



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 167 OF 2016 (OS)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22, 7, 17 AND ORDER 37 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAND PARCEL LR NO BOKOLI/KITUNI/1246

BETWEEN

VINCENT WAFULA JUMA.....APPLICANT

VERSUS

JOHN MUYOMA MAKHANU.....RESPONDENT

J U D G M E N T

VINCENT WAFULA JUMA (the plaintiff herein) filed this Originating Summons against **JOHN MUYOMA MAKHANU** (the defendant herein) claiming to be in adverse possession of a portion measuring 1 acre out of the land parcel **NO BOKOLI/KITUNI/1246** and a determination of the following questions: -

- 1. That the plaintiff be declared as the owner of a piece of land measuring approximately 1 acre to be curved out of the land parcel NO BOKOLI/KITUNI/1246 which he is in possession of having occupied the same for over 12 years.**
- 2. An order that the plaintiff has become entitled to be registered as joint owners (sic) of land parcel NO BOKOLI/KITUNI/1246 by operation of law viz Sections 7, 17 and 38 of the Limitation of actions Act (Chapter 22 Laws of Kenya) in place of the defendant.**
- 3. That the defendant's names to the said parcel of land be removed and cancelled on the 1 acre out of the land parcel NO BOKOLI/KITUNI 1246 and be replaced with the names of the plaintiff.**
- 4. That the registration of the defendant as the owner of the land parcel NO BOKOLI/KITUNI/1246 in the year 2003 did not interrupt the rights of the plaintiff as an adverse possessor.**
- 5. That in the alternative and without prejudice to the averments 1, 2, 3 and 4 a declaration that the defendant holds the title to a portion of land measuring 1 acre out of land parcel NO BOKOLI/KITUNI/1246 in trust for the benefit of the plaintiff.**
- 6. That costs of this summon be borne by the defendant.**

The Originating Summons was supported by the plaintiff's affidavit dated 28th December 2016 to which was annexed the Green Card to the land parcel **NO BOKOLI/KITUNI/1246** (the suit land).

The basis of the plaintiff's claim as per the said supporting affidavit and also his witness statement dated 30th November 2019 is that the suit land is a resultant sub – division of the original land parcel **NO BOKOLI/KITUNI/310** which was originally registered in the names of the parties father one **MARTIN WAFULA** who, prior to his demise in 1991, had given out his land to his children but died before obtaining titles to the respective portions of which the plaintiff was given 1 acre. That the defendant who became the Administrator to their late father's Estate has refused to give the plaintiff his share because he is a step – brother yet the plaintiff has lived and utilized his portion for

over 12 years thus necessitating this suit.

The defendant filed a replying affidavit dated 31st May 2017 in which he confirmed that he is the registered proprietor of the suit land but added that the plaintiff had no relationship with the said **MARTIN WAFULA**. He added that the said **MARTIN WAFULA** had in fact refunded the plaintiff's father the purchase price for a portion out of the original land parcel **NO BOKOLI/KITUNI/310** after which the plaintiff's father moved elsewhere. That the defendant filed at the **WEBUYE RESIDENT MAGISTRATE'S COURT CIVIL CASE NO 255 OF 2006** and **BUNGOMA HIGH COURT CIVIL CASE NO 37 OF 2006** (later **ELC CASE NO 16 OF 2012**) seeking eviction orders. That the defendant only obtained title in 2004 and the plaintiff has not been in peaceful occupation of the suit land. He urged the Court to dismiss the Originating Summons.

Although the defendant referred to previous cases being **WEBUYE RMCC NO 255 OF 2006** and **BUNGOMA H.C.C.C NO 37 OF 2006** (later **ELC CASE NO 16 OF 2012**), he did not avail any pleadings, proceedings or Judgment in those cases. In any event, the plaintiff having been in occupation since 1991, those cases did not interrupt his claim.

The defendant did not however turn up for hearing of the suit on 10th March 2020 yet the affidavit of service by one **PIUS WAMALWA KUNDU** a process server of this Court dated 29th January 2019 (he must have meant 29th January 2020) shows that the defendant was served, accepted service but stated that the plaintiff is neither his son nor relative.

During the trial, the plaintiff testified and adopted as his evidence his witness statement dated 30th November 2019 and also his supporting affidavit dated 28th December 2016 contents of which I have already referred to above. He also called as his witness his brother **BARTHOLOMEW SIMIYU (PW 2)** who also adopted as his evidence his statement dated 30th November 2019 in which he has stated that the original parcel of land **NO BOKOLI/KITUNI/310** belonged to their late father **MARTIN WAFULA** who had distributed it among his children.

The plaintiff's claim is based on adverse possession and in the alternative, trust. His case is that the suit land is a resultant sub – division of the original land parcel **NO BOKOLI/KITUNI/310** which belonged to their late father who in 1991 had given each of his sons their shares but died before they had obtained their respective titles.

The plaintiff's evidence is un – controverted because although he was served, the defendant did not attend the Court during the trial. I shall nonetheless consider the evidence by the plaintiff to see if it meets the threshold for claims in adverse possession and trust.

ADVERSE POSSESSION: -

The plaintiff's main thrust is that he has occupied 1 acre out of the suit land since 1991 when he was given his portion by their late father. **Section 38 of the Limitation of Actions Act** allows a person who is in occupation of land for the statutory period of twelve years to apply to the Court to be registered as the proprietor thereof. It reads: -

39 (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 the proprietor of the land."

In **KASUVE .V. MWAANI INVESTMENTS LTD & 4 OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a person claiming to be entitled to land by adverse possession must prove. It said: -

"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 the discontinuation of possession by the owner on his own volition."

It is now well settled that the combined effect the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Actions 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. This suit was filed on 11th April 2018 when the new land laws 2012 were already in force and **Section 28(h) of the Land Registration Act 2012** identifies 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."

Section 7 of the Land Act 2012 on the other hand provides that: -

"Title to land may be acquired through –

- a. –
- b. –
- c. –

d. Prescription”

The Claimant of land by way of adverse possession must also demonstrate that he has occupied the same peacefully and not by force or stealth i.e. nec vic nec clam nec precario – **KIMANI RUCHINE .V. SWIFT RUTHERFORD & CO KLR 10.**

As I have already indicated above, the defendant did not attend Court and therefore the plaintiff’s evidence is un – controverted. It is also supported by the evidence of **BARTHOLOMEW SIMIYU (PW 2)** who is a brother to the parties. Although the defendant alluded to other suits in **WEBUYE** and **BUNGOMA** Courts, he did not avail the pleadings or Judgments arising therefrom and this Court is therefore not in a position to know what effect, if any, they had on the plaintiff’s case. The law is that the party who wishes the Court to believe in the existence of a particular fact has the duty to lead evidence to prove that fact. No evidence has been placed before me to suggest that the plaintiff’s occupation of 1 acre out of the suit land since 1991 when it was given to him by his father has not been open, peacefully exclusive, peaceful and with the knowledge of the defendant. The defendant in his replying affidavit has deponed at paragraph 8 that he only acquired the title to the suit land in 2004. That is true. The copy of the title deed annexed to the Originating Summons confirms that the defendant obtained it on 15th September 2004. This suit was filed on 28th December 2018 well after the statutory period of 12 years had lapsed and therefore the defendant’s claim to the 1-acre portion which the plaintiff seeks in adverse possession has been extinguished.

The plaintiff’s claim to a portion of the suit land measuring 1 acre by way of adverse possession is well merited. I allow it.

TRUST: -

In the alternative, the plaintiff also sought an order that he is entitled to a portion of 1 acre out of the suit land by way of trust.

Again, that claim is merited. Firstly, there is un – controverted evidence supported by another sibling **BARTHOLOMEW SIMIYU (PW 2)** that the suit land is a sub – division of the original land parcel **NO BOKOLI/KITUNI/310** which belonged to one **MARTIN WAFULA** the father to the parties herein. There is also evidence that the defendant is the eldest brother in the family. He did not purchase the suit land or the original land. He can only be holding it in trust for his younger siblings and himself as well.

Secondly, the plaintiff lives on the suit land since 1991. He has done so from the time his father gave him a 1-acre portion. He has an interest in the said land. The defendant cannot now allege, as he has done in his replying affidavit, that there is no relationship between him and the plaintiff. If there is no such relationship, on what basis has the plaintiff lived on the suit land all this time. Possession and occupation of land creates an overriding interest – **OBIERO .V. OBIERO 1972 E.A 227.** I must remind the parties herein, as I did to the parties in **RICHARD MUSE .V. WASWA MUSE ALIAS ROBERT WASWA MUSE BUNGOMA ELC CASE NO 67 OF 2017** the following Scriptures: -

GENESIS 4:9 KING JAMES VERSION

“And the Lord said unto Cain, where is Abel thy brother?

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

And in **PSALM 133:** -

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

As the elder brother to the plaintiff, the defendant not only owes him a duty in trust with respect to the suit land which originally belonged to their late father but he should also be his brother’s keeper as the scriptures demand of him. If he is not a believer, this may be the appropriate time to start.

The claim by the plaintiff to 1 acre of the suit land based on trust is also well founded. I would allow it.

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

- 1. An order is made that the plaintiff is entitled to 1 acre out of the land parcel NO BOKOLI/KITUNI/1246 by way of adverse possession.**
- 2. The defendant shall execute all the necessary documents to facilitate the transfer of 1 acre out of the land parcel NO BOKOLI/KITUNI 1246 in the names of the plaintiff within 30 days of this Judgment.**
- 3. In default of (2) above, the Deputy Registrar shall be at liberty to do so on behalf of the defendant.**
- 4. As the parties are siblings, each shall meet their own costs.**

Boaz N. Olao.

J U D G E

12th March 2020.

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

Mr Were for plaintiff present

Defendant – absent

Plaintiff present

Joy – Court Assistant

Right of Appeal explained.

Boaz N. Olao.

J U D G E

12th March 2020