



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 16 OF 1999 (O.S)

ABRAHAM BARASA SONGOI PLAINTIFF

VERSUS

DISMAS WANYAMA MAWANI DEFENDANT

J U D G M E N T

Before his demise on 29th October 1986, **JONATHAN WEKESA MAKALAYA** also known as **MAWANI MAKALAYA** (hereinafter referred to as **MAKALAYA**), was the registered proprietor of land parcel **NO KIMILILI/ KAMUKUYWA/631** (the suit land) which has since 24th January 1996 been registered in the names of his son **DISMAS WANYAMA MIWANI** (the defendant).

On the other hand, land parcel **NO KIMILILI/KAMUKUYWA/630** is registered in the names of **CHARLES BARASA (BARASA)** who is also deceased and whose Estate is now being administered by his son **ABRAHAM BARASA SONGOI** (the plaintiff).

The two parcels of land share a common boundary.

BARASA originally filed this suit at the High Court Kakamega being **HIGH COURT CIVIL CASE NO 234 OF 1995 (O.S)** seeking against the defendant the main order that he had become entitled by way of adverse possession a portion measuring 3 acres or thereabouts out of the suit land by way of adverse possession since 17th August 1965 having occupied the said portion without any interruption or interference from the defendant.

In response to the Originating Summons, the defendant filed a replying affidavit dated 8th December 1995 in which he deponed, inter alia, that there are no boundary features between the two parcels of land **KIMILILI/KAMUKUYWA/630** and **631** and that in 1952, **SONGOI MUNYIFWA** had filed a civil case against **MAKALAYA** at Bungoma being case **NO 97 OF 1952** which was dismissed. That **BARASA** had tempered with the boundary between the two parcels in 1979. He denied holding any land in trust for **BARASA** and urged that the Originating Summons be struck out.

The suit was subsequently transferred to this Court in 1999 where the Originating Summons was amended to substitute **BARASA** with his son the plaintiff herein.

In the amended Originating Summons, the plaintiff sought the following orders: -

- 1. A declaration that the defendant's rights over 3 acres or thereabouts being part of title NO KIMILILI/KAMUKUYWA/631 got extinguished by adverse possession upon expiry of 12 years and when the plaintiff remained in sole occupation.**
- 2. A declaration that upon expiry of the 12 years, the defendant held the 3 acres or thereabouts being part of title NO KIMILILI/KAMUKUYWA /631 in trust for the plaintiff.**
- 3. An order be made under Section 38 of the Limitation of Action Act that the 3 acres or thereabout being part of title NO KIMILILI/ KAMUKUYWA/631 be registered in the name of the plaintiff.**
- 4. An order be made condemning the defendant to pay the costs of this suit.**
- 5. Such further as other under or relief that this Honourable Court shall deem fit to grant.**

The amended Originating Summons was accompanied by the plaintiff's supporting affidavit dated 13th October 2001 in which he deponed, inter alia, that his late father **BARASA** was the registered owner of the land parcel **NO KIMILILI/ KAMUKUYWA/630** which borders the

suit land registered in the names of **MAKALAYA**. That both parcels were registered on 17th July 1965 and the boundary that had been established in 1952 still exist and as per the said boundary, some 3 acres or thereabouts which form part of the suit land were retained by **BARASA**. That no new boundary was ever established and both **BARASA** and himself occupy 3 acres or thereabouts which form part of the suit land. That since 17th August 1965, **BARASA** and himself have been in open, continuous, peaceful notorious and exclusive possession of the 3 acres or thereabouts of part of the suit land exercising all the rights of ownership over the said 3 acres or thereabouts. That as from 17th July 1977, the defendant's right to the 3 acres or thereabouts of the suit land has been extinguished and the defendant holds it in trust for him.

The defendant by his replying affidavit filed on 12th July 2002 in response to the amended Originating Summons deponed, inter alia, that there has been a boundary dispute pending at the land registry between members of the plaintiff's and the defendant's family. That one **SONGOI MUNYIFWA** had commenced **BUNGOMA CIVIL CASE NO 97 OF 1952** on behalf of the plaintiff's family which was dismissed. He deponed further that the plaintiff's father had filed **KAKAMEGA HIGH COURT CIVIL CASE NO 94 OF 1991** which was dismissed on 17th January 1997. He denied that his late father **MAKALAYA** held any land in trust for the plaintiff.

The trial commenced before **HON OMOLLO J** on 9th July 2014 when the plaintiff's witnesses **SIMIYU EDMONDS DAVID (PW 1)** who is a Land Surveyor and **NAFTALI KHAMALA NDINYO (PW 2)** who belongs to the same clan as the parties testified.

In his testimony **PW 1** told the Court that in 1998, the plaintiff asked him to establish the boundaries of land parcel **NO KIMILILI/KAMUKUYWA/630** and also the ground acreage. The said land borders the suit land and also parcels **NO KIMILILI/KAMUKUYWA/629** and **661**. He found that the boundary between the suit land and parcel **NO KIMILILI/KAMUKUYWA/630** is a road which also has trees, sisal plants and barbed wire. He established also that the acreage of land parcel **NO KIMILILI/KAMUKUYWA/630** was 7.2 Ha and produced the sketch plan as plaintiff's Exhibit 1. He also established that the acreage of the suit land is 7.6 Ha. He confirmed from the Registry Index Map (**RIM**) that there was a boundary between the suit land and parcel **NO KIMILILI/KAMUKUYWA/630** but he was not able to see it on the ground because it did not exist but he reflected it on his sketch. He was also able through the Director of Survey, to take the aerial photographs which reflected the boundaries between the suit land and parcel **NO KIMILILI/KAMUKUYWA/630**. However, his attempt to produce the said photographs was objected to by **MR OCHARO** counsel for the defendant and **OMOLLO J** up – held the objection.

PW 2 testified that he owns land parcels **NO KIMILILI/KAMUKUYWA /694** and **695** and knows both parties as well as their parents. He added that **SONGOI MUNYIFWA** was the grandfather to the plaintiff and that the boundaries between the suit land and land parcel **NO KIMILILI/ KAMUKUYWA/630** was placed in 1945 when trees and sisal were planted and to – date, there still exists a big tree. He testified further that **SONGOI** had gone to Court because he was not happy about the boundary which remains in place to – date.

The plaintiff testified before the late **MUKUNYA J** on 11th May 2016 and told the Court that his late father **BARASA** was registered as the proprietor of the land parcel **NO KIMILILI/KAMUKUYWA/630** on 17th July 1965 and he produced the abstract of title and Green Card as plaintiff's exhibit 3. He testified that **MAKALAYA** who is the defendant's father was the proprietor of the suit land and that the boundaries between the land parcel **NO KIMILILI/KAMUKUYWA /630** and the suit land were established before the titles thereto were issued. He told the Court that the boundary which was established in 1945 is still in place and confirmed that in 1952 his grandfather **SONGOI** and **MAKALAYA** had a case regarding the boundary and that he still utilizes the 3 acres out of the suit land to grow coffee, bananas and sugar cane and asked the Court to order that the said 3 acres be registered in his names because he and his family have occupied it from 1965.

The defendant testified before me on 26th March 2019 and confirmed that he is the current registered proprietor of the suit land which was originally registered in the names of his late father. He added that the plaintiff's father owned land parcel **NO KIMILILI/KAMUKUYWA/630** but denied that the plaintiff's father has lived on a portion of the suit land without interference. He told the Court that the plaintiff's father **BARASA** entered the suit land by force in 1971 and a complaint was lodged in the Lands Office where **BARASA** was summoned on 26th October 1983 and also on 11th January 1984, 10th May 1991, 1st December 1995 and 12th February 1996. The plaintiff's lawyer was also addressed by the District Land Registrar Bungoma over the suit land on 13th March 1996. That there was also a case at **KAKAMEGA HIGH COURT CIVIL CASE NO 94 OF 1991** involving **BARASA** and **MAKALAYA** which was dismissed. He also asked the Court to adopt as his evidence his witness statement dated 15th October 2013 as well as the documents filed. In the said statement, the defendant states that although the boundary of the suit land was fixed in 1945 and confirmed by Court in 1952, the plaintiff's family was opposed to it and **BARASA** who owned the adjacent land parcel **NO KIMILILI/KAMUKUYWA/630** picked a dispute over the boundary in an attempt to alter it. This made the defendant's father seek the intervention of the provincial Administration and the Land Registrar in 1983 but **BARASA** was reluctant to co – operate and even ignored summons and filed **KAKAMEGA HIGH COURT CIVIL CASE NO 94 OF 1991** which was dismissed. He added that all along, the 3 acres out of the suit land has been the subject of a boundary dispute.

Submissions were thereafter filed both by **MR KIARIE** instructed by the firm of **KIARIE & COMPANY ADVOCATES** for the plaintiff and **MR OCHARO** instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the defendant.

I have considered all the evidence by both parties and the submissions by counsel.

The plaintiff's case is that he is entitled to an order that he be registered as the proprietor of 3 acres or thereabouts out of the suit land by way of adverse possession the same having been occupied openly, continuously and exclusively since 17th August 1965 first by his late father **BARASA** and thereafter by himself.

That claim is contested by the defendant who insists that there have been boundary disputes between the parties, families and therefore the occupation by the plaintiff and before him, his father **BARASA**, of 3 acres out of the suit land has not been peaceful.

What this Court needs to investigate and determine is whether the plaintiff has established a claim for adverse possession of 3 acres or

thereabouts out of the suit land and if the defendant is a mere trustee of that portion his right therein having been extinguished by operation of the law.

It is common ground that the suit land and the land parcel **NO KIMILILI/KAMUKUYWA/630** share a common boundary. It is also not in dispute that the suit land was first registered in the names of the defendant's father **MAKALAYA** on 17th 1965 but has since 24th January 1996 been registered in the defendant's names. It is also not in dispute that the land parcel **NO KIMILILI/ KAMUKUYWA/630** is registered in the names of the plaintiff's late father **BARASA**. Has the plaintiff met the threshold for an order that he be registered as the proprietor of 3 acres out of the suit land by way of adverse possession?

Section 38(1) of the Limitation of Action Act which governs the law on adverse possession 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 the adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996**.

In the case of **TITUS KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS C.A CIVIL APPEAL NO 35 OF 2002 [2004 eKLR]**, the Court of Appeal stated that a person claiming land registered in the names of another through adverse possession must prove: -

“..... that he has been in exclusive possession of the land openly and as of right 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.”

The Claimant must also demonstrate that he has been in possession and occupation of the land in dispute without force, secrecy or evasion – nec vi nec clam nec precario – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**.

And in **PETER KAMAU NJAU .V. EMMANUEL CHARO TINGA C.A CIVIL APPEAL NO 29 OF 2016**, the Court stated as follows: -

“A registered owner of land may not, by the provisions of Section 7 of the Limitation of Actions Act, bring an action to recover land after the end of twelve years from the date on which the right of action occurred to him. At the expiration of that period, the owner's title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession without the land owner's permission, for a continuous and un – interrupted period of 12 years but who has also done acts which are inconsistent with the registered owners enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as it's owner.” Emphasis added.

In **GRACE WAIRIMU SORORA .V. CHAKA LTD & OTHERS 2017 eKLR** the Court of Appeal had the following to say about the need for peaceful occupation of the land being claimed by adverse possession: -

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

In the circumstances of this case, it can hardly be said that the plaintiff's occupation of 3 acres or thereabouts out of the suit land has been peaceful. That term is defined in the **OXFORD ENGLISH DICTIONARY** as follows: -

“Free from disturbance; calm 2: not involving war or violence: 3: inclined to avoid conflict.”

The term peace is also defined in **BLACK'S LAW DICTIONARY** as: -

“A state of public tranquility; freedom from civil disturbance or hostility.”

From the evidence herein, it is clear that whereas the parties obtained titles to their respective parcels of land in 1965, they have been engaged in boundary disputes from as far back as 1945. This is indeed confirmed in the submissions by both the plaintiff's and defendant's counsel. In his submissions on that issue, **MR KIARIE** states in paragraph 4 that: -

“The boundary between parcel NO 630 and 631 was established in 1945 as per the plaintiff's exhibit No 5. The plaintiff's grandfather SONGOI MUNYIFWA being aggrieved by the position of the established boundary appealed. The appeal was dismissed on 14/11/1952 and the boundary established in 1945 is in existence todate and it marks the boundary between parcel NO 630 and 631 on the ground.”

On his part **MR OCHARO** submitted as follows on the same issue: -

“There is evidence on record from the Applicant himself that sometime before he lodged this claim, there was a dispute concerning the boundary that was established in 1945, that his grandfather SONGOI MUNYIFWA sued in KAKAMEGA

CASE NO 94/1991 which suit was dismissed and being aggrieved he appealed and the same was dismissed and that the boundary established in 1945 confirmed which is still in existence today.”

The dispute between the parties and, before then, their parents has never ceased even after they were registered as owners of their respective parcels of land being **KIMILILI/KAMUKUYWA/630** and **KIMILILI/KAMUKUYWA/631**. This is demonstrated by the numerous summons and letters inviting them to settle the boundary dispute between them. They include: -

- 1. Summons to BARASA dated 11th January 1984.**
- 2. Summons to BARASA dated 19th September 1983.**
- 3. Letter to BARASA dated 10th May 1991.**
- 4. Letter to both BARASA and MAKALAYA dated 1st February 1995.**
- 5. Letter to both BARASA and MAKALAYA dated 12th February 1996.**

Indeed, this suit is a clear manifestation of the boundary dispute between the parties and it appears that the 3 acres or thereabout that the plaintiff seeks forms part of that boundary. **SIMIYU EDMONDS DAVID (PW 1)** who is licensed Surveyor and therefore an expert said the following when he testified before **OMOLLO J** on 9th July 2014: -

“My comparison revealed that on R.I.M there was a boundary between plot 630 and 631 that I was not able to get on the ground because it was not existing. I reflected this boundary on my sketch by tracing this boundary in my sketch (copy the B.I.M on sketch). After tracing it, I marked it as dotted line.

The effect of non – existence of this boundary means it cuts off a portion of Plot 630 on the ground. Between the existing boundary on the ground and the boundary on the map, I did calculate the difference. I got the difference to be approximately 3 acres (i.e. between 631 and 630).”

In circumstances such as obtain in this case where the portion of land being claimed by way of adverse possession has been the subject of long-standing disputes, it can hardly be claimed by the plaintiff that he has been in exclusive and peaceful occupation and possession of the land in dispute. This was reinforced in **SAMMY MWANGANGI & 10 OTHERS .V. COMMISSIONER OF LANDS & OTHERS C.A CIVIL APPEAL NO 30 OF 2013 [2018 eKLR]** where the Court held: -

“Therefore, for the Appellants to succeed in their claim for adverse possession to the suit land by statute of limitations, the burden was on them to prove the following conditions on a preponderance of evidence; that their possession of the suit land was adverse to the true owner’s title; that it was without the authority or permission of the true owner and without use of force; that, without colour of right they had been in actual, open, peaceful, uninterrupted, notorious and exclusive possession for a period of at least 12 years.” Emphasis added.

It has also not escaped this Court’s attention to the fact that in his amended Originating Summons, the plaintiff describes the portion of land which he seeks as **“3 acres or thereabouts.”** This is what he states in paragraph 9 of his supporting affidavit dated 13th October 2001: -

“That ever since 17/8/65 CHARLES BARASA and myself have been in open continuous, notorious and exclusive possession of the 3 acres or thereabouts part of KIMILILI/KAMUKUYWA/631 and we have so remained in possession without any kind of interruption or interference from the defendants.”

It is rather strange that a party who claims to have been in exclusive possession of a parcel of land can only describe it as **“3 acres or thereabout.”** I should have thought that the plaintiff would describe the land he is claiming in more definitive terms. From his pleadings, this Court can only conclude that he is not in exclusive occupation and possession of the land that he seeks to be registered as the proprietor by way of adverse possession. For him to succeed, he has a duty to prove **“exclusive possession of an identifiable portion of the suit land”** - **JOSEPH MUTAFARI SITUMA .V. NICHOLAS MAKHANU CHERONGO C.A CIVIL APPEAL NO 351 OF 1995 [2007 eKLR]**. The drawing of a decree in respect of a parcel of land described only as **“3 acres or thereabouts”** would be fraught with many challenges if the plaintiff were to succeed.

It must be clear by now that the plaintiff has not proved that he is entitled to 3 acres or thereabouts or indeed any portion of the land parcel **NO KIMILILI/ KAMUKUYWA/630** by way of adverse possession.

The up – shot of the above is that the plaintiff’s suit is dismissed with costs to the defendant.

Boaz N. Olao.

J U D G E

20th February 2020.

Judgment dated, delivered and signed in Open Court this 20th day of February 2020 at Bungoma.

Ms Ratemo for defendant present

Ms Wanjala for plaintiff present

Plaintiff present

Defendant absent

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

20th February 2020.