

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C CIVIL CASE NO.1258 OF 1996

MURUGAMI GICHEMBE PLAINTIFF

VERSUS

GUNDA GICHEMBE DEFENDANT

J U D G E M E N T

The Plaintiff came to this court by way of Originating Summons seeking orders that he is entitled to be registered as a proprietor of a portion of five eight (5/8) share the equivalent of five acres (5) out of a total of eight (8) acres now in his occupation being part of ALL THAT parcel of land known as **LR NO. KIGANJO/HANDEGE/943** in place of the defendant herein by virtue of the provisions of section 38 of the limitation of Actions Act (Chapter 22)

Briefly the facts of the Plaintiff case are as follows: Before the land consolidation at his area, he was the proprietor of three fragments of land whose acreage was ascertained by the Land Adjudication and consolidation team in 1958 as five acres while his brother **GUNDA GICHEMBE** the defendant herein was the proprietor of three acres. In 1958 the Plaintiff and the defendant agreed that the Plaintiff's 5 acres and the defendant's acres be combined and registered as one title in either of their names and they finally settled in the Defendant's name. The combination of the Plaintiff fragments together with the defendant's fragments became registered in the form of the present **LR NO. KIGANJO/HANDEGE/934**. The same year they unofficially subdivided the said land on the ground into two portions of 3 and 5 acres, each and the Plaintiff occupied 5 acres portion while the Defendant occupied 3 acres portion, which portions have well defined boundaries. In 1963 the Plaintiff planted tea on his 5 acres portion and he has cultivated the said portion peacefully and as of right since 1958. The said occupation is adverse to the Defendants title and interest in the said parcel. His efforts to have the said portion of 5 acres transferred to him have not born fruit.

While the Defendant's case is as follows: He is the registered proprietor of the suit land **LR NO. KIGANJO/HANDEGE/934** measuring 8 acres. His mother now deceased had 27 acres of land and the Plaintiff who was a senior member of land Adjudication and consolidation team in 1958 used his position and unlawfully influenced the said team to register him as the owner of 19 acres of the land.

The Plaintiff then registered the other portion of 8 acres in the name of **MURUGANI GUNDA** a non-existing person. At this time the defendant was in detention camp while the Plaintiff was a senior official assisting the Adjudication and Consolidation Committee. There is no explanation as to why the Plaintiff could cause 15 acres registered in his name and have his other 5 acres registered in the name of the defendant together with the defendant's own 3 acres which in total made 8 acres. Moreover the title as the defendant says was in a non-existing **MURUGANI GUMBA** .

The Plaintiff called 2 witness **P.W.2 MBOGO THUO** who said that he knew that the Plaintiff had purchased the 5 acres comprised in LR NO. KIGANJO/HANDEGE/934 from one Waithaka **P.W.3 DAVID GICHEMBE** who is a brother to the parties who said that each son had inherited 3 acres from his late father. Be it as it may, the suit herein is based on adverse possession. The law of adverse possession is clear. For the Plaintiff to succeed in his claim for adverse possession he has to prove that:-

(a) He took the suit land without permission.

(b) He has been in excessive possession of the land for none than 12 years without right, without force or fraud and that his possession is hostile to that of the defendant

Counsel for the defendant submits that the Plaintiff has not been in possession of the suit land. The land is in possession of the defendant who lives there with his family.

Since the Plaintiff says that they had agreed with the defendant that his registers his portion in the name of the defendant and he was using it with the consent of the defendant, then the doctrine of adverse possession does not arise.

He could have been registered as a trustee, Secondly the suit land **LR NO. KIGANJO/HANDEGE/934** was registered in the name of the defendant **GUNDA GICHEMBE** in 1994. This is the time the defendant got title to the suit land. There before the title was in the name of **MURUGANI GUNDA** which the defendant states in a name of a non-existing person. Even assuming that the suit land was registered in joint names of the Plaintiff and that of the defendant, the Plaintiff claim could not succeed as the time could not against his own title. If the suit land was registered in the names of a non –existing person the time for adverse possession against the defendant could start from the time the suit land was registered in his names thus **GUNDA GICHEMBE**.

For the reasons stated above the Plaintiff claim against the defendant for adverse possession fails and the suit is dismissed with costs.

Dated and Delivered at Nairobi this 23rd day of March, 2000

J.LA. OSIEMO

JUDGE