



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 568 of 2002**

**EDWIN G.K. THIONGO.....1ST
PLAINTIFF**

**WAWERU HOLDINGS LTD.....2ND
PLAINTIFF**

VERSUS

**GICHURU KINUTHIA.....1ST
DEFENDANT**

PATTERSON NJOROGE GICHURU.....2ND DEFENDANT

JOHN NGETHE GICHURU.....3RD DEFENDANT

JUDGMENT

The two plaintiffs brought this suit against the three defendants and prayed for judgment for

1. An eviction order requiring the defendants to vacate the suit lands LR NO. DAGORETTI/THOGOTO/1191 and DAGORETTI/THOGOTO/1192
2. Mesne profits to be assessed by the court
3. Costs of the suit.

In the plaint it is averred that in or about March 1990 the 1st Plaintiff herein purchased land parcel LR NO. DAGORETTI/THOGOTO/836 from one Mwathi Kinuthia who was the registered proprietor thereof. In or about 1994 the 1st plaintiff sub divided the parcel of land LR No.DAGORETTI/THOGOTO/836 aforesaid into two parcels namely LR NO. DAGOORETTI/1191 and LR NO. DAGORETTI/THOGOTO/1192 and transferred the later to one PATRICK WAWERU KINUTHIA now deceased.

In or about august 2001 land parcel LR NO. DAGORETTI/THOGOTO/1192 was transferred to the 2nd plaintiff herein pursuant to succession proceedings in NAIROBIHC SUCC. CAUSE NO. 2041 of 2000. That since 1990 when the 1st plaintiff purchased land parcel LR NO. DAGORETTI/THOGOTO/836 the defendants have been unlawfully occupying the suit land and have refused to vacate despite numerous demands. The defendant upon being served with summons filed a

defence in which they averred that the suit land was a family land where they have lived continuously and without interruption over 40 years and that the sale of the suit land to the plaintiffs by Mwathi Kinuthia was fraudulent and they sought rectification of the register.

Briefly the facts of the background of this suit are as follows:

The suit land was originally known as LR NO. DAGORETTI/THOGOTO/182 whose original owner was MBARIA GACHOKA now deceased. Upon his demise the title transmitted upon his two wives namely MILKA KABURA MBARIA and LEAH WAITHERA MBARIA. Both wives were entitled to ½ share of the title each. When Milka Kabura Mbaria died, Leah Waithera Mbaria and Mwathi Kinuthia who was the 2nd son of the late Milka Kabura Mbaria applied for Letters of Succession in Kiambu SRM SUCC. CAUSE NO. 58 OF 1987.

The suit land was divided into 2 equal portions namely LR NO. DAGORETTI/THOGOTO/835 and DAGORETTI/THOGOTO/836. L.R. NO. DAGORETTI/THOGOTO/835 was registered in the name of the surviving wife LEAH WAITHERA MBARIA and L.R. NO. DAGORETTI/THOGOTO/836 was registered in the name of MWATHI KINUTHIA on behalf of the house of the late MILKA KABURA. Mwathi did not disclose the existence of his elder brother GICHURU KINUTHIA who is now the 1st defendant in this suit. The two sons of Milka Kabura Mbaria were each entitled to half share of their late mother's portion being L.R. NO. DAGORETTI/THOGOTO/836. But this never happened and instead Mwathi Kinuthia disposed of the suit premises and hence the suit.

Edwin Thiongo the 1st plaintiff in his evidence told the court that in May 1990 one Mwathi Kinuthia approached him and offered to sell land to him. The land was L.R. NO. DAGORETTI/THOGOTO/836. He accepted the offer and carried out a search and confirmed that Mwathi Kinuthia was the registered proprietor. Sale Agreement was drawn and signed by both the seller and the purchaser. Land Control Board consent was obtained and it was transferred to him and he was registered as the legal proprietor and was issued with title. Soon thereafter it emerged that there was another succession cause being NAIROBI HC SUCC. CAUSE NO. 28 OF 1991 filed by Leah Waithera and Gichuru Kinuthia the elder brother of Mwathi Kinuthia who had sold him the suit land. The cause was over the estate of Mbaria Gachoka which comprised of land parcel L.R. NO. DAGORETTI/THOGOTO/182.

The suit land L.R. NO. DAGORETTI/THOGOTO/836 came out of the subdivision of L.R. NO. DAGORETTI/THOGOTO/182. Succession Cause No. 28 of 1991 was referred to the arbitration by a panel of elders who filed their award in court and the same was adopted but this never changed the position on the ground. He confirmed that there were 2 succession causes over the same estate.

He later subdivided land parcel L.R. NO. DAGORETTI/THOGOTO/836 into 2 portion being DAGORETTI/THOGOTO/1191 and 1192 and resold DAGORETTI/THOGOTO/1192 to the 2nd plaintiff. He sought orders to have the defendants evicted from the suit land. The three defendants are related. The first defendant GICHURU KINUTHIA is the father to the second and third defendants.

The 1st defendant told the court that the suit land belonged to his deceased father who died in 1960. He had two wives who survived him namely Milka Kabura his mother and Leah Waithera his step mother. The estate of his deceased father which comprised only one piece of land L.R. NO. DAGORETTI/THOGOTO/182 was distributed and registered in the names of his two widows jointly. His mother died in 1984. A succession cause was filed being Cause No. 57 of 1987 and the estate was distributed. L.R. NO. DAGORETTI/THOGOTO/835 was registered in the names of his step mother Leah Waithera and L.R. NO. DAGORETTI/THOGOTO/836 was registered in the name of his brother Mwathi Kinuthia. This registration in the name of his brother was done fraudulently as the same was supposed to be shared equally between him and his brother. He filed summons for revocation of grant being No. 28 of 1991.

They were referred to arbitration by the elders but they could not agree. Subsequently his brother Mwathi Kinuthia sold the L.R. NO. DAGORETTI/THOGOTO/836 to the 1st plaintiff who is a neighbour. He has

lived on the suit land for over 50 years and both the 2nd and 3rd defendants who are over 40 years were born there. The 1st defendant cannot claim to be an innocent purchaser without notice since he was aware of their presence on the suit land all along.

The defendants claim that they have lived on the suit land for over 40 years peacefully, continuous and uninterrupted and that there are no subdivisions on the ground and they were not aware of the alleged subdivisions. The 1st plaintiff claims that he was sold the suit land by Mwathi Kinuthia but he never called him to come and give evidence nor did he produce any sale agreement signed between him and Mwathi Kinuthia.

Although the plaintiffs are registered as proprietors of the suit land. I find the process flawed and therefore the registration is a nullity as the statute cannot be used to further a fraudulent act. The plaintiffs claim is therefore dismissed.

The defendants have been in possession of the portion they are occupying for well over 40 years continuous and uninterrupted and they have asked this court in the counter claim to make a declaration that they have acquired proprietorship of that portion under their occupation by adverse possession.

I agree and declare that the defendants have acquired ownership of the portion of the suit land which has been under their occupation for over 40 years by adverse possession and the same should be registered in their names jointly and order that the register be rectified accordingly.

The defendants shall also have costs of the counterclaim and it is so ordered.

Dated and Delivered at Nairobi this 14th day of September 2006.

J.L.A. OSIEMO

JUDGE