



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI Civil Case 41 of 2003**

**G ERALD MURIITHI KAMONDE, (*Legal Representative of the estate of*)**  
**KAMONDE MURIITHI, *DECEASED*.....PLAINTIFF**

**VERSUS**

**WAMUGUNDA MURIUKI .....1<sup>ST</sup> DEFENDANT**

**JACOB WAWERU MURIGU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

Kamonde Muriithi, the plaintiff herein, took out the originating summons dated 5<sup>th</sup> May 2003 in which he sought for the following questions to be determined:

1. *Whether having been in continuous and uninterrupted possession and occupation of the suit land KIINE/KIANGAI/147 for a period in excess of 12 years the Plaintiff has now acquired prescriptive right to the title thereto by adverse possession.*
  
2. *Whether the Land Registrar at Kerugoya should be ordered and directed to delete the name of the 2<sup>nd</sup> Defendant JACOB WAWERU MURIGU and register the name of the Plaintiff herein KAMONDE MURIITHI in the place thereof absolutely.*
  
3. *Whether the Defendant should meet the costs of this suit.*

The plaintiff named Wamugunda Muriuki and Jacob Waweru Murigu as the Defendants. The defendants each filed a replying affidavit to oppose the summons.

When the suit came up for hearing, the defendants and their advocate failed to turn up hence the suit proceeded for hearing and at the end of the plaintiff's case the defence case was ordered closed.

The Plaintiff (P.W.1) testified with one independent witness. P.W.1 said that his late father Kamonde Muriithi

purchased the parcel of land known as Kiine/Kiangai/147 from one Wamugunda Mwaniki in 1962. He produced as an exhibit in evidence the land certificate issued under the Native Land Tenure Rules of 1956, to show that Wamugunda Mwaniki was the private right holder of Plot No. 147. The plaintiff alleged that he was aged 13 years when he witnessed the sale agreement between his late father Kamonde Muriithi and Wamugunda Mwaniki. He claimed the later asked to be paid Kshs. 1000/-, 10 goats and 4 cows. Kamonde Muriithi is said to have taken immediate possession of the suit land. P.W.1 averred that he has been in continuous peaceful occupation of the land since then and that he has cultivated coffee and tea. He produced in evidence as an exhibit a copy of the permit allowing him to cultivate tea. He also produced in evidence as an exhibit a bank booklet which he uses to receive payments from the delivery of coffee. It is P.W.1's evidence that he put up a house on the suit land. Kamonde Muriithi is said to have died before obtaining title to the land. The plaintiff alleged that the title is no longer in the name of Wamugunda Mwaniki but was transmitted to Wamugunda Muriuki upon the death of Wamugunda Mwaniki, 1<sup>st</sup> defendant herein. It is said that Wamugunda Muriuki sold the land to Jacob Waweru Murigi 2<sup>nd</sup> Defendant herein. P.W.1 produced the official search proving the sequence of aforesaid transactions. P.W.1 said that by 1994, title to Wamugunda Mwaniki and or his successors had been defeated by effluxion of time hence there was nothing to transfer. Muriithi Gachagua (P.W.2), confirmed that he knew Wamugunda Mwaniki had sold his land to Kamonde Muriithi. He said he witnessed Kamonde Muriithi paying Kshs. 300/-, 4 cows and 10 goats to Wamugunda Mwaniki. He said Kamonde Muriithi immediately moved to settle on the land in dispute where he put up a house, cultivated coffee and tea.

At the close of the plaintiff's evidence, the plaintiff's learned counsel was given leave to file written submissions. At the time of writing this judgment learned counsels from both sides had filed their submissions. I have considered the evidence tendered by the plaintiff and the written submissions. Though directions were given by this court on 16<sup>th</sup> May 2005 to have the originating summons determined by the reception of oral evidence I feel obliged to take into account the affidavit evidence tendered by both sides. I admit the affidavit in view of the fact that the defendants did not participate in the hearing and also because of the fact that the plaintiff Kamonde Muriithi died before testifying. In fact Kamonde Muriithi, deceased was substituted with his legal representative Gerald Muriithi Kamonde. In any case the affidavits filed herein form part of the pleading in this dispute. There is no dispute that the parcel of land known as L.R. No. Kiine/Kiangai/147 was first registered in the name of Wamugunda Mwaniki on 4<sup>th</sup> December 1959. It is also not in dispute that Wamugunda Mwaniki, died in 1964. In the replying affidavit of Wamugunda Muriuki the 1<sup>st</sup> Defendant avers that Wamugunda Mwaniki died in 1964 after which he succeeded him vide Kerugoya R.M.'s Succession Cause No. 138 of 1994. Pursuant to the aforesaid succession proceedings, title No. Kiine/Kiangai/147 was transmitted to the 1<sup>st</sup> Defendant. Title was issued to him on 9<sup>th</sup> May 1996. the green card produced by the plaintiff indicates that the late Kamonde Muriithi lodged a caution against the title specifying his interest as a purchaser on 25<sup>th</sup>

September 1997. The same green card indicates that the caution was rejected on 20<sup>th</sup> July 1998. The rejection is noted as entry No. 8. Entry No. 9 was surprising made on 20<sup>th</sup> February 1998 which shows that the title was issued to Jacob Waweru Murigu, the 2<sup>nd</sup> defendant. In his replying affidavit the 2<sup>nd</sup> defendant avers that he purchased the land from the 1<sup>st</sup> Defendant for value without notice. Both defendants do not state the amount of the purchase price. They do not also give details as to whether or not the transaction got the approval of the land control board. There is also a mystery surrounding the removal of the caution lodged by the plaintiff. The 1<sup>st</sup> Defendant denies knowledge as to who removed the aforesaid caution in his replying affidavit. I do not think the 1<sup>st</sup> defendant is an innocent bonafide purchaser for value without notice. He has not narrated in his affidavit the steps he took to acquire the title. He did not present himself to court to explain himself out. There is no evidence that the duo questioned the person who registered the caution. The circumstances of this case enjoins to infer that the defendants were not innocent. They have concealed a lot of information.

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met. It suffices to refer to the case of *Wambugu vs= Njuguna (1983) K.L.R. p. 172* in which the court of Appeal held *interalia* as follows:

- 1. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.*
- 2. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.*
- 3. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.*

Let me apply the aforesaid principles to this case. In his affidavit evidence the late Kamonde Muriithi averred that he purchased the suit land from Wamugunda in 1962 who in turn gave him vacant possession. The late Kamonde Muriithi further deponed that he established his matrimonial home where he resided thereon with his family. There are also averments showing that the plaintiff cultivated coffee and tea. In para 10 of his replying affidavit the 1<sup>st</sup> Defendant admits that the plaintiff planted a few tea bushes. This admission corroborated the evidence of P.W.1 and P.W.2. P.W.1 produced documents evidence showing that the plaintiff planted tea on the suit land which he delivered to the local tea factory. In fact he was issued with a tea permit which indicate the suit premises. I am satisfied by the evidence tendered by the plaintiff and his witness that Kamonde Muriithi has been in continuous and peaceful occupation of the suit land. I am also convinced that the late Kamonde Muriithi and his family were put into occupation of the suit land by virtue of a sale agreement he made with the late Wamugunda Mwaniki in 1962. There is satisfactory evidence to show that the late Kamonde Muriithi paid the full purchase price at the time of taking occupation. There is evidence that title to the parcel of land was on 9<sup>th</sup> May 1996 transmitted to the 1<sup>st</sup> Defendant who in turn transferred it to the 2<sup>nd</sup> Defendant on 20<sup>th</sup> February 1998. The 1<sup>st</sup> defendant acknowledges that the plaintiff has cultivated tea on the suit land. That indicates he knew his presence. It would appear title passed to him in his capacity on administrator and beneficiary. I have already stated that the 2<sup>nd</sup> Defendant did not prove that he was an innocent purchaser for value without notice. At the time of transmission the late Kamonde Muriithi had been in occupation of the suit land for 32 years. By then title to the late Wamugunda Mwaniki and or his legal representative over the suit premises had been defeated by effluxion of time. The court of appeal restated the legal position in the Githu vs= Ndeete (1984) K.L.R. p. 776 when it held *interalia*:

1. *The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.*

The 1<sup>st</sup> defendant therefore had no good title to pass on to the 2<sup>nd</sup> Defendant.

In the end I enter judgment in favour of the plaintiff by declaring that he acquired the parcel of land known as Kiine/Kiangai/147 by adverse possession. Consequently the Land Registrar Kerugoya is directed to rectify the register relating to the aforesaid land by canceling the name of Jacob Waweru Murigu and in its place substitute with the name of Gerald Muriithi Kamonde legal representative of Kamonde Muriithi, deceased.

Costs of the originating summons to be given to the plaintiff.

Dated and delivered this 19<sup>th</sup> day of March 2010.

**J.K. SERGON**

**JUDGE**

In open court in the presence of Miss Kabethi. .K. SERGON

JUDGE