



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 537 OF 2007 (OS)

TABITHA WAMBUI GITAU.....1ST
PLAINTIFF

PATRICK NGERE2ND
PLAINTIFF

CHURCH COMMISSIONER OF KENYA.....3RD
PLAINTIFF
V E R S U S

JULIUS WAGACHA KABUTHIA1ST
DEFENDANT

PETER THAIRU KABUTHIA.....2ND
DEFENDANT

JOHN KINYANJUI KABUTHIA.....3RD
DEFENDANT

J U D G M E N T

In 1999 the 1st Plaintiff, the 2nd Plaintiff and the 3rd Plaintiff bought ½ acre each of land parcel Kiambaa/Kihara/760 and was issued with title. They were buying from one Kamau Kariuki to whom a power of attorney had been donated by the registered owner one Richard Marimbet. Marimbet had been the registered proprietor of Kiambaa/Kihara/760 since 1998 having bought it from one Morris Kungu who had been its registered owner since 1958.

Kamau Kariuki took the Plaintiffs to show them the portions they were buying. It was a bushy area that was not occupied. It turned out in 2001 that the ground the Plaintiffs had bought was for land parcel Kiambaa/Kihara/759. Parcel Kiambaa/Kihara/759 was registered in the name of the deceased Kabuthia Wagacha. He died in 1980 and in 2001 the Defendants who are his sons became the legal representatives of his estate (D Exhibit 1). The deceased had bought this land in 1959. The Defendants had lived on it since 1968. Unknown to them, the ground on which they were staying was for land parcel Kiambaa/Kihara/760. They found out this in 2001 when a surveyor came to survey and discovered this problem. The Defendants decided to shift to their proper ground which the Plaintiffs had been occupying.

On 20th February, 2002 the Plaintiffs filed this suit by way of originating summons under **sections, 7, 17 and 18 of the Limitation of Actions Act (Cap. 22)** and **Order 36 rule 1 of the Civil Procedure**

Rules for an order that they have been in adverse possession of L.R. No. Kiambaa/Kihara/759 through their predecessor in title from 1958 to date and sought to be declared the absolute owners thereof and be registered as the proprietors. It was further sought that the Defendants being the administrators of the estate of the late Kabutha Wagacha do transfer the land to the Plaintiffs.

The court received the evidence of the 1st and 2nd Plaintiffs and that of the 1st and 2nd Defendants. It then received the written submissions of Mr. Kimani for the Plaintiffs and Mr. Etemesi for the Defendants.

There is no dispute the Plaintiffs bought from parcel Kiambaa/Kihara/760 in 1999. By 2002 when they filed the suit they had not been on the land for 12 years. They have title to the portions they bought and therefore cannot base their claim on adverse possession. An adverse possessor is a person who has no title to the land but is relying on open, uninterrupted, actual and physical possession to the land for a period in excess of 12 years to the detriment of the title holder (**Mbira –Vs- Gichuhi [2002] 1EA 137**).

It should also be noted that while the Plaintiffs had titles to portions of Kiambaa/Kihara/760, they were not in actual occupation or possession of the ground of the titles. It was the Defendants, who held title to Kiambaa/Kihara/759, who were in actual occupation and possession of the ground of Kiambaa/760. In short, what is open is for the Plaintiffs to seek to occupy the land that is subject of the titles they have. Indeed, it was evident that when the Defendants realized their mistake they moved to the land on which the Plaintiffs were as that was their proper ground. This is what forced the Plaintiffs to come to court. I am unable to find that the Plaintiffs were in adverse possession of Kiambaa/Kihara/759. This is because neither Richard Marimbet nor Morris Kungu, who are the alleged predecessors, testified that he ever occupied land parcel Kiambaa/Kihara/759 for any period leading to the 4 years that the Plaintiffs were in occupation before the suit was filed. When the Plaintiffs came to the land it was a bush and not occupied. In calculating time, the cumulative period of occupation by the Plaintiffs and their predecessors should be 12 years or more.

In conclusion, the originating summons is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2010

**A. O. MUCHELULE
J U D G E**