



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELC CIVIL SUIT NO. 490 OF 2010**

**SOPHIE WANJIKU JOHN.....PLAINTIFF**

**VERSUS**

**JANE MWIHAKI KIMANI.....DEFENDANT**

**JUDGEMENT**

By consent dated 2<sup>nd</sup> July 2012 parties agreed to consolidate **ELC 490 of 2010** with **ELC 81 of 2012**. The two files were consolidated and carried on as one action with ELC 490 OF 2010 being the main file.

**PLEADINGS**

By an amended plaint dated 6<sup>th</sup> July 2011, the plaintiff Sophie Wanjiku John came to court seeking an order of eviction against the defendant and vacant possession of plot No Ndumberi/Riabai/3784, an order of removal of the caution lodged by the defendant against the title No Ndumberi/Riabai/3784 plus costs and interest.

The Plaintiff avers that she purchased a property known as Ndumberi /Riabai/3784 measuring 0.0535 hectares from one Margaret Wanja Korogo between 13<sup>th</sup> October, 2009 and 30<sup>th</sup> July, 2010. That when she went to fence the property in September 2010, she found the defendant squatting on it. She ordered the defendant to vacate the said premise but the defendant refused, neglected and/or has failed to vacate the said premises. The defendant subsequently lodged a caution with the Kiambu District Land Registrar on 10<sup>th</sup> December, 2009 against the title of the suit property claiming a beneficiary interest.

The defendant Jane Mwhaki Kimani filed an amended defence in which she denied each and every allegation contained in the plaint. She avers as follows; that her correct names are Jane Mwhaki Karogo. She denies that the plaintiff purchased LR No. Ndumberi/Riabai/3784 from Margaret Wanja Karogo. She avers that is a beneficial owner of L.R. No. Ndumberi/Riabai/3784 by virtue of the fact that she was a beneficiary to the estate of the late Lilian Wanjiku in her will. That in terms of the said will, her late father Daniel Karogo was allocated two and a quarter hectares of land, to distribute among his beneficiaries, the defendant included. That she has not been squatting on the plaintiff's property as

alleged but has been staying on the subject land L.R No. Ndumberi/Riabai/3784 for over 25 years, undistributed since 1986, and has cultivated fruit crops and built a permanent house on the subject land. Whereas she admits lodging a caution with the Kiambu District Land Registrar against the title of the suit property, the same was solely done to protect her interest in the suit property as the legal and beneficial owner hence the lodged caution should not be removed. She avers in the alternative and without prejudice to the foregoing, that if at all the plaintiff claims ownership to the subject land, then such ownership was obtained through fraudulent means, and the title held by the plaintiff is null and void. The defendant avers the particulars of fraud by the plaintiff as;

- a. Procuring registration on a title to land with the knowledge that the defendant had been in physical possession for over 12 years.
- b. Purporting to purchase land from an individual who did not have authority to transact on behalf of the deceased's estate.
- c. Possessing an illegal title to LR No. Ndumberi/Riabai/3784.
- d. Declaring vacant possession on LR No. Ndumberi/Riabai/3784 knowing very well that the defendant resided there.

The defendant further avers that the plaintiff holds an illegal title to the subject land, then it was due to her own negligence, and the plaintiff was the author of her own misfortune because she failed to conduct a physical search on the suit property before transacting to ensure there was vacant possession. In a counterclaim in the same defence, the defendant reiterates the contents of her defence and in turn claims that she is the beneficial owner of the subject land by virtue of the fact that she has resided on the subject land since 1986 uninterrupted. That she has been in possession of the land *nec claim, nec viv, and nec precario* and pleaded ownership of L.R No. Ndumberi/Riabai/3784 by virtue of adverse possession and prays that the plaintiff's suit be dismissed with costs and for orders that:

- a. A declaration that the defendant is the rightful owner of L.R No. Ndumberi/Riabai/3784.
- b. A permanent injunction do issue restraining the plaintiff, her servants or agents from taking over possession, occupying, alienating, trespassing/interfering, selling or disposing of or dealing in any way whatsoever with all that property identified as Ndumberi/Riabai/3784.
- c. The title held by the plaintiff over the subject land be declared null and void.
- d. The plaintiff be condemned to pay the costs of this suit.

In reply to the defendant's defence and counterclaim, the plaintiff reiterates all the paragraphs in the amended plaint and responds that

the late Lilian Wanjiku willed her estate to her three (3) brothers and niece Lilian Wanjiku. That the defendant was never a beneficiary to her estate and Daniel Karogo, that the defendant's father was at liberty to distribute his inheritance as he wished and put the defendant to strict proof. The plaintiff denies that the defendant has been staying on the suit property L.R No. Ndumberi/Riabai/3784 for over 25 years and further states that the suit property L.R No. Ndumberi/Riabai/3784 came into existence in April, 2009 after the sub-division of L.R No. Ndumberi/Riabai/3201 by Margaret Karogo who inherited the same from her husband who died in 1979 intestate. That the defendant constructed two mabati houses on the said land in 1986 and was never evicted from the said land before since the estate of Daniel Karogo had not been distributed by the administrator, Washington Njuguna and therefore nobody had a legal right over the said land. That it was after L.R No. Ndumberi/Riabai/3201 was transferred to Margaret Karogo in 2007 by the estate administrator that Margaret Karogo asked her to vacate from her property. The plaintiff states that the defendant's actions have always been ill motivated. That in 2007, she lodged a caution against Margaret Karogo's land L.R No Ndumberi/Riabai/2267 and only had it removed after being paid Kshs. 40,000/=. That after sub-division of L.R No. Ndumberi/Riabai/3201, she lodged a caution on all the resultant parcels of land and only had them removed after the intervention of the local administration. The plaintiff states that she possesses a legal title as it is the defendant's mother who sold her the said suit property through a lawful transaction. The plaintiff states that the amended plaint filed discloses a cause of action and has strictly adhered to the mandatory rules of pleadings and is therefore entitled to the orders sought.

The plaintiff filed her defence to the counterclaim denying each allegation as alleged in the counterclaim and reiterates what she deponed in her plaint on the defendant's status in relation to the suit property. She prays that the defendant's amended defence and counterclaim be dismissed with costs.

In **ELC No. 81 of 2012**, Sophie Wanjiku John is still the plaintiff and the defendant is Margaret Wanja Karogo. The plaintiffs averments at paragraph 3,4,5,6, and 7 are similar to her averments in the amended plaint of **ELC No. 490 of 2010**. She seeks judgment to be entered against the defendant for an order for vacant possession of Plot No Ndumberi/Riabai/3784, OCS Kiambu Police Station to ensure compliance of vacant possession, costs and interest.

Margaret Wanja Kagoro did not file a defence in **ELC No 81 of 2012**. The plaintiff Sophie Wanjiku John and Margaret Wanja Karogo filed a consent dated 3<sup>rd</sup> April 2012. This consent though filed was not adopted as a court order.

### **PLAINTIFF'S EVIDENCE**

The plaintiff Sophie Wanjiku John filed her witness statement on 20<sup>th</sup> July 2012 and testified in court on 14<sup>th</sup> February 2013. Her evidence was as follows. That on 13<sup>th</sup> October, 2009, she together with Justus Wainaina Njuguna entered into a Sale Agreement with Margaret Wanja Karogo for the sale of a parcel of land known as Ndumberi/Riabai/3784. She diligently carried out the transaction, confirmed the ownership details of the property through a Certificate of Search dated 10<sup>th</sup> November, 2009 and finalized the sale transaction on 12<sup>th</sup> November, 2009. She registered the Transfer of Land and was issued with a Title Deed to the property in her name on 19<sup>th</sup> November, 2009. When she went to fence off the property, she found the defendant squatting on it. She demanded her to vacate the premises but the defendant refused to do so to date and instead the defendant lodged a caution against the title with the Kiambu District Land Registrar on 10<sup>th</sup> December, 2009 claiming a beneficiary interest. She has therefore come to Court for orders of eviction and vacant possession as well as orders that the said caveat be removed from her property on the basis that she has no relationship with the defendant and she is on her land illegally and unlawfully. She is also seeking costs of this suit. On being cross examined the plaintiff stated that she got to know Margaret Wanja through an agent and she visited the suit plot about three times. She noticed a mabati structure in the premises which looked temporary. Margaret assured her it would be removed. Thereafter they signed the agreement. She also recalled that she met a brother and two other sisters of the defendant but she never met the defendant Jane Mwihi Kimani. That Margaret told her that Jane resides in Muranga and that they would resolve the issue they had. Later she realised that Jane was occupying the property. Jane claimed she had a beneficiary interest in the land. She stated that she did not know that Margaret had held the land as trust for her sons and daughters as beneficiaries. The rest of her cross examination reiterated her evidence in chief. On re-examination, stated that she was a purchaser in good faith.

The plaintiff's witness Margaret Wanja Karogo who is the defendant in **ELC No 81 of 2012** stated that she was the previous registered owner of Land No. Ndumberi/Riabai/3784. That in July, 2009 she put up the land for sale and the same year in the month of October, Sophia Wanjiku John was introduced to her by a broker with the intention of buying the piece of land. Following bargains and negotiations, she agreed to sell the same land to her. They entered into a sale agreement on 13<sup>th</sup> September, 2009. That her sister-in-law; the late Lilian Wanjiku willed her estate to her three (3) brothers, Daniel Karogo, Walter Njau and Paul Muiruri and her niece Lilian Wanjiku. The defendant was never a beneficiary to her estate. When her [Margaret] husband Daniel Karogo passed on in 1979, he left behind two wives and several children. Washington Njuguna being the first born of the family was appointed the administrator of the estate. In 2007, the administrator Washington Njuguna, transferred to her L.R No. Ndumberi/Riabai/3201, being her share of the estate of her late husband Daniel Karogo. That the suit property L.R No. Ndumberi/Riabai/3784 came into existence in April, 2009 after she sub-divided L.R No. Ndumberi/Riabai/3201. That when the defendant's [Jane Mwihi Kimani who is her daughter] husband, Joseph Mwaniki Gathuru died in April, 2006 the defendant and her children took his remains to his rural home in Kihumbu-ini location Gatanga, Thika District. During her husband's burial, the defendant was requested especially by Njeri, her sister-in-law to return home and build a house on the land that her

husband had inherited from her father-in-law. She nevertheless declined their proposal despite being given building materials to build the house by her late husband's family. She further stated that the defendant's actions have always been ill motivated. In 2007, she lodged a caution on one of her properties L.R No. Ndumberi/Riabai/2267 and only had it removed after she paid her Kshs.40, 000/= . After subdivision of L.R No. Ndumberi/Riabai/3201, she also lodged a caution on all the resultant parcels of land and only had them removed after the intervention of the local administration. In March 2012, the defendant decided to return to her matrimonial home and built for her two sons houses on the land that her husband's family had allocated her. Despite this, she has still refused to vacate the property and has refused to remove her tin house. She has also vowed not to remove the caution that she placed on the suit property even after being informed that it had changed hands. She stated that the plaintiff is not a member of her family and neither is she a friend. She only knew her through the sale of her plot and she confirmed that she owned the plot and sold the same to her in a lawful transaction. Therefore the tin house erected on the suit property by the defendant is trespass as she has no right whatsoever whether legal or equitable deriving from the said land parcel L.R No. Ndumberi/Riabai/3784. She testified that she had ten children but three are deceased .That she gave all the children their portion except the defendant. That the defendant is married in Kihumbuini in Murang'a and has land at her husband's place. That the defendant cannot stop her from selling the land .On cross examination she stated that the defendant had built on Lilian Wanjiku's portion of land, later she built on her of land. That the other children shared the piece of land that belonged to Karogo and not Lilian. She stated that she could not give the defendant land because she was married. She also stated that the land which she sold to the plaintiff in which the defendant had built a house belonged to Lilian Wanjiku and not Daniel Karogo. That when selling the land to the plaintiff she saw the house of Jane built on the suit land. That she and the defendant went to the chief to remove the caveat she had lodged on Karogo's land and gave the defendant Kshs 40,000/= .She stated that she had not given her portion of land to the other children. That she had not given to the other girls because they are married and she could not have given the defendant because she was married. She reiterated her evidence in chief during cross examination and on re-examination she stated that according to Kikuyu customary laws any woman who is married doesn't acquire a piece of land. She stated that the land was subdivided into 8 portions and the plaintiff bought her portion. That Jane was there but she later went to her husband. That there was a temporary structure in which the defendant was in that piece of land in Muranga when she was not married. She also stated that the defendant built on the suit land in 2002 or 2003 and they stayed in that land with the husband. That the defendant and her husband temporarily stayed on the portion of land before they went away.

### **DEFENCE EVIDENCE**

The defendant filed her witness statement on 30<sup>th</sup> July 2012. She stated that the suit property was registered in the name of her mother, Margaret Wanja Karogo, who fraudulently transferred the title to the plaintiff. That she has been continually referred to as Jane Mwhaki 'Kimani' in all the pleadings by the plaintiff instead of Jane Mwhaki 'Karogo' albeit to conceal her relationship with Margaret Wanja Karogo. That the property in dispute, L.R Ndumberi/Riabai/3784 was originally registered in the name of her aunt, Lilian Wanjiku, who transferred it to her father, Daniel Karogo before his death by way of a will made by his late sister. That the father was a polygamist with two wives and they were 16 children from the two houses. That upon the death of their father their eldest brother James Washington Njuguna became the administrator of the estate of their father and subsequently her mother was left in charge of the estate as a trustee for purposes of distributing the estate to all beneficiaries including her. She stated that her mother has distributed the estate and given all the other beneficiaries their respective titles she did not give the defendant her title and sought to disinherit her by selling her portion to the plaintiff. That she has been in occupation of the suit land since 1996 and have erected permanent housing in which she and her family have been living. She also claims that the other parcel of land LR No Ndumberi/Riabai/2267 which formed part of the estate was distributed by her mother to the other beneficiaries without her knowledge and involvement and she was not given any inheritance from that land. That it was after the intervention of the local administration that the defendant and her mother agreed that she be paid Kshs 40,000/= as the costs she incurred in stopping the transfer of LR No Ndumberi/Riabai/2267 as a pre-condition for removing the caveat she had lodged against the title and also in doing so she would be entitled to the suit land. She requests the Court to grant the orders sought by the defendant and to dismiss the plaintiff's case with costs to the defendant. The defendant testified in court on 21<sup>st</sup> February 2012. She

stated that she has rented a space at Ndumbuini. That she placed a caution on the land because she was tilling it and when the land was being subdivided she was not there. That LR No Ndumberi/Riabai/2267 was the defendant's father's parcel. She also stated that the brothers subdivided her father's land secretly and did not give her a portion and only got to know of that that the land was sold when she was served with a letter that she was a trespasser. That she has been on the shamba since 1986 and has never been told to vacate. That she has built houses for her two sons and hers is a three bedroomed house which is built of iron sheet since that was what she could afford. On re-examination she stated that the portions were divided to 8 parts for two daughters and six sons. That she was given 3784 and got a title for that portion .That the title to LR No Ndumberi/Riabai/ 3784 was in the name of Margaret Wanja her mother. That she had asked her deceased aunty Lilian Wanjiku permission to stay on the shamba.

### **ISSUES BY THE PARTIES**

Parties filed their respective statement of issues in court. The Plaintiff filed her issues on 30<sup>th</sup> July 2012 as follows;

1. Whether the plaintiff purchase property known as Ndumberi/Riabai/3784 from the defendant's mother.
2. Whether the defendant has trespassed against the plaintiff's property knows as Ndumberi/Riabai/3784.
3. Whether the defendant lodged a caution on Ndumberi/Riabai/3784.
4. Whether the defendant's counter claim meets the threshold for ownership through adverse possession.
5. Whether the plaintiff is entitled to the orders sought.

The defendant filed her issues dated 30<sup>th</sup> July 2012 in court as follows;

1. Whether LR No. Ndumberi/Rabai/3784 is part of the estate of the Late Daniel Karogo
2. Whether the Defendant is a beneficiary to the estate of the Late Daniel Karogo
3. Whether Margaret Wanja held the suit property in trust for the beneficiaries
4. Whether the defendant acquired good title to the property
5. Whether the defendant has been disinherited as a beneficiary
6. Whether the defendant has acquired title by way of adverse possession.

### **SUBMISSIONS**

Parties filed their submission. The plaintiff filed her submissions on 7<sup>th</sup> March 2013. I have read them and summarise them as follows. The plaintiff submitted that sections 24 to 29 of the **Land Registration Act 2012** deals with the effect of registration and quoted section 24 (a) which stated that "*the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto*" and section 26 states that "*a certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.*" The plaintiff cited the case of **Obiero –vs-Opiyo [1972] EA 227** where the courts affirmed absolutism of the rights of a registered proprietor. In this case the plaintiff got registered as the proprietor of land .No encumbrances were noted in the register. The defendants were in possession of the land in question and were cultivating it in accordance with customary norms. The plaintiff sought to evict them from the land but they raised their customary entitlement to it in their defence and attributed fraud to the plaintiff's registration as proprietor .In holding for the plaintiff Bennet J stated that even if the defendants had any rights over the land ,the same have been extinguished by the plaintiff becoming the registered proprietor. The plaintiff also cited the case of **Esiroyo –vs. - Esiroyo [1973] EA 388** where the judge reiterated the absolutism of registration and stated that even though the defendants had customary rights over the land the same were extinguished by registration of the plaintiff as proprietor. The plaintiff submits that she got into a sale agreement with Margaret Wanja Karogo who was the registered owner of the land .That she conducted all the necessary searches and concluded the agreement on 12th November 2009 upon which she registered the transfer.

On adverse possession, counsel submitted that the defendant had to prove that she has been in possession for the last twelve years, that she has been continuous and that the possession was *nec vi, nec clam, nec precario*, (without force, without secrecy, without permission). The question was whether she had proven all the elements stated. The plaintiff examined the elements as

- a. Possession of the property must be for at least 12 years. That the defendant submits that she has been in continuous and undisturbed possession since 1986. That she claims that the 12 years have elapsed thus entitling her to have ownership of the property. The plaintiff submitted that while the defendant had possession of the property since 1986 she could not claim adverse possession against the plaintiff since the plaintiff was not the owner of the said property in 1986 and that a claim of adverse possession can only be instituted against a registered owner. That the plaintiff got ownership and registration of the property in 2010. The plaintiff cited the case of **Dhawal Hotels Limited –vs- Sato Properties Ltd [2011] e KLR** where the court in dismissing a claim for adverse possession stated that a claim for adverse possession does not apply to land before registration. She also relied on the case of **Henry Mwangi Kihara –vs- Rachael Nyambura Kimani & 4 Others [2005] e KLR** where the judge held that “*against the defendants, adverse possession should only begin to run from the date and not earlier*” and further stated “*...that adverse possession only runs against the rightful owner and property in the absence of the rightful owner*” and stated that the defendant cannot claim to have a claim of adverse possession as against the plaintiff due to the fact that the plaintiff became registered owner in 2010.
- b. On the issue that the possession has to be continuous and uninterrupted. She stated that this limb doesn't apply because the defendant's possession hasn't been continuous and uninterrupted.
- c. On the issue that her possession has to be *nec vi, nec clam, nec precario*. She submitted that the person possessing the land has to have it without force, without secrecy and without permission. She relied on the case of **James Kamau Kimani-vs- James Gichuru Civil No 1024 of 1999(OS)** where court stated that the plaintiff had shown that he was living on the plot with his parents and that the plot belonged to his father. He cannot therefore claim adverse possession of the land since he was on the land by his parents possession. She also relied on the case of **Mary Wanja Gichuru –vs- Esther Watu Gachuhi Civil Appeal No 76 of 1998** in which the Respondent sought a declaration of adverse possession of the suit land and that the appellant held in trust for her. It was held that in that the respondents were on the land with the consent of other stakeholders and thus her occupation could not qualify her to be an adverse possessor.

On the issue of succession the plaintiff submitted that the defendant claimed to have beneficial interest by virtue of a will. That the land was previously owned by the defendant's aunt Lilian Wanjiku now deceased. That Lilian Wanjiku willed her property to her brother who is the defendant's father and subsequently when the defendant's father died intestate the property was divided between the two wives. That there is nowhere the defendant has been willed any property and therefore she had no interest in the suit property and therefore she has proved her case on a balance of probabilities. She submitted that the defendant was a trespasser on the plaintiff's property and has no legal right whatsoever whether legal or equitable deriving from the said parcel of land LR No Ndumberi/Riabai/3784.

The plaintiff also filed submissions on **ELC No 81 of 2012**. She reiterated the submissions she made on **ELC NO 490 of 2010** on the absolutism of title to the land and added that Margaret Wanja Karogo had ownership of the property and as such was able to deliver a clean title to the plaintiff when they signed a sale agreement and she had the right to transfer the property to the plaintiff.

On whether the plaintiff had the right to vacant possession the plaintiff submitted that she relied on section 25 of the Land Registration Act which stated that upon registration a proprietor should hold title free from all other interests and claims whatsoever and submitted that the plaintiff had the right to vacant possession of the suit property since she bought the suit property knowing that she would get a clean title and enjoy exclusive use of it. As such the plaintiff states that the defendant [Margaret] has the duty as the seller to deliver the said vacant possession.

The defendant filed her submissions on 23<sup>rd</sup> March 2013. According to the defendant the issues to be considered for determination as per the submissions are:-

1. Whether Margaret Wanja Karogo held the suit land in trust?
2. Whether the defendant is entitled to inherit the suit property?
  3. Whether the defendant is entitled to the property by way of adverse possession?
4. Whether the sale of the suit land to the plaintiff is legal?

Whether Margaret Wanja Karogo held the suit property in trust?

She submitted that a trust arises from the possession and occupation of the land by an heir to the property which has the protection of *section 28 and 30 (g) of the Registered Land Act Cap 300* Laws of Kenya and that such trusts may arise out of customary rights such as right to inherit coupled with occupation .The defendant cited the case of **Mukangu-vs- Mbui [2004] 2 KLR** where a father had sought to evict his son from his property stating that he was the absolute owner of the property by virtue of registration under Cap 300 Laws of Kenya. The Court of Appeal agreed with Khamoni J in **Gathiba vs Gathiba [2001]2 EA** where it was held that, *“the position as I see it is therefore as follows ;correctly and properly the registration of land under the RLA extinguishes customary land rights and rights under customary law are not overriding interests under section 30 of the Registered Land Act .But since the same registration recognises trusts in general term as is done in the proviso to section 28 and section 126 (1) of the Registered Land Act without specifically excluding trusts originating from customary law and since African Customary Laws in Kenya generally have the concept or notion of a trust inherent in them where person holding a piece of land registered in his name under the Registered Land Act with the relevant instrument an acquisition either describing him or not describing him by the fiduciary capacity that registration signifies recognition by the Registered Land Act of the consequent trust with the legal effect of transforming the trust from customary law to the provisions of the Registered Land act because according to the proviso to Section 28 of the Registered Land Act registration does not relieve from any duty or obligation to which he is subject as a trustee”* The defendant urged this court to adopt the same finding which is binding to the court. The defendant further submitted that the question of whether Margaret Wanja Karogo held this land in trust is answered. They relied in the case of **Kanyi –vs- Muthiora [1984]KLR 712** where the respondent was enforcing the rights of an unmarried daughter under Kikuyu Customary law against her stepmother who had been registered as the absolute owner of the land after the death of her husband the father of the respondent. The court held that *“The registration of the land in the name of the appellant under the Registered Land Act did not extinguish the respondent’s right under the Kikuyu customary law and neither did it relieve the appellant of her duties or obligations under section 28 as trustees”* further when testifying Margaret Wanja stated that the defendant should not be given land because she was a married. The defendant relied on the case of **Re Estate of Leriuka Ole Ntutu[2008] eKLR** Rawal J held that , *“section 82 (a)of the previous Constitution was enacted along with the original provision of section 82 which did not include discrimination on the ground of sex and after the passage of several treaties and their ratification it was found necessary to make the amendment to include prohibition of discrimination on the ground of sex and after amendments include prohibition of discrimination on the basis of sex .Hence Kenya knowingly and rightly took a bold step to eliminate the discrimination of all manners and types against women. Section 82 (4) (b)of the Constitution was not and cannot have been made so as to deprive any person of their social or legal right only on the basis of sex. Finding otherwise would be derogatory to human dignity and equality amongst sex universally applied. I shall add that taking the view otherwise shall definitely create imbalance and absurd situation .I shall without reservation find that even if the provisions of section 32 do apply to Uasin Gishu area and even Maasai Customary Law would be applicable to the estate the customary law which shall abrogate the right of the daughters to inherit the estate of a father cannot be applicable as it shall be repugnant to justice and morality”*. That Margaret Wanja Karogo stated that the defendant should not inherit the land because she is a married woman and for that reason should go and get land from her husband’s place and not from her parents place .The defendant distinguished the cases of **Obiero –vs-Opiyo and Esiroyo –vs- Esiroyo** in that the sons had alternative land and they had forcefully moved in to occupy the other land parcel of land registered in the name of their father that constituting themselves as trespassers by their conduct and in the present case the defendant has no alternative land and has been in occupation of the suit land since 1986.

On whether the defendant is entitled to inherit the property, the defendant submitted that by virtue of being the daughter of Daniel Karogo the defendant was entitled to inherit from the estate of the deceased just as other sons and daughters were. She cited the case of **Peter Kirara Kuria –vs- Hannah Nyambura Kuria [2004] e KLR** where the objector was the daughter of deceased she was aged 59 years old in 2000. The petitioner said that the suit land was supposed to be divided among the deceased's five sons and the 2nd petitioners only as her daughter were married and had no right to inherit any portion thereof. That the trial judge was guided by section 40 of the Law of Succession Act which provide that property ought to be distributed amongst all the beneficiaries of the deceased's estate 'the law does not specify the status of the child; this means that locking out the defendant for reasons that she is married is illegal. The defendant also relied on Article 1 of Covenants on the Elimination of All Forms of Discrimination Against Women[**CEADAW**] which stipulates that "*any discrimination or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition ,enjoyment or exercise by woman irrespective of their marital status on a basis of equality of men or human rights and fundamental freedoms in the policy ,economic social cultural civil or any other field*" and submitted that the defendant is rightfully placed in claiming that she be given back the land since it is her rightful inheritance as the daughter of Daniel Karogo.

Whether the defendant is entitled to the property by way of adverse possession .It was submitted that the defendant testified that she has been in occupation of the suit land since 1986 and has built a house which she lived with her husband and children. That this stay was uninterrupted which fact was confirmed by Margaret on cross examination. She relied on *section 7* of the **Limitation of Actions Act** which provided that an action may not be brought to recover land after 12 years from the date which the right of action accrued to him. From 1986 to 2010 are 26 years of uninterrupted stay and therefore qualify the defendant to acquire land by way of adverse possession.

### **ISSUES FOR DETERMINATION**

I have considered the pleadings, the evidence, exhibits, the submissions and the cases relied on .In my view the issues for determination are:

1. Who owned the suit property L.R No. Ndumberi/Riabai/3784 before its sale to the plaintiff.
2. Whether Margaret Wanja Karogo who claims to own the suit property had the legal capacity to sell the same.
3. Whether Margaret Wanja Karogo held the suit property in trust for the defendant Jane Mwhiki Kimani.
4. Whether the plaintiff's ownership of title was obtained by fraudulent means as claimed by the defendant.
5. Whether the defendant has any claim under adverse possession as claimed in her Counter claim.
6. Which party has proved her case and what orders are they entitled to.

There are issues that are not in dispute. That the defendant in **ELC 81 of 2012**; Margaret Wanja Karogo sold the suit property to the plaintiff Sophie Wanjiku John. That Jane Mwhiki had built a mabati structure on the said land at the time the sale took place, that the plaintiff asked Jane Mwhiki for vacant possession and hence the two suits.

The history behind the suit land from the pleadings and evidence is that Lilian Wanjiku a sister in law to Margaret Wanja Karogo and aunty to Jane Mwhiki Kimani bequeathed LR No. Ndumberi/Riabai/3201 to Margaret's late husband Daniel Karogo who is also the defendant's father. After subdivision of LR No Ndumberi/Riabai/3201, the suit property Ndumberi/Riabai/3784 came into existence in April 2009. Margaret Wanja Karogo thereafter sold a portion Ndumberi/Riabai/3784 on 13<sup>th</sup> October 2009 to Sophia Wanjiku John and Erastus Wainaiana Njuguna.

The plaintiff Sophie on purchasing suit land sought vacant possession.

I now turn to the issues.

- 1. Who owned the suit property L.R No. Ndumberi/Riabai/3784 before its sale to the plaintiff.** From the evidence the suit land was owned by Margaret Wanja Karogo and not Jane Mwihi Kimani Although Jane claims that she has a beneficial interest I find that there is no evidence that the suit land was bequeathed to her or that she was a beneficiary of the suit land as she claims. In her list of documents she has attached a copy of originating summons where she was included as a plaintiff in an application that sought the mode of subdivision of suit property L.R No. Ndumberi/Riabai/601(not the subject of this suit) and an affidavit sworn by the James Washington Njuguna who claims that they were beneficiaries .A copy of a will is attached that shows that it is her late father who was a beneficiary amongst two other persons. Further, a Court order in relation to this application on whether it was granted or not is not attached. It is also not clear whether the defendant Jane Mwihi ever challenged her mother's actions in a succession cause. The defendant's evidence is therefore insufficient for this court to conclude that she was a beneficiary as she alleges. I find that the suit property was owned by Margaret Wanja Karogo after the subdivision L.R No. Ndumberi/Riabai/3201 and a creation of LR No Ndumberi/Riabai/3784
- 2. Whether Margaret Wanja Karogo who claims to own the suit property had the legal capacity to sell the same.** Having found that Margaret Wanja became the owner of the suit property after it subdivision, I find that she had the legal capacity to sell the land to any purchaser as there was no encumbrance as at the time of sale to the plaintiff. The plaintiff Sophie has exhibited a title deed showing that Margaret Wanja was issued with a title deed under the Registered Land Act Cap 300 Laws of Kenya [now repealed] on 16<sup>th</sup> April 2009. This made her an absolute owner of the suit land as provided under section 28 of the said Act. Section 28 of the repealed Cap 300 states that "*The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be liable by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-*

  - a. To leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and*
  - b. Unless the contrary is expressed in the register to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register*

*Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is a subject as a trustee.* This is the title she transferred to Sophie through a transfer of land dated 12<sup>th</sup> November 2009. She therefore had capacity to sell the suit land.
- 3. Whether Margaret Wanja Karogo held the suit property in trust for the defendant Jane Mwihi Kimani.** Counsel for the defendant has submitted that the land was held in trust for her. With due respect I do not agree with the defendant's counsel's submission that Margaret Wanja held the land in trust for the defendant as a beneficiary. I have already stated that Jane Mwihi has failed to prove that she was a beneficiary. The property was will to her father and not her which property was then transferred to her mother by the administrator of the estate neither was her interest registered as required by law (Section 30 of Cap 300). Her case is therefore not similar to the one she cited in her submissions.
- 4. Whether the plaintiff's ownership of title was obtained by fraudulent means as claimed by the defendant.** Fraud is the intentional use of deceit, a trick or some dishonest means to deprive another of his money or property. There was no evidence that the plaintiff had knowledge that the defendant had been in physical possession of the land for 12 years. The suit land came into existence in April 2009. The defendant has also failed to prove that he plaintiff is holding an illegal title as claimed. Fraud must be pleaded and strictly proved, the burden being heavier than on a balance of probabilities generally applied in civil matters. When it is pleaded it must be sufficiently proved by the party who does so. The defendant has failed to prove that the ownership of title was procured through fraudulent means as stated in paragraph 11 of her amended defence.

There was no evidence of fraud adduced.

5. **Whether the defendant has any claim under adverse possession as claimed in her counter claim.** A party is entitled to adverse possession if they have been in the land uninterrupted for 12 years or more. The question I have to address is whether the defendant established her claim of adverse possession. What constitutes adverse possession is provided for under the Limitation of Actions Act Cap 22 of the Laws of Kenya in particular *Section 7* of the Act provides that an action for recovery of land cannot be brought after expiry of 12 years from the date on which the cause of action arose. *Section 17* provides that after expiry of the 12 years period for a person to bring an action to recover land, the title of that person in the land is extinguished. There is also a long line of authorities by this court established over a long period of time that define the principle of adverse possession. The case of **Kasuve v Mwaani Investments Ltd. & 4 others (2004) KLR 184 at page 188** states that “*In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition*”

In the case of **Mbira v Gachuhi 2002 1 EA Page 138** Kuloba J. held that, “*Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser*”. The defendant built on the land with the permission of her mother in 1986 before it was subdivided. On the land being subdivided her mother sold the land to the plaintiff. I agree with Mr Ojienda’s submissions that a claim of adverse possession can only be sustained on a registered owner. The plaintiff got ownership in 2010 when she bought the land from Margaret Wanja and the period of adverse possession will run from 2010 and as correctly submitted 12 year time period has not expired. Counsel cited the case of **Dhawal Hotels Limited –vs. - Sato Properties Ltd [2011]e KLR** which I find persuasive. In this matter, even if I were to consider her continuous stay on the portion of the land before subdivision there is evidence on record that the defendant did move out of the land at one time and went back. In my view, the defendant’s claim against the plaintiff Sophia Wanjiku John on adverse possession in law cannot be sustained. The defendant has failed to prove that she has been on the suit land *nec vi, nec clam, nec precario*. She was on the said land on the permission of her mother. The defendant’s claim of adverse possession has not been proved. Her evidence that the land was held in trust for her by her mother too cannot stand as she has failed to prove she was a beneficiary therefore her counter claim fails and is dismissed with costs.

6. **Which party has proved her case and what orders are they entitled to.** Having dismissed the defendant’s counterclaim, I now turn to the plaintiff’s claim. The plaintiff has adduced evidence that she bought the suit land as a bona fide purchaser for value. She has a title deed which was not fraudulently obtained but obtained after a valid sale transaction took place. Her rights to the said property are protected under section 24 and 26 of the Land Registration Act 2012 .The two sections vest in a person who has absolute proprietorship together all rights and privileges and the certificate of title issued to her shall be taken by all courts as prima facie evidence that the person named is the absolute owner. The plaintiff is therefore entitled to the order of vacant possession of L.R No. Ndumberi/Riabai/3784.I therefore enter judgement as prayed for an order of vacant possession of L.R No. Ndumberi/Riabai/3784.I however decline to grant the prayer for OCS Kiambu Police Station to ensure compliance as so far there is no evidence of resistance or a threat to violence/disturbance to necessitate the said order. The plaintiff is awarded costs of the suit.

Orders accordingly.

Dated, signed and delivered this 23<sup>rd</sup> Day of July 2013.

**R. E.OUGO**

**JUDGE**

In the Presence of:-

.....Plaintiff

.....Defendant

.....Court clerk