



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL CASE NO 101 OF 2004(O.S)

JAMES KIKECHI PLAINTIFF

VERSUS

SEPSTIANO WAFULA.....1ST DEFENDANT

DAVID MWECHER CHONGWONY 2ND DEFENDANT

J U D G M E N T

The land parcel **NO ELGON/CHEMOGE/188** (the suit land) was first registered in the names of **JOSEPH KHUTUKHULU** (the deceased) on 18th January 1967. He is the father to **SEPSTIANO WAFULA** who had been sued as the 1st defendant herein but the suit against him was withdrawn on 18th December 2017. The only defendant is now **DAVID MWECHER CHONGWONY** (herein the 2nd defendant).

This suit has a chequered history. It has been heard by not less than five Judges. In 2011 it stalled when the plaintiff, acting on his own and without involving his advocate, wrote to the Registrar of the High Court complaining about the delays in finalizing it. On 13th April 2011, the plaintiff appeared before **MUCHEMI J**, apologized and reinstated his advocate. Thereafter he proceeded with his case ex – parte, obtained a Judgment on 13th July 2011 which was subsequently set aside before the trial commenced afresh on 27th May 2015.

By his Originating Summons dated 3rd August 2004, the plaintiff claiming to be entitled by way of adverse possession to 14.8 acres out of the suit land moved to Court seeking a determination of the following issues: -

- 1: Whether the plaintiff has occupied and developed 14.8 acres out of the suit land for an un – interrupted period exceeding 12 years.**
- 2: Whether the plaintiff did on 13th October 1968 purchase a parcel of land from the deceased father to SEPSTIANO WAFULA measuring 14.8 acres.**
- 3: Whether the deceased died in 1977 before he could transfer the parcel of land to the plaintiff.**
- 4: Whether the deceased and/or his Estate’s title in the suit land was extinguished on expiry of 12 years from the date of occupation of the same by the plaintiff.**
- 5: Whether the 2nd defendant in conspiracy with the 2nd defendant (this must be a typographical error) maliciously, unlawful and fraudulently acquired title to the suit land malafides and only with the sole view of defeating the plaintiff’s interest and justice.**
- 6: Whether the registration of the said parcel of land in the names of the 2nd defendant is null and void ab initio and the same be cancelled.**
- 7: Whether the plaintiff has become entitled to the 14.8 acres comprised in the suit land by operation of law and should therefore be registered as proprietor thereof for reasons put forth in the annexed affidavit of the plaintiff and on other grounds to be adduced at the hearing hereof.**

The plaintiff therefore sought the following orders against the defendant: -

- a. That the deceased and/or his Estate's title over the portion of the land measuring 14.8 acres and comprised in the suit land got extinguished by operation of the law when the plaintiff was in adverse possession and upon expiry of 12 years.
- b. A declaration that the deceased's and/or his Estate's title over the 14.8 acres having been extinguished by operation of the law in favour of the plaintiff, there was no valid title to be passed over to the 2nd defendant in respect of that portion measuring 14.8 acres.
- c. A declaration that the purported registration of the 2nd defendant as owner of all that parcel of land comprised in the suit land was irregular, malicious, unlawful, fraudulent and malafides.
- d. A declaration that the beneficial ownership and use of the 14.8 acres comprised in the suit land was legal and transferred to the plaintiff.
- e. A declaration that the defendants must be perpetually restrained from taking tilling, trespassing wasting, using, alienating, selling and/or in any way dealing with the said portion of 14.8 acres or any part thereof or in any way interfering with the plaintiff's quiet possession thereof.
- f. A declaration that under Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya the plaintiff has been in open, quiet, continuous and adverse possession of the portion of land measuring 14.8 acres comprised in the suit land and hence he be registered as the proprietor thereof.
- g. An order that the defendants be condemned to pay costs of this suit.
- h. Such other or further relief this Honourable Court deems fit and just to grant.

The Originating Summons was supported by the plaintiff's supporting affidavit to which are annexed copies of sale agreements, Death Certificate of the deceased, extract of title to the suit land, Kenya Gazette, letters dated 4th November 1994, 8th December 1994, 24th February 2003 and 14th March 2003 and statements of the plaintiff's witnesses.

The plaintiff's case, as contained in his supporting affidavit and the annexures thereto, is that vide a written agreement dated 13th October 1968 he purchased 14.8 acres from the deceased being part of the suit land. He took possession of the said parcel but was forced to move out during the land clashes in 1992 when his houses were burnt down. That he however continued leasing out the suit land to other persons including the 2nd defendant but the deceased died in 1977 before transferring the 14.8 acres to him.

In 2002, he discovered that the 2nd defendant had on 27th June 2002 transferred the whole of the suit land including the 14.8 acres to himself. He therefore lodged a claim with the **MT ELGON LAND DISPUTES TRIBUNAL** (the Tribunal) which made an award in his favour and which was adopted as a Judgment of the Court. That Judgment was however, successfully challenged by the 2nd defendant in **JUDICIAL REVIEW PROCEEDINGS** thus necessitating this suit.

He adds that he knows the 2nd defendant very well having been his headmaster in primary school in 1976. That the 2nd defendant claims to have purchased the suit land from the deceased yet he was aware that the plaintiff had been in open, peaceful, continuous and adverse possession thereof for over 20 years and the registration of the suit land in his names was unlawful irregular null and void.

The Originating Summons is opposed and the 2nd defendant filed a replying affidavit dated 29th August 2011 and a further replying affidavit dated 18th June 2013 as well as a statement dated 21st February 2013.

The gist of the 2nd defendant's response is that the Originating Summons is misconceived, misinformed, and activated by malice. That the plaintiff has never been in possession of the suit land which the 2nd defendant has developed for the last 15 years and holds the title thereof. That the plaintiff's assertion of having been forced out of the suit land during the land clashes is an afterthought as it was never raised during the proceedings at the Tribunal where the plaintiff had filed a case against him but it's decision was reversed in **BUNGOMA JUDICIAL REVIEW CASE NO 33 OF 2003**. That although he had leased land from the plaintiff, it was for different parcels of land being **ELGON/CHEMOGE/160** and **580** and not the suit land. That the plaintiff never obtained consent to transfer the suit land and is employing un – orthodox means to acquire it and does not qualify for orders in adverse possession as he had not lived thereon for 12 years. The 2nd defendant added that he would be raising a Preliminary Objection on the competency of this suit. He also filed his list of documents and witness statements.

That trial commenced on 27th May 2017 when the plaintiff repeated the averments in his supporting affidavit and stated that after he had purchased 14.8 acres on 13th October 1968, he took possession of the land and lived thereon upto 1992 and when tribal clashes started, he leased the land to the 2nd defendant from 1994 to 1995 who paid him Kshs. 28,000/=. That the plaintiff did not visit the suit land between 1995 – 2000 and when he went there in 2000, he found that the 2nd defendant had registered the whole suit land measuring 15.8 Hectares in his names. He therefore filed a suit at the Tribunal but its decision was over – turned. He produced the relevant documents in support of his case adding that when he purchased the suit land from the deceased, the 1st defendant who is the deceased's son was infact a witness and that the suit land was sold by the 1st defendant to the 2nd defendant after the demise of the deceased.

He called as his witnesses **PROTUS NAIBEI** and **SINDANI WASWA BONZEMO** who also adopted as their evidence their witness statements dated 18th June 2014.

In his statement, **PROTUS NAIBEI** a retired Chief of **KONGIT LOCATION** states that he is aware that the plaintiff purchased 14.8 acres from the deceased being a portion of the suit land. That in 1992 he was forced to move out of the suit land following the land clashes and thereafter started leasing out the land to third parties including the 2nd defendant. That the deceased died in 1977 before he had transferred the 14.8 acres to the plaintiff and that the registration of the suit land in the names of the 2nd defendant was unlawful since he knew about the plaintiff's occupation of the land.

SINDANI BONZEMO also adopted as his evidence his witness statement dated 18th June 2014. He is a Lecturer at the Masinde Muliro University and is also conversant with the facts of this case. He confirmed that the plaintiff purchased 14.8 acres out of the suit land from the deceased and took possession thereof until 1992 when he was forced to vacate following the land clashes. He however continued to lease the suit land to third parties including the 2nd defendant and by the time the deceased passed away in 1977, he had not yet transferred the 14.8 acres to the plaintiff and therefore the registration of the suit land in the names of the 2nd defendant was unlawful since he knew about the plaintiff's occupation of the same.

The 2nd defendant adopted as his evidence his statement dated 21st February 2013 in which he states that on 6th June 1996, he was approached by the deceased's sons to purchase the suit land measuring 15.5 Hectares. They told him that the deceased had died in 1977. So he demanded to see the relevant documents including the minutes of the meeting by the deceased's family mandating the eldest son to sell the suit land. When he was satisfied that the suit land belonged to the deceased, he paid Kshs. 600,000/= in cash to deceased's family in 1996. He then constructed two houses and planted trees and in 1999, the deceased's family filed a succession cause and he obtained his title in 2000. In 2002, the plaintiff filed a case at the Tribunal which cancelled his title and so he moved to Court and filed a Judicial Review application and the Tribunal's award was quashed.

In his defence, the 2nd defendant called the following as his witnesses: -

1. **FRED WATILA KILWAKE (DW 2)**
2. **DISMAS WANJAL KUTUKHULU (DW 3)** and
3. **ANTONINA NAMALWA KUTUKHULU (DW 4)**

They all adopted as their evidence their witness statements filed herein on 22nd December 2017.

In his statement, **FRED WATILA KILWAKE (DW 2)** states that the 2nd defendant is the registered proprietor of the suit land after it was sold to him by **SEPSTIANO WAFULA** (originally the 1st defendant herein) on 14th October 1996. That the deceased's family authorized **SEPSTIANO WAFULA** to sell the land in order to raise money to solve family problems. That the 2nd defendant has developed it by putting up a dwelling house and planting crops. That the plaintiff has never been in occupation of the suit land and his claim to have been forced out during the land clashes is an afterthought which was never raised during the Tribunal proceedings or other forum.

DISMAS WANJALA KUTUKHULU (DW 3) and **ANTONINA NAMALWA KUTUKHULU (DW 4)** both corroborated the testimony **FRED WATILA KILWAKE (DW 2)** as their statements were all similar.

Submissions were thereafter filed both by the firms of **KIARIE & COMPANY ADVOCATES** for the plaintiff and **AREBA ATANCHA & COMPANY ADVOCATES** for the 2nd defendant.

I have considered the evidence by the parties including the documents filed and the submissions by counsel.

The plaintiff's claim to the suit land is predicated on the assertion that he bought 14.8 acres out of the suit land in 1968 and has been in adverse possession thereof until 1992 when he was forced to vacate it during the infamous land clashes. That the 2nd defendant took advantage of his absence to register himself as the proprietor of the suit knowing very well that the plaintiff was in possession of the same.

Section 38 of the Limitation of Actions Act entitles a person who claims to have become entitled to land registered in the names of another person by way of adverse possession to apply to this 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 said land. It is now well settled that the combined effect of 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 – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996**. This suit was filed in 2004 before the promulgation of the **2010 Constitution** but it is clear that the new land laws enacted in 2012 recognize the doctrine of adverse possession both in **Section 28(h) of the Land Registration Act 2012** and **Section 7 of the Land Act 2012**.

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 the 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.”

Adverse possession is a fact to be observed upon the land – **MAWEU .V. LIU RANCHING & FARMING CO – OPERATIVE SOCIETY LTD 1985 KLR 430**.

It is not in dispute that the suit land was first registered in the names of the deceased on 18th January 1967. It is also not in dispute that the deceased died on 25th March 1977 and on 27th June 2000, the suit land which, as per the Green Card, measures 15.5 Ha, was registered in the names of the 2nd defendant. The plaintiff however registered a caution thereon on 23rd May 2002 which is still in place pending the determination of this suit.

The plaintiff's case is that he first took possession of 14.8 acres out of the suit land following a sale agreement between him and the deceased who was the father to **SEPSTIANO WAFULA** who was the 1st defendant herein before the suit against him was withdrawn and who was in fact a witness to the same. The said agreement is part of the plaintiff's documents. That evidence was corroborated by the plaintiff's witnesses **PROTUS NAIBEI** and **SINDANI BONZEMO** who also confirmed that the plaintiff took possession of the 14.8 acres following that agreement dated 13th October 1968. Indeed, nowhere in their testimonies did the 2nd defendant and his witness deny that the deceased sold the plaintiff 14.8 acres out of the suit land in 1968. What the 2nd defendant denies is that the plaintiff was in fact forced out after the 1992 clashes. He and his witnesses term that allegation as an afterthought.

It is also not in dispute that the 2nd defendant purchased the suit land in 1996 from the family of the deceased. That was long after the deceased had passed away on 25th March 1977 and when he was cross – examined, the 2nd defendant confirmed that during the sale transaction between him and **SEPSTIANO WAFULA** who was representing the deceased's family, succession in respect of the deceased's Estate had not been done.

In my view, the plaintiff's claim to 14.8 acres out of the suit land stands or falls on the determination of what happened between 13th October 1968 and 1992.

As I have already stated above, the entry of the plaintiff on the suit land in 1968 has not really been rebutted. In paragraphs 3 and 4 of his supporting affidavit he deposes as follows: -

3: "That vide a written agreement dated 13th October 1968, I purchased 14.8 acres of land which acres were to be parceled from that parcel of land that was comprised in title NO ELGON/ CHEMOGE/ 188 from one JOSEPH KUTUKHULU (see annexure JK 1(a) (b) and (c)."

4: That upon purchase, I took possession of the said parcel of land until 1992 when I was constrained to move out when my houses were burnt down during the infamous land clashes."

In opposition to the above, the 2nd defendant averred as follows in paragraphs 5 and 6 of his replying affidavit dated 18th June 2013: -

5: "That the 2nd Respondent is in occupation of the suit land and had developed the same for the last 15 years (see copy of photos marked DMC – 2)"

6: "That the plaintiff's assertion that he was forced out of the suit land during the infamous clashes is an afterthought and was never rose (sic) at any other forum including his statement at the MT ELGON LAND TRIBUNAL."

As indicated above, the fact that the 2nd defendant purchased the suit land from the family of the deceased in 1996 cannot be doubted. And so too the fact that by 2013 when he signed his replying affidavit, he had been in occupation thereof for over 15 years. However, the plaintiff's claim as I understand it is that having taken possession of the suit land in 1968 following the purchase from the deceased, by the time he was forced out in 1992 following the land clashes, he had been in possession and occupation thereof for 24 years well in excess of the statutory period of 12 years that would entitle him to orders in adverse possession.

The 2nd defendant and his witnesses have asserted that the issue of the plaintiff having moved out of the suit land following the 1992 land clashes is an afterthought which was never raised during the proceedings in the Tribunal or indeed any other forum. It may be true that the plaintiff did not raise the issue of the 1992 land clashes during the Tribunal case. However, the 1992 land clashes is a matter of general or local notoriety in Kenya and which this Court can take judicial notice of as provided in **Section 60(1) of the Evidence Act**. I reject the suggestion that it is an afterthought. It is well known that communities were displaced from their land in the clashes that followed the disputed elections and **MT ELGON** area was one of the areas affected. Although the 2nd defendant and his witnesses claim that the plaintiff was not in occupation of the suit land, he does not explain why he only purchased the suit land in 1996 and not before. There can only be one explanation for that and it is because from 1968 upto 1992 when he was forced to relocate following the clashes, the plaintiff remained in continuous, open, peaceful and exclusive and un – interrupted occupation and possession of the 14.8 acres which he had purchased from the deceased. There is no evidence to suggest that upto the time of his death in 1977, the deceased had interfered with the plaintiff's occupation and possession of the 14.8 acres. And even after the deceased's death in 1977, it took another 19 years for the 2nd defendant to purchase the suit land in a transaction that was clearly illegal as I shall demonstrate shortly. The only way in which the plaintiff's occupation and possession of the suit land could have been interrupted by the deceased and, after his death, by the 2nd defendant as the subsequent registered proprietor, was by filing a suit to assert their ownership of the suit land or by making an effective entry before the expiry of the 12 years – **GITHU V NDEETE 1984 K.L.R 776**. That did not happen and by 1980, any right that the deceased's Estate had in the suit land had been extinguished by operation of the law. The purported transfer of the suit land to the 2nd defendant in 1996 was always subject to the overriding interest enjoined by the plaintiff and which had crystallized even long before he was displaced in 1992. Therefore, by the time the 2nd defendant obtained the registration of the suit land in his names on 27th June 2000, he was merely holding it in trust for the benefit of the plaintiff. The mere change of ownership of the suit land from the deceased to the 2nd defendant did not interrupt the plaintiff's adverse possession of the 14.8 acres which he claims – **GITHU .V. NDEETE** (supra).

As I have already found above, the plaintiff's entry into the suit land was by way of a purchase in 1968 which is not really in dispute. There are contrasting views as to when time for purposes of adverse possession begins to run in favour of a purchaser. In **WAMBUGU .V.**

NJUGUNA 1983 KLR 172, 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 want of the necessary consent, then time for the purpose 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 2007**, it was held 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 held as follows: -

“On our part, we are of the view that there are four alternative timelines that could be used to compute when time begins 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 stated that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In the circumstances of this case, there is nothing to suggest that the agreement between the plaintiff and the deceased dated 13th October 1968 was ever repudiated. It is also now common ground that the plaintiff took possession of the 14.8 acres on the date of that agreement and therefore, for the purposes of adverse possession, time started to run in 1968. There is also evidence that the deceased was not buried on the suit land but had moved to **SABOTI** where he was buried. This was confirmed by his wife **ANTONINA NAMALWA KUTUKHULU (DW 4)** during cross – examination by **MR NYAMU**. This is confirmation therefore that the deceased, having sold the suit land to the plaintiff, was dispossessed of the same and moved elsewhere.

There is also evidence that even after 1980 when the 12-year limitation period had lapsed, the 2nd defendant knew about the fact that the plaintiff was in possession of the suit land and even leased it from him. And although the 2nd defendant tried to suggest that the parcel of land which he leased from the plaintiff was different from the suit land, this is what he said during cross – examination on 15th November 2017: -

“I confirm I have leasing (sic) land from the plaintiff. There is no document to show that I was leasing a different land. I paid Kshs. 20,000/= by cheque for leasing the land. I have not denied the authenticity of the documents filed in Court.”

Finally, it is clear to me that although the 2nd defendant is the registered proprietor of the suit land, he does not in fact hold a valid title and it is impeachable by virtue of Section 26 of the Land Registration Act for having been acquired illegally. As is now clear, the suit land was sold to the 2nd defendant by the deceased’s son **SEPSTIANO WAFULA** even before the succession process has been commenced and finalized. No confirmed grant was exhibited in this case and what **SEPSTIANO WAFULA** did amounted to intermeddling with the Estate of the deceased contrary to the provisions of **Section 45 of the Law of Succession Act**. Without a confirmed grant, the said **SEPSTIANO WAFULA** had no capacity to dispose off the deceased’s land and what he did amounted to an illegality. However, that does not defeat the plaintiff’s claim which is against the registered proprietor of the suit land.

Having considered all the evidence herein, I am satisfied that the plaintiff has proved his case against the 2nd defendant as required in law.

There shall be Judgment for the plaintiff against the 2nd defendant in the following terms: -

- a. The plaintiff has acquired a portion of land measuring 14.8 acres out of the land parcel NO ELGON/CHEMOGE/188 by way of adverse possession.**
- b. The 2nd defendant’s proprietary interest in the portion measuring 14.8 acres out of the land parcel NO ELGON/CHEMOGE/188 has been extinguished by operation of law.**
- c. The purported registration of the 2nd Respondent as owner of all that parcel of land comprised in the title NO ELGON/CHEMOGE/188 was illegal and fraudulent.**
- d. The 2nd defendant to execute all the necessary documents to facilitate the registration of 14.8 acres out of the land parcel NO ELGON/CHEMOGE/188 in the names of the plaintiff within 30 days from the date of this Judgment.**
- e. In default of (d) above, the Deputy Registrar of this Court shall be at liberty to execute the said documents on behalf of the 2nd defendant.**
- f. The 2nd defendant, his agents, servants or any one acting through him are restrained from taking, tilling trespassing, wasting, alienating selling or in any other way dealing with the portion of 14.8 acres out of the land parcel NO ELGON/CHEMOGE/188.**
- g. The 2nd defendant shall meet the plaintiff’s costs.**
- h. The case against the 1st defendant is marked as withdrawn as per the orders dated 18th December 2017.**

Boaz N. Olao.

J U D G E

27th May 2020.

Judgment dated, delivered and signed at Bungoma this 27th day of May 2020.

Boaz N. Olao.

J U D G E

27th May 2020.

This Judgment was due on 11th June 2020. However, in view of the measures restricting Court operations following the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23rd April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

Boaz N. Olao.

J U D G E

27th May 2020.