



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 95 OF 2015**

**AGNESS NASUMBU MUNIALO.....1<sup>ST</sup> PLAINTIFF**

**ROBINSON JUMA MUKHONGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF BUNGOMA.....1<sup>ST</sup> DEFENDANT**

**THE ST. MATHEW'S ACK WEBUYE PARISH**

**CATHEDRAL COMMITTEE.....2<sup>ND</sup> DEFENDANT**

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

By an amended plaint dated 21<sup>st</sup> December 2016 and filed herein on 10<sup>th</sup> February 2017, **AGNES NASUMBU MUNIALO** and **ROBINSON JUMA MUKHONGO** (the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) sought Judgment against **THE COUNTY GOVERNMENT OF BUNGOMA** and **THE WEBUYE ACK ST MATHEWS PARISH CATHEDRAL COMMITTEE** (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) in the following terms: -

**(a) This Honourable Court be pleased and grant orders directing the County Land Registrar of the County Government of Bungoma to transfer L.R NO NDIVISI/MUCHI/1384 in the names of AGNES NASUMBU MUNIALO who has occupied and developed the same since 1967 prior to the first land adjudication, then direct the 2<sup>nd</sup> defendant herein to be confined on his current premises which are St Mathews ACK Secondary School Webuye and the Cathedral Compound.**

**(b) Any other penal; (sic) this Honourable Court finds just and expedient to grant.**

**(c) Costs of this suit.**

The basis of the plaintiffs' claim is that they have occupied the land parcel **NO NDIVISI/MUCHI/1384** (the suit land) since 1967 having purchased it from the late **ALFAYO WAKALIKHA NAMISIKO** at a consideration of three (3) heads of cattle. That on 2<sup>nd</sup> October 1970, the 1<sup>st</sup> defendant without the plaintiffs' consent or knowledge proposed to allot the suit land to the then Prod Rick Falls Anglican Church which does not exist. That the current Webuye A.C.K St Mathews Parish was allotted land at the neighbouring Pan African Paper Mills E.A Ltd Company where it has developed and settled. That the plaintiffs' effort to transfer the suit land into their names has been fruitless due to the bias, nepotism, discrimination and contravention of **Article 27 of the Constitution** thus necessitating this suit.

Together with the plaint, the plaintiffs filed witness statements and their list of exhibits being the Certificate of Search showing that the suit land is registered in the names of the defunct Bungoma County Council and reserved for Broderick Falls Anglican Church since 1970 and a sale agreement dated 16<sup>th</sup> February 1967 between the 1<sup>st</sup> plaintiff and one **ALUFAYO WAKALIKHA NAMISIKO**.

1<sup>st</sup> defendant filed a defence describing the plaintiff's averments as misplaced, strange, imaginary and putting them to strict proof thereof. The 1<sup>st</sup> defendant added that this suit is time barred, defective, bad in law and a Preliminary Objection would be taken at the opportune time. No such Preliminary Objection was however raised.

The 1<sup>st</sup> defendant's witness Bryan Kubwa who is the County Land Surveyor signed a witness statement in which he stated that the suit land was set aside for the 1<sup>st</sup> defendant after the land adjudication exercise in 1969. It was then reserved for the 1<sup>st</sup> defendant and the ACK Church and therefore the legal proprietor thereof is the defunct Bungoma County Council.

The 1<sup>st</sup> defendant also filed as it's exhibits, the official search and certificate and adjudication register in respect of the suit land. The

mutation forms, though listed as among the exhibits, was not produced.

The 2<sup>nd</sup> defendant did not file any defence to the claim. The record shows that all it did was file grounds of opposition to the plaintiffs' application seeking to enjoin it in this suit.

The plaintiffs testified and adopted as their evidence their respective statements. The gravamen of those statements is that since 1967 and prior to the land adjudication process, the plaintiffs have been occupying the suit land having bought it from the late **ALFAYO WAKALIKHA NAMISIKO** at a consideration of three (3) heads of cattle. That on 2<sup>nd</sup> October 1970 and without their consent and knowledge, the Bungoma County Council Proposed to allocate the suit land to the then **BRODERICK FALLS ANGLICAN CHURCH** which does not even exist. That the **WEBUYE ACK ST MATHEWS PARISH** was allocated land at the neighbouring **PAN AFRICAN PAPER MILLS (E.A) LTD COMPANY** which it developed. That during the land adjudication process, the then Bungoma County Council overlooked the plaintiffs' right of ownership of the suit land yet they were occupying the said land.

The plaintiffs also called as their witness **JOHN WANJALA WAMBEYE** (PW 3) who also adopted as his evidence the witness statement dated 10<sup>th</sup> August 2015 in which he says he is a neighbour to the late **ALFAYO WAKALIKHA NAMISIKO** and a former village elder. He confirms that he was a witness when the late **ALFAYO WAKALIKHA NAMISIKO** sold the suit land to the plaintiffs in 1967. That the plaintiffs have occupied and developed the suit land where they have stayed peacefully without any dispute with the Local Government, Provincial Administration and/or neighbours.

On his part **BRYAN KUBWA (DW 1)** who is the Bungoma County Land Surveyor also adopted as his evidence the contents of his witness statement dated 7<sup>th</sup> October 2019 and which I have already alluded to above. The gist of that statement is that the suit land is the property of the defunct Bungoma County Council which is the current Bungoma County Government since 1969 and is reserved for the ACK Church.

No submissions were filed at the end of the trial.

The plaintiffs are acting in person and as is common with pro se litigants, much of the Court's challenge is understanding their pleadings and particularly the remedies that they seek the Court to address. Yet, while pleadings need not be necessarily be elegant, and I am alive to the fact that many of the litigants in our Courts cannot afford the service of counsel, nonetheless they must at least be clear and coherent enough to communicate the dispute both to the adverse party and also the Court. When a pleading fails to effectively deliver the dispute to the Court, the so called "home – made" pleadings, then a lot of valuable judicial time is expended trying to understand the salient issues involved in a dispute. That in turn militates against the expeditious determination of disputes which is an important constitutional requirement. Having said so, the Court must do their best to comprehend what the parties are saying and address their grievances.

Looking at the amended plaint herein, it seems to me that the plaintiffs are seeking Judgment that the suit land be registered in the names of the 1<sup>st</sup> plaintiff because: -

**1: It is her property following the purchase from the late ALFAYO WAKALIKHA NAMISIKO in 1967 at a consideration of 3 heads of cattle and/or;**

**2: That having occupied the suit land and developed it since 1967, they are entitled to the same by virtue of adverse possession.**

That is what I can make out of paragraph five (5) and fifteen (15) of the amended plaint.

If the plaintiffs' case is premised on the pleading that they purchased the suit land from the late **ALFAYO WAKALIKHA NAMISIKO** in 1967 at a consideration of three (3) head of cattle as pleaded in paragraph five (5), then this suit ought to have been directed at the said **ALFAYO WAKALIKHA NAMISIKO** and not the defendants herein because they were not parties to that agreement. The defendants cannot be directed to transfer the suit land to the plaintiffs on the basis of an agreement to which they are strangers. Besides, the agreement itself only identifies the land which the 1<sup>st</sup> plaintiff was purchasing as measuring "100 x 100'. There is no reference in the agreement that it involved the suit land. And even assuming that the defendants were properly sued, the claim against them would have been caught up by the statute of limitation. It is not surprising therefore that in it's defence, the 1<sup>st</sup> defendant describes the suit as "**misplaced strange and imaginary**" (paragraph 3), "**time barred**" (paragraph 6), "**bad in law, defective**" (paragraph 7) and that the plaintiffs have "**no cause of action**" against the 1<sup>st</sup> defendant or it's agents as there is "no contractual relationship" between the parties. Therefore, in so far as the plaintiffs seek to rely on the sale agreement between the 1<sup>st</sup> plaintiff and the late **ALFAYO WAKALIKHA NAMISIKO** dated 16<sup>th</sup> February 1967 to claim the suit land, that prayer is not available to them.

The plaintiffs also appear to be agitating a claim to the suit land by way of adverse possession thereof since 1967. That, in my view, is what their witness **JOHN WANJALA WAMBEYE (PW 3)** appears to suggest when in paragraph four (4) of his witness statement dated 10<sup>th</sup> August 2015 he states: -

**4: "That the plaintiff herein occupied and developed the current L.R NO NDISI/MUCHI/1384 since 1967 and has peacefully stayed thereon without any dispute by the Local Government, Provincial Administration and/or neighbours."**

That also appears to be the plea of the 1<sup>st</sup> plaintiff when at paragraph three (3) of her witness statement dated 10<sup>th</sup> August 2015 she states: -

**3: "That I know of my own knowledge being the plaintiff herein has ever since 1967 occupied L.R NO NDISI/MUCHI/1384 prior to the first land adjudication."**

It is common ground that the suit land has since 2<sup>nd</sup> October 1970 been registered in the name of the defunct Bungoma County Council. The Certificate of Search also indicates that it had been reserved for use by **BRODERICK FALLS ANGLICAN CHURCH**. **Section 38 of the Limitation of Actions Act** provides that a person may claim to have become entitled by way of adverse possession to land registered under any of the Acts cited in **Section 37** thereof such person can apply for an order that he be registered as the proprietor of such land or lease in place of the person then registered as proprietor of the land. That is essentially the main prayer that the plaintiffs seek by their plaint. However, **Section 41** of the same Act provides as follows: -

*“This Act does not –*

*a. Enable a person to acquire any title to or any easement over –*

*i. –*

*ii. –*

*iii. –*

*iv. –*

*v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered Land Act): or*

*vi. - .”*

**Section 120(8)** was repealed in 1972. It is clear therefore that a person cannot claim by adverse possession any land vested in the County Council and it matters not how long he has occupied the same or how extensively he had developed it. The plaintiffs may have lived peacefully on the suit land without any dispute from the Local Government or the Provincial Administration as stated by their witness **JOHN WANJALA WAMBEYE** a former village elder and their neighbours. The suit land may not even have been utilized by the **BRODERICK FALLS ANGLICAN CHURCH**, as was intended, or any other institution. It may even have remained fallow for a long time. However, it is clear from Section 41 of the Limitation of Actions Act that the plaintiffs cannot lay claim to the suit land by virtue of adverse possession since it is the property of the defunct Bungoma County Council the predecessor of the 1<sup>st</sup> defendant.

The up – shot of the above is that the plaintiffs suit lacks merit. It is accordingly dismissed with costs to the 1<sup>st</sup> defendant.

**Boaz N. Olao.**

**J U D G E**

**12<sup>th</sup> March 2020.**

Judgment dated, delivered and signed in Open Court this 12<sup>th</sup> day of March 2020 at Bungoma.

Plaintiffs present in person

Mr Were for Mr Kituyi for 1<sup>st</sup> defendant present

No appearance for 2<sup>nd</sup> defendant

Joy – Court Assistant

Right of Appeal explained.

**Boaz N. Olao.**

**J U D G E**

**12<sup>th</sup> March 2020.**