



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 571 of 1987**

**STEPHEN MWANGI NJOGO & OTHERS.....PLAINTIFFS**

**VERSUS**

**ELIUD KIRAGU NDEGWA..... DEFENDANT**

**JUDGMENT**

The plaintiffs who claim to have acquired land title . No loc. 19/ Gacharageini/ 49 by prescription/adverse possession filed this originating summons for the following reliefs:

1. A declaration that the defendant's right to recover land reference Number Loc. 19/Gacharageini/49 is barred under the Limitation of Act Cap 22 Section 7 and title extinguish on. the ground that since the year 1964, the plaintiffs have been openly, peacefully and as of right in occupation of the above mentioned land that is to say for a period of twelve (12) years preceding the presentation of this summons.
2. That there be an order that the plaintiffs be registered as the proprietors of the said land reference Number Loc. 19/Gacharageini/49 in equal shares in place of the defendant under section 38 of the Limitation of Actions Act cap 22 .
3. Costs of this suit be awarded to the plaintiffs.

The originating summons is supported by a short joint affidavit of the four plaintiffs who depose in paragraphs 3, 4 and 5 thus:

3. *The land reference Number Loc. 19/Gacharagweini/49 is registered in the name of the defendant.*

4. *That in the month of February 1 964 we took*

*possession and planted coffee on the above mentioned piece of land and since the above date we have been peacefully and openly in occupation of the said land,*

5. *The defendant has never interfered with our possession of the said piece of land and/or the persons through whom, he claims have never interfered with our occupation.*

The defendant filed a replying affidavit on 23<sup>rd</sup> April, 1987. He deposes, inter alia, that he is the registered proprietor of the suit land and that his predecessor in title died in 1964 and was succeeded by his son Guthua Wangondu in Resident Magistrate's Muranga Succession Cause No. 139 of 1984.

A further affidavit sworn by Guthua Wangondu was filed on 7<sup>th</sup> November, 1987. He deposes among

other things that:

(i) He is the administrator of the estate of his late father Wangondu Gituku who died on 8<sup>th</sup> January, 1964.

(ii) He filed a petition for grant of letters of administration in Succession Cause No. 139 of 1984 of Muranga

Resident Magistrates Court on 21<sup>st</sup> June 1984; that no objection was raised; that the Grant was given on 14<sup>th</sup> November, 1985 and confirmed on 28<sup>th</sup> June, 1986.

(iii) First plaintiff Mwangi Njogo lodged a caution against the said land on 28<sup>th</sup> November, 1972 on the allegation that he had entered into an agreement of sale of the said land and that he had paid Shs. 4.250 to Macharia Wangondu. That he save possession of the suit land to the

defendant in or about 19<sup>th</sup> September, 1986 and after defendant had taken possession first plaintiff filed High Court Msc. Succession Cause No. 677 of 1986 for revocation of the Grant which application was later withdrawn by the plaintiff. Guthua Wangondu annexed several documents to his affidavit including the affidavit of first plaintiff sworn on 19<sup>th</sup> September, 1988 to support the application for revocation of the Grant in H.C.Misc Succession Cause No. 677/86. In that affidavit first plaintiff states, among other things that: -

(a) Wangondu Gituku died before 1963.

(b) In the year 1964 first plaintiffs father Njogo Kihara entered into a sale agreement in respect of suit land with the sons of the late Wangondu Gituku who died before land demarcation and registration.

(c) The sons of Wangondu Gituku one of them being Guthua Wangondu gave possession of the suit land to Njogo Kihara in 1964 and the sons of Njogo Kihara planted coffee and other crops on the land.

(d) Njogo Kihara died in 1982,

(e) The sons of deceased Wangondu Gituku and his brothers have never been in occupation of the land as they have stayed in. Rift Valley since land demarcation.

The copies of agreements of sale were annexed to that affidavit but they are not legible. This dispute had been referred to a panel of elders for arbitration and the proceedings and the Award were filed in Court on

25.5.93. The award was however set aside by consent on 30.4.95. In the proceedings before the elders Stephen Mwangi Njogo (first plaintiff) told the elders in part:

*"This shamba we are casing for was bought by our father from the children of Wangondu Gituku in 1964.*

*After our father died we decided to take over this shamba, the four of us (plaintiffs) and we each got his*

*share and we started cultivating it Wangondu's sons neither transferred this shamba to our father before his death or to us. In 1986 we were issued with a notice to vacate from, this shamba. This notice was from Eliud Kiragu Ndegwa the defendant I went to the Lands Office and filed a caution against this shamba but it was removed without our notice ."*

Defendant produced a copy of the Caution and accompanying Statutory Declaration of Mwangi Njogo - (first plaintiff) lodged in respect of the suit land on 21<sup>st</sup> November, 1972. He declared in support of the application to lodge a caution that:

*"1. Wangondu Gituku the registered owner of the land died on 8-1-64.*

2. *Macharia Wangonde the proposed heir of land parcel No. Loc. 19/Gucharageini/49 received a sum of Shs. 4250 being sale price of the land but refused to transfer the said land to me or refund my money.*

3. *Macharia now wants to sell the said land to someone else instead of transferring the land to me,"*

The first plaintiff died on 18th July, 1997. His wife Margaret Waithera Kihara was joined as a party in place of her deceased husband. But it is only the third plaintiff- Stanely Kagunda Njogo (PW1) who gave evidence in this suit. It is apparent from his evidence that he was not aware of most of the facts relating to this suit. He conceded that it is Stephen Mwangi Njogo (deceased first plaintiff) who was representing the family in this dispute and also the one who instructed the lawyer.

According to the abstract of title (Green Card) the land in dispute is 3.3 acres. It was registered in the name of Wangonde Gituku on 11.3.63. A caution lodged by Mwangi Njogo was registered on 24<sup>th</sup> November, 1972- On 30<sup>th</sup> December, 1985 Guthua Wangonde was registered as an administrator by transmission and on 18<sup>th</sup> August, 1988 Eliud Kiragu Ndegwa, defendant, was registered as proprietor upon the confirmation of the Grant. According to the evidence of Peter Wangonde Guthua (DW1) his father Guthua Wangonde had already transferred the land to the defendant before he died in 1994.

There is ample evidence that the said land has a common boundary with the original land title No. Loc. 19/ Gatherageini/ 662 measuring 4.29 H.A which was registered in the name of Njogo Kihara (father of plaintiffs) on 11<sup>th</sup> March, 1963. The abstract of title (Green Card) shows that upon the death of Njogo Kihara the four plaintiffs became the heirs of their father's land. the land was then sub-divided and distributed as follows:

Loc. 19/Gacharageini/1138- 2.6 acres - Stephen Mwangi Njogo.

Loc. 19/Gatharageini/ 1439- 2 acres -James Muriri Njogo.

Loc, 19/ Gatharageini/ 1441-4 acres Benson Thuo Njogu.

The search certificates show that Stanely Kagunda Njogo has two other parcels of land - Loc. 19/Gacharageini/414 measuring 3.56 hectares and Loc. 19/Gacharageini/252 measuring 1.7 hectares. Yet Stanley Kagunda Njogo at first told the court that he has no other land other than one plot which is 1/16 of an acre. Later he testified that he has another land which is 1 1/2 acres. He admitted that none of the plaintiffs lives in the land in dispute and that none of the plaintiff has built any structure in the land in dispute. According to him each plaintiff lives in his other land but cultivates the land in dispute. In his evidence in chief he said in part as follows:

*"Wangonde Gituku sold the land to my father Njogo Kihara. My father started using the land. My father gave us the land before he died. We were using the land together with my father, Later in 1984 we subdivided the land. The land was sub-divided among the four plaintiffs."*

Have the plaintiffs proved on a balance of probabilities that they have been in exclusive and uninterrupted adverse possession of the suit land for 12 years before the institution of this suit? Defendant advocate relies on the law as stated in the case of *Mugambi Gichembe v. Gunda Gichembe - Civil Appeal No. 90 of 2000 (unreported)* and in the case of *Harrison Ngige Kaara v. Gichohi Kaara & Another - Civil Appeal No. 79 of 2996 (unreported)*. In the Murugami Gichembe case (supra) the court said in part:

*"We must, however add that adverse possession of land or an interest in land really means a hostile possession which is expressly or implied by in denial of the title of the owner and in order to constitute adverse possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the owner. Indeed, the classical require parts of acquisition of title by adverse possession are that such possession in denial of true owner's title must be peaceful, open and continuous. It must be open and hostile enough to be capable of being known by the parties interested in the property, though it*

*is not necessary that there should be evidence of the adverse possession actually informing the real owner of the former's hostile action".*

Where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to the area and to time - see *Kimani Ruchine v. Swift Rutherford & Co. Ltd.* -

*[1980] KLR 10 at page 16 Paragraph G.*

According to paragraph 4 of the affidavit to support the Originating Summons, the plaintiffs have been in possession of the suit land since February 1964. However Stephen Mwangi Njogo (first plaintiff), deceased, has not been consistent on when and how possession of the suit land was acquired. According to his affidavit sworn on 19<sup>th</sup> September, 1986 to support the application for annulment of Grant in H.C. Misc. Succession Cause No, 677/86, Wangondu Gituku the original owner of the suit land died before land demarcation and Wangondu's son sold the said land to Njogo Kihara, the plaintiffs father. That affidavit further shows that the sons of Wangondu Gituku including Guthua Wangondu, gave plaintiffs father possession of the land. But in his statutory declaration made on 21<sup>st</sup> November, 1972 in support of the application for registration of a caution he claimed that it is Macharia Wangondu - son of Wangondu Gituku who received the purchase price but had refused to transfer the land. In his evidence before the elders, Stephen Mwangi Njogo claimed that it is their father who bought the suit land from the children of Wangondu Gituku in 1964 and that after their father died plaintiffs decided to take over the land, that each plaintiff got his share and that they all started cultivating the land.

Stanley Kagunda Njogo (PW1) gave similar evidence. According to him. it is Wangondu Gituku who sold and gave possession of the suit land to Njogo Kihara in 1964. The alleged sale is denied by the defendant. I will assume for the purposes of deciding the issue of adverse possession that what, both Stephen Mwangi Njogo and his brother Stanley Kagunda Njogo have said is correct. That being so, then the correct position is that the land was not sold to the plaintiffs and plaintiffs were never given possession of the suit land by either Wangondu Gituku or the sons of Wangondu Gituku. It was the plaintiffs' father Njogo Kihara who was asserting a right over the suit land as a purchaser all through until he died in 1982.

If the evidence of PW1 is to be believed it would, follow that the plaintiffs were also cultivating the land and exercising an independent claim, of right to the land from that of their father against the registered owner of the land. That is neither credible nor probable. In my view, if the plaintiffs were cultivating the suit land after their father had already been given possession they could have only used the land with the permission of their father. That finding is supported by the evidence of Stanley Kagunga Njogo who said among other tilings, that their father gave them land before he died and that later in 1984 plaintiff subdivided the land and each got his own portion. Stephen Mwangi Njogo gave similar evidence before the elders in the arbitration proceedings. He told the elders that it was after the death of their father that they (plaintiffs) decided to take over the land, that they shared it and that they then started cultivating the land.

From the foregoing, there is no credible evidence that plaintiffs were in possession of the suit land independently as adverse possessors before the death of their father in 1982- And if they- took possession of the land in 1982 as the evidence shows, then, they had not been in possession of the suit land for 12 years by 1986 when they were given notice to vacate and when they also filed these proceedings,

Secondly, there is no tangible and credible evidence of possession of the suit land by either Njogo Kihara or by the plaintiffs before Njogo Kihara died. Stanley Kagunda Njogo claimed that their father was given possession of the land by Wangondu Gituku in 1964 after purchase. That evidence is in consistent with the position of Stephen Mwangi Njogo who claimed in the aforesaid affidavit that his father was given possession of the land by sons of Wangondu Gituku. He also said in the statutory declaration that the land was purchased from Macharia Wangondu. The evidence about the purchase of land by Njogo Kihara is not consistent. There is no document or evidence to show that Njogo Kihara ever claimed to have bought the land or to have taken possession of the land before he died. If indeed, he had purchased the land or was in possession why didn't he take any action for 18 years to have the land conveyed to him or to file claim to the land by adverse possession The suit land is adjacent to the land of Njogo Kihara which has

now been inherited by the plaintiffs. If Njogo Kihara believed that he bought the land in dispute the suit land would have been an extension of his land and would have utilized it as part of his adjacent land. If this is so, why didn't Njogo Kihara leave any tell tale evidence that he was in possession of the suit land as of right for 18 years? He did not for instance fence the suit land, build any houses or other structures on the land or undertake any other major development in the land or settle any of his sons on the disputed land.

As regards the use of the land by the plaintiffs there is no evidence that any of them was using any identifiable specific portion with known acreage for a minimum of 12 years. Their claim is joint. Indeed, the evidence is that the land was sub-divided in 1984 and henceforth each occupied a specific portion.

If indeed Njogo Kihara had become entitled to the suit land by-adverse possession by 1982 when he died, Stephen Mwangi Njogo could have included it as part of the estate of his father in the succession cause he filed in respect of his father's estate. And there is no explanation why Stephen Mwangi Njogo who was a legal representative of Ms father's estate did not claim the suit land on behalf of the estate of his father and file this suit as a legal representative of Njogo Kihara, Mwangi Njogo filed a caution which was registered against the title on 24<sup>th</sup> November, 1972 claiming a purchaser's interest during the life time of his father. To support the application for a caution he declared by statutory Declaration that he had bought the land from Macharia Wangondu the heir of Wangondu Gituku. That claim is in consistent with the claim of adverse possession by the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs.

Lastly, there is evidence that the Wangondu Gituku the original registered proprietor died on 8<sup>th</sup> January, 1964 and that Wangondu Guthua was given the Letters of Administration to the estate of Wangondu Gituku on 14<sup>th</sup> November, 1985. The Abstract of title shows that Guthua Wangondu was registered as administrator of the estate of Wangondu Gituku on 30<sup>th</sup> December, 1985. The defendant was registered as proprietor of the suit land on 18<sup>th</sup> August, 1986 pursuant to the confirmed grant. It is noticeable from the foregoing that there is nobody who could have legally exercised any rights over the suit land or protect the land from 8<sup>th</sup> January, 1964 when Wangondu Gituku' died and 14<sup>th</sup> November, 1985 when Wangondu Guthua was appointed as the administrator of the estate. Did the period of limitation to recover the land run against the deceased during that period? That issue was neither raised nor argued and I will refrain from commenting on it.

More importantly, Wangondu Guthua, the Administrator of the estate of Wangondu Gituku has not been made a party to this originating summons. The defendant was given the suit land by the said Wangondu Guthua, The first relief sought in the originating summons is a declaration that defendants right to recover the suit land is barred under the limitations of Actions Act. By the time the originating summons was filed the defendant was already registered as the proprietor of the *land*. In my view, the declaration sought in prayer 1 of the originating summons can only be sought against Wangondu Guthua the administrator of the estate and not against the defendant. But as I have said above Wangondu Guthua was not made a party to the suit.

There is also the problem of jurisdiction of this court to grant, the reliefs sought. Guthua Wangondu was appointed as administrator of the estate and registered as proprietor of the suit land as an administrator through the order of the Senior Resident Magistrate Muranga in Succession Cause Wo. 139 of 1984. Similarly the defendant was registered as proprietor of the suit land through an order of the same court made on 28<sup>th</sup> July, 1988 as shown in the certificate of the Confirmation of the Grant annexed to the further affidavit of Guthua Wangondu, Stephen Mwangi Njogo filed High Court Misc. Succession Case No. 677 of 1986 on 23<sup>rd</sup> September, 1986 for revocation of the Grant. That application was subsequently withdrawn with the consequence that the orders of Muranga Court that Guthua Wangondu be registered proprietor as an administrator and that defendant be registered as absolute proprietor are still subsisting. If the Court were to grant the reliefs sought in this Originating Summons such orders of the court would be in conflict with the orders given by the Senior Resident Magistrate in the Succession Cause. In my view unless and until the orders of the Muranga Resident Magistrate's Court are set aside in appropriate proceedings, this court has no jurisdiction to grant the reliefs sought.

For the foregoing reasons, I dismiss the suit with costs to the defendant.

Dated and delivered at Nairobi this, 20th day of November, 2003,

*E.M, GITHUNJI*

JUDGE