



Adverse possession

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO.2360 OF 1995**

**WANJIKU KINUTHIA & ANOTHER ..... PLAINTIFFS**

**VERSUS**

**STEPHEN KINOORO KAMAU & ANOTHER..... DEFENDANTS**

**JUDGMENT**

The relationship of the parties in this suit is as follows:-

Plaintiff No.1 and 2 are (the administrators of the estate of Kinuthia Kariuki deceased). They are also the 2nd and 3rd wives of the said Kinuthia Kariuki. The 1s wife is said to be deceased.

Kinuthia Kariuki is the brother to the 2nd defendant Mwaura Kariuki.

Stephen Kinooro Kamau is a purchaser to the original land reference Ndumberi/Tingaga/859 which was transferred a day after filing this suit to Stephen Kinooro Kamau defendant No.1. It is now Ndumberi/Tinganga/1940.

The plaintiffs filed this suit in their capacity as administrator. The evidence of the first plaintiff claim that there was a sales a agreement on the 15.4.64 between the deceased and the 2nd defendant. That this was for the sale of the land which was for Ksh.1,500/-. This is said to have been paid. That the deceased took possession of the said land and continued to cultivate the said land till his death. He had buried two of his grandson on the said land.

Upon the deceased death the 2nd defendant transferred the land to the 1st defendant. He had obtained a sale agreement after the transfer. The 1st defendant hold two titles to cater for a road reserve a and or easement. The titles are Ndumberi/Tinganga/1940 and Ndumberi/Tinganga/1941 respectively.

During the evidence of this case certain facts transpired that may have an effect on this case.

The first, is, that whilst the deceased claimed to have bought the land and took possession of it, he did not build or physically live on the land. He cultivated the land and grew various produce. Does this amount to possession?. I hold that as long as the person is in possession this means the use of the said land, that this amounts to possession despite there not being any building constructed thereon.

The defendant No.2 has since died. There has been no substitution of the said defendant. The suit abates as against him.

The other fact brought out is the 2nd plaintiff has been mentally retarded for almost twenty years. She is

a co-administrator. The suit as against her is not able to stand unless order 31 CPR was complied with - namely a guardian ad litem be appointed. Nonetheless the 1st plaintiff is also a co-administrator and came to give evidence in court.

The defence, defendant No.1 stated that he was a bonafide purchaser for value. He has obtained title.

The witness he called, DW2 is the nephew of the 2nd defendant. He is the son of the 1st wife (now deceased). He denied that the deceased was ever the owner of the said land. That in fact there was no sale agreement. No one was using the land. His father made him bury his minor son on the suit premises so that his uncle and 2nd defendant might be forced to sell the property to him and another brother.

I find in this case that there was some form of agreement between the deceased and the 2nd defendant being the sale of the land Ndumberi/Tinganga/859 on 15.4.64. No land control board was required during the said time. (The requirement was then in 1967).

That the deceased took possession by cultivating the said land. The witness DW2 implied workers were hired to cultivate on the land.

That no building was erected on the said land. The fact that cultivating by the deceased was done is said to be occupation and thereby possession.

The sale agreement became null and void after 3-4 months that it was entered into. The time that began to run for adverse possession was 1964 August or September. The 12 years therefore lapsed in 1976.

There is on record, the affidavit of the 2nd defendant who stated that his father had divided land between him and the deceased. That the deceased was given 2 acres and he was given 1 acre. It is this one acre that is the subject matter of this said suit.

From the evidence the 2nd defendant had buried his own son on the 2 acre belonging to the deceased.

The 2nd defendant has got land in Rift valley where he has resided all along. He has not been in occupation of the one acre.

I have before the case law by the defendants of:-

1) Gateri Keru Vs Mary Waruhiu Nene

Hccc 333/78 unreported

2) James Mwangi & Others Vs. Mukunge Enterprises Ltd.

Hccc 3912/86 - Unreported.

Both these cases are High court decisions. They deal with possession where the full 12 years had not been completed. The plaintiff submitted the case of:-

Peter Thuo Kariu Vs Kuria Gacheru

(1988) 2 KAR 111 CA

A court of appeal decision Nyarangi, Apaloo, Masime JJA

Which states that a title is extinguished after 12 years. It entitles one to be registered owner in place of the one who holds title.

I am satisfied in this case that the plaintiff and deceased had obtained title by way of adverse

possession. I hereby enter judgement accordingly as prayed in the originating summons being in the positive of the questions.

Dated this 19th day of October, 2000 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**