



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT MERU
Civil Case 155 of 2001**

**JENESIO MURITHI JOVENALE MAGAMBO.....PLAINTIFF
VERSUS**

JAMES NKONGE.....1ST DEFENDANT

JAMES NKONGE

(AS THE GUARDIAN OF

JOHN MURITHI NKONGE.....2ND DEFENDANT

MARKO NGAINE JOVENALE MAGAMBO.....3RD DEFENDANT

JUDGMENT

Jenesio Murithi Jovenale Magambo bought parcel number Igoji/Gikui/1257 in 1973. In his claim, he stated that he purchased it through his brother the 3rd defendant. His brother was an assistant chief of Gikui location. He gave to his brother Kshs. 350,000 being the purchase price. By then, the plaintiff was employed at Igoji Teachers College. He took possession of the property and begun to develop it in 1974. He remained in possession to date. He has planted coffee, bananas and trees. The land is fenced. He stated in evidence that the title documents were retained by the 3rd defendant and the 3rd defendant subsequently sold that land. It was not until the year 2000 when he on going to the land's office found that the 3rd defendant sold the land to the first defendant but registered it in the name of the 2nd defendant. When he reported the wrongful selling of his property by the 3rd defendant to the chief, the chief summoned the 3rd defendant. Before the chief, 3rd defendant promised to return the land to the plaintiff. He stated that at the time the 3rd defendant sold his property, the value of his land was Kshs. 250,000/=. From the documents he saw that the 3rd defendant had sold the land for Kshs. 70,000/=. When the plaintiff was cross examined he stated that he purchased the suit property from Kamundi. The 3rd defendant was present when the purchase took place. He stated that the transaction was carried out in the presence of a man called Kariuki at Igoji Kiandege land office. At that time, the land had not been adjudicated. He denied that the suit property was family land. The 3rd defendant, he said, was employed at that time and had purchased his own parcels of land elsewhere. He said he trusted the 3rd defendant and that was why he allowed him to carry out the transaction for him. He had inherited another parcel of land which was 3 acres from his late father. That is where he resides with his family. After the third defendant sold the suit property, he was arrested for trespassing on his own land. Whilst he was under arrest, he was forced to sign an undertaking that he would vacate the property. The agreement was drafted by a police officer. He stated that the first and 2nd defendant's property border the suit property. PW2 was Francis Kamundi. He said that parcel number 639 belonged to his late father. His late father sold one acre to the plaintiff which is now the suit property. He was present when he sold it to the plaintiff. The transaction was done at the land office at Kieni Kia Ndege in the presence of Mr. Kariuki. This was in 1973. He witnessed the transaction by virtue of being the eldest son of his late father. The plaintiff took possession of that acre and begun to cultivate it. He has remained in possession and that a house had been

built on that land. He was categorical that the 3rd defendant did not buy the suit property from his late father. He also denied that the first defendant had done any development on that land but rather, it was the plaintiff who had done the development. He said he did not know the 2nd defendant in whose name the suit property is registered. PW3 is the chief of Igoji. He had been a chief since 1988. The suit property he said is the property of the plaintiff and had been cultivated by him since 1973. He said that the 3rd defendant was the assistant chief during the period of demarcation of land. This case came to his attention when the plaintiff's son committed suicide by taking poison. The reason that was advanced for the son committing suicide was because the 3rd defendant sold the plaintiff's land where that son resided with his family. He summoned the plaintiff, the 3rd defendant and elders. The 3rd defendant before him admitted that the plaintiff had given him the money in order for him to buy him that land. The 3rd defendant however registered the land in his name. He said that 3rd defendant further said had the plaintiff bought him a suit he would have re-transferred that land to the plaintiff. On being requested to try and resolve the matter, the 3rd defendant refused because he said he had already sold it to the 1st defendant. The chief in evidence said that the land todate is used by the plaintiff. PW4 is a neighbour of the plaintiff. He said that his property is divided by a road from the suit property. The adjudication in that area took place in 1973. To his recollection the plaintiff begun to use that land in 1973. He remembered that in that year the plaintiff requested him to allow him to use his hoe and fork to clear the bush on the suit property. The plaintiff planted coffee, trees, fruit trees and other crops. He had never seen the 3rd defendant nor his children on the suit property. After the plaintiff's son committed suicide, he was amongst the people summoned by the chief. After discussing the issue relating to the suit property at the chief's office, it was found that the suit property belonged to the plaintiff. He stated that even if he undertook the Kimeru oath, he would still state that the suit property belonged to the plaintiff. On being cross examined, he stated that the plaintiff had given the 3rd defendant money in order for him to buy the suit property for the plaintiff and this was because the plaintiff was fearful of being cheated by the vendor. In his defence, the 1st defendant stated that the 3rd defendant sold to him the suit property in the year 2000. In that regard, they entered into a written agreement and he paid to the 3rd defendant the total purchase price of Kshs. 70,000/=. After consent was obtained from the Land Control board, the suit property was registered in his son's name, the 2nd defendant. He exhibited minutes of the Land board to prove that consent was obtained. The land was transferred into his son's name when his son was 16 years old. When the transaction was over, he said that he planted maize. That he was requested by the plaintiff, he be given 3 months to vacate the land. This was reduced into an agreement in writing. The agreement was entered into at Kiandegge Police Post on 31st March 2001. Before the transaction, he had confirmed that the land was registered in the name of the 3rd defendant. On being cross examined, he stated that he had noted there was a small house on the land. The house was occupied by Kirimi Murithi. He said he did not know whether Kirimi was the family of the 3rd defendant since he was a stranger in that area. The 3rd defendant had told him that Kirimi was his son. Later on being cross examined, he changed his testimony by saying that he did not visit the land before he purchased it. He then alluded to a meeting that was called by the 3rd defendant where the plaintiff, his wife and son Kirimi were present. The 3rd defendant at that meeting informed the plaintiff and his family that he had sold the land to the 1st defendant. Kirimi was given notice at that meeting to vacate the land. The first defendant confirmed that the plaintiff agreed to vacate the land when he was arrested and taken to the police post. On being further questioned in relation to the agreement drawn at the Police Station, he accepted that the agreement did not indicate the title number of the land which the plaintiff agreed to vacate. He also accepted that although the transfer document indicated that the purchase price was Kshs. 20,000/= the actual amount he paid the 3rd defendant was Kshs. 70,000/=. He further stated that it was the 2nd defendant who signed the transfer. When he signed the transfer, he was still a minor aged 16 years old. The 3rd defendant in evidence stated that he purchased the suit property during the period of demarcation that is 1974/75. He said that the property

was registered in his name in 1985. He said that Francis Kamundi and his wife were present when he purchased the land. He denied that the plaintiff sent him to buy the land for him. On purchasing the land, he gave the land to Kirimi, the son of the plaintiff to cultivate it. Kirimi had constructed a small house which he normally used to cook in while he was working on the land. The first defendant when he purchased the land paid him at first Kshs. 20,000/= and subsequently, paid him the balance of Kshs. 50,000/=. Thereafter, they attended the Land Control board and obtained consent to transfer. On being asked what was the cause of the dispute before the court, he said that he was not aware the cause. He however knew that the plaintiff chased away the 1st defendant from the suit property. On being cross examined, he stated that he was the assistant chief from 1962 to 1986. The adjudication for that area took place between 1964 and 1985. He obtained the title of the suit property when he was the assistant chief. He paid for the suit property between Kshs. 600, Kshs. 700 or Kshs. 800/= thereabouts. On being asked what his salary was he did not give a direct answer but stated that on top of his salary, he carried out business running a shop and also farmed coffee. He was asked why Francis Kamundi did not testify on his behalf and he responded as follows:-

“I did not request Kamundi to give evidence on my behalf because I have the title to the suit property. I did not require his testimony. Francis Kamundi is one of the persons who witnessed me buying the suit property.”

He accepted that he was summoned by the chief. He however denied that he acknowledged that the suit property belong to the plaintiff. He said that he had allowed Kirimi to cultivate the land free of charge. As I received the evidence of this defendant, I formed the opinion that he was not a truthful witness. The 2nd defendant in his evidence said that his father the 1st defendant bought the suit property. He confirmed that he signed the transfer forms. The suit property is about 50 – 100 metres away from where he and his father resided. From their home, one is able to see people working on the suit property. Although they did not come from that area, he said that they moved there in 1993. He had noted that the suit property had coffee and avocados. He had noted that there were people who worked on the suit property but he did not know who they were. That is the evidence that was submitted before the court. The defendants in their submissions alluded to a ruling/judgment of Kasanga Mulwa J. of 21st November 2002. I perused this file and I was unable to trace that ruling. As a result, I am unable to confirm what was submitted before me. The defendant further submitted that the plaintiff's claim is defeated by the fact that the 3rd defendant gave Kirimi permission to cultivate the suit property. That submission is made in my view in misapprehension of the plaintiff's case. The plaintiff is not claiming that he acquired title through his deceased son, Kirimi. Not at all. He claims that he has been in possession of the suit property since 1974 and he brought before court the credible witnesses to support his contention that he had been in occupation of that land. It should also be noted that the issue of the 3rd defendant allowing Kirimi to cultivate was not put in cross examination of the plaintiff and his witnesses. It was first raised in evidence in chief of the 3rd defendant. For that reason, I do not accept that evidence. It does in my view seem to have been an afterthought by the 3rd defendant. Since the plaintiff's claim is not based on the occupation of the land by his deceased son, he did not need to obtain letters of administration of his estate to bring this action. The defendant also misunderstood the plaintiff's claim by submitting that it was defeated by the non conformity to the Law of Contract Act. The plaintiff's claim, as I understood it, is that the 3rd defendant either held the title in trust or that the plaintiff had obtained the title by adverse possession. The plaintiff is not seeking in this case to enforce the sale of the land to him by the father of Francis Kamundi. Accordingly, the plaintiff did not have to comply with the requirements of Section 3 (3) of the Law of Contract Act. The defendant further argued in their submission that the plaintiff's claim is defeated by the fact that the plaintiff sought the prayer for trust in conjunction with the prayer for adverse possession. It was also argued that the plaintiff did not plead the particulars of fraud. The originating summons filed by the plaintiff seeks those prayers in the alternative to each other. The plaintiff sought for the court to hold that the 2nd defendant held the suit property in trust for him. In alternative, the plaintiff

sought that the court will find that he acquired title to the property by adverse possession. The plaintiff further prayed that the court will find that the transfer by the 3rd defendant to the 2nd defendant was tainted by illegality due to misrepresentation and non disclosure. I therefore make a finding that the plaintiff's prayer in his originating summons are not defeated because they are in the alternative. I will respond to the defendant's submissions by saying that the plaintiff did set out clearly the particulars of fraud. The defendants were wrong to say that those particulars were missing. Although the defendants claimed that the plaintiff did not prove any evidence against the 1st defendant, there is clear evidence that came out that it was the 1st defendant who was attempting to evict the plaintiff. The 1st defendant in his own testimony confirmed that he complained to the police and as a result, the plaintiff was arrested. The plaintiff in his claim has sought for injunction to stop such eviction. There is therefore a case against the first defendant. The defendants relied on two cases which it was argued showed that the plaintiff's claim for adverse possession cannot succeed. The first case is **Wasui Vs. Musumba** [2002] 1 KLR. That case can be distinguished from our present case in that the applicant in that case sought to be declared to have acquired title by adverse possession to a property that was not in existence due to subdivision. The second case is **Ibrahim Wakhayanga & Others Vs. Peter Mubatsi Nambiro** Civil Appeal Case No. 84 of 1998. In this case, it was an appeal from the High Court where the High Court had dismissed the appellant's claim in adverse possession. The High Court dismissed the appellant's originating summons because it found it was defeated by an objection raised by the respondent that the suit was *res judicata*. It is clear that those two cases are distinguishable from our present case and they do not advance the defendant's argument. The plaintiff has claimed that the 2nd defendant holds the title of the suit property in trust for him. I find that the claim in trust against the 2nd defendant fails. The plaintiff did not prove that the 2nd defendant owed him a fiduciary duty. In that regard, the court cannot impose a trust on the 2nd defendant. The other claim in the alternative is for a declaration that the plaintiff has acquired title to the suit property by adverse possession. There was uncontroverted evidence that the plaintiff has been in possession and has cultivated the suit property from 1974 to date. That is a period of 27 years. By virtue of Section 7 of the Limitation of Actions Act Cap 22 the defendants are time barred from bringing an action to claim the suit property from the plaintiff. The 12 years period required under that Section were attained by the plaintiff in 1986. The plaintiff by then had a right under Section 38(1) of Cap 22 to claim that he was entitled to the title of the suit property by adverse possession. As stated before, the claim by the 3rd defendant that he allowed Kirimi to cultivate the suit property, having been raised for the first time in defence, is rejected. The plaintiff by 1986 had dispossessed the 3rd defendant of the suit property. This is clearly set out in Volume 24 of Halsbury's Laws of England 3rd Edition page 252. That portion provides:-

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

It has been argued by the defendant that the plaintiff could not acquire title because he had not been in occupation for 12 years from the date when the 2nd defendant was registered as the owner of the suit property. The green card shows that the 2nd defendant was registered as the owner on 11th December 2000. The present suit was filed on 1st August 2001. Can the plaintiff then claim to have acquired title when the title was passed on to the 2nd defendant less than a year before the suit was filed? Did the transfer of the suit property to the 2nd defendant defeat the plaintiff's claim in adverse possession? The Court of Appeal in the case **Githu Vs. Ndeete** [1984] KLR was faced with that situation and held as follows:-

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession..... Immediately before the appellant became the registered proprietor in 1966 the

respondents were in the course of acquiring rights under Section 7 of the Limitation of Actions Act, Cap 22, and by virtue of Section 30 (f) of the Registered Land Act, Cap 300 those rights are overriding interests. The appellant even as a registered purchaser for value could never be in a better position than his predecessor in title and must take subject to the rights of squatters.”

In evidence, the 1st and 2nd defendant are said to live very close to the suit property. The 2nd defendant even accepted that he used to see people cultivating on that land from where he resides. He was aware that Kirimi the son of the plaintiff resided on the suit property. It therefore follows that even as the first defendant entered into the transaction to buy the suit property from the 3rd defendant, he must have known that the suit property did not belong to the 3rd defendant. The above case clearly shows that the plaintiff's claim in adverse possession was superior to the registration of ownership by the 2nd defendant. The plaintiff's claim therefore was not defeated by the sale of the land to the 2nd defendant. The plaintiff proved on a balance of probability that he is entitled to the title of the suit land by adverse possession. I cannot end this judgment without commenting on what transpired during the hearing of this case before me. It became clear to me during the hearing that my police usher P.C. Murithi was interfering with the witnesses because I saw him from my vantage seat walking out of court as the proceedings were going on and I formed an opinion that he was assisting the defendant through the evidence that was being adduced in court. As a consequence of that behaviour, I did request the Deputy Registrar of this Court to remove that usher from the precinct of the Meru High Court. It was as a result of that suspicion that I ordered that this file be made a strong room file. I grant the following judgment:-

- 1. I hereby declare that the plaintiff acquired title to parcel number Igoji/Gikui/1257 by adverse possession and in that regard, I hereby order that the land registrar do register parcel number Igoji/Gikui/1257 in the name of Jenesio Murithi Jovenale Magambo. To that end, leave is hereby granted to the land registrar to dispense with the requirement of the original title document in carrying out that registration.*
- 2. The plaintiff's costs of this suit shall be paid by the 1st and the 3rd defendants jointly and severally.*

Dated and delivered at Meru this 7th day of May 2010.

MARY KASANGO
JUDGE