



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 99 OF 2001.

BENJAMIN KISAKA MUYALAPLAINTIFF

VERSUS

JOHN WAFULA MAKOKHA.....DEFENDANT

J U D G M E N T

When I delivered my ruling on 26th July 2018 dismissing with costs the defendant's Preliminary Objection dated 6th May 2015 in which he had sought orders to strike out this suit for being Res – judicata, I expressed my concerns that such a Preliminary issue was being raised in 2015 over a suit that was filed in 2001. I therefore made the following directions:-

“I further direct the parties to take the earliest available date in the new term so that this suit which was filed in 2001 is heard and determined on priority basis.”

It would appear that the earliest date available was on 17th December 2018 but unfortunately, I was engaged in an urgent three Judge matter in **MERU ENVIRONMENT AND LAND COURT CIVIL CASE NO. 163 OF 2014** and therefore did not sit.

Therefore when this suit came up next before me on 27th March 2019, it was for the prosecution of the defendant's application dated 25th March 2019 filed under Certificate of Urgency and seeking the main order that a temporary injunction be issued restraining the plaintiff from burying the body of his wife **ROSA KISAKA** on the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/659** (the suit land). In view of the urgency of the matter, I persuaded the plaintiff to put on hold the burial of his wife on the suit land and since I was again going to be involved in the three Judge matter in **MERU** from 1st to 5th April 2019, I undertook to hear the main suit on 8th April 2019 and deliver a Judgment on 9th April 2019. I am grateful to the parties and **MR KWEYU ADVOCATE** for the plaintiff for their co-operation in having the suit heard and finalized as agreed.

By an Amended Originating Summons dated 4th June 2015, the plaintiff (**BENJAMIN KISAKA MUYALA**) sought the main order that he has been in actual, open, peaceful and uninterrupted occupation of a portion measuring 8.0 Hectares out of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/659** since 1938 and even after the first registration in 1969 and has therefore acquired that portion by way of adverse possession. That it was not until 1990 when the defendant sued him in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO 612 OF 1990** seeking his eviction therefrom.

The Originating Summons was accompanied by his Supporting Affidavit dated 4th June 2015 and a copy of the Green Card to the suit land.

In the said affidavit, the plaintiff has deponed, inter alia, that he was born on the suit land in 1938 and grew up, married and settled on a portion measuring 8.0 Hectares where his relatives including his mother **LUDIA NABALAYO** who died in 1976 are buried. That the whole suit land measuring 15.8 Hectares originally belonged to his late grandfather **NGOYA MALABA** before it was invaded by neighbours leaving his family with only 8.0 Hectares which he now seeks through this suit. He added that the defendant's late father **ANORITI MAKOKHA MUTAYI** became the first registered owner of the suit land in 1969 but they lived peacefully and it was not until 1990 that the defendant, after obtaining the Grant of Letters of Administration in respect to his father's Estate, filed **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO 612 OF 1990** seeking the plaintiff's eviction. That the suit was heard by the **KANDUYI LAND DISPUTES TRIBUNAL** which ordered his eviction but he appealed to the **PROVINCIAL APPEALS COMMITTEE** which ordered that the suit land be shared equally. That he later filed a case at the **KAKAMEGA HIGH COURT** to seek orders in adverse possession but that suit was withdrawn. It is his case therefore that the defendant only holds the suit land in trust for him since 1969.

The plaintiff's witnesses are **JOHN WEKESA MUYALA (PW 2)** who is his brother and who also confirmed that he too has lived on the suit land since his birth in 1944 although he has now relocated to a parcel of land which he bought in **NALONDO**. He confirmed however that his father and other family members have lived peacefully and without interruption on 8.0 Hectares of the suit land and that it was not until 1990 that the defendant sued the plaintiff in **BUNGOMA COURT**.

The plaintiff's other witness – **HERBERT WANYONY NGOYA (PW 3)** stated in his statement that when he was born in 1952, he found the plaintiff living on the suit land where he still lives todate.

In opposing the Originating Summons, the defendant [**JOHN WAFULA MAKOKHA**], filed a Replying Affidavit dated 9th June 2015 in which he deponed, inter alia, that the suit land is ancestral land which he holds in trust for his seven brothers and on which the plaintiff has trespassed. He added that there have been various cases in which he sought to remove the plaintiff from the suit land. These cases include:-

1. **BUNGOMA RMCC NO 164 OF 1981.**
2. **BUNGOMA PMCC NO 612 OF 1990.**
3. **KAKAMEGA HIGH COURT CIVIL CASE NO 10 OF 1991.**

That the defendant has therefore not lived openly, quietly and uninterrupted on the suit land since his occupation has been resisted and he cannot claim it by way of adverse possession. That the plaintiff should therefore be removed from the suit land. The defendant did not call any other witness.

When the suit came up for hearing on 8th April 2019, the parties and their witnesses adopted as their evidence their respective affidavits and witness statements although they also testified briefly in support of their cases.

I have considered the evidence by both sides together with the documents filed.

In his oral evidence, the defendant took time to take this Court through the previous litigation involving the parties in this case over the suit land. He commenced by narrating how the plaintiff and his family have caused him problems since 1980 when he was still in school and how this dispute has been the subject of Judgments by Judges **ANG'AWA, AGANYANYA, MBITO** and the late **ETYANG**. He also took the Court through previous litigation in the then **DIPSUTES LAND TRIBUNALS** and **THE APPEALS COMMITTEE** under the now repealed **LAND DISPUTES TRIBUNAL ACT**. However, in my ruling dated 26th July 2018 and from which there was no appeal, I have exhaustively interrogated those previous cases and arrived at a decision that this suit is not Res judicata. Therefore, in as far as the defendant is trying to challenge the bona fides of the plaintiff's claim by re-visiting the previous litigation over the suit land, I must inform him that all that is now water under the bridge. What this Court is now

concerned with is whether or not on the evidence, the plaintiff has a genuine claim to 8.0 Hectares out of the suit land by way of adverse possession.

In **KASUVE V MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a party claiming to be entitled to land by adverse possession must prove. It held that:-

“In order to be entitled to land by adverse possession, the claimant must prove that he had been in exclusive possession of land openly and as of right without interruption after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

Possession of the land being claimed by the adverse possessor is a matter of fact to be observed on the land – **MAWEU V LIU RANCHING & FARMING CO-OPEERATIVE SOCIETY LTD 1985 K.L.R 430**. And it is not enough that some acts of adverse possession have been committed on the land in dispute. In **KIM PAVEY & OTHERS V LOISE WAMBUI NJOROGE & ANOTHER 2011 eKLR**, the Court of Appeal said:-

“Thus to prove title by way of adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances.”

In **KIMANI RUCHINE V SWIFT RUTHERFORDS & CO. LTD 1980 KLR 10**, it was stated that in a claim for adverse possession:

“..... the plaintiffs have to prove that they have used this land which they claim as of right; nec vic nec clam nec precario The possession must be continuous. It must not be broken for any temporary purpose by any endeavours to interrupt it or by way of recurrent consideration.”

This suit is premised under the provisions of **Sections 7, 12, 37 and 38 of the Limitation of Actions Act**. It is now well settled that the combined effect of the relevant provisions of the law 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**.

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** identified some of the overriding interests in land as:-

“rights acquired or in 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 as follows:-

“Title to land may be acquired through:-

(a)

(b)

(c)

(d) prescription.”

Finally, **Section 38(1) of the Limitation of Action Act** provides as follows:-

“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 these 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 the proprietor of the land.”

In a more recent exposition on the doctrine of adverse possession, the Court of Appeal had the following to say in the case of **MTANA LEWA .V. KAHINDI NGALA MWAGANDI 2015 eKLR:-**

***“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 persons 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 prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act*”**

I will now consider the merits or otherwise of the plaintiff’s claim guided by the above precedents, the law and the parties evidence.

The plaintiff’s claim is based on the pleading that he was born on the suit land in 1938 and has lived there to-date and even buried his mother and other family members thereon. He claims that it was only in 1990 after the defendant had obtained a Grant of Letters of Administration in respect of the Estate of his late father that disputes arose over the suit land. All that is denied by the defendant who has referred the Court to previous litigation over the land and added that the plaintiff’s occupation of the suit land has not been peaceful open or un-interrupted.

It is not in dispute that the suit land which measures 15.8 Hectares was first registered in the names of the defendant’s father **ANORITI MAKOKHA** (who later changed his names to **MAKOKHA MUTAYI**) since 2nd January 1969. Twenty years later on 15th August 1989, it was registered in the names of the defendant. By entry No. 5 on the Green Card, the title was closed on 7th December 1996 to create new titles being **EAST BUKUSU/SOUTH KANDUYI/659** but that entry was cancelled on 18th February 2002 following a Court order.

Although the plaintiff’s claim to have been in occupation of the suit land since 1938 was supported by his witnesses **JOHN WEKESA MUYALA (PW 2)** and **HERBERT WANYONYI NGOYA (PW 3)**, the defendant strenuously denied this in his oral evidence during the trial when he stated that infact the plaintiff’s father was living on another parcel of land being **EAST BUKUSU/SOUTH KANDUYI/660**. This is what he said:-

“The plaintiff is not entitled to the orders of adverse possession. He has his own land NO EAST BUKUSU/SOUTH KANDUYI/660. His stay there has not been peaceful. They started reporting me to the police in 1980. So he has been staying there by force. He is a former Police Officer. He was not born there. He was born in Misikhu.”

When cross – examined by the Court, he stated that his dispute with the plaintiff started in 1975 when the plaintiff left his land and moved to settle on the suit land. What I understand the defendant to be claiming in his oral evidence is that the plaintiff infact lives on a different parcel of land and not on the suit land. This is what he said when cross – examined by **MR. KWEYU** counsel for the plaintiff:-

“The plaintiff’s father was not living on the land in dispute. He was living on parcel NO. 660. I did succession in 1989 and that is when I moved to Court.”

The defendant did not avail any evidence that the plaintiff or his father live on another land parcel known as **EAST BUKUSU/SOUTH KANDUYI/660**. The onus was on him to lead evidence to prove that assertion section 109 of the Evidence Act is couched in the following terms:-

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In both his first replying Affidavit dated 16th July 2001 and his subsequent reply to the Amended Originating Summons, there is no mention of the claim which he raised orally in Court that the plaintiff's family occupied other parcel of land being parcels **NO EAST BUKUSU/SOUTH KANDUYI/660** or **EAST BUKUSU SOUTH KANDUYI/1072** where he claims the plaintiff's father was buried. Nothing would have been easier than to avail a Certificate of Search to prove those allegations. Indeed in his Replying Affidavit, he concedes that the plaintiff has trespassed onto the suit land and should be evicted. That is an admission that the plaintiff is in occupation of the suit land. This is what the defendant has deponed in paragraphs 2, 4, 5, 6 and 7 of his Replying Affidavit dated 9th June 2015 in response to the Amended Originating Summons:-

2: “That I know land parcel number E. BUKUSU/S. KANDUYI/659.”

4: “That I have held this land in trust for my seven brothers and members of their families, the land being our ancestral family land measuring 15.8 Ha.”

5: “That the Applicant/Plaintiff trespassed into our said parcel of land and there have been various cases involving us to remove him from our land including BUNGOMA RMCC NO 164 OF 1981, BUNGOMA PMCC NO 612 OF 1990, KAKAMEGA HIGH COURT CIVIL CASE NO 19 OF 1991.”

6: “That the Applicant/Plaintiff being a trespasser has never lived openly, quietly and uninterruptedly into our land as I have actively resisted his occupation of our land and cannot claim acquiring any part of our land through adverse possession.”

7: “That therefore, the Applicant/plaintiff should be removed from our land as a trespasser and move out of land parcel NO E. BUKUSU/S. KANDUYI/659.”

Those assertions, in my view, clearly prove that the plaintiff is in occupation of a portion of the suit land and not any other land. And whereas the defendant complains that the plaintiff has trespassed onto the suit land, that is what adverse possession is all about. That is what the Court re-stated in the **MTANA LEWA** case (supra) when it said that adverse possession occurs when a person takes possession of another person's land and asserts rights over it yet the registered owner takes no action to assert his right over the same land. In simple language, when a person enters into land registered in the names of another person and uses it as his own and the registered owner does nothing towards asserting his right to the said land for a period of twelve (12) years, then the registered owner's right over that land becomes extinguished. The person claiming the land may initially enter as a trespasser or even a purchaser. So the fact that the person claiming the land by adverse possession started by trespassing onto the land in dispute, as the defendant claims, does not defeat the adverse possessor's claim to such land. It can however be defeated if the entry was with the consent of the registered owners – **WAMBUGU .V. NJUGUNA 1983 KLR 172**. In that case, adverse possession would start from the time the license is terminated. In this case, the defendant having conceded that the plaintiff is on the suit land but a trespasser, it was his duty to evict him from the said land before the expiration of twelve (12) years.

The important issue that the defendant has raised in his Replying Affidavit is that the plaintiff has not been on the suit land peacefully. Instead, the defendant has alluded to the various litigations involving the two of them. Those cases were dealt with at length in my ruling dated 26th July 2018 and it is clear that among those cases was the **KANDUYI LAND DISPUTES TRIBUNAL CASE NO OF 1990** where the suit land was awarded to the defendant herein. The plaintiff's case is that he was born on the suit land in 1938 and has lived thereon since then. The defendant has controverted that allegation and stated that the plaintiff only moved onto the suit land in 1975. From the Green Card, the suit land was first registered in the names of the defendant's late father **ANORITI MAKOKHA** on 2nd January 1969 before it was

registered in the names of the plaintiff on 15th August 1989. For purposes of adverse possession, time started to run on 2nd January 1969 and the law is that a change of ownership of land does not interrupt adverse possession – **GITHU .V. NDEETE 1984 KLR 776**. Such adverse possession can only be interrupted when the owner asserts his right to the land by filing a suit or when such right is admitted by the person claiming the land. The plaintiff stated in his oral evidence that he was born on the suit land in 1938 and has lived thereon since that time to-date. He then added that he buried both his mother **LUDIAH NABALAYO** and father **LABAN MUYALA** on the suit land in 1976 and 1965 respectively. While the defendant stated in his oral evidence that plaintiff's father was buried in parcel **NO EAST BUKUS/SOUTH KANDUYI/1072**, he did not deny that the plaintiff's mother was buried on the suit land. Indeed in paragraphs 4 of his Supporting Affidavit dated 4th June 2015, the plaintiff has made the following assertions:-

4: "That all my paternal relatives live and died and were buried on this disputed land including my mother LUDIAH NABALAYO who died in 1976."

This was never refuted by the defendant in his Replying Affidavit and that is a clear admission that the plaintiff and his family occupied and utilized the suit land as their own peacefully, openly and with the knowledge of the defendant. No evidence was adduced to demonstrate any objection to that burial. Again there is the plaintiff's averment in paragraph 2 of his Replying Affidavit that he was born in 1938:-

" While my parents were living on part of land NO E. BUKUSU/S. KANDUYI/659 measuring 15.8 Ha. I grew up married and now settled on part of the said parcel of land measuring 8 Hectares (annexed is a copy of the Green Card.)"

Other than the assertion that he holds the suit land in trust for his brothers and that the plaintiff is a trespasser thereon, there was no direct challenge to the plaintiff's averments. This Court is entitled, in the circumstances, to make a finding that the plaintiff was born on the suit land in 1938. The defendant by his own Replying Affidavit has deponed at paragraph 5 that the first of the several suits involving the suit land was **BUNGOMA RMCC NO 164 of 1981**. It is clear that by the time that suit was filed, the plaintiff and his family had occupied and been in possession of the suit land for 43 years well in excess of the statutory period provided for in law. It is also not lost to this Court that whereas the defendant says that he holds the suit land in trust for his seven brothers, none of them has come to support his case. On the other hand, the plaintiff's claim to occupation of the suit land is supported by two witnesses one of whom (**HERBERT WANYONI NGOYA PW 3**) also lives thereon. This Court can only conclude that the reason why the defendant could not call any of his brothers is because they would not have supported his case.

Turning back to **BUNGOMA RMCC NO 164 OF 1981**, none of the parties availed any pleadings with respect to the case. All that the defendant pleaded in paragraph 12 of his Replying Affidavit dated 16th July 2001 was as follows:-

"That the plaintiffs relatives also sought vide BUNGOMA RMCC NO 164 OF 1984 PHILIP MUYALA and MELAP NASIKE .V. MAKOKHA MUTAYI (DECEASED) to claim this land but the said suit was dismissed. This has the up-shoot that the plaintiff's suit is brought in bad faith and not authentic (True Photostat copy of the proceedings is annexed and marked JMN 4)."

Unfortunately, no proceedings were annexed. Then in his other Replying Affidavit dated 9th June 2015 filed in reply to the Amended Originating Summons, the defendant has deponed as follows at paragraph 5:

"That the Applicant Plaintiff trespassed into our said parcel of land and there have been various cases involving us to remove him fro our land including BUNGOMA RMCC NO 164 OF 1981, BUNGOMA PMCC NO 612 OF 1990, KAKAMEGA HIGH COURT CIVIL CASE NO 10 OF 1991."

It is immediately clear that the **BUNGOMA RMCC CASE** file is being referred to as **NO 164 OF 1984 and also No 164 of 1981**. Being the first case filed in relation to this dispute. I took it upon myself to have the file retrieved because if indeed it was filed in 1981 and was seeking orders for the eviction of the plaintiff from the suit land, it would have a significant bearing on this suit in terms of interrupting the plaintiff's adverse possession of the suit land. This is because, as I have already stated above, the suit land was first registered on 2nd January 1969 and time only starts running once the land is registered and not before. The Deputy Registrar was able to retrieve the Register which confirmed that the proper citation of the suit is as follows:-

“NO OF CASE PARTIES

164 of 1981 PHILIP MUYALA and MALEPU NASIKE .V. MAKOKHA MULAYI

NATURE OF CLAIM

Rectification of land.

Parcel NO. E. BUKUSU/S. KANUYI/659

DATE OF SUMMONS DATE OF HEARING

20/3/1982

SUMMONS AND OTHER FEES PAID

Kshs. 224/=

REMARKS

CASE DISMISSED”

From the above summary, it is immediately clear that **BUNGOMA RMCC NO 164 OF 1981** did not seek any orders of eviction against the plaintiff who was not even a party. It only sought orders of rectification of the register and the summons was only applied for on 20th March 1982. It is also clear from the record that among the documents filed in this case are an order issued on 9th June 1982 in **BUNGOMA RMCC NO 164 OF 1981** by **PHILIP MUYALA and MELAPU NASIKE .V. MAKOKHA MUTAYI**. The order reads:-

“ 9.6.1982.

BEFORE H. R. AGGARWAL – RM

Plaintiff in person

Defendant – dead

Court: - This case was filed in this Court on 18/12/1981 and when a process server of this Court went to serve the defendant named on the summons, he was informed by one JOHN MAKOKHA, the son of the defendant, that the defendant died in 1973. The plaintiff should not have brought a suit against the deceased.

Order: - Plaint defective. Case dismissed.

H. R. AGGARWAL – RM.”

That order is clear that **BUNGOMA RMCC NO 164 OF 1981** was filed on 18th December 1981. The suit land having been first registered in the names of the defendant's father **ANORITI MAKOKHA** on 2nd January 1969, it is clear that the defendant's rights to the suit land were extinguished on 3rd January 1981. The result is that **BUNGOMA RMCC NO 164 OF 1981** and which was the earliest case could not have interrupted the plaintiff's occupation of the suit land as it came close to one year late. Besides, it did not involve the plaintiff in this case and neither did it seek orders for the eviction of the plaintiff from the suit land. It is clear from the decision in **GITHU .V. NDEETE** (supra), that the only way in which time which has started to run in adverse possession can be interrupted is by a filing a suit to evict the party claiming the land by adverse possession.

I have also seen a record of proceedings in the **DIVISIONAL TRIBUNAL THE COLONY AND PROTECTORATE OF KENYA CIVIL CASE NO 25 OF 1953**. The record is not very clear but suffice it to state that it involved one **LABAN NGOYA** and **NATAKA CHEMIATI**. Since the suit land was only registered in 1969, a dispute filed in 1953 could not be the subject of that land. Therefore, whereas there have been previous litigation over the suit land in the 1990's and thereafter, those cases came too late to interrupt the plaintiff's occupation of the suit land. Although the plaintiff was born on the suit land in 1938, time for purposes of adverse possession commenced on 2nd January 1969 when the suit land was first registered in the name of the defendant's late father **ANORITI MAKOKHA**. That would mean that by 18th December 1981 when the first case was filed, the defendant's rights to the suit land had been extinguished.

Having considered all the evidence by the parties herein, I am satisfied that the plaintiff has established his case to warrant the orders sought in his Amended Originating Summons.

Judgment is therefore entered for the plaintiff against the defendant in the following terms:-

- 1. An order is issued that the plaintiff is entitled to 8.0 Hectares out of land parcel NO EAST BUKUSU/SOUTH KANDUYI 659 by way of adverse possession.**
- 2. The Land Registrar to register the plaintiff as proprietor of a portion of land measuring 8.0 Hectares out of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/659.**
- 3. The defendant shall execute all the documents to facilitate that transfer within 30 days from today and in default, the Deputy Registrar of this Court shall be at liberty to do so on his behalf.**
- 4. Each party to bear their own costs.**

Boaz N. Olao.

JUDGE

9th April 2019.

Judgment dated, signed and delivered in Open Court at Bungoma this 9th day of April 2019

Mr. Kweyu for plaintiff present

Defendant present in person.

Right of appeal explained.

Boaz N. Olao.

JUDGE

9th April 2019.