



**REGISTERED LAND ACT**

- Consideration of overriding interest under s. 30(g).

**LIMITATION OF ACTION ACT**

- A judgment not executed after 12 years is time barred.

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL CASE NO. 226 OF 2001**

**CONSOLIDATED WITH**

**HIGH COURT CIVIL CASE NO. 130 OF 2003**

**CYPRIAN KIRIKA ..... 1<sup>ST</sup> PLAINTIFF**  
**ESTHER TIRINDI ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARY CIOKABOGO NJUKI ..... 1<sup>ST</sup> DEFENDANT**  
**NJAGI NJOKI ..... 2<sup>ND</sup> DEFENDANT**  
**NJUKI THAGICHA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

Parcel No. *Abogeta U-Kiongone/773* (suit property) was first registered in the name of Njuki Thagicha (**Njuki**) on 2<sup>nd</sup> February 1970. On 1<sup>st</sup> August 1990 it was registered in the name of Esther Tirindi (**Tirindi**). On 16<sup>th</sup> October 1990 it was registered in the name of Cyprian Kirika (**Cyprian**). The above two cases that were consolidated on 8<sup>th</sup> March 2006 relate to the above changes in the registration of the suit property. Cyprian filed a claim in HCC No. 226 of 2001 against Mary Ciokabogo Njuki (**Mary**) and Njagi Njuki (**Njagi**) seeking their eviction from the suit property. Mary and Njagi are mother and son. Njuki the 3<sup>rd</sup> defendant now deceased was the husband of Mary and the father of Njagi. Cyprian pleaded in his plaint that he was the sole owner of the suit property and as such was entitled to quiet and an interpreted possession of that property. He prayed in his plaint that the court would declare Mary and Njagi as trespassers of the suit property and would order for their eviction. Mary and Njagi filed a defence denying that claim. Mary and Njagi in their joint defence pleaded that the transfer of the suit property from Njuki's name to the name of Tirindi was dubious. They denied being trespassers. HCC No. 130 of 2003 was filed by Njuki now deceased against Tirindi and Cyprian. He claimed that the transfer of the suit property into Tirindi's and Cyprian's name was fraudulently carried out. That claim has now abated because Njuki died in December 2008 and there has been no substitution made for him. See order 24 of

the Civil Procedure Rules 2010. Cyprian in evidence stated that he acquired the suit property in 1998. He produced a green card of that property to prove that he is the registered owner. After purchasing it, he said he did not take possession because Mary and Njagi had refused to give him vacant possession. He said that he knew both of them very well. He issued both of them with a demand notice to vacate the suit property which was dated 26<sup>th</sup> October 2001. However he said that they both refused to comply with that demand. He said that they had constructed houses on the land but that at the time when he purchased the land he did not know that they were in occupation. He said that he only knew that Tirindi was the owner. On being cross examined Cyprian stated that when the suit property was sold to him by Tirindi, both Mary and Njagi were living on the land. That Tirindi at one time had occupied the land but he was unable to state the date she so occupied. He however on cross examination stated that he did not know if Tirindi ever built on that land. He then stated:-

***“I knew when buying the land that the defendants (Mary and Njagi) were living there and harvesting Esther’s (Tirindi) tea. Esther told me she would use my money after paying her to evict the defendants.”***

Cyprian said that Tirindi was his mother-in-law. Tirindi in evidence confirmed that she sold her land to Cyprian her son in law. She said that Njuki sold the suit property to her husband Simon Kithinji now deceased. Her said husband died in 1980 and had bought the land before 1980. She however could not recall when this was. She cultivated tea on the land but sometimes after the death of her husband the defendants Mary and Njagi chased her away. It was thereafter that she filed a case Meru HCC No. 77 of 1989 against Njuki. She produced in evidence the court’s judgment in that case dated 28<sup>th</sup> November 1989. That judgment declared that she had acquired title of the suit property by adverse possession. In that judgment, the learned Judge in summarizing the evidence stated that:-

***“They (Tirindi and her late husband) remained in quiet possession of the land (suit property) until 25<sup>th</sup> August 1987 when the defendant (Njuki) and his wife (Mary) tried to assert their rights over the land.”***

Tirindi stated that Njuki although originally was from Kionyo where she also comes from he had transferred or moved away to Embu and had settled there. She confirmed that Mary and Njagi built houses on the suit property. That when they built those houses Njuki was not present because he was still living in Embu. On cross examination, she further said that when she sold the suit property to Cyprian, Cyprian was then not her son in law. That he married her daughter subsequently. She said that Mary and Njagi chased her away from the suit property and she left behind her tea bushes that she had planted. She confirmed that before selling the suit property to Cyprian she did not give notice to Mary and Njagi to vacate the land. Njagi in evidence stated that Njuki was her father and Mary was his mother. He said that he was born in Meru in 1963 but grew up in Embu. He moved to Embu with his mother to join his grandfather who was residing there. It was Njuki his father who first went to Embu and he and his mother followed him. That the suit property during consolidation and demarcation of land was registered in his father’s name. That they returned to the suit property with his mother in 1988. By then, his father was living in Kiambu. They found Tirindi farming on his father’s land, the suit property. She had cultivated tea. Tirindi was requested by the chief and other government officers of the administration to vacate and to remove what was hers on the suit property. She removed her crops but left behind one yam. Njagi and his mother settled there and now live there with four of his other brothers. He said that Tirindi did not inform them that she sold the land to Cyprian. He denied that they were trespassers. On being cross examined, he stated:-

***“Why did Cyprian who is a neighbor buy the land (suit property) without telling us?”***

DW2 Josphat Miriti Mathew was seated in court when Tirindi gave evidence. For that reason, his testimony will not have a high evidential value. He said that the suit property borders his father’s land. That the adjudication of lands was done in that area in 1968. In 1970 Njuki left his property (the suit property) under the care of Kanampiu who in turn allowed Kithinji husband to Tirindi to plant napier grass. This he said was when Njuki moved to Embu. Njuki’s family returned to the suit property in 1988. They found Tirindi had planted napier grass and 2,996 tea bushes. Tirindi was requested to uproot

her yams that she was growing on the land to enable Mary build her house. The villagers using trees on the suit property built a house for Mary. That was in 1988. He said that he did not get to know that Tirindi sold the land to Cyprian. He confirmed that Cyprian had not entered on the land. He infact said that from 1988 both Tirindi and Cyprian had not been on the suit property. Counsel for the plaintiff at the conclusion of the case relied on the case Wamwea vs. Catholic Diocese of Murang'a Registered Trustees [2003] KLR where the court held:-

***“Once a party acquires legal title over a parcel of land, such party is entitled not only to possession but also to occupation of that land.***

***A party who refuses to give vacant possession becomes a trespasser notwithstanding that the party refused to take nay compensation given, if such refusal of compensation does not confer a legal interest in the land.”***

The rights of a registered owner of land are set out in section 27 of the Registered Land Act (RLA). That section provides as follows:-

***“27. Subject to this Act –***

***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***

***(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed rights agreements, liabilities and incidents of the lease.”***

The holding of Wamwea (supra) is therefore in conformity of that section. What however comes out very clearly in the evidence of this case is that Mary and Njagi returned to the suit property in 1988. On their return Tirindi was requested to vacate that land. That is confirmed in the exhibit produced by Tirindi that is the judgment in Meru HCC No. 77 of 1989. From 1988 Mary, Njagi and Njagi's other four brothers have been in occupation of the suit property todate. It has been argued in this case that the rights of Mary and Njagi to occupy the suit property were extinguished by the judgment of Meru HCC 77 of 1989. A closer look at the green card however reviews that Tirindi's registration as an owner of the suit property was on 1<sup>st</sup> August 1980. The judgment in Meru HCC 77 of 1989 only declared that she had acquired title adverse possession in 1989. That registration was not as a result of the judgment in Meru HCC No. 77 of 1989. The entry that is on the green card for that day is as follows:-

***“Esther Tirindi Simon. ID 2523339/65 Kshs. 30,000/=.”***

The entry under the column entitled 'consideration' is where it is noted Kshs. 30,000/=. That means that the transfer was as a result of a purchase for which consideration of Kshs. 30,000/= was noted. Tirindi did not prove before this court that there was any such purchase by her of the suit property. The judgment that she exhibited before this of court Meru HCC No. 77 of 1989 the judge made a finding therein that the alleged purchase by Tirindi's husband of the suit property was defeated by lack of consent as required under section 6(2) of the Land Control Act Cap 302. It therefore follows that the transfer of the suit property into Tirindi's name was not as a result of the execution of the judgment in Meru HCC 77 of 1989. The defendant's counsel argued in his final submissions that the judgment in Meru HCC 77 of 1989 is now time barred as per the provisions of section 4 (4) of the Limitation of Actions Act Cap 22. That section provides as follows:-

***“4. (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”***

It is however not yet 12 years since the judgment in HCC 77 of 1989 was delivered. It will be 12 years after November 2011. After 12 years as provided in section 4 (4) of Cap 22 that judgment will be time barred as well set out in the case **Malakwen Arap Maswai vs. Paul Kosgei** Civil Appeal No. 230 of 2001:-

***“We would also rely on the authorities cited both before us and before the learned Judge. Both Lamb & Sons Ltd vs. Rider [1948] 2 ALL E.R. 402 and Lougher vs. Donovan [1948] 2 ALL E.R. 11 dealt with similar provisions under the relevant English statutes. It was held in both cases that an action to enforce a judgment after the twelve years’ period is statute barred. Locally, the point was conclusively determined in the case of Njunguna vs. Njau [1981] KLR 225 where this court held that ‘action’ in the context of section 4(4) of Cap 22 is not intended to bear a restricted meaning and therefore embraces all kinds of civil proceedings including execution proceedings.”***

Even if the judgment had been executed and the transfer into Tirindi’s name was as a result of that execution, would that entitle Cyprian to obtain vacate possession of the suit property from Mary and Njagi? Cyprian in evidence confirmed that he knew Mary and Njagi very well. Njagi in cross examination stated that Cyprian lived near the suit property. Infact he said that he was their neighbour. He further said that Cyprian even though he was their neighbour failed to inform them of his intention to buy the suit property. Cyprian in evidence accepted that Mary and Njagi were in possession of the suit property when he purchased it. He was informed by Tirindi that the sale proceeds would be used to get vacant possession from Mary and Njagi. It is therefore undisputed that since 1988 Mary and Njagi have been in possession of the suit property. That was the position even when Tirindi sold the property to Cyprian. As such, Mary and Njagi have rights recognized under section 30 (g) of LRA. That section provides as follows:-

***“30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register***

- a) .....
- b) .....
- c) .....
- d) .....
- e) .....
- f) .....
- g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.***

Overriding interest is stated in Wikipedia web page as:-

***“Overriding interest is a term in English land law. The general rule in registered conveyancing is that all interests and rights over a piece of land have to be written on the register entry for that land, otherwise, when anyone buys that piece of land, the interests wont apply to the purchaser and the rights will be lost. Overriding interests are the exception to this general rule. Overriding interests need not be registered to bind any new owner.***

***Overriding interest was created because it was perceived that for several classes of interest, it would be unreasonable to expect such interests to be registered. Such interests include short term leases, seen as being too minor an interest to burden with the bureaucracy of registration. They include the rights of people in actual occupation, perhaps unaware of their legal rights. They also include public rights of way, as it was not clear who should be made to register them.***

***Overriding interests were introduced by section 70 of the Land Registration Act 1925.”***

That section 70 (g) of the Land Registration Act 1925 (UK) is *pari materia* to our section 30 (g) of the RLA. The House of Lords in the case **Williams & Glyn’s Bank vs. Boland** [1981] AC 487 as reported in

the Wikipedia web page states as follows:-

***“A husband and wife were tenants in common of a matrimonial home as they had both contributed to the purchase price. However only the husband’s name appeared on the documents at the Land Registry. The husband mortgaged the property without the knowledge of the wife. The bank did not enquire as to whether the wife had any interest in the property. When the mortgage was defaulted, the bank brought proceedings and was granted possession of the property.***

***The Court of Appeal ruled that the wife was in actual occupation under s. 70 (1) (g) of the 1925 Land Registration Act and that therefore she had an overriding interest in the property. The bank appealed contending that the wife’s interest could only be considered a minor interest and that she could not be considered to be ‘in actual occupation.’***

***The House of Lords dismissed the appeal and emphasized that 70 (1) (g) of the 1925 Land Registration Act should be interpreted in plain English. Accordingly, what was required was physical presence on the land; the word ‘actual’ was not intended to introduce any additional qualification but merely emphasized that what was required was presence and not some entitlement in law. Since the wife was physically present in the matrimonial home, with all rights that occupiers had, including the right to exclude all others except those having similar rights, and the home was a matrimonial home intended to be occupied and in fact occupied by both spouses, both of whom had an interest in it, the wife was in actual occupation.***

***Even though the wife’s interest, in so far as it existed under a trust for sale, was an equitable interest capable of being overreached and therefore a ‘minor interest’ with s. 3 IXV) of the 1925 Act, it was also capable of being an overriding interest if it was protected by ‘actual occupation’, particularly if it was a house bought jointly by spouses to be lived in as a matrimonial home, because then it would be unreal to describe the spouses’ interests as merely an interest in the proceeds of sale, or rents and profits until sale, and there was every reason why, in that event, such an interest should acquire the status of an overriding interest. The wife’s interest, subsisting as it did ‘in reference to the land’, within the opening words of s. 70 (1), was by the fact of occupation made into an overriding interest and so protected by so. 70 (1) (g).***

As will be seen the facts of that case are very relevant to our present case. As a result of the provisions of section 30 (g) LRA I make a finding that Cyprian purchased the suit property from Tirindi but his said purchase and registration as an owner was subject to the overriding interest of Mary and Njagi. It is for that reason that I find there is no merit in the orders sought by Cyprian for eviction of Mary and Njagi. The orders cannot be granted because they are defeated by the overriding interest of Mary and Njagi. I make a declaration that Mary Ciokabogo Njuki and Njagi Njuki have a right to occupy *Abogeta U-Kiongone/773* to the exclusions of others not having similar rights as they do. HCC No. 226 of 2001 is hereby dismissed and the costs of Mary Ciokabogo Njuki and Njagi Njuki in respect of that case shall be paid by Cyprian Kirika.

**Dated, signed and delivered at Meru this 13th day of April 2011.**

**MARY KASANGO  
JUDGE**