



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 28 OF 2019

IN THE MATTER OF LAND PARCEL NO MALAKISI/E. SASURI/236

AND

IN THE MATTER OF SECTIONS 7, 17 & 38 OF THE LIMITATION OF ACTIONS ACT

BETWEEN

EVANS WALUBUKA WEPUKHULU.....PLAINTIFF

VERSUS

EDWARD ABEL WATI alias EDOURD ABEL WATI.....DEFENDANT

J U D G M E N T

Although **EVANS WALUBUKA WEPUKHULU** (the plaintiff herein) and **EDWARD ABEL WATI** alias **EDOURD ABEL WATI** (the defendant herein) appear to have harboured the illusion that they are friends, they were probably not familiar with the book of **PROVERBS 18:24**. Therein, it is written: -

“One who has unreliable friends soon come to ruin, but there is a friend who sticks closer than a brother.”

Or;

“Some friends play at friendship but a true friend sticks closer than one’s nearest kin.”

Notwithstanding their façade of friendship, it is doubtful if the two will even be talking to each other by the end of this Judgment. And all because of one (1) acre of land comprised in the parcel **NO MALAKISI/EAST SASURI/236** (suit land).

Listen to the way the plaintiff describes the defendant in paragraph 3 of his supporting affidavit dated 18th October 2019: -

3: “The Respondent herein is a person well known to me as we are village mates.”

He then goes on to add in paragraph 5 thereof that the defendant is ***“a person well known to me and even a relative.”***

And this is how the defendant compliments the plaintiff in paragraph 3 of his replying affidavit dated 18th November 2019: -

3: “That the Respondent (sic) herein is a person well known to me as we were to enter into a land transaction with him.”

If the parties took any vows when they met and struck a relationship as friends, they probably said to each other: -

“TILL MALAKISI/EAST SASURI/236 do us part.”

The defendant is the registered proprietor of the suit land. The Green Card shows that he acquired it from the first registered owner one **ELIAKIMU WASIKE** on 13th December 1988 at a consideration of Kshs. 105,000/= . By an Originating Summons filed herein on 22nd

October 2019, the plaintiff sought for a determination of the following questions with regard to the suit land: -

- (a) **Whether the plaintiff is entitled to one (1) acre comprised in L.R NO MALAKISI/EAST SASURI/236 by way of adverse possession.**
- (b) **Whether the defendant's right to the one (1) acre comprised in the above title in occupation of the plaintiff was extinguished by operation of the law.**
- (c) **Whether the defendant should execute all the requisite documents to vest the said one (1) acre in the name of the plaintiff.**
- (d) **Whether in default of (a) above, the Deputy Registrar of this Court or any other Officer appointed by this Court should execute all the requisite documents on behalf of the defendant to vest one (1) acre in the name of the plaintiff.**

The plaintiff therefore beseeched the Court for the following orders: -

- i. That the plaintiff having been in occupation and/or possession of one (1) acre comprised in title NO MALAKISI/EAST SASURI/236 for a period of more than 12 years is entitled to it by way of adverse possession.**
- ii. That the defendant's right over the said one (1) acre was extinguished by operation of the law.**
- iii. That the defendant should execute all documents to vest the said one (1) acre into the plaintiff's name and in default, the Deputy Registrar or any other Officer of this Court appointed to do so.**
- iv. That the costs of this summons be borne by the defendant.**

In support of his claim, the plaintiff filed a supporting affidavit also dated 18th October 2019 to which was annexed a copy of the register to the suit land.

In his supporting affidavit, he has averred, inter alia, that sometime in 2007, the defendant approached him and offered to sell him one (1) acre out of the suit land to enable him settle a pressing issue. They agreed that the consideration would be Kshs. 120,000/= plus transaction fees of Kshs. 10,000/= and so the plaintiff issued him with a cheque No 000021 dated 8th February 2009 for Kshs. 130,000/=. Prior to that, the one (1) acre had been surveyed and fenced. The plaintiff took immediate possession of the one (1) acre on which he planted Eucalyptus trees and also put up a house to be used by the caretaker. He harvested his first crop of trees in 2012 and in 2017 he allowed the **LAKE VICTORIA NORTH WATER SERVICES** to lay their pipes through his portion of the suit land. However, the defendant has not executed the requisite transfer documents and has become evasive. That the plaintiff has enjoyed exclusive rights of occupation and possession over the one (1) acre since 2007. Therefore, the plaintiff is entitled to that portion by way of adverse possession and the defendant's interest therein has been extinguished by operation of the law although he still remains the registered proprietor thereof.

The plaintiff filed statements of the following as his witnesses.

- 1. GEORGE WAKORA WEPUKHULU**
- 2. JEREMIAH KACHILA WANJALA**
- 3. ELISHA MISIKO MUKUBWA**

In his un – dated statement filed on 31st March 2021, **GEORGE WAKORA WEPUKHULU (PW 2)** a retired Civil Servant previously working with the Land Adjudication Department states that on 7th February 2007, he was requested by the defendant to go to his home on the following day to demarcate some land which he was selling. On 8th February 2007, the witness went to the defendant's home where he met the plaintiff, the village elder **PETER CHEBOSI WEKALAO** and some witnesses. The defendant directed him to demarcate a portion measuring one (1) acre comprised in the land parcel **NO MALAKISI/EAST SASURI/236** which had been sold to the plaintiff. That he demarcated the said one (1) acre portion and to his knowledge, the plaintiff is entitled to that portion where he has planted Eucalyptus trees.

In his statement dated 30th March 2021 and filed on 31st March 2021, **JEREMIAH KACHILA WANJALA (PW 3)** states that he was the Chairman of the **LAKE VICTORIA WATER COMPANY LTD** in 2015 and is aware that the defendant sold a portion of his land measuring one (1) acre comprised in the parcel **NO MALAKISI/EAST SASURI/236** to the plaintiff. That the plaintiff has been in occupation of the said portion for over ten (10) years and has planted Eucalyptus trees thereon.

ELISHA MISIKO MUKUBWA (PW 4) in his statement dated 30th March 2021 states that in 2007, he learnt that the defendant wanted to sell a portion of the suit land so he informed the plaintiff. He was present when the parties agreed on the purchase price of Kshs. 130,000/= for one (1) acre and plaintiff took immediate possession and is the owner thereof.

The defendant filed both replying affidavit dated 18th October 2019 and a statement dated 26th October 2020 in opposition to the plaintiff's claim.

His case as can be gleaned from both the replying affidavit and statement is that he had originally intended to dispose off one (1) acre out of the suit land to the **CATHOLIC CHURCH CHESIKAKI** at a consideration of Kshs. 300,000/=. However, the church failed to take up the offer and so when the plaintiff approached him in 2007, he agreed to sell to him the one (1) acre at a consideration of Kshs. 300,000/=. They entered into an oral gentleman's agreement and the plaintiff made a deposit of Kshs. 130,000/= by cheque. On 1st June 2010, the plaintiff asked him to transfer the one (1) acre to him but the defendant insisted on payment of the balance of Kshs. 170,000/=. The matter went up to the Chief but the defendant insisted that the plaintiff clears the balance of Kshs. 170,000/=. The defendant also made a report at **CHESIKAKI POLICE STATION** when the plaintiff called him a thief and even threatened to kill him when the defendant insisted on being paid the balance of the purchase price before transferring the one (1) acre to the plaintiff.

That due to the plaintiff's unwillingness to clear the balance of Kshs. 170,000/=: the defendant instructed his lawyers **KRAIDO & COMPANY ADVOCATES** to write to the plaintiff advising him to collect his cheque for Kshs. 130,000/= (annexture **EW – 1**). The defendant made out a bankers cheque for Kshs. 130,000/= drawn in favour of the plaintiff (annexture **EW – 2**). That the plaintiff has not been in open, continuous and peaceful occupation of the said portion of land since 2007 as is demonstrated by the correspondences between them (annexture **EW 3**). That the defendant has always asserted his rights over the said one (1) acre since 2007 and this suit is an abuse of the Court process, frivolous and vexatious.

The defendant filed the following as his documentary evidence vide the list dated 26th October 2020: -

- 1. POLICE ABSTRACT REGISTRATION No 37 of 2017 OB 9/21/11/2015.**
- 2. Letter dated 13.7.2013 addressed to CHIEF CHESIKAKI, CHAIRMAN CATHOLIC CHURCH.**
- 3. DEMAND LETTER DATED 20.11.2015 ADDRESSED TO THE PLAINTIFF BY KRAIDO & COMPANY ADVOCATES.**

The plenary hearing commenced on 3rd June 2021 when the plaintiff testified and called his three (3) witnesses. They all adopted as their evidence the supporting affidavit and statements.

The defendant's case was heard on 27th September 2021. He was the only witness in support of his case and he adopted as his testimony his replying affidavit dated 18th November 2019 as well as his statement dated 26th October 2020. He also produced as his documentary evidence the list dated 26th October 2020.

Submission were thereafter to be filed by Counsel and the matter be mentioned on 27th October 2021 to confirm compliance. However, only the firm of **J. O. MAKALI ADVOCATES** for the plaintiff filed submissions. The firm of **KASSIM SIFUMA & ASSOCIATES ADVOCATES** for the defendant did not file any submissions.

I have considered the evidence by the parties including the documents filed and the only submissions on record.

The plaintiff's case is that he is entitled to a portion of land measuring one (1) acre out of the suit land which he purchased from the defendant in 2007 and that he has been in occupation and possession thereof since then for a period now of over 12 years. That he paid the agreed consideration of Kshs. 130,000/= but the defendant has been reluctant to transfer that portion to him.

The defendant's rejoinder is that the consideration was infact Kshs. 300,000/= of which the plaintiff only paid Kshs. 130,000/= and has refused to pay the balance of Kshs. 170,000/=. Further, that the plaintiff's occupation and possession of the suit land has not been peaceful, open, continuous and without interruption since 2007.

Section 38(1) of the **Limitation of Actions Act** 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.”

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 registered proprietor of land in favour of an adverse possessor at the expiry of twelve (12) years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL No 213 of 1996.**

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

“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 discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA (No 2) 1984 KLR 284.”

A claim for adverse possession can also be made for only a portion of the land and not necessarily for the whole land – **GITHU .V. NDEETE 1984 KLR 777**. The registered proprietor of the suit land can also only interrupt the adverse possession by filing a suit and as Counsel for the plaintiff has rightly submitted citing the case of **NJUGUNA NDATHO .V. MASAI ITUMO & OTHERS 2003 eKLR**. The mere writing of letters is not enough.

A claimant to land by way of adverse possession must however also demonstrate that his possession of the same is without force, secrecy or evasion – (***nec vi, nec clam, nec precario***) – **KIMANI BUCHINE & ANOTHER .V. SWIFT RUTHERFORD COMPANY LTD 1980 KLR 10**. It must also be peaceful. In **GRACE WAIRIMU SOROMA .V. CHAKA LTD & OTHERS 2017 eKLR** the Court of Appeal said: -

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

As will soon become clear in this case, the element of **peaceful occupation** and **possession** will play a crucial role in determining if the plaintiff is entitled to the orders sought. I will therefore cite other cases to illustrate the importance of that element.

In **ROBERT SHUME & OTHERS .V. SAMSON KALAMA 2015 eKLR**, the Court of Appeal said: -

“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 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.

Finally, in **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No 50 of 2014 (2015 eKLR)**, the same Court said: -

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

I have no doubt in my mind that the plaintiff took possession of one (1) acre out of the suit land in 2007. The portion is demarcated and he had planted Eucalyptus trees thereon. By the time this suit was filed on 22nd October 2019, that occupation and possession had met the statutory threshold of twelve (12) years. It was also exclusive, open, notorious and with the knowledge of the defendant.

However, the plaintiff was also required to prove that his occupation and possession of the one (1) acre was **peaceful, without force** or **stealth**. The evidence herein shows that it was far from that. In paragraph 12 of his replying affidavit, the defendant has deponed as follows:

12 “That the Applicant has not been in open, continuous and peaceful occupation of the said one (1) acre since 2007 will no interruption from me as the owner of the said piece of land as deponed in the preceding paragraph 5 and other correspondences. See annexures marked EW – 3 (a), (b).”

In paragraph 7 of the same affidavit, the defendant has deponed that when he asked the plaintiff to pay him the balance of the purchase price of Kshs. 170,000/=, the plaintiff threatened to kill him and the defendant was forced to report to the Police. Among the documents produced by the defendant is a copy of the Police Abstract dated 21st November 2015. The relevant portions of that Abstract from **CHESIKAKI POLICE STATION** reads: -

“WE HAVE CONFIRMED THE REPORT OF LAND OWNERSHIP AND THREATENING TO KILL BY EVANS WALUBUKA WHICH WAS REPORTED AT CHESIKAKI POLICE STATION.

CASE FILE NO – N/A

NAME OF THE COMPLAINANT EDOURD ABEL WATI TEL 0726445618 P.O. BOX 861 BUNGOMA.”

The above report was made on 21st November 2015 which was one day after the defendant’s Counsel had written to the plaintiff vide a letter dated 20th November 2015 instructing him to collect his Kshs. 130,000/= from their office within seven (7) days as he had failed to meet the contractual consideration of Kshs. 300,000/= as per their ***“gentlemen’s agreement.”*** Clearly, the threats upon the defendant and which were reported to the Police are a clear indication that although the plaintiff was in occupation and possession of the one (1) acre, it was not peaceful at all.

It is also instructive to note that whereas the plaintiff insists that the purchase price for the one (1) acre was only Kshs. 130,000/= which he paid in full, the defendant’s case is that it was in fact Kshs. 300,000/= of which the Kshs. 130,000/= was only a deposit. Their agreement was oral no doubt because they were friends. It is therefore a case of one’s word against the other. The real terms of their ***“gentlemen’s agreement”*** can therefore only be determined by other surrounding circumstances. What strikes me as strange is the fact that when the defendant’s Counsel addressed the plaintiff by the letter dated 21st November 2015 accusing him of failing to pay the balance of the purchase price, the plaintiff did not rebut the contents of that letter which made it clear that the full purchase price was in fact Kshs. 300,000/= and not the Kshs. 130,000/= as alleged by the plaintiff. If indeed the full purchase price was in fact Kshs. 300,000/=, nothing would have been easier than for the plaintiff to respond by setting the record straight. He could also have reported to the Police because that would be a criminal offence of obtaining by false pretenses. He did neither. His continued occupation and possession of the one (1) acre out of the suit land was therefore **not peaceful**. If anything, it was by **force** and **stealth**. He cannot be deserving of the orders sought in his Originating Summons.

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

Boaz N. Olao.

J U D G E

20th December 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 20th day of December 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

20th December 2021.