



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 289 OF 2013

IN THE MATTER OF LIMITATION OF ACTIONS ACT LAWS OF KENYA

AND

IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 OF CIVIL PROCEDURE RULES

BETWEEN

SIMON KHAEMBA MWANJA – DECEASED

(substituted with his son KENNEDY

WAKOTO KHAEMBA) PLAINTIFF

AND

JAMIN WASIKE KHAEMBA 1ST DEFENDANT

JOHNSON WASWA KHAEMBA 2ND DEFENDANT

J U D G M E N T

According to the Certificate of Search annexed to the plaintiff's Originating Summons dated 31st October 2013 and filed herein on the same day, the land parcel **NO EAST BUKUSU/NORTH KANDUYI/748** (hereinafter the suit land) and which measures 4.0 Hectares is registered in the names of **JAMIN WASIKE KHAEMBA** (1st defendant) and **JOHNSON WASWA KHAEMBA** (2nd defendant) who respectively own 1.5 acres and 1.8 acres together with 6 other proprietors. Indeed, that ownership has been clearly set out in paragraph 11 of the 1st defendant's witness statement dated 11th November 2014 as follows: -

“That after succession, we did distribute the said parcel of land amongst the beneficiaries as follows as per the Certificate of Confirmation: -

- (a) JAMIN WASIKE KHAEMBA - 1.5 acres**
- (b) JOHNSON WASWA KHAEMBA - 1.8 acres**
- (c) CLEMENT WAFULA KHAEMBA - 1.4 acres**
- (d) WYCLIFF WANJALA KHAEMBA - 1.4 acres**
- (e) TITUS WAMALWA WANJALA - 1.5 acres**
- (f) TOM WANYAMA JUMA - 1.5 acres**

(g) RAEL NASIMIYU KHAEMBA - 0.4 acres

(h) PAULIN NAFIFU KHAEMBA - 0.5 acres”

The suit land was previously registered in the names of their father one **KHAEMBA MUMELO** on 8th November 1975 but has since 8th May 2013 been registered in the names of the above named proprietors as per the Certificate of Search dated 21st November 2013. Given that un – disputed fact, it is not clear why this Originating Summons was only filed against the 1st and 2nd defendants herein. I shall revert to this later in the Judgment.

By his Originating Summons, **SIMON KHAEMBA MWANJA** (now deceased and substituted with his son **KENNEDY WAKOTO KHAEMBA** (hereinafter the plaintiff), sought a determination of the following issues: -

- 1. Whether the land parcel NO EAST BUKUSU/NORTH KANDUYI/748 measuring 4.0 Hectares was owned by the late KHAEMBA MUMELO prior to the succession process by his sons the Respondents herein.**
- 2. Whether the late KHAEMBA MUMELO sold the entire suit land to the plaintiff between 1982 and 1984.**
- 3. Whether the late KHAEMBA MUMELO died before transferring the suit land to the plaintiff in 1985.**
- 4. Whether the plaintiff has been in peaceful continuous, open and notorious occupation of the 10 acres of the suit land for over 30 years.**
- 5. Whether the deceased and his family migrated to Kitale where they have stayed all long to - date.**
- 6. Whether the deceased and his late brother had sold an extra 1 acre to the plaintiff in 1992 prior to his death.**
- 7. Whether the plaintiff has un – successfully tried to obtain title to the suit land from the defendants to – date.**
- 8. Whether the defendants filed full succession to the Estate of the deceased and failed or omitted the names of the plaintiff.**
- 9. Whether the succession cause NO 409 OF 2011 at BUNGOMA has been concluded and the defendants are now clothed with title to the suit land.**
- 10. Whether the defendants are holding title to the suit land in trust for the plaintiff.**
- 11. Whether the defendants should transfer the suit title to the plaintiff and in default, the Executive Officers of this Honourable Court do transfer the same.**
- 12. Whether the defendants have settled in Kitale for over 30 years since the suit land was sold by their deceased father to the plaintiff in 1982 and 1984.**
- 13. Whether the costs of this suit should not be paid to the plaintiff.**
- 14. Whether any other order should be made as the Honourable Court may deem it fit.**

The Originating Summons was predicated on the grounds set out therein and also supported by the affidavit of **SIMON KHAEMBA MWANJA** dated 31st October 2013 to which was annexed the Certificate of Search in respect of the suit land. He also filed a statement dated 18th May 2015.

The basis of the plaintiff’s case as per his supporting affidavit and witness statement is that he was a neighbour of **KHAEMBA MUMELO** the deceased father to the defendants who was the proprietor of the suit land which had been charged to the **AGRICULTURAL FINANCE CORPORATION** as security for a loan. The said **KHAEMBA MUMELO** (hereinafter **MUMELO**) defaulted in servicing the loan and offered to sell it and so by various agreements, the plaintiff purchased the whole of the suit land as follows: -

- 1. 19th December 1982 - 3.7 acres**
- 2. 18th April 1984 - 5¼ acres**
- 3. 26th April 1991 - 1 acre**

The purchase price was paid for in instalments the last one being on 4th June 1995 but the plaintiff went into occupation of the suit land in 1982 following the first agreement and has been in peaceful occupation thereof **MUMELO** having moved to Kitale.

However, in 2013 the plaintiff discovered that the defendants had done a private succession process and sold the suit land to third parties who invaded the land in 2014, destroyed his houses and cut down his crops. He therefore filed this suit.

The Originating Summons is contested and the 1st defendant, also acting on behalf of the 2nd defendant, filed a replying affidavit dated 13th December 2013 describing it as misplaced since their late father **MUMELO** never sold the suit land or any part thereof to the plaintiff in 1982 and 1984 or any other year and that the alleged sale agreements are null and void for lack of consent from the Land Control Board. He also described the plaintiff's allegation of having been in open, peaceful and continuous occupation of 10 acres out of the suit land as "**a big lie**" with no proof adding that the plaintiff only encroached on the suit land and put up a structure in 2013. That **MUMELO** could not have sold the suit land which is ancestral land passed on from their late grandfather **SIKHUTU MUMELO** who was buried thereon. That what the plaintiff is doing amounts to inter – meddling with the Estate of a deceased person contrary to the provisions of Section 45 of the **LAW OF SUCCESSION ACT** and that the plaintiff who lives some 200 metres from the suit land has been busy leasing portions of it to strangers who have been planting various crops.

The hearing commenced before **MUKUNYA J** on 20th May 2015 when the plaintiff testified and adopted as his evidence his witness statement dated 18th May 2015 and also produced as his documentary evidence, the sale agreements dated 19th December 1982, 18th April 1984, photographs of destroyed houses amongst others.

The plaintiff called as his witnesses **JERMIN WEBANDA WANYONYI (PW 1)** and **FRED SIMIYU (PW 2)**.

JERMIN WEBANDA WANYONYI (PW 1) told the Court that **MUMELO** had a loan which he was unable to service so he sold the suit land to the plaintiff in the presence of witnesses including **RICHARD GICHOBE** and **SAMUEL NANGENDO** both deceased. Thereafter **MUMELO** migrated to Kitale.

Similar evidence was given by **FRED SIMIYU (PW 2)** who added that **MUMELO** died in 1984 before transferring the 10 acres to the plaintiff.

For several reasons including the death of the late **SIMON KHAEMBA MWANJA**, nothing happened in the matter from the time the plaintiff closed his case until 17th October 2018 when **MR OTSIULA** who was acting for the defendants was allowed to cease acting for them for want of instructions. And although the defendants were personally served on 27th December 2019 for the defence hearing on 27th January 2020, they did not attend or send a representative and upon the application by **MR SICHANGI** for the plaintiff, the defendants' case was marked as closed and thereafter submissions were filed by the plaintiff's counsel.

I have considered the evidence by the plaintiff and his witnesses including the documents filed.

The plaintiff's case is hinged on a claim of adverse possession. It is his case that his late father took possession of the suit land measuring 10 acres following two purchase agreements dated 19th December 1982 and 18th April 1984. The sale agreement dated 19th December 1982 is in the **KIBUKUSU** dialect but a translation thereof was availed. It reads in the first paragraph as follows: -

“RE: LAND NUMBER E. BUKUSU/N. KANDUYI/748

I, KHAEMBA MUMELO have sold SIMON KHAEMBA MWANJA land measuring 3.7 acres and we have agreed for every acre Kenya shillings four thousand (Kshs. 4,000) which now totals Kenya shillings fourteen thousand and Eight hundred only (Kshs. 14,800). To-day has paid Kshs. 10,700 (Kenya shillings ten thousand seven hundred only). The balance Kshs. 4,100 (Kenya shillings four thousand one hundred only).

The agreement dated 18th April 1984 is in **KISWAHILI** language which is not the language of this Court. The language of this Court following the amendment to **Section 23 of the Environment and Land Court Act** is **ENGLISH**. I do not know what informed the 2012 amendment to **Section 23 of the Environment and Land Court Act** which previously read as follows: -

23 “The language of the Court shall be English or Kiswahili.”

Since Article 7 (1) and (2) of the Constitution provides that: -

7(1) “The national language of the Republic is Kiswahili.”

(2) “The official languages of the Republic are Kiswahili and English,”

there was no need to restrict the language of this Court to English only. The 2012 amendment to **Section 23(1) of the Environment and Land Court Act** to restrict the language of this Court to only the English language was, in my view, not well informed.

Having said so, the second agreement dated 18th April 1984 is in Kiswahili language. It reads as follows in the first paragraph which is necessary for the purposes of this Judgment: -

“RE: LAND NUMBER EAST BUKUSU N. KANDUYI/748

Mazikizano ya kuuziana shamba.

Mimi bwana Simon Khaemba nimenunua

shamba la bwana Masita Khaemba lenye

ekari 5 ¼ (tano na robo) kwa sh 6,000

Kila ekari zote zikawa ni sh 31,500

Thelethini na moja na mia tano ekari zote

Zikawa ni (9) tisa.

Ametoa sh 10,000 (ten thousand.)”

The agreement was signed both by **SIMON KHAEMBA MWANJA** and **MUMELO** and was witnessed. And although this second agreement is in **KISWAHILI** language and notwithstanding the provisions of **Section 23 of the Environment and Land Court Act** as amended in 2012, I shall consider the contents thereof as part of the evidence in this case for two reasons. Firstly, unlike the situation which I was confronted with in **BIBIANA NEKESA WANDALA (suing on her own behalf and on behalf of the Estate of WANDELA WANGILA NAMANGALA) .V. DALLAS WAFULA WAMALWA & OTHERS BUNGOMA ELC CASE NO 3 OF 2019**, where the agreements were in **KIBUKUSU** language which I don't understand, the agreement dated 18th April 1984 is in **KISWAHILI** language which I am fully conversant with. Secondly, I take the view that since **Article 7 (2) of the Constitution** provides that the official languages of the Republic are Kiswahili and English, this Court can invoke its inherent powers and the provisions of **Article 159(2) (d) of the Constitution** to admit in evidence a document that is in **KISWAHILI** language notwithstanding the provisions of **Section 23(1) of the Environment and Land Court Act**. Basically, the agreement dated 18th April 1984 is that the plaintiff's late father **SIMON KHAEMBA MWANJA** purchased a further 5¼ acres out of the suit land making a total of 9 acres.

As the defendants did not attend Court to controvert the plaintiffs evidence, I have no doubt in my mind that the plaintiff went into occupation of the suit land in 1982 and 1984 pursuant to the two agreements whose contents speak for themselves. I am also fortified in this view by the ruling of **OMOLLO J** dated 22nd May 2014 in which the Judge enjoined the defendants from invading, evicting or demolishing the plaintiff's house or trees pending the hearing and determination of this suit. In that ruling **OMOLLO J** made the following remarks in paragraph 5: -

“The Applicant has submitted he had been on the land for over 30 years. According to him, he has been peacefully utilizing the suit land until 3rd January 2014 when some people went to cut his mature trees claiming to have bought the land from the Respondents. This fact has not been denied by the Respondents. The Respondents also admitted the Applicant's son having put up a semi – permanent house on the land in September 2013 which they did nothing to stop the construction from going on.”

It is also obvious to me that the defendants have conceded, in paragraphs 4 and 8 of the 1st defendant's replying affidavit dated 13th October 2013, that the plaintiff has indeed been in occupation of the suit land. It is deponed in those two paragraphs as follows: -

4: “That infact the Applicant and his son one KENNEDY WAKOTO WASWA have been busy engaging in encroachment activities and his said son said (sic) purported to put up a semi-permanent structure on the suit land sometime late September 2013 and we have since moved to stop him from engaging in the said unlawful actions as the same are likely to cause a breach of the peace.”

8: “That it is also worth noting that the Applicant stays 200 metres away from the suit land and has been busy leasing portions on (sic) the suit land to strangers who have been ploughing the same to plant various types of crops including maize, grains, potatoes etc. without our express consent and/or authority.”

The plaintiff's occupation and possession of the suit land is not, in my view, a matter that the defendants can deny.

Section 38(1) of the Limitation of Actions Act allows a person to move to this Court for an order that he be registered as the proprietor of land or a lease in place of the person registered as proprietor thereof. In **KASUVE.V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a person claiming to be entitled to land by way of adverse possession must prove and 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 discontinuation of possession by the owner on his own volition.”

It is now well settled that the combined effect of the relevant provisions of **Section 6, 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**.

Similarly, the new land laws promulgated after the 2010 Constitution recognize the doctrine of adverse possession. **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 provides that: -

“Title to land may be acquired through –

(a) –

(b) –

(c) –

(d) prescription”

A person claiming land by way of adverse possession must prove 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 open, peaceful 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 in – action of the owner. The essential pre – requisites being that the possession of the adverse possessor is neither by force or stealth or 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.”

There is nothing to suggest that the defendants, or even before that, their father **MUMELO** took any legal action to assert their rights over the suit land from 1982 upto the time this suit was filed in 2013. That would have been the only way in which time for purposes of adverse possession would have been interrupted. And neither has the plaintiff admitted the defendants’ right to the suit land – **GITHU .V. NDEETE 1984 KLR 776**. Indeed, it is clear from the evidence in this case that the defendants only started asserting their rights to the suit land in 2013 after it was registered in their names. That is what prompted the plaintiff to move the Court by filing this suit and obtaining injunctive orders to restrain the defendants from interfering with his occupation of the suit land. By then, the plaintiff had been in occupation of the suit land for over 30 years well in excess of the 12 years provided for in law which would entitle him to orders in adverse possession.

A casual look at the Green Card in respect to the suit land annexed to the Originating Summons would seem to suggest that the suit land was first registered in the names of **KHAEMBA MUMELO** on 22nd May 2013 being the first registration. That would, of course, defeat the plaintiff’s claim to the suit land by way of adverse possession because time would start to run from that date meaning that by the time this suit was filed on 31st October 2013, the 12 years Limitation period had not lapsed. However, a further perusal of the said Green Card in the encumbrances section shows that infact as far back as 19th December 1975, the suit land had been changed to the Agricultural Finance Corporation to secure a loan of Kshs. 7,300/= . However, in both the sale agreements dated 19th December 1982 and 18th April 1984, the suit land is clearly identified by it’s registration number being **EAST BUKUSU/NORTH KANDUYI/748**. Therefore, the suit land was not first registered in the names of **KHAEMBA MUMELO** on 22nd May 2013, as the Green Card, at a casual glance, appears to suggest.

The 1st defendant in his replying affidavit appears to suggest that the plaintiff only moved onto the suit land in September 2013 when he put up a semi – permanent structure thereon. However, the evidence of the plaintiff as supported by his witnesses that **MUMELO** migrated to Kitale after selling the suit land to the plaintiff’s father in 1982 was not rebutted. And by planting trees and other crops on the suit land, the plaintiff dispossessed the defendants and, before them, **MUMELO** of the suit land and used it openly as his property. And time, for purposes of adverse possession, started to run in 1982 when the plaintiff took possession of the first 3.7 acres and for purposes of the 5¼ acres, it started to run in 1984. Whether time is computed from 1982 or 1984, the Limitation period of 12 years has been met. I am satisfied therefore that the plaintiff’s claim to part of the suit land by way of adverse possession is well founded.

In the preceding paragraph of this Judgment, I have deliberately used the words *“part of the suit land”* for reasons that I shall now explain.

At the commencement of this Judgment, I wondered aloud as to why the plaintiff had only filed this Originating Summons as against the 1st and 2nd defendants yet the suit land is currently registered in the names of those two defendants and their six siblings. It must be remembered that the two defendants have not been sued as the Administrators of the Estate of **MUMELO**. They have been sued in their own capacities as the current registered proprietors of the suit land which in any event is no longer registered in the names of **MUMELO**. In the circumstances, I do not think that any orders in adverse possession can be made against the other six owners of the registered land without them having been enjoined in this suit as defendants. That would amount to an arbitrary violation of their rights to property and would also be against the rules of natural justice in that they will have been condemned un – heard. It is not clear to me why the plaintiff did not file this suit against all the registered proprietors of the suit land and only chose the two defendants herein. What is clear however is that whatever orders this Court will make at the end of this Judgment can only relate to the two defendants herein and not the other co – owners of the suit land as per the Certificate of Search herein. That means therefore, that whereas the plaintiff would have been entitled to the whole of the suit land by way of adverse possession, he can only be awarded the land equal to the shares of the two defendants because those are the only owners that were sued. Orders in adverse possession can only be against the persons registered as the proprietors of the land in dispute or the Administrators of their Estates. And since the combined shares of the two defendants in the suit land is only 3.0 acres (see the Certificate of Search), that, unfortunately for the plaintiff, is the only land that this Court can award him. It was fatal on his part in failing to sue the other proprietors of the suit land.

Ultimately therefore and having considered the evidence by the plaintiff and his witnesses, un – controverted as it is, I enter Judgment for him as against the defendants in the following terms: -

1. An order is made that the plaintiff is entitled to be registered as proprietor of 3.0 acres out of the land parcel NO EAST BUKUSU/NORTH KANDUYI/748 by way of adverse possession.
2. The rights of the defendants in 3.0 acres out of the land parcel NO EAST BUKUSU/NORTH KANDUYI/748 has been extinguished by effluxion of the law.
3. The defendants shall execute all the relevant documents to facilitate the registration of 3.0 acres out of the land parcel NO EAST BUKUSU/NORTH KANDUYI/748 in the names of the plaintiff within 30 days from to-day.
4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to execute such documents on behalf of the defendants herein.
5. The defendants shall meet the Costs of the suit.

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.