



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 59 OF 2005.

NICHOLAS SIMIYU SULULU - DECEASED

(Substituted by MARCELLA SIMIYU)..... PLAINTIFF

VERSUS

EDWARD WANJALA1ST DEFENDANT

VINCENT WEKESA2ND DEFENDANT

(Being sued as legal and personal representatives of the Estate of

SILVANO WEPUKHULU – DECEASED)

AND

MARCELLA NAFULA SIMIYU APPLICANT/INTENDED PLAINTIFF

J U D G M E N T

NICHOLAS SIMIYU SULULU (the deceased) who was later substituted by his wife **MARYCELLA SIMIYU** (the plaintiff) had filed this suit by way of Originating Summons against **EDWARD WANJALA** and **VINCENT WEKESA** (the 1st and 2nd defendants respectively and sued as the legal representatives of the Estate of **SILVANO WEPUKHULU KURANDA (KURANDA)** seeking a determination of the following questions:-

- 1. That the plaintiff has been in continuous and peaceful occupation of the said 2¾ acres of the land parcel NO EAST BUKUSU/NORTH NALONDO/79 for a period of not less than 12 years.**
- 2. That even though the said land is still registered in the names of the defendants' deceased father, his title to the said land as Administrator of the Estate of the deceased father has been extinguished by operation of Section 7 and 17 of the Limitation of Actions Act Chapter 22 Laws of Kenya.**
- 3. That the plaintiff is entitled to be registered as proprietor of the aforesaid portion by way of adverse possession instead of the defendants in accordance with Section 37 and 38 of the Limitation of Action act Chapter 22 Laws of Kenya.**
- 4. That the costs of this Originating Summons be borne by the defendants herein.**

The Originating Summons was supported by the deceased's affidavit dated 22nd December 2004 to which are annexed the following documents: -

1. A grant of Letters of Administration issued to the 1st defendant in respect of the Estate of KURANDA.

2. Copy of the following sale agreements for plot No. 79: -

(a) Agreement dated 21st May 1980 between the deceased and KURANDA.

(b) Agreement dated 4th July 1982 between the deceased and the two defendants.

(c) Agreement dated 19th July 1986 between the deceased and the 2nd defendant.

3. Copy of the register for parcel NO EAST BUKUSU/NORTH NALONDO/79.

The deceased's case, as per his supporting affidavit, was that at all material time, the defendants were sons of **KURANDA** and are sued as his legal representatives. That on 21st May 1980, 4th July 1982 and 19th July 1986 the defendants and **KURANDA** agreed to sell to him land measuring 1 ¼ acres, 1 acre and ½ acre respectively from the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** at a total sum of Kshs. 11,400/= as per the annexed sale agreements. That the deceased paid the purchase price and was given possession of the said portions by the defendants and **KURANDA** and has been in quiet, continuous and peaceful occupation thereof for the last 24 years on the understanding that the transfer would be done by **KURANDA** who, unfortunately, died in 1990 before the transaction could be approved by the Land Control Board. The deceased had carried out substantial developments on the said portions of land including permanent and semi permanent residential and commercial premises and also grown food and cash crops such as coffee, bananas, sweet potatoes, vegetables, ground nuts, maize, sugar cane and trees although the title is still in the names of **KURANDA**. That on 27th February 2004 the 1st defendant filed **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 26 OF 2004** and was issued with the grant of Letters of Administration to the Estate of **KURANDA** but has refused to sign transfer forms to enable the deceased acquire the said portion. Attempts through the local Administration and even counsel to see if this dispute can be settled have fallen on deaf ears hence this suit.

In addition to the supporting affidavit, the deceased also filed a statement repeating the same averments.

In opposition to the Originating Summons, the defendants filed statements dated 5th February 2013.

The 1st defendant confirmed that he is the son of **KURANDA** and his personal representative. That before his death, **KURANDA** had allocated to the defendants their respective shares out of the land parcel **NO EAST BUKUSU/ NORTH NALONDO/79** and the plaintiff who is their neighbour has never taken possession of any portion of the said land. He denied that the deceased had been cultivating or had constructed on the land. Further, he denied having agreed to sell 1¼ acres of a portion from the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** to the plaintiff or that **KURANDA** had sold ½ an acre thereof to the deceased. However, the plaintiff has recently and unlawfully entered part of the land parcel **NO EAST BUKUSU/NORTH NALONDO/79**.

The 2nd defendant also filed a statement dated 5th February 2013 repeating the same averments as his brother the 1st defendant. He however clarified that it is the 1st defendant who is the legal representative of their father's Estate.

Following the demise of the deceased, his legal representative and who is now the plaintiff herein filed a statement dated 25th February 2013 in which she stated that on 21st May 1980, 4th July 1982 and 19th July 1986, the defendants and their late father **KURANDA** sold to the deceased a portion of land measuring 1½ acres, 1 acre and ½ acre from the parcel **NO EAST BUKUSU/NORTH NALONDO/79** at a

consideration of Kshs. 11,400/= which was paid in full. That she and the deceased took vacant possession immediately on the understanding that **KURANDA** the registered proprietor and the defendants would transfer to them the said portion but **KURANDA** died in 1990 before doing so. The plaintiff and the deceased have carried out substantial developments on the said portion by constructing permanent residential and commercial premises as well as farming food and cash crops such as coffee, bananas, sweet potatoes, vegetables, ground nuts, maize, sugar cane and trees. That on 27th February 2004, the 1st defendant as the legal representative of **KURANDA** filed **BUNGOMA HIGH COURT SUCCESSION CASE** and was thereafter registered as the proprietor of the land in dispute but has refused to transfer the portions purchased by the deceased.

The plaintiff further filed a list of documents showing photographs of the buildings on the portion that she occupies.

On 16th February 2016, the 2nd defendant filed a statement of admission confirming that **KURANDA** had sold to the deceased portions of land measuring 1¼ and ½ acres out of the land parcel **NO EAST BUKUSU/NORTH NALONDO/79**. He added that on 4th July 1982 the deceased purchased from him 1 acre out of the said land and that therefore, the plaintiff is entitled to 1 ¾ from the 2nd defendant and 1 acre from the 1st defendant which he should be compelled to transfer to the plaintiff.

During the pendency of this suit, the land parcel **NO EAST BUKUSU/ NORTH NALONDO/79** was sub – divided and a portion namely **EAST BUKUSU/NORTH NALONDO/4293** was registered in the names of the 2nd defendant.

By a consent order dated 4th October 2017 and filed in Court on the same day, it was agreed as follows: -

“By consent of counsels for the plaintiff Applicant and the 1st defendant and 2nd defendant in person, the portion of land measuring 0.64 Ha comprised in land parcel NO E. BUKUSU/N. NALONDO/4293 which is in the names of the 2nd defendant which originated from land parcel NO E. BUKUSU/N. NALONDO/79 being the suit land be registered in the names of the Applicant MARYCELLA NAFULA SIMIYU in accordance with the survey report dated 27.7.2017.

That the remaining 0.33 Ha on the side of the 1st defendant herein is subjected to hearing and arbitration by the Court.”

When the trial commenced on 29th May 2019, the 2nd defendant informed the Court that he had admitted the plaintiff’s claim.

The plaintiff testified and asked the Court adopt as her evidence the statement filed herein contents of which I have already summarized above. She also produced as part of her evidence the list of documents filed herein.

She called as her witness the area Chief **ELIUD MUYEKHO (PW 2)** who also adopted as his evidence his statement dated 25th March 2019.

In that statement, the said witness confirms that he knows the parties herein who are residents of **KISIWA LOCATION** where he has worked for 23 years first as Assistant Chief and thereafter as Senior Chief. That he used to see the deceased utilize the land in dispute and later learnt that the deceased had purchased from the defendants’ portions of land measuring 2 ¾ acres from the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** but had not obtained title thereto. He added that the deceased’s family have been using the land in dispute since he was born and he recalled having written letters to the 1st defendant following complaints that he (1st defendant) had destroyed the deceased’s property.

Before she closed her case, the plaintiff called the 2nd defendant who confirmed on oath that he admits

the plaintiff's case as per his statement dated 15th February 2016 which I have already alluded to above.

On his part, the 1st defendant denied having sold any portion of the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** to the deceased adding that he is the one occupying the land. He denied having sold any portion of the suit land to the deceased adding that both his brother the 2nd defendant and the area Chief (PW 2) lied to this Court. He asked the Court to adopt as his evidence the witness statement dated 5th February 2013 and the replying affidavit dated 12th August 2005.

Submissions were thereafter filed both on **MS CHUNGE** instructed by the firm of **CHUNGE & COMPANY ADVOCATES** for the plaintiff and **MR KUNDU** instructed by the firm of **BULIMO & COMPANY ADVOCATES** for the 1st defendant.

The claim by the deceased (now substituted with his wife the plaintiff) is that the plaintiff, as the legal Administrator of this Estate of the deceased is entitled to a portion of land measuring 2¾ acres out of the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** by way of adverse possession. It is the plaintiff's case that the deceased purchased the said portion of land from **KURANDA** and the two defendants at various times on 21st May 1980, 4th July 1982 and 19th July 1986 and took possession and has since occupied the said portion continuously and peacefully having put up homes and commercial buildings and also grows crops for food as well as cash crops since 21st May 1980. However, on 27th February 2004 when the 1st defendant obtained a grant of Letters of Administration in respect of his father **KURANDA**, he refused to sign transfer forms to enable the deceased obtain registration of those parcels in his names.

It is not in dispute that the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** has been registered in the names of **KURANDA** since 20th June 1972 as per the copy of register produced by the plaintiff. It is common ground that the defendants are sons to **KURANDA** but only the 1st defendant is the legal representative of the Estate of **KURANDA**. However, in the cause of the trial, the 2nd defendant admitted the plaintiff's claim thus leaving only the 1st defendant contesting the same.

In **KASUVE .V. MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 KLR 184**, the Court of Appeal said the following in regard to what a party claiming land by adverse possession has to prove: -

“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.”

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 proprietor of land in favour of the adverse possessor of the same at the expiry of 12 years of the adverse possession of that land – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2132 OF 1996**. Similarly, the new Land laws promulgated after 2010 recognize the doctrine of adverse possession.

Section 38 of the Limitation of Actions allows a person who claims to have become entitled to land registered under any of the Acts cited in **section 37** thereof to apply to the High Court (and since 2012 to this Court) for an order that he be registered as the proprietor of the land or lease in place of the registered proprietor. To amount to adverse possession, such occupation must be non permissive, actual, open, notorious and exclusive for the statutory period of 12 years – **MBIRA .V. GACHUHI 2002 1 EALR 137**.

The adverse possessor must have dispossessed the registered proprietor – **WAMBUGU .V. NJUGUNA 1998 KLR 173**. The occupation must also be peaceful and not by force.

In **KIMANI RUCHINE .V. SWIFT RUTHERFORD & CO LTD 1980 KLR** the Court stated that the

plaintiff has to prove that he has occupied the land in dispute **nec vi nec clam nec precario** (no force, no secrecy, no evasion). It is also settled that a purchaser in possession has an overriding interest which binds the land – **PUBLIC TRUSTEE .V. WANDURU 1984 KLR 314** and also **MWANGI .V. MWANGI 1986 KLR 328**.

The plaintiff's case is that the deceased took possession of portions of the suit land in 1980 when he bought the first 1¼ acre and bought the last ½ acre in 1986 from **KURANDA**. The deceased and his family which includes the plaintiff have developed the portions which they bought by putting up their homes and commercial buildings photographs of which have been produced as part of the plaintiff's evidence. Whereas the 1st defendant has denied all that, there is evidence from the area Chief (**ELIUD MUYEKHO (PW 2)**) an independent witness, who has confirmed that indeed the deceased and his family have been occupying the 2¾ acres out of the suit land from the time when he purchased it from **KURANDA**. Then there is the evidence of the 2nd defendant who is a brother to the 1st defendant in which he concedes the plaintiff's claim. Surely it cannot be that all the other witnesses in this case are liars except the 1st defendant. I am satisfied that the plaintiff and her witness spoke the truth and it was the 1st defendant who tried to mislead this Court. There is no evidence that the occupation of the portion of the suit land by the deceased and his family has been interrupted or that it has not been peaceful, exclusive and open. This suit was filed on 4th July 2005 and even if the limitation period is calculated from 19th July 1986 when the deceased paid **KURANDA** for the last portion of ½ acres, the deceased and his family had been in occupation of their portions of the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** for 19 years which is well beyond the statutory period of 12 years provided by law to entitle the plaintiff to orders of adverse possession.

It is not clear where the portion of the suit land designated as **EAST BUKUSU/NORTH NALONDO/4293** and which the 2nd defendant surrendered to the plaintiff came from. If it came from the suit land, then that would mean that the land parcel **NO EAST BUKUSU/NORTH NALONDO/79** no longer exists. However, other than the register produced by the deceased when he filed this suit in 2005 showing that the said land is registered in the names of **KURANDA**, no other register has been availed by either of the parties including the register in respect to the parcel **NO EAST BUKUSU/NORTH NALONDO/4293**. However, in the consent order which I have already reproduced above, order No (11) reads

“That the remaining 0.33 Ha on the side of the 1st defendant herein is subjected to hearing and arbitration by this Court.”

However, it came out in the submissions by counsel that the 1st defendant's portion of the suit land is now known as **EAST BUKUSU/NORTH NALONDO/4297**. This is what the 1st defendant's counsel submitted in paragraph 4 of his submissions.

“That the 1st defendant is the registered proprietor of land parcel NO EAST BUKUSU/NORTH NALONDO/4297 originating from land parcel NO EAST BUKUSU/NORTH NALONDO/79 measuring 0.33 HA and he got registered in 2016.”

On her part, counsel for the plaintiff submitted as follows on the same issue in paragraph 32(a) of her submissions: -

“The 1st defendant be directed to forthwith execute all the necessary land transfer documents and provide all the supporting documents pertinent to registration and transfer of land to transfer a portion of land measuring approximately 0.33 hectares comprised in land reference number EAST BUKUSU/NORTH NALONDO/4297 derived from the original title deed of the suit land comprised in title number EAST BUKUSU/NORTH NALONDO/79 in the names of the plaintiff.”

Of course, submissions by counsel are not evidence. However, in a situation such as is obtaining here

where the registers of the land being claimed in adverse possession are not produced but both counsel for the protagonists confirm that indeed titles for parcels **NO EAST BUKUSU/NORTH NALONDO 4293** and **4297** exist, then this Court must conclude that indeed those titles exist even if the documents have not been produced for the Court's inspection. I am therefore satisfied that the 1st defendant is the registered proprietor of the land parcel **NO EAST BUKUSU/ NORTH NALONDO 4297** measuring **0.33 HA** and which the plaintiff and her family are claiming by way of adverse possession and which was previously part of the original land parcel **NO EAST BUKUSU/NORTH NALONDO/79** from which the deceased acquired several portions between 1980 and 1986 through a purchase. The law is that a mere change of ownership of the land being claimed by the adverse possessor does not interrupt that possession and further, that adverse possession can be made on only a portion of the land – **GITHU .V. NDEETE 1984 KLR 776**.

Having considered the evidence by the parties herein, I am satisfied that the plaintiff has established, as required in law, that she is entitled by way of adverse possession, to a portion measuring **0.33 HA** being the land parcel **NO EAST BUKUSU/NORTH NALONDO 4297** now registered in the names of the 1st defendant. That was the dispute placed before this Court for its determination following the consent filed by the parties herein on 4th October 2017.

There shall be Judgment for the plaintiff against the 1st defendant in the following terms: -

- 1. The plaintiff be registered as the proprietor of a portion measuring 0.33 HA comprised in land parcel NO EAST BUKUSU/NORTH NALONDO/4297 registered in the names of the 1st defendant.**
- 2. The 1st defendant to execute all the necessary documents to facilitate the transfer of that portion into the names of the plaintiff within 14 days of this Judgment and in default, the Deputy Registrar be at liberty to execute the said documents on behalf of the 1st defendant.**
- 3. The 2nd defendant, if he has not already done so, to forthwith execute all the necessary documents to facilitate the transfer of the land parcel NO EAST BUKUSU/NORTH NALONDO/4293 into the names of the plaintiff pursuant to the consent order dated 4th October 2017 and filed herein on the same date.**
- 4. The plaintiff is awarded costs of the suit to be met by the 1st defendant.**

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 4th 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 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.