



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL CASE NO.65 OF 1997**

**KABITA KIBOTHO.....PLAINTIFF**

**VERSUS**

**ELIAS NJAGI NJOKA.....1ST DEFENDANT**

**PHYLIS MICERE KUBUTA.....2ND DEFENDANT**

**J U D G M E N T**

This suit was commenced by way of an originating summons brought by Kabita Kibotho (hereinafter referred to as the Plaintiff) under order XXXVI rule 7 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act seeking orders as follows:-

*(a) That the ownership of land parcel Number NGARIAMA/NGIRIAMBURU/58 now vests in the Plaintiff by virtue of the fact that he has been in continuous and uninterrupted occupation of the whole said land parcel for a period of over twelve years by virtue of Section 13 and 38 of the Limitation of Actions Act.*

*(b) That the 2nd Defendant forthwith transfer the said land to the Plaintiff.*

*(c) That a perpetual injunction issues restraining the defendants, their personal representatives, successors and assigns from interfering with the Plaintiff's quiet enjoyment of the ownership and possession thereof.*

*(d) That costs of this application be provided for.*

The originating summons was supported by an affidavit in which the Plaintiff swore that although Land Parcel Number Ngariama/Ngiriambu/58 (hereinafter referred to as the suit land) was registered in the name of his elder brother Mbire Kibotho neither the Plaintiff's brother nor his family lived on the land but that it was the Plaintiff and his family who have been utilizing the land since the land was demarcated in 1958 and that He only came to learn that the suit land was registered in the names of Elias Ngugi Njoka and Phyllis Micere (hereinafter referred to as 1st and 2nd Defendants respectively) when they sent him a notice in May 1994 requesting him to vacate the land.

The Defendants on the other hand responded that the land was allocated to Mbire Kibotho in 1958, and that the Plaintiff has never lived on the suit land, but that it is Mbire Kibotho's wife Priscilla Kanini who was living on the land with the 2nd Defendant, and that upon the death of Mbire Kibotho, Priscilla Kanini succeeded to the land and subsequently transferred it to the Defendants but that in 1984 the Plaintiff and his family entered the suit land.

On 17th February 2000, directions were issued for the suit to be disposed off by way of *viva voce*

evidence. Two witnesses testified in proof of the Plaintiff's case. These were the Plaintiff and one Munene Muthio.

In his evidence the Plaintiff testified that Mbire Kibotho who died in 1983 was his elder brother. The suit land which is 11½ acres was allocated to Mbire Kibotho by his clan during the demarcation period. At the time of demarcation Mbire Kibotho was away. The Plaintiff is the one who paid the required fee of Ksh.60/= and caused the land to be registered in the name of Mbire Kibotho. Although the Plaintiff was allocated land parcel Ngariama/Merichi/23 by the clan, He settled on the suit land allocated to Mbire Kibotho and continued to live there. Mbire Kibotho came back when He was very old. The Plaintiff allowed him to stay on the Plaintiff's land Ngariama/Merichi/23. He married Priscilla Kanini Kubuta but divorced her seven years later. Priscilla Kanini Kubuta had a daughter born before the marriage. The marriage did not have any issues.

The Plaintiff maintained that Mbire Kibotho never lived on or cultivated the suit land and that He the Plaintiff was the one cultivating the land and living on the suit land. He was surprised to learn through a letter from the Defendants Advocate that the Defendants were now the registered proprietors of the suit land. He maintained that the Defendants were not living on the suit land but were only cultivating ¼ acre of the land and had sold portions of the land to other people except 8 acres which the Plaintiff was still in occupation of and was still using. The Plaintiff contended that He had lived on the suit land for over 12 years. He therefore urged the court to cancel the registration of the two Defendants and have the land registered in his favour.

Munene Muthio an 80 year old man of the Unjiru clan supported the Plaintiff's evidence that the clan allocated the suit land to Mbire Kibotho but that at the time of demarcation Mbire Kibotho was somewhere in Ndia and it is the Plaintiff who paid the required fee. He confirmed that Mbire Kibotho never settled on the land but it was the Plaintiff who was using the land and that when Mbire Kibotho came back He lived on the Plaintiff's land until He died and was buried there.

In support of the defence, the 2nd Defendant testified that the suit land was allocated to her father Mbire Kibotho by the clan and it was registered in his name in 1958, and that the Plaintiff was also allocated his own land by the clan. She testified that before her father died in 1983 they were all living together on the suit land.

She maintained that it was after her father's death that the Plaintiff moved into her father's land in 1984. Following her father's death her mother Priscilla Kanini Kubuta filed a Succession Cause at Kerugoya Law Court to succeed her father's land. She produced the letters of administration and confirmation of grant issued to her mother by the court.

Priscilla Kanini Kubuta was thereafter registered as the proprietor of the suit land in 1993. She subsequently transferred the land to her daughter (2nd Defendant) and her husband (1st Defendant). Priscilla Kanini Kubuta later died and was buried on the suit land.

The 1st Defendant reiterated the 2nd Defendant's evidence that the Plaintiff only entered the suit premises in 1984 after the death of Mbire Kibotho, and that Mbire Kibotho's wife Priscilla Kanini Kubuta inherited the suit land and transferred it to 1st and 2nd Defendants. The Defendants maintained that the Plaintiff had no rights to the land and was only trying to take the land because Mbire Kibotho did not have a son to inherit him.

I have carefully considered all the evidence adduced the submissions made by counsels and authorities cited. The following undisputed facts stand out:

*§ That the suit land was allocated to Mbire Kibotho by the Unjiru clan and he was registered as proprietor in 1958.*

*§ That the Plaintiff was also allocated land known as Ngariama/Merichi/23 which was registered in the name of the Plaintiff.*

*§ That Mbire Kibotho married Priscilla Kanini Kubuta.*

*§ That Mbire Kibotho died in 1983 and was buried on the Plaintiff's land Ngariama/Merichi/23.*

*§ That Priscilla Kanini Kubuta filed a Succession Cause in respect of Mbire Kibotho's estate and inherited the suit land which she transferred to 1 st and 2nd Defendants who are currently registered as proprietors.*

The facts which remain in dispute are as follows:

*§ Whether the Plaintiff has been in continuous occupation and possession of the suit land from 1958.*

*§ Whether Mbire – Kibotho was ever in possession of the suit land from 1958 to the time of his death.*

*§ Whether Mbire Kibotho divorced Priscilla Kanini Kubuta after 7 years.*

*§ Whether the Defendants are in possession and occupation of the suit premises.*

The following issues also arise for determination:

*§ Whether the Plaintiff has been in adverse possession of the suit premises for a period of over 12 years.*

*§ If so whether Mbire Kibotho's title to the suit land was extinguished by the Plaintiff's adverse possession .*

*§ The effect of the Succession Cause, registration of Priscilla Kanini Kubuta and the subsequent transfer to the Defendants.*

*§ Whether Plaintiff is entitled to the orders sought.*

It is not disputed that Mbire Kibotho was allocated the suit Land by the Unjiru clan and that He was registered as the proprietor of this land in 1958. The Plaintiff can therefore only successfully claim ownership of the suit land if He proves that He acquired the land through adverse possession. In the case of *Wambugu vs Njuguna* [1983] K.L.R. 172 the court of appeal held inter alia.

*“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it..... The limitation of Actions Act, on adverse possession, contemplates two concept dispossession and discontinuance. The proper way of assessing proof of adverse possession would then be whether or not the title holder had been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”*

Both Plaintiff and P. W. 2 Munene Muthio testified that Mbire Kibotho was not present at the time the land was allocated to him and that He never in fact settled on the land. Although the Defendants denied this no evidence was adduced to contradict this contention. Both Plaintiff and P. W. 2 were present during the demarcation. Their evidence on what transpired is a more credible account as against that of the second Defendant which is basically based on hearsay. The evidence of the Plaintiff and P. W. 2 that Mbire Kibotho did not establish any home on the suit land but lived on the Plaintiff's land is consistent with the burial of Mbire Kibotho on the suit land.

It is therefore evident that Mbire Kibotho was at no time in possession of the suit land. The issue of an adverse act or clear ouster as arose in the case of *Jandu vs Kirpal* [1975] EA 225 does not therefore arise

herein as it is apparent that the Plaintiff was the one in possession of the suit land having settled his second wife on the suit land and being the one cultivating the suit land. Moreover the Plaintiff could not have taken possession of the suit land with the consent of Mbire Kibotho as He was not around during the allocation and demarcation.

No evidence of any complaint made to the Police or provincial administration or evidence from any other independent source was adduced to prove the alleged forceful entry by the Plaintiff in 1984. I find that there was no such forceful entry but that the dispute over the suit land came to a head in 1984 after the death of Mbire Kibotho when 2nd Defendant and her mother tried to claim land.

Moreover, the 2nd Defendant did not prove that the name “*Kubuta* ” adopted by her mother and herself was an alias for Mbire Kibotho. This was consistent with the Plaintiff’s evidence that Mbire Kibotho and Priscilla Kanini separated at some stage hence the adoption of a different name by his wife.

I am satisfied and I do find that the Plaintiff was in open and continuous occupation of the suit land from 1958 and was therefore in possession for a period well over 12 years. I am satisfied that the Plaintiff’s possession was adverse to the rights of Mbire Kibotho who was never in possession.

I find that Mbire Kibotho’s title to the suit land was extinguished after 12 years and in accordance with the spirit. *in the case of Benjamin Kamau Murima and others vs Gladys Njeri C A Civil Appeal 213 of 1996*, Mbire Kibotho did not have any title in the suit land to confer to his estate or Beneficiaries. The purported succession to the suit land by Priscilla Kanini Kubuta was null and void. The subsequent transfer of the suit land to 1st and 2nd Defendants was of no legal effect and it matters not whether they are in possession of the suit land.

I find that the Plaintiff has proved his case against the Defendants. I do grant prayer (a) of the originating summonses and do further issue a vesting order vesting the suit land upon the Plaintiff. A perpetual injunction shall also issue as prayed in prayer (c) of the originating summonses.

I award costs of the suit to the Plaintiff. These shall be the orders of this court.

*Dated, signed and delivered this 27 th day of February 2004.*

**H. M. OKWENGU**

**JUDGE**