



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL CASE NO. 16 OF 2004(O.S.)**

**HENRY MWANGI KIHARA.....PLAINTIFF**

**Versus**

**RACHEL NYAMBURA KIMANI)**

**SAMUEL KAMAU MARITE )**

**JOSEPH KARIUKI MARITE ).....DEFENDANTS**

**JOHN GITONGA KIMANI )**

**ISAAC MBOGO KIMANI )**

**JUDGMENT**

By an originating summons dated 3rd February 2004, the Plaintiff in this suit is praying for:

- “1. A declaration that the Plaintiff has become entitled to be registered as sole proprietor of one acre out of parcel No. **LOC. 2/MAIRI/22** by way of adverse possession and subsequently in place of the present registered owners the defendants herein.*
- 2. An order of injunction restraining the defendants either by themselves, their agents, servants and employees from entering, trespassing, alienating, dealing and/or interfering with the Plaintiffs peaceful possession and occupation of one acre out of parcel No. **LOC.2/MAIRI/22.**”*

Briefly, it is the Plaintiff’s case that the First Defendant is the wife of one Kimani Kamau son of Kamau Kihara who are both dead, that the Plaintiff was informed by his father Kihara Mbogo that the said Kihara Mbogo occupied the whole parcel of land in the year 1968 when the Plaintiff was a minor after the said Kihara Mbogo had bought the land from Kimani Kamau the son of Kamau Kihara, that the Plaintiff was brought up in the land and sometime in 1976 the Plaintiff’s father moved out of the suit land leaving the Plaintiff there by then an adult; That the Plaintiff erected his living houses and planted trees including 3500 tea bushes in 1981 and subsequently obtained the relevant Tea Plantation Licence dated 16th October 1992, that immediately his father moved out of the suit parcel of land, the Plaintiff used his father’s house which the Plaintiff subsequently renovated and extended, that the First Defendant’s husband died in 1989 after the Plaintiff had been in continuous, open, undisputed and exclusive possession of the suit parcel of land during the lifetime of the said Kimani Kamau, and that therefore the

Plaintiff has acquired a good title, by adverse possession, to the one acre the Plaintiff occupies against the registered owner; that sometime in 1989 the First Defendant entered the suit land and occupied a portion about 1.8 acres which the Plaintiff had not fully developed and left the Plaintiff with the developed one acre, that the First Defendant filed Succession Cause No. 5 of 1992 in the Magistrate's Court Murang'a in respect of the estate of her deceased father-in-law and that without consideration that the Plaintiff was occupying the said portion of one acre, had the grant confirmed and the whole parcel of land shared among the beneficiaries mentioned in the land register; that since 1976 to date, the Plaintiff has lived and continued using the suit parcel of land openly as his land and has been doing that with full knowledge of the First Defendant; and that therefore in the interest of justice and fairness, it is reasonable and proper that the Plaintiff be granted the orders prayed for.

Another part of the same story is that the Plaintiff's father claiming to have bought one acre out of the suit parcel of land from husband of the First Defendant took possession of the suit parcel of land by occupying it when he moved his home and his family who included the Plaintiff, then as a minor to that land. Subsequently the father of the Plaintiff, who is still alive to-date, went to live in a home in another parcel of land at a different location as he left the Plaintiff, then an unmarried adult, in occupation of the homestead on the suit parcel of land. But the said father of the Plaintiff lost no interest in the suit parcel of land as following the death of the First Defendant's husband in 1989 and the subsequent filing of Succession Cause No. 5 of 1992 – Murang'a Magistrate's Court, the said father of the Plaintiff raised objection claiming ownership as purchaser of the one acre the Plaintiff is claiming in this suit.

His name is Harrison Kihara and in that Succession Cause he filed affidavits dated 26th August 2000 and 7th May 2001 which clearly disclose that all along the use of the land and developments were attributable to him including tea bushes, and that the Plaintiff could only have claimed under the said Harrison Kihara. The said succession cause, filed in 1992, ended on 27th February 2003 before the present suit was filed on 23rd February 2004 meaning that for the 11 years Harrison Kihara's objection was still alive, the Plaintiff was comfortable with it as the Plaintiff though fully aware of the Succession proceedings, never bothered to raise any objection or file a protest or file summons, for revocation of grant or appeal, all those options having been open to him in the Succession Cause. Had Harrison Kihara succeeded therefore, the Plaintiff would not have bothered to file this suit. Indeed the Plaintiff's father was so active in the succession cause that at one time he became a co-administrator with the First Defendant before he finally lost his case on 27th February 2003. In those circumstances, how could the Plaintiff acquire adverse possession?

In other words when a parent who is occupying a parcel of land with his spouse, children and dependants is, on any ground claiming ownership of that land from the registered/lawful owner or from beneficiaries in the estate of the lawful owner, is the said parent's wife or any of his children or dependants entitled to adverse possession of same land during the same period of the claim even if during the last part of that period the parent had moved out of the land leaving the subsequently claiming wife or child or dependant on the land? In the instant case, the parent having moved out of the land continued pressing for his interest in the land until he lost it in a court of law – a year before the Plaintiff filed this suit claiming adverse possession from 1976 when he may as well have been a minor. Does that not look like a joke?

The Plaintiff told this court that he had gone to the suit parcel of land with his parents when he was a minor. He went on to say that he grew up on that land until he became an adult. As a person claiming adverse possession he had the duty to prove before the court the date upon which he became an adult. He did not discharge that duty. He had to go further and prove the date on which adverse possession started running in his favour. He did not also discharge that duty.

Having gone to the suit parcel of land as a dependant of his father, the man who was claiming purchaser's interest in the suit parcel of land, the Plaintiff remained a dependant of his father and this was more so in relation to the estate of his father even after the Plaintiff had become an adult and married and it is immaterial whether or not the Plaintiff was living in the homestead of his father – who is still alive. This is because the Plaintiff cannot inherit the estate of his father or any property in that estate before his father dies and he cannot lawfully take ownership of any of his father's property during his father's

lifetime without his father having lawfully given that property to him.

The Plaintiff's father is still alive to-day. It was only on 27th February 2003 when the Plaintiff's father lost his purchaser's interest claim in the suit parcel of land meaning that up to that date, Harrison Kihara's interest in the suit parcel of land was purchaser's interest. That was the interest Harrison Kihara's dependants or beneficiaries in his estate including the Plaintiff, had in the same suit parcel of land and they had it only through Harrison Kihara, and not on their own independently.

With respect to the one acre that Plaintiff is claiming, he had first to be in adverse possession against the interest of his father, that is against his father, before he could be in adverse possession against the rightful owner of that one acre.

The Plaintiff's father is still alive to day. It was only on 27th February 2003 when the Plaintiff's father lost his purchaser's interest claim in the suit parcel of land meaning that up to that date, Harrison Kihara's interest in the suit parcel of land was purchaser's interest. That was the interest Harrison Kihara's dependants or beneficiaries in his estate, including the Plaintiff, had in the same suit parcel of land and they had it only through Harrison Kihara, and not on their own independently. Harrison Kihara having lost that interest through court proceedings on 27th February 2003, beneficiaries in his estate also lost that interest on that date.

In the period before that date therefore, the Plaintiff did not have interest other than that in the suit parcel of land because he was a son who had been left by his father in his father's former homestead to look after and maintain his father's property as well as his own property he was lawfully free to acquire. With regard to interest in the suit parcel of land, the Plaintiff adduced no evidence to show he had done anything to enable him lawfully acquire an interest other than the one through his father as the Plaintiff's mere stay on that land could not bring any change in his then existing interest in the land.

That explains why he could not bother to join in Succession Cause No. 5 of 1992 when his father was there battling. From what I have said therefore, since Harrison Kihara's interest in the suit parcel of land was rejected by the court, the Plaintiff's interest in that land through his father ended and that having happened on 27th February 2003, the question of adverse possession in his favour does not arise.

In case my conclusion above is wrong, how far does the Plaintiff succeed? The originating summons prayer the first prayer says what the Plaintiff wants. He wants to be registered as sole proprietor on one acre out of the suit parcel of land in the place of the

***“present registered owners.”***

That refers to registered owners as at the date of the filing of the Originating Summons and that was on 23rd February 2004. Those people were the present five defendants who got registered following a certificate of confirmation of a grant dated 5th March 2003 after Harrison Kihara's claim had failed. They became registered as proprietors of the suit parcel of land on 28th April 2003.

Against the defendants, adverse possession should begin to run from that date and not earlier.

From the originating summons the Plaintiff is using the period 1976 to 1989 in counting his limitation period and he gets the period. But against who, unless it is against his father where such a period cannot run. From the Plaintiff's own evidence and supported by defendants, right from the day the defendants went to the suit parcel of land, they were out to eject the Plaintiff from the land. They have talked of the year 1989 following the death of the First Defendant's husband who was not, and his family, living on the suit parcel of land and appears to have been tolerant to the occupation of the land by Harrison Kihara, also called Kihara Mbogo, and his family. The Plaintiff refused to move away and as a result friction between the Plaintiff and the defendants has remained, defendants having originally thought that through succession proceedings the Plaintiff could be moved out quickly. It has not been so as the Plaintiff's father engaged the defendants in lengthy proceedings from 1992 ending only two years ago and the Plaintiff intervening with this suit a year ago. It is the defendant's position, as they told the court, that

they are waiting for these litigations to end in order to eject the Plaintiff from the suit parcel of land.

So as things stand, there has been no period in which it can be said adverse possession in favour of the Plaintiff run against the defendants in case that could happen in this case. To my mind, however, it could not happen because adverse possession only runs against the rightful owner, and properly in the absence of possession by the rightful owner. Use rightful or lawful. In the instant case, from about the year 1989 the defendants had come to be also in possession. But like the Plaintiff or his father, they were not yet the rightful owner.

The year in which the rightful owner died has not been revealed. He was Kamau Kihara and neither the Plaintiff nor his father seems to have seen that man. He died and the suit parcel of land remained registered in his name until that name was replaced in the relevant land register by the registration of defendants on 28th April 2003 following confirmation of grant.

Kimani Kamau was Kamau Kihara's son but never got the suit parcel of land registered in his name. If true there was a sale of one acre to the Plaintiff's father by Kimani Kamau, the transaction may or may not have taken place in the lifetime of Kamau Kihara, but whatever was the case, the legal position was that Kimani Kamau had no title in the suit parcel of land to pass to the father of the Plaintiff and Kimani Kamau's permission to Harrison Kihara, if any, to take possession of the suit parcel of land could not be permission of Kamau Kihara the registered owner.

Kimani Kamau having died without having been registered as rightful owner of the suit parcel of land, he could have no adverse possession running against him in relation to the suit parcel of land. The most he could have was a beneficiary's interest and that interest passed over to the First Defendant after Kimani Kamau died. It did not pass over to the rest of the defendants.

The Plaintiff's father purported to buy title to land from Kimani Kamau in respect of the suit parcel of land. Kimani Kamau did not have such title to pass to the Plaintiff's father who therefore got nothing and similarly the Plaintiff nothing.

If the Plaintiff thought he could fall back to adverse possession, I have said it could not have run against the defendants. I add that it could not run against Kimani Kamau because he was not the rightful registered owner even if he remained alive. I add further that adverse possession could not run against Kamau Kihara as having died he was not a rightful owner capable of taking legal action against the Plaintiff or the Plaintiff's father to remove them from the suit parcel of land.

This is the end and I still find the Plaintiff failing to get the portion of land he wanted to get from the suit parcel of land through adverse possession.

On the whole therefore, the Plaintiff's suit is hereby dismissed with costs to the defendants.

**Dated this 4th day of March 2005.**

**J. M. KHAMONI**

**JUDGE**