



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 3 OF 2019**

**BIBIANA NEKESA WANDALA (suing on her**

**own behalf and on the behalf of the Estate of**

**WANDELA WANGULA NAMANGALA –**

**DECEASED) ..... PLAINTIFF**

**VERSUS**

**DACLAS WAFULA WAMALWA ..... 1<sup>ST</sup> DEFENDANT**

**EMMANUEL JUMA WAMALWA ..... 2<sup>ND</sup> DEFENDANT**

**JOHN WEKESA WAMALWA ..... 3<sup>RD</sup> DEFENDANT**

**BENJAMIN WANJALA WAMALWA ..... 4<sup>TH</sup> DEFENDANT**

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

Land parcels **NO WEST BUKUSU/SOUTH MYANGA/2442, 2443, 2444 and 2445** (hereinafter the suit land) are currently registered in the names of **DACLAS WAFULA WAMALWA, EMMANUEL JUMA WAMALWA, JOHN WEKESA WAMALWA and BENJAMIN WANJALA WAMALWA** (hereinafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively). They are sub – divisions of the original land parcel **NO WEST BUKUSU/SOUTH MYANGA/ 143** which was first registered in the names of the defendants’ deceased father **BENEDICTO NANGAKI (BENEDICTO)** before it’s sub – division on 7<sup>th</sup> June 2018 to create the suit land.

**BIBIANA WEKESA WANDALA** (the plaintiff herein) moved to this Court by her amended Originating Summons dated 24<sup>th</sup> May 2019 in which she sought the following orders against the defendants: -

- (a) That the titles to 5 acres of land comprised in land parcels **NO WEST BUKUSU/SOUTH MYANGA/2442, 2443, 2444 and 2445** situated in **MYANGA** within **BUNGOMA COUNTY** be deemed to have been extinguished through adverse possession by the plaintiff.
- (b) A declaration that the plaintiff has acquired 5 acres of land comprised in land parcels **NO WEST BUKUSU/SOUTH MYANGA/2442, 2443, 2444 and 2445** by virtue of the **Limitation of Action Act** and by the doctrine of adverse possession and that therefore, the defendants hold the said titles in trust for the plaintiff.
- (c) That the plaintiff be registered as the proprietor of the said 5 acres of land.
- (d) That the Honourable Court be pleased to grant such further or other relief as may be just in the circumstances.
- (e) Costs be borne by the defendants.

The Originating Summons is supported by the plaintiff’s affidavit and annexures thereto. The gist of the affidavit is that the plaintiff and her deceased husband **WANDELA WANGULA NAMANGALA** who died on 5<sup>th</sup> April 2011 had purchased 4 acres of the original land parcel **NO WEST BUKUSU/SOUTH MYANGA/143** from the deceased father of the defendants (**BENEDICTO**) on 26<sup>th</sup> June 1972 at a consideration of Kshs. 1,360/= which was paid in full. Then on 5<sup>th</sup> May 1978, they purchased a further 1 acre at a consideration of Kshs. 1,400/= which was also paid in full. However, **BENEDICTO** passed away on 8<sup>th</sup> June 1988 before effecting the transfer of the 5 acres into

the names of her deceased husband. During the succession process of the Estate of **BENEDICTO**, the plaintiff was listed among the beneficiaries of his Estate but the defendants went ahead to sub – divide the said land into the suit land which they then transferred into their names. Nonetheless, the plaintiff and her family have continued to live on the suit land continuously and without interruption since 1972 to – date and she is therefore entitled to the 5 acres by way of adverse possession. Annexed to the supporting affidavit is her late husband’s Death Certificate, a Limited Grant of Letters of Administration in respect of his Estate, the Certificate of Marriage, copies of Sale Agreements which unfortunately are in **KIBUKUSU LANGUAGE** with no **ENGLISH** translation, a letter dated 24<sup>th</sup> September 2015 addressed to the **PRINCIPAL MAGISTRATE BUNGOMA** by the **CHIEF MABUSI LOCATION** with respect to the Estate of **BENEDICTO**, a confirmed grant in respect to the Estate of **BENEDICTO** issued to **DACLAS WAFULA WAMALWA** and **EMMANUEL JUMA WAMALWA** confirming that each of the 4 defendants was awarded 2 acres out of the land parcel **NO WEST BUKUSU/ SOUTH MYANGA/143** and the Green Card showing that **BENEDICTO** was first registered as the proprietor of the land parcel **NO WEST BUKUSU/SOUTH MYANGA/143** on 10<sup>th</sup> August 1973 before it’s sub – division on 7<sup>th</sup> June 2018 to give rise to the suit land.

The Originating Summons is opposed and **DACLAS WAFULA WAMALWA** the 1<sup>st</sup> defendant and with the authority of the other defendants filed a replying affidavit dated 19<sup>th</sup> June 2019 and also a statement dated 4<sup>th</sup> July 2019 in response to the amended Originating Summons. The defendants acknowledge that the plaintiff and her late husband took possession of 2 acres of the suit land following a sale agreement in 1972 but the balance of Kshs. 80,000/= had not been paid by the time the plaintiff’s husband died. That **BENEDICTO** kept demanding the balance of the purchase price which remains un – paid. That during the succession proceedings in respect of the Estate of **BENEDICTO**, the plaintiff was listed as a liability and signed for her rightful share of 2 acres. That having failed to pay the balance of the purchase price, the plaintiff is not entitled to the reliefs sought in her Originating Summons.

At the end of the trial, I gave the plaintiff 14 days within which to file and serve translated versions of the sale agreements filed herein because they are in **KIBUKUSU** language which, unfortunately, I cannot read or understand. As per **Section 23(1) of the Environment and Land Court Act** as amended in 2012, the language of this Court is English. I don’t know what informed the amendment to remove **KISWAHILI** as among the language of this Court. All I can say is that if the said agreements were in **KISWAHILI** language or any other language that I can read and understand, I would have no hesitation in invoking this Court’s inherent powers and **Article 159 of the Constitution** to admit the contents thereof. Unfortunately, however, those agreements will not aid the plaintiff in this case.

Submissions were filed and served as directed.

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

The plaintiff’s claim to 5 acres of the suit land is based on adverse possession. It is common ground that the land was originally parcel **NO WEST BUKUSU/SOUTH MYANGA/143** registered in the names of the defendants’ late father **BENEDICTO** on 10<sup>th</sup> August 1973 before its sub – division on 7<sup>th</sup> June 2018 to create the suit land now registered in the names of the defendants. It is also common ground that the plaintiff and her late husband entered the suit land pursuant to two sale agreements the first one dated 26<sup>th</sup> June 1972 and the second one dated 5<sup>th</sup> May 1978. The point of divergence between the parties is that whereas the plaintiff claims that she occupies 5 acres which is what she and her late husband purchased, the defendants’ case is that infact the sale agreement was in respect to only two (2) acres of land for which the plaintiff’s late husband had not even completed paying the balance of the purchase price by the time he passed away.

**Section 38 (1) of the Limitation of Actions Act** reads: -

*“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.”*

A person claiming land by adverse possession must also show that his occupation of the land in dispute is not by force, secrecy or persuasion (*nec vi nec clam nec precario*) – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**. It must be peaceful, open, continuous, un – interrupted and with the knowledge of the owner. In a recent exposition of the doctrine of adverse possession, the Court of Appeal in **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL NO 56 OF 2014 [2015 eKLR]** described it 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 pre – requisites being that the possession of the adverse possessor is neither by force or stealth nor 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.”*

As indicated above, the plaintiff’s occupation of a portion of the suit land is not really in dispute. What is contested is the acreage. In his replying affidavit in paragraphs 4 and 8, the 1<sup>st</sup> defendant has averred as follows: -

4: *“That indeed according to the land sale agreements annexed by the Applicant the Applicant came into occupation as a result of land purchase of the two acres.”*

8: *“That it is not true that the Applicant is in occupation of 5 acres as claimed but two (2) acres only.”*

In her supporting affidavit dated 9<sup>th</sup> January 2019 however, the plaintiff has averred as follows in paragraphs 6 and 7: -

6: *“That on 26<sup>th</sup> June 1972, my late husband entered into an agreement with one **BENEDICTO NANGAKI (deceased)** who was*

*the father to the Respondents herein to purchase 4 acres of land comprised in L.R NO W. BUKUSU/S. MYANGA at a consideration of Kshs 1,360 which he paid in full. (annexed hereto is a copy of the agreement marked BNW 3).*

*7: "That later on 5<sup>th</sup> May 1978, my late husband entered into a further agreement with BENEDICTO NANGAKI to purchase a further one acre of land comprised in L.R NO W. BUKUSU/S. MYANGA at a consideration of Ksh 1,400 which he also paid in full. (annexed hereto is a copy of the agreement marked BNW 4)."*

Counsel for the defendants has submitted that since the plaintiff took possession of the suit land by way of purchase, then she is on the land with the consent of the owner in which case adverse possession would not apply. This is how counsel has submitted: -

*"Your Lordship the Applicant came into the land by way of purchase as such through the consent of the registered owner. Your Lordship the land sale agreements produced as exhibits the Applicant paid for the 2 acres which the Respondents agreed that the Applicant has been and is in occupation to date."*

It is correct that where the occupation is with the consent of the registered owner of the land in dispute, a claim for adverse possession cannot be sustained – **JANDU .V. KIRPAL 1975 E.A 225** and also **WAMBUGU .V. NJUGUNA 1983 KLR 172**. As I have already stated above, the land sale agreements were not translated into a language that I could understand. Therefore, it is not clear whether the agreements were subject to the Land Control Board's consent or even if there were time lines within which the purchase price was to be paid. According to the plaintiff, the purchase price was fully paid but the defendants have denied that.

In my view, the plaintiff's deceased husband must have paid the purchase price in full. This is because of the following reasons. Firstly, the plaintiff and her husband were allowed to remain in occupation of the suit land from 1972 to – date. They would not have been permitted to do so if there was any dispute over the purchase price. Secondly, no evidence has been produced by the defendants that a demand for the balance of the purchase price was even made by **BENEDICTO** after the last instalment was paid in 1978. Thirdly, the defendants were strangers to the agreements between the plaintiff's husband and their father **BENEDICTO**. They cannot therefore purport to add or subtract anything to/from those agreements. When the 1<sup>st</sup> defendant was cross – examined by **MR MUKISU**, this is what he said: -

*"It is true that the plaintiff and her family live on the land in dispute. I was not there when my late father sold the land to the plaintiff's husband."*

The 1<sup>st</sup> defendant admitted that he has not made any attempt to evict the plaintiff from the suit land or claim for the balance, if any, of the purchase price. That is clear evidence that the plaintiff and her husband fully paid the purchase price.

As to whether a purchaser in possession can claim land by way of adverse possession, there are contrasting views. In **WAMBUGU.V. NJUGUNA** (supra) the Court took the view that where the Claimant is a purchaser under a contract of sale, the possession only becomes adverse when the contract is repudiated. In **SAMUEL MIKI WAWERU .V. JANE NJERI RICHU C.A CIVIL APPEAL NO 122 OF 2001**, the Court held that where the adverse possessor takes possession following a sale agreement which is subject to the Land Control Act and which becomes null and void for lack of the necessary consent, then time for purposes of adverse possession begins to run from the moment the agreement becomes void under **Section 6 (1) of the Act**. However, in **MBUGUA NJUGUNA .V. ELIJAH MBURU WANYOIKE & ANOTHER C.A CIVIL APPEAL NO 27 OF 2002**, it was stated that where a transaction for sale of land is frustrated for lack of consent by the Land Control Board, time starts to run on the day the Claimant is put in possession of the land. A similar view was taken in **PETER MBIRI MICHUKI .V. SAMUEL MUGO MICHUKI C.A CIVIL APPEAL NO 22 OF 2013 (2014 eKLR)** where the Judges said: -

*"On our part, we are of the view that there are four alternative timelines that could be used to compute when time began to run for purposes of the plaintiff's claim for adverse possession. These are 1964, 1970, 1971 or 1978. The year 1964 is the year of the sale agreement between the parties and in this year, the plaintiff took possession of the suit property."*

I would follow this latter view bearing in mind that in **MWANGI & ANOTHER .V. MWANGI 1986 KLR 328**, the Court held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

As I have already indicated above, the plaintiff's occupation of part of the suit land is not really in dispute. What is contested is the exact acreage of land that she and her family occupy. While the defendants claim that she is only entitled to 2 acres, the plaintiff insists that she occupies 5 acres. The sale agreements which could have confirmed how much land the plaintiff and her deceased husband purchased are not of much help for the reasons that I have already stated above.

In paragraph 10 of his replying affidavit, the 1<sup>st</sup> defendant has deposed that during the succession process in respect to the Estate of **BENEDICTO**, the plaintiff signed that her share of the suit land was 2 acres. I have perused the affidavit prepared by the 1<sup>st</sup> defendant in support of the Summons for Confirmation of Grant in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 349 OF 2017**. It is neither dated nor commissioned and therefore it does not conform with the provisions of the **OATHS AND STATUTORY DECLARATIONS ACT**. It is a defective document and cannot be considered by this Court. Most importantly, although the plaintiff signed the consent to the making of a Grant of Administration Intestate to a person of equal or lesser priority which is also annexed to the 1<sup>st</sup> defendant's replying affidavit, nowhere in that form is it indicated that the plaintiff signed for 2 acres.

It must be remembered that a claim for adverse possession is predicated on what the Claimant actually occupies on the ground. Such possession is a matter of fact to be observed on the land in dispute – **MAWEU .V. LIU RANCHING & FARMING CO – OPERATIVE SOCIETY LTD 1985 KLR 430**. During the trial, the 1<sup>st</sup> defendant confirmed that he was not a party to the sale agreement between **BENEDICTO** and the plaintiff's husband. Indeed, he did not even know the acreage of the land that the plaintiff occupies. This is what he

said in cross – examination by **MR MUKISU**: -

***“I was not there when my late father sold land to the plaintiff’s husband. I don’t know the size of the land that the plaintiff and her family occupy.”***

Indeed, he added that he was young in 1972 when the plaintiff’s husband bought portions of land from **BENEDICTO**.

On the other hand, in her evidence in chief, the plaintiff said: -

***“It is not true that I only occupy 2 acres as alleged in the replying affidavit. I occupy 5 acres of the land parcels NO W. BUKUSU/S. MYANGA/2442, 2443, 2444 and 2445.”***

In view of the above, I have no hesitation in making a finding that the plaintiff and her family occupy 5 acres of the suit land and not 2 acres as alleged by the 1<sup>st</sup> defendant. Further, that the said occupation has been open, peaceful, exclusive un – interrupted and with the knowledge of the defendants since 1972 when the plaintiff and her husband first took possession of 4 acres followed thereafter with 1 acre in 1978. And although the suit land was only registered in the names of the defendants on 7<sup>th</sup> June 2018 having previously been registered in the names of **BENEDICTO** on 10<sup>th</sup> August 1973, the law is that a mere change of ownership of land claimed by a person in possession does not defeat that person’s claim in adverse possession – **GITHU .V. NDEETE 1984 KLR 776**. I am therefore satisfied from the totality of the evidence herein that the plaintiff has established her case against the defendants and is entitled to the orders sought in her amended Originating Summons.

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

- 1. The defendants’ titles to 5 acres out of the land parcels NO WEST BUKUSU/SOUTH MYANGA/2442, 2443, 2444 and 2445 have been extinguished.**
- 2. The plaintiff is entitled to be registered as the proprietor of 5 acres out of the land parcels NO WEST BUKUSU/SOUTH MYANGA/2442, 2443, 2444 and 2445 having acquired the same by virtue of adverse possession.**
- 3. The defendants to execute all the necessary documents to facilitate the transfer and registration of 5 acres out of the land parcels NO WEST BUKUSU/SOUTH MYANGA/2442, 2443, 2444 and 2445 in the names of the plaintiff within 30 days from the date of this Judgment.**
- 4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to do so on behalf of the defendants.**
- 5. The defendants shall meet the plaintiff’s costs.**

**Boaz N. Olao.**

**J U D G E**

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

**Judgment dated, delivered and signed at Bungoma this 27<sup>th</sup> day of May 2020.**

**Boaz N. Olao.**

**J U D G E**

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

This Judgment was due on 4<sup>th</sup> June 2020. However, in view of the measures restricting Court operations due to the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23<sup>rd</sup> April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

**Boaz N. Olao.**

**J U D G E**

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