



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 2 OF 1998

JAMLECK MUCHIRA WANJAU.....PLAINTIFF

VERSUS

CHARLES MAINA MURIUKI.....DEFENDANT

JUDGMENT

JAMLECK MUCHIRA WANJAU, the Plaintiff herein, took out the Originating Summons dated 5th January 1998 in which he applied for the following orders:

(a) “That the Plaintiff has become entitled by adverse possession of a half portion of the land parcel L.R.MUTIRA/KAGUYU/1049.

(b) That the Plaintiff be registered as proprietor of the half portion of land parcel L.R.MUTIRA/KAGUYU/1049 in place of the Defendant free from any encumbrances.

(c) That the District land Registrar, Kirinyaga District, do effect the registration of the Plaintiff as proprietor of the half portion of land parcel L.R.MUTIRA/KAGUYU/1049.

(d) That the Defendant do pay the costs of this suit and interest thereon at court rates.”

CHARLES MAINA MURIUKI, the defendant herein, opposed the Originating Summons by filing the Replying Affidavit he swore on 3rd April 1998.

The Plaintiff and the Defendant each testified in support of their positions without tendering the evidence of independent witnesses. The Plaintiff told this Court that he has been in occupation of a portion measuring 2 acres comprised in **L.R.NO.MUTIRA/KAGUYU/1049** since 1962. It is his evidence that his late father, Wanjau Gakuya, purchased 2 acres from one Gakuya Kamanga to be excised from **L.R. NO. MUTIRA/KAGUYA/444**. The parcel was subsequently subdivided into the following sub-divisions namely: **MUTIRA/KAGUYU/1048** and **MUTIRA/KAGUYU/1049**. The Plaintiff told this Court that the vendor did not give title to his late father but instead opted to sub-divide the land into two sub-divisions. The Plaintiff further alleged that in 1974, the vendor sold L.R. NO.

MUTIRA/KAGUYU/1049 to one **JOSEPH WANJAU**. The Plaintiff produced a copy of the green card in respect of **L.R. NO. MUTIRA/KAGUYU/1049** which indicated that the aforesaid parcel changed hands three times before it was registered in the name of Charles Maina Muriuki, the defendant herein. According to the Plaintiff, none of the registered owners including the Defendant took up occupation and possession of the suit land hence his occupation and possession was open and uninterrupted. He produced documents showing he cultivated tea, coffee and other crops.

The Defendant on his part, testified in his defence whereupon he produced the green card and the title in respect of **L.R. NO. MUTIRA/KAGUYU/1049** to prove that he is the registered owner. The Defendant further produced proceedings in respect of **EMBU R.M.CC.NO.141 OF 1983** to show that there was a dispute over the ownership of the parcel of land known as **L.R. MUTIRA/KAGUYU/1049**. The Defendant further produced pleadings and proceedings in respect of **NYERI H.C.C.C.C. NO. 259 OF 1991** and **H.C.C.C. NO.190 OF 1995** – to show that the aforesaid suits were filed prior to this case over the suit premises. The Defendant refuted claims that the Plaintiff was the sole occupant of the suit parcel of land. It is the evidence of the Defendant that the Plaintiff's occupation was not peaceful nor uninterrupted. He claimed he bought the land when it was vacant. The Defendant also alleged that twelve (12) years had not lapsed by the time of filing suit hence the Defendant's title had not been extinguished.

At the end of the evidence, learned counsels were permitted to file written submissions. I have considered the evidence and the written submissions. The following issues arose for the determination of this court:

- (i) Whether or not the Plaintiff acquired 2 acres of the suit land by prescription?
- (ii) Whether or not the Defendant's title is protected by law in the circumstances of this case.

Let me start by dealing with the first issue. There is no doubt that one Gakuya Kimanga sold a portion of the parcel of land known as **L.R. NO. MUTIRA/KAGUYU/444** to Wanjau Gakuya, the Plaintiff's father who in turn moved into occupation. Gakuya Kimanga caused the suit land to be sub-divided into two portions namely: **L.R. NO. MUTIRA/KAGUYU/1048** and **MUTIRA/KAGUYU/1049**. The 2 acres portion occupied by the Plaintiff is said to be comprised in **L.R. NO. MUTIRA/KAGUYU/1049**. There is evidence that the Plaintiff has cultivated tea and coffee on the aforesaid portion for many years. There is evidence that the Defendant was registered as the proprietor of the aforesaid land in 1987, having purchased the same from Joseph Muriuki Mugweru and Mutahi Mugweru. There is no direct denial on the part of the Defendant that the Plaintiff has been in occupation of the suit land since 1962. From the evidence tendered, I am convinced that the Plaintiff has been in continuous and peaceful occupation of two acres comprised in **L.R.NO.MUTIRA/KAGUYU/1049** from 1962 upto 1987 when the Defendant purchased the land. By the time of purchasing the land, the Plaintiff had been in occupation of the suit land for a period of over 20 years. I am convinced the Plaintiff had acquired the land by adverse possession by the time the Defendant purchased the land.

Having determined the first issue, let me now turn my attention to the second issue as to the status of the Defendant's title. The law is well settled that prescriptive rights which have accrued cannot be defeated by subsequent change of ownership of the land in dispute. By the time the Defendant purchased **L.R.NO. MUTIRA/KAGUYU/1049**, the Plaintiff had already acquired 2 acres by adverse possession. That right is treated as an overriding interest under *Section 30 (f)* of the Registered Land Act as against the Defendant's title. In **GITHU =VS= NDEETE [1984] K.L.R. 776**, the Court of Appeal held *inter alia*, that ***“the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.”***

In the end and on basis of the above reasons, I enter judgment in favour of the Plaintiff and against the Defendant in the following terms:

(i) The Plaintiff is declared to have acquired 2 acres by adverse possession within L.R. NO. MUTIRA/KAGUYU/1049.

(ii) The Defendant is directed to sign the necessary transfer documents to cause 2 acres to be excised from L.R. to MUTIRA/KAGUYU/1049 and thereafter the same be transferred to the Plaintiff. In default, the Deputy Registrar is authorized to execute these documents in place of the

Defendants.

(iii) Costs of this suit.

Dated and delivered this 15th day of October 2010.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Muhoho holding brief Mwai for Plaintiff and Kimunya for Defendant.