

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC NO. 56 OF 2017**

**JAMES WESONGA NAFWA .....**

**PLAINTIFF**

**= VERSUS =**

**JENEPHER MAROTI BARASA .....**

**DEFENDANT**

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

1. **JAMES WESONGA NAFWA** (the Plaintiff) approached this Court by way of Originating Summons dated 16<sup>th</sup> March 2017 and filed on 17<sup>th</sup> March 2017. He impleaded **JENEPHER MAROT BARASA** (the Defendant) claiming to have acquired the land parcel **NO MARACHI/ELUKHARI/948** (the suit land) by way of adverse possession. He therefore sought a determination of the following questions:

- 1) Whether the Plaintiff has been in possession of the land parcel NO MARACHI ELUKHARI/948 cultivating the same, planting bananas, cassava, maize and**

**potatoes peacefully without interruption for a period of more than 12 years.**

**2) Whether the Defendant's title to land parcel NO MARACHI/ELUKHARI/948 has been extinguished and she is holding the same in trust for the Plaintiff.**

**3) Whether the Plaintiff should be declared the absolute owner of the suit land with a right to be registered as the proprietor in place of the Defendant.**

2. Arising out of the above, the Plaintiff sought judgment against the Defendant in the following terms:

**1) The Defendant's title to the land parcel NO MARACHI/ELUKHARI/948 has been extinguished and the same be registered in the name of the Plaintiff instead of the Defendant.**

**2) The Defendant do execute and sign all necessary documents to facilitate the registration of the Plaintiff as the proprietor of the land parcel NO MARACHI/ELUKHARI/948 failure of which an**

**officer of this Honourable Court be empowered to do so in her place.**

**3) The Land Registrar Busia County do effect the registration of the Plaintiff as the proprietor of the land parcel NO MARACHI/ELUKHARI/948 in the land Register in place of the Defendant.**

3. In support of his Originating Summons, the Plaintiff filed an affidavit of even date in which he has deponed, inter alia, that the suit land was registered in the name of the Defendant in 2012 by the original owner **FESTO WERE**. That he has however been staying on the suit land since 1996 cultivating bananas, cassava, Maize and potatoes thereon peacefully and without interruption for more than 20 years. That in 1999, the initial owner of the suit land sued him in **BUNGOMA HIGH COURT CIVIL CASE NO 313 of 1999** seeking to evict him from the suit land but that suit was dismissed.
4. That in 2012 and without his knowledge or consent, the initial owner **FESTO WERE** transferred the suit land to the Defendant in order to avoid the Plaintiff's claim against him. That neither the Defendant nor **FESTO WERE** stay or

cultivate the suit land. It is his belief therefore that the Defendant's title to the suit land has been extinguished since 1996 and he holds the same in trust for him.

5. The Plaintiff also filed the statement of his witness **ALUFREDI OUMA KUDADI (PW2)** dated 30<sup>th</sup> December 2024. He states therein that before its registration, the suit land was the property of his grandfather **DUKWA** who gave a portion thereof to his brother-in-law **MUYUBI** who left it to his son **NAFWA**. Later, **NAFWA** went to Nairobi and **AFWANDE LUBALE** invaded the suit land in 1956 or 1957. When **NAFWA** learned about the invasion of the suit land, he returned from Nairobi and sued the said **AFWANDE LUBALE** at the **NAMBALE AFRICAN COURT**. The case proceeded upto appeal and **AFWANDE LUBALE** was evicted from the suit land.
6. During the land registration process, **FESTUS WERE OMIRE** the Defendant's husband secretly had the suit land registered in his name and subsequently in the Defendant's name. That on the ground, all the neighbours know that the suit land is the property of the Plaintiff and should be registered in his name.

7. The Plaintiff also filed a list of documents which is undated but which was filed on 5<sup>th</sup> February 2024. It contains the following documents:

- 1) The decision of the **D.O.** Bungoma in land appeal **NO 63** of **1957** made on 19<sup>th</sup> November 1957.
- 2) Sketch map
- 3) Decision of the Application for Review by the Provisional African Court's offices dated 14<sup>th</sup> April 1958.
- 4) An order issued in **NAIROBI HIGH COURT CIVIL SUIT NO 3375** on 28<sup>th</sup> December 1988 between **FANUEL NAFEA MUYUBI** (as Plaintiff) and **FESTUS WERE** (as Defendant) injunctioning the Defendant (**FESTUS WERE**) from the suit land.
- 5) Judgment delivered on 13<sup>th</sup> December 1996 in **KAKAMEGA HIGH COURT CIVIL CASE NO 146** of **1989** between **FANUEL NAFWA MUYUBI** (as Plaintiff) and **FESTUS WERE** (as Defendant) cancelling the said Defendant (**FESTUS WERE's**) title to the land parcel **NO**

**MARACHI/ELUKHARI/948** and referring the matter to arbitration.

- 6) Decree issued in **KAKAMEGA HIGH COURT CIVIL CASE NO 146** of **1989**.
- 7) Order issued in **NAIROBI HIGH COURT MISC** Application **NO 753** of **1998** (later **KAKAMEGA HIGH COURT MISC** Application **NO 105** of **1998**) setting aside the award of the **MARACHI LAND ARBITRATION TRIBUNAL**.
- 8) Order made on 16<sup>th</sup> September 1999 in **KAKAMEGA HIGH COURT MISC** Application **NO 105** of **1998**.
- 9) Ruling delivered on 31<sup>st</sup> July 2000 in **BUNGOMA HIGH COURT MISC** Application **NO 313** of **1999**.
- 10) Ruling delivered on 22<sup>nd</sup> February 2003 in **BUNGOMA HIGH COURT MISC** Application **NO 93** of **2001**.
- 11) An Order of stay issued on 11<sup>th</sup> March 2003 in **KAKAMEGA CMC MISC** Application **NO 116** of **1998**.

- 12) Letter by **FESTUS WERE** dated 5<sup>th</sup> December 2002 applying for copy of the judgment in **KAKAMEGA CMC MISC Application NO 116 of 1998.**
- 13) **Letter by FESTUS WERE** dated 12<sup>th</sup> February 2003 seeking eviction order.
- 14) Ruling issued in **KAKAMEGA CMC MISC Application NO 116 of 1998.**
- 15) Letter from the Land Adjudication Department dated 3<sup>rd</sup> November 1999 and addressed to the Director of Land Adjudication and Settlement Nairobi.
- 16) Letter from the Provincial Commissioner Western addressed to the District Commissioner Busia dated 26<sup>th</sup> June 2000 seeking the appointment of an Arbitration Board to hear land cases.
- 17) Letter from the Land Adjudication Department dated 13<sup>th</sup> September 2000 addressed to the District Commissioner Busia seeking the appointment of an Arbitration Board to hear land cases.

- 18) Letter from the Land Adjudication Department dated 23<sup>rd</sup> February 2004 to the District Commissioner Busia seeking the appointment of the Arbitration Board.
- 19) Letter from the Ministry of Lands, Housing and Urban Development dated 19<sup>th</sup> November 2013 addressed to the Land Registrar Busia regarding the Plaintiff's complaint over the land parcel **NO MARACHI/ELUKHARI/948.**
- 20) Kenya Gazette **NO 3636** of 8<sup>th</sup> April 2011.
- 21) Letter dated 9<sup>th</sup> March 2011 from the Land Registrar Busia and addressed to **BULIMO & CO ADVOCATES** conveying the inability to implement the order issued in **KAKAMEGA H.C.C.C NO 146** of **1989.**
- 22) Judgment in **BUSIA CRIMINAL CASE NO 1525** of **2010.**
- 23) Judgment in **BUSIA ELC MISC** Application **NO 125** of **2014.**

In addition to his supporting affidavit, the Plaintiff also filed a statement dated 5<sup>th</sup> February 2024 in which he states that his father **NAFWA MUYUBI** and **AFWANDE**

**LUBALE** started litigating in or about 1956. That **AFWANDE LUBALE** trespassed into **NAFWA MUYUBI'S** land and the dispute was heard by the **NAMBALE AFRICAN COURT** where **PETRO MUNG'AYO LUBALE** the father of **FESTO WERE** was a witness of his brother **AFWANDE LUBALE** who lost the case and appealed to the African Court of Review in Bungoma which visited the land and drew a sketch map showing the parties land and dismissed **AFWANDE LUBALE'S** appeal.

8. **AFWANDE LUBALE** then appealed to the Bungoma District Officer and subsequently to the Court of Review but lost both appeals and went back to his ancestral land.
9. In 1966 when the Land Registration process commenced, **NAFWA MUYUBI** was in Nairobi and was not aware about the Land Registration and Adjudication process. When he returned, he found that the suit land had been registered in the name of **FESTO WERE** the Defendant's husband. **NAFWA MUYUBI** instituted **KAKAMEGA HIGH COURT CIVIL CASE NO 146** of **1989** and obtained an order of injunction against **FESTO WERE** but died in 1991 before the case could be heard. The Plaintiff substituted his late father and the case was determined in his favour on 13<sup>th</sup>

December 1996 and the registration of **FESTO WERE** was cancelled.

10. Since 1958, the Plaintiff and his father have cultivated the suit land growing maize, cassava, potatoes and bananas thereon and in 1996, he built his home. When he visited the Land Registrar in Busia to implement the Court's decision, he found that **FESTO WERE** had used the title as Security to obtain a loan of Kshs.3,000 from Barclays Bank which had then risen to Kshs.8,000 and so the Court order could not be implemented. The Plaintiff paid the loan and the title to the suit land was released to **FESTO WERE** who refused to release it to the Land Registrar for implementation of the Court order. The Land Registrar placed an advertisement in the Kenya Gazette on 8<sup>th</sup> April 2011. However, since it was a first registration, the Land Registrar was not able to implement the orders issued by the High Court in Kakamega and only placed a restriction on the title.

11. The Plaintiff then approached the offices of the District Commissioner Busia and the Provincial Commissioner Kakamega as well as the Lands Office in Kakamega seeking that Land Arbitration Board members be

appointed to hear the dispute but to date, that has not been done. It is not correct, as deposed by the Defendant in her replying affidavit dated 4<sup>th</sup> May 2017 that this dispute was conclusively heard in the Land Adjudication case **NO 44 of 1966**, Kakamega **CMC MISC** case **NO 116 of 1998** and **BUSIA ELC MISC** case **NO 125 of 2005** and the suit land awarded to the Defendant. That **FESTO WERE** misled authorities including the Magistrate who heard Kakamega **CMC MISC** case **NO 116** of 1998 and the Land Registrar who was compromised to remove the caution placed on the suit land. That **FESTO WERE** also filed a case of forcible detainer against him in Busia **CMC Criminal Case NO 1525 of 2010** which was dismissed. The Plaintiff also moved to Kakamega High Court vide Misc Application **NO 105 of 1989** which vacated the false Arbitration award which **FESTO WERE** had used in Kakamega **CMC NO 116 of 1998**.

12. That since 1998, the Plaintiff has made every effort to convince the relevant authorities to appoint the Arbitration Board Members but none have been appointed. Therefore, the claim by the Defendant that the said Board Members were appointed is a sham to mislead the Court.

13. After the judgment in Kakamega High Court Civil Case **NO 146 of 1989** which cancelled **FESTO WERE's** title to the suit land, he moved and filed against the Plaintiff herein, Bungoma High Court Civil Case **NO 313 of 1999** and Bungoma High Court Civil Case **NO 93 of 2001** which were dismissed with costs. Then in 2012, **FESTO WERE** without a valid order set aside the order issued in Kakamega High Court Civil Case **NO 146 of 1999** on 13<sup>th</sup> December 1996 and compromised the Land Registrar to remove the caution on the suit land and transferred the suit land to his wife the Defendant herein with intent to defeat justice. The Plaintiff has however remained on the suit land cultivating thereon for over 12 years. That **FESTO WERE** and his wife the Defendant herein have never at any time occupied or utilized the suit land on which the Plaintiff has a home. That the Plaintiff did not contest the registration of the suit land in the name of **FESTO WERE** since it was a first registration. However, he would like this Court to consider whether he should be robbed of the same yet he has been in possession of the suit land for over 12 years even after registration of the

same in the name of **FESTO WERE** who therefore holds the suit land in trust for him.

14. The Defendant filed a replying affidavit dated 8<sup>th</sup> November 2017 in which she has deposed, inter alia, that the Originating Summons is frivolous and an abuse of the Court process. She added that she is the absolute registered proprietor of the suit land which was transferred to her by her husband **FESTO WERE** the previous proprietor.
15. That there was Kakamega **CMC MISC** Case **NO 116** of **1998** in which the Plaintiff was ordered to vacate the suit land. After that, the Plaintiff filed Busia High Court Misc Application **NO 125** of **2014** against the Defendant. That the Plaintiff's previous attempts to lay a claim over the suit land are not binding and this suit should be dismissed with costs.
16. **FESTO WERE (DW2)** filed a statement dated 4<sup>th</sup> November 2024 in which he stated that since 1996, he is the proprietor of the suit land which is adjacent to the Plaintiff's land parcel **NO MARACHI/ELUKHARI/949**. That he transferred the suit land to his wife in 1966. Although the Plaintiff claims to be in quiet possession of

the suit land, it is the witness's family which has been in possession of the suit land actively utilizing it extensively. That the Plaintiff has been disputing the title and has filed several cases in Nairobi, Kakamega, Bungoma and the subordinate Court seeking to injunct him. There have also been several Tribunal awards over the land including at the Butula Forest office and correspondences with the Provincial Administration between him and the Plaintiff. In one such case, the Provincial Commissioner wrote to the District Commissioner Busia that the Land Board had decided the dispute between them in his favour and the Plaintiff was stopped from working on the suit land. That having claimed that the Plaintiff obtained the suit land by fraud, he cannot seek the same land.

17. That in 1999, he filed a suit against the Plaintiff being Kakamega Case **NO 105** of **1999** (later Bungoma High Court Civil Case **NO 313** of **1999**) seeking the eviction of the Plaintiff from a portion of the suit land but which suit was dismissed by **G. P. MBITO J.** A similar case being Bungoma High Court Civil Case **NO 93** of **2001** was also dismissed by **M. ANGAWA J.** He then went back to Court vide Kakamega Case **NO 116** of **1998** seeking the

eviction of the Plaintiff from the suit land. On 11<sup>th</sup> March 2003, the Plaintiff obtained an order staying his eviction.

18. After the witness had transferred the suit land to the Defendant who is his wife, the Plaintiff sought an order restraining him from utilizing the suit land. That application was dismissed but the Plaintiff proceeded to destroy the semi-permanent structure which the witness had contracted thereon. The matter was reported to the Police and two members of the Plaintiff's family were charged in Busia Court Criminal Case **NO 1654** of **2016**. He too was charged in Busia Court Criminal Case **NO 1655** of **2016**, was convicted and served his sentence.
19. The Defendant filed a list of documents dated 4<sup>th</sup> May 2017 and a supplementary list of documents dated 4<sup>th</sup> November 2024.
20. The first list of documents has the following:-
  - 1) Award in Arbitration case **NO 44/66** between **JAMES NAFWA MUYUBI -V- FESTUS WERE OMIRE.**
  - 2) Eviction order issued in Kakamega Court Case **NO 116** of **1998** adopting an award in favour of **FESTUS WERE.**

- 3) An order issued in Kakamega Chief Magistrate's Court Civil Case **NO 116** of **1998** on 20<sup>th</sup> February 2003 ordering for the eviction of **FESTUS WERE** from the land parcel **NO MARACHI/ELUKHARI/948**.
- 4) An eviction order issued in Kakamega Chief Magistrate's Court Case **NO 116** of **1998** on 21<sup>st</sup> December 2015 ordering for the eviction of **FESTUS WERE OMIRE** from the land parcel **NO MARACHI/ELUKHARI/948**.
- 5) A ruling delivered on 26<sup>th</sup> February 2015 in Busia **ELC** application **NO 125** of **2014**.

By the supplementary list of documents, the Defendant filed the following:

- 1) Photographs of the destroyed house belonging to **FESTUS WERE**.
- 2) Order issued in Busia Chief Magistrate's Court case **NO 1654** of **2016**.
- 3) Page 18 of the proceedings in Busia Chief Magistrate's Criminal Case **NO 1655** of **2016**.

- 4) Pages 19 to 20 of the proceedings in Busia Chief Magistrate's Court Criminal Case **NO 1655** of **2016**.
- 5) Pages 22 to 23 of the proceedings in Busia Chief Magistrate's Court Criminal Case **NO 1655** of **2016**.
- 6) Proceeding of page 1 in Busia Chief Magistrates Court Criminal Case **NO 1655** of **2016**.
- 7) Petition of Appeal filed in Busia High Court Criminal Appeal **NO E035** of **2021**.

21. The hearing commenced and also terminated on 10<sup>th</sup> March 2025 when the Plaintiff testified and called his witness **ALUFRED OUMA KUDADI (PW2)** and the Defendant also testified and called her witness **FESTUS WERE MUNYALO (DW2)**. They all adopted as their testimony the contents of their respective affidavits and statements. The parties also produced as their documentary evidence the documents filed herein.

22. Thereafter, the Plaintiff who is acting in person filed his submissions while the Defendant who is represented by **MR WASILWA** instructed by the firm of **WASILWA**

**MAKHAKARA & COMPANY ADVOCATES** also filed his submissions.

23. I have considered the evidence by the parties as contained in their affidavits and statements which I have summarized above as well as the submissions by the Plaintiff and by **MR WASILWA**.

24. The only issue that calls for my determination in this suit is whether the Plaintiff has acquired the suit land by way of adverse possession and whether the Defendant's title therein has been extinguished by the operation of law. **Section 38** 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 of this Act, 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 the case of **TITUS KASUVE -V- MWAANI INVESTMENTS LTD & 4 OTHERS C.A. CIVIL APPEAL NO 36 of 2002 [2004 KECA 161 KLR]**, the Court had the following to say about what a party seeking an order to have acquired land by adverse possession must prove:

**“And in order to be entitled to the 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 the discontinuation of possession by the owner of his own volition - Wanje -v- Saikwa (NO 2) 1984 KLR 284.”**

25. In the case of **KIMANI RUCHINE -V- SWIFT RUTHERFORDS & COMPANY LTD 1980 KLR 10 [1976-8- VOL 1 KLR 1500]** at page 16 letter **B, KNELLER J** stated that:

**“The Plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec plecario* (No force, no secrecy, no persuasion). So the Plaintiff must show that**

**the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

Emphasis mine.

The **SUPREME COURT OF INDIA** similarly discussed the essentials of adverse possession in the case of **KARNATAKA BOARD OF WAKF -V- GOVERNMENT OF INDIA & OTHERS 2004 10 SCC 779** and said:

**“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must**

**prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.”** Emphasis mine.

In reiterating the importance of peaceful occupation and possession of the land in dispute, the Court of Appeal had the following to say in the case of **GRACE WAIRIMU SORORA -V- CHAKA LIMITED & 6 OTHERS C.A. CIVIL APPEAL NO. 64** of 2015 [2017 KECA 549 KLR] at paragraphs 30 and 31:

**30: “What the applicant needed to prove was that her occupation was continuous, open, peaceful and without permission of the owner.”**

**31: “It is also evident that several suits were instituted against the 7<sup>th</sup> Respondent as well as the appellant and other squatters who were in occupation of the suit property; one of them being HCCC NO 3178 of 1995. To us this was further**

**interruption of the appellant’s continuous occupation of the suit land, it is immaterial that the suit was struck out on technicality; the mere filing of suit interrupted the continuation of peaceful occupation of the suit land.”**

It is common ground that the suit land was first registered in the name of **FESTO WERE** the Defendant’s husband on 8<sup>th</sup> November 1966. On 4<sup>th</sup> May 2016, it was registered in the Defendant’s name but before that, the Plaintiff had registered a caution on it on 6<sup>th</sup> May 2013. The Plaintiff’s claim is that he has been in occupation and possession of the suit land since 1996 where he not only stays but has also been cultivating bananas, cassava, maize and potatoes. However, in 1999, **FESTO WERE** the initial owner sued him in Bungoma Court. This is how the Plaintiff has deponed in paragraphs 2, 3 and 4 of his supporting affidavit:

**2: “That the land parcel NO MARACHI/ELUKHARI/948 is registered in the name of the Defendant having been transferred to her by the initially (sic)**

**owner one MR FESTO WERE in the year 2012.”**

**3: “That I have been staying on the said land since 1996 cultivating it planting bananas, cassava, maize and potatoes openly peacefully without interruption more than 20 years now.”**

**4: “That in the years 1999 the initially (sic) owner FESTO WERE sued me in Bungoma High Court in Civil Case NO 313 of 1999 seeking eviction order against me in respect of the suit land, but the case was dismissed on 31.05.2000 and since I occupied the suit land cultivating the same without interruption for more than 12 years now.”**

It must be therefore clear from the above that the Plaintiff's occupation and possession has not been peaceful. It was interrupted just 3 years into his entry on the suit land. Interruption of occupation and possession by the claimant occurs when the owner of the land asserts his right, or his ownership is admitted by the claimant or

when the owner institutes legal proceedings - **GITHU -V- NDEETE 1984 KLR 776**. It is also clear that even prior to 1999 and after, there has been a lot of litigation both in Court and in other Tribunals over the suit land some which involved the Plaintiff's father **FANUEL NAFWA MUYUBI** and the Defendant such as Land Disputes Case **NO 140 of 1989** at Kakamega High Court. Indeed this is aptly covered in paragraphs 2(b) and (c) of the statement of **FESTO WERE** dated 4<sup>th</sup> November 2024 where he states:

**2(b): "During the period the Plaintiff alleges to have been in quiet possession, my family has been in possession, and actively used the land exclusively, the Plaintiff has been disputing my title and right of use in various law Courts, land tribunals and in the administration offices of Busia and Bungoma for a very long time during the period he alleges to have been in quiet possession; the dispute has been the subject of Court cases in Nairobi, Kakamega, Bungoma both in the subordinate, High Court and Court of**

**Appeal at Kisumu. Last where the Plaintiff herein unsuccessfully sought to obtain an interlocutory injunction against me.”**

**2(c): “There have been several cases, tribunal awards, correspondence by the Provisional Administration and Butula Forest Officers’ assessment of tree and crop damage (page 98 and 99 Defendant’s bundle) over time that indicates constant controversy between me and JAMES NAFWA over the possession, use and entitlement to the suit land; another example is a letter dated 20<sup>th</sup> August 1998 (page 82A of Defendants bundle now produced as an exhibit) by which the Provincial Commissioner wrote to the District Commissioner Busia that the Land Board had decided the dispute in favour of FESTO WERE and that JAMES NAFWA should stop working on the land; even an eviction order was issued against JAMES NAFWA (see copy at page 89 now**

**produced as exhibit) and a letter by Police for the arrest of JAMES WESONGA, JOYCE WESONGA which resulted in their conviction in Busia Criminal Case. The said documents are respectively produced on behalf of the Defendant as exhibits.”**

All the above is well documented and demonstrates that the Plaintiff's occupation and possession of the suit and has been far from peaceful or un-interrupted which is a crucial requirement of a claim founded on adverse possession.

26. The Plaintiff has also cast aspersions on the process by which **FESTO WERE**, and by extension the Defendant obtained the title to the suit land. In paragraphs 32, 33 and 34 of his statement dated 5<sup>th</sup> February 2024, the Plaintiff states:

**32: “In the year 2012, FESTO WERE without any valid Court order setting aside an order of Kakamega HCCC NO 146 of 1989 as made on 13<sup>th</sup> December 1996 and without a valid Land Adjudication Arbitration Board Members order he**

**falsely compromised Busia Land Registrar without my knowledge to remove the restriction he placed over the suit land in disregard to the decision in the said Kakamega HCCC NO 146 of 1989.”**

**33: “When I learnt about the same in 2013 I placed a caution over the suit land pending the process for cancellation of FESTO WERE’S registration as ordered in Kakamega HCCC NO 146 of 1989.”**

**34: “In 2015 FESTO WERE falsely and without my knowledge using the decision made in Busia Environment & Land Court Misc NO 125 of 2014 which did not set aside the decision of Kakamega HCCC NO 146 of 1989 and which did not give the suit land to him compromised Busia Land Registrar to withdraw the caution and then transferred the suit land to his wife JENEPHER MAROTI BARASA the Defendant herein with an intend (sic) defeat justice.”**

The Plaintiff is therefore alleging that the Defendant's title to the suit land was obtained in a fraudulent manner. Yet that is the same title he wishes this Court to direct that it be registered in his name. This Court cannot award to him the land whose title he claims to have been obtained fraudulently. Faced with a similar situation in the case of **ASUNDA -V- ONGOMA & ANOTHER BUSIA ELC CASE NO E022 of 2021 [2025 KEELC 3037 KLR]** and which has been cited by the Defendants counsel **MR WASILWA**, I stated as follows in paragraph 9 of my ruling delivered on 3<sup>rd</sup> April 2025:

**“A party claiming land by way of adverse possession must admit the title of the registered owner. It cannot lie in the mouth of the Applicant to seek to be registered as the proprietor of the suit land yet at the same time claim that the title which he seeks to be registered in his name was infact acquired illegally and through a fraudulent process. It is akin to asking this Court to perpetuate an illegality which is not the business of a Court of law.”**

That is exactly what the Plaintiff in this case seeks me to do. If his intention was to cancel the Defendant's title for lack of validity, then he should have moved the Court accordingly setting out the fraudulent allegations against the Defendant. Basically, an adverse possessor starts by acknowledging that indeed the land which he claims through adverse possession is registered in the name of the person against whom the claim has been filed. And that registration must of course be lawful and valid because that is the import of Section 38 of the Limitation of Actions Act. However, the moment the claimant starts questioning the validity of the title which he is claiming, then he is actually defeating his own case. That is exactly what the Plaintiff herein is doing through this suit. This Court must inform him that such procedure is not proper. He must elect either to recognize the Defendant's title and seek the orders that he has obtained the same by way of adverse possession or he can elect to cancel the said title on the ground that it was obtained through fraud or any other illegal process. However, the Plaintiff cannot challenge the validity of the Defendant's title and at the same time, seek that the same be registered in his name.

27. Having considered all the evidence herein, it is clear that the Plaintiff's occupation and possession of the suit land can hardly be described as peaceful or un-interrupted as set out in the relevant precedents some of which I have already set out above. Rather, it has been characterized by long and drawn out litigation involving those claiming through them. A claim of the suit land by way of adverse possession has not been made out in the circumstances.

28. The up-shot of all the above is that having considered the evidence herein, this Court issues the following disposal orders:

- 1) The Plaintiff's suit is dismissed.**
- 2) Costs to the Defendant.**
- 3) On 15<sup>th</sup> November 2025 when this Court fixed a judgment date, the Plaintiff stated that he prefers the judgment be delivered in Open Court. The Court will therefore accede to his request. The Defendant's counsel will get his copy of the judgment by way of email as is the current practice.**
- 4) The delay in the delivery of the judgment was occasioned by my transfer from Busia**

**Court and the fact that I had to concentrate on my part heard cases. The same is regretted.**

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY 2026**

Judgment dated and signed at Iten Court on this 26<sup>th</sup> day of February 2026. The same shall be delivered by **WAITHAKA J** as per the directions in (3) above and with notice to the parties.

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY 2026**

Explanatory Notes:

This judgment was due on 20<sup>th</sup> November 2025. However, following my transfer from Busia to Iten Court w.e.f 15<sup>th</sup> January 2026, I had to prioritize my part heard cases thus necessitating the delay which is regretted.

**BOAZ N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY 2026**

ORIGINAL