



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC NO. 62 OF 2018(O.S)

IN THE MATTER OF LAND PARCEL NO. S. MALAKISI/ S. NAMWELA / 736 & 737

AND

IN THE MATTER OF SECTIONS 7, 17 & 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

BETWEEN

JAMES BARASA MUKOLELIPLAINTIFF

VERSUS

DAVID LUSWETI WASIKE1ST DEFENDANT

REUBEN MANYONGE MABONGA2ND DEFENDANT

CONSEPTA NASIMIYU WEFWAFWA3RD DEFENDANT

J U D G M E N T

Vide his Originating Summons dated 13th November 2018 and filed on 14th November 2018, **JAMES BARASA MUKOLELI** (plaintiff herein) impleaded **DAVID LUSWETI WASIKE, REUBEN MANYONGE MABONGA** and **CONSEPTA NASIMIYU WEFWAFWA** (the 1st, 2nd and 3rd defendants respectively) claiming to have acquired by way of adverse possession a portion of land measuring approximately four (4) acres comprised in the land parcels **NO SOUTH MALAKISI/SOUTH NAMWELA/736** and **734**.

The plaintiff therefore sought a determination of the following questions: -

(a) Whether the plaintiff has been in open, peaceful and continuous occupation of the entire land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/736.

(b) Whether the plaintiff has been in open, peaceful and continuous occupation of a portion measuring 1.5 acres of land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737.

(c) Whether the 2nd defendant's title to the extent of 1.5 acres comprised in land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 has been extinguished by the operation of the law.

(d) Whether the 3rd defendant's title comprised in land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/736 has been extinguished by the operation of the law.

(e) Whether the plaintiff has acquired title to a portion of land measuring 1.5 acres comprised in land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 and a portion measuring 2.5 acres comprised in all the piece of land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/736.

(f) Whether the 2nd defendant should transfer 1.5 acres of land comprised in land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 to the plaintiff.

(g) Whether the 3rd defendant should transfer the entire portion of 2.5 acres of land comprised in land parcel NO SOUTH

MALAKISI/SOUTH NAMWELA/736 to the plaintiff.

(h) Whether in default, the Deputy Registrar of this Court be authorized to sign all relevant documents on their behalf.

Arising out of a determination of the above, the plaintiff sought Judgment against the defendants in the following terms: -

- 1. The 2nd defendant's title to a portion of land measuring 1.5 acres comprised in land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 has been extinguished by operation of the law.**
- 2. The 3rd defendant's title comprised in land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/736 has been extinguished by operation of the law.**
- 3. The 2nd defendant holds the said portion of 1.5 acres in trust for the plaintiff who has been in occupation peacefully, continuously and without interruption for more than 12 years.**
- 4. The 3rd defendant holds the said portion of 2.5 acres in trust for the plaintiff who has been in occupation peacefully, continuously and without interruption for more than 12 years.**
- 5. The plaintiff has acquired the aforesaid portions of land respectively by way of adverse possession.**
- 6. That the 2nd defendant do transfer 1.5 acres of land comprised in the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 to the plaintiff and in default, the Deputy Registrar of this Court do execute all the relevant documents on behalf of the defendants to vest ownership of the said portion in the plaintiff's name.**
- 7. That the 3rd defendant do transfer the entire portion of land measuring 2.5 acres of land comprised in the land parcel NO SOUTH MALAKISI/736 to the plaintiff and in default, the Deputy Registrar of this Court do execute all the relevant documents on behalf of the 3rd defendant to vest ownership of the said portion in the plaintiff's name.**
- 8. That a declaration to the extent that the sub – division and subsequent transfer of land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/283 to the 2nd and 3rd defendants does not affect the plaintiff's proprietorship/ownership of the land in question.**
- 9. That costs be borne by the defendants.**

In support of the Originating Summons, the plaintiff filed an affidavit also dated 13th November 2018 in which he deponed, inter alia, that by an agreement dated 11th September 1995, he purchased from the 1st defendant a portion of land measuring 4 acres comprised in land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** at a consideration of Kshs. 132,00/= and immediately took possession by putting up houses and cultivating it. That the said portion was clearly demarcated by establishing a boundary using sisal and euphorbia trees which are still intact. That on 18th November 2002, the 1st defendant sub – divided the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** to create two portions being **SOUTH MALAKISI/SOUTH NAMWELA/736** and **737** which he then transferred to the 3rd defendant and 2nd defendant respectively. That the 2nd defendant's portion measures 3.2 Ha and the 3rd defendant's portion measures 1.0 Ha. That he has extensively developed his portion of land which touches on both land parcels **NO SOUTH MALAKISI/SOUTH NAMWELA /736** and **737** by putting up houses and other structures as well as planting trees and various crops since 1995. That he has been in occupation of the said portion peacefully, continuously and without interruption with the knowledge of the defendants.

That in 2012, the 3rd defendant sued him in **BUNGOMA HIGH COURT CIVIL CASE No 47 of 2012** seeking his eviction from the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736**. That he instructed the firm of **KAKOI & ASSOCIATES ADVOCATES** to defend him and file an Originating Summons against the defendants. However, the said firm acting contrary to his instructions proceeded to only file a defence to the suit and thereafter recorded a consent without his permission. That his plea to his then Advocate to set aside the decree has not been attended to. That the defendants' titles have been extinguished by operation of the law and he has nowhere else to go at his old age and therefore the orders sought in his Originating Summon be granted.

Annexed to the Originating Summons are: -

- 1. Memorandum of Agreement between the plaintiff and the 1st defendant dated 11th September 1995 for the purchase of 4 acres out of the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/283.**
- 2. Green Card for the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/283.**
- 3. Certificate of Search for land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737.**
- 4. Photographs of a man, woman, children homes and crops.**
- 5. Complaint and defence in BUNGOMA HIGH COURT CIVIL CASE No 47 of 2012.**
- 6. Consent order dated 27th October 2015 issued in BUNGOMA HIGH COURT CIVIL SUIT No 47 of 2021.**

7. Acknowledgment slip dated 30th December 1995 signed by plaintiff and 1st defendant.

The plaintiff filed a further affidavit dated 21st October 2020 in which he deponed that part of the land measuring 1.5 acres which he has been occupying since 1995 falls in the title **NO SOUTH MALAKISI/SOUTH NAMWELA /737** registered in the name of the 2nd defendant. That the 2nd defendant's title to the extent of the 1.5 acres has been extinguished by operation of the law. That as per the annexed report of the surveyor (annexture **JBM 1**) part of the land he occupies is comprised in both land parcels **NO SOUTH MALAKISI/SOUTH NAMWELA/736** and **737**.

The plaintiff filed a further list of documents dated 21st October 2020 containing: -

1. Surveyor's report dated 19th May 2020.

He also filed a further list of documents dated 4th April 2021 containing: -

1. Title deed for the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/736.

2. Mutation Form for the land parcels NO SOUTH MALAKISI/SOUTH NAMWELA/736 and 737.

The Originating Summons was opposed by all the defendants herein.

By a replying affidavit dated 25th March 2019 and which he adopted as his evidence during the trial, the 1st defendant deponed that the land parcel **NO SOUTH MALAKISI/NORTH NAMWELA/283** initially belonged to one **PETER WEFWAFWA** his deceased grandfather and also the father to the 3rd defendant. That upon the demise of the said **PETER WEFWAFWA**, he filed a Succession Cause and became the registered proprietor of the said land measuring 12 acres and sold 4 acres each to the plaintiff, the 2nd defendant and one **JOB WENANI**. He then migrated to Uganda. It is therefore his case that the plaintiff holds 4 acres out of the land parcel **NO SOUTH MALAKISI/ SOUTH NAMWELA/737**. He was therefore shocked to learn that the 2nd defendant had registered the land parcel **NO SOUTH MALAKISI/ SOUTH NAMWELA /283** in his names and that the title was closed on 1st February 2008 to create parcels **NO SOUTH MALAKISI/SOUTH NAMWELA/736** and **737**. That the parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** which is registered in the names of the 3rd defendant measures 2.5 acres. That the plaintiff occupies the entire portion of the land registered in the name of the 3rd defendant and 1.5 acres out of the land registered in the names of the 2nd defendant. That if the land was still registered in his names, he would have transferred 4 acres to the plaintiff having been paid the whole of the purchase price. That the 2nd defendant who was also a purchaser like the plaintiff turned against the plaintiff and he should therefore transfer to him 1.5 acres comprised in the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** to the Applicant. That the plaintiff is therefore entitled to the orders sought in his Originating Summons.

The 1st defendant annexed to his replying affidavit the Green Card to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**. Clearly therefore, the 1st defendant supports the plaintiff's case.

The 2nd defendant filed a replying affidavit dated 16th December 2019 in which he averred that he is the registered proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** being a sub – division of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** while another portion being **SOUTH MALAKISI/SOUTH NAMWELA 736** was transferred to the 3rd defendant. That when the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** was transferred to him, it was occupied by one **JOB WENANI**. So he filed **BUNGOMA HIGH COURT CIVIL CASE No 48 of 2012** seeking orders to evict him but the suit was however withdrawn following the demise of the said **JOB WENANI**. He denied that the plaintiff has ever occupied the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**. He annexed to his replying affidavit the following documents: -

1. Title deed to the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737.

2. Pleadings in BUNGOMA HIGH COURT CIVIL CASE No 48 of 2012.

The 3rd defendant filed a replying affidavit dated 20th March 2019 in which she deponed, inter alia, that she is the proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** and had filed a suit against the plaintiff in **BUNGOMA ELC CASE No 47 of 2012** and obtained orders to evict the plaintiff therefrom. She added that this suit is infact res – judicata.

That plea of res – judicata was the subject of a ruling delivered by this Court on 11th July 2019 wherein it was up – held. The suit against the 3rd defendant was accordingly struck out with no orders as to costs.

The suit therefore proceeded only as against the 1st and 2nd defendants.

During the hearing, the plaintiff, the 2nd and 3rd defendants were the only witnesses who testified in support of their respective cases. They all adopted as their evidence their respective affidavits and produced the documents filed as their documentary evidence.

Submissions were thereafter filed both by **MR R. WAMALWA** instructed by the firm of **EMMANUEL WANYONYI & COMPANY ADVOCATES** for the plaintiff and by **MR KWEYU** instructed by the firm of **E. O. KWEYU & COMPANY ADVOCATES** for the 2nd defendant. The 1st defendant who was acting in person did not file any submissions.

I have considered the evidence by all the parties including the documents filed and the submissions by Counsel.

Notwithstanding what I consider to be rather prolix, repetitive and lengthy paragraphs that set out the remedies sought by the plaintiff and the grounds upon which they are predicated, the only issues in my view which call for my determination are: -

- 1. Whether the plaintiff has acquired a portion measuring 4.0 acres out of the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 by adverse possession.**
- 2. Whether the 2nd defendant did obtain a valid title to the original land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/283 and the resultant sub – divisions and if in fact he holds 4.0 acres out of title NO SOUTH MALAKISI/SOUTH NAMWELA/737 in trust for the plaintiff.**
- 3. Who should bear the costs of this suit.**

As is now clear, the only land subject of this suit is now the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** registered in the name of the 2nd defendant. This is because in **BUNGOMA ELC CASE No 47 of 2012** in which the 3rd defendant was the plaintiff and the plaintiff was the defendant, the following consent order was recorded on 27th October 2015: -

“By consent of the parties, the plaintiff do transfer to the defendant one acre of land from S. MALAKISI/S. NAMWELA/736 upon payment of Kshs. 50,000/= (fifty thousand) which is to be paid on or before 30.3.2016. if the defendant pays by that date, the plaintiff to attend the relevant Land Control Board for both sub – division and transfer. The costs of sub – division and transfer shall be borne by the defendant. The period of doing so shall be 90 days from 30/3/2016.

Each party to bear it’s own costs.

Suit be and is hereby marked as settled.”

It would appear that the above consent order was not complied with. This is because, some two (2) years later, the parties recorded yet another consent on 20th September 2017 in the following terms: -

“IT IS HEREBY ORDERED BY CONSENT OF THE PARTIES AND DECREED THAT: -

(a) The defendant be and is hereby granted 45 days to pay the sum of Kshs. 50,000/= to the plaintiff.

(b) In default, the defendant be evicted from the suit land S. MALAKISI/S. NAMWELA/736.”

Ordinarily, I would not have been prepared to hold that any of the above consent orders interrupted the plaintiff’s claim to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** by way of adverse possession. That is because, the plaintiff having taken possession of the said parcel of land in 1995 as he has averred, the consent orders came too late because by 2007, the 3rd defendant’s right in the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA 736** had long been extinguished by operation of the law. With respect to Counsel, I think the consent recorded in **BUNGOMA ELC CASE No 47 of 2012** with respect to title **NO SOUTH MALAKISI/SOUTH NAMWELA/736** may have been ill advised.

And it was precisely because of the consent orders recorded in **BUNGOMA ELC CASE No 47 of 2012** that this Court delivered a ruling on 11th July 2019 in which I found the suit as against the 3rd defendant to be res – judicata and proceeded to strike it out with no orders as to costs. The plaintiff may very well have filed a Counter – Claim in **BUNGOMA ELC CASE No 42 of 2012** seeking orders to have acquired the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** by way of adverse possession. That is why I sympathize with the plaintiff when he depones in paragraphs 17 and 18 of his supporting affidavit dated 13th November 2018 as follows: -

17: “That I instructed my advocate then KAKOI & ASSOCIATES ADVOCATES to defend me and proceed to file an O.S against the Respondent herein.”

18: “That unfortunately, my said advocate filed only a defence but failed to file an O.S. Hereto annexed and marked JBM 7 a copy of the defence.”

Following the consent orders and my ruling delivered on 11th July 2019 against which no appeal was preferred, it follows that the plaintiff cannot now pursue any claim against the 3rd defendant with respect to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736**. He can only pursue a claim with regard to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**.

The plaintiff’s claim with regard to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** is hinged on adverse possession and trust. **Section 38(1)** of the **Limitation of Actions Act** provides that: -

38(1) “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

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

“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition – **WANJE .V. SAIKWA (No 2) 1984 KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – (see **GITHU .V. NDEETE 1984 KLR 776**.” Emphasis added.**

The Claimant must also prove that he has been in occupation and possession of the land which he claims without force, without secrecy/stealth and without permission/licence (**nec vi nec clam nec precario**) – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & COMPANY LTD 1980 KLR 10 [1976 – 80 KLR 1500]**. In **KWEYU .V. OMUTO 1990 KLR 709**, the Court of Appeal stated that: -

“By adverse possession is meant a possession which is hostile, vide 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 occupation must also be peaceful – **GRACE WAIRIMU SOROMO .V. CHAKA LTD & OTHERS 2017 eKLR**.

It is not in dispute that the 2nd defendant is the registered proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**. The Certificate of Official Search to the said parcel of land confirms as much and further that the 2nd defendant was registered as the proprietor thereof on 6th February 2008 and a title issued. The said parcel measures 3.2 Ha which translates to **(3.2 x 2.47) 7.9 acres**. According to the sale agreement dated 11th September 1975, the plaintiff purchased a portion measuring 4.0 acres out of the original land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** which, according to Certificate of Official Search, measured 4.4 Ha which translates to **(4.4 x 2.47) 10.86 acres**. The other resultant sub – division of that land being parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** measures 1.0 Ha as per the copy of Title deed and Certificate of Search. That translates to **(1.0 x 2.47) 2.47 acres**.

It is not in dispute that the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** originally belonged to one **PETER WEFWAFWA** the 1st defendant’s grandfather who was also the father to the 3rd defendant. The 1st defendant’s testimony as per paragraphs 5, 6, 7, 8 and 9 of his replying affidavit is that following the demise of **PETER WEFWAFWA**, he did succession and the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** was registered in his names. He sold 4.0 acres each to the plaintiff, the 2nd defendant and one **JOB WENANI** and migrated to Uganda but was later shocked to learn that the 2nd defendant had registered the whole land in his names. This is what the 1st defendant has deponed in the above paragraph of his replying affidavit dated 25th March 2019: -

5: “That upon the demise of the said PETER WEFWAFWA, I filed a succession cause and after confirmation of the grant I became the registered owner of the said land measuring 12 acres on the ground. Hereto annexed and marked DLW1 is a copy of the Green Card.”

6: “That I subsequently sold 4 acres each to REUBEN MANYONGE MABONGA the 2nd Respondent herein, JAMES BARASA MUKOKELI the Applicant herein and one JOB WENANI.”

7: “That after selling the said land, I migrated to the Republic of Uganda.”

8: “That it is within my knowledge that the Applicant herein holds 4 acres of land on the ground.”

9: “That I was shocked when I received information from the Applicant herein that the land parcel NO S. MALAKISI/S. NAMWELA/283 was transferred to the 2nd Respondent without my knowledge.”

The Green Card to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** confirms that indeed it was first registered in the name of **PETER WEFWAFWA** on 23rd August 1972 before being registered in the name of the 1st defendant and the title thereto issued to him on 14th November 1994. A caution was registered thereon by the 3rd defendant on 2nd May 1995 but was withdrawn on 12th November 2002 and on 18th November 2002, it was registered in the names of the 2nd defendant who was subsequently issued with the title deed thereto on 9th December 2002. That title was closed on 1st February 2008 to create the parcels **NO SOUTH MALAKISI/SOUTH NAMWELA/736** and **737**. As stated above, the 1st defendant’s testimony is that he sold 4 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** to the 2nd defendant. He sold similar portions to the plaintiff and one **JOB WENANI**. However, during cross – examination by the plaintiff’s Counsel **MR R. WAMALWA**, the 2nd defendant tried to suggest that the 1st defendant sold him the whole of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**. This is what he said: -

“It is true that the 1st defendant sold me 4 acres out of the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/283. However, he later transferred the whole parcel to me. It is true that the 1st defendant signed the necessary documents to facilitate the transfer.”

The 2nd defendant however did not avail any sale agreement or signed transfer forms to prove the above. On further cross – examination by

MR R. WAMALWA, the 2nd defendant said: -

“It is not true that I went behind the back of the plaintiff and the 1st defendant. It is true that the plaintiff and JOB WENANI bought land but they bought from the wrong person. That wrong person is the 1st defendant because the succession process was nullified by the Court.”

Again there was no evidence produced by the 2nd defendant as proof that the said succession process was “nullified.” More importantly, the 2nd defendant cannot claim that he first bought 4.0 acres and later the whole of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** from the 1st defendant and in the same vein allege that the succession process by which the 1st defendant acquired the land was “nullified.” The only persons who could have “nullified” the said process were the beneficiaries of the Estate of **PETER WEFWAFWA** and there is no evidence suggesting that the 2nd defendant was among those beneficiaries.

I have no doubt in my mind that the 1st defendant sold a portion of land measuring 4 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** to the plaintiff in 1995. The sale agreement dated 11th September 1995 is self-explanatory. At the time of the sale agreement, the 1st defendant was the registered proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**. No evidence has been produced by the 2nd defendant or any other party for that matter, to demonstrate that the 1st defendant obtained title thereto through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. As the proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**, the 1st defendant was entitled to sell it to any person of his choice including giving it out to charity. The only persons who could challenge such a transfer would be those who had a legal or beneficial interest therein and certainly those persons do not include the 2nd defendant. If anything, it is the 2nd defendant who fraudulently transferred the whole of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** in his names when he was only entitled to 4 acres as has been demonstrated by the then proprietor of the land. The 1st defendant having confirmed that in 1995, he sold 4.0 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** to the plaintiff who has similarly confirmed in paragraph 3 of his supporting affidavit that “**immediately after executing the said agreement**” he entered the land “**and put up houses and started cultivating the said portion of land,**” there can be no doubt that the plaintiff went into occupation and possession of the 4 acres in 1995. Therefore, by 1st February 2008 when the 2nd defendant closed the title to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** to create parcels **NO SOUTH MALAKISI/SOUTH NAMWELA/736** and **737**, the plaintiffs overriding interests in a portion thereof measuring 4.0 acres had long crystalized as provided under **Section 30(f)** of the repealed **Registered Land Act** which was the applicable law at that time. There is nothing to suggest that his occupation and possession of the said 4.0 acres was not exclusive, open, peaceful, uninterrupted and with the knowledge of the 2nd defendant. There is no evidence placed before the Court to show that the 2nd defendant filed any suit against the plaintiff asserting his right to the said 4.0 acres. The only suit that the 2nd defendant filed in relation to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** was **BUNGOMA HIGH COURT CIVIL CASE No 48 of 2012** and it was against **JOB WENANI** but not the plaintiff. The other suit being **BUNGOMA ELC CASE No 47 of 2012** was filed by the 3rd defendant against the plaintiff in relation to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736**. The only way in which the 2nd defendant could have interrupted the plaintiff’s occupation and possession of the 4.0 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** or any of the resultant sub – divisions thereof was by filing a suit – **GITHU .V. NDEETE** (supra). It is also instructive to note that by a ruling delivered on 11th July 2019, this Court had enjoined the 2nd defendant, his agents nominees, representatives, servants or any other person from entering, remaining on or evicting or causing destruction on the plaintiff’s property on the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**. That order was only granted because the plaintiff had established a prima facie case with respect to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**.

In his replying affidavit dated 16th December 2019, the 2nd defendant deponed that he is the registered proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** being a resultant sub – division of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**. He then adds in paragraphs 7, 8 and 9 of the same affidavit as follows: -

7: “That at the time of such sub – divisions part of my share NO S. MALAKISI/S. NAMWELA/737 had been occupied by one JOB WENANI who is now deceased.”

8: “That I then filed a suit for eviction of the said JOB WENANI vide BUNGOMA CIVIL SUIT No 48 of 2012 which has since been withdrawn due to his demise (Annexed is a copy of the plaint and a defence marked RMM – 2)”

9: “That the said Applicant in this case has never occupied any portion of my share since the alleged transaction between the 1st Respondent and the Applicant.”

The acreage of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/ 737** as I have already stated above and as is clear from the title deed is **3.2 Ha (7.9 acres)**. The 1st defendant’s testimony is that he only sold the 2nd defendant 4.0 acres. The 2nd defendant admitted that the 1st defendant first sold him 4.0 acres and later the whole land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** which this Court finds to be untrue. It follows therefore that the 2nd defendant’s entitlement was the 4.0 acres which the 1st defendant admits to have sold him. This Court makes a finding that the 4.0 acres which the plaintiff has occupied since 1995 is on the parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**. The answer to issue No (1) above is that the plaintiff has acquired by adverse possessions 4.0 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737**. He is therefore entitled to be registered as the proprietor thereof.

The plaintiff also hinged his claim in trust. The term trust is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** to include: -

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustee) at the request of another (the settlor) for the benefit of a third party (the

beneficiary).”

The 1st defendant has deponed in his replying affidavit how he acquired ownership of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** previously belonging to his grandfather **PETER WEFWAFWA**. He then sold 4.0 acres each to the plaintiff, the 2nd defendant and one **JOB WENANI** before migrating to Uganda. Only the plaintiff produced his sale agreement to confirm that indeed the 1st defendant sold him 4.0 acres in 1995 but there can be no doubt that the 1st defendant disposed the land as he alleges. He then adds that he **“was shocked”** when he was informed that the 2nd defendant had transferred the whole land to his name. And although the 2nd defendant alleges that the 1st defendant sold him the whole land, parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**, it is obvious from the 1st defendant’s testimony that that was not the case. The 2nd defendant has no single document to explain how he acquired ownership of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** in 2002 when it was still registered in the name of the 1st defendant. The 1st defendant has stated further in paragraph 9 of his replying affidavit that the transfer was done without his **“knowledge.”** The inevitable conclusion is that the 2nd defendant acquired ownership of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/ 283** fraudulently. And as he was doing so taking advantage of the 1st defendant’s absence in Uganda, the plaintiff as well as another purchaser one **JOB WENANI** were in occupation and possession of various portions of the land thereon. When **MR R. WAMALWA** asked him if he took advantage and acted behind the back of the plaintiff and the 1st defendant, he denied. However, from the sequence of events and the cogent evidence by both the plaintiff and the 1st defendant, it is obvious that the 2nd defendant acquired no valid title to the whole 4.4 Ha (10.86 acres) comprised in the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**. The proprietor of the land says he sold him only 4.0 acres and the Court is entitled to believe that testimony. But as is now clear, the 2nd defendant not only took the whole 10.86 acres but even went further to sue the other purchaser **JOB WENANI** seeking to evict him from his portion. And in order to appease the 3rd defendant who is the daughter of the original proprietor of the land, he transferred to her parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** measuring 1.0 Ha (2.47 acres) perhaps because she is a woman. The long and short of all the above, however is that other than the 4.0 acres which the 1st defendant says he sold the 2nd defendant out of the 10.8 acres comprised in the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**, the 2nd defendant was not entitled to the extra 6.8 acres. It is important at this stage to point out that although the 1st defendant has stated in paragraph 5 of his replying affidavit that the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/ 283** measured 12 acres, it is clear from the documents herein that the acreage was in fact 10.8 acres. The 2nd defendant therefore stole 6.8 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283**. A thief acquires no interest in stolen property – **JANE GACHOKI GATHECHA .V. PRISCILLA NYAWIRA GITUNGU C.A CIVIL APPEAL Nos 243 and 345 of 2002 [2008 eKLR]**. The acquisition of the whole of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/283** having been done through a fraudulent process, this Court must invoke the concept of a constructive trust in order to protect the interest of the plaintiff. Such a trust was defined in the case of **TWALIB HATAYAN & ANOR .V. SAID SAGGAR AHMED AL – HEIDY & OTHERS 2015 eKLR** citing **BLACK’S LAW DICTIONARY 9TH EDITION** as: -

“... An equitable remedy imposed by the Court against one who has acquired property by wrong doing.”

A constructive trust is also defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as: -

“An equitable remedy by which a Court recognizes that a claimant has a better right to certain property than the person who has the legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title.”

MR KWEYU Counsel for the 2nd defendant made the following submission: -

“The plaintiff is occupying the entire parcel of land S. MALAKISI/S. NAMWELA/736 and from the alleged report it shows that the plaintiff has never been in occupation of 1.5 acres forming part of the suit parcel NO S. MALAKISI/S. NAMWELA/737 which is registered in the name of the 2nd defendant but rather the report states at paragraph 3 that the area approximately one (1) acre 0.40 Ha was capture (sic) in the land parcel NO S. MALAKISI/S. NAMWELA/737.”

Counsel added: -

“Then from the evidence above, the plaintiff has pleaded for a claim of 1.5 acres form parcel NO S. MALAKISI/S. NAMWELA/737 registered in the name of the 2nd defendant and the documentary evidence that is the survey report which evidence he relies on shows approximately 1 acres of land is captured in parcel NO S. MALAKISI/S. NAMWELA/737.”

The report that **MR KWEYU** is referring to is one dated 19th May 2020 prepared by one **ERIC WAFULA MUNYOLE** a Survey Assistant from the firm of Private Surveyors known as **GEODATA LAND SURVEYORS & CONSULTANTS**. Among the findings in the report is that the registered area of land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** is given as **1.0 Ha (2.47 acres)** yet on the ground it is **1.42 Ha (3.5 acres)**. Further, that **0.40 Ha (1 acre)** of that land was captured in the land parcel **NO SOUTH MALAKISI SOUTH NAMWELA/437**. The Surveyor then makes the following suggestion in paragraph 4 of the report: -

4: “We therefore request for fresh mutation of the original land parcel S. MALAKISI/S. NAMWELA/283 to be done afresh to pick the boundaries as they exist on the ground.”

This Court cannot accede to that request for two reasons. Firstly, this suit is not about fixing boundaries, Secondly and most important, land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/736** is no longer a subject in this dispute and the registered proprietor thereof one **CONCEPTA NASIMIYU WEFWAFWA** is no longer a party in this suit. It would be improper for this Court to purport to make orders that affect that parcel of land in her absence. In any event, by a decree issued in **BUNGOMA ELC CASE No 47 of 2012**, the plaintiff was

ordered to be evicted from the said parcel of land unless he paid Kshs. 50,000/= to **CONCEPTA NASIMIYU WEFWAFWA**. To take the route suggested by the Surveyor would be opening up old wounds.

As far as this Court can glean from the evidence in this case, the 2nd defendant did not purchase the whole of the land **parcel NO SOUTH MALAKISI/SOUTH NAMWELA/283**. He only purchased 4.0 acres as the 1st defendant, the then registered proprietor thereof, has told the Court yet he holds a title to the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** measuring **3.2 Ha (7.9 acres)**. He fraudulently obtained an extra 3.9 acres more than what he bargained for. His rightful entitlement was only 4.0 acres and nothing more. If he should ask where the 0.1 acres will come from in order to make his parcel 4.0 acres, the answer that this Court now gives him is that he was the author of his own misfortune through his fraudulent activities and the Court will be making appropriate orders shortly.

It must now be clear that the plaintiff has also proved that he is entitled to 4.0 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/ 737** by way of a constructive trust. The 2nd defendant was only entitled to 4.0 acres out of the said parcel of land but fraudulently had the whole land registered in his name. He is a trustee holding the 4.0 acres out of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/737** in trust for the plaintiff. That trust shall now be determined to enable the plaintiff get his just entitlement.

As for the claim against the 1st defendant, he is no longer the registered proprietor of the land parcel **NO SOUTH MALAKISI/SOUTH NAMWELA/ 737**. Orders in adverse possession and trust can only be made against the registered proprietor of the land in dispute. The claim against him must therefore be dismissed.

Ultimately therefore and having considered all the evidence herein, there shall be Judgment for the plaintiff against the 2nd defendant in the following terms:-

- 1. The plaintiff has acquired a portion of land measuring 4.0 acres out of the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 both by way of adverse possession and a constructive trust.**
- 2. The title to the land parcel NO SOUTH MALAKISI/SOUTH NAMWELA/737 is hereby cancelled and the Land Registrar Bungoma shall amend the register accordingly.**
- 3. The Land Registrar and County Surveyor Bungoma shall forthwith sub – divide the land parcel NO SOUTH MALAKISI/SOUTH NAMWEL/737 to hive off 4.0 acres which shall be registered in the names of the plaintiff and the balance in the names of the 2nd defendant. Each shall thereafter be issued with their respective titles.**
- 4. The 2nd defendant shall meet the plaintiff's costs of the suit.**
- 5. The suit against the 1st defendant is dismissed.**
- 6. The plaintiff shall meet the 1st defendant's costs of the suit.**

BOAZ N. OLAO.

J U D G E

9TH DECEMBER 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 9TH 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

9TH DECEMBER 2021.

Explanatory notes: -

THIS JUDGMENT WAS DUE FOR DELIVERY ON 18TH OCTOBER 2021. HOWEVER, I WAS UN – WELL. THE DELAY IS REGRETTED.

BOAZ N. OLAO.

J U D G E

9TH DECEMBER 2021.