



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 14 of 1990**  
**JASON GITAU GITHINJI.....PLAINTIFF**  
  
**-versus -**  
  
**WAMBURI NJOROGE.....RESSPONDENT**

**JUDGMENT**

The suit concerns a piece of land known as Location 4/Kaguthi/374 situated in Kandara, Muranga District. The registered owner of it is Wanja Githinji, deceased, having died in 1975.

In this action the plaintiff Jason Gitau Githinji, seeks a declaration inter alia, that he has become entitled to the suit land by adverse possession and that the named defendants hold the land in trust for him. He also prays that an order be issued by this court decreeing that he be registered as owner of the land in place of Wanja Githinji. The suit is contested by Wamburi Njoroje, the others although having filed defences do not think the plaintiff's right to the land should be opposed.

The plaintiff took possession of the suit land sometimes towards the end of 1965 under an agreement of sale between Wanja and himself. Wanja agreed to sell and the plaintiff agreed to buy the entire parcel of land at an agreed price of Kshs 1610/-, Kshs 1030/- was paid over to Wanja, as part payment of the purchase price. Land Control Board consent was sought from the appropriate Land Control Board, but was not obtained because Wanja did not immediately have evidence that she owned an alternative piece of land on which she would settle.

The plaintiff has since 1965 been living on the land. He has over the years made several developments on it, buried some of his dead children there and in effect assumed the character of owner since 1965.

In 1987, however the 1<sup>st</sup> defendant, Wamburi Njoroje, alias Githinji Njoroje sought to evict him. That provoked this suit.

The plaintiff's case is that for over 12 year he has been in possession of the suit land exclusively, continually and for all intents and purposes assumed the character of owner of the suit land exercising ordinary rights of ownership without interruption. Consequently he contended, he has acquired title to it by adverse possession.

John Maina, the 3<sup>rd</sup> defendant and the 1<sup>st</sup> defendant appeared and filed affidavits in response to the plaintiff's case. The 3<sup>rd</sup> defendant in his affidavit dated 22<sup>nd</sup> May, 1989 denied the applicant/plaintiff bought the suit land that he was ever in occupation of the same and that he is entitled to the land.

Wamburi Njoroje (the 1<sup>st</sup> defendant) in his affidavit like the 3<sup>rd</sup> defendant denied the plaintiff had ever

purchased the suit land. He deponed inter alia, that the suit land is actually his own but had been registered in the name of Wanja Githinji who was his mother, because at the time of land demarcation and consolidation he was in detention at Manyani following a state of emergency which was there in force in Kenya. His mother held the land as trustee until her death.

The second defendant Joseph Kamee and the 4<sup>th</sup> defendant Wanjiru Njoroge, neither appeared, nor filed any affidavits in answer to that of the plaintiff. Both are brother and sister of the 1<sup>st</sup> and 3<sup>rd</sup> defendants respectively.

The affidavits filed herein were treated as pleadings and issues based on the averments therein were framed. Oral evidence was adduced. The plaintiff's case was simple and straightforward. He had bought the land. He moved onto it, has lived on it continuously, openly, without force and without right land control board consent having not been obtained. Such consent was necessary under the provisions of the law in force in 1965. That such consent having not been obtained the agreement for his purchase of the land became void, and his continued occupation of it was as trespasser. Neither the deceased, Wanja, nor her children (the defendants herein) as beneficiaries of her estate had up to 1987 taken steps to exert their rights over the land. Their rights became extinguished pursuant to the provisions of ss 7 and 17 of the Limitation of Actions Act, cap 22, Laws of Kenya

equently he is entitled to be registered as owner.

At the hearing of this case, the third defendant shifted his position. He did not think anybody had the right to challenge the plaintiff's right to this suit land. It was his evidence that the plaintiff agreed to buy the land from Wanja Githinji and made part payment of the purchase price. The 1<sup>st</sup> defendant and all the other defendants were aware of the deal and did not raise any objection. So that in his view the 1<sup>st</sup> defendant is not telling the truth. He produced several letters allegedly written by the 1<sup>st</sup> defendant or on his direction in which refers is made to the sale of the land to the plaintiff. The 1<sup>st</sup> defendant denied having written or directed or authorized anyone else to write the same. That is however, not of any serious moment considering that the plaintiff's case is not based on his alleged purchase of the suit land. What is significant here is that the 3<sup>rd</sup> defendant conceded that the plaintiff has been in occupation of the suit land since 1965. The 1<sup>st</sup> defendant conceded as much as well. They also conceded that no one in their number or any other person took steps to challenge his stay on the land. He had a quiet uninterrupted and exclusive possession of the land for a period in excess of 20 years.

Lord MacNoughters in the case of *Parry v Clissold & others* (1907) AC 73, said at p. 79:

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.”

As I stated earlier this plaintiff went into possession of the suit land sometimes towards the end of 1965. At the time of the registered owner's death in 1975, he had been in exclusive possession of the land for about 10 years. His possession was peaceful and open.

And throughout the whole period, and long thereafter, he was exercising ordinary rights of ownership. The possession was adverse to the rights of the owner of the land who took no steps to exert her rights of ownership of the same. But at the time of her death the period of 12 years prescribed by the Limitation of Actions Act, cap 22 Laws of Kenya had not expired. Although that was so, time did not stop running upon the death of the registered owner of the land, viz Wanja.

The plaintiff's trespass over the land started at the expiry of the period which as at the year 1965 was prescribed for obtaining the appropriate Land Control Board Consent, if such consent was essential. The possession by the plaintiff was adverse to the registered owner's rights over the land. So that on the date

Wanja died there was a right over the land which was in the process of being acquired by the plaintiff by adverse possession (s.30(f) Registered Land Act Cap 300 Laws of Kenya). Upon death of Wanja, her children, the defendants herein, were obliged to but did not take steps to either get grant of probate or letters of administration of her estate, and thereafter to take legal steps to exert their rights over the land. The plaintiff's possession of the land extinguished the rights both Wanja and her children at the expiry of twelve years commencing from end of 1965.

Assuming I am wrong, but I have no doubt in my mind that I am right, the plaintiff became entitled to the land at the expiry of 12 years from the date Wanja died. As yet none of the defendants has taken any steps by process of the law to exert their rights, if any, over the land. Nor has anybody else done so.

The 1<sup>st</sup> defendant says that he is owner of the land and that his brothers, among them the 3<sup>rd</sup> defendant, are siding with the plaintiff against him. It is my judgment that whatever differences that may presently or previously existed between or among the defendant in no way affect the plaintiff's right over the suit property. His right over the land does not arise from his alleged purchase of it. It accrues from his exclusive, uninterrupted peaceful and open possession of it as assumed owner for over twelve years. Consequently he is entitled to the orders sought more particularly, he is entitled to this suit land by adverse possession, and that he should be registered as owner of it in place of Wanja Githinji. He is also entitled to full costs, against the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant filed a replying affidavit resisting the plaintiff's claim. However, he later refuted and did not contest the claim. Consequently, I am of the view that an order for costs against him will be onerous. I, therefore, make no order as to costs against him. The 2<sup>nd</sup> and 4<sup>th</sup> defendants did not appear. I make no order as to costs against them considering that under the law the plaintiff was obliged to come to court for orders anyway. Orders accordingly.

Dated at Nairobi this 15<sup>th</sup> day of January, 1993.

SEO BOSIRE

JUDGE