



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL SUIT NO. 21 OF 2009 (O.S)

JOYCE K. MAKOKHA1ST PLAINTIFF

AGNES M. WASHIALI.....2ND PLAINTIFF

AMBROSE WASHIALI3RD PLAINTIFF

VERSUS

FERDINAND M. MUFUTU1ST DEFENDANT

JULIUS WANJALA MUFUTU.....2ND DEFENDANT

J U D G M E N T

JOHN WASHIALI HAMU (deceased) filed this Originating Summons on 5th March 2009 seeking the main prayer that he had become entitled to the land parcels **NO BOKOLI/BOKOLI/1697 and 1698** by way of adverse possession having settled therein since 1973.

However, following his death on 8th March 2009 his legal representatives who are the plaintiffs herein filed an amended Originating Summons dated 7th October 2011 seeking the same orders as follows:-

- (a) That the Applicant has become entitled to parcels NO L.R BOKOLI/BOKOLI/1697 and 1698 by adverse possession.**
- (b) That the defendants do forthwith transfer parcels NO L.R BOKOLI/BOKOLI/1697 and BOKOLI/BOKOLI/1698 to the plaintiffs and in default thereof, the Executive Officer do execute all relevant documents for and on behalf of the defendants.**
- (c) That costs of this suit be borne by the defendants.**

The Originating Summons, as is required, was accompanied by the supporting affidavit of **JOYCE K. MAKOKHA** the 1st plaintiff and sworn on behalf of the two other plaintiffs, the deceased's Death Certificate, the Grant of Letter of Administration issued to the plaintiffs in respect to the Estate of the deceased, the Green Card in respect of the land parcels **NO BOKOLI/BOKOLI/1697, 1698 and 1242**, and the Grant of Probate of Will issued to the defendants in respect to the written Will of **FESTO MUFUTU MILIMO**.

In her supporting affidavit, the 1st plaintiff **JOYCE K. MAKOKHA** deponed, inter alia, that the land parcel **NO BOKOLI/BOKOLI/1697** is registered in the names of the 1st defendant **FERDINAND M. MUFUTU** who, together with his brother **JULIUS W. MUFUTU** are the Administrators of the Estate of their late father **FESTO MUFUTU MILIMO** in whose names the land parcel **NO BOKOLI/BOKOLI/1698** is still registered. That the said two parcels of land were carved out of land parcel **NO BOKOLI/BOKOLI/1241**. That neither **FESTO MUFUTU MILIMO** nor the two defendants have ever occupied the land parcels **NO BOKOLI/BOKOLI/1697 and 1698** (hereinafter the suit land) which has been in the exclusive use and possession of the plaintiffs since 1973 when the deceased who was the husband to the 1st plaintiff moved therein and put up a semi permanent home and latrine where the plaintiffs live to-date in three semi permanent houses, three kitchen, two roomed semi permanent house, a maize store and pit latrine together with her children and their families. That apart from putting up the above structures on the suit land, the plaintiffs have also made other developments thereon including planting four acres of sugar cane, ½ acre of bananas, ¼ acre of eucalyptus trees, oranges and Cyprus. They have also connected piped water on the suit land which is also where the deceased was buried having bought the land from **FESTO MUFUTU MILIMO** who however demanded more money before he could transfer it to the deceased. That the plaintiff's occupation of the suit land has been exclusive and peaceful but in order to have **FESTO MUFUTU MILIMO** transfer the suit land to the deceased, a suit was filed at the **BOKOLI LAND DISPUTES TRIBUNAL** which however only ordered the transfer of land parcel **NO BOKOLI/BOKOLI/1698** to the deceased who filed an appeal to the Provincial Lands Appeal Committee which allowed it. That the defendants filed **BUNGOMA SUCCESSION CAUSE NO 90 of 2001** in respect to the Estate of their father **FESTO MUFUTU MILIMO** without disclosing that the plaintiffs had an interest in the suit land. Therefore, having occupied the suit land openly, continuously and exclusively since 1973, the plaintiff are entitled to be jointly registered as proprietors

thereof as the defendant's rights thereto are extinguished.

ABROSE WASHALI the 3rd plaintiff filed a statement dated 7th May 2014 in which he stated that the deceased was his father and the two defendants are his cousins being the sons to his late **UNCLE FESTO MUFUTU MILIMO**. That the deceased who was employed as a policeman in Trans Mara had given money to his brother **FESTO MUFUTU MILIMO** to buy him land in 1973 on which the deceased settled. That the said land was parcel **NO BOKOLI/BOKOLI/1269** which was later sub-divided into **BOKOLI/BOKOLI/1697 and 1698** where the plaintiffs and their families live to-date. That in 1997, the deceased requested **FESTO MUFUTU MILIMO** to transfer the suit land to him but the request was declined. That neither of the two defendants live on the suit land.

The plaintiffs filed statements from other witnesses who however did not testify except **JULIUS CHANGALWA KALAMU** who in his statement dated 2nd November 2015 stated that he was the chairman during the "LUFU" ceremony of **FESTO MUFUTU MILIMO** which is conducted to ascertain the properties and debts of a deceased person. That during that ceremony whose proceedings were reduced in writing, it was found that **FESTO MUFUTU MILIMO** was to transfer to the deceased 14 acres of land who in turn was to pay Kshs. 20,000/= and other payments related to the transfer.

In response to the originating summons, the two defendants filed a replying affidavit and a statement to which were annexed a copy of the title deed in respect to land parcel **NO BOKOLI/BOKOLI/1697**, proceedings in the **PROVINCIAL LAND DISPUTES APPEAL COMMITTEE** between the deceased and **FESTO MUFUTU MILIMO** in case **NO 112 of 1998**, proceedings in **BUNGOMA SPM'S COURT CIVIL APPLICATION NO 125 OF 2004** between the deceased and the defendants and the Memorandum of Appeal in **BUNGOMA HIGH COURT CIVIL APPEAL NO. 28 OF 2005** between the deceased and the two defendants.

The 1st defendant **FERDINAND M. MUFUTU** deponed, inter alia, that he is the registered proprietor of the land parcel **NO BOKOLI/BOKOLI/1697** while parcel **NO BOKOLI/BOKOLI/1698** is still in the names of his late father **FESTO MUFUTU MILIMO** and this case should therefore await the outcome of **BUNGOMA SUCCESSION CAUSE NO 90 OF 2001** which is in respect of the Estate of his late father. That the plaintiffs are not being candid when they claim to have enjoyed open, continuous and peaceful possession of the suit land because prior to his demise, the deceased had sued **FESTO MUFUTU MILIMO** at the **BOKOLI LAND DISPUTES TRIBUNAL and the PROVINCIAL APPEALS COMMITTEE in KAKAMEGA**. That land parcel **NO BOKOLI/BOKOLI/1697** is 7½ acres in size and the plaintiffs hardly occupy 5 acres. That his late father **FESTO MUFUTU MILIMO** welcomed the deceased on land parcel **NO BOKOLI/BOKOLI/1698** as his brother in law and it is therefore only fair that the plaintiffs be evicted from the suit land. The 1st defendant also recorded a statement in similar terms.

JULIUS WANJALA MUFUTU the 2nd defendant filed a statement dated 13th October 2016 in which he stated, inter alia, that he has no relationship with the 1st plaintiff but that the 2nd and 3rd plaintiffs are his cousins while the 1st defendant is his brother who is the registered proprietor of land parcel **NO BOKOLI/BOKOLI/1697** which was a gift from their deceased father **FESTO MUFUTU MILIMO** in whose names the parcel **NO BOKOLI/BOKOLI/1698** is still registered. That both parcels were a sub-division of land parcel **NO BOKOLI/BOKOLI/1242** on which the deceased was staying by virtue of having been married to their auntie one **ELMINA NAMALWA**. That the deceased had filed a case at the **WEBUYE LAND DISPUTES TRIBUNAL** which decreed that he be granted parcel **NO BOKOLI/BOKOLI/1698** which he declined and appealed but died before the case could be determined. That the plaintiff's stay on the suit land has never been peaceful because of the numerous cases and in any event, the plaintiffs have not filed any objection proceedings in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 90 OF 2001** and this suit is therefore premature. That the land parcel **NO BOKOLI/BOKOLI/1697** was legally transferred to him during the life time of his father and this suit is scandalous frivolous, vexatious and an abuse of the process of the Court which should be dismissed with punitive costs.

The hearing commenced before the late **MUKUNYA J** on 30th May 2017 when the 1st plaintiff **JOYCE KHALAYI MAKOKHA (PW 1)** testified and adopted her supporting affidavit as part of her evidence adding that she was one of the three wives of the deceased and from the time she married him in 1997, he was living on the suit land where he and his first wife **ELMINA NAMALWA** were both buried. She added that the deceased had bought the land in 1972 but started living thereon in 1973. And apart from the homes built on the suit land, there is also a crop of bananas. The defendants have however never lived on the suit land.

AMBROSE WANYONI WASHALI (PW 2), JULIUS CHANGALWA KALAMU (PW 3) and the two defendants testified before me when I took over the case on 20th September 2018. They all adopted as their evidence their respective replying affidavits and witness statements which I have already summarized above.

Submissions were thereafter filed by **J.O MAKALI ADVOCATE** for the plaintiffs and **J.B. OTSIULA ADVOCATE** for the defendants.

I have considered the evidence by both parties and the submissions by counsel.

In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 I K.L.R 184**, the Court of Appeal set out what a party claiming to be entitled to land by adverse possession must prove. It said:-

"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 of possession by the owner on his own volition".

See also **WANJE .V. SAIKWA 1984 KLR 284**.

The plaintiffs claim to the suit land is by adverse possession having occupied the same since 1973 when the deceased who was the husband and father to the plaintiff's bought it from **FESTO MUFUTU MILIMO** the father to the defendants who are sued in their capacity as the Administrators, of their late father's Estate. The suit is premised under the **provision of Sections 7, 17 and 38 of the Limitation of Actions**

Act. Section 38 of the Limitation of Actions Act entitles a person who claims to have become entitled by way of adverse possession to land registered under any of the Acts cited in **Section 37 of the Limitation of Actions Act** or land comprised in a lease to apply to this Court for an order that he be registered as the proprietor thereof. It is now well settled that the combined effect 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 adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996.**

Similarly, the new land laws that followed the promulgation of the new constitution in 2010 recognize the doctrine of adverse possession. **Section 28(h) of the Land Registration Act 2012** identifies some of the overriding interests in land as:-

“rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription”.

Section 7 of the Land Act 2012 on the other hand provides that:-

“Title to land may be acquired through:-

(a)

(b)

(c)

(d) prescription”

Possession of land being claimed by the adverse possessor is a matter of fact to be observed on the land in dispute – **MAWEU .V. LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 KLR 430.**

It is not in dispute that land parcel **NO BOKOLI/BOKOLI/1697** is registered in the names of the 1st defendant while land parcel **NO BOKOLI/BOKOLI/1698** is registered in the names of **FESTO MUFUTU MILIMO** the late father of the two defendants who are also the joint Administrators of his Estate. While the plaintiffs allege that the deceased entered the suit land in 1973 and has lived thereon with his family and without interruption, this is denied by the defendants. The 1st defendant in his replying affidavit dated 27th April 2012 in response to the Originating Summons has alluded to the **TRIBUNAL CASE NO 35 of 1998** involving his father **FESTO MUFUTU MILIMO** and the deceased adding that at no time did the deceased occupy the suit land. However, in a supplementary affidavit dated 29th April 2016, the 1st defendant makes the following averment in paragraph 18:

“That it’s only fair and just that Respondents, their urgents (sic) or any other person claiming through them be evicted from land parcel NO BOKOLI/BOKOLI/1697 and 1698”.

The fact that the 1st defendant was praying for the eviction of the plaintiffs from the suit land is evidence that the plaintiffs are indeed in occupation of the same.

On his part the 2nd defendant in his statement dated 13th October 2016 has stated as follows at paragraph 13:

“That the said JOHN WASHIALI was only claiming interest as a purchaser when he was only staying on the said parcel by virtue of being married to my auntie ELMINA WAMALWA”.

Again that is an admission that the deceased and his family who include the plaintiffs herein have been in occupation of the suit land. What is clear from the evidence of the plaintiffs is that the suit land measures 14 acres in total and the deceased’s claim was that it was bought on his behalf by **FESTO MUFUTU MILIMO** using funds provided by the deceased. It was also not denied that both the deceased and his first wife **ELMINA NAMALWA** were buried on the suit land. There is also un-controverted evidence that the plaintiffs have several houses and farm on the suit land. That is sufficient evidence that the plaintiffs have been in occupation and possession of the suit land since 1973. Indeed that was confirmed by the defendants themselves in cross – examination. This is what the 1st defendant said:-

“I was registered as the owner of BOKOLI/BOKOLI/1697 in 1997. At that time, the family of JOHN WASHIALI HAMU was living on the land but I filed a suit to evict them. I filed a suit in the subordinate Court at Bungoma but I don’t recall the number. But I must have filed the suit in 2016 or 2017”.

On his part, the 2nd defendant said:

“I confirm that the suit land is in possession of the family of JOHN WASHIALI HAMU. I have never lived on the land subject of this case”.

Therefore, while there is no documentary proof of any sale agreement between the deceased and **FESTO MUFUTU MILIMO** with respect to the suit land, it is clear that the deceased and his family have occupied the suit land since 1973 to-date.

Has that occupation been exclusive, open, peaceful and without interruption? **MR OTSIULA** counsel for the defendants has submitted, citing **FRANCIS GICHARU KARIRI .V. PETER NJOROGE MAIRU C.A CIVIL APPEAL NO 293 OF 2002 (NBI)**, that the plaintiff's occupation of the suit land has not been peaceful because of the numerous disputes between the deceased and **FESTO MUFUTU MILIMO** over the suit land. It is true that there have been several suits between the deceased and **FESTO MUFUTU MILIMO** over the suit land. The law is that time stops running under the Limitation of Actions Act when the owner of the land asserts his right or when his right is admitted by the party claiming through adverse possession – **GITHU .V. NDEETE 1984 KLR 776**. It is clear that the first case filed in respect of the suit land was at the **LAND DISPUTES TRIBUNAL WEBUYE CASE NO. 35 OF 1998** which led to the **PROVINCIAL APPEAL CASE NO 112 OF 1998**. That case could not have interrupted the plaintiff's adverse possession of the suit land because by 1998, the plaintiffs had already been in adverse possession of the suit land for a period of nineteen (19) years. That is if the Limitation period is computed from 7th August 1979 when the original parcel **BOKOLI/BOKOLI/1242** was first registered in names of **BARASA KALENDA** as per the Green Card which is among the documents produced by the plaintiffs. Therefore, before 1998 the plaintiff's had peacefully occupied the original suit land **BOKOLI/BOKOLI/1242** and thereafter the suit land and by the time the first case was filed at **LAND DISPUTES TRIBUNAL at WEBUYE**, the plaintiffs' right to the suit land had already crystalized and the defendants' rights extinguished.

The other issue that I have had to consider is whether the plaintiffs' claim to the suit land can be maintained against the Estate of a deceased person bearing in mind that one portion of the suit land (**BOKOLI/BOKOLI/1698**) is still registered in the names of the defendant's late father **FESTO MUFUTU MILIMO**. The defendants have been sued jointly as the Administrators of the Estate of their late father **FESTO MUFUTU MILIMO**. It is clear from **Section 2(1) of the Law Reform Act** that a claim in adverse possession can be instituted against the Estate of a deceased person. This was also confirmed in the case of **KARUNTIMI RAIJI .V. M'MAKINYA M'ITUNGA C.A CIVIL APPEAL NO 325 OF 2009 (2013 eKLR)**. Both defendants are therefore properly sued.

It is not disputed that the suit land was as a result of the sub-division of the original land parcel **NO BOKOLI/BOKOLI/1242**. According to the Green Card, title to land parcel **NO BOKOLI/BOKOLI/1242** was closed on 30th April 1997 following its sub-division to give rise to the suit land. The land parcel **NO BOKOLI/BOKOLI/1242** was first registered on 7th August 1979 in the names of one **BARASA KALENDA** before it was registered in the names of **FESTO MUFUTU MILIMO** on 5th May 1981. A claim in adverse possession is as against the registered proprietor of the land in dispute and in the circumstances of this case, time stated to run when the parcel **NO BOKOLI/BOKOLI/1242** was first registered on 7th August 1979 and the charge of ownership from **BARASA KALENDA** to **FESTO MUFUTU MILIMO** did not interrupt the plaintiffs' adverse possession thereof – **GITHU .V. NDEETE 1976 KLR 776**. So by the time this suit was filed originally on 23rd February 2009 before the Originating Summons was amended on 7th October 2011, the plaintiffs had been in occupation of the suit land for thirty (30) years. So really by 1997 when **FESTO MUFUTU MILIMO** sub-divided the original land parcel **NO BOKOLI/BOKOLI/1242** to create the suit land and transfer the portion **BOKOLI/BOKOLI/1697** to the 1st defendant and retain the portion **BOKOLI/BOKOLI/1698**, they were merely trustees of the plaintiffs as their rights thereto had long been extinguished by operation of the law. The plaintiffs had effectively dispossessed the defendants of the suit land where they have not only put up their homes but also buried the deceased and his wife **ELMINA WAMALWA**. I am therefore satisfied that the plaintiffs' have established their claim to the suit land by way of adverse possession and I answer the questions set out for my determination in the amended Originating Summons in their favour.

Ultimately therefore, I enter judgment for the plaintiffs as against the defendants in the following terms:-

- 1. The plaintiffs have become entitled to the land parcels NO BOKOLI/BOKOLI/1697 and BOKOLI/BOKOLI/1698 by way of adverse possession.**
- 2. That the defendants do, within. 30 days of this judgment, execute all the relevant documents to facilitate the transfer of the land parcels NO BOKOLI/BOKOLI/1697 and BOKOLI/BOKOLI/1698 in the joint names of the plaintiffs and in default, the Deputy Registrar to execute such documents on their behalf.**
- 3. The plaintiffs are awarded the costs of this suit.**

BOAZ N. OLAO.

JUDGE

27th March 2019.

Judgment dated, delivered and signed in open Court this 27th day of March 2019.

Mr. Murunga for plaintiff present

Mr. Otsiula for defendant present

1st plaintiff present

2nd and 3rd plaintiffs – absent

Defendants both absent.

Right of Appeal explained.

BOAZ N. OLAO.

JUDGE

27th March 2019.