



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NYERI**

**Civil Appeal 298 of 1996**

**WAHOME KIRENGO .....**  
**.....APPELLANT**

**AND**

**JOSPHAT WAMBUGU .....**  
**RESPONDENT**

**(Appeal from the ruling and order of the High Court of Kenya at Meru (Mr. Justice Oguk) dated  
20<sup>th</sup> March, 1991**

**IN**

**H. C. C. C. NO, 255 OF 1989)**

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**JUDGMENT OF THE COURT**

The appellant, WAHOME KIRENGO, was the plaintiff in a suit which was commenced by plaint at the Principal Magistrate's Court at Meru, in which as purchaser he sought orders, inter alia, that a parcel of land known as Nyaki/Kithoka/291 be transferred to him by the respondent in this appeal as the defendant in that suit. The suit was commenced on 5<sup>th</sup> October, 1987 by a home made plaint. It would appear to us that before the respondent, JOSPHAT WAMBUGU filed defence to the claim the appellant engaged counsel who amended the plaint in which he raised adverse possession as an additional ground for claiming the aforesaid parcel of land. However, instead of filing the amended plaint at the Principle Magistrate's Court, at Meru where the suit was still pending, he filed it at the High Court of Kenya, at Meru where it was assigned a new number. In his plaint and amended plaint the appellant averred that he bought the aforesaid parcel of land in 1966, he has planted coffee and other trees thereon and that the respondent had refused to transfer the land to him.

In his written statement of defence the respondent averred, inter alia, that the amended plaint was improperly filed in the High Court; that it was bad in law; that it was an abuse of the process of the court in view of the pending proceedings before the Principle Magistrate’s Court, at Meru, which we referred to earlier; and that the claim was not maintainable in law. Thereafter pleadings closed and the suit was set down for hearing. At the hearing the respondent’s counsel declared he was raising a preliminary objection which he did. His objection was based on four main grounds, namely that the suit was irregularly instituted in the High Court by reason of having been commenced there by an amended plaint; that in any event it was statute barred, having been instituted after the statutory limitation period of 12 years; that the suit land is agricultural and no land control board consent had been obtained from the appropriate land control board within the period prescribed, and that in view of the provisions of order 36 rule 3 D of the Civil Procedure Rules, a claim over land based on adverse possession can only be commenced by Originating Summons, which was not done in that suit.

The trial Judge (Oguk. J. ) upheld the objection on the basis of all those grounds and struck out the amended plaint and thereby provoked this appeal.

By dint of the provisions of Order 6 rule 4 (1) and (2) of the Civil procedure Rules, the issue of limitation, absence of land control board Civil procedure Rules, the issue of Limitation, absence of land control board consent and the manner in which the suit was commenced in the High Court , were in our view improperly allowed to be canvassed the respondent having not specifically pleaded them. However, the suit having been commenced in the High Court in contravention of the provisions of order 4 rule 1 of the Civil procedure Rules, an issue which was specifically pleaded in the defence, and notwithstanding the irregularities we have pointed out, which in any event are curable under section 79A of the Civil procedure Act, we think that the appellant’s amended plaint was properly struck out.

Besides, we have gone through the record and find no order transferring the suit in question from the Principal Magistrate’s Court to the High Court in terms of section 18 of the Civil Procedure Act, which in the event would have shown justification for filing the amended plaint in the High Court.

For the foregoing reasons, and notwithstanding our sympathy to the appellant in the predicament he finds himself in, the appeal has clearly to merit. It is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 15<sup>th</sup> day of May, 1998.

R. S. C. OMOLO

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

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

**DEPUTY REGISTRAR**