



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO. 77 OF 2007**

**IN THE MATTER OF LAND REFERENCE NO. BOKOLI/KITUNI/341 AND**

**BOKOLI/KITUNI/343**

**AND**

**IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**WASIKE SIMWELO SHEM.....PLAINTIFF**

**AND**

**FREDRICK WAFULA NABEKI (DECEASED)**

**(substituted by JOAB M. WAFULA).....DEFENDANT**

**JUDGEMENT**

**WASIKE SIMWELO SHEM**, (the Plaintiff herein), filed this Originating Summons on 5<sup>th</sup> November 2007 against **FREDRICK WAFULA NABEKI** (the defendant who later passed away on 1<sup>st</sup> October 2011 and was, by consent of the parties dated 13<sup>th</sup> September 2012, substituted by **JOAB M. WAFULA**) seeking a determination of the following questions:

- 1. Whether or not the plaintiff herein has been in occupation of land parcels No. L.R. BOKOLI/KITUNI/341 and BOKONI/KITUNI/343 openly, continuously and peacefully for a period exceeding 12 years.*
- 2. Whether the Defendants title over the said parcels of land has been extinguished by operation of the law.*
- 3. Whether the plaintiff should be registered as the proprietor of the said parcels of land in place of the defendant herein.*
- 4. Whether the Court should order the plaintiff to be registered as the proprietor of the said parcels of land in place of the defendant herein.*
- 5. Whether the plaintiff has become entitled to the said parcels of land by the concept of adverse possession.*
- 6. Who should pay the costs of this suit.*

The Originating Summons was, as required, accompanied by the plaintiff's supporting affidavit dated 5<sup>th</sup> November 2007 as well as copies of the register confirming that the land parcels **No. BOKOLI/KITUNI/341** and **BOKOLI/KITUNI/343** (hereinafter the suit land) are registered in the names of **FREDRICK WAFULA NABEKI** (hereinafter the deceased). According to paragraph 10 of the said supporting affidavit, the plaintiff has been in exclusive, open and continuous occupation of the suit land since the early 1960's and nobody has ever laid claim to the same and that the deceased has never lived on the suit land and instead lives some 5 kilometers away. It is the plaintiff's averment therefore that having lived on the suit land for a period in excess of 12 years, without any interruption, the deceased's title has been

extinguished and the plaintiff is entitled to the suit land by adverse possession.

The deceased filed a replying affidavit dated 18<sup>th</sup> December 2007 in which he averred, inter alia, as follows:

- 1. That he is the registered proprietor of the suit land which was originally registered in his father's names before being transferred into his names on 26<sup>th</sup> May 2004.**
- 2. That the plaintiff owns his own parcel of land No. BOKOLI/KITUNI/841 and has never had exclusive possession of the suit land and is therefore not entitled to orders in adverse possession or at all.**
- 3. That there exists a boundary dispute between the parties which is yet to be resolved.**
- 4. That the deceased's father utilized the suit land until his death in 1959 after which he and his siblings started utilizing the suit land and therefore the plaintiff's suit should be dismissed with costs.**

Directions were taken before **MBOGHOLI J** on 7<sup>th</sup> July 2008 that the suit be determined by way oral evidence but it was not until 12<sup>th</sup> June 2018 that the hearing commenced before me.

The plaintiffs testified and adopted the contents of his supporting affidavit and called as his witnesses **JAMES IYAYA SIMWELO (PW2)**, **JAFESO MULONGO WANAMI (PW3)** and **HUDSON WANYONYI (PW4)**. He also produced as his documentary evidence the list of documents dated 31<sup>st</sup> October 2008 as well as a report of the Land Registrar dated 8<sup>th</sup> May 2013. The gist of the plaintiff's evidence and that of his witnesses is that the plaintiff has been in occupation of the suit land in excess of 12 years and that the deceased had never utilized it and neither has the defendant. There is however no agreement among the plaintiff and his witnesses as to when exactly the plaintiff started occupying the suit land. The plaintiff himself states in his affidavit that he has been in exclusive continuous and open occupation of the suit land since *"the early 1960"*. **JAMES IYAGA SIMWELO (PW2)** says *"since 1951"*, whereas **JAFESO MULONGO WANAMI (PW3)** and **HUDSON WANYONYI (PW4)** put the period as *"since time immemorial"*. They are all in agreement, however, that all that time, neither the deceased nor the defendant have ever utilized the suit land.

The defendant **JOAB MUNYEFU WAFULA (DW1)** also adopted his statement dated 5<sup>th</sup> October 2015 as his evidence and his list of documents dated the same day as his documentary evidence. He called as his witnesses **WILLIAM NYONGESA WEKESA (DW2)** and **DICKSON SANJA SIBOKO (DW3)**. The defendant's case is that the suit land was originally registered in the names of his late father **NABEKI WANGUSI** and later on 18<sup>th</sup> January 1967 was registered in the names of the deceased who was his elder brother and was also known as **WANGUSI NABEKI** before changing his names to **FREDRICK WAFULA NABEKI**. It is his case that he and the deceased have been using the suit land as grazing ground until sometime in 2004 when the plaintiff started interfering with the boundaries thereon and he was summoned by the Administration but still continued cultivating it. He disputed the plaintiff's claim to the suit land by virtue of adverse possession stating that it is infact him who has used the suit land as grazing ground *"from time immemorial"*. His witnesses supported him stating that it is the family of the deceased who have been utilizing the suit land and that in 2004, a boundary dispute arose between the deceased and the plaintiff but when the plaintiff was summoned by the area Chief for a meeting, he refused to attend and instead filed this suit.

When the hearing closed on 13<sup>th</sup> June 2018, it was agreed by Counsel that the plaintiff would file and serve his submissions within 14 days after which the defendant would also have 14 days to reply. However, when the case was mentioned on 12<sup>th</sup> July 2018, only the plaintiff's Counsel had complied and the defendant's Counsel sought and obtained a further extension upto 16<sup>th</sup> July 2018 to do so but still did not comply. I have therefore only had the benefit of the submission by the plaintiff's Counsel.

I have considered the evidence of the parties both oral and as recorded in their statements, the documentary evidence and the submissions but **Mr. J.O. MAKALI** Counsel for the plaintiff.

The plaintiff's claim to the suit land is premised on adverse possession thereof and as rightly submitted by his Counsel citing **WAMBUGU V NJUGUNA 1983 KLR 173**:

***"For an order to acquire by statute of Limitations title to land which has a known owner, that owner must have lost his rights to the land either by being disposed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it"***.

It is now well established that the combined effects 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 an adverse possessor of the same at the expiry of twelve (12) years of the adverse possession of that land – **BENJAMIN KAMAU & OTHERS V GLADYS NJERI C.A. CIVIL APPEAL NO.2132 of 1996**. And in **KASUVE V MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 KLR 184** the Court re-stated what a party claiming land by adverse possession must prove. The Court held that:

***"In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusion 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 of his own volition"***.

Similarly, **Section 28(h)** of the new **Land Registration Act 2012** provides that one of the overriding interests in land are rights acquired or in the process of being acquired by prescription. **Section 7** of the new **Land Act 2012** on the other hand provides that title to Land may be acquired through prescription. It is also a requirement for the party claiming land through adverse possession to prove that he has used the

land in dispute **NEC VI, NEC CLAM NEC PRECARIO** (no force, no secrecy no evasion) – **KIMANI RUCHINE V SWIFT RUTHERFOLD & CO. LTD 1980 KLR 1500**. The foundation of a claim for land through adverse possession is of course Section 38 of the Limitation of Actions Act which provides as follows:

***“Where a person claims to have become entitled by adverse possession to land registered under all of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may 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 proprietor of the land.”***

This Court shall therefore be guided by the above precedents and law.

It is common ground that the suit land has since 26<sup>th</sup> May 2004 been registered in the names of the defendant. Prior to that, it had been registered in the names of the defendant’s brother **WANGUSI NABEKI** since 1967. That is clear from the register. What I have to determine is whether the plaintiff has been in occupation of the suit land for the statutory period of 12 years and whether that occupation has been open, exclusive and un-interrupted for a period of 12 years after dispossessing the defendant. It must be remembered that the law on adverse possession affects not only present holders of the title but also their predecessors – **THUO KAIRU V KURIA GACHERU 1988 2 KAR 111**.

The plaintiff’s occupation of the suit land is disputed. While he claims to have been utilizing the suit land since the early 60’s (his witnesses talked of since time immemorial), the defendant denied that and has stated in paragraphs 8 and 12 of his witness statement as follows:

**8: “That my brothers and I have been using the said land parcel No. BOKOLI/KITUNI/341 and BOKOLI/KITUNI/343 as grazing grounds.”**

**12: “That his claim of adverse possession over the said parcels of land cannot be sustained since my brothers and I have been using the said land as grazing grounds from time immemorial.”**

In cross – examination by **Mr. MURUNGA** Counsel for the plaintiff, the defendant said:

***“The land I live on is BOKOLI/KITUNI/817 which was bought in 1978 by himself. I have lived there since I bought it. It is my evidence that we have only used the suit land as a grazing field. We have never lived there.”***

The defendant’s witness **WILLIAM NYONGESA NEKESA (DW2)** had this to say in paragraph 7 of his statement:

**7: “That the family of the late NABEKI WANGUSI have been using the said land as grazing land”.**

Similar sentiments were expressed by **DICKSON SANJA SIBOKO (DW3)**.

While it is clear from the evidence that neither the plaintiff nor the defendant live on the suit land, indeed it is clear from the evidence on the record including the pictures annexed to the defendant’s own affidavit in his chamber summons application dated 22<sup>nd</sup> January 2017 that there is no house on the suit land, I am satisfied from the evidence that it is the plaintiff, and not the defendant, who is actually in occupation of the suit land which he uses as a grazing field as well as for other activities including making bricks. This is because, in the defendant’s own affidavit dated 22<sup>nd</sup> January 2017 in which he was seeking an order of temporary injunction against the plaintiff, he averred as follows in paragraph 3 and 4:

**3: “That I know as of personal knowledge that the Applicant/Respondent herein was informed through a letter dated 6<sup>th</sup> November, 2017 to stop interfering with the parcels of land named above. See copy of letter marked JMW – 1”.**

**4: “That the letter was ignored by the Applicant / Respondent and that has continue (sic) to interfere with the said parcels of land by making bricks. See copy of photos marked J MW 11 (a), (b) & (c)”.**

Those averments are in themselves a confirmation by the defendant himself that the plaintiff was occupying and utilizing the suit land without his consent. The defendant cannot therefore again allege, as he has done in his statement at paragraph 12 cited above, that it is him and his brothers who have been utilizing the suit land as **“grazing ground from time immemorial”**. He cannot approbate and reprobate.

There is then the report of **GEORGE OBONDO ONGUTU** the Land Registrar Bungoma County dated 8<sup>th</sup> May 2013 and which was admitted in evidence by consent of the parties on 22<sup>nd</sup> May 2013. In that report, the said Land Registrar makes the following observations and findings:

**1. “Parcel No.343 is used on the ground by SHEM WASIKE SIMWELO. It is planted with maize. The records in the registry indicates that it is owned by FREDRICK WAFULA NABEKI (see copy of certified register attached).”**

**3. “Parcel No.341 is occupied on the ground by SHEM WASIKE SIMWELO and has planted maize crop on it. The record in the registry indicate it is owned by FREDRICK WAFULA NABEKI (see copy of register attached)”.**

This is the evidence of an independent witness, an expert at such, who confirmed that it is the plaintiff who is in occupation of the suit land and not the defendant. It is worth noting that the said report was as a result of a consent order recorded before **MUCHEMI J** on 12<sup>th</sup> July

2011 in the following terms:

***“By consent the District Land Registrar and District Land Surveyor do visit land BOKOLI/KITUNI/341, 343 and 841 and prepare a report on the actual boundaries and occupation on the ground. Parties to jointly facilitate the exercise. Mention on 09/11/11.”***

Given those facts, I have no hesitation in making a finding that the plaintiff is in occupation of the suit land and has indeed dispossessed the defendant of the same. The defendant, as the registered proprietor of the suit land, appears not to have done anything to assert his ownership of the same even after he obtained the title in 2004. Nothing would have been easier for the defendant, or even his brother **WANGUSI NABEKI** who was his predecessor in title following his registration as the proprietor in 1967, to assert their ownership of the suit land by evicting the plaintiff from the same.

It is also clear to me that the plaintiff has indeed been in occupation of the suit land which he has utilized since the 1960's. In an attempt to rebut the plaintiff's assertion that he has utilized the suit land since the 1960s the defendant swore a replying affidavit dated 18<sup>th</sup> December 2007 and deponed in paragraphs 13 and 14 as follows:

**13: “That my late father resided on and utilized the two parcels until his death in 1959”**

**14: “That thereafter I and my siblings resided on the land and we have utilized the same to-date”**

The only reasonable conclusion that this Court can arrive at in light of the above averments is that after the defendant's father died in 1959, the plaintiff entered the suit land in 1960 and has remained there to-date grazing growing maize and making bricks. That means that by the time this suit was filed in November 2007, the plaintiff had been in occupation of the suit land for 47 years well beyond the statutory period of 12 years. Yet for all this time, neither the defendant nor his predecessor in title filed any suit to evict the plaintiff therefrom. It is trite law that the change of ownership of the suit land from **WANGUSI NABEKI** to the defendant did not interrupt the plaintiff's occupation of the suit land – **GITHU V NDEETE 1984 KLR 776**. Similarly, the Plaintiff's entry on the suit land was not with the consent of either the defendant's father or the defendant himself. This is because the entry was in 1960 one year after the death of the defendant's father in 1959 and from that time, and despite the knowledge that the Plaintiff was utilizing the suit land, no suit was filed against him by the defendant or his predecessor in title to assert their ownership thereof.

I have also considered whether the plaintiff has taken the suit land with the necessary *animus possidendi* (the intention to possess) thereby asserting his right thereto inconsistent with the right of the defendant who is the registered owner thereof. As is now clear from the evidence, the Plaintiff is in occupation of the suit land which he uses as a grazing ground, for making bricks and grows a crop of maize. This is occupation that is inconsistent with the defendant's use of the suit land.

A similar scenario was considered by the Court of Appeal in the Case of **ALFRED WERIMO V MULAA SUMBA BARASA C.A. CIVIL APPEAL NO.186 of 2011 (KISUMU)**, which has been cited by Counsel for the Plaintiff. The Court pronounced itself as follows:

***“The evidence in this appeal is quite consistent that from 1975, the Respondent dispossessed the Appellant and took possession of the suit property. He started asserting the rights of an owner thereof by cultivating the land and planting thereon various crops and grazing his own animals. He even started excavating, extracting and selling stones therefrom”***

It is common knowledge that in this Country, and particularly in the rural areas, land is commonly used for growing subsistence crops or farming for commercial purposes and also grazing livestock. That is what the plaintiff has done since the 1960's and is what the defendant and his predecessor would ordinarily have been utilizing the land for. They did not do so upto the time this suit was filed. The plaintiff's use of the suit land is not what can be described as occasional or intermittent as was the position in **FRANCIS GICHARU KARIRI V PETER NJOROGE MAIRU C.A. CIVIL APPEAL NO. 293 of 2002 (NAIROBI)**. Possession and occupation of land in dispute is a question of fact to be determined in the circumstances of each case and I have no hesitation in making a finding that the plaintiff has proved as required in Law that he has been in possession and occupation of the suit land for a period well in excess of 12 years openly, exclusively and without interruption with the knowledge of the defendant whose title has thereby been extinguished.

I therefore find that the Plaintiff has established his case against the defendant as required in Law and is entitled to the orders sought in his Originating Summons.

There will therefore be judgement for the Plaintiff against the defendant in the following terms:

- 1. The plaintiff has become entitled to be registered as the proprietor of land parcels No. BOKOLI/KITUNI/341 and BOKOLI/KITUNI/343 having acquired the same by adverse possession.**
- 2. The Plaintiff should therefore be registered as the owner of the said parcels of land in place of the defendant.**
- 3. The defendant shall execute all the relevant documents to facilitate such registration within 30 days of the decree herein failure to which the Deputy Registrar of this Court shall be at liberty to do so.**
- 4. Each party to meet their own costs.**

**BOAZ N. OLAO**

**JUDGE**

**11<sup>TH</sup> OCTOBER 2018**

Judgement dated, delivered and signed in open Court this 11<sup>th</sup> day of October 2018 at Bungoma.

Mr. Murunga for Plaintiff – Absent

Mr. Kundu for defendant – present

Right of Appeal.

**BOAZ N. OLAO**

**JUDGE**

**11<sup>TH</sup> OCTOBER 2018**