



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 29 OF 2015**

**FRANCIS SIMIYU WEKESA - DECEASED**

**(substituted and represented by ELIUD SAHENYI).....PLAINTIFF**

**VERSUS**

**JOSEPH NAMASAKA NATO.....1<sup>ST</sup> DEFENDANT**

**JACOB NATO.....2<sup>ND</sup> DEFENDANT**

**SIMIYU NATO.....3<sup>RD</sup> DEFENDANT**

**KADENGE JOEL NATO.....4<sup>TH</sup> DEFENDANT**

**CARO YOHANA NATO.....5<sup>TH</sup> DEFENDANT**

**EVANS SITUMA.....6<sup>TH</sup> DEFENDANT**

**GEORGE PROTUS BARASA.....7<sup>TH</sup> DEFENDANT**

**NJOKO KHAMA.....8<sup>TH</sup> DEFENDANT**

**WABOMBA WEYAMA.....9<sup>TH</sup> DEFENDANT**

**ROSE NAKHUMICHA NATO.....10<sup>TH</sup> DEFENDANT**

**HUMPHREY WECHULI.....11<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

This suit was filed on 11<sup>th</sup> March 2015 by **FRANCIS SIMIYU WEKESA (WEKESA)** seeking various remedies against the eleven defendants. Following his demise on 23<sup>rd</sup> September 2018, the plaint was amended on 15<sup>th</sup> May 2019 and he was substituted with his son **ELIUD SAHENYI** (the plaintiff). In the plaint, the following orders are sought against the defendants: -

1. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as title NO BUNGOMA/KABISI/323 measuring five point eight (5.8) hectares or thereabouts situate at KABISI within BUNGOMA COUNTY (the suit property) which the defendants whether by themselves or their servants or agents or otherwise are wrongfully in occupation and or accordingly trespassers thereon and are not entitled to remain on the suit property which they should give vacant possession thereof.
2. An injunction restraining the defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.
3. General damages for trespass.

**4. Costs of this suit together with interest therein.**

**5. Any such other or further relief as this Honourable Court may deem appropriate.**

The basis of the plaintiff's claim is that **WEKESA** was at all material time the owner of the land parcel **NO BUNGOMA/KABISI/323** (the suit property) having been allocated the same in 1963 and obtained title thereto on 11<sup>th</sup> September 2009. However, the defendants have wrongfully entered and taken possession of the suit property resulting in constant confrontations between the parties which have been referred to the local administration but remains unresolved. The defendants have fenced the suit property and put up permanent structures thereon without the express knowledge, consent or authority of the plaintiff in addition to utilizing other resources including flora and fauna, water and keeping livestock thus causing the plaintiff loss and damage particulars of which have been itemized in paragraph 12 of the plaint as follows:-

**(a) Deprivation of the use possession, occupation and quiet enjoyment of the suit property.**

**(b) Misuse of the flora, fauna and water resources and the defendants' poor husbandry methods which have led to environmental degradation of the suit property.**

**(c) Erection of fences and houses on the suit property are an eye sore and have defaced it's beauty.**

Despite verbal requests to vacate, the defendants have refused, neglected and failed to do so and have even refused to comply with eviction notices dated 21<sup>st</sup> January 2015. The defendants therefore, unless restrained by this Court, intend to remain in wrongful occupation of the suit property hence this suit. Together with the plaint, the plaintiff filed his list of documents and witness statement.

The defendants filed a joint statement of defence in which they pleaded that they have been in lawful occupation and use of the suit property since 1964 the same having been allocated to their deceased father **WILSON NATO (NATO)** on 25<sup>th</sup> September 1967. That the plaintiff has been economical with the truth and failed to disclose that there is in existence **BUNGOMA ELC CASE NO 3 OF 2013** over the same matter that was determined in favour of **JOSEPH NAMASAKA NATO** (the 1<sup>st</sup> defendant herein) as the administrator of the Estate of **NATO** vide the ruling of **ANNE OMOLLO J** dated 10<sup>th</sup> June 2013. That the plaintiff has never lived on nor developed the suit property in his life – time and cannot lay a claim of ownership over the same. That the plaintiff obtained the title to the suit property fraudulently with the knowledge that there was a case pending in Court and the title thereto was revoked by the orders of **ANNE OMOLLO J** in **BUNGOMA ELC CASE NO 3 of 2013**. The defendants further denied that the local administration have had to arbitrate over a dispute involving the parties with regard to the suit property adding that they have been in lawful occupation thereof for over fifty (50) years. The defendants added for that as the lawful owners of the suit property, they have every right to develop it and this suit is an afterthought since the plaintiff left the suit property in 1964 and cannot obtain orders to evict the defendants. The defendants further averred that this suit is infact res – judicata **BUNGOMA ELC CASE NO 3 OF 2013** which is set for review on 9<sup>th</sup> September 2015 and not only does this Court lack the jurisdiction to determine it but it is also an abuse of the Court process and a Preliminary Objection would be raised pursuant to the provisions of **Section 6 of the Civil Procedure Act**. The defendants therefore prayed that the suit be dismissed with **"punitive costs."**

Together with their defence, the defendants filed the following witnesses' statements: -

**1. JOSEPH NAMASAKA NATO – 1<sup>st</sup> defendant**

**2. JACOB NATO – 2<sup>nd</sup> defendant**

**3. KADENGE JOEL NATO – 4<sup>th</sup> defendant**

**4. EVANS SITUMA – 6<sup>th</sup> defendant**

**5. HARMAN INDIAZI D. CHOKO**

They also filed their two lists of documents one dated 13<sup>th</sup> July 2018 and a further list of documents dated 16<sup>th</sup> December 2019.

The hearing commenced on 2<sup>nd</sup> July 2018 and **WEKESA** was the only witness in support of his case. He adopted as his evidence the witness statement and list of documents both dated 23<sup>rd</sup> February 2015.

In that statement he averred that he is the proprietor of the suit property which was allocated to him in 1963 but he lost the letter of allotment and reported the loss on or about 11<sup>th</sup> April 1977. That upon allocation of the suit property, he used it to secure a loan with the Settlement Fund Trustee and upon repayment of the loan, a discharge was prepared and the suit property was transferred into his names and a title was issued to him on 11<sup>th</sup> September 2009. He is therefore entitled to the exclusive occupation and use of the suit property but the defendants have, without any claim or right whatsoever, entered and taken possession of the same and put up structures thereon. He therefore seeks orders that the defendants be restrained from continuing the trespass on the suit land and give vacant possession to him.

**JOSPEH NAMASAKA NATO** (1<sup>st</sup> defendant), **KADENGE JOEL NATO** (4<sup>th</sup> defendant) and **HARMAN INDIAZI CHOKO (DW 3)** testifies on behalf of the defendants. They all adopted as their evidence their statements and list of documents filed herein.

In his statement dated 10<sup>th</sup> December 2019, the 1<sup>st</sup> defendant states that he is the son of the late **NATO** who was allotted the suit property in

1964 after **WEKESA** who was the previous allottee in 1963 failed to adhere to the rules of the Settlement Fund Trustees. That on 22<sup>nd</sup> July 1971, the Settlement Officer wrote to **NATO** to trace **WEKESA** so that they could go and sign the transfer forms in **NATO**'s favour. That **NATO** died in 1996 and was buried on the suit property but before that, he had paid the Settlement Fund Trustees Kshs. 15,500 in 1989 for the suit property. That in 2001, the 1<sup>st</sup> defendant and his late brother filed **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 43 OF 2001** and were issued with Letters of Administration in respect to **NATO**'s Estate. The defendants therefore pray that the plaintiff's suit be dismissed and the title deed issued in the names of **WEKESA** be revoked.

**KADENGE JOEL NATO** (the 4<sup>th</sup> defendant) also adopted as his evidence the witness statement dated 10<sup>th</sup> December 2019 whose contents are similar to the statement by his brother the 1<sup>st</sup> defendant.

In his statement also dated 10<sup>th</sup> December 2019 **HARMAN INDIAZI CHOKO (DW 3)** avers that he is a liability to the Estate of **NATO** having purchased the suit property from his son **PETER NATO**. That **NATO** died in 1996 and was buried on the suit property and the grant of Letters of Administration were issued to his sons **DAVID WILSON NATO** and the 1<sup>st</sup> defendant on 2<sup>nd</sup> November 2001. That the plaintiff is a stranger to the suit property and his claim should be dismissed and his title revoked.

Submissions were thereafter filed both by **MR INGOSI** instructed by the firm of **DAVID INGOSI & CO ADVOCATES** for the plaintiff and **MR OTSIULA** instructed by the firm of **J. B. OTSIULA & ASSOCIATES ADVOCATES** for the defendants.

I have considered the evidence by all the parties including the documents filed and the submissions by counsel.

In their defence, the defendants pleaded that this suit is res – judicata and therefore offends the provisions of **Section 7 of the Civil Procedure Act** (paragraph 13) and also that this suit is sub – judice and offends the provisions of Section 6 of the same Act (paragraph 15) in view of the fact that there exists **BUNGOMA ELC CASE NO 3 OF 2013** involving the plaintiff and the 1<sup>st</sup> defendant over the suit property. No Preliminary Objection was raised by the defendants prior to the commencement of the hearing and although the defendants' list of documents dated 13<sup>th</sup> July 2018 lists the proceedings in **BUNGOMA ELC CASE NO 3 OF 2013** as among their documents to be produced at the trial, no such proceedings were availed. All that the defendants availed in their further list of documents dated 16<sup>th</sup> December 2019 is a copy of the ruling by **ANNE OMOLLO J** delivered on 10<sup>th</sup> June 2013 in **BUNGOMA ELC CASE NO 3 OF 2013**.

The onus is on the party pleading res – judicata or sub – judice to place before the Court evidence to prove the same. I must also point out to counsel that a suit can either be res – judicata or sub – judice but not both. Res – judicata refers to a matter that has been heard and determined involving the same parties over the same subject and is provided for in **Section 7 of the Civil Procedure Act** as follows: -

*“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.”* Emphasis added.

Sub – judice on the other hand is provided for under **Section 6 of the Civil Procedure Act** in the following terms: -

*“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”* Emphasis added.

The doctrines of res – judicata and sub – judice are very key in litigation as they can be a successful bar to a suit. Therefore, when they are raised, the Court must interrogate them. However, as is clear from the provisions of **Section 109 of the Evidence Act**, the burden of proving that a suit is res – judicate or sub – judice lies on the party alleging it. It has never been the duty of Courts to go out and fish for evidence. Rather, Courts determine disputes on the basis of the evidence placed before them. That notwithstanding and in the interests of justice and also bearing in mind that **BUNGOMA ELC CASE NO 3 OF 2013** is in this Court's registry, I called for the file in order to confirm the veracity of the defendants' allegations.

Upon perusal of the said file, I am satisfied that this suit is neither res – judicata nor sub – judice **BUNGOMA ELC CASE NO 3 OF 2013** for the following reasons: -

**1. In BUNGOMA NO 3 OF 2013 which was originally filed in KAKAMEGA HIGH COURT as case NO 344 OF 1990 before being transferred to this Court, NATO had filed an Originating Summons against WEKESA seeking orders that he be registered as the proprietor of the suit property by way of adverse possession.**

**2. The suit was however, dismissed by WAWERU J on 26<sup>th</sup> July 2001 for want of prosecution.**

**3. On 7<sup>th</sup> March 2012 CHITEMBWE J allowed an application by the plaintiff herein to be substituted in place of NATO following an application dated 9<sup>th</sup> September 2010. That application which was allowed ex – parte also sought orders that the registration of the suit property in the names of WEKESA be revoked and the same be registered in the names of the plaintiff.**

**4. The orders issued on 7<sup>th</sup> March 2012 were however set aside on 5<sup>th</sup> December 2012 pursuant to WEKESA's application dated 23<sup>rd</sup> July 2012.**

5. On 8<sup>th</sup> May 2013 following the transfer of the suit to this Court, the parties appeared before ANNE OMOLLO J to canvass the plaintiff's application dated 9<sup>th</sup> September 2010 seeking, inter alia, the reinstatement of the dismissed suit.

6. ANNE OMOLLO J in a ruling dated 10<sup>th</sup> June 2013 held that the application was spent following the orders of CHITEMBWE J issued on 7<sup>th</sup> March 2012 and went on to add that the suit be treated as "concluded."

7. However, in a subsequent though un – dated nor signed ruling, ANNE OMOLLO J set aside the dismissal order and reinstated the plaintiff's suit for hearing.

8. On 17<sup>th</sup> November 2014, the late MUKUNYA J again dismissed the suit for non – appearance by the plaintiff.

9. The plaintiff reacted by filing an application dated 11<sup>th</sup> March 2015 seeking the main prayer that the orders of 17<sup>th</sup> November 2014 dismissing the suit be reviewed and/or set aside.

10. In a ruling dated 4<sup>th</sup> October 2017, MUKUNYA J dismissed that application with costs. That ruling was the last activity in BUNGOMA ELC CASE NO 3 OF 2013 and therefore that suit stands dismissed pursuant to the orders of MUKUNYA J dated 17<sup>th</sup> November 2014.

From my perusal of BUNGOMA ELC CASE NO 3 OF 2013, there is no application pending therein as pleaded by the defendants in paragraphs 14 and 15 of their defence. The plea of sub – judice is therefore not properly taken and must be dismissed.

As to whether or not this suit is res – judicata in view of BUNGOMA ELC CASE NO 3 OF 2013 it is clear from my summary above that BUNGOMA ELC CASE NO 3 OF 2013 was never heard. Instead, it was dismissed on 17<sup>th</sup> November 2014 for want of prosecution. The issue that I need to interrogate therefore is whether the plea of res – judicata can be sustained under those circumstances.

Res – judicata is provided for under Section 7 of the Civil Procedure Act as follows: -

*"No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of their claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which issue has been subsequently raised, and has been heard and finally decided by such Court."* Emphasis added.

From the above, it is clear that for a plea of res – judicata to be sustained, the following must be established: -

1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.
2. The former suit must have been between the same parties or parties under whom they claim.
3. The parties must have litigated under the same title.
4. The Court which decided the former suit must have been competent and; lastly
5. The former suit must have been heard and finally decided by the Court in the former suit.

It must be clear by now from my summary above as to what transpired in BUNGOMA ELC CASE NO 3 OF 2013 that whereas that case involved the same parties litigating over the same subject in a competent Court, that dispute was never "heard and finally decided" as required by Section 7 of the Civil Procedure Act. Instead, that suit was dismissed for want of prosecution. There are divergent views as to whether the dismissal of a suit for want of prosecution can amount to res – judicata. In SALEM AHMED ZAIDI .V. FAUD HUMEIDAN 1960 E.A 92, the plaintiff's case had been dismissed for non – attendance and a fresh suit was filed. The then East African Court of Appeal held that the latter suit was res – judicata because an order dismissing a suit has the same effect as a dismissal upon evidence and accordingly, the first suit must be deemed to have been heard and determined and therefore, the dismissal of the earlier suit operated as res – judicata. Given the advent of the overriding objectives principles and the new Constitutional dispensation to administer justice without undue regard to technicalities, there is need to have a re – look at the matter. The proper position must now be that unless a suit has been "heard and finally decided" in a former suit, a plea of res – judicata is not available. This was the view that the Court of Appeal took in MICHAEL BETT SIROR .V. JACKSON KOECH C.A CIVIL APPEAL NO 53 OF 2016 ELDORET (2019 eKLR) when it said: -

*"We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a Judgment, however, such a Judgment does not satisfy the requirements of Section 7 of the Civil Procedure Act, as the issues raised in the suit has not been addressed and finally determined by the Court, but the Judgment is the result of what may be described as a technical knock – out."* Emphasis added.

See also the case of THE TEE GEE ELECTRICAL & PLASTICK CO .V. KENYA INDUSTRIAL ESTATES LTD C.A CIVIL APPEAL NO 333 OF 2011 [2005 2 KLR 97] where the Court also took the view that res – judicata only applies where a matter has been heard and determined on the merits and not where the matter was disposed of by the Court due to want of jurisdiction. Similarly, in CANELAND LTD & OTHERS .V. DELPHIS BANK LTD C.A CIVIL APPEAL NO 20 OF 2000, the Court held that for res – judicata to arise, the issue must have been heard and decided on merits otherwise the plea cannot be sustained. I followed that view in FRANCIS

**ALIGA OKUSO .V. DORCUS OMEGA 2019 eKLR** and given the requirement of **Article 50 of the Constitution** that parties have the right to have their disputes heard, it is obvious that the new thinking is that unless a suit has been heard and finally decided on its merits, the plea of res – judicata cannot be up – held. And since **BUNGOMA ELC CASE NO 3 OF 2013** was never heard and determined on its merits but was only dismissed for want of prosecution, the plea of res – judicata raised by the defendants herein must be rejected.

I shall now proceed to determine the merits or otherwise of the plaintiff’s claim herein.

The plaintiff’s case is very concise. His late father **WEKESA** was allocated the suit property in 1963 but lost the letter of allotment sometime in 1977 and made a report. He subsequently repaid the loan to the Settlement Fund Trustees and the title deed thereto was issued to him on 11<sup>th</sup> September 2009. Therefore, the defendants have no right to continue occupying the suit property and are mere trespassers who ought to be evicted therefrom.

There is no doubt that as the registered proprietor of the suit land, the plaintiff is entitled to all the rights and privileges belonging or appurtenant thereto. This includes the right to eject trespassers. That is clear from **Section 25 of the Land Registration Act 2012**. However, as is provided under **Section 26(1) of the same Act**, such registration is only “*prima facie*” evidence of ownership. The term Prima Facie is defined in **BLACK’S LAW DICTIONARY** as follows: -

**1: “Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination even though it make (sic) later be proved to be untrue.”**

**2: “At first sight; on first appearance but subject to further evidence or information ……….”**

It is clearly on the basis that a title in itself is only prima facie evidence of absolute and indefeasible ownership of land that **Section 26(1) of the Land Registration Act** goes on to qualify in sub – rules (a) and (b) that such title can be impeached on the ground of fraud, misrepresentation or where it has been acquired illegally, unprocedurally or through a corrupt scheme. It is instructive, however, that the defendants did not plead any Counter – Claim seeking to impeach **WEKESA**’s title. And neither did they lay a claim of the suit property by way of adverse possession or trust. I shall revert to this later in this Judgment.

The defendant’s case is that whereas they concede that the suit property was initially allocated to **WEKESA** in 1963, he was not able to comply with the rules of the Settlement Fund Trustees and the same was allocated to **NATO** in 1964 who went on to pay the outstanding fees of Kshs. 15,500/= in 1989. **NATO** was buried on the suit property when he died in 1996 and the defendants remain in occupation and possession of the suit property to – date. That fact is not disputed by the plaintiff and indeed in his plaint, **WEKESA** sought that the defendants yield vacant possession thereof to him. On his part, **WEKESA** also filed as among his documents various receipts of the following sum, paid to the Settlement Fund Trustees: -

**1. Receipt dated 22<sup>nd</sup> February 1971 for Kshs. 10/=**

**2. Receipt dated 5<sup>th</sup> August 1974 for Kshs. 1,000/=**

**3. Receipt dated 21<sup>st</sup> August 1974 for Kshs. 300/=**

**4. Receipt dated 15<sup>th</sup> June 1990 for Kshs. 617.30**

**5. Receipt dated 20<sup>th</sup> November 1990 for Kshs. 350/=**

**6. Deposit slip for Kshs. 300 dated 20<sup>th</sup> August 1974 paid to Standard Bank in favour of the Settlement Officer Nzoia.**

**7. An incomplete and un – registered discharge of charge Form RL 10 which is not even executed.**

**8. A Transfer of Land in Settlement Scheme Form for the suit property in favour of WEKESA.**

**9. A copy of the title deed in respect of the suit land in the names of FRANCIS SIMIYU WEKESA dated 11<sup>th</sup> September 2009.**

**10. A copy of the Official Search for the suit property in the name of FRANCIS SIMIYU WEKESA dated 2<sup>nd</sup> February 2015.**

The defendants’ case therefore is that notwithstanding the registration of the suit property in the names of **WEKESA**, he relinquished his rights therein to **NATO** way back in 1964 after he was un – able to comply with the rules of the Settlement Fund Trustees. Upon perusal of the documents filed by the defendants’ herein, there is cogent evidence to support that assertion. This is because of the following reasons: -

Firstly, it is clear from the oral testimony of the 1<sup>st</sup> defendant that it is the defendants who have been in occupation and possession of the suit property since 1964. He denied a suggestion by **MR INGOSI**, counsel for the plaintiff, that the defendants have been on the suit property with the permission of the plaintiff. Infact he denied knowing the plaintiff. When re – examined by his counsel **MR OTSIULA**, he said: -

**“We have lived on the land since 1964. I don’t know the plaintiff.”**

When he testified before me on 2<sup>nd</sup> July 2018, **WEKESA** confirmed that although the suit property was allocated to him in 1963, he never developed it. This is what he said when cross – examined by **MR OTSIULA**: -

***“The land parcel NO BUNGOMA/KABISI/323 is mine. I obtained the title deed in 2009 as shown therein. It was allocated to me by the Settlement Fund Trustees in 1963 but I only obtained the title in 2009. Before that, I was living in Trans – Nzoia. I have not developed the land since 1963. I knew that there were persons living on the land. I complained to the Settlement fund Trustees that there were persons trespassing on the land. It is true that the defendants have been living on my land for a long time.”***

The plaintiff did not produce as part of his documentary evidence any letter that he wrote to the Settlement Fund Trustees or the local Administrator that the defendants were trespassing on his land. Surely, he ought to have taken legal action against the defendants as far back as 1964.

Secondly, there is documentary evidence produced by the defendants and which lends credence to their assertion that although the suit property was originally allocated to **WEKESA**, it was subsequently transferred to **NATO**. Among those documents is a letter from the Settlement Officer Kitale dated 22<sup>nd</sup> July 1971 and addressed to **NATO**. It is short and reads: -

***“THE SETTLEMENT OFFICER***

***SETTLEMENT SCHEME***

***P.O. BOX 203***

***KITALE***

***MR WILSON NATO***

***C/O PLOT NO 323***

***KABISI SCHEME***

***TRANSFER OF PLOT NO 323 – KABISI SCHEME***

***Dear Sir***

***You are required to trace MR FRANCIS S. WEKESA and report to this office as soon as possible to sign transfer forms for the above plot. Remember carrying with you the Identity Card and MR WEKESA carries with him the copies of documents he was documented for the plot.***

***Yours faithfully***

***A. MIRIKAU***

***SETTLEMENT OFFICER –***

***KAMUKUYWA COMPLEX.”***

There is also another letter from the Settlement Officer **KAMAKOIWA COMPLEX** dated 30<sup>th</sup> August 1966 though not very legible. It reads: -

***KAMAKOIWA***

***COMPLEX***

***HOEY’S BRIDGE***

***30<sup>th</sup> August 66***

***THE LOANS OFFICER***

***MINISTRY OF LAND S & SETTLEMENT***

***P.O. Box 30450***

**NAIROBI**

**Thro' SENIOR SETTLEMENT OFFICER**

**P.O. BOX 17**

**HOEY'S BRIDGE**

**RE: PLOT NO 323 – KABISI SCHEME**

*Will you please let me know whether you received Transfer Forms signed by MR FRANCIS S. WEKESA and MR WILSON NATO for the above plot which were sent to you in 1965.*

*The loan repayment bills still come in the name of FRANCIS S. WEKESA but should read WILSON NATO.*

*Please check and make alterations.*

**J. G. KISIA**

**SETTLEMENT OFFICER**

**KAMAKOIWA COMPLEX.”**

Then there is another letter from the **CHIEF NAITIRI LOCATION** dated 23<sup>rd</sup> May 1975 and addressed to the **SETTLEMENT OFFICER KITALE**. It reads: -

**“NAITIRI LOCATION**

**P.O. NAITIRI**

**23<sup>rd</sup> May 1975**

**THE SETTLEMENT OFFICER**

**AREA NORTH**

**KITALE**

**RE: PLOT NO 323 KIBISI**

*A MR FRANCIS SIMIYU WEKESA handed over the plot to WILSON NATO in 1964. In actual fact, it was WILSON NATO who signed the documents. As a formality, a transfer was made in those early days by so called ..... (illegible)*

*The proof is in documents available by the complainant.*

*For some very strange reasons, this man SIMIYU who has never stepped on this plot for the last 12 years is now causing trouble*

*Please sort out this (illegible) affair*

**YOURS FAITHFULLY**

**RICHARD (illegible)”**

There are other letters which are illegible but that is not surprising for letters, some of them handwritten, which were authored in the 60's and 70's when I was in primary school!! What is portrayed by those letters is that as far back as 1965, **WEKESA** who had been the first allottee of the suit property had decided to transfer it to **NATO** but for some reasons, he decided to become evasive. It is highly un – likely that the Settlement Officers and the local Chief would be writing such letters unless they had evidence that **WEKESA** had infact transferred the suit property to **NATO** but was dragging his feet in executing the transfer documents. The authenticity of those letters was never in doubt during the trial.

Thirdly, there is an Official Government receipt No 163001 issued by the Settlement Fund Trustees to **WILSON W. NATO** on 28<sup>th</sup> November 1989 for the sum of Kshs. 15,500/= being in respect of Plot **NO 323 KABISI SCHEME**.

The only reason that the Settlement Fund Trustees could have collected that sum from **WILSON W. NATO** was because he was entitled to the suit property instead of the original allottee **WEKESA**.

Fourthly, although **WEKESA** in his witness statement dated 23<sup>rd</sup> February 2015 states that: -

***“Upon allocation of the plot I subsequently obtained a loan from the Settlement Fund Trustee where the same was offered as security and a charge registered thereon. Upon repayment of the loan and all other necessary charges, the charged (sic) was discharged and the plot transferred into my names”***

The evidence tendered by him demonstrate that he was infact in arrears. The receipts produced as part of his document total Kshs. 1,677.30 yet the advice of repayments due notices also filed by him indicate that by 31<sup>st</sup> December 1976, he was in arrears of Kshs. 5,596.00. All that taken together with the fact that the Discharge of Charge Form dated 24<sup>th</sup> July 1990 is not properly executed casts doubt on the process through which **WEKESA** was registered as the proprietor of the suit property and the title thereto issued to him on 11<sup>th</sup> September 2009.

Finally, there is evidence which is not rebutted, that when **NATO** died in 1996, he was buried on the suit property. There is nothing to suggest that **WEKESA** objected to the burial of **NATO** on that land. It is strange that **WEKESA** would have allowed a stranger to be buried on his land. The inevitable conclusion can only be that **WEKESA** had long ceded the suit property to **NATO** and his family and moved to settle in Trans – Nzoia.

Earlier on in this Judgment, I alluded to the fact that the defendants did not plead any Counter – Claim hinged on adverse possession or trust. They were content with asserting their ownership to the suit property by virtue of having occupied it since 1964. For pleadings that were drawn by counsel, that was not elegant drafting. However, as was held by the Court of Appeal in **MACHARIA MWANGI MAINA & OTHERS .V. DAVIDSON MWANGI KAGIRI 2014 eKLR**, Courts are enjoined to do substantive justice particularly following the promulgation of the **2010 Constitution** and the enactment of the overriding objective principles. The Judges in that case also cited Lord **DENNING IN HUSSEY .V. PALMER (1972) 3 ALL. ER 744** where he held that a constructive trust is imposed by law whenever justice and good conscience require it and it is an equitable remedy by which a Court can enable a party to obtain restitution. Further, equity will not suffer a wrong to be without a remedy.

In **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION**, it is stated as follows under the term constructive trust: -

***“It is sometimes said that where there are sufficient grounds for imposing a constructive trust, the Court constructs a trust”***  
Emphasis added.

In **ROBERT MBUI .V. KENNEDY MWANZIA MUSEMBI 2019 eKLR**, the Court of Appeal was clear that a constructive trust can only be enforced on parties with a common intention. The **OXFORD DICTIONARY 12<sup>TH</sup> EDITION** defines the word impose to include: -

***“Force to be accepted done or complied with.”***

In the circumstances of this case, considering the fact that **WEKESA** voluntarily relinquished the suit property to **NATO** way back in 1964 and moved elsewhere taken together with the documentary evidence manifesting an intention to transfer the same and in view of the fact that no breach of any law has been proved against **NATO** or any of the defendants, this is a clear case where this Court can impose a constructive trust even if the same was not pleaded as is required of parties in a dispute. The law as stated in **CANDY .V. CASPAIR AIR CHARTERS LTD 1956 23 E.A.C.A 139** is that cases are determined on the pleadings by the parties. However, it is also clear that in appropriate cases, and particularly where a deserving party has not been shown to be in breach of any law, the Court may impose a constructive trust. In this case, it is clear that **WEKESA** is simply using the title deed obtained in 2009 as a sword to eject the defendants from land which he infact relinquished over 50 years before this suit was filed. It would be unconscionable and a complete travesty of justice for this Court to treat the defendants as trespassers and order that they give vacant possession of the suit property to the plaintiff and be enjoined from remaining thereon or even pay him damages as sought in the plaint.

It must also be remembered that **Section 30(g) of the repealed Registered Land Act** under which the title to the suit property was issued recognized as among the overriding interests to which all registered land is subject: -

***“The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”***

In **OBIERO .V. OPIYO 1972 E.A 227**, it was held that: -

***“The Respondent has rights against the Appellant stemming from possession and occupation of part of the land, which amounted to an overriding interest not required to be noted on the register and the Appellants’ proprietorship was subject to it section 30(g)”***

That decision has been affirmed in subsequent cases including **JANET NGENDO KAMAU .V. MARY WANGARI MWANGI C.A CIVIL APPEAL NO 173 OF 2003** and also recently in **WENSLEY BARASA .V. IMMACULATE AWINO ABONGO C.A. CIVIL APPEAL NO 115 OF 2015**. The defendant’s rights to the suit property are overriding interests. The plaintiff’s suit is, clearly therefore, for dismissal.

But that is not all. Although the defendants did not plead limitation in very clear language, they pleaded at paragraph 16 of their defence as follows: -

**16: “The defendants’ jointly aver that the suit herein is frivolous, vexatious and an abuse of the due process of law henceforth**

*the plaintiff shall be invited to absolute strict proof thereof.”*

Whereas I am not persuaded that this suit is frivolous or vexatious, it is clearly an abuse of the due process of law of limitation. In any event, an issue of limitation is a jurisdictional issue that can be raised by the Court suo – motto – **NASRA IBRAHIM IBREN .V. I.E.B.C & OTHERS SUPREME COURT PETITION NO 19 OF 2018**. See also **ANACLET KALIA MUSAU .V. A – G & OTHERS C.A CIVIL APPEAL NO 111 OF 2017 [2020 eKLR]** and also **EDWARD LILUMBI & OTHERS .V. DIPHINA AHAMBELWA & OTHERS 2019 eKLR**. The plaintiff’s case is that the defendants have dispossessed him of the suit property. In his plaint, **WEKESA** did not plead when exactly he was dispossessed of the land. But that is not surprising because that non – disclosure was meant to forestall any objection premised under the provisions of **Section 7 of the Limitation of Actions Act** which reads: -

*7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”*

**Section 9(1) of the same Act** provides that: -

*9(1): “Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.”*

It is common ground that **WEKESA** was the first allottee of the suit property. In his oral testimony on 2<sup>nd</sup> July 2018, he told the Court that he built a house thereon in 1963. The defendants’ uncontroverted evidence is that they have been in occupation and possession of the suit property since 1964 which means that that is the year when **WEKESA** was dispossessed of the same. He did not have to wait until 2015 or indeed, until after he had obtained the title thereto in order to file this suit, because his interest therein was well known as far back as 1963. **WEKESA**’s cause of action accrued in 1964 and this suit is clearly out of time and that alone disentitles the plaintiff to the orders sought therein.

The up – shot of all the above is that the plaintiff’s suit is devoid of merit and must be dismissed.

Earlier on in this Judgment, I indicated that the defendants did not plead any Counter – Claim seeking orders to impeach the plaintiff’s title to the suit property. This Court has already made a finding that whereas the plaintiff is the registered proprietor of the suit property, the defendants have established that they have a genuine claim to the same and continue to be in occupation, possession and use thereof. Courts do not act in vain and it is my view that in order to bring this dispute to a logical conclusion at least for purposes of this Judgment, and further, to avoid mischief in the use of the title held by the plaintiff, it is in order that this Court cancels that title. In doing so, I invoke the inherent powers bestowed upon this Court by **Section 3A of the Civil Procedure Act** “*for the ends of justice or to prevent abuse of the process of the Court.*” I am also emboldened by the decision in **ODD JOBS .V. MUBIA 1970 EA 476** where it was held as follows: -

*“In East Africa, the position is that a Court may allow evidence to be called and may base it’s decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has infact been left to the Court for decision.”*

See also **DAVID NJAGI WAMBU .V. GRACE MUTHONI GITUTO 2018 eKLR**. In the course of this trial, the plaintiff asserted his claim to the suit property on the basis of being the registered proprietor thereof. The defendants on the other hand have established, to my satisfaction, that not only are they entitled to ownership of the suit property by virtue of their long period of occupation, possession and use thereof to entitle them orders in trust but also, there is cogent evidence that **WEKESA** did infact relinquish ownership of the suit property in favour of **NATO**.

Ultimately therefore and having considered the evidence by the parties herein, I make the following orders: -

- 1. The plaintiff’s suit is dismissed.**
- 2. The Land Registrar Bungoma is directed to cancel the title to land parcel NO BUNGOMA/KABISI/323 issued on 11<sup>th</sup> September 2009 in the names of FRANCIS SIMIYU WEKESA and to issue a new title in the names of JOSEPH NAMASAKA NATO in trust for himself and his siblings.**
- 3. The plaintiff shall meet the costs of this suit.**

**Boaz N. Olao.**

**J U D G E**

**26<sup>th</sup> June 2020.**

**Judgment dated, delivered and signed at BUNGOMA this 26<sup>th</sup> day of June 2020.** To be delivered by electronic mail with notice to the parties in light of the practice directions following the **COVID – 19** pandemic.

**Boaz N. Olao.**

**J U D G E**

26<sup>th</sup> June 2020.