

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 622 of 1989

PETER IRUNGU WAINAINA PLAINTIFF

VERSUS

NJUGUNA KIHARA DEFENDANT

JUDGMENT

(1) This Originating Summons was filed on the 9th February 1989 by Wainaina Kihara who sought to acquire title by adverse possession of the piece or parcel of land known as Title No. LOC/18/KIRERE/210 in Kirere Village, Murang'a District, which at that time was registered in the name of Wamaitha Kihara, who was named as Respondent in the suit.

(2) According to the affidavit of Kihara made on the 30th January 1989, he entered the suit land some time in 1964 with the understanding that the Respondent would eventually sell and transfer the suit land to him.

(3) When Kihara Wainana died, he was substituted by his son Peter Irungu Wainaina (P.W.1) as the Plaintiff. Wamaitha Kihara, the Defendant, also passed on and was substituted by her son Njuguna Kihara as Defendant. Njuguna Kihara obtained a Grant of Letters of Administration *intestate* of his mother's estate on the 6th September 1995 (Defendant's Exhibit 1).

(4) In his evidence the Plaintiff said that in 1972, Wamaitha agreed to sell the suit land to his father for Kshs.4,000/= and his father made a part payment of Kshs.3,000/= leaving a balance of Kshs.1,000/=. For some reason Wamaitha refused to accept the balance of the purchase price until she died. The Plaintiff produced a note book which he claimed contained the details of the Sale Agreement and called a witness, Geoffrey Macharia Kigume (P.W 2) who claimed to have drawn up the Agreement for Sale on the 13th February 1972. He also confirmed that Wainaina Kihara lived on the suit land until his death.

(5) Kigume (P.W.2) also said that a man called Chege Njuguna also claims to have bought the suit land from Njuguna Kihara, the Defendant. But he does not know who is presently registered as owner. He confirmed that Wamaitha permitted Wainaina to stay on the suit land as caretaker and cultivate with an option to purchase if and when Wamaitha decided to sell.

(6) Njuguna Kihara ("**the Defendant**") also testified. He said Wamaitha Kihara, the original Defendant, was his mother. He lives in the Settlement Scheme in Nyandarua. He confirmed that his mother left Wainaina Kihara to look after the suit land when he and his late mother relocated to Nyandarua. After moving to Nyandarua, he did not return to Kiiriangoro for a very long time. He knows nothing about the Agreement for Sale alleged to have been drawn by Macharia Kigume (P.W2). He said that upon his mother's death, he applied for and obtained a Grant of Letters of Administration *intestate* of her estate. He then caused the suit land to be registered in his own name. He referred to the Plaintiff's Exhibit 3 (Abstract of Title) which indicates that on the 18th September 1995, Chege Njihia was registered as owner.

(7) In cross-examination, Njuguna said in part as follows:

"I cannot quite recall when this suit was filed but it is a number of years ago. My mother was alive when the suit was filed. She died six years later. I knew that there were people on the suit land but I nevertheless sold the land because it was mine."

(8) I have considered the evidence and submissions of learned counsel. The suit land is not registered in Njuguna Kihara's name. The registered proprietor is Chege Njihia who was registered as such way back on the 18th September 1995. The Plaintiff took no steps to join Chege Njihia as a Defendant. It seems to me that the Plaintiff's claim must therefore fail because it has been brought against the wrong Defendant. Njuguna Kihara is not the registered proprietor of the suit land. The court cannot make an order affecting Chege Njihia's title behind his back without giving him notice and an opportunity of being heard in answer to any claim over his land.

(9) For these reasons, the suit fails and is hereby dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this Twenty-third day of September, 2008.

P. Kihara Kariuki

JUDGE