



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 400 of 2003**

**TERESIA WANJIRU MACHARIA .....PLAINTIFF**

**VERSUS**

**KIURU MACHARIA ..... 1<sup>ST</sup> DEFENDANT**

**PHYLLIS NJERI NGANGA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

I: Background

1. The relationship between the plaintiff and defendant 1 and 2 is as follows:-

The plaintiff ..... Sister to defendant No.1

The defendant No.1 ..... Brother

The Defendant No. 2 ..... Sister in Law

2. All three are fairly elderly and are over 50 years old. The plaintiff is not married but she does have three sons and grand children. There is another sibling a sister who is married but is not interested in the suit land.

3. The plaintiff being unmarried used to live in Thika after she left home. She returned to her parents ancestral home LR Loc.4/Naaro/520 in Muranga District whereby she lived with her parents till they both passed away.

4. The usage of the land was that at the upper part of the land bordering the road, the homes of the parents; the 1<sup>st</sup> defendant, her brother and the home of her sister in law, the widow of her late brother, are constructed. The lower part of the land that slopes to the river was left for cultivation.

5. The plaintiff herein together with her late mother had been cultivating for food the lower part of the land whilst living at the upper part of the land.

6. The 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant at the demise of her parents transferred the land into their two names and left her out. The plaintiff filed this suit by way of Adverse Possession. She then stated that she had been in occupation of the land for over 12 years.

## II: Procedure

7. To make such a claim to court, an originating summons is filed under order XXXVI Civil Procedure Rules. Directions on the way the trial would be heard may be taken out by either party under order XXXVI r 8a, 12 Civil Procedure Rules.

8. This was one on 22 September 2003 (Mbitio, J) a trial commenced before Ochieng, J on the 15 January 2004. He was transferred to the High Court Commercial Courts at Milimani, Nairobi.

9. The Hon. Judge had made orders that a surveyor do survey the actual area occupied by the plaintiff on the whole suit land. The surveyor did come up with the map of the area and outlined area "A" and "B" as the area occupied by the plaintiff.

10. When the parties appeared before me three years later it was agreed by them on inspecting this map that judgment be entered for the plaintiff on portion marked "A" only that measures 0.4 acres.

11. This court entered judgment in favour of the plaintiff for portion "A" measuring 0.4 acres. The two defendants went further and gave 0.1 acres adjacent to the area mark "A" whereby they were of the opinion that the plaintiff would fore go the area marked "B" situate lower down the slope of the land near the river where the cultivation takes place.

12. The dispute therefore before me is:-

"Whether the plaintiff is entitled to portion marked "B" compulsory 0.325 acres?"

## III: Findings

13. When the plaintiff came to the witness box she stated that her entitlement and usage of the land was portion "A" and "B". She accepts portion "A" but NOT the 0.1 acres added to portion "A". What she wants is 0.35 acres that also is portion "B" and where she had been cultivating with her late mother. She called PW1 who confirmed she had been on the land and used it.

14. The 2<sup>nd</sup> respondent/defendant stated in cross examination that it is true that the plaintiff had been cultivating the area with her late mother in law but that the land is now hers. She has given the son to 1<sup>st</sup> defendant to also cultivate the said portion of land. It was her (2<sup>nd</sup> defendant) who gave the plaintiff the land.

15. The 1<sup>st</sup> defendant discovered the plaintiff as his sister for claiming the said portion.

16. There is evidence before this court that three siblings lived on the land after their parents died. This is the plaintiff, the 1<sup>st</sup> defendant being her brother and the 2<sup>nd</sup> defendant a sister – in law. It is without a doubt that the 1<sup>st</sup> and 2<sup>nd</sup> defendant registered the land in their names following the patriarchal line of inheritance. This meant that the said plaintiff being a woman was disinherited. Her claim lies in Adverse Possession.

17. The parties conceded she is entitled, also rightly so, to the suit land but how much? The defendants have conceded to portion "A". They resist her taking portion "B" of the land and it is this court that is called upon to determine whether she is entitled to this land.

18. Under the convention on the Elimination of Discrimination Against Women, that was ratified by Kenya on March 9 1984 without any reservation, it states at article I that the meaning of discrimination against women's shall mean:-

“any discrimination, exclusive or restriction made on the basis of sex which has the effect or purpose of imparting or nullifying the recognition, employment or exercise by women, irrespective of their marital status, on a basis of equality of men and women . . .”.

19. The plaintiff was discriminated upon because she did not fall under the paternal patriarchal lineage to be given and or considered to portion of the land.

20. She therefore was not permitted to enjoy the right to family benefits. Article 13 states that:

“State parties shall take all appropriate measures to eliminate discrimination against women in area of economic and social life in order to ensure on a basis of equality of men and women the same rights in particular:-

a) The right to family benefit.”

21. Both 1<sup>st</sup> and 2<sup>nd</sup> defendant have benefited from the family rights. To leave out the plaintiff because she is a women amounts to discrimination.

22. The portion “B” of the land nears the river. The 1<sup>st</sup> and 2<sup>nd</sup> defendant also have their portion going to the river that they cultivate. Both agree that the plaintiff has been in possession of this portion even when their parents were alive. I believe that there should be equality before the law.

23. I hereby rule that the portion “B” should also belong and be awarded to the plaintiff by way of Adverse Possession. I would nonetheless set aside the consent to award the plaintiff 0.1 acres adjacent to plot portion A on the grounds that the plaintiff never wanted it in lieu of portion B.

24. I accordingly enter judgment for the plaintiff by way of Adverse Possession on portion A = 0.4 acres and portion B – 0.325 acres making a total of 0.725 acres that is hereby awarded to the plaintiff.

25. The district surveyor of Muranga/Maragwa confirmed the total portion of whole parcel of land is 2.37 acres. The 1 and 2<sup>nd</sup> would therefore occupy the rest of the land measuring to the amount of 1.645 acres.

26. I award the costs of this suit to the plaintiff.

Dated this 25<sup>th</sup> day of October 2007 at Nairobi.

M.A. ANG’AWA

JUDGE

O. Omondi of Moindi & Co. Advocates for the plaintiff/applicant-present

N. Kugwa of Njoroge Kugwa & Co. Advocates for the defendant/respondent -present