



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 2694 of 1988**

**ROSE WANJIKU KOMO ..... PLAINTIFF**

**VERSUS**

**SERAH WATURI MBUGUA .....1<sup>ST</sup> DEFENDANT**

**SAMUEL KIARIE MBUGUA.....2<sup>ND</sup> DEFENDANT**

**PETER KIMACHU MBUGUA..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By Originating Summons dated 30<sup>th</sup> May 1988, filed in court on 7<sup>th</sup> July, 1988, the plaintiff, **ROSE WANJIKU KOMO** sued the 3 defendants, claiming “to be declared to have become entitled by adverse possession of over 12 years to the piece of land described as Riabai/Ndumberi/T35, and situated in Kiambu District.”

**2. “The plaintiff prayed to be registered as the sole proprietor of the said piece of land, instead of the deceased and or his administrators.”**

The Originating Summons was supported by the affidavit of the plaintiff, filed on 7<sup>th</sup> July 1988. The plaintiff entered the suit premises in 1959 and by the time she filed the suit, she said she had, **“continuously and exclusively been in occupation of the whole of the suit property.”**

She averred further that the deceased’s title has been extinguished by her address possession, and hence that of his 3 administrators whom she sued, and because a period of 12 years had elapsed she prayed that she be registered as the owner of the property in dispute.

The defendant/respondents who are the administrators of the estate of the late Mbugua Kimochu opposed the Originating Summons vide a replying affidavit sworn by Samuel Kiarie Mbugua, dated 1<sup>st</sup> August 1988 filed in court the same day. Another replying affidavit was sworn by Peter Kimochu, after the death of Samuel Kiarie Mbugua.

The Respondents – stated that the applicant Rose Wanjiru Komo took possession of the suit premises as a **“tenant at will”** pursuant to the permission granted to her late husband by the registered property.

The Respondent stated further that Rose’s occupation of the suit premises was interrupted by a suit,

HCCC No.1031 of 1970 in which Rose's son claimed title to the suit land, and the claim was dismissed with costs.

The Respondent again referred to Succession Cause No.185 of 1997 filed in Kiambu Magistrate's Court by the applicant following the death of his later father.

At paras 7 and 8 of the affidavit, the Respondent talks of when the other members of the family left the suit land, but Rose's sons left her on the suit land. This would be about 1958, according to the averment in the 2 paragraphs.

That the Respondent's father, who was the registered proprietor Mbugua Kimochu died on 19.6.80 and further, that before he died, he sold the suit premises to one Njenga Gachuchu because he needed to raise money to defend the court case namely HCCC No.1031 of 1970. That this means that there is nothing for the applicant Rose to claim.

Rose filed affidavit in reply to the replying affidavit of Samuel Kiarie Mbugua. At para 3 thereof, she denied having been a party to HCCC No.1031 of 1970, as such, she was not affected by the Judgment of Trevelyan, J (as he then was).

Rose repeated at para 5, that her "**adverse possession has never been interrupted or challenged in any manner or at all**". She also denied that her late husband ever asked for the suit premises to be sold to him, and again, never denied his title to the suit premises.

In court during the hearing of the Originating Summons, Rose Wanjiru Komo identified Peter Kimochu, a son of the late Mbugua Kimochu in whose name the suit land was and is still registered.

That Sarah Waturi Mbugua, the 1<sup>st</sup> defendant in this suit, and Samuel Kiarie Mbugua the 2<sup>nd</sup> defendant are both dead. Rose's husband Komo Kimochu died about 45 years ago, during emergency.

That he had a one acre piece of land which was registered in the name of the late Mbugua Kimochu, his brother. This was Riabai/Ndumberi/T.35, where Rose has been living all these years, about 42 years.

Her late husband lived with her in the suit premises, since demarcation. Rose said that she has a house in the suit premises, which she has wired and connected with electricity, and she also has water in the house. That the house occupies about a quarter of an acre; which was excised from another bigger portion.

According to Rose, nobody has ever claimed this land, and she asked the court to declare that she has acquired this land by adverse possession. Rose explained that she sued the 3 defendants as the legal representatives of the late Mbugua Kimochu. Rose was not aware that the land she has occupied for over 42 years was sold to somebody else. She was aware of the fact that the late Mbugua Kimochu had all family land registered in his name. Rose's husband was by then in detention. He was a brother of Mbugua Kimochu.

Josphat Mbugua Komo, is Rose's son, aged 57 years old.

He testified that he lived with his mother Rose in "**concentration camp**" during emergency when his father was in detention. He was aware that his father's land (plot) was put together with that of his uncle Mbugua Kimochu and registered in his name. That this was ancestral land, and was part of the bigger land.

Josephat re-called that his late Uncle Mbugua Kimochu, was registered first on this land in 1959. He produced a copy of the green card as exhibit. According to Josephat, his mother Rose has not moved out of this land since 1959 which she has developed and put electricity and water. Josephat produced a Grant of Letters of Administration to the estate of the late Mbugua Kimochu issued on 24.3.97. He also referred to the Certificate of Confirmation of that Grant, Ex. 3. The properties listed therein included this land,

No. LR Ndumberi/Riabai/T.35 which was to be registered in the name of one John Njenga Gachuchu. The Certificate of Confirmation of Grant is dated 9<sup>th</sup> December, 1996.

The copy of the Green card shows a caution lodged on the title to this land by John Njenga Gachuchu on 13.10.81.

The 3<sup>rd</sup> defendant Peter Kimochu Mbugua filed a replying affidavit dated 3.3.2003, as the other 2 defendants had died by the time of the hearing of the Originating Summons.

The defendant denied the plaintiff's claim of adverse possession but admitted that his late father Mbugua Kimochu, is still the registered proprietor of the suit property since 1959.

He charged that the claim by the plaintiff is not justified because her late husband died in 1969 and immediately after that, a suit being HCCC No.1031/70 was filed claiming title to this land as well as another piece of land, T.92.

The claim was dismissed vide a judgment delivered in January 1979. The title to the suit land, T.35 remained in the name of the late Mbugua Kimochu.

The defendant again referred to a Succession Cause filed in Kiambu Magistrate's Court by Rose and her sons in respect of the estate of the late Mbugua Kimochu.

The defendant filed objection in that Succession Cause No. 185 of 1987 and the court ruled in their favour declaring them heirs of the estate of their late father. The Certificate of Confirmation of Grant was issued on 9.12.1996. The court found that Rose was not the right person to file the Succession Cause, however, the judgment in the Succession Cause was **never executed** and the defendant now wanted Rose to be evicted, as she remained in the suit premises even after the death of her late husband.

In fact, the second defendant Samuel Kiarie Mbugua, stated in his replying affidavit sworn on 1<sup>st</sup> August, 1998, that the applicant Rose refused to vacate the suit premises when other family members including her sons did so. This is para 16 of his affidavit. At para 15 of the same affidavit, he conceded that the applicant Rose, "**recently erected a house**" in the suit premises valued at Kshs.6,000/=. This was in 1988. Rose told court in her oral evidence that she has since wired her house, put in electricity and even has running water flowing into the house. This claim was not disputed by the respondent/defendant Peter Kimochu Mbugua.

Both the replying affidavits of Peter Kimochu Mbugua, filed in court on 3.3.2003, and the one already referred to the late Samuel Kiarie Mbugua stated that Rose's occupation of the suit premises was interfered with by the Civil Suit, HCCC No. 1031 of 1970, determined in 1979. But as has already been stated, Rose was not a party to this suit. It was her son George Kamau who was claiming land which he said belonged to his late father Komo Kimochu under a trust.

I find that Rose's occupation of the suit premises was not interrupted by that case.

Another case referred to was the Succession Cause filed in the Magistrate's Court in Kiambu by the applicant Rose Wanjiru Komo, Lucia Muthoni Njoroge, Wanjiru Gikonyo and George Kamau Gikonyo. This was in 1987, it was SRM Succession Cause No. 185 of 1987. The four petitioned for a Grant to the estate of the late Mbugua Kimochu. Their claim to the estate was not successful, as Mbugua Kimochu's family later obtained the Grant instead.

As far as this case is concerned I find that it was filed about 28 years (from 1959 to 1987) after Rose had been in continuous and uninterrupted possession and occupation of the suit land being NDUMBERI/RIABAI/T.35. This suit too did not in my considered opinion, interfere with her adverse possession of the suit premises.

Finally was the Succession Cause filed by the late Mbugua Kimochu's family where the certificate of

confirmation of Grant was issued to them on 9.12.1996. By this date Rose's suit by way of Originating Summons, this one claiming land L.R NDUMBERI/RABAI/T.35 was already pending in court awaiting determination, and the defendant's were aware of Rose's claim by adverse possession. Secondly, the Grant to the estate of Mbugua Kimochu was issued and subsequently confirmed when Rose had continuous and uninterrupted occupation of the suit premises for over 12 years, so her claim by adverse possession was not defeated by that Succession Cause.

From the evidence which I have considered in great detail, I find that Rose, the applicant in the Originating Summons has proved on a balance of probabilities that,

**1. That her occupation of the suit premises has been open, continuous and uninterrupted for a period of over 12 years.**

2. For the above reason I declare ROSE WANJIKU KOMO to, "have become entitled by adverse possession of over 12 years to the piece of land known as RIABAI/NDUMBERI/T.35 situated in Kiambu District in the Republic of Kenya.

Secondly, I direct that the plaintiff be registered as the sole proprietor of the said piece of land known as RIABAI/NDUMBERI/T.35 in place of the deceased Mbugua Kimochu, and or the administrators to his estate, or **ANYBODY** who acquired title from the deceased or the administrators to his estate and or the defendants.

Finally, I award Rose Wanjiku Komo costs of the Originating Summons as against the surviving defendants.

**DATED at NAIROBI this 19<sup>th</sup> day of May, 2006.**

**JOYCE ALUOCH**

**JUDGE**