



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 63 OF 2018 (O.S)

IN THE MATTER OF SECTION 7, 17 & 38 OF THE LIMITATION OF ACTIONS ACT

IN THE MATTER OF LAND PARCEL NO. W. BUKUSU/N. MYANGA/1516

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

WANAMBUKO NYONGESA MUKETHE PLAINTIFF

VERSUS

PATRICK KITUYI NAMBALE1ST DEFENDANT

MICHAEL NANGABO NAMBALE 2ND DEFENDANT

JOHN MAKOKHA ELIJAH3RD DEFENDANT

SIMON SIKUKU ELIJAH4TH DEFENDANT

ANDREW BARASA KAKAI 5TH DEFENDANT

DANIEL KAKAI6TH DEFENDANT

HUMPHREY WEKESA WAFULA7TH DEFENDANT

RESILA KONGANI NAMBALE..... 8TH DEFENDANT

LORNA NDEREMA ELIJAH 9TH DEFENDANT

EVERLYN NEKESA MUNYASIA10TH DEFENDANT

J U D G M E N T

The plaintiff herein **WANAMBUKO NYONGESA MUKETHE** filed this Originating Summons on 20th November 2018 against: -

- 1. PATRICK KITUYI NAMBALE**
- 2. MICHAEL NANGABO NAMBALE**
- 3. JOHN MAKOKHA ELIJAH**
- 4. SIMON SIKUKU ELIJAH**
- 5. ANDREW BARASA KAKAI**

6. DANIEL KAKAI
7. HUMPHREY WEKESA WAFULA
8. RESILA KONGANI NAMBALE
9. LORNA NDEREMA ELIJAH
10. EVERLYN NEKESA MUNYASIA

(the 1st to 10th defendants respectively) seeking a determination of the following questions: -

- (a) Whether the plaintiff has been in open, continuous peaceful, exclusive and adverse possession of 7 acres of land forming part of land parcel NO WEST BUKUSU/NORTH MYANGA 1516.
- (b) In view of or consequent upon the answer in paragraph (a) above, whether the plaintiff is entitled to be registered as the proprietor of 7 acres forming part of land parcel NO WEST BUKUSU/NORTH MYANGA/1516.
- (c) Whether the 1st and 2nd defendants being the joint Administrators of the Estate of ELIJAH NAMBALE KAKAI should transfer 7 acres of the land parcel NO WEST BUKUSU/NORTH MYANGA/1516 to the plaintiff.
- (d) Whether the defendants are merely holding in trust for the plaintiff 7 acres out of the land parcel forming part of WEST BUKUSU/NORTH MYANGA/1516.
- (e) Whether in default of the defendants jointly executing the relevant documents to vest 7 acres out of land parcel NO WEST BUKUSU/NORTH MYANGA/1516 in the plaintiff's names, the Executive Officer or any other duly appointed officer of this Court should do so on their behalf.
- (f) Whether the defendant's title on the 7 acres in the said parcel of land has been extinguished by operation of the law.
- (g) Whether the costs of this summons should be borne by the defendants.
- (h) Whether this Honourable Court should grant any other alternative or further relief.

The plaintiff therefore sought the following orders: -

1. That the plaintiff has become entitled to 7 acres forming part of the land parcel NO WEST BUKUSU/NORTH MYANGA/1516 by adverse possession and/or by acquiring prescriptive rights thereon.
2. That the defendants do forthwith transfer 7 acres forming part of land parcel NO WEST BUKUSU/NORTH MYANGA/1516 to the plaintiff and in default thereof, the Executive Officer do execute all relevant documents for and on behalf of the defendants.
3. That costs of this application be borne by the defendants.

The Originating Summons is supported by the plaintiff's affidavit dated 19th November 2018 to which are annexed the following documents:

1. Certificate of rectification of grant in respect of the Estate of the late ELIJAH NAMBALE KAKAI issued to PATRICK KITUYI NAMBALE and MICHAEL NANGABO NAMBALE showing the manner in which the land parcel NO WEST BUKUSU/NORTH MYANGA/1516 was distributed among the defendants.
2. The Certificate of Search in respect to the land parcel NO WEST BUKUSU/NORTH NYANGA/1516 showing that the proprietors thereof are the defendants as per the grant, and,
3. A letter dated 2nd July 2018 from the Chief Kimaeti location addressed to the Land Registrar Bungoma in reference to the land parcel NO WEST BUKUSU/NORTH MYANGA/1516.

I need to point out that although the Certificate of rectification of grant issued by **ALI – ARONI J** on 18th August 2016 only describes the property as **WEST BUKUSU/NORTH MYANGA**, there is no doubt from the examination of the other documents herein that the land being referred to is the land parcel **NO WEST BUKUSU/NORTH MYANGA/1516** (hereinafter the suit land).

In his supporting affidavit, the plaintiff has averred, inter alia, that he is aged 94 years old and that the suit land is registered in the names of the defendants as the beneficiaries of the Estate of **ELIJAH NAMBALE KAKAI** (deceased) whose Administrators are the 1st and 2nd defendants. That he has been in occupation of 7 acres forming part of the suit land since 1979 where he has lived peacefully and exclusively and neither the deceased nor the defendants have ever occupied that portion. That he took occupation of the said 7 acres following a

purchase from one **MACHWENGE MANYURU KILIBOTI** who also sold land to the deceased. However, when the deceased processed his title, he included the plaintiff's portion therein. That since 1979, the plaintiff and his entire family have resided on the 7 acres and the defendants live in **KABULA LOCATION** some 10 kilometres away where the deceased migrated and settled his family. That the plaintiff has extensively developed the said 7 acres where he has put up both permanent and semi – permanent houses during his 39 years stay thereon where he and his family enjoy peaceful, open, exclusive and un – interrupted occupation growing trees and food crops. That he later learnt that the defendants had obtained a grant of Letters of Administration in respect to the Estate of the deceased without listing him as a person having a claim in the Estate. It is only fair that he be registered as the proprietor of the 7 acres and the defendants' rights thereto have been relinquished and they are now mere trustees.

The Originating Summons is opposed and the 1st defendant, on behalf of the other defendants, filed a replying affidavit dated 24th December 2018 in which he deposed, inter alia, that the plaintiff has not been in continuous, peaceful and exclusive possession of 7 acres comprised in the suit land and is a trespasser thereon. That the deceased sued the plaintiff in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE NO 551 OF 1994** which case was dismissed for want of prosecution. That the deceased later filed a suit at the **BUMULA LAND DISPUTES TRIBUNAL** but died before it could be determined. That the deceased who was the father to the defendants' was the sole proprietor of the suit land and the plaintiff ought to be evicted as he never purchased any land from the deceased and therefore this Originating Summons seeking orders in adverse possession is brought in bad faith, is frivolous and meant to dis – inherit the defendants of their rightful share to the deceased's Estate and should be dismissed with costs.

In addition to his supporting affidavit, the plaintiff also filed witness statements by his two witnesses namely **STEPHEN WEKESA LUKHALE (PW 2)** and **HENRY WANYONYI WANYAMA (PW 3)**.

In his statement **STEPHEN WEKESA LUKHALE (PW 2)** stated that he is a neighbour to the plaintiff who has lived with his family on the suit land since 1979. That on 18th October 1991 he attended a boundary dispute between the plaintiff and the deceased where it was resolved that each party remain in their respective portion with plaintiff retaining 7 acres and the deceased 8 acres. That the defendants have never lived on the suit land and instead sold their 8 acres and moved to **KABULA**.

On his part, **HENRY WANYONYI WANYAMA (PW 3)** stated in his statement that on 8th October 1991 he attended a meeting called by the elders after the deceased had complained that the plaintiff had occupied part of his land measuring 1 acre. That both the plaintiff and defendant had purchased land from one **WACHWENGE MANYURU KILIBOTI** and it had been agreed that the plaintiff was to get 7 acres and the deceased 8 acres. In the meeting, it was resolved that the deceased would transfer 7 acres to the plaintiff and the boundary was demarcated and the agreement was duly executed by both parties. That the plaintiff has been in open, continuous and peaceful occupation of 7 acres since 1979 to – date.

The 1st defendant did not file any replying affidavits from his co – defendants or statements from any witness.

The hearing commenced on 23rd January 2020 when the plaintiff and his witnesses testified while the 1st defendant was the only witness to testify on behalf of the defendants.

The parties and their witnesses basically adopted as their evidence their affidavits and witness statements contents of which I have already summarized above.

Submissions were thereafter filed both by **MR OTSIULA** and **MR ATEYA** counsel for the plaintiff and the defendants respectively.

I have considered the evidence adduced by both parties including the documents filed as well as the submissions by counsel.

The plaintiff's claim to 7 acres out of the suit land is based on adverse possession having occupied the same peacefully, openly, continuously exclusively and without interruption since 1979.

In **KASUVE .V. MWAANI INVESTMENTS LITD & 4 OTHERS 2004 1 KLR 184**, the Court of Appeal said the following about what a person claiming to be entitled to land by way of adverse possession must prove: -

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner on his own volition.”

Section 38 of the Limitation of Actions Act allows 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 the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the 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**. Possession of the land in dispute is a fact to be proved and observed on the land itself – **MAWEU .V. LIU RANCHING & FARMING CO – OPERATIVE SOCIETY LTD 1985 KLR 430**. It is also now well established that an adverse possessor can lay a claim to only a portion of the land in dispute so long as the same is well identified and further, that such occupation can only be interrupted when the owner thereof makes an effective entry or takes legal action against the adverse possessor – **GITHU .V. NDEETE 1984 KLR 776**.

The new land laws promulgated following the 2010 Constitution also recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** recognizes the following as overriding interests in land: -

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Similarly, **Section 7 of the Land Act 2012** provides that: -

“Title to land may be acquired through: -

(a) –

(b) –

(c) –

(d) prescription.”

The Court of Appeal recently described the doctrine of adverse possession as follows in the case of **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL NO 56 OF 2014 [2015 eKLR]: -**

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites 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.”

The plaintiff’s case is that since 1979 he and his family have been in exclusive peaceful and un – interrupted occupation of 7 acres out of the suit land where they have put up permanent and semi – permanent buildings and also grow crops. His evidence has been supported by that of his two witnesses **STEPHEN WEKESA LUKHARE (PW 2)** and **HENRY WANYONYI WANYAMA (PW 3)**. And although the 1st defendant in his replying affidavit at paragraph 5 denied that the plaintiff has been in continuous, peaceful and exclusive possession of 7 acres comprised in the suit land, he nonetheless conceded that the plaintiff has indeed trespassed onto the land. In paragraph 6 of the same affidavit, he depones that: -

“That it is true that the Applicant named herein above is a trespasser on the land known as W. BUKUSU/N. MYANGA/1516.”

By conceding that the plaintiff is a trespasser on the suit land, the 1st defendant is essentially confirming that the plaintiff is in possession and occupation of the suit land as deponed in the supporting affidavit. An adverse possessor is basically one who has taken possession of land registered in the names of another and proceeds to exercise rights thereon as the owner would for a period of 12 years without the owner taking any action to assert his rights thereon. In his submissions, **MR ATEYA** has stated that there are doubts if the plaintiff indeed purchased 7 acres out of the suit land from one **WACHWENGE MANYURU KILIBOTI** and if he did, then he should have claimed his share from the seller. My understanding of the plaintiff’s claim is that both he and the deceased father to the defendants bought their portions of land from the said **WACHWENGE MANYURU KILIBOTI** but when the deceased processed his title, he also registered himself as the proprietor of 7 acres which belonged to the plaintiff. The plaintiff nonetheless continued to occupy his portion measuring 7 acres while the deceased occupied 8 acres out of the original land parcel **NO WEST BUKUSU/NORTH MYANGA/140** which they had purchased from the said **WACHWENGE MANYURU KILIBOTI**. The plaintiff is not seeking to enforce any sale agreement between him and the said **WACHWENGE MANYURU KILIBOTI**. Such a claim would be statute barred. He has moved to this Court by way of adverse possession.

MR ATEYA has similarly submitted that the plaintiff had filed objections in **BUNGOMA SUCCESSION CAUSE NO 387 OF 2013** in which the Estate of the deceased was distributed and after that objection was dismissed, he filed this Originating Summons. Nothing stopped the plaintiff from filing this suit because his claim to the suit land by adverse possession could not have been determined by **ALI – ARONI J** in the succession cause.

As to whether the plaintiff’s occupation of 7 acres out of the suit land has been peaceful, the 1st defendant in paragraph 7 of his replying affidavit alluded to **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE NO 551 OF 1994** where the deceased had sued the plaintiff for trespass but which suit was dismissed for want of jurisdiction. The pleadings in that case were not availed for this Court’s perusal. **Section 109 of the Evidence Act** requires any person who wishes the Court to believe in the existence of any fact to prove the same. That notwithstanding, **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE NO 551 OF 1994**, if indeed it was filed, came too late because by that time, the plaintiff, who took possession of the 7 acres out of the suit land in 1979, had been in continuous, exclusive, peaceful and un – interrupted occupation thereof for a period of 15 years well beyond the statutory period of 12 years. That case could not therefore have legally interrupted the plaintiff’s occupation and possession of 7 acres out of the suit land. The 1st defendant admitted during cross – examination by **MR OTSIULA** that the plaintiff has always occupied the 7 acres out of the suit land and that the defendants have never utilized it. This is what he said: -

“We don’t live on the 7 acres which the plaintiff is demanding. The whole land parcel NO WEST BUKUSU/NORTH MYANGA/1516 measures 15 acres. It is true that before his death, my father was only using 8 acres. It is true that the plaintiff lives on 7 acres. None of the defendants utilize the suit land which is being claimed by the plaintiff. My father moved elsewhere to KABULA where he was buried.”

And with regard to the dispute between the plaintiff and the deceased, the 1st defendant said: -

“By the time my father died in 1994, the plaintiff was living on the land in dispute. I am not aware of any boundary dispute.”

Although the plaintiff’s witnesses alluded to some boundary dispute between the plaintiff and the deceased in 1991, it is clear from their evidence herein that it was not with regard to the whole of the 7 acres but it involved 1 acre and was resolved amicably. This is what **STEPHEN WEKESA LUKHALE (PW 2)** stated in his witness statement at paragraph 9 and 10: -

9: “That on 8th day of October 1991, I attended a boundary dispute between the Applicant and the deceased ELIJAH NAMBALE where it was resolved by village elders that each of the parties remain on their respective portions.”

10: “That the Applicant WANAMBUKO NYONGESA MUKETHE was to remain with 7 acres while ELIJAH NAMBAL was to remain with 8 acres of land.”

The same was repeated by **HENRY WANYONYI WANYAMA (PW 3)** and the minutes of that meeting were part of the plaintiff’s documents (document **NO. 1**). However, those **MINUTES** were in **KIBUKUSU LANGUAGE** which is not among the languages of the Court and there was no translation into the **ENGLISH** language as required by law and therefore those minutes do not aid this Court. That notwithstanding, it is clear from the oral evidence given by he said witnesses as well as their statements that the boundary dispute between the plaintiff and the defendant was a one – off incident which was amicably resolved on 8th October 1991 after which the plaintiff and his family continued to live peacefully on the 7 acres of the suit land.

MR ATEYA also posed the following question in his submissions: -

“Your Lordship, the question ought to be asked, how can one purchase the land and later demand to own it by way of adverse possession.”

The answer to that question is that it is possible to enter the disputed land as a purchaser and later claim it by way of adverse possession if the sale agreement, for one reason or another, aborts but the purchaser remains in possession. A good example is where following a land sale agreement that is subject to the Land Control Board’s consent, the seller refuses to obtain the Board’s consent but the purchaser remains in occupation for the statutory period peacefully, exclusively and without interruption. A claim for adverse possession can be sustained in those circumstances – See **PUBLIC TRUSTEE & BEATRICE MUTHONI .V. KAMAU WANDURU C.A CIVIL APPEAL NO 73 OF 1982** and **GATIMU KUNGURU .V. MUYA GATHANGI 1976 KLR 53** among other cases.

MR ATEYA finally submitted that the plaintiff had not proved his case to the required standard. From my evaluation of the evidence by both parties, I am satisfied that the plaintiff has proved that he is entitled to be registered as the proprietor of 7 acres out of the suit land having acquired the same by way of adverse possession. His occupation of the said portion since 1979 is not really in doubt and is in fact conceded by the 1st defendant. That occupation has been peaceful, exclusive, open, un – interrupted and with the knowledge of the defendants. The only suit that could have interrupted it, being **BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE NO 551 OF 1994**, came long after the plaintiff’s claim to the 7 acres had crystalized and the defendants as the registered proprietors of the suit land are now mere trustees holding it in trust for the plaintiff. The plaintiff is therefore entitled to the orders sought in his Originating Summons dated 19th November 2018 and filed herein on 20th November 2018. As per the Certificate of Search herein, the defendants were registered as owners of the suit land on 26th September 2012 although the same was previously registered in the names of the deceased since 25th October 1988. However, a change of ownership of land which is occupied by another under adverse possession does not interrupt a claim in adverse possession – **GITHU .V. NDEETE** (supra).

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

- 1. An order is issued that the plaintiff is entitled to 7 acres out of land parcel NO WEST BUKUSU/NORTH MYANGA/1516 by way of adverse possession.**
- 2. The defendants shall within 30 days of this Judgment execute all the relevant documents to facilitate the transfer of 7 acres out of the land parcel NO WEST BUKUSU/NORTH MYANGA/1516 in the names of the plaintiff.**
- 3. In default of (2) above, the Deputy Registrar of this Court shall execute all the relevant documents on behalf of the defendants to facilitate the transfer of 7 acres out of the land parcel NO WEST BUKUSU/NORTH MYANGA/1516 in the names of the plaintiff.**
- 4. The defendants shall meet the plaintiff’s 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 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.