



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 199 OF 1991

WANJOHI MURIUKI PLAINTIFF

VERSUS

WAMUIRU GITEMENGE DEFENDANT/RESPONDENT

J U D G M E N T

This suit was brought by Wanjohi Muriuki (hereinafter referred to as the Plaintiff) by way of an originating summons seeking declaration follows:

1. *That the Plaintiff has become entitled by adverse possession to proprietorship of 6 acres of land parcel Kiine/Sagana/52 (hereinafter referred to as suit land).*
2. *That the Plaintiff be registered as the sole proprietor of 6 acres out of 10 acres comprised in the suit land, in place of the Respondent Wamuiru Gitemenge.*
3. *That the Respondent holds the 6 acres in the suit land in trust for the Plaintiff under the provisions of the Registered Land Act section 30.*

Four witnesses testified for the Plaintiff. Briefly their evidence was as follows:

The Plaintiff who testified as P.W.1 testified in examination in chief that the suit land is registered in the name of the Defendant. He testified that his father bought a portion of the suit land and was in possession and occupation of the suit land until he died and that when his father died the Plaintiff took possession of the land in 1960 and the father of the Defendant showed him where to build a house and a store. He stated that he purchased 6 acres of the suit land from the father of the Defendant and that he paid a total of Kshs.6,400/=, for the 6 acres and that he leased 3 acres from the Defendant in October 1984 for one season only. He maintained that he occupied the land with his sister Rahab Nyawira (P.W.2). Under cross examination the Plaintiff conceded that he entered into a lease agreement for 3 acres on 12th March 1984. He conceded that he paid Kshs.6,400/= in 1984 but maintained that the money was for purchase of the land.

P.W.2 testified that she has been living on the land since 1960 and that the land was bought by her father. She maintained that the Plaintiff leased 3 acres in 1984 for one season only. Under cross examination she maintained that the Plaintiff paid 6,400/= as the purchase price for the land and 300/= for leasing the 3 acres. She conceded however that she was not present during the purchase of the land and did not know the details of the agreement.

Michael Mwangi Igati (P.W.3) a retired assistant Chief testified that he knew neither the Defendant nor the father of the Defendant nor did he know the owner of the suit land. He maintained however that the father of the Plaintiff built houses on the suit land in 1955 and started cultivating the land. He maintained that the Plaintiff and his sister have been in occupation of the suit land and never went there in 1984.

Ndunyu Njiri (P.w.4) also testified that he knows the parties and that the Plaintiff and his sister have been living on the suit land since before the period of emergency. He conceded under cross-examination that he only heard of the agreement of sale.

In his reply to the originating summons the Defendant averred that the Plaintiff leased 3 acres of the suit land at 640/= per year. He paid a total of Kshs.6,400/= and that he paid 300/= for an extra 3 acres for the short rains of 1984. He denied that the Plaintiff has been in adverse possession, or that he has been in continued uninterrupted occupation of the 6 acres as alleged.

Four witnesses also testified in support of the defence. The Defendant (D.W.1) testified that he got the suit land which is 10 acres from his father Nimrod Gitemenge who gave it to him during the land consolidation in 1960. He maintained that he has been cultivating the land but has leased part of it to several people including the Plaintiff who had leased 3 acres. He testified that he leased the land to the Plaintiff in 1984. He denied having sold the land to the Plaintiff in 1960. He conceded that the land was registered in his name by his father when he was an infant. He produced a document duly signed by the Plaintiff showing that the Plaintiff paid him Kshs.6,400/=. He maintained that the money was for leasing of the land and had been utilized in full.

Under cross examination the Defendant conceded that he only started cultivating the land in 1976 and that he only utilized 3 acres and leased the rest. He conceded that the Plaintiff had put up a small structure on the suit land pursuant to an agreement between them but that there was no sale agreement.

Nimrod Gitemenge Muiru (D.W.2) the Defendant's father testified that the suit land was given to him by his father and that he in turn gave it to his son i.e. the Defendant. D.W.2 appears to have been totally confused concerning dates as he claimed he gave the suit land to the Defendant in 1984 when he got married, but then claimed the Plaintiff leased the land from the Defendant in 1954. He denied having discussed the land with the Plaintiff or having received Kshs.6,400/= from the Plaintiff for the sale of the land.

James Mwangi Kirungu (D.W.3) who has land near that of the Defendant testified. He maintained that D.W.2 was the one previously cultivating the land and that he had planted trees. He testified that P.W.2 was the one who had leased the land and was planting food crops. He denied that the Plaintiff was not living on the suit land.

Under cross-examination he explained that the Plaintiff is the one who had leased the land for his sister Rahab.

John Njogu Kariu (D.W.4) testified that on a day in 1984 he found the Plaintiff and his sister at the home of Nimrod (i.e. D.W.2). He learnt from D.W.2 that the two wanted to lease the Defendant's land.

Both counsel for the Plaintiff and the Defendant each filed written submissions urging the court to find in favour of his client, counsel for the Plaintiff relying on the case of **Githu v/s Ndeete [1984] KLR 776**.

On the 12th November 1992, the parties agreed on the issues to be determined as follows:

1. ***When did the Plaintiff go into the suit land?***
2. ***Was there a lease in 1984?***
3. ***If so for how many acres?***
4. ***Did the Plaintiff buy land from the defendant? If so how many acres?***
5. ***Has the Plaintiff built on the land?***

It is not disputed that the suit land belonged to the Defendant's father but was registered in the name of the Defendant in 1960. Although the Plaintiff claimed that his father had bought a portion of the land and gone into possession there was no evidence to support this. To the contrary the Plaintiff contradicted himself when he testified that he is the one who bought the land from the father of the Defendant. According to the evidence of both P.W.1 & P.W.2 the purchase price was paid in 1984. So the sale if any took place in 1984 and not 1960 as claimed.

I find that the negotiations made in 1984 whether for a lease or purchase of the suit land was a clear recognition of the Defendant's title to the suit land as at that date. The Plaintiff cannot therefore be said to have been in exclusive control of the suit land prior to 1984. Although D.W.2 talked of the land having been leased in 1954, it is evident that D.W.2 was totally confused as to the dates, may be due to his age. His evidence in this regard was not useful as he could not even explain how Defendant leased land to the Plaintiff in 1954 when it was apparent Defendant had not even been born by then.

I find that by 1984 a payment of 6,400/= was made to the Defendant. Although the Defendant maintains that this was for lease of the land the document he produced in evidence (D. Exh. 1) did not support his evidence. While there was a clear acknowledgement of receipt of money from the Plaintiff the documents does not reveal what the sum of Kshs.6,400/= was for, as compared to the Kshs.300/= which is clearly indicated to be in respect of lease of 3 acres of land for the short rains. Although it is not clear what the payment was for it is evident that the Plaintiff and his sister were in occupation of the land by this time. Their occupation was however still subject to the Defendant's control.

The Plaintiff's evidence that he bought the land for Kshs.6,400/= cannot hold as the oral agreement is not evidenced by any memorandum nor is there any evidence of any land control Board consent having been obtained. Any sale agreement was therefore void and unenforceable. I find that the Plaintiff did lease only 3 acres from the Defendant and that this was the authority upon which the Plaintiff put up a structure on the land.

The upshot of the above is that the Plaintiff has failed to prove that he has become entitled by adverse possession to proprietorship of 6 acres of land parcel Kiine/Sagana/52 or that the Defendant hold the suit land in trust for him. Accordingly I dismiss the Plaintiff's suit with costs to the Defendant.

Dated signed and delivered this 14th day of September 2005.

H. M. OKWENGU

JUDGE