



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**ENVIRONMENT AND LAND CASE NO.164 OF 2014**

**RASHID MASHAURI NAMURWE.....PLAINTIFF**

**VERSUS**

**DAVID FABIAN MUKAWA.....DEFENDANT**

**JUDGEMENT**

The plaintiff filed this Originating Summons on 3<sup>rd</sup> September 2014 against the defendant seeking the determination of the following issues with respect to land parcel No. **W. BUKUSU/S. MATEKA/3503** formerly **L.R. No. W. BUKUSU/S. MATEKA/3501** formerly **L.R. No. W. BUKUSU/S. MATEKA/352, 389 and 390** i.e.

**a. Whether the plaintiff was the son to the late NAMURWE WABALA who died in the late 1947 and whether the suit land above quoted in his ancestral land.**

**b. Whether the suit land now comprised in title numbers **W. BUKUSU/S. MATEKA/3502, 3503, 3504** among others all of which arose from the surface area being 7.3Ha the parent title being the combination of **L.R. No. W. BUKUSU/S. MATEKA/332, 389 and 390** in the plaintiff's deceased father aforesaid was buried there.**

**c. Whether the registration of land parcels numbers **W. BUKUSU/S. MATEKA/332, 389 and 390** in the name of one MAURICE WANJALA NASI (now deceased), the subsequent creation of title No. **W. BUKUSU/S. MATEKA/3501** surface area being 7.3Ha which in turn gave rise to new numbers 3503 whose beneficiary is the defendant herein among others was procured through fraud and misrepresentation of facts particulars of fraud attributed to the defendant.**

*i. Causing to close and open new registers pertaining to parcels numbers **W. BUKUSU/S. MATEKA/332, 389, 390, 3502, 3503** among others and subsequently getting registration of **L.R. number W. BUKUSU/S. MATEKA/3503***

*ii. Forging or presenting or causing to be presented for registration forged land transfer forms pertaining to the exercise in (i) above.*

**d. In view of or subsequent upon the answer to paragraph 1,2 and 3 above, whether the District Land Registrar Bungoma should be compelled to cancel the exercise and or registration in paragraph 3 above and the old numbers **W. BUKUSU/S. MATEKA 332, 389 and 390** to revert.**

**e. Whether the defendant and all subsequent proprietors who benefited from the creation of land parcel No. W. BUKUSU/S. MATEKA/3501 arose from L.R. 332, 389 and 390 have always held the same in trust for the plaintiff.**

**f. Whether the plaintiff's deceased father aforesaid new numbers other ancestral land apart from the suit land other suit land and whether the plaintiff has been in open continuous and peaceful occupation and utilization of the suit land from childhood to-date.**

**g. Who should be considered to pay the costs of this suit.**

The Originating Summons is supported by the affidavit of the plaintiff dated 2<sup>nd</sup> September 2014 and his statement of the same date. Annexed to the said affidavit is a copy of the Green Card to parcels No. **W. BUKUSU/S. MATEKA/389** and Certificates of Search for parcels No. **N. BUKUSU/S. MATEKA/3502, 3503, 3504, 3505, 4708 and 4709.**

The defendant **DAVID FABIANO MUKWA** swore a replying affidavit opposing the plaintiff's Originating Summons and adding that the plaintiff has never been in occupation of parcel No. **W. BUKUSU/S. MATEKA/3503** which arose from the sub-division of L.R. No. **W. BUKUSU/S. MATEKA/3501** which in turn arose from the sub-division of a combination of **L.R. No. W. BUKUSU/S. MATEKA/332, 389 and 390** which belonged to his late father **NASI MUKWA** whose Estate was being administered by **MAURICE WANJALA NASI** now deceased. That the consolidated parcels No. **W. BUKUSU/S. MATEKA/332, 389 and 390** were distributed to the beneficiaries after the Succession process and he doesn't understand why the plaintiff has filed this suit. That the plaintiff has never been in adverse possession of land parcel No. **W. BUKUSU/S. MATEKA/3503** and this suit is misplaced and should be dismissed.

This suit was fixed for hearing on 24<sup>th</sup> July 2018 and though served with the hearing notice, the defendant did not attend Court and so the trial proceeded in his absence.

The plaintiff adopted as his evidence his statement dated 2<sup>nd</sup> September 2014 as well as the other supportive documents.

Before the plaintiff's Counsel **MR. WATTANGA** closed his case, I drew his attention to the fact that it was not clear from the pleadings what parcel of land the plaintiff was seeking in adverse possession and I gave Counsel time to confirm. On 26<sup>th</sup> September 2018, **MR. WATTANGA** confirmed to me that the plaintiff's claim is in respect to parcel No. **W. BUKUSU/S. MATEKA/3502.**

I must say I had considerable difficulties in comprehending what exactly the plaintiff's claim is.

However, after perusing various pleadings herein it is now clear that the plaintiff's claim is based on advising possession. One such pleading is the supporting affidavit by his Counsel **MR. WATTANGA** dated 3<sup>rd</sup> December 2014 in support of an application for the taking of directions. In paragraph 3 of the said affidavit, Counsel has deposed as follows:

**3: "That the plaintiff filed Originating Summons dated 2.9.2014 claiming inter alia for adverse possession."**

Secondly the Originating Summons itself cites Sections 7, 17 and 38 of the **Limitation of Actions Act** and finally, as is now clear from paragraph (f) of the Originating Summons, the plaintiff claims to have been in **"open continuous and peaceful occupation and utilization of the suit land from childhood to-date"**

I must again reiterate what I have previously stated elsewhere that pleadings must properly bring out the dispute to be resolved by the Court – See **BRENDA MUNIKA & ANOTHER V. CLARE NANG'UNDA BARASA & ANOTHER BUNGOMA ELC CASE NO.184 of 2013 (2018 eKLR).**

Having determined that the plaintiff's claim is based on adverse possession, I then sought from his Counsel what parcel of land he is claiming because it was not clear both from his Originating Summons and his evidence what parcel of land he was referring to and as I have already indicated above, Counsel confirmed that the parcel is No. **W. BUKUSU/S. MATEKA/3502**.

From the Search Certificates annexed to the Plaintiff's Originating Summons, the land parcel No. **W. BUKUSU/S. MATEKA/3502** was registered in the names of **MAURICE WANJALA NASI** on 13<sup>th</sup> March 2003 but was closed on 4<sup>th</sup> October 2013 upon sub-division to create new parcels number **4708 and 4709**.

Therefore, even if land parcel No. **W. BUKUSU/S. MATEKA/3502** was still in existence, the plaintiff's suit is bound to fail because that parcel is not registered in the names of the defendant herein but is registered in the names of one **MAURICE WANJALA NASI** who is not a party in this suit.

A claim for adverse possession is against the registered proprietor of the land in dispute and nobody else. Section 38(1) of the **Limitation of Actions Act** makes that very clear in the following terms:

***“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, 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.”*** Emphasis added.

Therefore, since the defendant herein is not the registered proprietor of the land parcel No. **W. BUKUSU/S. MATEKA/3502**, no adverse orders can be made in respect to that land in the absence of the registered proprietor thereof.

Secondly, it is clear from the same Certificate of Search that the parcel No. **W. BUKUSU/S. MATEKA/3502** ceased to exist on 4<sup>th</sup> October 2013 over a year before this suit was filed. Orders in adverse possession cannot be made in respect to land that no longer exists.

The up-shot of the above is that the Plaintiff's Originating Summons filed herein on 3<sup>rd</sup> September 2014 lacks merit. It is dismissed with no order as to costs.

**BOAZ N. OLAO**

**JUDGE**

**15<sup>TH</sup> NOVEMBER 2018**

Judgement dated, delivered and signed in open Court this 15<sup>th</sup> day of November 2018 at Bungoma.

Mr. Kundu for Mr. Wattanga for plaintiff present

Defendant – Absent.

Right of Appeal.

**BOAZ N. OLAO**

**JUDGE**

**15<sup>TH</sup> NOVEMBER 2018**