



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 99 OF 2012.

(Formerly CIVIL SUIT NO. 56 OF 2002)

HENRY WAMBETSA MUTONDO (Substituted by

HELLEN KOMBO MAKOMERE).....PLAINTIFF

VERSUS

MOSES JEMINI BARASA.....DEFENDANT

J U D G M E N T

By a Plaintiff dated 18th April 2002 and filed herein on 19th April 2002, **HENRY WAMBETSA MUTONDO** (the plaintiff herein now substituted with his daughter **HELLEN KOMBO MAKOMERE**) sought against **MOSES JEMINI BARASA** (the defendant herein) Judgment in the following terms: -

*“The plaintiff claim against the defendant is for the cancellation of the defendant’s registration and transfer of land parcel **NO BUNGOMA/NAITIRI/517** into the plaintiff’s name.”*

The plaintiff’s claim was premised upon pleadings that at all material time, he was the original allottee of the land parcel **NO BUNGOMA/NAITIRI/213** by the **SETTLEMENT FUND TRUSTEES**. However, without his knowledge, one **PRISCILLA NASIMIYU WEKESA** filed **BUNGOMA SUCCESSION CAUSE No 17 of 1990** purporting that the plaintiff had died. She then obtained the land parcel **NO BUNGOMA/NAITIRI/213** through transmission which she then sub – divided into two parcels being **BUNGOMA/NAITIRI/429** and **428**. Upon her death, she was succeeded by the defendant who further sub – divided the land parcel **NO BUNGOMA/NAITIRI/428** into two parts being **BUNGOMA /NAITIRI/518** which he transferred to one **JUSTUS WANYONYI WEKESA** and retained ownership of the parcel **NO BUNGOMA/NAITIRI/517** (the suit land). All this was done while the plaintiff was still alive hence this suit.

By his defence dated 29th May 2002, the defendant denied that the plaintiff was the original allottee of the land parcel **NO BUNGOMA/NAITIRI/213**. The defendant pleaded further that his late father purchased the said land from the plaintiff in 1965 and paid all the outstanding loan to the settlement **FUND TRUSTEES** and was duly registered as the owner thereof. He pleaded further that the proceedings in **BUNGOMA SUCCESSION CAUSE No 17 of 1990** were done in conformity with the law in respect to the Estate of the late **WEKESA WEKHONYA** and not **HENRY WAMBETSA MUTONDO** as alleged. The plaintiff cannot therefore now claim the original land parcel **NO BUNGOMA/NAITIRI/213** having vacated it in 1965 after giving the title to the defendant’s father. The defendant will therefore claim the same if not by virtue of registration as owner, then by virtue of adverse possession. The defendant sought the dismissal of the suit as it does not disclose any cause of action.

On 4th September 2002, the parties framed and filed the following six (6) agreed issues: -

1. Was the plaintiff the original allottee of the parcel of land then known as BUNGOMA/NAITIRI/213"

2. Did the late PRISCILLA NASIMIYU WEKESA vide BUNGOMA P & A No 17 of 1990 become the administrator of the land parcel NO BUNGOMA/NAITIRI/213 from the plaintiff"
3. Did the late WEKESA WEKONYA purchase the land parcel NO BUNGOMA/NAITIRI/213 from the plaintiff"
4. Was the land parcel NO BUNGOMA/NAITIRI/213 sub – divided severally and is the defendant now the registered owner of the land parcel NO BUNGOMA/NAITIRI/517"
5. Is the registration of the defendant as the owner of the land parcel NO BUNGOMA/NAITIR/517 proper and lawful"
6. Is the plaintiff entitled to costs"

Before I delve into the merits or otherwise of the case, I must express my concerns about what I consider not to have been very elegant pleadings on the part of the plaintiff in this case. It was not very clear whether the plaintiff's case was premised on fraud and if so, what the allegations of fraud were and against whom. For instance, in paragraph eight (8) of the plaint, it is alleged *“that the registration of the defendant as the proprietor of the land parcel NO BUNGOMA/NAITIRI/ 517 is wrong.”* The plaintiff then goes ahead to plead in paragraph nine (9) that the said registration be cancelled and the land parcel NO BUNGOMA/NAITIRI/ 517 reverts to the plaintiff's names. Given that the grounds upon which a registration of land may be cancelled are clearly set out in **Section 143** of the repealed **Registered Land Act** which was the applicable law in 2002 when this suit was file, it would have been preferable for those grounds to be specifically pleaded. Having said so, however, my duty has been made easier by the fact that the parties have themselves set out the issues which I should determine in this dispute. I am also guided by the decision in **ODD JOBS .V. MUBIA 1970 E.A** where **DUFFUS P** while considering the question whether an unpleaded issue can form the basis of a decision rendered himself as follows: -

“Generally speaking, pleadings are intended to give the other side fair notice of the case it has to meet and also to arrive at the issues to be determined by the Court. In this respect, a trial Court may frame issues on a point that is not covered by the pleadings but arise from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties.”

That decision has been affirmed in several cases. See for instance, **HERMAN P. STEYN .V. CHARLES THYS 1997 eKLR** and also **SAMSON KAIRU CHACHA .V. ISAAC KIIRU KINGORI [2016 eKLR]** among others. The thread that runs through those cases and others is that pleadings must be crafted in a clear manner that enables the Court to pick out the facts on which the reliefs sought by the parties are grounded. However, that does not stop the Court from making a decision on un - pleaded issues if the parties, by their conduct raise those issues and leave them for the Court to make a decision on them. That is the route that this Court shall adopt in this case.

In support of the plaintiff's claim, **HELLEN KOMBO MAKOMERE** testified on 4th December 2017 before **MUKUNYA J** and told the Court that **HENRY WAMBETSA MUTONDO** the original plaintiff was her father and died on 28th November 2003. She relied on her statement dated 8th July 2011 in which she states that prior to his death, her father had been allocated the land parcel **NO BUNGOMA/NAITIRI/213** by the **SETTLEMENT FUND TRUSTEES** in 1965. He had then employed one **WEKESA WEKHONYA** to work on the said land. That her father paid all the loans and the land parcel **NO BUNGOMA/NAITIRI/ 213** was registered in his names. However, unknown to her late father, one **PRISCILLA NASIMIYU WEKESA** the wife of **WEKESA WEKHONYA** filed **BUNGOMA P & A No 17 of 1990** claiming that **HENRY WAMBETSA MUTONDO** had died yet he was still alive. She then acquired the land parcel **NO BUNGOMA/NAITIRI/213** which she sub – divided among her sons and sold other portions to third parties. The defendant retained the suit land which is registered in his names but she does not know how he acquired it. She therefore seeks the cancellation of his title. She produced as her documentary evidence the list of documents dated 6th November 2006 – number 1 to 20.

In his testimony, the defendant told the Court that he lives on the suit land by virtue of being the son of the previous owner thereof one **WEKESA WEKHONYA** who bought it from **HENRY WAMBETSA MUTONDO** in 1965. He added that after his father and mother died in 1985 and 1994 respectively, they were buried on the suit land.

In his statement dated 19th September 2011, he reiterated that his father the late **WEKESA WEKHONYA** was the registered proprietor of the land parcel **NO BUNGOMA/NAITIRI/213** having purchased it from **HENRY WAMBETSA**

MUTONDO although the agreement is misplaced. That his late father followed all the necessary steps to have the land transferred to him and the plaintiff who has never lived thereon is only out to disrupt his peaceful occupation thereof. He too produced as his documentary evidence the list of documents dated 19th September 2011 – Nos 1 to 5.

At the end of the trial, the plaintiff's counsel **MR OMUKUNDA** filed his submissions on 1st July 2019. The defendant's then counsel **MR WANYONYI** did not file any submissions. An attempt by the defendant's new Counsel **MR KHAKULA** to re – open the defence case was dismissed by this Court vide a ruling delivered on 22nd October 2020. And although in that ruling I allowed the defendant up to 5th November 2020 to file and serve his submissions, that was not done.

I have considered the evidence by the parties including the documents filed as well as the submissions by **MR OMUKUNDA** Counsel for the plaintiff.

As the parties had filed their agreed issues dated 4th September 2002, this Court shall, in determining this dispute, abide by those agreed issues which I have already referred to earlier in this Judgment.

1. WAS THE PLAINTIFF THE ORIGINAL ALLOTTEE OF THE LAND PARCEL NO BUNGOMA/NAITIRI/213"

Among the documents filed by the plaintiff in support of his case is the Green Card for the original land parcel **NO BUNGOMA/NAITIRI/213** which shows that the said land was first registered in the name of the **SETTLEMENT FUND TRUSTEES** on 10th October 1984. On 9th July 1990, it was registered in the names of **HENRY JACKSON W. MUTONDO**. There are two other entries for that day being the 3rd and 4th entries both in the names of **PRISCILLA NASIMIYU**. Entry No 3 shows that the change of ownership was by transmission while entry No 4 shows that it was by way of transfer. That title was then closed on 17th July 1990 following its sub – division into parcels **NO BUNGOMA/ NAITIRI/428** and **429**. Contrary to the defendant's evidence, there is nothing to suggest that the land parcel **NO BUNGOMA/NAITIRI/213** was ever registered in the names of his father **WEKESA WEKHONYA**. And although the defendant made reference to some agreement dated way back in 1965 by which his late father purchased the land parcel **NO BUNGOMA/NAITIRI/213** from **HENRY WAMBETSA MUTONDO**, no such agreement was proved. On the contrary, among the letters produced by the plaintiff is one dated 21st June 2001 from the **DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER BUNGOMA** and addressed to the **DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT, NAIROBI**. It reads: -

“RE: DISCHARGE OF CHARGE PLOT NO BUNGOMA/NAITIRI/213

The original allottee of the above plot one MR HENRY JACKSON MUTONOD has appeared in this office complaining that somebody in the name of JUSTUS WEKESA obtained a title deed sometimes back. I don't know how he got the discharge of charge and there is nothing according to the records held in this office indicating that JACKSON sold the land to JUSTUS WEKESA.

I have a discharge of charge in this office in the name of HENRY JACKSON. The discharge was signed by the then Settlement Officer MR MUKHWANA but it could not be registered since MR JUSTUS WEKESA had already obtained the title deed.

Please sir advise me on how I can assist MR JACKSON to obtain his title deed.

J. WELANGAI

DISTRICT LAND ADJUDICATION/SETTLEMENT OFFICER BUNGOMA.”

The plaintiff also filed as part of his documents various receipts issued in his names for payments made to the **SETTLEMENT FUND TRUSTEES** in respect to plot **NO 213**.

The answer to the above question is that after the **SETTLEMENT FUND TRUSTEES**, the plaintiff **HENRY JACKSON MUTONDO W. MUTONDO** became the registered proprietor of the land parcel **NO BUNGOMA/NAITIRI /213**. That is clear from the Green Card and other supporting documents whose veracity has not been challenged.

2. DID THE LATE PRISCILLA NASIMIYU WEKESA VIDE BUNGOMA P & A NO 17 OF 1990 BECOME THE ADMINISTRATOR OF THE LAND PARCEL NO BUNGOMA/NAITIRI/213"

When she filed **BUNGOMA P & A No 17 of 1990**, the late **PRISCILLA NASIMIYU WEKESA** described herself as the Administratrix of the Estate of the late **WEKESA WEKHONYA**. Those are the details that appeared in the Gazette Notice **NO 2053** of 4th May 1990 which is among the defendant's documents. However, the Grant of Letters of Administration Intestate issued on 27th June 1990 indicated that the deceased was **WEKESA WAKONYA** also known as **HENRY MUTONDO**. It is not clear how the Resident Magistrate who signed the Grant did not notice that an alias had now been added to the name of the deceased. Most significantly, by 27th May 1990, the land parcel **NO BUNGOMA/ NAITIRI/213** was still registered in the names of the **SETTLEMENT FUND TRUSTEES**. It was not until 9th July 1990 that it was transferred into the names of **HENRY JACKSON W. MUTONDO** and on the same day, into the names of **PRISCILLA NASIMIYU WEKESA**. There is no evidence to suggest that **HENRY JACKSON W. MUTONDO** was also known by the names **WEKESA WAKONYA** or **WEKHONYA**. It is clear therefore that **BUNGOMA P & A No 17 of 1990** was a ploy contrived to defraud the Estate of the plaintiff. The answer to that question is that **PRISCILLA NASIMIYU WEKESA** did not lawfully acquire **BUNGOMA/NAITIRI/213** by way of transmission or otherwise.

3. DID THE LATE WEKESA WEKONYA PURCHASE THE LAND PARCEL NO BUNGOMA/NAITIRI/213 FROM THE PLAINTIFF"

In his statement dated 19th September 2011, the defendant states as follows in paragraphs 5 and 6: -

5. *"That the agreement between WEKESA WAKHONYA (deceased) dated way back 1965 or thereabout."*

6. *"That the original agreement was misplaced in the hands of the area Administrator as evidence by the letter herein."*

The letter referred to in paragraph 6 of that statement was among the defendant's documents. It is dated 21st April 1999 and is addressed to **WHOM IT MAY CONCERN** and states that the bearers are the true owner of the land parcel **NO BUNGOMA/NAITIRI/213** which was purchased by **WEKESA WEKHONYA**. The writer is the Assistant Chief **NAITIRI SUB – LOCATION**. The plaintiff could not have sold the land parcel **NO BUNGOMA/NAITIRI/213** in 1965 when he only acquired ownership thereof in 1990. Strangely, the application for consent of the Land Control Board which is among the defendant's documents is neither dated nor signed by any of the parties to the sale agreement. It is clear to this Court that there was no sale agreement between the plaintiff and **WEKESA WEKHONYA** in 1965 or at any time with respect to the land parcel **NO BUNGOMA/NAITIRI/213**.

4: WAS THE LAND PARCEL NO BUNGOMA/NAITIRI/213 SUB – DIVIDED SEVERALLY AND IS THE DEFENDANT NOW THE REGISTERED OWNER OF THE LAND PARCEL NO BUNGOMA/NAITIRI/517"

The answer to the above is **YES**. The documents filed herein show clearly that the original land parcel **NO BUNGOMA/NAITIRI/213** was sub – divided on 17th July 1990 to give rise to two parcels being **BUNGOMA/NAITIRI/428** and **429**. Both were registered in the names of **PRISCILLA NASIMIYU**. Land parcel **NO BUNGOMA/NAITIRI/428** was sub – divided on 5th March 1999 to give rise to two parcels being **BUNGOMA/NAITIRI/517** (the suit land) which is registered in the names of the defendant and parcel **NO BUNGOMA/NAITIRI/518** which is registered in the names of one **JUSTUS WANYONYI WEKESA**.

5: IS THE REGISTRATION OF THE DEFENDANT AS THE OWNER OF THE LAND PARCEL NO BUNGOMA/NAITIRI/ 517 PROPER AND LAWFUL"

That is the crux of this dispute and from what I have already found in the proceeding paragraphs of this Judgment, the defendant did not obtain a lawful or proper title to the suit land.

The defendant obtained title to the suit land through a fraudulent process that started way back in 1990 when **PRISCILLA NASIMIYU WEKESA** obtained a grant of letters of Administration in respect of the Estate of the plaintiff whom she also described as **WEKESA WEKHONYA**. It is clear from the defendant's own oral testimony on 4th December 2017 that the plaintiff and **WEKESA WAKHONYA** were two different persons contrary to the claims of **PRISCILLA NASIMIYU WEKESA** when

she filed **BUNGOMA P & A No 17 of 1990**. In his testimony, the defendant stated thus: -

“I come from NAITIRI SCHEME SANGO area. I live in BUNGOMA/NAITIRI/517.

I live there as the son of the owner of the land known as WEKESA WAKHONYA who bought the land from HENRY WAMBETSA MUTONDO in 1965”

In her statement dated 8th July 2011, **HELLEN KOMBO MAKOMERE (PW 1)** the plaintiff’s daughter, confirmed that **PRISCILLA NASIMIYU WEKESA** was the wife to **WEKESA WEKHONYA** and that means that the defendant was not an innocent observer in this fraud. He knew that his mother **PRISCILLA NASIMIYU WEKESA** was not a beneficiary to the Estate of the plaintiff. It is also clear that by the time **PRISCILLA NASIMIYU WEKESA** was applying for a Grant of Letters of Administration to the Estate of the plaintiff in 1990, he was still alive and complaining about the theft of the title to the land parcel **NO BUNGOMA/NAITIRI/213**. By a letter dated 11th June 2003 addressed to the plaintiff by the **LAND ADJUDICATION AND SETTLEMENT DEPARTMENT, NAIROBI** the **DIRECTOR** addressed the plaintiff as follows: -

“MR HENRY A. MUTONDO

P.O. Box 288

BUTERE

Dear Sir

LAND DISPUTE

PLOT NO 213 – NAITIRI SETTLEMENT SCHEME.

I am in receipt of your letter notifying this office of one MR JUSTUS WEKESA who has taken the tile to you land. You are hereby informed that this is a case of fraud/forgery and you are hereby advised to take the matter to Police for investigation and eventually prosecution.

I regret to say that the matter is no longer in our hands.

Yours faithfully

T. N. MBURU

For: DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT.”

The plaintiff could not have died on 20th August 1978 as stated by **PRISCILLA NASIMIYU WEKESA** when she applied for the Grant of Letters of Administration in respect of his Estate vide **BUNGOMA P & A No 17 of 1990** yet in 2003 he was writing to the **DIRECTOR OF ADJUDICATION AND SETTLEMENT** about the theft of his title to the land parcel **NO BUNGOMA/NAITIRI/213**. Indeed, in her oral testimony, his daughter **HELLEN KOMBO MAKOMERE** stated that the plaintiff in fact died on 28th November 2003.

It is also instructive to note that the Grant of Letters of Administration issued to **PRISCILLA NASIMIYU WEKESA** in **BUNGOMA P & A No 17 of 1990** on 27th June 1990 was never confirmed. If it was, no such evidence was produced. Therefore, what **PRISCILLA NASIMIYU WEKESA** did was simply intermeddling with the Estate of a deceased person contrary to the provisions of Section 45 of the **LAW OF SUCCESSION ACT** which is in fact a criminal offence with penal consequences. **PRISCILLA NASIMIYU WEKESA** was, for all practical purposes, a thief and could not pass any interest in the land parcel **NO BUNGOMA/NAITIRI/213** or any sub – division thereof to the defendant. As the Court of Appeal stated in **JANE GACHUKI GATHELI .V. PRISCILLA NYAWIRA GITUNGU 2008 eKLR:-**

“A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable.”

Section 143 of the repealed Registered Land Act which was the applicable law when this suit was filed and also **Section 80 of the new Land Registration Act 2012** empower this Court to cancel any registration which is proved to have been obtained by fraud or mistake. And in the circumstances of this case, it is clear to me that the defendant was privy to the fraud that was perpetrated by his mother **PRISCILLA NASIMIYU WEKESA** with respect to the land parcel **NO BUNGOMA/NAITIRI/213** from which the suit land was hived. The defendant does not hold a lawful title to the suit land because it was obtained through a fraudulent process. As was held in **BUNJAMIN LEONARD MACFOY .V. UNITED AFRICA COMPANY LTD 1962 ac 152**, something cannot stand on nothing and a nullity always begets a nullity. The plaintiff’s assertion in paragraph eight (8) of his plaint that the defendant’s registration as the proprietor of the suit land *“is wrong”* is therefore well founded. The prayer for the *“cancellation”* of the title is equally merited.

Although not specifically pleaded as a Counter – Claim and whereas it was not among the issues raised, the defendant averred in paragraph eight (8) of his defence that since 1965, he and his family have resided peacefully, openly and done substantial developments on the original land parcel **NO BUNGOMA /NAITIRI/213** and the subdivisions thereof. He therefore craved that he is entitled to the suit land *“if not by virtue of registration as owner, then by virtue of adverse possession.”* As I have already stated above, his registration as the proprietor of the suit land was obtained through fraudulent means. It is impeachable under **Section 80 of the Land Registration Act** and cannot be accorded the protection of **Article 40 of the Constitution**.

As to whether the defendant can claim any interest to the suit land by way of adverse possession, that is also not legally possible because the said land is registered in his names. **Section 38 of the Limitation of Action Act** only allows a person to claim by way of adverse possession land that is registered in the names of another person. The defendant cannot claim the suit land by way of adverse possession when it is registered in his names. Clearly therefore, that fleeting reference to a claim in adverse possession was not made with any conviction. It must be treated as such.

The answer to the above therefore is that the defendant did not obtain any proper title to the suit land.

6: IS THE PLAINTIFF ENTITLED TO COSTS"

Under Section 27(1) of the Civil Procedure Rules, costs follow the event unless the Court *“for good reasons otherwise order.”* There are no good reasons why the plaintiff should be denied costs of this suit.

The up – shot of the above is that there shall be Judgment for the plaintiff in the following terms: -

- 1. The registration of the defendant as the proprietor of the land parcel NO BUNGOMA/NAITIRI/517 is hereby cancelled for having been obtained fraudulently.**
- 2. The Land Registrar Bungoma shall forthwith cancel the defendant’s names from the register of land parcel NO BUNGOMA/NAITIRI/ NAITIRI/517 and issue a new title thereto in the names of the plaintiff.**
- 3. The defendant shall meet the costs of this suit.**

Boaz N. Olao

J U D G E

19th November 2020.

Judgment dated, signed and delivered at BUNGOMA this 19th day of November 2020 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.

Boaz N. Olao.

J U D G E

19th November 2020.



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