REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO 107 OF 2017

SOLOME NALIAKA WABWILE...PLAINTIFF

VERSUS

ALFRED OKUMU MUSINAKA..DEFENDANT

J U D G M E N T

This case, sadly, is another illustration of the pitfalls that lay litigants encounter in an attempt to assert what they consider to be their legitimate rights to land. A very emotive subject indeed in this country.

SALOME NALIAKA WABWILE (the plaintiff herein and acting in person) moved to this Court by what I refer to as a ***"home – made plaint"*** dated 24th August 2017 in which she sought the following main order as per paragraph 9 thereof: -

> ***"The plaintiff's claim against the defendant is the IMMEDIATE nullification or cancellation of title in respect of title NO BUNGOMA/KABISI/61 and the same be registered in the plaintiff's name and the plaintiff be paid costs of this suit."***

The basis of the plaintiff's claim is that she is the Administrator of the Estate of her late husband **FRANCIS WABWILE** (the deceased) who before his death in 1996, had purchased the land parcel **NO BUNGOMA/KABISI/61** (hereinafter the suit land) measuring 15 acres from one **JOSEPH KATUKHULU** (hereinafter **KATUKHULU**) in 1971. That the plaintiff and her family immediately settled on the suit land which however became the subject of a dispute between the deceased and the defendant's father at the **TONGAREN LAND DISPUTES TRIBUNAL** which ruled in favour of the deceased. The **TRIBUNAL**'s award was subsequently adopted as a Judgment of the Court in **KIMILILI RMCC NO 20 OF 2000** and a vesting order was signed by the Court's Executive Officer to the effect that the said land be transferred to the plaintiff. However, that vesting order was not effected and instead, the defendant secretly and unlawfully obtained title to the suit land in his name on 18th April 2017 thus necessitating this suit.

ALFRED OKUMU MUSINAKA (the defendant herein) filed a defence and Counter – Claim in which he pleaded, inter alia, that the plaintiff has no locus standi to institute this suit and that the suit land belonged to his late father **DESTERIO MUSINAKA KHAOYA** (hereinafter **KHAOYA**) and was registered in his names after the Succession process. He denied that **KHAOYA** had sold the suit land prior to his death and added that **KATUKHULU** had no capacity or authority to transact over the suit land on behalf of **KHAOYA**. He added that the proceedings in the **TRIBUNAL** were null and void with no binding force in law and the orders sought by the plaintiff are therefore not available.

In his Counter – Claim, the defendant pleaded that he is the registered proprietor of the suit land following the succession process yet the plaintiff has unlawfully invaded the same and built a house in total disregard of the defendant's proprietary rights. The defendant therefore sought Judgment against the plaintiff as per his Counter – Claim in the following terms: -

> **1. Eviction order.**
>
> **2. A permanent order of injunction restraining the plaintiff, by herself, her agents, workers, servants and whomsoever claiming through her from entering, occupying trespassing and or in any manner interfering with the defendant's use occupation and access to the land parcel NO BUNGOMA/KABISI/61.**
>
> **3. Costs of this suit.**
>
> **4. Any other relief that the Honourable Court deems fit and just to grant.**

The hearing commenced on 25th March 2013 and each of the parties testified and called one witness. Although the plaintiff had filed her plaint in person, **MR WACHANA** appeared for her during the trial while **MR MILLIMO** appeared for the defendant.

During the trial, both parties and their witnesses adopted their respective statements and produced their list of documents.

In her statement dated 24th August 2017, the plaintiff repeated the averments in her plaint which I have already summarized above.

Her witness **JOHN SIMIYU KONJE (PW 2)** also adopted as his evidence his un – dated statement filed herein on 29th April 2019. He states thereon that he is a neighbour to the plaintiff and knew the deceased who died in 1996. He adds that the deceased bought the suit land from one **KATUKHULU** but the defendant fraudulently registered it in his names and has not developed it. That the deceased was buried on the suit land and nobody made any claim with regard to it during the **LUFU** ceremony. He did not explain what the **LUFU** ceremony is all about but I have been in **BUNGOMA** long enough to learn that it is a ceremony held after the burial of a person when, inter alia, creditors are expected to put forward their claims which are then noted.

The defendant similarly adopted as his evidence his witness statement filed on 6th November 2017 and his list of documents dated 15th November 2017. Contents of that statement are as per the defence and Counter – Claim summarized above. He urged the Court to dismiss the plaintiff's claim and enter Judgment for him as prayed in the Counter – Claim.

He called as his witness his sister **AGNETA NASIMIYU WAMALWA (DW 2)** who adopted as her evidence her un – dated statement filed on 6th November 2017 in which she has stated, inter alia, that the defendant acquired ownership of the suit land from their late father **(KHAOYA)** following a succession process. That the land had a loan which their late father and the family cleared and they have a discharge to confirm the same. However, in 1981, his late father was attacked and injured using a spear and the house he had constructed thereon was torched together with all the items following a land dispute between him and the deceased. That despite numerous attempts to evict the plaintiff, she has refused and continues to unlawfully occupy the suit land.

I have considered the evidence by both parties and their witnesses, the documents filed and the submissions by both **MR WACHANA** counsel for the plaintiff and **MR MILLIMO** counsel for the defendant.

I have identified the following issues for determination: -

> **1. Whether the plaintiff has any right to the suit land known in law to enable this Court make orders that the same be registered in her names.**
>
> **2. Whether the defendant's title to the suit land was infact obtained fraudulently and should be cancelled.**
>
> **3. Whether the plaintiff should therefore be evicted from the suit land and she and her servants, agents or any persons claiming through her should be injuncted therefrom.**

Among the ways in which one can acquire property in land include through a sale or transmission. The plaintiff's case is predicated upon a claim that the deceased purchased the suit land from one **KATUKHULU** in 1971 and took possession. She did not say if there was any written or oral agreement to that effect. She added however that there was a land dispute between her and **KHAOYA** which was determined in her favour by the **TONGAREN LAND DISPUTES TRIBUNAL** and the award was adopted as a Judgment of the **KIMILILI RM'S COURT** and a decree was issued that the suit land be registered in her names. It is however not clear why that decree was not executed way back in 2004 when it was issued. The vesting order that was subsequently issued by **HON. R. O. OIGARA (SRM KIMILILI)** on 11th August 2009 reads: -

> ***"VESTING ORDER***
>
> ***IT'S HEREBY ORDERED THAT:***
>
> ***1. The land parcel NO TONGAREN/KIBISI/61 of fifteen acres be left to the widow SALOME NALIAKA NABWILE to develop it assisted by her orphaned five sons. The Executive Officer of this Court is hereby authorized by this Court to sign the relevant documents on behalf of the objector to facilitate the subsequent transfer of the said parcel of land to SALOME NALIAKA WABWILE.***
>
> ***2. The signing of the necessary documents by the objector is hereby dispensed with.***

The Executive Officer of the Subordinate Court duly executed the transfer forms as directed in the vesting order. However, no rights in the suit land passed to the plaintiff, because the said transfer was not effected. This is clear from paragraph eight (8) of the plaint.

The plaintiff has stated, and it is not denied, that she and the deceased took possession of the suit land in 1971 following the purchase from **KATUKHULU** before **KHAOYA** started claiming it. The plaintiff 's occupation of the suit land from 1971 not being in doubt at least upto the time she started having problems with **KHAOYA**, I have agonized whether she acquired the same by way of overriding interests as provided for under **Section 28 of the new Land Registration Act** or **Section 30 of the repealed Registered Land Act** under which the suit land is registered. The only such interest that the plaintiff could have acquired is one by way of adverse possession if there was evidence that she had occupied, continuously and without interruption for a period of 12 years **– KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 K.L.R 184**, **WANJE .V. SAIKWA 1984 KLR 284** and **MTANA LEWA .V. KAHINDI NGALA MWAGANDI 2015 eKLR** among other cases. However, and that is why at the commencement of this Judgment I described this case as a sad one, the plaintiff's

claim to the suit land is not by way of adverse possession or even trust. It is based on a purchase in 1971 as supported by a Court decree that was never executed. In any event, it is clear that any claim based on adverse possession would not have been sustainable because there is also evidence that in 1981, **KHAOYA**'s house on the suit land was torched and he was attacked following a dispute with the deceased. This is what the defendant has stated in paragraphs 5, 6, 8 and 9 of his statement: -

> ***5: "In 1981, my late father built a house on the land and started to live on the land. In the same year, my late father was attacked and injured with a spear, the house was torched and all the items in the house burnt."***

> ***6: "At that time, there was a dispute of ownership over the land between my late father and the late husband to the plaintiff named FRANCIS WABWILE."***

> ***8: "There have been numerous attempts by my late father and myself to have the defendant (sic) evicted out of the suit land but she has always resisted the same."***

> ***9: "The action of the plaintiff and his family to invade the suit land as above stated is unlawful and is infringing on my proprietary rights and has exposed me to commercial losses and I continue to suffer loss for the time I am not in use of the land."***

The above was also confirmed by the defendant's sister **AGNETA NASIMIYU WAMALWA (PW 2)**. I have also perused the proceedings in **TONGAREN LAND DISPUTES TRIBUNAL** dated 6th April 2000 produced by the plaintiff as part of her documents. This is what she said in support of her case against **KHAOYA**: -

> ***"My husband was FRANCIS WABWILE who is now dead (1996). In 1971 he bought land known as TNG/KIBILISI/PLOT NO 6 of fifteen acres for Kshs. 3,900 cash from one JOSEPH KATUKHULU who is now also dead (1985).***

> ***We established the said plot immediately we bought it and have lived there ever since and nobody else has ever lived in.***

> ***However, one night in 1971, one later on known to be MUSINAKA KHAOYA came at night and started constructing a house. When my husband heard, he went there and immediately they fought ending up in stopping the intruder. The case was reported to our area Chief and on ending up in Webuye Court in December 1975.***

> ***MUSINAKA lost the case and was thrown out. My husband never stopped there. He had also reported the incident to our D.O TONGAREN who called both JOSEPH KATUKHULU (who had sold the plot to us) and MUSINAKA KHAOYA plus their witnesses."***

Therefore, from the plaintiff's own testimony as adduced in the **TRIBUNAL**, and which appears to lend evidence to the defendant's testimony, it is clear that the plaintiff's occupation of the suit land has not been peaceful. Indeed, from her own testimony in the **TRIBUNAL**, disputes between the deceased and **KHAOYA** started in the same year that they took possession of the suit land (1971), and not even in 1981 as stated by the defendant. Whether the disputes started in 1971 or 1981, what is clear beyond peradventure is that the dispute started before the expiry of the 12 years' statutory period that would have entitled the plaintiff to orders in adverse possession. A person claiming land by way of adverse possession must prove that his occupation is peaceful. In **KIMANI RUCHIRE .V. SWIFT RUTHERFORDS & CO. LTD 1980 KLR 10, KNELLER J** held that: -

> ***"The plaintiffs have to prove that they have used this land which they claim as of right nec vic nec clam nec precario (no force, no secrecy, no persuasion."***

See also **GRACE WAIRIMU SORORA .V. CHAKA LTD & OTHERS 2017 eKLR** where the Court of Appeal said: -

> ***"What the Appellant needed to prove was that her occupation was***

> ***continuous, open and peaceful without permission of the owner."*** Emphasis added.

If, as per the plaintiff's own testimony in the Tribunal, her family and **KHAOYA** had disputes from 1971 and the matter was even reported to the Chief and ended up in Court at **WEBUYE** in 1975, then her occupation of the suit land cannot be described as peaceful.

It is also clear from the documents filed by the defendant herein that until 24th March 2000 when **KHAOYA** paid the last instalment of Kshs. 760.00/=, the suit land was still under the Settlement Fund Trustee. It was not until 14th November 2000 that the discharge was prepared vide the **DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICE** vide their letter ref **DSC/B/12/61/65**. The title to the suit land was subsequently issued to the defendant on 18th April 2017. Time for adverse possession does not run where the land belongs to the Government. **Section 41(a)(i) of the Limitation of Actions Act** provides that: -

> ***"This Act does not –***

> ***(a) enable a person to acquire any title to, or any easement over –***

> ***(i) Government land or land otherwise enjoyed by the Government."***

Time could only have started to run in 2017 which is the same year that this suit was filed.

Although I have considered the issue as to whether the plaintiff may, due to her occupation and possession of the suit land, be entitled to orders that she is entitled to the same by way of adverse possession, I am of course cognizant of the fact that in an adversarial system like ours, Courts only determine disputes on the basis of the parties' pleadings. In **CANDY .V. CASPAIR AIR CHARTERS LTD 1956 23 E.A.C.A 139 SIR SINCLAIR V.P** said: -

> ***"The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them so that each may have full information on the case he has to meet and prepare his evidence to support his case to meet that of the opponent. As a rule, relief not founded on the pleadings will not be given."***

There is however an exception to that rule and it was stated by **DUFFUS P** as follows in the case of **ODD JOBS .V. MUBIA 1970 E.A 476**: -

> ***"Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the Court. In this respect a trial Court may frame issues on a point not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."***

In the circumstances of this case, the issues of adverse possession or trust were neither pleaded nor raised in the evidence by the parties in order to enable this Court make a decision on them. In any case, even if the principle in **ODD JOBS .V. MUBIA** (supra) was to be invoked in this suit, the evidence would still not support those claims.

The plaintiff's case is that she is entitled to be registered as the proprietor of the suit land following the purchase thereof by her husband in 1971 and the subsequent Decree issued in **KIMILILI RM'S CASE NO 20 OF 2000** on 16th November 2004 and the Vesting Order issued on 11th August 2009. It is clear to me that the plaintiff's suit is geared towards executing the said Decree and Vesting Order in her favour. That is not legally possible for the following reasons.

Firstly, the said Decree and Vesting Order were issued against **KHAOYA** who by then was deceased having died on 2nd January 2002. The Vesting Order was also issued against the deceased on 11th August 2009 some seven (7) years after his death. Those were essentially execution proceedings against a Judgment – Debtor long after his death. They were not proceedings against the defendant herein who was only appointed as the Administrator of his late father's Estate on 12th June 2014 vide **KITALE HIGH COURT SUCCESSION CAUSE NO 69 OF 2014**. Those proceedings were irregular because under **Section 37(1) of the Civil Procedure Act**, it is provided as follows: -

> ***"Where a Judgment – Debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of such deceased or against any person who has intermeddled with the Estate of such deceased."***

Since the plaintiff is clearly intent on executing the Decree issued on 16th November 2004 against the defendant as the legal representative of **KHAOYA**, she was obliged to make an application to that effect. This was considered by the Court of Appeal in **BAKARI IBRAHIM.V. ISSA IBRAHIM 2016 eKLR** when it said: -

> ***"In our view, the words "may apply" as used in Section 37 of the Civil Procedure Act signify that a Judgment – Creditor may elect to execute a decree or order against the legal representative of a deceased Judgment – Debtor. However, if the Judgment – Creditor elects to do so he must, in our Judgment, make an application to execute against the legal representative of such deceased person."***

No such application was made by the plaintiff in this case which, as is now obvious, is predicated on orders issued against a deceased person.

Secondly, even assuming that the plaintiff could legally execute the decree against the defendant, the same is statute barred by virtue of the provisions of **Section 4(4) of the Limitation of Actions Act** which provides that an action may not be brought upon a Judgment after the end of twelve years from the date on which the Judgment was delivered. It is not clear when the Subordinate Court adopted the Tribunal's award as it's Judgment. However, the decree was issued in 2004 but was not executed. This suit having been filed in 2017 with the main purpose of enforcing that decree is well out of time. At least that is what is conveyed by paragraph 6, 7 and 8 of her plaint. When she pleads about the Tribunal's award and the subsequent Judgment, the Vesting Order and the transfer that was not effected.

Thirdly, and most important, the defendant herein was not a party in the proceedings in the **TRIBUNAL** and the **RESIDENT MAGISTRATE'S COURT AT KIMILILI**. Therefore, the Judgment that was obtained following those proceedings cannot bind him. He is a stranger to the Decree, Vesting Order and any other orders that may have been obtained as a result of the said Judgment.

In my view, what the plaintiff ought to have done was to execute the decree in **KIMILILI RESIDENT MAGISTRATE'S COURT CIVIL CASE NO 20 OF 2000** before the demise of **KHAOYA**. The route she took by filing this case in an attempt to execute the decree obtained in the Subordinate Court is irregular. This is because, **Section 34(1) of the Civil Procedure Act** provides as follows: -

> ***"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate***

***suit.*"** Emphasis added.

That is really what the plaintiff ought to have done, and even then, within the limitation period. That window, unfortunately, is now closed.

Meanwhile, the defendant acquired ownership of the suit land in 2017 following succession proceedings at **KITALE HIGH COURT SUCCESSION CAUSE NO 69 OF 2014** as a result of which the grant was confirmed by **J R KARANJA J** on 25th June 2015. Thereafter, he obtained the title deed on 18th April 2017. It is this title that the plaintiff seeks to be cancelled and the suit land be registered in her names.

Under **Section 261(1) of the Land Registration Act**, the registration of the defendant as the proprietor of the suit land is prima facie evidence that he is the indefeasible owner thereof. However, the title can be challenged if: -

(a) It was obtained through fraud or misrepresentation to which the registered owner is proved to have been a party;

or

(b) Where the title was acquired illegally, un-procedurally or through a corrupt scheme.

In seeking to have the defendant's title cancelled, the plaintiff pleaded in paragraph 8 of her plaint that it was obtained unlawfully on 18th April 2017. However, no evidence was led by her to demonstrate in what manner the registration of the suit land in the defendant's names was unlawful. On his part, however, the defendant has testified that the suit land was first registered in **KHAOYA**'s names during the adjudication process in 1968 and that it had a loan with the Settlement Fund Trustees which his family cleared before acquiring the title. Two receipts issued by the Settlement Fund Trustees for Kshs. 6,950/= and Kshs. 760/= and dated 20th March 2000 and 24th March 2000 respectively were produced as part of the defendant's documents. Therefore, not only has the plaintiff failed to prove that the defendant obtained registration of the suit land in his names through fraud or other unlawful, corrupt or un – procedural means but, to the contrary, the defendant has adduced congent evidence showing that the registration was above board and cannot therefore be cancelled.

In his submissions, counsel for the plaintiff stated as follows: -

> ***"It is our humble submission this title deed was obtained through fraudulent means and the same should be nullified and the defendant to be compelled to pay costs of this suit.***
>
> ***The plaintiff obtained a vesting order and the same was signed by the Executive Officer of KIMILILI COURT as a Judgment of the Court. The land parcel was transferred to the plaintiff."*** Emphasis added.

Submissions are not evidence. Fraud must be pleaded and proved. In **ARTHI HIGHWAY DEVELOPERS LTD .V. WEST END BUTCHERY LTD C.A CIVIL APPEAL NO 246 OF 2013 (NBI)**, the Court affirmed the following passage from **BULLEN & LEAKE PRECEDENTS OF PLEADING 13TH EDITION** at page 427: -

> ***"It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice."***

In the absence of pleadings and evidence to prove fraud to the required standard, the submissions by counsel remain hollow.

The bottom line therefore is that whereas the plaintiff has proved that she is in occupation of the suit land, there is no basis upon which the Court can cancel the defendant's title. That occupation in itself does not translate into any legal rights over the suit land to justify it 's registration in her names. And I say so with a lot of sympathy for the plaintiff. However, the duty of this Court is to apply and enforce the law. In **CHALICHA FARMERS CO – OPERATIVE SOCIETY LTD .V. GEORGE ODHIAMBO & OTHERS C.A CIVIL APPEAL NO 27 OF 1986 [1987 eKLR], APALOO J.A** (as he then was) had the following to say on that issue:-

> ***"A Court is governed by principles of law, not the hardship of any individual case. The Judge's feeling of sympathy cannot be an acceptable substitute for the law. There is justice to a plaintiff as well as to a defendant and it would, in my Judgment, be an intolerable negation of justice, if a Judge were free to inject his own subjective feeling of sympathy for a party in defiance of his opponent's legally proven right"***

That, however, is not to say that in the discharge of their duties, Courts should be impervious to sympathy. Indeed, the common adage is that in appropriate cases, justice should be tampered with mercy. However, in doing so, the Court must always tread carefully in order not to appear to be abrogating or trampling on the other party's rights.

Contrary to her counsel's submissions, the suit land was never ***"transferred to the plaintiff."*** If it was, there is no evidence placed before this Court as proof of such transfer. Indeed, that is one of the prayers that she seeks in paragraph 9 of her plaint which I referred to at the commencement of this Judgment wherein she seeks an order that the suit land be registered in her names. On the available evidence, that would violate the defendant's right to property as enshrined in **Article 40 of the Constitution**.

The up – shot of the above therefore is that having considered the evidence by both parties, there shall be Judgment in the following terms: -

1. The plaintiff’s suit is dismissed.

2. The defendant’s Counter – Claim is allowed as follows: -

(a) The plaintiff shall vacate the land parcel NO BUNGOMA/KABISI/61 within 6 months from the date of this Judgment or be evicted therefrom in accordance with the relevant provisions of Section 152 of the Land Act.

(b) Thereafter, the plaintiff by herself, her agents, workers, servants and any other persons claiming through her shall be permanently injuncted from entering, occupying trespassing or in any other manner interfering with the defendant’s use occupation and access to the land parcel NO BUNGOMA/KABISI/61.

3. Costs follow the event. However, in the circumstances of this case and given the age of the plaintiff who is a widow, I direct that each party meets their own costs.

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.