REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 35 OF 2012

GERISHOM WANYONYI KOLOLI.............................1ST PLAINTIFF

AGGREY WAMBULWA KOLOLI...............................2ND PLAINTIFF

HENRY MASIBO KOLOLI...3RD PLAINTIFF

JULIANA KOLOLI..4TH PLAINTIFF

VERSUS

JOSEPH SAPIRI..1ST DEFENDANT

JAMES NGOSIA NANDOLI....................................2ND DEFENDANT

DOMINIC WAFULA NANDOLI..............................3RD DEFENDANT

LENAH MURUNGA CHENJENI.............................4TH DEFENDANT

DANIEL NAMACHANJA NANDOLI......................5TH DEFENDANT

ELIZABETH OKEMA JAIRO.................................6TH DEFENDANT

CONSOLIDATED WITH ELC CASE NO. 27 OF 2013 (formerly HCC NO. 89 OF 2005)

JOSEPH SAPIRI...1ST PLAINTIFF

JAMES NGOSIA NANDOLI......................................2ND PLAINTIFF

DOMINIC WAFULA NANDOLI

(Suing as personal representative of

WYCLIFFE MASIKA NANDOLI – DECEASED)..3RD PLAINTIFF

LINA MURUNGA CHENJENI..................................4TH PLAINTIFF

DANIEL NAMACHANJA NANDOLI......................5TH PLAINTIFF

DAVID WAFULA NANDOLI...................................6TH PLAINTIFF

DOMINIC WAFULA NANDOLI.............................7TH PLAINTIFF

ELIZABETH OKEMA JAIRO................................ 8TH PLAINTIFF

VERSUS

JOHNSTONE KHISA KOLOLI..................................DEFENDANT

J U D G M E N T

This case was scheduled for mention on 23rd March 2020 to confirm if the parties had filed their respective submissions. However, due to the **COVID – 19** pandemic, it was not until 11th June 2020 that counsel for the plaintiffs filed his submissions.

On 22nd June 2015, **MUKUNYA J** made orders consolidating this suit and **BUNGOMA ELC CASE NO 27 OF 2013** (formerly **BUNGOMA HCCC NO 89 OF 2005**) for purposes of hearing. This file would be the lead file for purposes of recording proceedings and the plaint herein would be the plaint and the Originating Summons in **BUNGOMA ELC CASE NO 27 OF 2013** would be the defence and Counter – Claim.

Land parcel **NO BOKOLI/BOKOLI/286** (the suit land) was first registered in the names of **JAVAN NANDOLI (NANDOLI)** on 26th October 1967. Prior to his death on 8th March 2007, **NANDOLI** took a loan from Kenya Commercial Bank which he was unable to service and requested **JOHNSTONE KHISA KOLOLI (KOLOLI)** to repay the loan. However, **NANDOLI** was unable to refund the money to **KOLOLI** who filed a suit against him at the **KAKAMEGA HIGH COURT** being **CIVIL SUIT NO 57 OF 1978** and pursuant to a decree obtained therein, **KOLOLI** was allowed to bid for the suit land in a public auction and became the registered owner thereof in 1984 although the family of **NANDOLI** who are the defendants herein remained in occupation and possession thereof and refused to vacate. This forced **KOLOLI** to file **BUNGOMA SRM CIVIL SUIT NO 158 OF 1996** which was later transferred to **BOKOLI LAND DISPUTES TRIBUNAL** as **CASE NO 4 OF 1996** and obtained orders to evict the defendants and their mother **LOICE NEKESA NANDOLI**. An appeal to the **WESTERN PROVINCE LAND DISPUTES TRIBUNAL** against that eviction order was dismissed and the order was adopted in **WEBUYE SRM CASE NO 22 OF 1998**. A further appeal to the High Court was dismissed by **MUCHEMI J** on 16th July 2009 in **BUNGOMA H.C CIVIL APPEAL NO 46 OF 2006** for want of prosecution. Yet another appeal by **LOICE NEKESA NANDOLI** being **BUNGOMA H.C CIVIL APPEAL NO 58 OF 1998** was also dismissed on 7th May 2002 by **MBITO J**.

Meanwhile, by an Originating Summons dated 10th November 2005 and originally filed in **BUNGOMA H.C.C.C NO 89 OF 2005** (later **BUNGOMA ELC CASE NO 27 OF 2013**) the defendants each claiming to have been given portions of the suit land by **NANDOLI** and having acquired the same by adverse possession sought a determination of the following issues as against **KOLOLI**:-

1. **Whether the defendants have been in continuous, open and peaceful occupation of their respective acreages out of the suit land measuring a total of 69 acres for a period exceeding 12 years.**

2. **Whether although the suit land is now registered in the names of KOLOLI, his right over all the 69 acres comprised therein has been extinguished by the operation of Section 7 and 17 of the Limitation of Actions Act.**

3. **Whether the defendants have acquired proprietary rights and interests in their respective acreages out of the suit land.**

4. **Whether the defendants are legally entitled to be registered as proprietors thereof.**

5. **Who should be condemned to pay the costs?**

The Originating Summons was based on the grounds set out therein and supported by the defendants' supporting affidavits all dated 10th November 2005.

It is the defendants' case that in 1982, they were allocated the following acreages out of the suit land by their father **NANDOLI** i.e:-

1. **JOSEPH SAPIRI - 10 acres**

2. **JAMES NGOSIA NANDOLI - 10 acres**

3. **DOMINIC WAFULA NANDOLI - 14 acres**

   (representing WYCLIF NANDOLI – deceased)

4. **LENA MURUNGA CHENJENI - 6 acres**

5. **DANIEL NAMACHANJA MUKANDA - 9 acres**

6. **DOMINIC WAFULA NANDOLI - 4 acres**

7. **DAVID WANJAL NANDOLI - 4 acres**

8. **ELIZABETH OKEMA JAIRO - 12 acres**

The basis of their claim is that during his life – time their father **NANDOLI** allocated to them the various acreages out of the suit land as

indicated above in 1982. That they have since then enjoyed quiet and peaceful occupation of their various portions which have clear boundaries put in place by **NANDOLI** in 1982. That in 1998 **KOLOLI** filed **WEBUYE SRM NO 22 OF 1998** seeking to evict **LOICE NEKESA NANDOLI** and her servants and agents from the suit land. It is their case that they have acquired the suit land by way of adverse possession and that **KOLOLI** though aware of their occupation thereof took no steps in repossessing the same. Those averments are contained in the separate supporting affidavits filed by each of the defendants.

In response to that Originating Summons **KOLOLI**, who was later substituted by the plaintiffs herein as Administrators of his Estate, filed a replying affidavit dated 8th February 2006 in which he deponed, inter alia, that the defendants' claim to the suit land by way of adverse possession cannot succeed in law as it is filed to evade the eviction orders issued against them. He added that he is the registered proprietor of the suit land having obtained the title on 24th November 1986 after purchasing it in an auction following **NANDOLI**'s inability to service a loan granted to him by Kenya Commercial Bank. However, **NANDOLI** refused to vacate the suit land and orders of eviction were issued against him. A fresh suit was filed against **NANDOLI**'s widow **LOICE NEKESA NANDOLI** which was transferred to the **BOKOLI LAND DISPUTES TRIBUNAL** by the Court which ruled in his favour. **LOICE NEKESA NANDOLI** appealed both to the Western Province Land Disputes Tribunal and the High Court but lost and on 6th June 2005 the **WEBUYE COURT in CASE NO 22 OF 1998** ordered the eviction of **LOICE NEKESA NANDOLI** and her family from the suit land but the defendants obtained an order that the eviction would not affect them. Then the file Court disappeared. That the defendants have not come to Court with clean hands and are bound by the eviction orders issued in **WEBUYE CASE NO 22 OF 1998**. He denied that the defendants have occupied the suit land openly continuously exclusively and un – interrupted adding that their occupation has been challenged in Court since 1978 and he has a vesting order. He therefore counter – claimed for the eviction of the defendants from the suit land as ordered in **WEBUYE COURT CASE NO 22 OF 1998**.

By their plaint dated 6th August 2012 and filed herein on 28th August 2012, the plaintiffs herein suing in their capacity as the Administrators of the Estate of **KOLOLI** sought Judgment against the defendants in the following terms: -

(a) The defendants do vacate the land parcel NO BOKOLI/BOKOLI/286 and in default, be forcefully evicted.

(b) The defendants be condemned to pay costs of this suit.

(c) Any further orders as the Court may deem fit to grant.

The basis of their claim is that prior to his death on 8th March 2007, **KOLOLI** had purchased the suit land which originally belonged to **NANDOLI** in a public auction but it was occupied by the defendants. In an attempt to evict the defendants, **KOLOLI** filed a suit which was referred to the **BOKOLI LAND DISPUTES TRIBUNAL** which ruled in his favour and the eviction orders were adopted in **WEBUYE SRM CASE NO 22 OF 1998**. However, **KOLOLI** passed away before the eviction orders had been executed. An application by the plaintiffs to be substituted in place of **KOLOLI** in **WEBUYE SRM CASE NO 22 OF 1998** was dismissed as the suit had abated. In 2005, the defendants filed **BUNGOMA H.C.C.C NO 59 OF 2005 (OS)** against **KOLOLI s**eeking orders that they had obtained the suit land by way of adverse possession but that suit was not prosecuted and similarly abated. The plaintiffs' claim therefore is that the defendants should vacate the suit land in accordance with the Judgment in **WEBUYE SRM CASE NO 22 OF 1998**.

Together with the plaint, the plaintiffs filed their list of documents and witness statements.

In his statement which was adopted by all the other witnesses, **GERISHOM WANYONYI KOLOLI** the 1st plaintiff herein states that he is one of the four Administrators of the Estate of **KOLOLI** who owned the suit land having purchased it in a public auction. That the suit land was previously occupied by **NANDOLI** and his family which comprise his wife **LOICE NEKESA NANDOLI** and the defendants. That **KOLOLI** filed a suit to have **LOICE NEKESA NANDOLI** evicted but died before the eviction could be carried out. The **BOKOLI LAND DISPUTES TRIBUNAL** ordered **LOICE NEKESA NANDOLI** and her family to vacate the suit land which decision was adopted by the **WEBUYE SRM COURT** and **LOICE NEKESA NANDOLI**'s appeal was dismissed both by the Wester Provincial Appeals Committee and the High Court **BUNGOMA in CIVIL APPEAL NO 58 OF 1998** and on 6th June 2005, the Court at WEBUYE ordered for the eviction of **LOICE NEKESA NANDOLI** from the suit land but her children who are the defendants herein obtained an order that the eviction would not affect them. That order was however set aside in **BUNGOMA HIGH COURT CIVIL APPEAL NO 46 OF 2006**. It was then that the defendants filed **BUNGOMA H.C.C.C NO 89 OF 2005 (OS)** against **KOLOLI** who however died before the suit was heard. The plaintiffs attempted to use the eviction order in **WEBUYE SRM CASE NO 22 OF 1998** to evict the defendants was rejected on the ground that it had lapsed thus necessitating this suit. **AGGREY WAMBULWA SITATI**, **HENRY MASIBO KHISA** and **JULIANA KOLOLI** (the 2nd, 3rd and 4th plaintiffs respectively) filed witness statements adopting the statement by the 1st plaintiff.

In response to that plaint, the defendants filed a joint statement of defence denying that **WEBUYE SRM CASE NO 22 OF 1998** had been filed against **NANDOLI** and his family or at all. They pleaded that the award of the **BOKOLI LAND DISPUTES TRIBUNAL** was incompetent and the claim by **KOLOLI** for their eviction was statute barred. That the Court in **WEBUYE SRM CASE NO 22 OF 1998** dismissed the plaintiffs' application to be substituted in that case in place of **KOLOLI** and the plaintiffs' suit is frivolous, incompetent and an abuse of the process of the Court since the Judgment in **WEBUYE SRM CASE NO 22 OF 1998** did not affect the defendants and this suit is barred by **Section 7 of the Civil Procedure Act** being res – judicata and should be dismissed with costs.

The 3rd defendant **(DOMINIC WAFULA NANDOLI)** with the authority of the other defendants filed a witness statement dated 29th May 2017 and a list of documents of the same date. In the said statement, he confirms that all the defendants are the children of **NANDOLI** who was the registered proprietor of the suit land in 1967 and that before his death in 1989, he had given each of the defendants their respective portion of the suit land as gifts in 1982. That from 1982 to – date, the defendants have enjoyed exclusive, and peaceful occupation of their respective portions of the suit land which they have developed. That in 1984, the plaintiffs became the registered proprietors of the suit land without the defendants' knowledge and in 1998, the plaintiff served the defendants' mother **LOICE NEKESA NANDOLI** with an eviction order which is over 12 years ago. That from 1984 when the plaintiffs became the registered proprietor of the suit land upto 1998, they had

never attempted to take possession of the suit land and their interest therein is therefore extinguished and the defendants should be registered as the proprietors of their respective portions. That the proceedings which led to **KOLOLI** being registered as the proprietor of the suit land were entirely ex – parte and even the original land certificate is still in the names of **NANDOLI**.

The trial commenced before **MUKUNYA J** on 31st May 2017 when **GERISHOM WANYONYI KOLOLI** (the 1st plaintiff herein) testified and adopted as his evidence the witness statement that I have already summarized above and also produced the plaintiff's list of documents.

DOMINIC WAFULA NANDOLI (the 3rd defendant herein) was similarly the only witness called by the defendants and he testified before me on 1st July 2017 and adopted his witness statement as his evidence. He also produced the defendants' list of documents dated 29th May 2017.

Submissions were thereafter filed both by **MR MAKOKHA** instructed by the firm of **MAKOKHA WATTANG'A & LUYALI ADVOCATES** for the plaintiffs and by **MR KRAIDO** instructed by the firm of **KRAIDO & COMPANY ADVOCATES** for the defendants.

I have considered the evidence by the parties herein, the documents filed and the submissions by counsel.

While the plaintiffs seek the main order to evict the defendants from the suit land, the defendants' Counter – Claim is that they have acquired the same by way of adverse possession having occupied it since 1982 when their late father **NANDOLI** gave each of them a portion thereof.

Before I consider the parties respective claims to the suit land, the defendants pleaded in paragraph 9 of their defence to the plaintiffs' suit that the matter is res – judicata and therefore this Court lacks the requisite jurisdiction to determine it.

As res – judicata is a complete bar to a suit and although it was not taken up as a Preliminary Objection, it is important that I address it first. This is because, jurisdiction is everything and once a Court establishes that it has no jurisdiction to determine a dispute before it, then it must down it's tools – **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' .V. CALTEX OIL (KENYA) LTD 1989 KLR 1**. Indeed, an issue of jurisdiction can be raised by the Court suo – motto.

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 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."***

Before res – judicata can apply, the following must be proved: -

> **1. The issue in dispute in the former suit between the parties must be directly and substantially in issue between the parties in the suit where the doctrine of res – judicata is pleaded.**
>
> **2. The former suit must have been between the same parties or those under whom they or any of them claim litigating under the same title.**
>
> **3. The former suit must have been heard and finally decided.**
>
> **4. The Court or Tribunal which determined the former suit must have been competent.**

See **KARIA & ANOTHER .V. ATTORNEY GENERAL 2005 1 E.A 83** and also **JOHN FLORENCE MARTITIME SERVICES LTD & ANOTHER .V. CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE C.A CIVIL APPEAL NO 42 OF 2014**. The rationale behind the principle of res – judicata is that there should be an end to litigation so that parties are not made to face repetitive litigation over the same subject matter. To determine whether the plaintiffs' suit is res – judicata, I must therefore examine the previous suits involving the suit land.

From the record herein, there is no doubt that the suit land has been the subject of previous suits involving **KOLOLI**, **NANDOLI** and their successors who are the parties herein. These suits are: -

> **1. BOKOLI LAND DISPUTES TRIBUNAL CASE NO 4 OF 1996.**
>
> **2. WEBUYE SRM CASE NO 22 OF 1998.**
>
> **3. BUNGOMA HIGH COURT CIVIL APPEAL NO 58 OF 1998.**
>
> **4. WESTERN PROVINCIAL LAND DISPUTES APPEAL NO 51 OF 1996.**

5. BUNGOMA HIGH COURT CASE NO 89 OF 2005 (OS).

6. BUNGOMA HIGH COURT CIVIL APPEAL NO 46 OF 2006.

BUNGOMA HIGH COURT CIVIL CASE NO 89 OF 2005 (OS) later became **BUNGOMA ELC CASE NO 27 OF 2013** which is also the subject of this Judgment following the consolidation. It is the only suit in which adverse possession is an issue. A claim for adverse possession could not have been raised in **BOKOLI LAND DISPUTES TRIBUNAL CASE NO 4 OF 1996** which culminated in orders that were adopted in **WEBUYE SRM CASE NO 22 OF 1998** and the subsequent appeals in **BUNGOMA HIGH COURT CIVIL APPEAL NO 46 OF 2006** and **NO 58 OF 1998** as well as the initial appeal at the **PROVINCIAL WESTERN LAND DISPUTES APPEAL CASE NO 51 OF 1996**. Therefore, those cases cannot be invoked to sustain a plea of res – judicata.

There was of course the first suit being **KAKAMEGA HIGH COURT CIVIL CASE NO 57 OF 1978** where **KOLOLI** had sued **NANDOLI** and obtained a Judgment for the sum of Kshs. 51,518/=. What precipitated that suit was **KOLOLI**'s claim for the refund of Kshs. 40,000/= which he had expended in paying **NANDOLI**'s loan at the Kenya Commercial Bank. That suit had nothing to do with the suit land herein. It however ended up with a decree in favour of **KOLOLI** for the sum of Kshs. 51,518/-. The execution of that decree resulted in a vesting order in favour of **KOLOLI** after he purchased the suit land in an auction. However, the matter directly and substantially in issue in **KAKAMEGA HIGH COURT CIVIL CASE NO 57 OF 1978** was never the suit land. It was a claim for the refund of the Kshs. 40,000/=.

In the circumstances, the defendants' plea that the plaintiffs' suit is res – judicata is not well taken. It is accordingly dismissed.

It is also clear from the record herein that although the land certificate in respect to the suit land and which is part of the defendant's documents shows that the suit land was registered in the names of **NANDOLI** on 14th January 1970, the register shows that on 14th November 1986, the suit land was registered in the names of **KOLOLI** and the land certificate was issued to him on 18th November 1986 no doubt pursuant to the vesting order issued in **KAKAMEGA HIGH COURT CIVIL CASE NO 57 OF 1978** after **NANDOLI** was un-able to satisfy the decree of Kshs. 51,518/=. Therefore, as per the register and which is the official document from the Land Registry, the suit land has since 14th November 1986 been registered in the names of **KOLOLI** whose Estate the plaintiffs represent.

From the plaint herein, the plaintiffs appear to be hinging their claim to the suit land on the eviction orders issued against **KOLOLI** in **WEBUYE SRM CASE NO 22 OF 1998**. This is what they have pleaded in paragraph 8 of their plaint.

> ***"The plaintiffs' case against the defendants is that the latter should vacate land parcel NO BOKOLI/BOKOLI/286 in accordance with the Judgment of the Court in WEBUYE SRM MISCELLENEOUS APPLICATION NO 22 OF 1998 or be forcefully evicted."***

In essence therefore, the plaintiffs are attempting, through this suit, to execute a decree issued in another Court. **Section 34(1) of the Civil Procedure Act** prohibits that. It reads: -

> ***"All questions arising between the parties to the suit in which the decree was passed, or their representative, 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.

It is clear therefore that what the plaintiffs ought to have done was to pursue the decree issued in **WEBUYE SRM COURT CASE NO 22 OF 1998** in that Court but not to file this case afresh to execute orders that were issued in a separate suit. Counsel for the plaintiffs has stated as follows in paragraph 32 of his submissions:-

> ***"We submit that the defendants have no authority to be on the suit property once the registered absolute proprietor demanded their removal whether peacefully and or forcefully by an order of the Court. Their mere denial of the rights of proprietorship of the Estate of the late JOHNSTONE KHISA KOLOLI does not in any way negate the trespass. Accordingly, the defendants' continued occupation of the land parcel number BOKOLI/BOKOLI/286 after they were requested to vacate the same constitutes trespass upon private land."***

That may be so. However, as is now clear from the mandatory provisions of **Section 34(1) of the Civil Procedure Act**, those issues could only properly be canvassed in **WEBUYE SRM COURT CASE NO 22 OF 1998** but not in another suit.

It is also instructive to note that the award of the **KAKAMEGA PROVINCIAL APPEALS COMMITTEE** was adopted as the Judgment of the Court on 28th August 1998 by **HON. H. S. WASILWA – RESIDENT MAGISTRATE** (as she then was). It is not clear if any decree was extracted. I could not see any in the documents filed herein other than the eviction order issued by **P. M. MULWA – RESIDENT MAGISTRATE** (as he then was) on 23rd June 2005. Even assuming that a decree followed immediately after the Subordinate Court had adopted the award of the **KAKAMEGA PROVINCIAL APPEALS COMMITTEE** on 28th August 1998, and that this matter is in the proper Court for execution of the resultant decree, it would clearly be defeated by laches since a decree cannot be executed after 12 years. That is the law under **Section 4(4) of the Limitation of Actions Act**. In the case of **M'IKIARA M'RINKANYA & ANOTHER .V. GILBERT M'MBIJIWE C.A CIVIL APPEAL NO 124 OF 2003 [2007 eKLR]** the Court of Appeal after considering English and local jurisprudence on the matter, stated as follows: -

> ***"From the above analysis, it is clear that a Judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in Section 7 of the Act. If the Judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the Judgment debtor acquires possessory title by adverse***

possession which he can enforce in appropriate proceedings."

It must be remembered that the eviction order issued on 23rd June 2005 was not, stricto sensu, the decree envisaged under **Order 21 of the Civil Procedure Rules**. It was simply meant to enforce a Judgment that had been delivered in 1998. The plaintiffs' suit was filed in 2012.

In my view therefore, and in light of the foregoing, the plaintiffs' suit is clearly bad in law, incompetent and misconceived.

In urging this Court to find in favour of the plaintiffs, their counsel has submitted, and rightly so, that the title of **KOLOLI** is protected by the provisions of **Sections 24, 25 and 26 of the Land Registration Act**. By virtue of being the registered proprietor of the suit land, **KOLOLI**, and after him, his Estate, is entitled to all the rights and privileges belonging or appurtenant thereto. That of course includes the right to eject trespassers and that is the remedy that the plaintiffs herein seek. However, that registration, as provided in **Section 25(1)(b) of the Land Registration Act** is subject: -

> ***"to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register."***

A similar provision is in **Section 28(b) of the repealed Registered Land Act** under which the suit land was registered. Among those rights are the overriding interests found in **Section 28(h) of the Land Registration Act** which are: -

> ***"rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."***

Those are the rights that the defendants are agitating in their Counter – Claim and it is those rights that I shall now interrogate.

Section 38(1) of the Limitation of Actions Act provides that: -

> ***"Where a person claims to have become entitled by adverse possession to land registered under any 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."***

In **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal held as follows: -

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

It is now well established that the combined effect 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 12 years of the adverse possession of the land in dispute – **BENJAMIN KAMAU .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996**. A party claiming land by adverse possession must also prove that his occupation and possession of the land has been nec vic nec clam nec precario i.e. no force, no secrecy no persuasion **– KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1976 – 80 1 KLR 1500 (1980 KLR 10)**. The occupation and possession must also be open, peaceful, continuous un – interrupted and with the knowledge of the owner. In a recent exposition of the doctrine of adverse possession, the Court of Appeal in the case of **MTANA LEWA .V. KAHINDI NGALA MWAGNDI C.A CIVIL APPEAL NO 56 OF 2014 [2015 eKLR]** described it as follows:-

> ***"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 pre – requisite being that the possession of the adverse possessor is neither by force or stealth or under 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."***

Time ceases to run for purposes of adverse possession when the owner of the land takes legal action to assert his ownership – **GITHU .V. NDEETE 1984 KLR 776** or when his right is conceded by the adverse possessor.

The defendants' case is that since 1982 when **NANDOLI** allocated each of them their respective portions of the suit land, they have been in quiet occupation and possession of those portions developing and cultivating them without any interruption. That it was not until 1998 that **KOLOLI** filed eviction proceedings against their mother **LOICE NEKESA NANDOLI** in **WEBUYE SRM COURT CASE NO 22 OF 1998**. The defendants' occupation and possession of the suit land since 1982 is not really in doubt. Indeed, that is why the plaintiffs want them evicted. The plaintiffs' counsel however questions how the defendants could have been allocated the suit land while there is no evidence of consent from the Land Control Board. This is how counsel puts it in paragraph 26 of his submissions: -

> ***26: "The defendants allege that the suit property belonged to their father the late JAVAN NANDOLI and that the same was given to them in the year 1982. This is agricultural land the same is subject to the provisions of the Land Control Act Cap 302 of the Laws of Kenya. There is no evidence placed before this Court showing that indeed in 1982, the defendants were presented before the Land Control Board and consents issued allocating them land."***

It is true that indeed there was no evidence presented by the defendants showing that **NANDOLI** transferred to them the various portions of the suit land as captured in their respective supporting affidavits. However, the defendants' claims are hinged on adverse possession and not on the transfer by **NANDOLI**. Therefore, the provisions of the Land Control Act are not applicable. **MADAN JA** (as he then was) said as follows in **PUBLIC TRUSTEE .V. WANDURU NDEGWA C.A CIVIL APPEAL NO 73 OF 1982 [1984 eKLR]**: -

> ***"The provisions of the Land Control Act have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land."***

Counsel for the plaintiffs has also urged in paragraph 37 of his submissions that the defendants' occupation of the suit land has not been peaceful as there have been many cases first between **KOLOLI** and **NANDOLI**, then between **KOLOLI** and **LOICE NEKESA NANDOLI** and finally between **KOLOLI** and the defendants. Further, that the defendants have not specifically stated what acreage each of them actually possesses on the ground. As to what acreage of the suit land each of the defendants occupy, it is pleaded in the Originating Summons that the suit land measures 69 acres. The portions that each of the defendants occupy is indicated in their respective affidavits as itemized earlier on in this Judgment. Therefore, the defendants' respective portions of the suit land are clearly defined and, in any event, they are claiming the whole suit land measuring 69 acres (27.6 Hectares) and not just a portion of it.

And as regards previous litigation over the suit land, it is clear from the authority of **GITHU .V. NDEETE** (supra) that time ceases to run when the owner of the land in dispute takes legal action to assert his proprietorship. It is clear form the register that the suit land was first registered in the names of **NANDOLI** on 26th October 1967. On 14th November 1986, it was registered in the names of **KOLOLI** and the land certificate was issued to him on 18th November 1986. The defendants' case is that they have been in peaceful, open, exclusive and un-interrupted occupation and possession of the suit land since 1982 after **NANDOLI** allocated each one of them their respective shares. As I have already stated above, the defendants' occupation and possession of the suit land is common ground. It is a fact well within the knowledge of the plaintiffs who want to evict them. It is also common ground that there have been previous litigations involving **NANDOLI**, **KOLOLI** and the parties herein over the suit land. What I need to consider now is whether the defendants' occupation and possession of the suit land has been interrupted by those litigations.

The first litigation, from the record herein, appears to have been **KAKAMEGA HIGH COURT CIVIL CASE NO 57 OF 1978** when **KOLOLI** filed a suit against **NANDOLI** and obtained a Judgment on 24th August 1980 for the sum of Kshs. 51,518/=. Although the pleadings in that suit were not availed, it is clear to me from the vesting order dated 28th August 1986 that **KOLOLI** had filed that suit seeking to recover the Kshs. 40,000/= which he had paid Kenya Commercial Bank on behalf of **NANDOLI** in order to redeem the suit property which was due for auction. I do not consider that suit to have been one where the proprietor of the suit property was taking legal action against the adverse possessor as envisaged in **GITHU .V. NDEET**E (supra). This is because, as at 1978, the registered proprietor of the suit property was **NANDOLI** and not **KOLOLI**. That is why the vesting order authorized the sale by public auction of the suit land to enable **KOLOLI** satisfy the decree of Kshs. 51,518/=. The vesting order reads in paragraph 1 as follows: -

> ***"Whereas on 24th August 1980 Judgment was passed by this Court against the defendant JAVAN NANDOLI wherein he was ordered to pay a sum of Kshs. 51,518 to the plaintiff."***

It was after **NANDOLI** had failed to satisfy the decree of Kshs. 51,518/= that the suit land was sold to **KOLOLI**. Therefore, **KAKAMEGA HIGH COURT CIVIL CASE NO 57 OF 1978** was not a suit by the registered owner of land seeking to asset his proprietary rights against an adverse possessor. In any event, **KOLOLI** only became the registered proprietor of the suit land on 14th November 1986. He had no interest in the suit land in 1978.

The next case was **BOKOLI LAND DISPUTES TRIBUNAL CASE NO 4 OF 1996** in which **KOLOLI** obtained orders from the **TRIBUNAL** to evict **LOICE NEKESA NANDOLI** and her family which includes the defendants herein, from the suit land. By 1996 however, the defendants had been in open, peaceful and un – interrupted occupation of the suit land for 14 years having taken occupation thereof in 1982. And although **KOLOLI** was only registered as the proprietor of the suit land on 14th November 1986, the law is that a mere change of ownership does not interrupt a claim to land by way of adverse possession – **GITHU .V. NDEETE** (supra). Therefore, by the time **KOLOLI** filed **BOKOLI LAND DISPUTES TRIBUNAL CASE NO 4 OF 1996** against **LOICE NEKESA NANDOLI**, his title to the suit land had already been extinguished by operation of law.

The suit land is currently registered in the names of **KOLOLI** (now deceased) and the plaintiffs are only the Administrators of his Estate having obtained the Grant of Letters of Administration in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 107 OF 2008**. However, it is clear from the decision in **KARUNTIMI RAIJI .V. M'MAKINYA M'ITUNGA 2013 eKLR** that a claim for adverse possession can be maintained against the Estate of a deceased person. The defendants' Counter – Claim seeking orders that they are entitled to the suit land by way of adverse possession is therefore well merited and I allow it.

On the issue of costs, **Section 27 of the Civil Procedure Act** is clear that costs are a discretion of the Court and ***"shall follow the event unless the Court or Judge shall for good reason otherwise order."*** In my view, what precipitated this litigation was the failure by **NANDOLI** to refund to **KOLOLI** the Kshs. 40,000/= which the latter had paid to Kenya Commercial Bank to redeem the suit property which was due for auction. The two were friends and indeed during the proceedings at the **BOKOLI LAND DISPUTES TRIBUNAL**, **KOLOLI** is recorded as saying: -

> ***"On humanitarian grounds, I gave my friend JAVAN NANDOLI 3 months to refund me my 85,000 so that I could surrender his land back to him but he was unable to raise the same."***

Given those circumstances, it would be harsh to penalize the plaintiffs with an order to pay costs.

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

1. The plaintiffs' suit is dismissed.

2. The defendants' Counter – Claim is allowed in the following terms: -

(a) The defendants have acquired the land parcel NO BOKOLI/ BOKOLI/286 of way of adverse possession and are legally entitled to be registered as proprietors thereof.

(b) The plaintiffs shall execute all the relevant documents to facilitate that registration within 30 days from the date of this Judgment.

(c) In default of (b) above, the Deputy Registrar shall be at liberty to do so on their behalf.

(d) Each party shall meet their own costs.

Boaz N. Olao.

J U D G E

16th July 2020

Judgment dated, delivered and signed at BUNGOMA this 16th day of July 2020. To be delivered through electronic mail with notice to the parties in keeping with the guidelines following the COVID – 19 pandemic.

Boaz N. Olao.

J U D G E

16th July 2020