



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 1708 OF 2000**

**MARY WANJIKU NJUGUNA.....PLAINTIFF/APPLICANT**

**VERSUS**

**BEATRICE WANJIKU NGUGI.....DEFENDANT/RESPONDENT**

**JUDGMENT**

The Plaintiff filed this suit by way of Originating Summons dated 18<sup>th</sup> October 2000 and filed on the same date where the Plaintiff sought for orders to be registered as the proprietor of the parcel of land known as Githunguri/Gathangari/T123 (hereinafter referred to as the “suit property”) by adverse possession in place of the currently registered owner Beatrice Wanjiru Ngugi, the Defendant in this suit, and further that the costs of this suit be borne by the Defendant.

**The Plaintiff’s Case**

The Plaintiff, Mary Wanjiku Njuguna, relied on her Supporting Affidavit sworn on 18<sup>th</sup> October 2000 and on her oral evidence wherein she stated that sometimes in or about 2<sup>nd</sup> November 1975, her late husband Gilbert Njuguna Muthee contracted with her late brother, James Waweru T. Njuguna, to purchase the suit property and a second parcel of land known as Githunguri/Gathangari/T.247 at the price of Kshs. 10,000/- and Kshs. 6,000/- respectively. It was her evidence that her late husband paid for both parcels of land in full and that she together with her late husband fenced and took possession of the suit property. She stated that she began to cultivate the suit property since then to date. Her husband died on 30<sup>th</sup> August 1990 after which she requested her brother to transfer the two parcels of land into her name. She confirmed that her brother transferred the parcel of land known as Githunguri/Gathangari/T.247 but declined to transfer to her the suit property on the ground that he had taken a loan with the bank using the title deed for the suit property as security. It was her testimony that sometime in September 2000, the Defendant entered the suit property and deposited manure therein and that upon challenging her, the Defendant disclosed that she had bought the suit property from James Waweru T. Njuguna. She testified that she was surprised by this turn of events considering that she had continually requested her brother to transfer the suit property to her and further that the Defendant, who is her neighbor, also knew that the suit property belonged to her and that she had cultivated it all along. She further testified having confronted her brother in the company of her sister Kibui Muniu (PW2) where she got confirmation from her brother that he had indeed sold the suit property to the Defendant and offered to refund the purchase price paid to him by her late husband. He never refunded that money. She further confirmed having conducted a search of the suit property at the Lands Office in Kiambu which confirmed the sale of the suit

property to the Defendant.

PW2 was Kibui Muniu Gathara, the elder sister of the late James Waweru T. Njuguna and the Plaintiff. She confirmed that she was aware that her late brother entered into an agreement way back in 1975 by which he agreed to sell to the Plaintiff's husband some two parcels of land being the suit property and parcel of land known as Githunguri/Gathangari/T.247. She testified further that their mother always asked her late brother to transfer the suit property to the Plaintiff but he declined. She confirmed having accompanied the Plaintiff to Longonot to seek clarification from James Waweru on the sale of the property to the Defendant. She confirmed that the late James Waweru did indeed confirm this offering to give her the purchase price paid by the Plaintiff's late husband which he never did.

### **The Defendants Case**

The Defendant testified that she entered into a sale agreement dated 19<sup>th</sup> July 2000 with James Waweru T. Njuguna for the sale of the suit property to her. She confirmed having paid the purchase price of Kshs. 185,000/- in full. She further testified that she did not take possession of the suit property because the Plaintiff would not allow her. She confirmed that the Plaintiff used to farm the suit property. It was her further testimony that James Waweru told her that he initially intended to sell the suit property to his late brother Gilbert Njuguna Muthee in 1975 but that they did not complete the transfer. She further testified that James Waweru told her that he allowed the Plaintiff to continue farming the suit property until he found another buyer.

DW2, namely Margaret Wanja Waweru, testified that she was the wife of the late James Waweru Njuguna. She testified that the suit property belonged to her late husband and that her late husband allowed the Plaintiff to live and farm on it until he repossesses it. She confirmed that the Plaintiff entered the suit property in the year 1975. She further testified that she is not aware of her late husband selling the suit property to the Plaintiff's late husband. She confirmed that her late husband did indeed sell the suit property to the Defendant. She testified that she attended the Land Control Board to obtain their consent to transfer the suit property to the Defendant.

### **Determination**

It is trite law that to sustain a claim for adverse possession, such possession must be *nec vi, nec clam, nec precario* which means the possession must be possession that is without force, without secrecy and without permission. This possession must challenge the title of the registered owner. The defendant contends that since the plaintiff entered into the suit property through a sale agreement, that entry was with the permission of the vendor therefore it cannot sustain a claim for adverse possession. If possession is with the permission of the registered owner, then it cannot be a possession that challenges the title of the registered owner, therefore such a possession cannot be held to be adverse and cannot support a claim of adverse possession.

The issue that arises in this matter is whether the entry by the plaintiff through a sale agreement is entry by permission so that her occupation can be said to be with permission. In the case of **Wambugu Vs Njuguna (1983) KLR 173** the court of appeal held that,

*"where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated.....where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment."*

The import of this decision is that if a purchaser has not completed the payment of the purchase price then the claim for adverse possession cannot be sustained and the only time one can claim adverse possession is when the purchaser has paid the purchase price in full. In this particular case, the issue of payment of the purchase price in full does not arise. However, what arises is the question of land control board consent. Since the suit property was agricultural land the sale transaction was subject to the consent of the Land Control Board that ought to have been obtained within six months of the said sale agreement. The plaintiff and defendant are in agreement that the plaintiff's purchase fell through by the operation of law and more specifically Section 6 of the Land Control Act Cap 302 Laws of Kenya due to lack of consent. The plaintiff was therefore allowed to be in possession of the land by the vendor until the transaction was completed and became void when the letter of consent was not obtained. After that period, possession became adverse from the time the transaction became null and void because possession was no longer premised on any agreement of sale. This position is buttressed in the Court of Appeal case of **Samuel Miki Waweru –vs- Jane Njeri Richu Civil Appeal No 122 of 2001 [2007] eKLR** where the court held that,

***“In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under section 6 (1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession if not legal becomes adverse from the time the transaction becomes void.”***

The sale agreement between the plaintiff's late husband and James Waweru was signed on 2<sup>nd</sup> November 1975. The sale transaction therefore became void after six months and the initial permission to enter the land by virtue of this agreement was negated with effect from 2<sup>nd</sup> May 1976 therefore the occupation of the suit property by the plaintiff became adverse from 2<sup>nd</sup> May 1976.

Having made a finding that the plaintiff was on the suit property without the permission of the vendor from 2<sup>nd</sup> May 1976, the next issue is for the court to find out whether the plaintiff has on a standard of proof shown that she has acquired the title to the suit property by adverse possession. Adverse possession is a fact to be observed upon the land and not to be seen in a title. If anyone buys land without knowing who is in possession of that land he risks his title the way he would lose it if he fails to inspect it for 12 years after acquiring it. **Section 28 (h) of the Land Registration Act** provides for the rights of the adverse possessor when a party is acquiring title to land by way of adverse possession. This section states that,

***“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”***

By the time the defendant was purchasing the suit property, the plaintiff had already been in occupation of the suit property for over 12 years. It was incumbent upon her to inspect the suit property and enquire about any interest on the suit property before purchasing. The defendant's evidence was that when she visited the property after purchase she found the suit property fenced and vegetables grown on it. She further confirmed that the plaintiff had been in occupation of the suit property firstly through purchase and later without permission after the sale agreement fell through. It is therefore safe to state that the plaintiff's occupation to the suit property was without force, without secrecy and without permission. The defendant's evidence in court was that she was unable to dispossess the plaintiff of the suit property because she was hostile towards her. In the Court of Appeal case of **In the Court of Appeal case of Kairu-vs- Gacheru 91986-1989)EA 215 Nyarangi J** held that,

***“.....On the evidence, the respondent continued to be in adverse possession until 12 years were over. The appellant did not dispossess the respondent and so as purchaser he took subject to overriding interests then subsisting”***

I therefore find that the plaintiff has proved her case and is entitled to the orders sought in the Originating

Summons dated 18<sup>th</sup> October 2000. The same is allowed with no order as to costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2015.**

**MARY M. GITUMBI**

**JUDGE**