REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 1293 OF 1985

NJERI KURU ……………………..………………….. 1ST PLAINTIFF

BEATRICE WAITHERA …………………..………….. 2ND PLAINTIFF

WANJIKU KURU ………………………….………… 3RD PLAINTIFF

VERSUS

GITAU KURU ……………………………..………………. DEFENDANT

JUDGMENT

I INTRODUCTION

If the age old doctrine "justice delayed is justice denied" has any significance, it certainly has had enormous impact on the parties before this Court. For two whole decades, these unfortunate people have waited for the wheels of justice to grind slowly. I hope today they can finally breathe a sigh of relief that they have at least got a decision. I hope it is a decision that brings a sense of happiness and justice to all of them.

As the caption of the case shows, the suit was commenced way back in 1985. It relates to landed property originally known as Komothai/Gathugu/966 (hereinafter referred to as "the suit land"). As will be seen later, the matters leading to the action relate way back to the 1950s. For the past two decades, the parties who are members of the same family have waited for a decision on their dispute. During that period, a lot of water has passed under the bridge. Time has not healed their wounds. If anything, time has aggravated their positions. For this reason, I have found it extremely important that I should set out the historical background of the case before I endeavour to decide on the rights of the parties.

As I said earlier, this suit was commenced, to be particular, on 8th May, 1985. The Defendant entered appearance on 22nd May, 1985 and filed his initial Defence on 6th June, 1985. There were certain interlocutory applications and I will deal with those that are relevant to the decision of the case.

On 5th July, 1985 the Plaintiffs filed an application of even date in which they sought the following orders:

> ***"(a) THAT the defendant … be restrained from parting possession with or otherwise disposing of parcel of … (the suit land) until final determination of this suit***

(b) THAT the defendant be restra ined from evicting the Plaintiffs or otherwise from interfering with the Plaintiffs possession of eleven acres being part of … (the suit land) until the determination of the suit herein

(c) (Costs) ."

That application was allowed by my learned sister Justice Aluoch on 27th September, 1985. On 27th May, 1986, the Plaintiffs filed another application dated 26th May, 1986 under Certificate of Urgency in which they sought the following orders:

"1. THAT a temporary injunction order be granted restraining the Defendant … from subdividing, transferring or in any other way interfering and/or dealing with the (suit) land until hearing and final disposal of this suit

2. THAT the said order be served upon the Land Registrar, Kiambu District

3. (Costs)."

The record shows that on the same day that application was filed, the Plaintiffs Advocate appeared before C K Njai, Deputy Registrar (as he then was) and the court made the following order on that day:

> "Temporary injunction granted as prayed for fourteen days. Application to be served on the defendants/respondents (sic). Hearing on 9th June, 1986 at 8.45 am"

The application appeared to have been adjourned on about three occasions. On 17th June, 1998, which was one such occasion, the parties Counsel appeared before Justice Bosire when he was still a member of this court before his elevation to the Court of Appeal and it was ordered by consent that "temporary injunction to issue until 25th June, 1986 when Plaintiffs application is due for hearing inter partes". The parties' counsel duly appeared before Justice O'Connor on 25th June, 1986 when the court recorded the following order:

"stood over to 3rd July, 1986. Order extended until then."

On 27th June, 1986 the Plaintiffs filed another application of even date under Certificate of urgency. The Certificate of Urgency was dated 26th June, 1986. In this new application, the Plaintiffs sought the following orders:

"1. THAT the Defendant … be ordered kept in p rison for a term not exceeding six months or such term as … (the court) deems fit for being in contempt of a court order

2. THAT the Defendant and the new Registered owners, and each one of them be restrained from any further dealing with the following titles or any one of them, that is to say KOMOTHAI/GATHUGU/1195, 119 6, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206 and 1207 (hereinafter referred to as "the sub -divisions")

3. THAT the … (court) be pleased to direct that the Registration of the said Titles be cancelled on the grounds that the same have been obtained and made fraudulently

4. (Costs)."

That application was supported by an Affidavit sworn by J M Njongoro Advocate for the Plaintiffs on 27th June, 1986. The substance of that affidavit is that the Defendant had sub-divided the suit property into several portions and which were registered in the names of third parties contrary to a court order. The third parties were in fact the sons and daughters of the Defendant. The court record shows that the Plaintiffs' Advocate appeared before Justice O'Connor exparte when the court made the following orders:

> <u>“Order</u> 1. Warrant of arrest to issue
>
> 2. Interim injunction granted as prayed in prayer 2 within fourteen (sic) pending hearing of this application inter partes on 9th July, 1986.
>
> 3. Land Registrar Kiambu … to appear at (sic) court on that date with the parent file
>
> 4. Orders extended till then.”

How was that application resolved? The parties’ Counsel appeared before Justice O’Connor on 21st July, 1986 and recorded the following orders by Consent:

> ***“1. Prayer 1 regarding committal to civil jail for con tempt be and is hereby abandoned***
>
> ***2. THAT the Defendant and the new registered owners and each one of them be and are hereby restrained from any further dealing with the following titles or any one of them, that is t o say … (the sub -divisions) which said Titles constitute … (the suit land) which is the subject matter of this suit until the final determination of this suit***
>
> ***3. THAT the sub -division of (the suit land) and the issuance of the above titles shall not affect th e merits of the case of the respective parties***
>
> ***4. THAT all the titles issued pursuant to the sub -division … be surrendered immediately to the custody and safe keeping of M/s Waruhiu & Muite Advocates who shall hold the same to the court’s order and/or until t he final disposal of this suit***
>
> ***5. THAT prayer 3 in respect of cancellation of the above titles be and is hereby abandoned.***
>
> ***6. (Costs).”***

That resolved, on 26th August, 1986 the Plaintiffs filed an application dated 15th August, 1986 in which they sought the leave of the court to amend their Plaint. Leave was granted by Justice Shields on 10th September, 1986.

The now obsolete Summons for Directions were dealt with on 12th May, 1987 with the parties having filed an Agreed version of Issues dated 7th March, 1987. The Agreed Issues were filed on 13th April, 1987.

Although other dates for hearing of the suit had been fixed earlier, the first opportunity for the trial to commence presented itself on 19th September, 1988 but alas, it was not to be. The matter could not proceed on that occasion as the court was informed that the 1st Plaintiff had since passed away. The case was adjourned sine die to allow the Plaintiffs’ Counsel time to obtain letters of administration for the estate of the deceased Plaintiff. In the event, no application for letters of administration appear to have been made and after a delay of about three years, another opportunity for trial presented itself on 6th May, 1991 when both parties were ready to proceed. Unfortunately, the trial could not take off on that date as Justice Mbito before whom the case was placed was seized of another matter which could not allow him to deal with this case. The Judge on that occasion adjourned the matter to 7th May, 1991.

On 7th May, 1991 the matter was placed before Justice Githinji when he was still a member of this court and before his elevation to the Court of Appeal. Unfortunately Justice Githinji was unable to accommodate the parties, for the same reason which faced Justice Mbito. The record of the court of that day shows that Mr Mohamed Ibrahim (as he then was before becoming a member of this court) indicated to the court that his client was then 70 years old and was almost senile (if not senile – whatever). He said that he was considering applying for his client to be represented in the suit by a Guardian ad litem and beseeched the court to be given hearing dates for the suit on priority. The Judge graciously allowed the parties to be allocated a hearing date at the Registry on priority basis.

A new hearing date was fixed for 26th June, 1991 and it appears that the parties were rearing to proceed on that date but again Justice Mbito who was seized of the matter was unable to start the trial as he was in a “two-Judge” matter. He adjourned the matter to 27th June, 1991.

The suit was placed before Justice Abdulhussein on 27th June, 1991. On that date the parties had the following order recorded by consent:

> ***“Amended Plaint dated 15 th August, 1986 and filed on 26 th August, 1986 be deemed to be the P laint before the Court. Application dated 5th September, 1988 and filed on 7 th September, 1988 for further amendment of the Plaint be deemed to be withdrawn. First Plaintiff died on 21 st November, 1985 and therefore her cause of action abated.***
>
> ***Suit to pr oceed on the basis that the cause of action for the 2 nd and 3rd Plaintiffs survived. Defendant do have costs of having defended the suit by Deceased 1 st Plaintiff to be recovered from the estate of the deceased 1 st Plaintiff.”***

The case was on that day adjourned to 16th and 17th July, 1991 as time had expired.

The hearing scheduled for 16th and 17th July, 1991 was scuttled as the Plaintiffs’ Advocate was faced with an unforeseen predicament.

Finally, good grace came in October, 1991. After more than 6 years of waiting, the trial of the suit commenced on 1st October, 1991. On that day the Plaintiffs’ Counsel, in what appears as an opening address, informed Justice Mbito that the trial would proceed on the Amended Plaint filed on 26th August, 1986.

After the long delay, one would have expected the trial to proceed expeditiously. As fate would have it, the court was only able to hear the testimony of the first Plaintiff’s witness on the first 2 days of the trial. The case could not proceed on the third day as scheduled as the Judge’s hands were full on that day.

It was not an easy case to hear. The record of Justice Mbito shows that the testimonies of the witnesses were lengthy. It is not difficult to see that the Judge required great patience. At some point the traditional trial process had to be disturbed as the Defendant’s Counsel continued to express concern about his client’s health condition. (I mentioned earlier that the Counsel was concerned that his client was (or was almost) senile). So an application was made and Justice Mbito ordered the taking of the Defendant’s evidence de bene esse . It was a wise thing to do. The Defendant last testified in court on 28th July, 1992. On 29th December of that year, he died. That caused more delays as an application for his substitution with his legal representatives had to be made.

An application for substitution of the deceased Defendant with his legal representatives was filed by the Plaintiffs’ Advocates on 17th May, 1993 and it was not until 1st August, 1996 that the same was prosecuted and the court allowed the deceased Defendant to be substituted with Lucy Wanjiru Gitau, Ruth Wairimu Gitau and Waithera Gitau as defendants in his place.

The trial did not come to an end until 14th February, 2002. It took about 11 years, if one were not to consider the fact that it was then almost 2 decades since the action was filed! But before I conclude with the historical outline of the case, I cannot also fail to mention two other important causes of the delay. It appears that when the trial was nearing conclusion at the end of the last decade, Justice Mbito was transferred to another station. The parties attended the Registry on numerous occasions to fix the case for hearing and at times even had the matter placed before the Honourable the Chief Justice but they had little luck. The parties waited until Justice Mbito returned to this station but that was not easy either. When that Judge had returned to this station, the record shows that he was assigned to the Criminal Division. However, the Honourable the Chief Justice was extremely concerned with the unfortunate situation of the parties and directed that Justice Mbito conclude the trial. Placing the matter before another Judge would have prejudiced the parties further.

The final cause of the delay was rather unfortunate. At the point things had reached, the court had grave concerns about delays in this case. So when an opportunity presented itself, it is quite evident that Justice Mbito was anxious to conclude the matter. One can only see from the record that he gave this case unquestionable priority. He allowed the parties to take most of the time available to the court until the trial was concluded, as I said earlier, on 14th February, 2002. At the conclusion of the trial, the matter was adjourned as the Counsel for the parties requested to be allowed time to prepare written submissions. The Plaintiffs' submissions were filed on 28th May, 2002. It was not until 28th August, 2002 that the Defendant put in his submissions. Thereafter, the Counsel for the contending parties sought to amplify their written submissions by oral representations. This was done on 19th September, 2002. Justice Mbito then reserved to deliver his Judgment on 15th November, 2002. There is no record of what happened on 15th November, 2002 but I can only say that Justice Mbito was suspended from exercising judicial functions before he delivered Judgment in this case. He later resigned from his office as a Judge. And the parties were once again left in confusion. So the parties groped for a way forward and it was agreed that Judgment be written by another Judge based on the typed proceedings. **In the event, the Duty Judge directed that the matter be placed before me to write the Judgment. Counsel for the parties appeared before me on 28th June, 2004** and I scheduled to deliver the Judgment on 22nd July, 2004. Unfortunately and unknown to me at the earlier date, I noticed, when I began reading this voluminous file with a view to drafting the Judgment, that the authorities referred to in the submissions filed on behalf of the parties were not on the court file. So, on 22nd July, 2004, I directed the Counsels to submit the authorities. The position was not regularized until 14th September, 2004 and I scheduled to deliver the Judgment on 7th October, 2004. I must have been a little ambitious. From the matters I have attempted to set out above, I was forced to carefully go through the record of the court and to fully understand the course of the proceedings. This consumed considerable time but I hope it was not in vain. I, like the Honourable the Chief Justice and Justice Mbito, was very concerned that the parties have had to wait this long. One cannot imagine what anxiety has attended them during that period. The parties have not been able to settle their affairs since then and it is obvious that they have been put to great expense. I feel sorry that they have had to contend with the unfortunate circumstances and in that spirit I shall endeavour to do my best and hope that justice will result to them from this decision.

II THE CASE

(a) THE PLAINTIFFS' CASE

It has already been seen that it was agreed that the Plaintiffs' case would proceed on the basis of the Amended Plaint filed on 26th August, 1986. I shall hereinafter refer to it as "the Plaint". Although the Plaint bears the date of 15th August, 1986, the leave allowing its amendment was granted on 10th September, 1986. In the Plaint, the Plaintiffs sought Judgment against the Defendant as follows;

> ***"(a) A declaration that he holds part of … (the suit land) measuring 11 acres in trust for the Plaintiffs***
>
> ***(b) An order directing that the Defendant do transfer to the Plaintiffs the said 11 acres***
>
> ***(c) That in the alternative, this c ourt be pleased to declare that the Plaintiffs are entitled to 11 acres of the land by way of prescription and/or adverse possession***
>
> ***(d) (Costs)."***

What was the basis of their claim? To answer this, I cannot do better than narrate the important paragraphs laying that down. This may be found in paragraphs 4, 5, 6 and 7 of the Plaint. These read as follows:

> "4. At the time of the deceased's (the father of all the parties) death he gave to his daughters, the Plaintiffs herein, a parcel of land measuring eleven acres in Komothai/Gathugu
>
> 5. The Defendant was directed to hold the said eleven acres of land in trust for the deceased's

daughters irrespective of being married or not as the Plaintiffs herein

6. Pursuant to paragraph 5 above the said eleven acres were joined together with the Defendant's inheritance and registered in the Defendant's name as … (the suit land) measuring approximately … 41 acres

7. Since 1958 the Plaintiffs have been in possession of the part parcel of land measuring 11 acres which they have developed without interruption from the Defendant until sometimes in March, 1985."

The Plaint goes further to say that the Defendant had ejected the Plaintiffs from the portion of the suit land which they claim in this suit.

(b) THE DEFENCE

In his statement of Defence dated 5th June, 1985, the Defendant denied the whole of the Plaintiffs' claim. He denied that the parties' Deceased father ever gave the Plaintiffs a parcel of land as claimed in paragraph 4 of the Plaint. In response to paragraph 5 of the Plaint the Defendant averred as follows:

"(a) the registered title of the … (suit land) is not subject to any trust (whether express or implied) in favour of the Plaintiffs or at all

(b) there is no jurisdiction to imply any trust in favour of the Plaintiffs in the absence of absolute necessity or compelling reasons c learly indicating any intentions of the parties to create a trust

(c) the defendant is the first registered owner of … (the suit land) and his title to the said land parcel is indefeasible and cannot be altered or rectified.

Those were the main defences.

III THE ISSUES FOR TRIAL

In my outline of the historical background of the case, I mentioned that the parties had agreed on the issues for trial. These were as follows:

"1. Did Ichangai Kuru (now deceased and father of the Plaintiffs and the Defendant) give the Plaintiffs, being his daughters eleven acres being part of … (the suit land) as alleged in paragraph 4 of the Plaint and did the Defendant have any knowledge of such giving?

2. Was the Defendant directed by Ichangai Kuru (now deceased) to hold the said eleven acres in trust for the Plaintiffs whether they were married or not as alleged in paragraph 5 of the Plaint?

3. Is it true that the said eleven acres were joined together with the Defendant's inheritance and registered in the Defendant's name as … (the suit land) measuring approximately 41 acres and was the Defendant directed to hold in trust for the Plaintiffs?

4. Is it true that the Plaintiffs have been in possession of the part of the land measuring 11 acres since 1958 and have they developed the same without interruption from the Defendant until sometime in March, 1985, as alleged in paragraph 7 of the Plaint?

5. Is the Defendant the first registered owner of … (the suit land)?

6. If the answer to paragraph 5 is in the affirmative, is the Defendant's title to the said land indefeasible and cannot be altered or rectified.

7. Are the Plaintiffs entitled to the reliefs they are seeking in their prayers?"

IV TESTIMONY

(a) ON BEHALF OF THE PLAINTIFFS

Four witnesses were called on behalf of the Plaintiffs.

The first Plaintiff witness (PW 1) was Beatrice Waithera Kuru. She is one of the Plaintiffs. I will summarize her testimony as follows. The parties' Deceased father had two wives. These were Wachuka Kuru and Wambui a.k.a Wangechi. Wachuka gave birth to seven children. They were all female. These included the Plaintiffs. Wambui, on the other hand, had only two children. They were both male. These were the Defendant and another called Njoroge Kuru (Njoroge). As will be seen shortly, Njoroge was the second witness who was called on behalf of the Plaintiffs. The parties' father died in 1958. The Deceased had 65 acres of land which he subdivided before his death. His children were present during the sub-division. On that occasion, the father told his children that he intended to give Njoroge, who was the eldest of his children, 27 acres and the Defendant 25 acres. Wachuka's house was to get 11 acres. This was agreed. Some of Wachuka's children particularly the Plaintiffs (including the one who is now Deceased) continued utilizing the portion given to Wachuka's house until they were thrown out by the Defendant in 1985. At the time of the meeting, she was about 15 to 16 years old and Wanjiru (the 3rd Plaintiff) who was the youngest of them all was about 9 years old.

On cross-examination, she said that under Kikuyu Customary Law Njoroge ought to have been the head but this could also depend on the father. In this case, the Defendant was chosen to be the head of the family as he was a Chief. She said that she was claiming the land not for herself alone but on behalf of her mother's house in general.

The second Plaintiff witness as mentioned earlier was Njoroge (PW 2). His outline of the family history was the same as that of PW 1. In his testimony, he said that their father distributed his land to all his children before he died and that the female children were given 11 acres. He reiterated that all the children of the family of the Deceased Patriach including the female children were present at the meeting at which the Deceased Patriach divided the land to his children. He said his step-sisters were entitled to the land given to them by their father whether or not they were married.

The other Plaintiff witnesses were Wanjiru Kuru (PW 3) who is also the other surviving Plaintiff and Naomi Gathoni (PW 4). They are both daughters of Wachuka. Their testimony was similar to that of PW 1.

(b) ON BEHALF OF THE DEFENDANT

The Defence called five witnesses.

The first defence witness was the original Defendant himself before he died. I have already mentioned that his evidence was taken **de bene esse** . He said the suit land measured about 40 acres, and that he inherited 6 acres from his father and bought the rest. He confirmed that the Deceased Patriach had distributed his land before his death.

The second defence witness was Wairi Kuma (PW 2). He was an Assistant Chief, a position which had previously been held by the Deceased Defendant. He knew little about the land issues involving the parties but said he knew that the daughters of Wachuka were married.

DW 3 was Kiarie Njoroge. He is a nephew of the parties. His father was called Njoroge Kiarie who was a cousin of the parties. DW 3 assisted the surveyor in the demarcation of the land of the greater Ichangai family which included his own father. According to him, the Ichangai family had 55 acres of land. That land was distributed among the family as follows:

(a) Deceased Defendant – 11 acres

(b) Njoroge – 11 acres

(c) Njoroge Kiarie (the cousin) – 11 acres

(d) Kamau Kiarie (also a cousin of the parties and a brother of Njoroge Kiarie) – 11 acres

(e) The Deceased Patriach – 11 acres

DW 3 went on to say that the Deceased Patriach's land was divided between his sons. The Deceased Defendant was given 6 acres of that land while his brother was given 5 acres of the same so that the Deceased Defendant ended up inheriting 17 acres and Njoroge 16 acres. In his testimony, no land was left to the female children of the Deceased Patriach. Those children were left under the guardianship of the Deceased Defendant upon their parent's death (apparently their mother died before their father). DW 3 said that the Deceased Defendant bought extra land from his own resources and registered the whole piece in his own name. He was not aware that the Deceased Patriach directed the Deceased Defendant to hold any land on behalf of his (the Deceased Patriach's) daughters. After the death of the Deceased Patriach, the female children continued to till the land which their father used to cultivate and this was one acre and not 11 acres.

DW 4, the fourth defence witness was Kamau Kinguuri. His testimony was similar to that of DW 3.

The final defence witness was Leah Wathira (DW 5). She is the wife of the Deceased Defendant. Her testimony on the distribution of the family land was similar to that of DW 3 and DW 4. She also testified on the marital status of the female children of the Deceased Patriach.

That, in brief, is a summary of the testimonies of the witnesses called on behalf of the contending parties. Other aspects of the testimonies will be considered below as necessary.

V THE LAW

(a) STATUTORY

(I) PROPRIETORSHIP OF LAND

The suit land is a property registered under the Registered Land Act (Cap 300). The Deceased Defendant was its registered proprietor. Section 28 of that Act provides as follows:

> **"The rights of a proprietor, whether acquired on a first registration**
>
> **or whether acquired subsequently for valuable consideratio n or by**
>
> **an order of court, shall not be liable to be defeated except as provided**
>
> **in this Act, and shall be held by the proprietor, together with all privileges**
>
> **and appurtenances belonging thereto, free from all other interests whatsoever, but subje**ct –
>
> > ***(a) to leases, charges and other encumbrances and to conditions and restrictions, if any, shown in the register; and***
> >
> > ***(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as effect the same and are declared by Section 30 not to require noting on the register:***
> >
> > > ***Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee."***

What are the liabilities, rights and interests referred to in Section 30 of the Act? These are what have been described as overriding interests. The overriding interests relevant to the decision of this case refer to those described in Section 30 (f) of the Act. They are as follows:

> "rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription."

(II) DEFEAT OF PROPRIETOR'S TITLE

Section 17 of the Limitation of Actions Act (Cap 22) provides for situations in which a registered proprietor's title to land may be extinguished and states that at the expiration of the period prescribed by that Act for a person to bring an action to recover, the title of that person to the land is extinguished. Once that happens and another claims title by adverse possession, the person who claims to have been entitled by adverse possession to registered land may apply to this court for an order that he be registered as proprietor of the land in the place of the person then registered as proprietor of the land.

(b) CASE LAW

(I) ON REGISTERED PROPRIETORSHIP OF LAND AND

TRUSTS TO SUCH LANDS

It is now well recognized in this jurisdiction beyond peradventure (and this has expressly been provided for by Parliament in the proviso to Section 28 of Cap 300) that there is nothing in that Act which precludes the inference of a trust in respect of a registered title to land. Such trust, although not exactly an overriding interest as defined by Section 30 of that Act, need not be registered. This position was put clearly by Justice Madan when he was a member of this court before his elevation to the Court of Appeal and subsequently to become the Chief Justice in the case of **Gatimu Kinguru vs Muya Gathangi (1976) KLR 253** . In considering the provisions of Sections 28 and 126 (1) of Cap 300, Justice Madan was of the view that it is not imperative that all trusts be registered to be recognized.

(II) ADVERSE POSSESSION

For one to found a claim on adverse possession, he must show that he has had possession of the suit property which act of possession is inconsistent with the title of the true owner for a period of more than 12 years. This matter was given important consideration in the case of ***Sisto Wambungu vs Kairu Njuguna Civil Appeal No 10 of 1982*** particularly by Chesoni, Ag J A (as he then was). The learned Judge quoted with approval the following passage in MEGARRY'S MANUAL OF THE LAWS OF REAL PROPERTY (5th Edition) at page 490 which defines what constitutes adverse possession:

> ***"Before 1833 the word "adverse" was used in a highly technical***
>
> ***sense: but today it merely means that there must be possession***
>
> ***inconsistent with the title of the true owner and not, for example,***
>
> ***possession by a trustee on his behalf. Time does not begin to run***
>
> ***merely because the owner abandons possession, for until some ot***
>
> ***her person has taken possession of the land there is nobody against***
>
> ***whom the owner is failing to assert his rights. If the owner has little***
>
> ***present use for the land, much may be done on it by others without***

demonstrating a possession inconsistent with th e owner's title …"

The courts of common law have developed a fine test on the aspect of possession. For a person claiming to have acquired another's land by adverse possession, he must show that the title owner has been dispossessed or has discontinued his possession of the land in question. The fact that one has been in possession for the statutory period is not always adequate to determine the matter (See **Leigh vs Jack** 5 Exhibit D 264 at 272 cited by Chesoni, Ag J A in ***Sisto Wambugu supra***). This was put as follows by ***Lindley, MR in Littledale vs Liverpool College*** **(1900) I CL 19** at page 21:

"In order to acquire by the statute of Limitations a title to land

which has a known owner, that owner must have lost his right to

the land either by being disposses sed of it or having discontinued his possession."

(Also quoted with approval by Chesoni, Ag J A in Sisto Wambugu).

The position is such that where a party enters the land of the true owner either based on some legal right or with the permission of the owner, he cannot claim to have acquired the Property by adverse possession unless he can show that the full statutory period has run after the right to entry or permission was negatived ***(See Jandu vs Kipral (1975) E A 225***). What then constitutes dispossession? This was dealt with succinctly by ORMEROD, L J as follows in **Halli's Cayton Bay Holiday** ***Camp Ltd vs Shell Mekland B P Ltd*** **(1975) Q B 94** at page 114:

"The next question, therefore, is what constitutes dispossession

of the proprietor. Bramwell, L J in Leigh vs Jack said at page 273,

that to defeat a title by dispossessing the former owner 'acts must be

done which are inconsistent with his enjoyment of the soil for the purpose for which he intends to use it'."

VI FINDINGS

Having considered the case including the testimonies of the witnesses and the submissions of the Counsel and the law in general, I make the following findings.

The most important aspects of the case were not disputed. The Deceased Patriach had two wives. The first wife had two male children: the Deceased Defendant and Njoroge. The second wife had seven female children who included the two surviving Plaintiffs in this case. It is also common ground that the Deceased Patriach had some land which he sub-divided to his children before his death. This is where the dispute begins. There were conflicting versions as to the exact acreage of the Deceased Patriach's land and how he distributed it. The Plaintiffs say that the Deceased Patriach gave their mother's house 11 acres and that the 11 acres were registered in the name of the Deceased Defendant who was to hold it in trust for them. The Defendant's position is that the whole suit land belonged to him alone. It consisted of a little portion inherited from his father and the rest acquired from his own resources. Who between the Plaintiffs and the Defendant was likely to be telling the truth?

Njoroge who was the Deceased Defendant's own brother said that the children of Wachuka who included the Plaintiffs were given 11 acres of land. There were suggestions that he was biased but that is not clearly borne out. He had been given land far away and it is not conceivable that the Plaintiffs would have made a similar claim against him. Although he was the eldest, he received less acreage and there is a presumption that his younger brother must have been given more for some purpose, which I think was to hold the extra land on behalf of Wachuka's house. Njoroge was also categorical that even if the Plaintiffs were married they were entitled to claim that land as it had been given to them by their father. The

suggestion advanced on behalf of the defence that married daughters could not lay a claim on land given by their father has, therefore, no place. **This Court will not make any distinction between a daughter who is married, and one who is not. Why should there be such a distinction, when none exists in respect of sons? A daughter is a daughter, whether married or no**t. In fact, there is evidence on record that when the Deceased Defendant subdivided the suit land, he gave some portions of it to his daughters. I do not think that the daughters claim to that land would be defeated upon their marriage. There was no evidence as suggested by the defence that Kikuyu Customary Law barred female children from acquiring property which had been given to them by their father in their own right. The general evidence is clear that the Deceased Patriach had set aside some land for Wachuka. The Deceased Defendant himself said that when Wachuka died the Deceased Patriach continued to live in the same house with his daughters. He suggested that the daughters were only occupying 1 or 2 acres and not 11 acres as claimed.

DW 5 who was the wife of the Deceased Defendant was clear that she and Wachuka used to cultivate parts of the suit land. On cross-examination, she conceded that the Wachuka girls were using more land than her as they were many.

From the general testimony, one cannot deny that the children of Wachuka who included the Plaintiffs must have been cultivating a portion of the suit land which had been given to them by their father. DW 2 did not have a historical background of the suit land and his testimony was not useful to controvert the Plaintiffs' version. In fact, he had a motive to take sides as his step brother was married to the daughter of the Deceased Defendant. DW 3 confirmed that the Wachuka family indeed cultivated a portion of the land.

The next question is what acreage was given to the Wachuka house.

As already seen, there were conflicting views on this. However, on a balance of probabilities, I am inclined to believe the Plaintiffs' version for the following reasons.

The defence witnesses were inconsistent in their testimonies on this subject. The Deceased Defendant said that he inherited only six acres of the suit land and bought the rest of the acreage totaling to about 40 acres. Unfortunately I do not think that he was candid on that point. On cross examination he gave conflicting statements. At first he said he bought the extra acreage adjoining his original six acres from different people. However, he did not name these people. He only gave the name of one person but that person was not called to testify in this case. Nothing would have been easier than to provide the evidence of purchase or call the persons who sold him the extra acreage to shed light on that matter. As none was called one can only presume that no extra land was acquired by the Deceased Defendant to make up the suit land.

DW 3 caused more confusion when he introduced new issues which were not useful to the case. He was unclear in his testimony possibly because of his advanced age (he was 82 years old when he testified). Nonetheless, he contradicted the Deceased Defendant when he said that the latter inherited 17 acres and not six acres of land from the Deceased Patriach.

On the final aspect of the first issue, it is quite obvious that the Deceased Defendant knew that the Deceased Patriach had given the 11 acres to the house of Wachuka. That is indeed why he let them occupy and utilize the same from the time of the death of the Deceased Patriach in 1958 until 1985.

Having set out my view of the facts as above, I will answer issues 1, 2, 3 and 4 in the affirmative. Issue number 5 was common and is also answered in the affirmative.

Issue No 6 is a legal matter and I propose to deal with it as follows.

Although Section 28 of Cap 300 gives a registered proprietor of land an indefeasible title, it has now been settled that nothing in that Act precludes the inference of the existence of a trust. That is what Parliament meant when it included the proviso to Section 28 of that Act. This position received Judicial consideration in the case of ***Gatimu Kinguru*** set out earlier. So, in this case the court is concerned with whether the

Plaintiffs are entitled to declarations of trust or adverse possession which would entitle them to be registered as proprietors of the portion to which their claim relate and not exactly to alteration or rectification of the register as contemplated by Section 143 of Cap 300. My view, therefore, is that although this matter was framed as an Agreed Issue for trial, it was wrongly framed as it is not relevant to the facts and circumstances of this case.

Finally, I think issue No 7 is superfluous and its determination will naturally follow the decision on the other issues.

VII CONCLUSION

My view is that the Plaintiffs have established their claim on a balance of probability to entitle them to Judgment.

The Plaintiffs claim as set out in their Plaint and presented in this Court was simple and straight forward. Their father, who was also the father of the Deceased Defendant had land on which they all lived. As the father had two wives, the two houses were given different portions to cultivate in order to sustain themselves. When the Plaintiffs' mother died, they continued to live on a portion of that land with the father. Before the father passed on he called a meeting of the family at which he sub-divided his land to his children. The Plaintiffs' house consisted of female children. The Deceased Defendant's house consisted of male children. The male children were given their share. The Deceased Defendant, though younger than his brother, was entrusted with land left for the Plaintiffs' house as he was the one near and who held a responsible position as an administrator in the government. It is not conceivable that the Deceased Patriach would leave his female daughters who were still young without a source of livelihood. So the Wachuka daughters who were unmarried were left with 11 acres given to them by their father. This gift could not, in my view, be extinguished only because those daughters later got married. They continued occupying that land following their father's death in 1958 until they were thrown out by the Deceased Defendant in 1985.

My view, therefore, is that the Plaintiffs are entitled to 11 acres of the suit land which was given to their house by their father and that the same were registered in the name of the Deceased Defendant to hold in trust for them. Consequently the same ought to be transferred to the Plaintiffs.

In the alternative, I am of the view that if no such gift was given to the Plaintiffs, they have been in occupation of a portion of 11 acres of the suit land since 1958 to 1985 which was inconsistent with the Deceased Defendants' title thereto and that such possession entitles them to the same by way of prescription and/or adverse possession. This is because their possession thereof was neither with the permission of the Deceased Defendant nor did he recognize their right to such possession.

VIII FINAL ORDERS

I, therefore, enter Judgment for the Plaintiffs against the Defendants in terms of paragraph (a) and (b) of their Amended Plaint dated 15th August, 1986 and filed in court on 26th August, 1986 or in the alternative I enter Judgment in their favour in terms of prayer (c) of the same Plaint and I also award them the costs of the suit.

In terms of the consent recorded by Counsel for the parties on 21st July, 1986 I order that the sub-divisions of the suit land the titles whereof are in the custody and safe keeping of Waruhiu & Muite Advocates (or the Defendant's Advocates as the case may be) shall be dealt with as if this decree were passed before the sub-division was effected.

Those shall be the orders of this court.

Dated and delivered at Nairobi this 22nd day of October, 2004.

ALNASHIR VISRAM

JUDGE