



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.129 OF 2005**

**CHEGE MUTUA.....PLAINTIFF**

**VERSUS**

**AMOS KAGUAI NJOROGE.....1<sup>ST</sup> DEFENDANT**

**JULIUS GATAMBIA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

In his plaint filed on 9<sup>th</sup> May, 2005, the plaintiff seeks the eviction of the two defendants from parcel of land known as L.R. No.NYANDARUA/KIRIMA 713 measuring 1.58 Ha (the suit land). He also seeks an order of perpetual injunction to restrain the defendants from trespassing onto, occupying or tempering with the suit land. The plaintiff's claim is premised on the grounds that:

- i) he is the registered owner of the suit land;
- ii) he purchased the suit land from his late brother, Aram Kamau who duly transferred it to him;
- iii) while he was processing the title documents to the suit land, the defendants trespassed on to the suit land purporting to have purchased it from the late Aram Kamau.

In their defence, the defendants have maintained that indeed they purchased the suit land from the late Aram Kamau in 1987, took possession and developed it; that the plaintiff's registration as the owner of the suit land was obtained fraudulently, alternatively that they are the lawful owners of the suit land by adverse possession arguing that they have been in peaceful occupation of the suit property without interruption since 1987; that the plaintiff has never occupied the suit land. Evidence was presented by the plaintiff to the effect that infact he did not purchase the suit land from his late brother, rather, it was a gift *inter vivos* from the latter to him. Before his brother's death he arranged and indeed obtained land control board consent and was subsequently issued with a title deed.

In 2003, his brother died and his remains interred in the suit land; that the defendants only came to the suit land in 2004 claiming that his late brother had sold it to them. They have put up houses and are cultivating the land. The plaintiff has maintained that he has lived on the suit land from 1974 to date. On his part, the 1<sup>st</sup> defendant testified that by a written agreement, he purchased from the late Aram Kamau 2¼ acres of the suit land at a consideration of Kshs.22,500/= in 1987.

After execution of the agreement he took possession and has been in possession since. He has built on the suit land and is farming it. That the plaintiff does not live on the land; that a transfer could not be effected as one Macharia Gicheru took the late Aram Kamau away; that Aram Kamau sold 3 acres to the said Macharia Gicheru after which Aram Kamau disappeared. He was later traced in Molo. It is only after the death of Aram Kamau that the 1<sup>st</sup> defendant learnt that the plaintiff had the title documents to the suit

land.

The 2<sup>nd</sup> defendant also testified that the late Aram Kamau sold to him 3 acres of the suit land in 1987; that the 1<sup>st</sup> defendant later that year purchased his portion leaving one portion which Macharia Gichure purchased. That constitutes the evidence presented at the trial by both sides.

I reiterate that the plaintiff seeks, in the main suit that the defendants be evicted from the suit land and thereafter they be restrained from interfering with the plaintiff's quiet possession. The defendants on the other hand have maintained that they are lawfully on the suit land having purchased, each a portion, from the late Aram Kamau. In the alternative, they are claiming that they have been in quiet possession for a period in excess of 12 years.

It is common ground that the suit property (NYANDARUA/KIRIMA 713) and NYANDARUA/KIRIMA 714 are a sub-division of parcel No.688. It is also not in dispute that the suit land is agricultural land within the meaning of the Land Control Act; similarly it is a matter of fact that the plaintiff is now the registered proprietor of the suit land. The main question therefore is whether the plaintiff is entitled to the orders sought in the plaint.

I reiterate that the plaintiff is the registered proprietor of the suit land which over the years belonged to his late brother, Aram Kamau. The defendants also have laid a claim on the very property on account of being purchasers or alternatively for the reason of adverse possession. The bases of the 1<sup>st</sup> defendant's claim are:

i) a copy of a hand written agreement dated 16<sup>th</sup> December, 1987 in which it is stated that the late Aram Kamau was selling to the 1<sup>st</sup> defendant 2¼ acres from the 7 acres comprised in plot No.688 KIRIMA, the consideration being Kshs.7000/=

ii) a caution lodged against NYANDARUA/KIRIMA/714 (and not 713 – the suit property)

iii) a letter to the chief Kipipiri from the chief Kihingo Location, Njoro dated 21<sup>st</sup> March, 2002 in which the late Aram Kamau is alleged to have acknowledged having sold to both the defendants part of parcel No.668 Kirima.

The 2<sup>nd</sup> defendant has no documentary proof in support of his claim apart from the caution of 1989. NYANDARUA/KIRIMA/713 and NYANDARUA/KIRIMA/714, resultant parcels of the original parcel No.688 were in 1989 in the name of the late Aram Kamau. The former measures 1.58Ha while the latter measures 1.22Ha. On 13<sup>th</sup> January, 1989, No.714 was transferred to James Macharia Gichure and No.713 transferred to the plaintiff on 15<sup>th</sup> March, 2002. Have the defendants demonstrated that the late Aram Kamau sold to them No.713?

In their statement of defence, the defendants are categorical that they purchased No.713. Yet in their testimonies they have not linked their claim to this property. For instance, the 1<sup>st</sup> defendant stated in respect to the suit land as follows:

**“I was shown 668 by Aram. That is where I am living. Nos.713/714 are subdivisions of 668.”**

He was not categorical as to which of the two parcels – Nos.713 or 714 he was sold and is occupied by him. He also confirmed that on 24<sup>th</sup> July, 1989, he lodged a caution in respect of No.714. He admitted that the application for a caution was made by the 2<sup>nd</sup> defendant but signed by him (1<sup>st</sup> defendant). The 2<sup>nd</sup> defendant for his part said in evidence that:

**“Aram sold to me land No.668 in 1987 – April – 3 acres. 668 was about 6.9 acres..... After subdivision Nos.713 and 714 were created.”**

He continued in cross-examination that:

**“I live on 713 for Aram Kamau. I have only fenced 3 acres. But I cannot tell if I occupy both 713 and 714. 1<sup>st</sup> defendant has also fenced. The land was not surveyed before we took possession.”**

It is apparent from the testimony of the defendants that they cannot, with certainty confirm that they purchased or occupy No.713. That probably explains why in the Originating Summons in Nkr.HCCC No.236 of 2006 (O.S.), in which the defendants have sued the plaintiff herein and James Macharia Gichure, the defendants’ claim is now in respect of both Nos.713 and 714. The plaintiff has a title to the suit land which title has not been challenged by evidence on account of fraud or misrepresentation.

For the foregoing reasons, the plaintiff’s claim against the defendants in this suit succeeds. The defendants are hereby given ninety (90) days within which to vacate the suit land failing which they will be evicted. After their vacation of or eviction from the suit land, they will be restrained by an order of permanent injunction in terms of prayer (a) in the plant. It is further noted that the defendants have a pending Originating Summons in which they claim ownership of Nos.713 and 714 by adverse possession. It is my view that that suit ought to be prosecuted and determined within the ninety (90) days granted herein. Indeed it is not clear to me why the defendants elected to bring an originating summons and abandon their application for amendment of the defence to introduce a counter claim for adverse possession. It would have also been convenient to consolidate that suit with this one. In view of my views expressed in this matter, it will be appropriate that the originating summons be heard by either High Court 1 or 2.

I award costs to the plaintiff.

**Dated, Delivered and Signed at Nakuru this 10<sup>th</sup> day of May, 2011.**

**W. OUKO  
JUDGE**