



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 127 OF 2014

RICHARD NYONGESA MAYAMBA PLAINTIFF

VERSUS

JANE NAMONO MERU DEFENDANT

CONSOLIDATED WITH

ELC CASE NO. 4 OF 2019 (O.S)

JANE NAMONO MERU.....PLAINTIFF

VERSUS

RICHARD NYONGESA MAYAMBA..... DEFENDANT

J U D G M E N T

RICHARD NYONGESA MAYAMBA (the plaintiff herein) moved this Court through his plaint dated 16th July 2014 in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 127 of 2014** seeking Judgment against **JANE NAMONO MELU** (the defendant herein) in the following terms: -

- 1. An order for the eviction of the defendant from the land parcel NO NORTH MALAKISI/SOUTH WAMONO/526.**
- 2. Costs**
- 3. Any other relief this Honourable Court may deem fit and just to grant.**

The plaintiff’s claim to the said land parcel **NO NORTH MALAKISI/SOUTH WAMONO/526** (the suit land) was premised on pleadings that he is the registered proprietor thereof yet in 2008, the defendant, without any colour of right or consent, entered and constructed semi permanent structures thereon and has refused to vacate. That the dispute over the suit land had been heard by the **MALAKISI LANDS DISPUTES TRIBUNAL** (herein the Tribunal) which made an award ordering her to vacate. That award was adopted by the **BUNGOMA CHIEF MAGISTRATE’S COURT IN CASE No 54 of 2005** but the defendant has refused to vacate hence this suit.

Together with the plaint, the plaintiff also filed his statement, that of his witness **MUSUNGU ROBERT MURAKWA (PW 2)** and a list of documents dated 16th July 2014. In the said statement, he reiterates that he is the registered proprietor of the suit land yet in 2008, the defendant entered thereon and constructed semi – permanent structures. That the defendant had also filed a case against him at the Tribunal which awarded her the suit land but he filed an appeal at the **KAKAMEGA LAND DISPUTES APPEAL TRIBUNAL** and the award was set aside. Among the documents filed are the copy of the Land Certificate in respect to the suit land showing that it was registered in his names on 24th July 1985 as well as the proceedings in the Tribunal and the **BUNGOMA CHIEF MAGISTRATE’S COURT CASE NO 54 OF 2005**.

His witness **MUSUNGU ROBERT MURAKWA (PW 2)** in his statement dated 20th November 2019 states that he knew that **GAVA CHIRO** bought the suit land from the father of **ISAAC OKATEGE**. He adds that he used to visit **GAVA CHIRO** and his wife **AMINA CHIRO** who had built a house on the suit land where they lived and they had no child.

Due to their adduced age, the couple needed a helper and so the plaintiff had to visit and help them. The plaintiff and **GAVA CHIRO** were

able to bond and since the couple had no child who inherit him, **GAVA CHIRO** transferred the suit land to the plaintiff. He adds that the defendant is not related to **GAVA CHIRO** and cannot make any claims on the suit land.

In response to the plaintiff's claim, the defendant filed a defence and Counter – Claim dated 1st August 2014 in which she pleaded, inter alia, that the plaintiff obtained title to the suit land through fraud and that land infact belonged to her late father and the plaintiff has no proprietary interest therein.

In her Counter – Claim, the defendant sought an order that the plaintiff's title be cancelled and the suit land revert to the name of the deceased **KEFA JIRO** to allow her apply for the grant. She also filed witnesses statements and list of documents which include a limited Grant of Letters of Administration Ad Litem issued to her on 14th September 2009 in respect to the Estate of **KEFA JIRO**, a copy of the Green Card showing that the suit land was first registered in the names of **GAVA S/O CHIRO** on 3rd May 1977 before it was transferred as a gift to the plaintiff on 24th July 1985, Chief's letters dated 13th May 2009 and 30th April 2009, agreements with **KABHARA PRIMARY SCHOOL** and a copy of the Death Certificate in respect of **KAVA JIRO**.

In her statement, she states that she is the only child of **GAVA CHIRO** and **AMINA CHIRO** having been born in 1956. That in 1966, her father **GAVA CHIRO** bought the suit land from one **BARNABA ESUTI** on which they settled. That she has lived on the suit land since 1966 to – date and that following the death of his father on 19th July 1985 and his burial on 20th July 1985 the “**LUFU**” ceremony was conducted and nobody made any claim to the suit land including the plaintiff who was present. She denied having entered the suit land in 2008 or that **GAVA CHIRO** gifted it to the plaintiff or sold it to him. She added that the plaintiff obtained registration of the suit land in his name through fraud and that infact it is her mother who has been leasing part of it to **KABHARA SECONDARY SCHOOL**. She too leased it to the school in 2005, 2007 and 2015 and that upon learning about the plaintiff's schemes, she filed a suit at the Tribunal. She therefore sought orders that the plaintiff's suit be dismissed with costs and the suit land revert to her.

On the other hand, the defendant also moved to this Court vide an Originating Summons dated 7th March 2019 and filed on 8th March 2019 in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 4 of 2019 (O.S)** seeking a determination of the following issues as against the plaintiff in respect to the suit land: -

- a. **Whether the defendant has been in open adverse and continuous enjoyment of the use of the suit land for a period of more than 12 years.**
- b. **Whether the plaintiff's title has been extinguished by operation of the law.**
- c. **Whether the plaintiff should transfer the suit land to the defendant and in default, the Deputy Registrar of this Court to execute the transfer documents.**
- d. **Whether the defendant has acquired title to the suit land by way of adverse possession.**

In her supporting affidavit filed together with the Originating Summons, the defendant averred, inter alia that she is the only child of **GAVA CHIRO** and **AMINA CHIRO** having been born in 1956 although she is now married to **NICANORI MERU**. That her late father **GAVA CHIRO** purchased the suit land in 1966 from one **BARNABA ESUTI** and settled his family which only consisted of the defendant and her mother thereon. That she has lived on the suit land from 1966 to – date and during the “**LUFU**” ceremony following the death of her father on 19th July 1985, the suit land was the only asset of her father and nobody including the plaintiff laid any claim to the same. That she put up a home on the suit land and was therefore surprised to learn that the plaintiff had purchased it. That the plaintiff has never lived on the suit land and obtained registration of the same in his name through fraud. That she has lived on the suit land peacefully, continually and adversely for a period of over 12 years and is therefore entitled to be registered as the proprietor thereof.

She also filed her list of documents which include the Green Card to the suit land showing that it was first registered in the names of **GAVA CHIRO** on 3rd may 1977, agreements with **KABKARA PRIMARY SCHOOL**, Death Certificate in respect of **GAVA CHIRO**, proceedings in the Tribunal, photographs, payment vouchers and letter from the Chief.

The defendant also file statements from the following witnesses: -

1. **HERBERT OKISAI OKANYA (DW 2)**
2. **MAURICE NDIEMA CHEMIAT (DW 3)**
3. **WALTER NAMAI OSHOME (DW 4)**
4. **ISAAC HAMISI OKATEGE (DW 5)**

In his witness statement dated 7th March 2019, **HERBERT OKISAI OKANYA (DW 2)** states that the defendant is the only child of **GAVA CHIRO** and his wife **AMINA CHIRO** and that the suit land was sold to **GAVA CHIRO** by the witness' uncle **BARNABA ESUTI** in 1966 whereupon **GAVA CHIRO** settled his family thereon. That following the death of **GAVA CHIRO** who was his neighbour in 1985, the **LUFU** ceremony was held and nobody including the plaintiff laid claim to the suit land which was the only asset left behind by **GAVA CHIRO**. That the plaintiff has never lived on the suit land and when her father died in 1985, she put up a house thereon.

The statements of **MAURICE NDIEMA CHEMAIT (DW 3)** and **ISAAC HAMISI OKATEGE (DW 5)** are similar and substantially

confirm the contents of the statements of the defendant and **HERBERT OKISAI OKANYA (DW 2)**. They confirm that the defendant is the only child of **GAVA CHIRO** who bought the suit land from **BARNABA ESUTI** on which he settled his family in 1966. That upon his death in 1985, nobody including the plaintiff laid any claim to the suit land during the **LUFU** ceremony. That they were later surprised to learn that the plaintiff had been registered as the proprietor of the suit land yet he has never occupied it.

In response to that Originating Summons, the plaintiff filed a replying affidavit dated 11th April 2019 in which he averred, inter alia, that he is the absolute registered proprietor of the suit land having purchased the same from **GAVA CHIRO** between 1982 – 1985 at a consideration of Kshs. 11,500/=. That since **GAVA CHIRO** had no Kenyan Identity Card as he had his roots in **UGANDA**, he swore an affidavit at the **SIRISIA LAW COURTS** in support of the fact that the land in question belongs to the plaintiff. An application was then sought to transfer the suit land to the plaintiff and on 21st June 1985, consent was given by the **SIRISIA LAND CONTROL BOARD**. That he is related to **GAVA CHIRO** by virtue of the fact that **AMINA CHIRO** the wife to **GAVA CHIRO** was a cousin to his (plaintiff's) father. That following the death of **GAVA CHIRO** in 1985, his wife **AMINA CHIRO** was attacked and raped while staying on the suit land and so the plaintiff moved her to his land at **KHABUKOYA "B"** village where he buried her in 2004 as she had no child. That he has been utilizing and also leasing out the suit land to third parties including **KABKARA SECONDARY SCHOOL** for several years. That in 2005, the defendant trespassed onto the suit land claiming that she is related to **GAVA CHIRO** which is not true. That the defendant filed a case at the Tribunal which ruled in her favour but he appealed and the award was set aside. Thereafter, the plaintiff made several efforts using the elders for the defendant to vacate but she refused. That no minutes of the "**LUFU**" ceremony were produced at the Tribunal and the defendant's allegation that he obtained the registration of the suit land in his names fraudulently are unfounded and neither is it true that the defendant has been living on the suit land since 1985. That the defendant has a father in **UGANDA** who died in 2004. That the Originating Summons is vexatious and an abuse of the process of this Court and should be dismissed with costs. Annexed to the replying affidavit are a copy of the Land Certificate in respect to the suit land issued to the plaintiff on 26th September 1985 showing that it was registered in his names on 24th July 1985 as a gift, an affidavit commissioned at the **SIRISIA MAGISTRATE'S COURT** on 24th May 1985 by **GAVA CHIRO**, an application for consent of the Land Control Board and the Minutes of 17th July 1985 both of which are not very legible and several letters from the **KABKARA SECONDARY SCHOOL**, proceedings in the Tribunal and the **BUNGOMA CHIEF MAGISTRATE'S COURT CASE No 54 of 2005**.

By consent of the parties, the two suits were consolidated on 21st November 2019. Directions were further taken that the plaint in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 127 of 2014** would be the plaint while the Originating Summons in **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 4 of 2019** would be the defence and Counter – Claim. Further, that **BUNGOMA ENVIRONMENT AND LAND COURT CASE No 127 of 2014** would be the lead file for purposes of recording proceedings.

The trial commenced on 30th June 2020 and the plaintiff testified and called as his witness **MUSUNGU ROBERT MURAKWA (PW 2)**. Both of them adopted as their evidence their respective statements contents of which I have already summarized above. The plaintiff also produced his list of documents as his documentary evidence.

The defendant similarly adopted as her evidence her witness statement, supporting affidavit and produced as her documentary evidence the list of documents. She also called as her witnesses **HERBERT OKISAI OKANYA (DW 2)**, **MAURICE NDIEMA CHEMIAT (DW 3)**, **WALTER NAMAI OSHOME (DW 4)** and **ISAAC HAMISI OKATEGE (DW 5)**. They too adopted as their evidence the contents of their respective statements which I have also summarized above.

Submissions were thereafter filed both by **MR MILIMO** instructed by the firm of **MILLIMO P.M & ASSOCIATES ADVOCATES** for the plaintiff and by **MS MUMALASI** instructed by the firm of **ANNET MUMALASI & CO ADVOCATES** for the defendants.

I have considered the evidence by both parties as contained in their respective statements, affidavits and the documents filed as well as the submissions by counsel.

The plaintiff's case is that he is the registered proprietor of the suit land which was gifted to him by the late **GAVA CHIRO** yet the defendant has, without any colour of right, trespassed thereon and constructed semi permanent structures and refused to vacate. The plaintiff denied that he obtained the said registration by way of fraud and denies the defendant's claim to the suit land by way of adverse possession.

The defendant's case on the other hand is that she has lived on the suit land since 1966 which her late father **GAVA CHIRO** purchased from one **BARNABA ESUTI**. She denies that her late father gifted the suit land to the plaintiff adding that following her father's death in 1985, she put up a home where she resides and the plaintiff has never lived there. She is therefore entitled to the suit land by way of adverse possession.

That the plaintiff is the registered proprietor of the suit land is not in doubt. The Green Card shows that the suit land was first registered in the names of **GAVA CHIRO** on 3rd March 1977 as the first owner but on 24th July 1985, it was transferred to the plaintiff by way of a gift.

The twin issues for my determination therefore are: -

1. As the registered proprietor of the suit land, is the plaintiff entitled to evict the defendant as sought in his plaint? or;
2. Has the plaintiff's title to the suit land been extinguished by operation of the law and the same should now be registered in the names of the defendant as sought in the Counter – Claim?

As the registered proprietor of the suit land, the plaintiff's title is protected by **Section 24, 25 and 26 of the Land Registration Act**. **Section 24** provides that: -

a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto; and

b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto subject to all implied or expressed agreements, liabilities or incidents of the lease.” Emphasis added.

Section 25(1) provides that: -

“The rights of a proprietor, whether acquired on first registration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and

b. 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 registered.” Emphasis added.

Section 26 of the same Act goes on to add that the title issued by the Registrar upon transfer or transmission of land is “prima facie evidence that the person names as proprietor of the land is the absolute and indefeasible owner” but subject to any encumbrances easements restrictions and conditions endorsed on the certificate. That title can however be impugned if it was obtained through fraud or misrepresentation to which the person is proved to have been a party or if it was acquired illegally, un-procedurally or through a corrupt scheme.

Prima facie therefore, the registration at the suit land in the plaintiff’s names confers upon him the “absolute ownership” thereof. And as “the absolute and indefeasible owner” of the suit land since 24th July 1985 when the suit land was registered in his names and the Land Certificate issued to him on 26th September 1985, the plaintiff is entitled to “all the rights and privileges belonging or appurtenant thereto.” Those “rights and privileges” include the right to evict trespassers from the suit land. That is the remedy that the plaintiff seeks against the defendant.

However, all registered land is subject to the overriding interests which are identified in **Section 28 of the Land Registration Act**. The relevant one for purposes of this Judgment is in **Section 28(h)** which reads: -

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being notes on the register –

a. –

b. -

c. -

d. -

e. -

f. –

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

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

“Title to land may be acquired through –

a. –

b. -

c. -

d. Prescription”

Those prescriptive rights are the ones that the defendant is agitating in her Counter – Claim in which she seeks an order that she be registered as the proprietor of the suit land by way of adverse possession. That is the claim that I shall now interrogate and although Counsel for the

plaintiff has submitted at length that the defendant did not prove fraud on the part of the plaintiff in the manner in which he obtained title to the suit land, the defendant's claim to the same, as is clear from her Originating Summons, is premised on adverse possession.

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 INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal stated thus: -

“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner on his own volition.”

Section 7 of the same Act provides as follows: -

“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.”

It is now well settled that the combined effect of the relevant provisions of **Section 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL No 2136 of 1996**. Possession of the land in dispute is a fact to be proved and observed on the land itself – **MAWEU .V. LIU RANCHING & FARMING CO – OPERATIVE SOCIETY LTD 1985 KLR 430**.

In the case of **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No 56 of 2014 [2015 eKLR]**, the Court stated that: -

“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 the licence of the owner. It must be adequate in Publicity and in extent to show that possession is adverse to the title owner”

It is common ground that although the suit land was first registered in the names of **GAVA CHIRI** on 3rd May 1977, it is currently registered in the names of the plaintiff since 24th July 1985. That is not in dispute. However, whereas the defendant has pleaded that she has lived on the suit land since 1966 when her father purchased it from one **BARNABA ESUTI** and has since 1985 constructed a home thereon, the plaintiff has pleaded in paragraph 4 of his plaint that the defendant trespassed and put up semi structures in 2008. That would mean therefore that by the time the defendant filed her Originating Summons on 8th March 2019 seeking orders that she is entitled to the suit land by way of adverse possession, she had only been in occupation and possession thereof for a period of 6 years which would not qualify her to such orders. But is that the position supported by the evidence herein?

From the evidence herein, it cannot be correct for the plaintiff to plead and allege as he had done, that the defendant only trespassed onto the suit land in 2008. This is because, as is clear from the proceedings in the Tribunal which have been filed by both parties, the defendant first filed at the Tribunal case No 6 on 26th April 2005 complaining that the plaintiff had sold part of it to **KABKARA PRIMARY SCHOOL**. She could not have trespassed onto the suit land in 2008 when 3 years earlier, she had filed a case at the Tribunal. In any case, the plaintiff conceded during this trial that he has never lived on the suit land. This is what she said when cross – examined by **MS MUMALASI**: -

“The defendant is utilizing the land in dispute. She has constructed homes and planted maize and bananas thereon. I want her evicted.”

He went on to add that: -

“I have never lived on the land in dispute. The defendant lives there.”

On the other hand, the defendant confirmed when cross – examined by **MR MILLIMO** that she put up a house on the suit land in 1985. This is what she said:-

“My father bought the land in 1966 and I lived there upto the time I got married in 1976. I don't have the Marriage Certificate. I went back to the land in 1985 after my father died. My mother was still living on the land in dispute. I also put up a house on the land in dispute so that I could have a place to sleep when I visit my home.”

In support of her Originating Summons, among the documents that the defendant produced were photographs of houses, bananas and other crops on the suit land. These were marked as annexures **JNM – 3** in her supporting affidavit. She also produced a letter from **KABKARA SECONDARY SCHOOL** dated 10th January 2007 showing that she had leased 1 acre out of the suit land to the said school at a rent of

Kshs. 4,000/=. I did not hear the plaintiff deny that the photographs are of the house that the defendant constructed on the suit land. The plaintiff however produced as part of his documentary evidence copies of letter showing that he had also leased part of the suit land to the same school. On such letter is dated 9th May 2002 which reads that he had leased 3¾ acre to the school for 1 year at a rent of Kshs. 7,200/=. However, it is instructive to note that it was the plaintiff's action of leasing part of the suit land to the school which prompted the defendant to file a suit at the Tribunal. Plaintiff called as his witness **MUSUNGU ROBERT MURAKWA (PW 2)** who during his oral testimony stated that he had never seen the defendant on the suit land, that evidence is clearly un – reliable given the fact that as I have already stated above, the plaintiff himself conceded in cross – examination that it is the defendant who has put up houses and planted crops on the suit land. There is also the evidence of the defendant's witnesses **HERBERT OKISAI OKANYA (DW 2)**, **MAURICE NDIEMA CHEMIAT (DW 3)**, **WALTER NAMAI OSHOME (DW 4)** and **ISAAC HAMISI OKATEGE (DW 5)** who all confirm that the defendant has lived on the suit land since 1966 and that even after she got married, she continued checking on her parents and after the death of **GAVA CHIRO** in 1985, she put up a house thereon. I find no reason to doubt the veracity of their evidence. I am satisfied from the totality of the evidence that not only did the defendant live on the suit land from 1966 after **GAVA CHIRO** had purchased it but further, that she constructed a house and planted crops thereon in 1985 after the death of **GAVA CHIRO**.

As to whether the defendant's occupation and possession of the suit land has been adverse, Counsel for the plaintiff submitted at length as to how the defendant did not lead any evidence to prove that the plaintiff acquired the suit land fraudulently. Counsel submitted, citing **KINYANJUI KAMAU .V. GEORGE KAMAU 2015 eKLR**, and rightly so, that allegations of fraud must be pleaded and strictly proved to the required standard which is higher than that required in ordinary civil cases. That is the correct position in law. However, the defendant's Counter – Claim is not hinged on fraud on the part of the plaintiff in the manner in which he acquired the suit land. And although the claim of fraud runs through the proceedings, the defendant's Counter – Claim is anchored on adverse possession. I have already in this Judgment referred to the elements that a party needs to prove to establish a claim of adverse possession. I need only add that the defendant also needed to prove that her occupation and possession of the suit land has been **nec vi nec clam nec precario** i.e. no force, no secrecy, no evasion – **KIMANI RUCHINE .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10**.

With regard as to when time for adverse possession should be computed, although the defendant has testified that she lived on the suit land from 1966, time could only start running in 1985 for two reasons. Firstly, between 1966 upto 1985, the plaintiff was living on the suit land with the consent of her father **GAVA CHIRO**. Her occupation thereof could therefore not be adverse to that of the registered owner. Secondly, it was only in 1985 that the plaintiff became the registered proprietor of the suit land. For the plaintiff to have interrupted the defendant's occupation and possession of the suit land, he ought to have filed a suit against the defendant to assert his ownership unless of course his title was admitted by the defendant – **GITHU .V. NDEETE 1984 KLR 776**. The plaintiff did not file any suit to assert his ownership of the suit land. Instead, it was the defendant who first moved to the Tribunal to complain that the plaintiff had unlawfully acquired ownership of the suit land which she said belonged to her father. That means therefore that by the time the plaintiff filed **BUNGOMA ENVIRONMENT AND LAND COURT CAS No 127 of 2014** seeing to evict the defendant from the suit land, his right in the suit land had been extinguished way back in 1997 some 17 years earlier. There is no evidence to suggest that the defendant's occupation and possession of the suit land was not open, exclusive, peaceful un – interrupted and with the knowledge of the plaintiff from 1985 to 1997 when the statutory 12 years statutory period elapsed. Indeed, notwithstanding his registration as the proprietor of the suit land, the plaintiff remained dispossessed of the same and that is why he filed this suit to evict the defendant therefrom. Unfortunately, his interest in the suit land having been extinguished as far back as 1997, this Court must dismiss his claim and up – hold the defendant's Counter – Claim.

Having said so, this Court must also address another issue which, though not pleaded, arises out of the evidence by the parties. It is a settled principle of law that parties are bound by their pleadings and must not depart from them. The Court of Appeal in **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER .V. STEPHEN MUTINDA MULE & OTHERS 2014 eKLR** cited with approval the decision of the Supreme Court of NIGERIA in the case of **ADETOUN OLADEJI .V. NIGERIA BREWERIES PLC S.C 91/2002** where **ADEREJI JSC** stated as follows on the issue of pleadings: -

“..... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded Infact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issue as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

That is the route that has been followed by Courts in this county including by the Supreme Court in **RAILA AMOLO ODINGA & ANOTHER .V. IEBC & OTHERS 2017 eKLR** where the Court said: -

“In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings”

However, there are circumstances where a Court may make a decision on unpleaded issues. In **ODD JOBS .V. MUBIA 1970 E.A 476, DUFFUS P.** while considering the question whether an un – pleaded issue can form the basis of a decision rendered himself as follows: -

“Generally speaking, pleadings are intended to give the other side fair notice of the case that it has to meet and also arrive at the issues to be determined by the Court. In this respect, a trial Court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and by which a decision is necessary in order to determine the dispute between the parties.” Emphasis added.

In the same case, **LAW JA** stated that: -

“On the point that a Court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by the Court is not as strict as appears to be that of the Courts in India. In East Africa, the position is that a Court may allow evidence to be called, and may base its decision, on an un – pleaded issue if it appears from the course followed at the trial that the un – pleaded issue has in fact been left to the Court for decision.” Emphasis added.

That decision has been followed by superior Courts in this County.

During the trial, one issue that has featured prominently is whether or not the defendant is a daughter of **GAVA CHIRO**.

Perhaps this is the appropriate time to address an issue that has run through these proceedings. **GAVA CHIRO** the first registered proprietor of the suit land has been referred to by others. In the Certificate of Death, he is referred to as **KAFA JIRO**, in the application for grant, he is named as **KEFA JIRO**, in some letters he is **KAFA CHIRO**. For avoidance of doubt all these names refer to one and the same person i.e. **GAVA CHIRO**.

Both Counsel also submitted on issue of the defendant’s relationship with **GAVA CHIRO**. The defendant’s evidence as supported by her witnesses is that she is the only child of **GAVA CHIRO**. The plaintiff and his witness denied that and stated that **GAVA CHIRO** had no child. Indeed, the plaintiff told the Court during cross – examination that the parents of the defendant were **STEPHEN WAMOLO** and **JEMIMA KALAENDA** and his witness added that in fact the defendant’s father was from Uganda. The importance of resolving these conflicting testimonies is because if this Court finds that indeed the defendant was the child of **GAVA CHIRO**, then she may also have a claim to the suit land in trust.

Among the documents produced by the defendant is an application for registration of a late death in the names of **KAFA JIRO** who I have no doubt is the **GAVA CHIRO** referred to in these proceedings. The applicant therein is the defendant **JANE NAMONO MELU** and whose relationship to the deceased is indicated as **“father”**. Then there is the Limited Grant Ad Litem dated 14th September 2009 and issued to the defendant in respect to the Estate of **KEFA JIRO** who again have no doubt is the same person referred to as **GAVA CHIRO** herein. The Death Certificate of **KAFA JIRO** issued under the Seal of the Principal Civil Registrar on 15th May 2009 describes the informant as the daughter. Then there is a letter dated 30th April 2009 from the Chief **NAMUBILA LOCATION** which is brief and because of its relevance, I shall reproduce it: -

“TO WHOM IT MAY CONCERN

Dear Sir/Madam

REF: JANE NAMONO MERU

ID NO 6328338

This is to certify that Mrs JANE NAMONO MERU is the only true child of the late KAFA JIRO. She is the only child known to me.

The deceased showed me his daughter and since then, I have never heard or seen any other child of the deceased.

She is the only heir to the property of the deceased including land title NO SOUTH WAMONO/NORTH MALAKISI/526 and other properties that the deceased left behind.

I therefore request your good office to assist her accordingly. Thanking you in advance for your assistance.

Yours faithfully

T. K. MAMASI”

There is also another letter from the Assistant Chief **WAMONO SUB – LOCATION** addressed to the **DISTRICT REGISTRAR BUNGOMA DISTRICT** and dated 3rd May 2009 also describing the defendant as the **“only daughter” of KAFA CHIRO**. These documents were exchanged and produced without any objection. Their veracity cannot be disputed and although the plaintiff said he was surprised that the Chief and Sub – Chief have written letters that the defendant is a relative of **GAVA CHIRO** while his witness said the **“letters are false,”** no reasons were advanced as to why the Chief and his Assistant would author false documents. Taken together with the oral evidence during the trial, these documents can only lead to one conclusion and that is that the defendant was indeed the daughter of **GAVA CHIRO**.

This Court has already made a finding based on the evidence herein that it is the defendant who has always been in occupation and possession of the suit land. All this taken together with the finding by this Court that the defendant was the daughter of **GAVA CHIRO** and the un – disputed fact that the said **GAVA CHIRO** was the first registered proprietor of the suit land, I take the view that there is sufficient evidence upon which this Court can also hold that the plaintiff is in fact a trustee holding the suit land in trust for the defendant. The Supreme Court in the case of **ISACK M’NANGA KIEBIA .V. ISAYA THEURI M’INTARI & ANOTHER 2018 eKLR** identified some of the elements of a customary trust as: -

1. The family was family clan or group land.
2. The Claimant belongs to such family, clan or group.
3. The relationship of the Claimant to such family clan or group is not tenuous or remote.
4. The Claimant could have been entitled to be registered as an owner or beneficiary but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

And in an audacious scheme solely meant to defeat the defendant's beneficial interest in the suit land, the plaintiff buried **GAVA CHIRO**'s wife **AMINA** at his (plaintiff's) land at **KHABUKOYA 'B'** village in 2004. An explanation for moving **AMINA** from the suit land to **KHABUKOYA 'B'** village was because **AMINA** was living alone and had been raped. That may be so. But the plaintiff has not offered any explanation as to why he did not return **AMINA** to the suit land and bury her there following her death in 2004. Surely, the rapist was not going to follow her in her grave and rape her again! The only reasonable conclusion that the Court can arrive at is that the plaintiff was preparing ground to keep the family of **GAVA CHIRO** as far as possible from the suit land and acquire it for himself.

All the above taken together with the fact that the defendant, and not the plaintiff, has always been the party in occupation and possession of the suit land leaves no doubt in my mind that a claim by the defendant based on trust would be on solid ground.

Ultimately however, and having considered all the evidence herein, there shall be Judgment for the defendant in the following terms: -

1. The plaintiff's suit is dismissed.
2. The defendant's Counter – Claim is allowed in the following terms: -
 - a. The plaintiff's title to the land parcel NO NORTH MALAKISI/SOUTH WAMONO/526 has been extinguished by operation of the law.
 - b. The defendant has acquired the title to the land parcel NO NORTH MALAKISI/SOUTH WAMONO/526 by way of adverse possession.
 - c. The plaintiff shall within 30 days from the date of this Judgment execute all the relevant documents to facilitate the transfer of the land parcel NO NORTH MALAKISI/SOUTH WAMONO/526 into the names of the defendant.
 - d. In default of (c) above, the Deputy Registrar shall be at liberty to execute such documents on behalf of the plaintiff.
3. The plaintiff shall meet the costs of the dismissed suit and the defendant's Counter – Claim.

Boaz N. Olao.

J U D G E

22nd October 2020.

Judgment dated, signed and delivered at **BUNGOMA** this 22nd day of October 2020 by way of electronic mail in compliance with the **COVID – 19** pandemic guidelines as was advised to the parties on 18th September 2020.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

22nd October 2020.