



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO.1554 OF 1989**

MARGARET MAGIRI PLAINTIFF

VERSUS

**PUBLIC TRUSTEE THE
ESTATE**

**OF DANIEL WAINAINA
GACHOKA**

**.....
DEFENANT**

J U D G M E N T

In this case filed on 1989 the original Plaintiff who is Margaret Magiri Gachoka was represented by her son Kibe Mariba as her personal representative in her death, although it appears there were no formal letters of Representation granted to him.

The Amended Plaintiff which refers to the original Plaintiff (Magaret) avers that Margaret was the wife of Mbiri Gachoka who died in 1935. Her husband one of the seven sons, but he dies before his father Gachoka Kaguku. Margaret claims that on the death of her husband she was absorbed into the family of Daniel Wainaina Gachoka who is now deceased and is represented by the Public Trustee who is a party to this suit: The second Defendant in the suit is Stephan Kaguku Mariba and he now defendant the suit.

- (a) A declaration that Daniel Wainaina Gachoka (deceased) hold the suit premises namely Kiganjo/Kiganjo/110 in that for Margaret on her Children**
- (b) An order directing the Defendant to effect legal transfer of the suit proprietor**
- (c) Alternatively an order that the Plaintiff has obtained a title to half share in Kiganjo/Kiganjo/110 and the whole of plot 31 Kiganjo Market by adverse possession.**

The satisfied Plaintiff Kibe Mariba gave evidence on oath. It was his evidence that when his father died his mother became part of the family of Daniel Wainaina Gachoka and that his mother and he had lived on Kiganjo/Kiganjo/110 since 1937 and that he and others of his relatives states in occupation of part of this land since his mother dies on 1989.

With regard to plot 31 Kiganjo he stated he was in sole occupation of it for the last forty years.

I note that the evidence given by this witness tended to refer not only to himself but other of his relatives.

He for example referred to Daniel Wainaina Gachoka as his father. I accept however that in reference to a person close to him included himself. Thus it appeared that his brother John Njuguna is in possession of plot 31 Kiganjo.

The second Defendant who is the son of Daniel Gachoka cross-examined the Plaintiff on the basis that he was a tenant in Kiganjo/Kiganjo/110 and that 31 Kiganjo with regard to the latter property he desired paying rent and said he only paid rent to the land and for a Trade Licence in respect of his premises. With regard to the former property he desired paying rent and stated he occupied the property before Daniel Wainaina died.

The second Defendant gave evidence. He stated that Margaret was married to Kibe Mariba's father who was a full brother of his father Daniel both being children of the second wife of his grandfather Gachoka Kaguku. Margaret's husband died before his father and that there were then at the date of the death of the father six sons still living, all of who inherited land. Though not part of the suit premises save for his father who inherited that land.

It was his evidence that Margaret her three sons and two daughters entered the land by force in 1978 when the father died.

This referred to Kiganjo/Kiganjo/110.

With regard to plot 31 Kiganjo he stated the plot was given to his father by the county council of Kiganjo. This is contrary to the evidence of Kibe Mariba who said that plot belonged to their grandfather Mbiri Gachoka who had built a mud house on it.

The second Defendant produces a number of receipts in support of his contentions with regard to the plot, which stretch from 1958 to 1979. A number of cases between Margaret and the 2nd Defendant's father were referred to but as no proceedings were produced I do not find them relevant so far as this case is concerned save only to observe that a dispute over the land in question in this case has been going on for many years. Having heard the evidence I preferred the evidence of the Plaintiff as being credible.

I do not believe that Margaret and the other members of the family were tenants in respect of Kiganjo/Kiganjo/1000. I accept that on the death of Margaret's husband she was absorbed into the family of Daniel Wainaina Gachoka and that they all lived together as one family. When land demarcation took place in 1962 title to the land was given to Daniel Wainaina Gachoka. This however, did not mean that Margaret's family were dispossessed or become tenants on the land.

They continued to live there as part of communal family. However it is clear that the 2nd Defendant since his father's death had been opposed to the occupation by the Plaintiff of the land and as he said, in his view they took the land by force in 1978 after his father's father. I do not find any evidence of a tenancy as alleged in para.5 of the plaint but hold that the Plaintiff's occupation of the land has been adverse to the Defendant's title and therefore grant prayer © so far Kiganjo/Kiganjo/110 is concerned.

During the proceedings it was agreed at my suggestion by the parties that the Public Trustee should visit the land to determine who was in occupation. He has filed a report, which by consent the parties have accepted as being correct. This report dated 21st November, 2001 shows that both families are occupying the land but there are no fixed boundaries. In order to determine these boundaries on an equitable law I direct that the Land Dispute Tribunal in the area determine the boundaries under its power contained in section 31(a) of the Land Dispute Tribunal Act. In apportioning the land and determining the boundaries I direct that the two portions of land which could arise as a result of the division of the land be as near as possible equal in size. The matter is to be dealt with and a report from Tribunal to be submitted to this court within three months from to-day's date. The land is to have two titles registered under the Registered Land Act and I direct that the present title be surrendered and the new titles to be issued in the name of the Plaintiff and the 2nd Defendant.

With regard to plot 31 Kiganjo I am satisfied that this has been in the constant possession of the

Plaintiff and his family. I have not been provided with any document of title and suspect that at most there is only a letter of allotment if at all. I direct the parties to produce evidence of the title after which I will make further orders if necessary. I will heard argument in costs

Dated and delivered at Nairobi this 23rd day of January 2002

P.J. RANSLEY

COMMISSIONER OF ASSIZE