



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: GICHERU, TUNOI & PALL, J.J.A.)**  
**CIVIL APPEAL NO. 298 OF 1997**  
**BETWEEN**

**WARARI GITHENGI SAMUEL WARARI GITHENGI**

**NDEGWA GITHENGI**

**KAMAU GITHENGI**

**JOHANA KIMANI .....APPELANTS**

**AND**

**WAITHAKA KAMAU ALIAS**

**WAITHAKA KIRAU .....RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nairobi (Hon. Justice Abdul Rauf) dated the 30th day of March 1987**

**in**

**H.C.C.C. NO. 306 OF 1986 (O.S.))**

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**JUDGMENT OF THE COURT**

This is an appeal by the five appellants, the plaintiffs in the suit before the superior court, against the decision of Rauf J. given on 30th March, 1987, by which the learned Judge dismissed with costs a suit instituted by the appellants in the superior court against the respondent, the defendant in the suit.

In the Originating Summons taken out on 29th January, 1987, the appellants who are brothers and sons of the late Githegi Warari who died on 5th June, 1976, sought a declaration against the respondent that he is a trespasser upon 8.46 acres of land being a portion of the parcel of land known as Ngenda\Nyamangara\550, hereinafter referred to as "the suit land".

The suit land was registered in the name of the appellants' deceased father on 20th January, 1958. It abuts on and is adjacent to the respondent's land known as Ngenda\Nyamangara\431, hereinafter referred to as plot No. 431. Its registration was also effected but in the respondent's name on 20th January, 1958. It is common knowledge that these were first registrations under the Registered Land Act, Cap. 300 Laws of Kenya. On or about 7th September, 1982, as a result of a succession cause pursuant to the death of the

appellants' deceased father, the suit land was registered in the names of the appellants as tenants in common.

The appellants' claim is based on the premise that in 1985 when an unnamed surveyor visited the suit land for the purposes of sub-dividing it amongst them in accordance with the shares allotted to each one of them under the succession suit they discovered that the respondent had been unlawfully occupying their 8.46 acres. This occupation, they allege, was without their knowledge and consent.

In support of their claim the appellants tendered in evidence a survey plan (Ex - 1) which purported to represent a general plan of Nyamangara sub-location of Kiambu District and contained the demarcations of numerous parcels of land including the suit land and plot No. 431. The plan bore no official stamp and was not authenticated. Its origin was obscure and no official from the Lands Department had been called to testify on it. The learned Judge rejected it in toto as being of no probative value.

The abstracts of title had glaring cancellations and alterations in the acreage. The acreage of the suit land had been amended and increased to 9.40 hectares from the original 17.70 acres while the acreage of plot No. 431 had been amended to read 8.5 acres instead of 17.41 acres. These cancellations and alterations were neither initialled nor explained. The learned Judge held and correctly so in our view that these abstracts and plans could not explain the true position as regards the sizes of the two parcels of land and were, in fact, useless as evidence to enhance the appellants' claim.

The learned Judge, also, found that the respondent had been in an uninterrupted occupation of the suit land since 1958 and that the appellants derived their titles from their deceased father in 1976 which meant that even during the life time of the original owner, the respondent had had open, continuous and uninterrupted possession of the suit land for over 18 years. Consequently, he held that the appellants' father's and their own claim on the suit land was extinguished by the respondent's prescriptive right over it and therefore their deceased father could pass no title to them and their suit in the circumstances lacked a cause of action.

The memorandum of appeal contains five grounds of appeal, which in the main, contend that the decision of the learned Judge is erroneous in fact and in law. However, in his submissions before us Mr. Kimwere, counsel for the appellants, conceded and, in our view rightly, that in view of the unauthenticated documents upon which the success of the suit rested, the suit was not maintainable. Counsel further admitted that failure to call some obviously relevant and important witnesses had doomed the appellants' suit. However, he urged us to order a retrial so that the missing evidence could be obtained.

The appellants, who were represented by counsel, went to trial knowing full well what they were required to prove. They adduced evidence of their choice in support of their claim. That evidence was fully considered by the learned Judge and they cannot now seek retrial to adduce further evidence to fill the omission. There is no basis in law for it for such a request.

The decision of the learned Judge was reached after a careful consideration of the evidence adduced by the parties during the trial. We see no reason to differ from his findings. The appellants simply had no cause of action against the respondent. Their claim against him was frivolous. This appeal is devoid of merit and is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 13th day of March, 1998.**

**J. E. GICHERU**

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**JUDGE OF APPEAL**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**G. S. PALL**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**