what the 1st plaintiff said in his oral testimony: -

“The defendant is wife to BARASA WASWA who was my late father’s brother. He is the current registered proprietor of the said land but I don’t know how he became the registered proprietor. The defendant has never lived on the land at all.”

On his part, the 2nd plaintiff said: -

“I know the defendant. She was the wife of JONATHAN BARASA MBOTIKI.”

The 3rd plaintiff also said: -

“I know the defendant. She was the wife to my uncle JONATHAN BARASA MBOTIKI.”

34 It is clear from the affidavit filed by the defendant in BUNGOMA HIGH COURT SUCCESSION CAUSE No 46 of 2016 in support of her application for the Grant of Letters of Administration in respect to the Estate of JONATHAN BARASA MBOTIKI that she described herself as “wife” to the deceased and his only heir. She also listed the suit land as the only property of the deceased. The plaintiffs did not file any protest in those proceedings yet that is what they should have done if indeed the suit land did not belong to BARASA WASWA. I have also looked at the proceedings of the BUMULA LAND DISPUTES TRIBUNAL CASE involving the defendant and MOURICE



NDAFU MBOTIKI who no doubt is the same MORRIS NDAFU MBOTIKI who was the plaintiffs' father as per their own affidavits and who passed away in January 2016. The said TRIBUNAL went out of its way and ordered that the defendant be given the title deed to the land she occupied. Those proceedings however involved another parcel of land being parcel NO WEST BUKUSU/WEST SIBOTI/524. However, what is important from those proceedings and is relevant for purposes of this Judgment is that in the course of his testimony, the plaintiffs' father MOURICE NDAFU MBOTIKI said the following with regard to the defendant: -

“I know the claimant EMILY NALIKA BARASA as my sister – in – law, who got married to my late brother JONATHAN BARASA MBOTIKI.”

35 Among the documents produced by the defendant is a letter from the CHIEF NAPARA LOCATION dated 13th February 2012 conveying the resolutions of a land dispute between the defendant and MAURICE NDAFU MBOTIKI. The resolutions are signed both by the defendant and MAURICE NDAFU MBOTIKI. The relevant portions for purposes of this Judgment read: -

“RE: THE RESOLUTIONS OF THE LAND DISPUTE BETWEEN MAURICE NDAFU MBOTIKI .V. EMILY NALIKA BARASA.

Before the Office of Chief and the Assistant Chief, BITOBO S/LOC and KHASOLO S/LOC. Mr MAURICE NDAFU MBOTIKI had signed in this Office to give MRS EMILY NALIKA BARASA a piece of land as part of a share of her late husband namely JONATHAN BARASA MBOTIKI ALIAS BARASA WASWA.

Mr MAURICE had agreed to give NALIKA a piece of land measuring one acre.”

36 The import of that resolution is that not only did the plaintiffs' father recognize that the defendant was her sister in law and entitled to land but further, that the defendant's late husband was also known as “JONATHAN BARASA MBOTIKI alias BARASA WASWA.” I therefore have no hesitation in making a finding that the names JONATHAN BARASA MBOTIKI and BARASA WASWA the registered proprietor of the suit land refer to one and the same person and who is the late husband to the defendant.

37 The plaintiffs' claim that they have been in occupation and possession of the suit land from as far back as the 1970's and 80's when their late father allocated each of them a portion of the suit land. In paragraph 10 of his supporting affidavit dated 3rd March 2016, the 1st plaintiff has averred as follows: -

“10 “That in the year 1970 after I had been circumcised and gotten married, I was allocated part of that land measuring about 7 acres by my late father MORRIS NDAFU MBOTIKI where I fully developed and I have been staying their (sic) todate and that I have even allocated my two sons who are also married with children who have also fully developed their respective places in the year 1998 and 2000 respectively after circumcising them.”

38 In his supporting affidavit also dated 3rd March 2016, the 2nd plaintiff avers in paragraph 9 as follows: -

“9: “That in the year 1976 after I was circumcised and got married, I was allocated part of that land measuring about 7 acres by my late father MORRIS NDAFU MBOTIKI where I fully developed and I have been staying their (sic) todate and that I have even allocated my son who is also married with children who have also fully developed his respective place.”



39 And in paragraph 6 of his supporting affidavit also dated 3rd March 1980, the 3rd plaintiff makes the following averment: -

“6: “That in the year 1986, I was allocated part of that land measuring about 7 acres by my late father MORRIS NDAFU MBOTIKI where I fully developed and I have been staying their (sic) todate with my children and my wife.”

40 Those averments cannot possibly be true for the following reasons. Firstly, BARASA WASWA who has since 1st November 1972 been the registered proprietor of the suit land only passed away in September 1993, It is highly unlikely that he would have allowed his brother to allocate his land to his sons when he had his own land WEST BUKUSU/WEST SIBOTI/524 measuring 18 Hectares which translates to 44.5 acres which is more than twice the size of the suit land. Secondly, the suit land measures 8.4 Hectares which translates to 20.8 acres. The acreage of the land which the plaintiffs allege to have been allocated by their father out of the suit land adds upto to 21 acres. The only conclusion is that the plaintiffs’ late father could only have allocated his sons portions out of his own land parcel NO WEST BUKUSU/WEST SIBOTI/524 and not the suit land. Otherwise, it would mean that the plaintiffs’ late father threw away his brother from the suit land in order to create room for his sons. Although the plaintiffs tried to suggest that the defendant never lived on the suit land, the evidence on record suggests otherwise. When he was cross – examined by the defendant the 1st plaintiff said: -

“It is true that your house was burnt.”

41 The 2nd plaintiff said the following also on being cross – examined by the defendant: -

“The land in dispute is not your land. When your husband died, you left the home. It is not true that your house was burnt.”

On his part, the 3rd plaintiff upon being cross – examined said: -

“You came to the suit land in 1987.”

42 The defendant stated the following in paragraphs 4, 5, 6, 7, 8 and 9 of her replying affidavit dated 15th August 2016: -

“4: “That in the year 1977, I got married to the 1st Respondent one JONATHAN MBOTIKI alias BARASA WASWA.”

5: “That we stayed together in land parcel NO W. BUKUSU/W. SIBOTI/607 measuring 8.4 Ha as husband and wife until the year 1993 when my husband died.”

6: “That we were not blessed with any child during our marriage so when my husband died, I remained alone in the said piece of land until the year 2008 when my house was burned.”

7: “That I had no alternative but to look for somewhere to stay and as a result, I entered into REFORMED CATHOLIC CHURCH premises at NAKALILA VILLAGE.”

8: “That despite moving away from the suit land, I continued carrying farming and leasing the same until 2010 when one MAURICE NDAFU MBOTIKI (my brother – in – law) and his sons now the Applicants threatened to kill me.”

9: “That the Applicants are malicious and they want to apply short cuts to acquire the suit land.”



When she was cross – examined by MR S. WAMALWA, she said: -

“I lived on the suit land for 14 years and in 1993 my husband died. Then in 2008 is when they burnt my house. The 1st plaintiff chased me away using a panga. I reported the incident to the Assistant Chief.”

43. It is clear even from the plaintiffs’ own testimony during the trial that the defendant lived with BARASA WASWA on the suit land from the time they were married. But they deny having chased her away and suggest that she left on her own volition. This is what the 2nd plaintiff said: -

“It is not true that we chased the defendant from the land in dispute. She left after her husband died. JONATHAN BARASA MBOTIKI the defendant’s husband died in 1993 and the defendant left immediately. I don’t know where she lives.”

The 3rd plaintiff said in his evidence in chief that: -

“The defendant left the suit land in 1993 after her husband died. It is not true that we chased her away. She left on her own.”

- 44 The only conclusion that I can arrive at upon my evaluation of the evidence herein is that the defendant indeed lived on the suit land with her late husband BARASA WASWA but was forcefully evicted therefrom in 2008 following his demise in 1993.

- 45 The plight that the defendant went through is best captured by the letter dated 29th August 2016 written to the Deputy Registrar of this Court by the Chief NAPARA LOCATION and which is part of the defendant’s documents. Because of it’s significance in this dispute, it is important that I reproduce it in extensor: -

“OFFICE OF THE CHIEF

NAPARA LOCATION

O BOX 98

MALAKISI

29TH AUGUST 2016

TO: THE DEPUTY REGISTRAR

BUNGOMA HIGH COURT

IN THE MATTER OF LAND PARCEL NO W. BUKUSU/W SIBOTI/607 CASE
No 23 of 2016 ENVIRONMENT AND LAND CASE IN THE HIGH COURT OF
BUNGOMA

This is to confirm that JONATHAN BARASA MBOTIKI alias BARASA WASWA hailed from my area of jurisdiction, NAKALIKA C VILLAGE, KHASOLO 51 LOCATION NAPARA LOCATION.

Before his demise, he was the biological husband to one EMILY NALIKA BARASA now the widow who is the second deponed. Pursuant to terms of marriage, she got married to JONATHAN BARASA MBOTIKI alias BARASA WASWA and they have lived as husband and wife for sixteen (16) years before her husband’s death on 8th September 1993.



That JONATHAN BARASA MBOTIKI alias BARASA WASWA left the lonely widow one EMILY NALIAKA BARASA and land parcel W/BUKUSU/W. SIBOTI measuring 8.4 Ha (607). And that EMILY BARASA NALIAKA the said widow herein remains the sole beneficiary to Estate W/BUKUSU/W/SIBOTI 607 (8.4 Ha) others are strangers to her and even to my Administration.

That from 1993 when her husband died, the widow remained on her land peacefully farming and leasing portions of her land for survival until 2007 when her brother –in –law one MAURICE NDAFU MBOTIKI (deceased) and his sons namely JOSEPH NDAFU NJURUKANI, SOSPETER JUMA NDAFU, TOBIAS WANGILA now applicants interfered with her normal farming as they demanded children but not the barren widow.

That despite demand having been made and notice of intention to arbitrations from the Provincial Administration Officers, relatives, BUMULA Divisional Land Tribunal verdict, the East African Resource Centre verdict, the one MAURICE NDAFU MBOTIKI (deceased), JOSEPH NDAFU NJURUKANI, SOSPETER JUMA NDAFU, TOBIAS WANGILA now applicants with bad motives went ahead to one burning her house 2008,

2: Chasing her from her land by restricting her not to rebuild her new house.

3: Destroying her 2.5 acres' sugar plantation contracted by Mumias Sugar Company,

4: And shared the land among MAURICE NDAFU sons and planted sugar cane against her consent.

Those shared her land are JOSEPH NDAFU NJURUKANI, DANIEL NDAFU, SOSPETER JUMA NDAFU and DAVID NDAFU.

That subsequently, it was agreed that the widow one EMILY NALIAKA BARASA successes (sic) her deceased husband land title deed the whole parcel W/BUKUSU/W.SIBOTI/607 and be registered on her name in all arbitrational verdicts. But the late MAURICE NDAFU MBOTIKI and his sons JOSEPH NDAFU NJURUKANI, SOSPETER JUMA NDAFU, TOBIAS WANGILA have remained malicious (sic) and have been using short cuts to acquire the suit land.

It is my prayer that this Honourable Court dismisses this case and allow the widow to continue with her succession process.

With thanks.

Yours faithfully

CHIEF OFFICE

NAPARA LOCATION.”

46 That letter was written while this matter was already in Court. It was produced without objection and whereas the CHIEF NAPARA LOCATION nor any person for that matter, cannot purport to advise the Court on how to determine a dispute before it, the other contents of that letter summarise the tribulations that the defendant had gone through at the hands of the plaintiffs and their father with regard to the suit land. And it cannot be disputed that the CHIEF of any area would normally have first hand information about what goes on in his or her area of jurisdiction.



47 Then there is also another letter from the ASSISTANT CHIEF KHASOLO SUB – LOCATION dated 8th September 2008 addressed to the Police concerning the defendant. I shall also reproduce it in extenso: -

“ ASSISTANT CHIEF

KHASOLO S/LOC

P, O. BOX 98

MALAKISI

8 – 9 – 08

THE OFFICER IN CHARGE

KIMAETI PATROL BASE

Dear Sir

RE: MRS EMILY NALIAKA BARASA

The above person is a resident of my area of jurisdiction. Recently her house was burnt by unknown persons. She is being threatened by one JOSEPH NDAFU not to step on her farm. She claims she has been chased away by JOSEPH yesterday around 3:30 pm. Kindly accord her necessary assistance.

Yours faithfully

LUCYN. MAKOKHA

ASS. CHIEF

KHASOLO S/LOCATION”

48 This letter was written on 8th September 2008 some eight (8) years before this suit was filed.

49 As already stated above, the defendant averred in her replying affidavit that following her husband’s demise in 1993, she was forcefully removed from the suit land and her house burnt down in 2008 leaving her to seek refuge at the REFORMED CATHOLIC CHURCH PREMISES at NAKALIKA VILLAGE. She maintained this position in her oral testimony and during cross – examination. These letters are a clear affirmation that the defendant could not have made up this story. The plaintiffs while suggesting that the defendant left the suit land on her own volition, do not explain why she could have left her husband’s land to seek shelter in a church. It is also not plausible that the defendant would voluntarily vacate the suit land and at the same time keep knocking on the doors of Chief’s and other Administrators seeking their help to reclaim the suit land.

50 The only inevitable conclusion that this Court can arrive at on the basis of the above evidence is that the defendant lived with BARASA WASWA on the suit land from 1977 upto the time of his demise on 8th September 1993. There is no way the plaintiffs could have been allocated and occupied any portions of land on the suit land for the reasons which I have already explained above. The land which they claim to have occupied could only have been their late father’s land parcel NO WEST BUKUSU/WEST SIBOTI/524 measuring 44.5 acres. That is the only land that could have accommodated them since they claim to have been allocated 21 acres in total. Surely they could not have been able to occupy 21 acres out of the suit land measuring 20.8 acres and still left a portion for their uncle BARASA WASWA who was still alive in the 1970’s and 80’s and was living thereon with the defendant until his demise on 8th September 1993.



- 51 The other irresistible and inevitable conclusion to be drawn from the evidence herein is that following the demise of BARASA WASWA on 8th September 1993 the plaintiffs, motivated by greed and, sadly, by the fact that the defendant was only a woman, widowed, and barren for that matter, devised a scheme to throw her out of the suit land. And the best way they could think of was by chasing her away in 2008 and setting her house on fire to ensure she does not return to the suit land and claim what is rightly hers. They then took over the suit land.
- 52 Given those facts, the plaintiffs cannot now beseech this Court to declare that they are entitled to the suit land by way of adverse possession. This is for the simple reason that there is cogent evidence demonstrating that the plaintiffs forcefully took over and occupied the suit land after threatening the defendant and burning her house. As is already clear from the cases of *Robert Shume .v. Samson Kalama* (supra) as well as *Mtana Lewa .v. Kabindi Ngala Mwangandi* (supra), for one to be entitled to land by way of adverse possession, the possession must be “peaceful” and not “by force or stealth.” A party claiming another person’s land by way of adverse possession cannot therefore forcefully evict the proprietor of the land and then move to Court for orders in adverse possession. That would open a highway to anarchy. In such a case, it won’t matter that the adverse possessor has occupied the land in dispute for 100 years. The law will not approve of it. Such a person will not have satisfied an important pre – requisite of the doctrine of adverse possession which is occupation without force, without secrecy and without permission – *nec vi nec clam nec precario* – *Kimani Ruchine & Another .v. Swift Rutherford & Company Ltd* (supra).
- 53 And even assuming that it is true, as suggested by the 1st plaintiff, that the defendant left the suit land voluntarily after her house got burnt which was in 2008, that would mean that this suit was filed prematurely in 2016. Then there is the defendant’s un – controverted evidence that even after she was ejected from the suit land in 2008, she continued leasing it out to farmers until 2010 when the plaintiffs threatened to kill her. The letter dated 29th August 2016 from her Chief suggests that in fact she continued leasing it out until 2007. That would mean that it was not until 2007 (being the earliest) or until 2016 (being the latest) that she was finally dispossessed of the suit land. Even assuming that the dispossession was voluntarily, those are the years when time would start running which would still render this suit premature as it was filed in 2016 before the lapse of the 12 years’ period stipulated in the law. There is clear evidence however that the plaintiffs forcefully ejected the defendant from the suit land and their claim to be registered as the proprietors thereof by virtue of having been in adverse possession of the same must collapse and is for dismissal.

The up – shot of the above is that the plaintiffs’ suit is dismissed.

- 54 Having said so, this is a Court of Law and also a Court of equity. Equity will not suffer a wrong to be without a remedy – *Macharia Mwangi Maina & Others .v. Davidson Mwangi Kagiri* 2014 eKLR. Further, in making its decision, this Court is governed by the Guiding Principles set out in Section 18 of the *Environment and Land Court Act*. Those principles include under Section 18(d): -

“ the national values and principles of governance under Article 10(2) of the Constitution.”

- 55 Article 10 (2)(b) of the Constitution identifies some of those values and principles as: -

“human dignity, equity, social justice, inclusiveness, equality, human rights, non – discrimination and protection of the marginalized.”

- 56 The view I take of this matter is that although the defendant has succeeded in warding off the plaintiff’s claim to the suit land, this will only amount to a pyrrhic victory unless this Court goes further and makes orders that will bring a conclusive finality to this dispute in addition to doing justice to the



parties. Article 27 (4) and (5) of the Constitution makes it clear that neither the State nor a person shall discriminate against another either directly or indirectly on any ground including: -

“race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture dress, language or birth.”

57 Further, it is clear from Article 27(3) of the Constitution that both women and men have the right to equal treatment. What I discern in this case is a well choreographed scheme by the plaintiffs to ensure that the defendant does not inherit the suit land. They believe, unfortunately like many of their contemporaries do, that women should not inherit land. In this case, the fact that the defendant did not have any children with their uncle fueled their desire to keep the defendant away from the suit land. If this Court does not make any final orders with regard to the ownership of the suit land, it will mean that the plaintiffs and their families will continue to occupy it as their own property while the defendant who is entitled to it continues to languish in the corridors of the REFORMED CATHOLIC CHURCH premises at NAKALILA VILLAGE. The results will be that the plaintiffs will benefit through unjust enrichment. This Court must not provide succor to such parties.

58 I have therefore agonized on whether firstly, I can make any other further orders other than simply dismissing the plaintiff's claim and leave it at that, and secondly, what orders, if any, I can make in the circumstances.

59 The defendant is acting in person and as is typical with pro –se litigants, her pleadings cannot be expected to be elegant. It is not therefore strange that she did not plead any Counter – Claim. It is trite that parties are bound by their pleadings. In *Caltex Oil (kenya) Ltd .v. Rono Ltd* C.A Civil Appeal No 97 of 2008 [2016 eKLR] the Court said: -

“If a party wishes the Court to determine or grant a prayer, it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayer he seeks to be granted in his favour. Where no such prayer is pleaded in specific and somewhat particularized manner, the party is not entitled to benefit and the Court has no jurisdiction to whimsically grant those orders.”

60 In *Joseph Mbuta Nziu .v. Kenya Orient Insurance Company Ltd* 2015 eKLR, the Court cited with approval the decision of the Nigerian Supreme Court in the case of *Adetoun Oladeji (NIG) Ltd .v. Negeria Breweries Plc* S.C 91/2002 wherein it was held that:-

“..... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

61 However, in *Odd Jobs .v. Mubia* 1970 E.A 476, the then Court of Appeal for East Africa held that where the parties have canvassed any issue and left it to the Court to decide, the Court can pronounce Judgment on it though it was not pleaded, LAW JA put it in the following words at page 478: -

“In East Africa, the position is that a Court may allow evidence to be called and may base a decision on an impleaded issue if it appears from the course followed at the trial that the unpleaded issue has infact been left to the Court for decision.”



62 That decision has been followed in many subsequent cases in this Country. See *Ngugi Ticha .v. Kiritu Ticha & Others* C.A Civil Appeal No 40 of 2004 [2014 eKLR] and also *Uyas Industries .v. Diocese of Meru* 1982 KLR 114 among others.

63 In the course of these proceedings, it became clear that the parties wanted a decision as to the ownership of the suit land and evidence was led on that. Whereas their claim to the suit land was based on adverse possession, the plaintiffs insisted that infact the land belonged to their late father. That is notwithstanding the fact that the suit land has since 1st November 1972 been registered in the names of BARASA WASWA. They have not demonstrated how it ended up being their late father’s land yet there is un – controverted evidence that on the same day that the suit land was being registered in the name of BARASA WASWA, their father acquired ownership of another and bigger parcel of land being WEST BUKUSU WEST SIBOTI/524. In the course of his oral testimony, the 1st plaintiff said: -

“ This land NO EAST BUKUSU/WEST SIBOTI/607 belonged to my later father MORRIS NDAFU MBOTIKI. I was born there in 1945 and that is where we live with the other plaintiffs todote. My father bought it in 1948.”

64 When he was cross – examined by the defendant, the 2nd plaintiff replied: -

“ The land in dispute is not your land The land is ours. The Court should rule so.”

65 In paragraph 16 of his supporting affidavit, the 1st plaintiff made the following averment which the 2nd and 3rd plaintiffs replicated in paragraphs 15 and 9 of their respective affidavits: -

“ The Court should order the Respondent to transfer the said land to me in trust for 2nd and 3rd defendant (sic) or in all our names that is me, 1st and 2nd Applicants.”

66 The defendant’s case is that the plaintiffs are malicious and are applying short cuts to acquire the suit land. When she was cross – examined by MR S. WAMALWA, she said: -

“ I want the Government to help me get back my land.”

Earlier in her evidence in chief, she said: -

“ I want the Court to give me my land. What they have said is not true.”

67 It is clear from the evidence led by the parties herein that even if I do not find in favour of the plaintiffs, as I have already done, I must go further and make a decision on whether the defendant is entitled to the suit land. This is bearing in mind that as of now, whereas the plaintiffs are in occupation of the suit land, it is not registered in the name of the defendant. By merely dismissing their claim, nothing stops them from continuing that occupation and possession of the suit land and the defendant’s sojourn in the corridors of the REFORMED CATHOLIC CHURCH at NAKALILA VILLAGE will continue indefinitely. The dispute over the suit land will not, in the circumstances, have been brought to a conclusion. As I have already stated earlier in this Judgment, the defendant’s victory in rebutting the plaintiffs’ claim will be rendered hollow. It is therefore clear from the evidence adduced by the parties herein that this Court has also been called upon to determine if the defendant is entitled to the suit land, as she claims, and make appropriate orders.



68 The Court of Appeal faced with a not too dissimilar situation in the case of *Anne Nyathira .v. Samuel Mungai Mucheru & Others* C.A Civil Appeal No 68 of 2015 NBI [2016 eKLR] affirmed *Odd Jobs .v. Mubia* (supra) and said: -

“We agree with Counsel for the Appellant that the pleadings before the trial Court were slovenly drawn. There was no specific prayer for a determination of where the deceased body should be interred. Nonetheless the issue was prominently germane in the evidence adduced by both parties and in the event, although it would have been prudent for the parties to amend the pleadings, it would appear even the appellants acquiesced to the state of affairs and participated in the proceedings by adducing evidence of the deceased will. Taking into account the circumstances obtaining in this case, we are of the view that it fits squarely within the ambit of the holding in the case of *Odd Jobs .v. Mubia* 1970 E.A 476

69 The same situation applies here. The issue of who owns the suit land is germane and was raised in evidence.

70 I have already found that the defendant was the wife of BARASA WASWA alias JONATHAN BARASA MBOTIKI the registered proprietor of the suit land. She obtained a grant in respect of his Estate in which the suit land is the only property listed therein. She had no children and that, in my view, largely contributed towards her tribulations at the hands of her brother – in – law and his sons the plaintiffs herein.

71 Section 61(1) of the Land Registration Act provides a remedy. It states: -

61(1) “If a sole proprietor or a proprietor in common alias, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words as executor of the will of (deceased) or as administrator of the Estate of (deceased), as the case may be.”

72 A similar provision is found in Section 50 of the *Land Act* as well as Section 119 of the repealed Registered *Land Act* which was the applicable law in 1972. This is not a Probate Court but even under the Law of Succession Act, the defendant’s interests would take priority over those of the plaintiffs. This Court makes a finding that the defendant is entitled to be registered as the proprietor of the suit land through transmission as provided under Section 61(1) of the *Land Registration Act* 2012.

73 The Court having found that the suit land should be registered in the name of the defendant, it follows that the plaintiffs are essentially trespassers thereon. They forcefully ejected the defendant from the suit land in 2008 and took possession thereof. Trespass is defined in *Black’s Law Dictionary 10th Edition* as: -

“An unlawful act committed against the person or property of another; esp, wrongful entry on another’s real property.”

74 The plaintiffs’ continued occupation of the suit land is a continuing trespass which is defined in the same Dictionary as: -

“A trespass in the nature of a permanent invasion on another’s rights such as a sign that overhangs another’s property.”



75 Having taken over the suit land in 2008, the plaintiffs, by their own admission have used it as their property by developing it and even allocating portions thereof to their sons. There is no time limit within which an action for such trespass should be instituted. In the case of *Isaack Ben Mulwa .v. Jonathan Mutunga Mweke* C.A. Civil Appeal No 6 of 2015 [2016 eKLR], the Court of Appeal said the following about a continuous trespass: -

“Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res – judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

76 What the plaintiffs did was to unlawfully occupy private land and Section 152 B of the *Land Act* makes it clear that such persons “shall be evicted.” This Court finds that the plaintiffs are trespassers on the suit land and liable for eviction. Appropriate orders shall be made accordingly.

77 Finally, having unlawfully ejected the defendant from the suit land, this Court must issue a permanent injunction perpetually restraining the plaintiffs from committing similar acts against the defendant in order to protect her rights. The antecedents of the plaintiffs clearly show that unless such an order is issued, they are likely to repeat what they did in 2008.

78 Ultimately therefore and having considered the evidence herein, this Court’s Judgment is as follows: -

- “1. The plaintiffs’ claim is dismissed.
2. A declaration is hereby issued that the land parcel NO WEST BUKUSU/WEST SIBOTI/607 is the property of the defendant.
3. The defendant shall forthwith apply to the LAND REGISTRAR BUNGOMA who shall register her as the proprietor of the land parcel NO WEST BUKUSU/WEST SIBOTI/607.
4. The plaintiffs, their families, agents, servants and any other persons occupying the land parcel NO WEST BUKUSU/WEST SIBOTI/607 shall vacate it within three (3) months of this Judgment or be evicted therefrom.
5. Thereafter, the plaintiffs, their families, agents, servants or any persons acting through them shall be permanently restrained from trespassing, upon ploughing or doing any acts which are prejudicial to the defendant’s proprietary interests in the land parcel NO WEST BUKUSU/WEST SIBOTI/607.
6. Each party shall meet their own costs, this being a family dispute.

BOAZ N. OLAO.

J U D G E

20TH SEPTEMBER 2021.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS
20TH DAY OF SEPTEMBER 2021.**

MR S. WAMALWA FOR PLAINTIFFS - PRESENT

1ST PLAINTIFF – PRESENT



**2ND AND 3RD PLAINTIFFS - ABSENT
DEFENDANT – PRESENT
COURT ASSISTANT – JOY**

Right of Appeal explained.

Boaz N. Olao.

J U D G E

20TH SEPTEMBER 2021.

