



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 36 OF 2010

RICHARD NJOGU IRERI.....PLAINTIFF

VERSUS

NJAGI KABUTHIA *alias* CYPRIAN NJAGI IRERI DEFENDANT

J U D G M E N T

1. This matter began by way of Originating Summons dated **15th May, 1994** and filed as **Nyeri HCCC No. 229 OF 1994**. The matter was later on transferred to Embu and registered as **Embu HCCC.NO. 36 of 2010**.
2. The original plaintiff was **John Richard Njogu**. He died on **9th March, 2000**. Following a successful application for substitution dated **9th April, 2001** one **Alphan Mugambi Njeru** a son of the deceased was substituted as the new plaintiff.
3. The subject matter herein is a parcel of land known as **BARAGWE/THUMAITA/73**. The prayers by the plaintiff are follows;

*“a) A declaration that the Title in respect of land parcel number **BARAGWE/THUMAITA/73**, in the name of **NJAGI KABUTHIA** is extinguished in accordance with **Section 17** of the **Limitation of Actions Act Cap 22 Laws of Kenya** on the ground that the Plaintiff/Applicant is and has been for a period in excess of 12 years been in adverse possession of the said parcel of land.*

*b) A declaration that the Applicant **John Richard Njogu Ileri** (now substituted by **Alphan Mugambi Njeru**) is entitled to be registered as proprietor of the property **BARAGWE/THUMAITA/73** pursuant to **Section 38** of the **Limitation of Actions Act**.*

*c) An order that the Land Registrar do cancel the name **Njagi Kabuthia** in the Land Register of the piece of land known as **BARAGWE/THUMAITA/73** and do register in substitution thereof the name of **JOHN RICHARD IRERI**.*

*Alternatively a declaration that the defendant holds the parcel of land known as **BARAGWE /THUMAITA/73** as trustee for the plaintiff.*

d) An order that the defendant/respondent do transfer at the cost and expense of the plaintiff to the plaintiff all that piece or parcel of land known as

BARAGWE/THUMAITA/73 forthwith and in default of the defendant signing, executing or endorsing the papers and documents necessary to effect such transfer the Deputy Registrar of this Honourable Court do sign, execute and/or endorse such papers or documents”

4. The Defendant in response filed grounds of objection plus an affidavit which were filed on **24th October, 1994**. He mainly raises two issues. These are
 - i. *The originating summons was res judicata as the plaintiff/applicant had instituted Kerugoya SRMCC NO. 299 OF 1993 which was pending.*
 - ii. *He had title to the said land as a first registered owner hence the title was indefeasible*
5. The original plaintiff died before the matter was heard. Its therefore the current plaintiff and another witness(PW2) who testified on behalf of the plaintiff.
6. A summary of their evidence is as follows;
 - *Ileri Gicheru alias Kibuthia and Mukono Gicheru were brothers. PW2 is a son of Mukono Gicheru while the original plaintiff (John Richard Njogu) and the defendant (Njagi Kabuthia alias Cyprian Njagi Ileri) are sons of Ileri Gicheru alias Kibuthia, albeit from different mothers.*
7. **John Richard Njogu** was settled on the disputed plot in **1963** by his father. By then his mother had died. His mother was Ruguru.The defendant, his siblings were settled by their father on **Baragwe/Thumaita/295**, which was much bigger than **Baragwe/Thumaita/73**.
8. The defendant was in **1958** registered as proprietor of **plot No. 73**. It is PW2’s evidence that the defendant was registered as such because **John Richard Njogu**, was away in Uganda. Disagreements only started emerging after the death of **Ileri Gicheru**. The defendant had once served **John Ricahrd Njogu** with a notice to quit plot 73.
9. The matter was referred to the chief and then the District officer. Elders were invited to hear the matter and it was resolved that :
 - i. *The plaintiff’s father remains on plot no. 73.*
 - ii. *And the defendant remains at plot 295. The minutes of the said meeting were produced as PEXB6. Another meeting was held later and resolved that plot No. 295 was to be shared out (PEXB7).*
- 10.The search certificates for both plots were produced as PEXB 3 and 4 and the green card for plot No. 73 is PEXB5. Plot 295 has been subdivided and new numbers issued, as can be seen from the certificate of search (PEXB 4).
- 11.Land parcel No. **Baragwe/Thumaita/73** appears to have also been subdivided as per the certificates of search produced as PEXB9 and 10. The High Court sitting at Nyeri on **16th September, 1999** issued an injunction against the defendant restraining him from dealing with the subject land until the case filed was finalized. The court also issued an inhibition against the said title plus any other resultant titles and in particular **No. 2029, 2030 and 2031** (PEXB 8).
- 12.In his evidence the defendant reiterates that he is the registered owner of land No. **Baragwe/Thumaita/73** since **15th November, 1958** (PEXB5). And between that **June-July, 1998** he divided his land into three portions two of which he sold i.e **No. 2030 and 2031**. There was nothing that stopped him from dealing with his land the way he wanted, he said.
- 13.That the order (PEXB8) was never served on him. He admits that the original plaintiff was his step brother and further that their father **Ileri** owned plot **No. 295** from which he inherited **No. 2619**, vide **Succession Cause No. 348 OF 1993** of **Kerugoya Law Courts**, with the full

knowledge of the original plaintiff.

14. He admits that on **7th September, 1993** him and the original plaintiff were called by the District officer over this matter. He however denies having been sent to any administrator by the District officer. He denied any knowledge of the document (PEXB7) as neither him nor his step brother signed.
15. It was his evidence that his step brother had built on **plot 295** when his father died and had never been taken to **plot 73**. He further stated that his step brother first planted tea and coffee on plot **No. 73** in **1984** and was stopped. He went back with his sons in **1989** and planted tea and coffee on **plot 73** unlawfully. When the tea matured in **1973** he had no tea factory licence and used the one for plot **295**. That's when he issued him with a Notice to vacate on **31st July, 1993**. It's at this point that cases started, he said.
16. He said he was adopting all the plaintiffs exhibits as his exhibits. He called for the dismissal of the plaintiff's case. In cross-examination he admitted that as he divided this land there was a case pending in court but there were no restraining orders.
17. In Cross-examination he admitted that a caution had been placed on **plot 73** but was later removed. He further stated that the plaintiff is the one utilizing **plot 73** after chasing him away in **1974**. He also admitted that as per PEXB 6 the District officer heard him and his step brother.
18. **M/S Muthoga Gaturu** for the plaintiff filed written submissions dated **18th October, 2013** which have been substantively responded to by the defendant vide his written submissions dated **4th March, 2014**. I have carefully considered these submissions alongside the entire evidence on record.
19. I hereby adopt the issues identified by **M/S Muthoga Gaturu** as the issues falling for determination. The defendant responded to them. They are:
 - a. *The existence of the suit-land parcel No. Baragwe/Thumaita/73,*
 - b. *Whether the plaintiff was in peaceful, open, uninterrupted occupation of parcel No. Baragwe /Thumaita/73 from 1963 and/or its resultant subdivisions and if so, for how long,*
 - c. *Whether the plaintiff acquired title to the said land through adverse possession,*
 - d. *Whether in the alternative, the Defendant holds the title over Baragwe/Thumaita/73 as trustee for the plaintiff.*
 - e. *Whether the plaintiff ought to be registered as the rightful owner of Baragwe/Thumaita/73 and its resultant sub-divisions.*

Issue No(a)

20. This suit rotates around land parcel No. **Baragwe /Thumaita/73**. From the copy of the green card/land register (PEX5) this land was registered in the name of the defendant on **15th November, 1958**. The defendant in his evidence said he was born in **1956**. If that is true then he was registered while aged 2 years of age. According to PW2, the original plaintiff was in Uganda when the farms were being registered and that's why the land was registered in the name of the defendant. From the evidence on record the original plaintiff who was a step brother of the defendant was older than the defendant and was the first child in the first house.
21. The father of both the original plaintiff and defendant died in **1979**. The contention between the two parties manifested itself in **1993** when the defendant issued the original plaintiff with notices to vacate the land **No. 73**. Why the notices? Because the original plaintiff was in actual occupation of the said land. In his evidence the defendant has stated that being the registered owner and exercising the rights of an owner he divided the land into three(3) portions and sold off two (2) of them in **June-July 1998**, hence creating new titles Nos. **2029, 2030 and 2031**. Earlier

on he indicated that the step brother had sued him vide **Kerugoya Court Civil Case No. 299 OF 1993**; which became **Nyeri HCCC No. 229 OF 1994**; and later **Embu HCC No. 36 OF 2010**.

22.It follows that as early as **1993** the defendant was aware that there was a matter in court concerning his rights over this land. It was therefore prudent that with or without a caution he could not dispose or otherwise deal with the land before the matter was finalised.

23.**M/S Muthoga Gaturu** have referred to **Section 52** of the **Indian Transfer of Property Act** which was applicable at the time: It provided thus;

“ During the active prosecution in any court having authority in British India/or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose”

24.It is true that there was a matter pending in court over this land. Its equally true that the original plaintiff had placed a caution on this land but the defendant had it removed and proceeded to subdivide it into three (3) portions and dispose of two of the said portions.

25.Further orders of injunction and inhibition were issued in respect of the same land by the High Court Nyeri (PEXB8). My finding therefore is that land parcel No. **Baragwe/Thumaita/73** exists in the form of Nos. **2029,2030 and 2031** and as per the order of the court in PEXB8.

Issues No. b,c and d

26.In his evidence, the defendant adopted all the plaintiff's exhibits as his exhibits. This means even PEXB7 which he had denied knowledge of became his exhibit, and so he can't deny its contents. The findings by the District officer in P.EXB6 was that the Original plaintiff (*John Richard*) had by **1993** been in occupation of **plot No. 73** for 30 years, and had 6000 tea bushes, 450 coffee trees, five(5) children, one permanent, one semi-permanent and three temporary buildings there. He had also buried **his wife there**.

27.The District Officer who saw both the defendant and John Richard found as a fact (*that the defendant was born in 1959 as per the defendant's identity card*). He therefore wondered how he could have been registered before he was born. The cousins to the defendant and John Richard testified that the father of these two parties had moved **John Richard** to **plot 73** to work and develop it in **1963**. He was well aware of the registration.

28.This movement in 1963 corroborates what the District Officer found as per PEXB6 that indeed the original plaintiff had been on the land for 30 years. The defendant stated in his evidence in chief that **John Richard** had come to **plot 73** in **1984** and planted tea and coffee but he stopped him. And that he again came back in **1989** with his sons and planted tea and coffee. He however stated in cross-examination that the plaintiff was the one living on the land after chasing him away in **1974** even though he has two acres of tea on that land. If he was chased away by the original plaintiff in **1974** could it then be true that the said plaintiff came to plant tea and coffee in **1984** and **1989** respectively? This bit of evidence does not add up.

29.The undisputed fact is that the **Mzee IRERI** had two wives. The mother of John Richard was the first wife while the defendant's mother is the second wife.It is also a fact that the land parcel No. **Baragwe/Thumaita/295** was registered in the name of **Mzee Ileri** while **Baragwe/Thumaita/73** was registered in the defendant's name.

30.Another fact is that the defendant, his mother and siblings resided on plot **No. 295**. Where did the

first wife of Mzee Ileri and her children reside? Was it ever Mzee Ileri's intention to disinherit his first wife and the children? I have looked at the defendant's Replying Affidavit to the Originating Summons dated **13th September, 1999** at paragraph 19 where he states:

“That the contents of paragraph 22 are denied as the plaintiff/applicant still has a share of my late father's land L.R.NO. Baragwe/Thumaita/295 and in which he grows tea and will therefore not be rendered landless and/or destitute”

31. In his evidence in court the defendant stated that he inherited No. **2619** from No. **295** (PEXB4) vide **Succession Cause No. 348 OF 1993 Kerugoya Law Courts**. He added that John Richard was alive and he never objected. If indeed as stated by the defendant at paragraph 19 of his Replying Affidavit above that John Richard had a share in **No. 295** why is it that when the Succession was done no share was given to him? What happened to the tea he is alleged to have in plot 295? The truth is that there was none.

32. A look at the certificate of search (PEXB4) shows that plot **No. 295** was distributed among three people namely;

- i. *Cyprian Njagi Ileri (Defendant)*
- ii. *Julia Wanjiku Ileri*
- iii. *Simon Karembu Ileri*

This distribution resulted in new numbers **2619-2622** of which the defendant got No. **2619**. This distribution also confirms the Ruling of the Elders dated **16th October, 1993**(PEXB7) which the defendant alleged to know nothing about.

33. If as the case is, parcel **No. 295** has been distributed without provision for John Richard and at the same time the defendant again wants to have parcel **No. 73** wholly for himself then where is the inheritance of the first house? The defendant by his actions cannot therefore be taken to stand by his averment in paragraph 19 of the Replying Affidavit. The reason for this conduct by the defendant comes out clearly in his statement as contained in PEXB7. He is out to disinherit his step brother John Richard.

34. When all these bits of facts are put together they confirm the evidence of PW2 who is a cousin to John Richard and the defendant when he says the defendant was registered in No. 73 because John Richard was in Uganda. Further that in 1963 their father moved John Richard to plot 73 to live there and develop it. And as clearly observed by the District officer in PEXB6 John Richard indeed developed the land and even buried his wife there. The defendant never raised a finger as John Richard buried his wife on the said land. One does not bury his family members on other people's lands. If he did so the owner/owners of the land would be up in arms and rightly so. The defendant did not raise an issue until 1993 when he issued notices to John Richard to vacate the land.

35. The land **Baragwe/Thumaita/73** was registered under the **Registered Land Act** which has since been repealed. The **Limitation Act** applied to the said Act. **Section 37(a)** of the **Limitation of Actions Act** stipulates:

“Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is to be extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act”

Section 38(1) of the **Limitation of Actions Act** provides:

“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 proprietor of the land.”

Section 38(2) of the **Limitation of Actions Act** states:

“An order made under subsection(1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act”

36.From the evidence above it has been shown by PW1, and PW2 that indeed John Richard started living on plot No.73 in 1963. He lived thereon continuously without any interruption and/or interference until 1993 when the defendant issued Notices for him to vacate. This was after 30 years of uninterrupted stay.

37.The Court of Appeal in **Criminal Appeal No. 57 of 1997 between Peter Njau Kairu and Stephen Ndungu Njenga & anor** adopted the following passage from the case of **Perry Vs Clissold & others** (1907) AC 73 at page 79 namely;

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of the law within the period prescribed by the provisions of all the statutes of limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title”

38.The prescribed period by the law to enable one claim for adverse possession is twelve (12) years. It is not correct as stated by the defendant in his evidence in court that the plaintiff did not claim for adverse possession either in his pleadings or evidence. Prayer (a) and (b) of his Originating Summons is about adverse possession.

39.Following the passage quoted above as followed in the Court of Appeal in the case of **Peter Njau Kairu (supra)** and by Justice Rawal (*as she then was*) in **Dominic Losamuli Yipani Vs Tubmees Waweru Kulo Nairobi HCCC.NO. 197 OF 2004.** I am satisfied that the plaintiff has proved that his father John Richard had prior to 1993 lived and worked on plot 73 uninterrupted for 30 years. His family has continued to live and work the land to date. As at 1993 John Richard had acquired title through adverse possession.

40.The evidence of PW2 is to the effect that plot No.73 was registered in the defendant's name because John Richard was away in Uganda. He was much older than the defendant. During the lifetime of their father(*Ireri*) the defendant did not go to plot No. 73. PEXB 6 and 7 which were among the documents adopted by the defendant explains this very well and also explains why the defendant decided to short change the step brother, John Richard as far as this title to No. 73 is concerned. The defendant, their father, his mother and siblings knew all along that the plot No. 73 though registered in the defendant's name belonged to John Richard. This is exhibited by the manner in which their father's land No. 295 was shared out without giving any share to any of the children of the first house.

41.My finding is that any title held by the defendant is so held in trust for his step brother John Richard and his family. The said title must be relinquished. **What about the portions sold to third parties?**

42.The defendant testified that he sold the two portions to third parties between **June-July 1998**. This he did when his rights as the registered owner had already been extinguished by the operation of the law. He did not therefore have any proprietary rights in the said land to pass onto the third

parties. I am guided to so find by the case of **Janet Ngendo Kamau Vs Mary Wangari Mwangi Civil Appeal No. 173 of 2003**(Court of Appeal Nairobi) where the court stated thus:

“Under Section 30(f) Registered Land Act, rights in the process of being acquired under the Limitation of Actions Act are in the nature of overriding interests and go with the land and not the registered proprietor. Change of ownership does not affect those rights as they attach to the land. In the circumstances as the plaintiff’s occupation started long before the defendant became the registered owner, his rights were in the nature of an overriding interest over the land and could be enforced at the expiry of the limitation period”

43. In this instance, the plaintiff’s occupation started long before the third parties became registered owners. His rights were attached to the land, and at the expiry of 12 years he by the operation of the Law became the proprietor of the said land, and the defendant’s rights were then extinguished. The defendant had therefore no rights to pass onto the third parties.

Issue No.(e).

44. Following my findings under issues **a-d** it follows that the plaintiff has proved his case, as required by law, and is entitled to the prayers sought in the Originating Summons.

I enter judgment for the plaintiff as prayed in the Originating Summons filed on **15th May, 1994**. The subdivision of the land parcel No. **Baragwe /Thumaita/73** is hereby nullified. The land to revert to its original number. And the Land register to be rectified by registering the plaintiff as proprietor in place of the present registered owners of the suit land. Costs to the plaintiff.

DATED AND SIGNED AT KERICHO THIS 20TH DAY OF NOVEMBER, 2014

H.I. ONG’UDI

JUDGE

DELIVERED AT EMBU THIS 26TH NOVEMBER, 2014 IN PRESENCE OF BOTH PARTIES

F. MUCHEMI

JUDGE