



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL CASE NO. 7 OF 2009

CONSOLIDATED WITH BUNGOMA HCCC NO. 76 OF 2009 (OS)

EDWIN JUMA LUMBASI.....1ST PLAINTIFF

GORPACHENI KATAU MREFU.....2ND PLAINTIFF

VERSUS

JULIUS NAIBEL.....DEFENDANT

J U D G M E N T

On 8th November 2010 and with the consent of the parties, **MUCHEMI J** consolidated **BUNGOMA HIGH COURT CIVIL CASE NO 76 OF 2009 (OS)** and **BUNGOMA HIGH COURT CIVIL CASE NO 7 OF 2009**. Direction were not taken then but I subsequently gave directions on 16th July 2018 that the Plaintiff in **BUNOMA HIGH COURT CIVIL CASE NO 7 OF 2009** be the Plaintiff and the Originating Summons in **BUNGOMA HIGH COURT CIVIL CASE NO. 76 OF 2009 (OS)** be the defence and Counter – Claim and the replying affidavit to the Originating Summons be the defence to the Counter – Claim.

EDWIN JUMA LUMBASI and **GORPACHENI KATAU MREFU** (the 1st and 2nd plaintiffs respectively) filed **BUNGOMA HIGH COURT CIVIL CASE NO 7 OF 2009** seeking against **JULIUS NAIBEL** (the defendant who was later substituted with his son **JACOB NGEYWO CHESORI**) Judgment in the following terms: -

(a) An eviction

(b) Costs of this suit and interest thereon

(c) Any other suitable or alternative relief as this Court may deem fit and just to grant.

The subject of this dispute is land parcel **NO MALAKISI/WEST SASURI/762** (the suit land) which has since 25th November 2008 been registered in the names of the plaintiffs. It is the plaintiffs' case that owing to the volatile political situation that arose in **MT ELGON DISTRICT** and the attendant clashes in 1992, 1996 and 2008, the defendant capitalized on the same and occupied the suit land which was then registered in the names of the **AINEAH WAMEMBA MUREFU** a kin to the plaintiffs. Owing to his advance age and failing health, **AINEAH WAMEMBA MUREFU** transferred the suit land to the plaintiffs but when the plaintiffs approached the defendant to peacefully move out, the defendant threatened them with dire consequences thus prompting this suit.

The defendant filed a defence denying that the plaintiffs are the registered proprietor of the suit land and putting them to strict proof thereof. The defendant denied having capitalized on the volatile political situation that arose in the **MT ELGON DISTRICT** in 1992, 1996 and 2008 to occupy the suit land and added instead that he entered the suit land in 1993 after having purchased it at a consideration from the then registered owner **AINEAH WAMEMBA MUREFU** and has been in occupation thereof and therefore this suit is statute barred and should be dismissed with cost.

The plaintiffs filed a reply to defence reiterating the contents of their plaint and denying that the defendant purchased the suit land from **AINEAH WAMEMBA MUREFU** adding that he illegally encroached thereon without the consent of the registered proprietors.

Together with those pleadings, the parties filed their respective witness statements and list of exhibits.

On his part, the defendant filed **BUNGOMA HIGH COURT CIVIL CASE NO 76 OF 2009 (OS)** by way of Originating Summons under the **Limitation of Action Act** the then **Registered Land Act** seeking the following orders against the plaintiffs: -

- 1. The plaintiffs' rights over the suit land got extinguished by adverse possession upon the expiry of the 12 years when the defendant was in occupation.**
- 2. A declaration that the beneficial ownership and use of the suit land be transferred to the defendant and that the plaintiffs execute the transfer thereof in his favour and in default, the Deputy Registrar to execute the transfers.**
- 3. A declaration that the plaintiffs be permanently barred from taking and/or using the said parcel of land or any part thereof.**
- 4. A declaration under Section 38 of the Limitation of Actions Act that the defendant be registered as proprietor of the land parcel NO MALAKISI/WEST SASURI/762.**
- 5. Any order that the plaintiffs be condemned to pay costs of the suit.**
- 6. Further or other relief.**

The Originating Summons was supported by the defendant's affidavit dated 8th October 2009 in which he pleads, inter alia, that he has been in occupation of the suit land since 1993 to – date having purchased it from the then registered owner **AINEAH WAMEMBA MUREFU** together with his family members and therefore by 2005, the registered owners proprietary interests had lapsed to the extent of the portion that he occupies. That therefore by 25th November 2008 when the plaintiffs obtained title to the suit land, their proprietary interest had lapsed and they have never occupied the defendant's portion where he has been farming and residing peacefully continuously and un – interrupted since 1993. That the portion which he occupies is demarcated and he has extensively developed it by constructing permanent houses and planting crops for over seventeen (17) years.

Together with the Originating Summons, the defendant filed statements of his witnesses and documents which include the Green Card to the suit land, sale agreements dated 21st February 1993, 4th March 1993, 6th March 1993 and 28th June 1993.

The Originating Summons is contested and in his replying affidavit dated 6th November 2009, the 1st plaintiff, with the authority of the 2nd plaintiff has deponed, inter alia that he and the 2nd plaintiffs are the registered proprietors of the suit land and it is not true that the defendant has been in occupation thereof since 1993 as alleged. They further deny that **AINEAH WAMEMBA MUREFU** sold the suit land to the defendant and even if there was any such sale, it became void for want of the requisite Land Control Board Consent and cannot therefore be the basis for a claim of adverse possession. That the defendant capitalized on the tribal clashes that engulfed the area between 1992 and 1996 to forcefully occupy part of the suit land without their consent. That the defendant's occupation of the suit land has neither been peaceful nor continuous as there have been several cases about the land. That it is not true that the defendant has extensively developed the suit land and he only rushed to put up a structure when the plaintiffs filed the suit. That the defendant is a mere trespasser using this suit to abet such trespass.

The trial commenced before **OMOLLO J** on 24th June 2013 when **EDWIN JUMA LUMBASI (PW 1)** told the Court that the suit land is registered in the joint names of the plaintiffs who obtained it from their grandfather **AINEAH WAMEMBA MUREFU**. He produced the official Certificate of Search (plaintiffs exhibit 1) and the relevant application for consent which was allowed to facilitate the said transfer after which they obtained the title (plaintiffs exhibits 2, 3, 4 and 5). He added that they have had problems with the defendant and even filed a complaint with the District Officer who wrote to the defendant on 8th May 1998, 24th March 2002 and 13th June 2005. He added that their grandfather informed them that the defendant entered the suit land in 1992 during the clashes that took place in **MT ELGON**. The 1st plaintiff stated further that although the other family members do not live on the suit land, his grandfather still lives there that the defendant only put up a semi permanent structure in 2008 and not in 1993 and has not lived thereon in peace.

GORBACHENI KATAU MREFU (PW 2) testified before the late **MUKUNYA J** on 13th December 2017 and adopted as his evidence his witness statement dated 3rd October 2011 in which he confirmed that he and the 1st plaintiff are the registered proprietors of the suit land. He added that the defendant has been in occupation thereof since the tribal clashes of 1992 in **MT ELGON** and not since 1993 as alleged but denied that **AINEAH WAMEMBA MUREFU** sold it to the defendant and even if there was any sale, it became null and void for want of the requisite Land Control Board Counsel. That the defendant capitalized on the 1992 and 1996 tribal clashes to forcefully occupy part of the suit land and that occupation has neither been peaceful nor continuous as there have been several cases over the same. He too denied that the defendant has extensively developed the suit land adding that the defendant only rushed to put up a structure when the plaintiffs filed this suit and he is a mere trespasser who should be evicted.

JACOB NGEYWO CHESORI (DW 1) who was substituted in place of his late father **JULIUS TERIA NAIBEI** also adopted as his evidence his statement dated 19th October 2011 and also produced the list of documents dated 3rd November 2011 and the further list of documents dated 28th October 2016.

In that statement, the defendant states that his late father purchased several parcels of land from **INEAH WAMEMBA MUREFU** through transactions that were witnessed by one **PATRICK MABELE MUREFU** a relative of the said **INEAH WAMEMBA MUREFU** the then registered owner of the suit land. That he should be assisted to get his rightful share of the suit land and that the plaintiffs who are a son and grandson of the said **AINEAH WAMEMBA MUREFU** have no right to question the transactions that took place in their absence.

The defendant testified before me on 16th July 2018 and called as his witness **MESHACK KISO MNG'AME (DW 2)** who also adopted as his evidence, his witness statement dated 19th October 2011 in which he states that he witnessed the then registered owner of the suit land sell it to the defendant between 1993 and 1995. That there were other purchasers who also bought from the then registered proprietor including **GIDERN KITTIY, MARTIN KITTIY** and **TIMO A KARATASI**. That the then registered owner also sub – divided the suit land among his four sons who include the 2nd plaintiff and **JACKSON LUMBASI** the father to the 1st plaintiff. That **JACKSON LUMBASI** thereafter sold all the land allocated to him. That the defendant should be accorded his right of ownership of land which he bought lawfully from one **JACKSON LUMBASI** the father to the 1st plaintiff. That the plaintiffs should be restrained from interfering with the defendant's possession and use of the suit land.

Submissions were thereafter filed both by **MR J.O. MAKALI** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the plaintiffs and **MR OMUNDI BW'ONCHIRI ADVOCATES** for the defendant.

I have considered the evidence by all the parties, the documents produced and the submissions by counsel.

While the plaintiffs case is predicated on the fact that they are the registered proprietors of the suit land since 25th November 2008 for which they have a title, the defendant Counter – Claims for the same on the basis that has been in possession of the suit land or at least portions of it since 1993 when he purchased it from the then registered proprietor **AINEAH WAMEMBA MUREFU** and having been in open, peaceful, continuous and un – interrupted occupation thereof, the plaintiffs' rights thereto have been extinguished and the defendant is entitled to the same by virtue of adverse possession.

It is common ground that the plaintiffs have since 2008 been the registered proprietors of the suit land. That registration which was under the then Registered Land Act, (now repealed), conferred upon the plaintiffs the absolute ownership of the suit land together with all the rights and privileges belonging or appurtenant thereto. That is clear from **Section 27 of the repealed Act**. However, such rights were always subject to any overriding interests by other persons, including the defendant herein, as provided by **Section 30 of the repealed Act**. Such overriding interests include rights relating to the **Limitation of Actions** or by prescription. Similar provisions are found in **Sections 25 and 28 of the new Land Registration Act 2012**. It is those prescriptive rights that the defendant is agitating in his Counter – Claim.

As I have already indicated above, the plaintiffs' registration as the proprietors of the suit land is not contested. Indeed, the defendant has not tried to impeach the plaintiffs' title as having been obtained through fraud, misrepresentation, un – procedurally illegally or through a corrupt scheme. It is also not the defendant's case that the plaintiffs' title is forged. Therefore, the plaintiffs' rights as proprietors of the suit land include the right to eject any trespassers therefrom. That is the order they seek against the defendant.

The defendant however claims the suit land by virtue of adverse possession having occupied it since 1993. It is that claim that I must now interrogate because if it is supported by the evidence herein and the law, then the plaintiffs are mere trustees holding the suit land in trust for the defendant their interests therein having been extinguished by effluxion of time and their claim would therefore be statute barred.

Section 7 of the Limitation of Action Act states that: -

7: "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."

Section 38(1) of the same Act provides as follows: -

38(1): "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 the proprietor of the land."

Counsel for the plaintiffs has submitted, citing the Court of Appeal's decision in **TITUS KIGORO MUNYI .V. PETER MBURU KIMANI 2015 eKLR**, that since the plaintiffs were only registered as proprietors of the suit land on 24th November 2008 (it was actually 25th November 2008) and the defendant filed the suit against them in 2008, the twelve (12) years limitation period had not run. Counsel did not however address himself to the fact that although the Court of Appeal held that time for adverse possession could not run against a person who had no proprietary interest in the suit land, the Court went on to state that: -

"However, it must be noted that under Section 7 of Limitation of Actions Act, the law relating to prescription affects not only the present holders of the title but their predecessors"

The Court cited **PETER THUO KAIRU .V. KURIA GACHERU 1988 2 KLR 111**. I only need to add that prior to the registration of the plaintiffs as the proprietors of the suit land, it had been registered in the names of the original owner **AINEAH WAMEMBA MUREFU** since 15th January 1979 and the law is that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession – **GITHU .V. NDEETE 1984 KLR 776**. In this case, it is clear from the Green Card that the suit land was first registered in the names of **AINEAH WAMEMBA MUREFU** on 15th January 1979 and therefore, for purposes of adverse possession, time started running in 1979.

Has the defendant made out a proper claim for the suit land by way of adverse possession? In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal said as follows about what a person claiming land by adverse possession must prove: -

“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 for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.” Emphasis added

As the defendant is claiming the suit land by way of adverse possession, he also has to prove that his occupation of the same is ***“nec vi nec clam nec precario”*** a latin phrase which means, as LORD HOFFMAN put it in **R. V. OXFORDSHIRE EX PARTE SUNNINGWELL PARISH COUNCIL 1999 3 ALL. E.R “not by force, nor stealth, nor the licence of the owner.”** In **KIMANI RUCHINE .V. SWIFT RUTHERFORDS & CO LTD 1980 KLR 10, KNELLER J**, as he then was put it this way: -

“The plaintiffs have to prove that they have used this land which they claim as of right nec vi nec clam nec precario (no force, no secrecy, no evasion). So the plaintiffs 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” Emphasis added.

In **GRACE WAIRIMU SORORA .V. CHAKA LTD & OTHERS 2017 eKLR**, the Court of Appeal had the following to say about the need for peaceful occupation of the land being claimed by the adverse possessor: -

“What the appellant needed to prove was that her occupation was continuous, open and peaceful without permission of the owner.” Emphasis added.

And in another recent exposition on the doctrine of recent possession, the Court of Appeal held in **MTANA LEWA .V. KAHINDI NGALA MWAGANDI 2015 eKLR (C.A CIVIL APPEAL NO 56 OF 2014 MALINDI)** 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 – requisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act” Emphasis added.

From the evidence herein, the occupation of the suit land (or at least part of it) by the defendant is not really in doubt. When he testified before me **JACOB NGEYWO CHEBOR (DW 1)** said he has occupied 3.5 acres thereof since 1993 when his late father purchased it. When his late father filed the Originating Summons in 2009, he was laying a claim to the whole of the suit land which, as per the Green Card, measures 2.4 Ha (about 5.9 acres). It is clear therefore that even if the defendant proves his claim in adverse possession, his entitlement would only be the 3.5 acres that he says he occupies and not the whole of the suit land.

What I need to consider is how the original defendant **JULIUS TERIA NAIBEI** entered the suit land because as I have already pointed out from the relevant case law, the occupation and possession of the adverse possessor must be peaceful. There must be no force, no secrecy and no evasion – ***“nec vi nec clam nec precario.”*** According to the supporting affidavit of **JULIUS TERIA NAIBEI**, he took possession of the suit land in 1993 having purchased it from **AINEAH WAMEMBA MUREFU** and his family members. In support of that assertion, he produced as part of his documents sale agreements dated 21st February 1993, 4th March 1993, 6th March 1993 and 28th June 1993. That was repeated by his son **JACOB NGEYWO CHESORI** the defendant herein who in his statement dated 19th October 2011 states at paragraph three (3) that his late father purchased several parcels of land from **AINEAH WAMEMBA MUREFU**. If that was the position, then the defendant’s entry on the suit land was peaceful.

The plaintiffs however contest that and have claimed that infact there was no such transaction involving **INEAH WAMEMBA MUREFU** over the suit land in 1993. The plaintiffs’ claim that defendant capitalized on the tribal clashes that engulfed **MT ELGON** area between 1992 and 1996 to forcefully occupy part of the suit land.

A perusal of the sale agreements dated 21st February 1993, 4th March 1993, 6th March 1993 and 28th June 1993 through which the defendant allegedly purchased the suit land (or portions of it) shows clearly that **AINEAH WAMEMBA MUREFU** who was the registered proprietor thereof was not a signatory to any of those sale agreements. Indeed even the further agreements dated 11th may 1993, 28th March 1993 and 21st February 1998 (see defendant’s further list of documents dated 27th February 2014), did not involve **AINEAH WAMEMBA MUREFU** as the seller yet he was the registered proprietor of the suit land since 15th January 1979 and therefore the only person who could have entered into any sale agreement over the sale of the suit land. There is no evidence that he authorized any other person to enter into such transactions even if such persons were his sons or relatives. The defendant confirmed that indeed his late father did not buy the land from the then registered proprietor **INEAH WAMEMBA MUREFU**. This is what he said when cross – examined by **MR MAKALI**: -

“My father bought the land from JACKSON LUMABASI MUREFU and PATRICK MABELE. PATRICK is deceased but JACKSON MUREFU is alive. The land was in the name of INEAH MREFU. I can see the agreement dated 21st February 1993. INEAH MREFU the registered owner is not a party in that agreement.

There is another agreement dated 4th March 1993 and 6th March 1993. In those agreements, INEAH MREFU is not a party either. Same for the agreement dated 28th June 1993. The green card for the land parcel NO NORTH MALAKISI/WEST SASURI/762 shows that the owner was INEAH MUREFU and not his sons.”

It is my finding therefore that the defendant did not enter the suit land peacefully through any valid sale agreement in 1993 because the

purported sellers had no interest therein to transfer to him. That notwithstanding, assuming that **AINEAH WAMEMBA MUREFU** had knowledge of the defendant's occupation of the suit land and did nothing to assert his ownership thereof for the statutory period of twelve (12) years, then the defendant would have a good claim in adverse possession.

The evidence however shows that the defendant's occupation of the suit land has been far from peaceful. In their supplementary list of documents, the plaintiffs produced three (3) letters addressed to the defendant by the **DISTRICT OFFICER CHEPTAIS DIVISION** which clearly show that there was a dispute between him and **AINEAH WAMEMBA MUREFU** as far back as 8th May 1998 which was only some five (5) years after the defendant allegedly entered the suit land pursuant to the sale agreements in 1993. The contents of those letters are important and since they are brief, I shall reproduce them: -

"8.5.98

1: MR JULIUS TERIA NAIBEI

RE: APPOINTMENT

You are required to report to this office on Wednesday 13.5.98 at exactly 9:00 am without fail.

This is in relation with the land dispute between you and AINEAH MREFU WAMBEMBE. Please come along with your son JACOB CHESOR KEROKO who is now staying on the land.

CHEBOI WILLY

DISTRICT OFFICER

CHEPTAIS DIVISION"

"24th March 2002

2: MR JULIUS TERIA NAIBEI

MR JACOB CHESOR KEROKO

SUMMON LETTER

You are hereby required to come to this office DC's office on 28.3.2002 at exactly 10:30 am without fail. This is to discuss about the issue of the land between you and MR AINEAH WAMBEMBE MREFU.

Note that this is not the first time you have been summoned to this office, you have been served with so many summon letters but you never turn up.

J. O. (name illegible)

DISTRICT OFFICER

CHEPTAIS DIVISION"

"13.9.05

3: MR JULIUS TERIA NAIBEI

MR JACOB CHESORI KOROKO

RE: SUMMONS

You are required to come to this office D. O's office on 18/9/05 at exactly 10 am without fail. This is in relation with the land dispute you have with mzee AINEAH WABEMBE MREFU.

Please note that this is the 3rd appointment to this office and you have not given it at redress (sic). Please come.

I. M OSEKO

DISTRICT OFFICER

CHEPTAIS DIVISION.”

In their witness statements dated 3rd October 2011, both plaintiffs state as follows:-

“I know of my own knowledge that the defendant’s occupation has neither been peaceful nor continuous as there have been several cases over and about the same land as particularized in the documents in support of our claim.”

When he testified, the defendant acknowledged that indeed there were tribal clashes in 1992 but he denied that any persons were displaced. Having found that **AINEAH WAMEMBA MUREFU** did not enter into any sale agreement with **JULIUS TERIA NAIBEI** or indeed any other person including the defendant herein, it is clear that the defendant’s claim that his late father entered the suit land in 1993 following a sale agreement with the said **AINEAH WAMEMBA MUREFU** cannot be correct. The entry of **JULIUS TERIA NAIBEI** onto the suit land could only have been through stealth. There is also evidence that the occupation of the suit land both by **JULIUS TERIA NAIBEI** and the son have not been peaceful as they have both been summoned by the District Officer to solve the land dispute and this began as far back as May 1998. It cannot therefore be said that the defendant’s occupation of the suit land or any portion thereof has been without force, secrecy, evasion or peaceful and therefore, the key ingredients of a claim for adverse possession have not been established. On the other hand, the plaintiffs hold a valid title to the suit land and there is no evidence suggesting that it was obtained fraudulently or through any other illegal or corrupt scheme. They therefore are entitled to all the right that are afforded to such registered proprietors and these include the rights to eject trespassers.

Ultimately therefore and having considered the evidence by both parties, there shall be Judgment for the plaintiffs as against the defendant in the following terms: -

- 1. An order for the eviction of the defendant from the land parcel NO NORTH MALAKISI/WEST SASURI/762 if he does not voluntarily vacate therefrom within three (3) months from the date of this Judgment.**
- 2. The eviction be carried out by the Court Bailiffs/Auctioneers in accordance with the relevant provisions of Section 152 of the Land Act.**
- 3. The defendant’s Counter – Claim is dismissed.**
- 4. The plaintiffs shall have costs of the suit and the dismissed Counter – Claim.**

Boaz N. Olao.

J U D G E

14th November 2019.

Judgment dated, delivered and signed in Open Court this 14th day of November 2019 at Bungoma.

Mr Murunga for plaintiff present

Mr Kweyu for Mr Bw’onchiri for defendant present

Plaintiffs both present

Defendant present

Joy – Court Assistant

Right of Appeal explained.

Boaz N. Olao.

J U D G E

14th November 2019