



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA.**

**HC. CIVIL CASE NO. 73 OF 1999**

**PIUS WAMALABE WEYUSIA.....APPLICANT**

**VERSUS.**

**VINCENT WAFULA CHENGEK.....1<sup>ST</sup> RESPONDENT**

**JOANNES LUNYOLO BIKETI.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT.**

[1]. The applicant PIUS WAMALABE WEYUSIA brought this originating Summon under Order XXXVI rule 3D(1) (2) and (3) of the Civil Procedure Rules for the determination of the question whether the applicant plaintiff has been in adverse possession of 7.8 hectares comprised in Land parcel No. N. Malakisi/S. Wamono/1110 and whether the respondents title to the said land parcel was extinguished on expiry of twelve 12 years and finally whether the applicant has become entitled by adverse possession against the registered as proprietor of 7.8 hectares of the whole of land parcel N. Malakisi/S. Wamono/1110 in place of the respondent number 2 the then registered proprietor.

The applicant swore an affidavit in support of the outgoing summons and averred that on 3<sup>rd</sup> April, 1973 his father Zebedayo Nalume now deceased purchased the whole of LR. No. Malakisi/S. Wamono/1110 from the 1<sup>st</sup> defendant at an agreed purchase price of Kshs.2,300/= . He stated that since that purchase, him and his family and other surviving dependants have been in uninterrupted occupation of the same since 3-4-73.

The applicant stated that his father had asked the 1<sup>st</sup> respondent to transfer the land sold to him but the 1<sup>st</sup> defendant ran away to an unknown destination. That his father died before he formalized the transaction and that thereafter the 1<sup>st</sup> respondent fraudulently transferred the land to the 2<sup>nd</sup> respondent. The applicant stated that his father left 40 members of his family on the suit land. He stated that they have acquired the land by adverse possession after long occupation.

[2]. The witness Pius Wamalabe Weyusia gave evidence on 15/3/2006 he said that his brother Maurice Wafula sued Vincent Wafula Chengek and Jones Lunyolo for the same land. The matter was referred to the elders, the case was heard and the ruling was that the land belonged to the buyer. He said that his family was evicted from the land on 3/7/99. He admitted in Cross examination that he had been evicted by the time he came to court. That the eviction order was issued in Civil Case No. 8/1982. The applicant admitted that there was a Kakamega High Court Civil Case No. 100 of 1988, he said that the case was filed by his brother Maurice Wafula. The witness agreed that there had been may cases including Criminal Cases in regard to the said land before his family was evicted. The applicant then called one Luka Wafula who said he was an Assistant Chief in 1963 and that Vincent came to him in 1973 because he wanted to sell his land Plot 1110. He refused to give his Consent because Vincent was young. The

witness told Vincent to bring his clan, which came and confirmed that Vincent had their blessings. He said that the sons of Mzee Zebedayo are the ones on the land and are still in occupation of the land.

On cross examination, he agreed that the registration of the land in question was done only on 3/5/1977. The applicant then thereafter after many adjournments closed his case on 13<sup>th</sup> October, 2016.

The case against the first defendant was marked by the court as having abated on 29-5-2013 with costs to his estate.

[3]. The second defendant Joannes Lunyoli Biketi gave evidence and told the Court that he does know Zebedayo Vincent Wafula Chengek. He produced to court the title of the suit Land. He said that by the time he bought the land there was no one on the land. That a brother of the applicant Francis Kuloba was charged with forcible detainer contrary to Sec. 91 of the Penal Code that between July 1979 and 3-1-1984 at Kabras Luandeti area in Bungoma District Western Province, being in possession of N. Malakisi/S. Wamono/1110 Parcel of land of Joannes Lunyolo without colour of right held possession of such land in a manner likely to cause a breach of the peace against Joannes Lunyolo who was entitled by law to the possession of the said land. The case was heard and the accused was acquitted after full hearing. Maurice Wafula Nalume filed an Appeal in High Court Kakamega in Case No. 100 of 1988 against his dismissal of a case of specific performance by the Resident Magistrate. The High Court dismissed the Appeal with costs on 17<sup>th</sup> June 1992. Thereafter the applicant and his family were evicted from the said land. Then the applicants filed this case.

The respondent said that the applicant entered the land in 1980. He says that they entered the land without his authority or consent. That all along he has been fighting them in all those cases cited above. He stated that there has been no occupation that can be called adverse. The 2<sup>nd</sup> defendant's witness Gladys Wafula Chengeti told the court that she comes from Samaya. She said she knows the 2<sup>nd</sup> defendant because her husband sold land to her. That land was 19 acres. It was LR No. N. Malakisi/S. Wamono/1110. She said that her husband is deceased. That he died over 10 years ago. She said that when the land was sold she was there and no one was living there. She said that her husband did not sell the land to anyone else. That when the 2<sup>nd</sup> respondent bought the land there was no one living there. That she is not related to the parties herein. She asked the court to adopt her statement.

That being the evidence of the parties can the questions posed to the court by the applicant be answered in the affirmative? From the evidence adduced, it cannot be said that there was dispossession by the applicant and discontinuance of possession of the suit land by the registered owner as is required by the law in a case of adverse possession. The alleged possession was not peaceful and uninterrupted. There were many cases by and against the family of the applicant and nearly all were ruled against the applicant culminating to the applicants eviction in 1999. Indeed, when the applicant filed this case he was evicted from the suit Land a fact the applicant himself admitted.

I am therefore unable to answer the questions posed on the Originating Summons in the affirmative. They are answered in the negative. In matters like this I would have dismissed the Originating Summons with no order as to costs. However, the applicant and his family were evicted pursuant to a Court Order. They came back after eviction occupied the land and filed this case. This is defiance of court orders.

I will therefore order that the Originating Summons is dismissed with costs to the 2<sup>nd</sup> respondent. It is so ordered.

Judgment read in Open Court in the presence of Mr. Otsiula.

**Dated at Bungoma this 3<sup>rd</sup> day of October, 2017.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Court Assistants: Joy/Chemutai

Firm for Fwaya for defendant - Not present