



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 67 OF 2017**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT AND THE REGISTRATION OF LAND ACT**

**AND**

**IN THE MATTER OF LAND PARCEL NO. E. BUKUSU/N.KANDUYI/801**

**BETWEEN**

**RICHARD MBINGA MUSE.....PLAINTIFF**

**AND**

**WASWA MUSE alias ROBERT WASWA MUSE.....DEFENDANT**

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

In **GENESIS 4:9 KING JAMES VERSION**, it is written

*“And the Lord said into Cain, where is Abel thy brother?”*

*And he said, I know not. Am I my brother’s keeper?”*

**PSALM 133** reads: -

*“Behold, how good and how pleasant it is for brethren to dwell together in unity.”*

**THE QURAN** has a similar message where the prophet Salallahu alayhi wa sallom said: -

*“None of you will believe until you love for your brother what you love for yourself.”*

The scriptures are replete with messages of love for your brother. The parties herein could do well to familiarize themselves with those important messages.

**RICHARD MBINGA MOSE** (the plaintiff herein) is a step – brother to **WASWA MUSE** alias **ROBERT WASWA MUSE** (the defendant herein).

By his Originating Summons filed herein on 16<sup>th</sup> May 2017, the plaintiff sought a determination of the following questions: -

- 1. Whether the plaintiff and his family members have been in continuous peaceful and exclusive occupation of the land comprised in title NO EAST BUKUSU/NORTH KANDUYI/801 measuring approximately 3½ acres for a period of over 12 years from 1970 against the registered proprietor to – date.**
- 2. Whether the title of the defendant, his successors, family members or assignees over the portion of land above stated has thereby extinguished in favour of the plaintiff and his family members.**
- 3. Whether an order should be made that the plaintiff be registered as the proprietor of the said parcel of land known as EAST BUKUSU/NORTH KANDUYI/801 by virtue of adverse possession.**

**4. Whether the Deputy Registrar of the Court should be authorized to execute the requisite documents for the transfer and registration of the aforesaid portion of land in the names of the plaintiff.**

**5. Whether an order of costs of this Originating Summons should be provided for.**

The Originating Summons is supported by the plaintiff's affidavit in which he has deponed, inter alia, that since 1970, he and the defendant have peacefully lived in and developed their respective portion of the land parcel **NO EAST BUKUSU/ NORTH KANDUYI/801** (the suit land) which they acquired following an exchange with one **KHAOYA MARUTI** who took the land parcel **NO EAST BUKUSU/NORTH KANDUYI/4081**. That he has extensively developed his portion of the suit land measuring  $3\frac{1}{2}$  acres where he has even buried his son **CALISTUS JUMA MBINGA**. However, the defendant is reluctant to sign the necessary transfer forms to facilitate the registration of this portion. Among the documents that he produced are photographs of his home and a Certificate of Search and Green Card in respect of the suit land.

His witness **CHRISPINUS SIMIYU MBINGA (PW 2)** who is his son recorded a statement dated 22<sup>nd</sup> February 2017 in which he stated that he was born on the suit land in 1972 and has been raised thereon and even built his house on the same land when he got married in 2001. He confirmed that his late brother **CALISTUS JUMA MBINGA** was buried on the suit land where his family still reside to-date. That only recently did he learn that the defendant who is his uncle is the registered proprietor of the suit land.

The defendant filed a replying affidavit in response to the Originating Summons in which he deponed, inter alia, that the suit land was purchased by their late father and denied that the plaintiff bought  $3\frac{1}{2}$  acres of the same. He added that he has been asking the plaintiff to vacate the land but to no avail even after writing several letters. He denied that the plaintiff has lived on the suit land peacefully for 12 years as alleged.

He called his witness **MARGARET SIAKILO SARANA (DW 2)** who is his mother. She recorded a statement dated 19<sup>th</sup> July 2019 in which she confirms that the plaintiff is a son to her co – wife but added that the suit land was purchased in 1968 by her late husband **STEPHANO MUSE MACHI** but was registered in the names of the defendant when he was still a child. She added that the plaintiff has entered the suit land unlawfully without the defendant's consent and so the defendant refused to sign any transfer forms. She therefore asked the Court to strike out the Originating Summons with costs.

Although the parties filed their pleadings while acting in person, they subsequently engaged counsel with **MR SIMIYU** appearing for the plaintiff and **MR IMENDE** for the defendant when the trial commenced on 2<sup>nd</sup> December 2019.

Both parties and their witnesses adopted as their evidence the contents of their affidavits and statements contents of which I have already summarized above.

Submissions were thereafter filed by counsel.

I have considered the evidence by both sides and the submissions by counsel.

The plaintiff's case is premised on a claim for  $3\frac{1}{2}$  acres out of the suit land by way of adverse possession.

**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”*

The ingredients of the doctrine of adverse possession were set out in the case of **MBIRA .V. GACHUHI 2002 I E.A LR 137** as follows: -

*“..... A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non – permissive or non – consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”*

In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 I KLR 184**, the Court of Appeal stated thus: -

*“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of 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”*

It is now well established that the combined effect of the relevant provision of **Section 7, 13 and 17 of the Limitation of Action Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996**.

The new land laws promulgated after the **2010 Constitution** also recognize the doctrine of adverse possession. **Section 28(h) of the Land Registration Act 2012** recognizes some of the overriding interests in land as: -

**“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”**

Similarly, **Section 7 of the Land Act 2012** provides that: -

**“Title to land may be acquired through: -**

**(a)**

**(b)**

**(c)**

**(d) Prescription”**

In **MTANA LEWA .V. KAHINDI NGALA MWANGANDI 2005 eKLR** the Court of Appeal described the doctrine as follows: -

**“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya it is twelve (12) years. The process springs into action essentially by default or inaction of the owner.**

**The essential prerequisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act which is in these terms: -**

**“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 occurred to him or, if it first accrued to some person through whom he claims, to that person.”**

From the Green Card produced herein, the suit land was first registered in 1973 in the names of the parties’ father **WASWA MUZEE**. That is not in dispute and was in fact confirmed by the parties viva voce evidence during cross – examination. It is also common ground that the defendant became the registered proprietor of the suit land on 28<sup>th</sup> April 2017. However, mere change of ownership does not defeat a claim of land based on adverse possession – **GITHU .V. NDEETE 1984 KLR 776**. Such occupation must also be peaceful. In **GRACE WAIRIMU SOROMA .V. CHAKA LTD & OTHERS 2017 eKLR**, the Court of Appeal held that: -

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

The occupation and possession should also be nec vic nec clam nec precario (no force, no secrecy, no evasion) – **KIMANI RUCHINE.V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**.

The plaintiff’s occupation and possession of 3½ acres out of the suit land since 1970 is not really in doubt. This is what the defendant said in cross – examination: -

**“I was not born on the land in dispute and I have never lived there. The plaintiff is my step – brother and has been living on the land in dispute since 1970.”**

The defendant also admitted in his evidence in cross – examination that the plaintiff buried his son on the suit land. The only issue that the defendant brought out in his replying affidavit which could defeat the plaintiff’s claim is when in paragraphs 5 and 6 he deposes as follows: -

**5 “That all along I have been requesting the plaintiff to vacate my land to no avail”**

**6 “That in addition, I wrote to him several letters indicating my desire to use my land but the plaintiff has not been responding to my mail (attached are some of the correspondence for proof).”**

No mail or any other evidence was attached to the said replying affidavit dated 15<sup>th</sup> June 2017. In any event, there was no evidence that the plaintiff is on the suit land by force. Indeed, the evidence shows that the plaintiff buried his son thereon without any objection by the defendant who has not taken any legal action to evict him. This is what the defendant said in cross – examination By **MR SIMIYU**: -

**“It is true that the plaintiff has buried his son on the land in dispute. It is true that I have never filed a suit against the plaintiff over the land in dispute.”**

In the light of such admission by the defendant himself, I found the evidence by his mother **MARGARET SHAKILO SARANA (DW 2)** quite un – reliable when she denied the plaintiff’s occupation of the suit land. She was clearly biased and as the record showed, I recorded her demeanour as **“shaky and evasive.”** She was clearly determined at all costs to favour her son (the defendant) at the expense of her step – son (the plaintiff) whose evidence was clear and cogent. Even if the defendant wrote letters to the plaintiff to vacate the land, which letters

as I have already stated above were not availed, the Court of Appeal in **NJUGUNA NDATHO .V. MASAI ITUMO & OTHERS 2002 eKLR** said: -

***“Mere writing of letters does not, in our view, interfere with the possession of the Respondent.”***

The defendant could only have interrupted the plaintiff’s occupation of the suit land by filing a suit to evict him – **GITHU .V. NDEETE** (supra). The plaintiff’s occupation and possession of the 3 ½ acres out of the suit land that he claims has been open, continuous, exclusive, peaceful and un – interrupted since 1970. This suit was filed on 16<sup>th</sup> May 2017 and therefore the plaintiff and his family have occupied it for 47 years well in excess of the 12 year statutory period that would entitle him to orders in adverse possession.

I am satisfied that the plaintiff has proved his case as required in law to warrant the grant of the orders sought. I dare add that other than a claim for adverse possession, the plaintiff, had he so pleaded, would also have had a solid claim based on trust going on the evidence of the defendant’s mother **MARGARET SIAKILO SARANA** who in her statement dated 19<sup>th</sup> July 2019 states as follows in paragraph 4: -

***“The land in dispute is EAST BUKUSU/N. KANDUYI/801 which I recall in 1968 my husband gave the defendant and registered it in the defendant’s name in 1973 while he was still a child but WASWA wasn’t aware of the registration until later.”***

The only reason the parties’ father could have registered the suit land in the defendant’s name was for him to hold it in trust both for himself and his brother the plaintiff. The suit land was never the defendant’s sole property. It was family land.

I hope that this Judgment and particularly the scriptures referred to earlier will guide the defendant in his future relationship with his brother the plaintiff and indeed all his other siblings. He should be their keeper.

Ultimately therefore, there shall be Judgment for the plaintiff against the defendant in the following terms: -

- 1. An order is made that the plaintiff is entitled to 3½ acres out of the land parcel NO EAST BUKUSU/NORTH NALONDO/801 by way of adverse possession.**
- 2. An order is made that the defendant’s ownership in the 3½ acres out of the land parcel NO EAST BUKUSU/NORTH NALONDO/801 has been extinguished by operation of law.**
- 3. The defendant shall execute all the necessary documents to execute the transfer and registration of 3½ acres out of the land parcel NO EAST BUKUSU/NORTH NALONDO/801 in the names of the plaintiff within 30 days from to-day.**
- 4. In default of the above, the Deputy Registrar of this Court shall be at liberty to do so on behalf of the defendant.**
- 5. With regard to costs, in keeping with the spirit of brotherhood and not wanting to further antagonize the two brothers, I direct that each shall meet their own costs.**

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> February 2020.**

Judgment dated, delivered and signed in Open Court this 27<sup>th</sup> day of February 2020 at Bungoma.

Mr Murunga for Mr Imende for defendant present

Mr Simiyu for plaintiff absent

Defendant present

Plaintiff present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> February 2020**