



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL CASE NO. 166 OF 2008**

SARAFINO NGARI MAGUTA.....PLAINTIFF  
VERSUS  
NJUKI NTHIGA.....DEFENDANT

**J U D G M E N T**

The Applicant herein came to court by way of Originating Summons, seeking the following prayers:

- 1. That the Applicant be declared to have acquired title over a portion of LR. NTHAWA/GITIBORE/332 measuring 2.5 acres by adverse possession.***
- 2. That upon the said portion of LR. NTHAWA/GITIBORE/332 being surveyed the Defendants/Respondents to execute a transfer of the said portion of 2.5 acres in favour of the Applicant.***
- 3. That in the event that the Respondent fails and/or refuses to execute the transfer as envisaged in prayer 2 above the court Executive Officer to execute the said transfer.***
- 4. The Defendant to be permanently restrained from entering upon the said area measuring 2.5 acres being a portion of LR. NTHAWA/GITIBORE/332 parcel of land.***
- 5. Costs of the Application be provided for.***

The Application is supported by the affidavit of **Serafino Ngari Maguta** the Applicant. He has in it explained how he came to be in possession of the said land. He has lived on the land for over 12 years uninterrupted.

In his replying affidavit the Respondent has opposed the Application. He is the youngest son of the late **Nthiga Ruanjunge** who is the registered owner of **LR. NTHAWA/GITIBORE/332**. He says he knows nothing about the Applicant's claim because he only came up after his father's death. In his evidence the applicant explained that he bought land from the Respondent's father in 1978, and paid Shs.2,210/= for it. The vendor died on 26/12/85 before transferring the land to him. There was no land Control Board consent obtained but he took possession and occupied 2.5 acres of the said parcel. He has used the land since 1978. He farms it, has planted trees and harvested them and everyone knows that's his shamba.

He produced a certificate of search which shows that the land **NTHAWA/GITIBORE/332** is registered in the name of the deceased **Nthiga Ruanjunge** (PEXB1). He lost their sale agreement and a report was made to the police as per the abstract (PEXB2). He confirmed that the suit he had filed in Siakago Senior Principal Magistrate's court was withdrawn (PEXB3) on 13/11/2008. His witness PW1 who is also his brother confirmed what the Applicant told the court. Both applicant and PW1 say there are boundary marks showing the extent of the Applicant's portion.

In his response the Respondent admits knowing the Applicant who is his neighbour. He says their father died in 1985, seven years after the alleged sale, but the Applicant never discussed this issue with the deceased or his elder brother who has also died. He further says he knows nothing about the land and does not even know if the Applicant is on his father's land. He asked the court to investigate the land in issue.

In cross examination by Mr. Okello he said he did not know if where Applicant had built was his father's land. He admitted having been given letters of grant over his father's estate which comprised this suit land only. This was in High Court Succession Cause No. 1213/02 (Embu).

Mr. Okello for the Applicant filed written submissions. He said the evidence of the Applicant and his witness is credible. He cited two authorities viz:

1. ***PETER NJAU KAIRU VS STEPHEN NDUNGU NJENGA & ANOTHER CIVIL APPEAL NO 57/97***
2. ***WILLIAM GATUHI MURATHE VS GAKURU GATHIMBI CIVIL APPEAL NO. 49/96.***

In both cases it was held that where a sale became void for lack of consent, adverse possession would commence thereafter.

In fact the issue for determination here is whether the applicant has been in continuous uninterrupted possession of the land for 12 years. The Applicants evidence and that of his witness PW1 is straight forward. The certificate of search produced herein (PEXB1) shows the acreage of the land is 3.2 hectares. So it can't be true when the Respondent in his replying affidavit says the land is about 2.5 acres!

Both Applicant and PW1 say it's the deceased's father who sold him the land in 1985 and he died before giving him the land. There was no consent obtained which means the sale became void 3 months after it was entered into. A report of the loss of sale agreement was made (PEXB2).

In his evidence the Respondent said the Applicant is his neighbor and stays on the land. He however did not know if the land on which the Applicant stays belongs to the deceased. He further said he did not know if the Applicant lived on the land because he did not know him.

I do find that the Respondent is not sincere when he says he does not know the Applicant because:

1. ***He says the Applicant's daughter was married by the Respondent's elder brother. So they are relatives.***
2. ***He says when letters of Administration were taken out the Applicant was present.***
3. ***He also says the Applicant is a neighbor and has even built.***
4. ***In the succession file he named the Applicant as one of the beneficiaries. He has even admitted that in cross examination in this case.***

In this case before me, I am satisfied that there was a sale of 2.5 acres of land from the suit land which is over 6 acres. The said sale was subject to consent under Section 6(1) of the Land Control Act. It was never obtained. In the above quoted cases and in the case of ***WAWERU VS RICHU E.A. [2007] VOL.I pg 403*** the court of Appeal stated thus:

***“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 illegal, becomes adverse from the time the transaction becomes void.”***

And the Applicant has been in occupation since 1978 continuously; has built a home, planted trees and used this land openly and of right using the clearly demarcated portion of the land, without interruption. It's with this acknowledgment that the Respondent named him as one of the beneficiaries of the deceased's estate.

He cannot now turn round to say he is not aware of this issue. I have looked at the Succession Cause No. 1213/2002 (Embu High Court) which is before me. The Respondent was granted letters of administration on 15/3/2006. The same has not been confirmed to date. Necessary orders will be made as pertains to that file.

I am satisfied that the Applicant has proved his case as required by the law. I therefore make the following orders:

- 1. The Applicant owns 2.5 acres out of LR. NTHAWA/GITIBORE/332 by adverse possession.**
- 2. Upon survey, 2.5 acres to be transferred to the Applicant by the Respondent.**
- 3. That in the event that he (Respondent) fails or refuses to execute the transfer as envisaged in (2) above the Executive Officer to execute the said transfer.**
- 4. The Respondent is hereby permanently restrained from entering the said area measuring 2.5 acres being a portion of Title No. LR. NTHAWA/GITIBORE/332.**
- 5. Owing to the nature of the case and the relationship between the parties herein, I will make orders that each party bears his own costs.**

**DELIVERED, SIGNED AND DATED AT EMBU THIS 1<sup>ST</sup> DAY OF FEBRUARY 2012.**

**H.I. ONG'UDI  
JUDGE**

**In the presence of:-**

**Mr. Walala for Plaintiff/Applicant**

**Respondent in person**

**Applicant in person**

**Njue CC**