



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 416 OF 2014**

**(Formerly NYERI HCCC 78 of 2001)**

**NDUNGU KAMOCHÉ.....PLAINTIFF**

**-VERSUS-**

**MUTHONI GITHAE.....1<sup>ST</sup> DEFENDANT**

**MURIHIA GITHAE.....2<sup>ND</sup> DEFENDANT**

**THIONGO KINGORI GITHAE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By an Originating Summons dated 2<sup>nd</sup> April, 2001 as amended further on 4<sup>th</sup> October, 2007 Ndungu Kamoche (*hereinafter the Plaintiff*) prays for an order that he has acquired title to land parcel No. Mahiga/Kamoko/149 and urges the court to determine the following questions:

1. *Whether the piece of land commonly known as Mahiga/Kamoko/149 should be declared as belonging to the Plaintiff and whether the rights of the Defendants should be declared as extinguished;*
2. *Whether the Plaintiff has become entitled to the entire piece of land by virtue of the fact that he has been in possession of the same since 1965 under and by virtue of **Section 13 and 38 of the Limitation of Actions Act, Cap 22;***
3. *Whether the Defendants should be ordered to transfer the said land to the Plaintiff; and*
4. *Whether the Plaintiff is entitled to the costs of this suit.*

2. Those prayers arise from the Plaintiff's contention that he entered into the suit property which is registered in the names of the Defendant sometime in 1965 and that he has remained thereon in an uninterrupted and continuous occupation.

3. The Defendants are named in the undated Amended Originating Summons filed on 5<sup>th</sup> September, 2002 in the suit as Muthoni Githae (*1<sup>st</sup> Defendant*), Murihia Githae (*2<sup>nd</sup> Defendant*) and Thiongo Kingori Githae (*3<sup>rd</sup> Defendant*). In a Replying Affidavit sworn and filed on 24<sup>th</sup> March, 2003 by the 2<sup>nd</sup> Defendant on his own behalf and on behalf of the 3<sup>rd</sup> Defendant whom he describes as his brother, he avers that the Plaintiff did not purchase the suit property from the 1<sup>st</sup> Defendant as he purports.

4. The 2<sup>nd</sup> Defendant avers that the suit property was acquired by the 1<sup>st</sup> Defendant who was their mother before her death in the year 1958. The 2<sup>nd</sup> Defendant further states that in the year 1991, the Plaintiff had filed another suit which was dismissed against himself and his brother.

5. The 2<sup>nd</sup> Defendant states in addition that the Plaintiff has been cultivating the land with their knowledge and consent and he cannot therefore acquire the same by way of adverse possession.

**THE PLAINTIFF'S CASE**

6. At the trial herein the Plaintiff called 2 witnesses in support of his case.

7. PW1 – Ndungu Kamoche is the Plaintiff and a farmer in Othaya. He told the court the 1<sup>st</sup> Defendant sold him the suit property but he was not aware whether the 1<sup>st</sup> Defendant was alive or not. He testified that according to the records held at the lands Office, the suit property initially belonged to the 1<sup>st</sup> Defendant. He purchased the land from the 1<sup>st</sup> Defendant and her mother Murehia at a consideration of Kshs.2,500/- after independence. PW1 further told the court that the parties executed a Sale Agreement written in Kikuyu Language.

8. PW1 further told the court that upon purchase, he took possession and occupied the suit property but the Defendants refused to transfer the land to himself. As a result, he filed case No. 41 of 1978 against the Defendants. In their Defence, the Defendants had stated in the said case that they were willing to refund Kshs.1,500/- as part of the payment to enable them settle the matter out of court. That case has never been concluded.

9. PW1 further testified that following their refusal to transfer, he lodged a caution over the property. In 1979, the Registrar wrote to him asking him to remove the caution. PW1 refused. He told the court that once he took possession he built both a mud house and a tin house, PW1's children also built their houses and settled on the land with their families. They have since planted 1000 tea bushes and 800 coffee trees on the land.

10. PW1 told the court the 3<sup>rd</sup> Defendant is registered as the owner of the land and that the 3<sup>rd</sup> defendant has asked him to vacate therefrom. He told the court the 3<sup>rd</sup> Defendant got registered through a succession cause while this suit was still pending. The 3<sup>rd</sup> Defendant's mother was however still alive when the succession cause was filed.

11. On cross-examination, PW1 told the court he did not know the 1<sup>st</sup> Defendant's husband and/or that she had a co-wife. He further told the court he was not aware that the person he had sued as the 1<sup>st</sup> Defendant died in 1958.

12. PW1 further testified that he was unaware the sale agreement they executed did not mention the 1<sup>st</sup> Defendant's name. he was however aware that the 1<sup>st</sup> Defendant never signed the agreement even though he entered into the transaction with the 1<sup>st</sup> Defendant and one Murihia s/o Githae.

13. PW2 – David Macharia Ndirangu is a farmer in Othaya and a neighbor to the Plaintiff. He told the court he knew the Plaintiff in 1958. When they left the village, the Plaintiff remained behind. On his return, PW2 found that the Plaintiff had moved into the suit property which was vacant. While he did not know how the Plaintiff entered the land, the Plaintiff is the only occupant of the land which neighbours PW2's Plot No. 148. The Plaintiff has built a timber home and resides thereon with his family. He has also planted coffee and tea.

14. On cross-examination, PW2 testified that he moved to his parcel No. 148 in 1980 and learnt that the adjacent parcel No. 149 belonged to the 3<sup>rd</sup> Defendant's father but he saw the Plaintiff planting crops in the land since 1965.

#### **THE DEFENCE CASE**

15. In support of their case, the Defendants called three witnesses.

16. DW1 – Maina Mbuthia Joseph is a resident of Othaya. He told the court he knows both the Plaintiff and the Defendants. DW1 testified that during land consolidation in the area, the suit property was occupied by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were brothers. Their mother – Muthoni Githae (*the 1<sup>st</sup> Defendant*) had passed on in 1958. The 2 brothers built a wooden house with an iron roof on the land. DW1 whose home was a kilometer away used to visit the brothers who planted maize and beans on their land.

17. DW1 told the court he was unaware when the Plaintiff entered the land but the 2<sup>nd</sup> Defendant had told him they leased the land to the Plaintiff at Kshs.2,500/-.

18. DW2 – Thiongo King'ori is the 3<sup>rd</sup> Defendant herein. He told the court the Plaintiff leased the Property from his brother Murihia Githae. DW2 gave his brother permission to do so. He told the court that initially, the property was registered in his mother's name because his father was fighting in the forest during the *Mau Mau rebellion*.

19. DW2 Further told the court that they have had a long standing dispute with the Plaintiff. The Plaintiff was charged and jailed at the Karatina Law Courts for assaulting DW2. Later DW2 filed a case seeking general damages for assault and the Plaintiff was ordered to pay DW2 Kshs.100,000/-. The Plaintiff has never paid money to-date.

20. On cross-examination, DW2 told the court his father died while fighting in the forest while his mother who is sued as the 1<sup>st</sup> Defendant passed away in 1958. He however admitted he had no Death Certificate to corroborate the fact.

21. DW2 testified that the Plaintiff entered the suit land with his permission. He (*DW2*) built the house erected on the land and planted tea bushes thereon. He was unaware that the Plaintiff had put up any buildings on the land and or that his brother was paid any money by the Plaintiff towards the purchase of the land.

22. DW3 – Harrison Waithaka Waithima is a resident of Othaya. DW3 told the court he knows both the Plaintiff and the Defendants. DW3 further told the court he knew the suit land and that he started visiting the Defendants who were living thereon in 1953. The Defendants started building on the land as far back as 1961.

23. DW3 further testified that the dispute between the brothers and the Plaintiff has been on-going for long. At some point, they had a meeting with the elders who asked the Plaintiff to leave the land but he refused.

24. On cross-examination DW 3 told the court he was about 9 years in the year 1953 and was in class 2. He knew the Defendants' father at the time. The land in the area was consolidated in 1958 by which time the Defendants' father was dead. After the consolidation the 3 sons moved away from the land to look for greener pastures. They left the land in the hands of their cousin.

25. DW3 told the court that the Plaintiff first occupied the land as a tenant who had leased the land for Kshs.2,500/-. DW3 was however not present when the money first exchanged hands.

### **ANALYSIS AND DETERMINATION**

26. I have carefully perused and considered the pleadings filed by the parties herein, the testimonies of the witnesses as well as the evidence adduced at the trial herein. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

27. The Plaintiff – Ndungu Kamoche initially instituted this suit vide an Originating Summons dated 2<sup>nd</sup> April, 2001 against one Muthoni Githae as the sole Defendant. Subsequently by a Chamber Summons application dated 26<sup>th</sup> July, 2002, the Plaintiff sought orders as follows:

*1. That the Honourable court be pleased to allow the Plaintiff (to) amend his Originating Summons dated 2<sup>nd</sup> April, 2002 and the draft amended Originating Summons be deemed to have been filed upon payment of the requisite fees; and*

*2. That the Honourable court be pleased to make Thiongo Kingori and Murihia Githae defendants herein.*

28. The said application was based on the grounds *inter alia* that:

*(i) The said Thiong'o Kingori had already obtained by fraud title to the suit land purporting to succeed Muthoni Githae, the defendant who was very much alive;*

*(ii) The Plaintiff entered into an agreement for the sale of land in question and that the said Murihia Githae, a son of the Defendant featured very prominently in the deal.*

29. Subsequently on 23<sup>rd</sup> August, 2002, the Plaintiff's counsel appeared before the Honourable Deputy Registrar of this court *ex-parte* and on the basis that the application was not opposed, the same was allowed. The Originating Summons would again be amended on 27<sup>th</sup> June, 2007 to correct a reference therein to **Order XXVI of the Civil Procedure Rule** instead of **Order XXXVI of the Rules** upon which the Plaintiff sought to invoke the jurisdiction of the court.

30. As it turned out at the trial herein, it was apparent that the said Muthoni Githae initially sued as the sole Defendant had died long before this suit was filed. From the material placed before the court, it was also apparent that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein were the sons of one Githae Mugweru who died in the *Mau Mau* liberation war in the 1950s.

31. Before his death, the said Githae Mugweru is said to have married two wives, namely, Muthoni Githae named as (*the 1<sup>st</sup> Defendant*) and one Elizabeth Gathoni Mwangi. It is the first wife, Muthoni Githae who gave birth to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It was not in dispute from either side of the divide that during land consolidation in the concerned area and given the fact that her husband was already dead, the said Muthoni Githae was registered as the proprietor of the suit property. That much is clear from a copy of the Green Card produced by the Plaintiff as Exhibit 2 which reveals that the said Muthoni Githae was first registered as the proprietor of the land on 2<sup>nd</sup> December, 1957.

32. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, their mother subsequently passed away the following year in 1958. While the Plaintiff vehemently disputed this fact, there was nothing he placed before the court to demonstrate that the said Muthoni Githae was alive as at 2<sup>nd</sup> April, 2001 when he instituted these proceedings.

33. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have produced a letter dated 3<sup>rd</sup> August, 1998 from the Gaturuturu Sub-location Area Assistant Chief indicating that the said Muthoni Githae passed away on 6<sup>th</sup> June, 1958. On the strength of the said letter, the 3<sup>rd</sup> Defendant did file Nyeri High Court Succession Cause No. 9 of 2000 seeking a grant of representation for the estate of his mother. The 3<sup>rd</sup> Defendant was on 19<sup>th</sup> April, 2002 issued with a Certificate of Confirmation of Grant for the estate of the said Muthoni Githae which Grant remains unchallenged to date.

34. The certificate of confirmation of Grant lists the suit property as the sole property and the same is to be registered absolutely in the name of the 3<sup>rd</sup> Defendant. It is evident that upon receipt of the Grant the 3<sup>rd</sup> Defendant proceeded to the Land Registry to have himself registered as the sole proprietor thereof. On 10<sup>th</sup> May 2002, the 3<sup>rd</sup> Defendant was issued with a title for the property measuring approximately 1.01 Ha.

35. As it were, a suit brought against a dead person is a nullity from its inception. The suit being a nullity, the writ of summons issued

in the suit by whomsoever accepted it is also a nullity. Similarly, an order made in the suit allowing the amendment of the originating summons by enjoining the legal representatives of the deceased as Co-Defendants and allowing the suit to proceed amounts to nothing. In this respect, it matters not that the suit was brought *bona fide* and in ignorance of the death of the person named herein as the 1st Defendant.

36. As was stated in **Benjamin Leonard Mc Foy -vs- United Africa Company Limited (1961) All ER 1169:**

**“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”**

37. That is exactly what the Plaintiff has attempted to do herein. Having discovered that the person he sued as the 1<sup>st</sup> Defendant is no more, he is now clinging on the 3<sup>rd</sup> Defendant who was not yet even a legal representative as at the time the suit was instituted, to realise the same prayers he had brought against the deceased. It is an attempt to place something on nothing and expect it to stay there. That won't happen and the case must be allowed to collapse.

38. At any rate, even if that were not the case, the Plaintiff's claim against the Defendants is that he had lived on the land for many years, since 1965, continuously and uninterrupted, and that for such reason, he had acquired the same under the doctrine of adverse possession.

39. In support of that proposition, the Plaintiff produced a hand-written sale agreement purportedly executed between himself and the said Muthoni Githae on 23<sup>rd</sup> December, 1965 wherein he bought the piece of land for Kshs.2,500/-. It is the Plaintiff's case that having paid the purchase price in full, the Defendants declined to transfer the suit property to his name.

40. At the trial herein however, the Plaintiff conceded that the said agreement does not make mention anywhere of the said Muthoni Githae. Instead, the agreement purports to show that the Plaintiff purchased the suit property from the 2<sup>nd</sup> Defendant. There was however no record that the property was owned at any time or was in the name of the said 2<sup>nd</sup> Defendant.

41. As it were, the requirements for one to acquire land by way of adverse possession are now quite settled. As was stated in **Mbira -vs- Gachuhi (2002) 1 EALR 137:**

**“... a person who seeks to acquire title to any land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual,**

**open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption ...”**

42. As was stated in **Samuel Miki Waweru -vs- Jane Njeru Richu (Civil Appeal No. 122 of 2001):**

**“... it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise ...”**

43. Again, it was clear to me from the Plaintiff's own admission that he had filed another suit in 1978 seeking to compel the Defendants to transfer the suit land to himself. That case according to the Plaintiff has never been concluded.

44. In the premises herein, it follows that I did not find, any basis for the Plaintiff's suit. The same is misconceived and filed in abuse of the court process. It is dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16<sup>TH</sup> DAY OF DECEMBER, 2021.**

**In the presence of:**

Mr. Karanja holding brief for Muguku for the Defendant

Ms Gichama holding brief for Wachira for the Plaintiff

Court assistant – Wario

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**J. O. Olola**

**JUDGE**