



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE NO. 812 OF 1997 (0.S)**

ROSEMARY WAMAI.....PLAINTIFF

V E R S U S

**ROSEMARY POULTRY FARM  
LTD.....DEFENDANT**

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

The suit was brought by way of originating summons under Order 36 rule 3 of the Civil Procedure Rules which deals with summons by vendor or purchaser of land to determine any question which may arise in respect of the contract of sale. The Plaintiff is saying Plot No. 41 which is a subdivision of L.R. No. 10389 situated Njiru area of Nairobi was sold to him by the Defendant and she wants it declared to be hers and that the Defendant be ordered to release its share certificate to her. Her case is that the size of the plot is 60ft by 80ft.

In the final subdivisions, the Plaintiff's counsel Mr. Nyaga indicated that the suit was based on adverse possession; that the Plaintiff has had since 1979 been in exclusive, uninterrupted and notorious occupation of the plot and therefore has become entitled to it by adverse possession. Quite rightly, and as was pointed out by the defence counsel Mr. Mugambi, the Plaintiff's own affidavit and testimony indicate she has all the time been here on permission from the Defendant because she bought the plot from it. It is trite that an applicant who enters the respondent's land not as a trespasser but with the consent/permission of the respondent as a licensee cannot successfully bring an action founded on adverse possession against the respondent (**Lukas Maina Mugo –Vs- Tabitha Muthoni, HCCC No. 238 of 2001 at Nyeri**). It is also notable that the originating summons makes no reference to adverse possession. The Plaintiff did not bring the suit under section 38 of the Limitation of Actions Act (Cap. 22) or Order 36 rule 3D of the Civil Procedure Rules.

The Defendant is a land buying company with members, one of whom was Ng'ang'a Gachau. It says that at about 1975 the shareholders resolved to occupy the land L.R. 10389 which had been subdivided into plots. It owned the land. Each plot measured 60ft by 80ft. The members were to each occupy such a plot pending formal survey and subdivision. Some members had paid for more than one plot but that had to be sorted out later. This is when Ng'ang'a Gacau asked that his plot be registered jointly between him and the Plaintiff.

The Plaintiff agrees she was not a member and says that Ng'ang'a Gacau, a member, did not have KShs. 1,500/= that was required for the plot. He asked that she pays the amount and said that he was going to refund half of it, that is KShs. 750/=. She paid the KShs. 1,500/= to the Defendant and the two got a share certificate showing they jointly owned the plot. Up to that point, I find, the Plaintiff was entitled to half of the 60ft x 80ft plot which would be 30ft x 80ft. She says the said Ng'ang'a Gacau disappeared and she has not seen him since and he has not refunded her KShs. 750/=. She would have to sue him to recover the amount, but cannot, unless she has a claim against him, say that she has become the owner of the entire plot.

On its part, the Defendants says that Ng'ang'a Gacau subsequently came with one Muiruri and said he was selling his portion, of the plot he jointly owned with the Plaintiff to him. The Defendant sought to recall the certificate issued to Plaintiff and Nganga Gacau to change it, but at that point their offices were broken into and documents stolen. In the meantime, in 1989 a formal survey and subdivision had been done and all plots reduced to 33ft x 80ft each. The Defendant therefore says the Plaintiff and Muiruri became entitled to plot No. 184 measuring 33ft x 80ft. That evidence was not controverted.

It is common ground that there was an advertisement by the Defendant recalling share certificates that had earlier been issued. The Defendant says the Plaintiff did not return it, but Plaintiff says she returned it to the chairlady of the company and that she was left with a copy. This copy still shows she owns the plot with Ng'ang'a Gacau, but the Defendant says Ng'ang'a Gacau sold his share to Muiruri. The Defendant produced survey map, advertisement, share certificate, minutes, extracts, etc, ("JG1 (a) – (i)") to support its evidence.

I accept each plot measures 33ft x 80ft. It is also clear from the Defendant that each member is supposed to make payments to process the plot up to title.

The result is it is declared that the Plaintiff jointly owns 33ft x 80ft comprised in plot No. 184 with Muiruri. It is made clear that the exact site is where the Plaintiff has residence. I ask that costs of the suit be paid by the Defendant.

**DATED, PRONOUNCED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF APRIL 2011**

**A. O. MUCHELULE**

**J U D G E**