REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1240 OF 2002 (O.S.)

IN THE MATTER OF THE REGISTERED LAND ACT CAP. 300 OF THE LAWS OF KENYA

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT

CHAPTER 22 OF THE LAWS OF KENYASECTIONS 7 AND 38

AND

IN THE MATTER OF FREEHOLD LAND REFERENCE

NUMBER NDARUGU/GACHARAGE/218 MEASURING 8.00 ACRES ONLY

JONAH KIMANI NG'ANG'A………………………………...…PLAINTIFF

VERSUS

ESTHER WACU KARANJA ……………………………...…DEFENDANT

JUDGEMENT

A. THE PLEADINGS AND THE DEPOSITIONS

This suit, dated and filed on 24th July, 2002 sought a declaration that the plaintiff had acquired adverse possession of the property known as NDARUGU/GACHARAGE/2418, and an order directing the defendant to execute all necessary papers to transfer the suit premises to the plaintiff.

The plaintiff's supporting affidavit, sworn on 24th July, 2002 may be summarised as follows. He avers that he had purchased from the husband of the deceased a portion of L.R. No. NDARUGU/GACHARAGE/90, on 15th November, 1971. He completed payment for the same on 1st November, 1974. He first paid Kshs.3,000/=, and thereupon the deceased (husband to the defendant) allowed him as purchaser to take possession. The deponent went on paying off the outstanding Kshs.3000/= by instalment, and on 16th July, 1972 the deceased received Kshs.2,500/=, which appeared to be a condition to the deponent taking possession immediately. Apparently he agreed to this, as he immediately took possession of the suit land. The original consideration payable by the deponent had been agreed before the elders, and the size of land being purchased was five acres. But subsequently, as the plaintiff went on paying the purchase price by instalments, the deceased sent his own son, ***Mwangi***

Ithibu, to inform the plaintiff that the deceased would sell to him a further three acres of land. On 5th January, 1972 the deceased vendor sent to the plaintiff the said ***Mwangi Ithibu*** who collected and acknowledged receiving a payment of Kshs.3,400/= in respect of the three additional acres of land. The agreed price for the said three acres was Kshs.3,600/=, so there was an outstanding balance of only Kshs.200/=. This payment transaction by the plaintiff was witnessed by one ***Burugu Kanyotu***. The unpaid balance was later paid off, and on 30th December, 1972 the deceased vendor came to the plaintiff and personally acknowledged receipt of the said Kshs.200/=. Thereafter the plaintiff was no longer indebted to the deceased, who undertook to effect transfer of a portion of L.R. No. NDARUGU/GACHARAGE/90 to the plaintiff. The deceased vendor, however, took no action on his promise. He disappeared to an unknown place, where he later died. The plaintiff averred that, immediately upon the death of the vendor, the defendant herein sought letters of administration and then sub-divided the suit land into two portions, so that the portion which the plaintiff had been occupying now became L.R. No. NDARUGU/GACHARAGE/218. The plaintiff subsequently filed a caution at the Thika District Lands Registry. He avers that since taking possession of the land in 1972 he has developed the same by planting tea bushes, and he has been in continuous occupation since then, without interruption.

In the defendant's replying affidavit of 15th August, 2002 she avers that her late husband, ***Danson Karanja Ithibu*** had been the owner of L.R. No. NDARUGU/GACHARAGE/90 comprising 8 acres. The said ***Danson Karanja Ithibu*** had died in 1977. The deponent states that she was never aware that the said parcel of land had been sold. She avers that, for over 30 years the plaintiff has never applied to the Land Control Board for consent to transfer. She depones that she has a family with 8 children, and they have no land other than the suit land, and that it is on this same land that her husband is buried. She depones that nobody had objected to the burial of the remains of ***Danson Karanja Ithibu*** on the suit land. Following the death of her husband, the deponent migrated with some of her children to Narok; but when one of her sons, one ***Kamau Karanja***, died she had interred his body on the same suit land. The defendant deposes that the suit land was in her possession all the time. She said that she returned to the suit land after staying in Narok, and found the same in the very same state in which she had left it, and neither the plaintiff nor anyone else had constructed any house or home on the suit land. She did file Succession Cause No. 58 of 1988, which was advertised in the ***Kenya Gazette***; but nobody raised any objection. This Succession Cause was heard by the Thika Chief Magistrate who made grant of letters of administration to the defendant jointly with her late husband's brother, ***John Njuguna Ithibu.*** The letters of administration were subsequently confirmed. In April 2001 the defendant got the suit land sub-divided into two portions, which function was attended by the local Chief, and a team of surveyors. The defendant deposes that the sub-division process was uneventful, and nobody attempted to interrupt it. She further avers that her brother-in-law, ***John Njuguna Ithibu***, moved into his portion of the suit land in February, 2001 which portion is now L.R. No. NDARUGU/GACHARAGE/2419, effectively taking possession thereof, and constructing thereon his house wherein he lives with his family without any objection from anyone. She, the defendant, also received a title deed for L.R. No. NDARUGU/GACHARAGE/2418 on 7th August, 2001 and she is in effective possession thereof. The defendant avers that the plaintiff filed suit long after the suit land had been physically sub-divided and registered in the names of the individual owners including herself. She states that the land being claimed by the plaintiff, L.R. No. NDARUGU/GACHARAGE/90 does not exist any more. The defendant avers that the plaintiff had filed High Court Miscellaneous Application No. 9 of 1991 claiming adverse possession, but never prosecuted the same to conclusion. She avers that the said suit was also heard by the Gatundu Land Disputes Tribunal, which made its award in favour of the defendant herein. The defendant averred that the plaintiff is not, and has not been in possession of the suit land.

B. EVIDENCE FOR THE PLAINTIFF

This case was first heard before ***Mr. Justice Rimita*** on 17th July, 2003. On that occasion PW1, the plaintiff himself, was sworn and gave his evidence in the Kikuyu language. He said he lives at Gatundu, in Thika District. He did know ***Karanja Ithibu*** who was the defendant's husband and who owned land at Gacharage, namely L.R. No. NDARUGU/GACHARAGE/90. In 1971 the said ***Karanja Ithibu*** was alive, but he died subsequently and the defendant is his legal representative. The witness testified that on 15th

November, 1971 he had entered into a written sale agreement with ***Karanja Ithibu.*** The deceased ***(Ithibu)*** had agreed to sell 5 acres of land, but later agreed to sell to the plaintiff an additional portion. The plaintiff testified that he paid to the vendor Kshs.3000/= at the time of the agreement, and later paid a further 3000/=, and these payments were recorded in written memoranda. He testified that on top of the Kshs.3000/= which he paid at the beginning, he later paid the deceased Kshs.6000/=; and that he took possession of the land in January, 1972. He found wattle trees growing on the land, and he uprooted them after paying for them. He then sold the uprooted trees for use in burning charcoal. The plaintiff averred that the parcel of land owned by the deceased, was then subdivided, in the presence of Agriculture Officers, and he took possession of five acres out of the larger portion. This was done, it is averred, in the presence of the vendor. The plaintiff testified that he begun cultivating his portion in 1972; he planted tea bushes, which are still standing on the suit land. The parties did not then obtain the consent of the Land Control Board, but there was no restriction on the plaintiff's use of the land. He testified that apart from tea bushes, he had also planted subsistence crops, and left some areas for grazing animals. The witness testified that the vendor, ***Karanja Ithibu,*** died in the 1980s, and his widow then applied for letters of administration. The land was thereafter sub-divided, and the part occupied by the plaintiff was registered in the name of ***Ithibu's*** widow; the other half being registered in the name of ***Ithibu's*** brother, ***Njuguna***. The witness testified that the defendant lives in Maasailand, and Njuguna occupies his piece of land with his relative, by name ***Mwangi Ithibu.*** The plaintiff averred that he had been the sole occupant of his portion of the land, and had filed suit when the defendant demanded that he vacate. The plaintiff avers that he is still the occupant of his portion, and prays that he be declared to be the lawful owner thereof.

On cross-examination, the plaintiff reaffirmed that he had purchased the suit land, and that he had filed suit in 1997 claiming ownership by adverse possession. He said the dispute had earlier come before the Elders' Tribunal as No. 3 of 2002 at Gatundu in which, however, his witness had not been allowed to give evidence. He said that the sub-divisions effected to the suit land by the defendant had been done secretly, sometime in 2001 or 2002. He said he was claiming *five acres* of land, two of which he had planted with tea bushes. He averred that although both the defendant's husband and her son who had died were both buried on the land, they were not buried in the five-acre portion which he claims as his; they were buried in the portion occupied by ***Njuguna*** (the brother of the deceased vendor***, Ithibu).***

PW2, ***Burugu Kanyotu***, gave his evidence before the ***Honourable Mr. Justice Rimita*** on 2nd October, 2003. He said his home was at Ituru, in Gacharage Location, where he had been a farmer and carpenter since about 1970. He had been, with one ***Kimani*** and the late ***Karanja Ithibu,*** in the employ of one ***Albert Ndirangu. Karanja Ithibu,*** husband of the defendant, once called the witness, sometime in 1971, to witness him receiving the purchase price in respect of land which ***Ithibu*** was selling. This money was paid by ***Jonah Kimani*** (the plaintiff), and it was in the amount of Kshs.300/=. The land in question was planted with wattle and grevillea trees. Later, sometime in 1971, ***Jonah*** (the plaintiff) called upon the witness to fell those trees for him, and the plaintiff later ploughed the land. ***Karanja Ithibu*** was not living on the land; he had shifted to Mdundu. The witness had heard that the amount of land sold to ***Jonah Kimani*** was five acres in size*; but on the ground, the plaintiff had possession of the entire parcel of land*. The witness testified that he had been present during the planting of tea bushes by the plaintiff, having been invited along with some other persons to come and give assistance. He averred that, to date, the plaintiff is still benefiting from his tea bushes. He said his own home is one-and-a-half km from the suit land, and that to his knowledge, the defendant does not use the suit land.

On cross-examination, PW2 said he did not remember when exactly ***Karanja Ithibu*** died, but he remembers that the deceased was buried on his brother's land, and this brother, by name ***Njuguna,*** is a neighbour of the plaintiff. The witness did not know when the said ***Njuguna*** had obtained title to his land. He said the whole parcel of land had belonged to the father of ***Karanja Ithibu***, and then ***Karanja Ithibu*** sold it to the plaintiff. Elders had conducted a sub-division, and in this way gave ***Karanja Ithibu*** his share; but ***Ithibu*** sold his share to the plaintiff. This share was *some 5 or 8 acres*. The witness was not sure whether ***Karanja Ithibu*** sold off 5 or 8 acres. The witness did know that the plaintiff had filed Civil Suit No. 2164 of 2001 against the defendant, *claiming 8 acres*. He did not know what became of the plaintiff's suit. He witnessed the payment of Kshs.300 by the plaintiff to the defendant's husband. He did not know why the plaintiff was not registered as the owner of the suit land since 1971. The witness did know that the land was divided into two portions in 2001 – one being for the plaintiff and the

other for ***Njuguna***. When he said he did not know who held the title deeds to the two portions of land, he was shown a title deed for L.R. No. NDARUGU/GACHARAGE/2418 which was in the name of ***Esther Wacu Karanja*** (defendant) and was issued on 7th August, 2001. He said there had been a dispute between the parties, at the Gatundu Lands Tribunal, but he had not been called as a witness. He did not know that the Tribunal awarded the land to the defendant, nor that the Tribunal's award was later confirmed by a Court. He did not also know whether there had been a succession cause at which the estate of ***Karanja Ithibu*** was the subject-matter.

The witness said that when he had witnessed payment of Kshs.300/= by the plaintiff to ***Karanja Ithibu,*** he had learned that other payments had been made earlier, as part of the purchase price for the land. He said he did not know why the land was not transferred to the plaintiff. He said the plaintiff was the Headman for the local area, and he did not know why the plaintiff would have remained quiet when he was not getting the title to the land. The witness said the plaintiff cultivates the suit land, but he does not live there; and that the defendant does not live in the local village.

On re-examination, the witness testified that the survey conducted for the defendant on the suit land, did not change the boundaries of the portion held by the plaintiff.

C. EVIDENCE FOR THE DEFENDANT

On 2nd October, 2003 DW1, the defendant, was sworn and gave her evidence. She said she lives at a place called Flyover, at a road turn-off in the Limuru direction. Her husband was ***Karanja Ithibu,*** who owned 8 ½ acres of land, being L.R. No. NDARUGU/GACHARAGE/90. He was co-owner of this land with his brother, one ***John Njuguna;*** and the original owner of this land was ***Karanja Ithibu's*** and ***John Njuguna's*** father. The witness expressed ignorance as to whether ***Karanja Ithibu*** had sold this land to the plaintiff. This land was sub-divided into two portions – and the witness did not remember when sub-division took place. She said her husband died some 26 years in the past, and was buried in his portion of the suit land. The witness, who said she was illiterate, testified that one of her sons had died and was buried "on his father's piece of land and not on Njuguna's side". After her husband died, the defendant relocated to Maasailand. Before the death of her husband she had moved to Ndunduru. She left Maasailand owing to ethnic clashes which were taking place in the Rift Valley, and she then found tea bushes on the suit land which had not been planted there when she had relocated elsewhere. She asked Njuguna about the ownership of the tea bushes, and was told they were the property of the plaintiff's. The defendant said she had not authorised the plaintiff, who was the local Headman, "to plant tea on our land". She said her late husband had not allowed the plaintiff to plant tea on the suit land.

The defendant said she and others filed a succession cause at the Thika Court, and the plaintiff raised no objection to the same; and subsequently the suit land was sub-divided into two portions, and she was issued with a title deed (Def's Exh.A).

The defendant testified that, in Civil Suit No. 2164 of 2001 the plaintiff had sued her for the whole of L.R. No. NDARUGU/GACHARAGE/90 measuring 8 acres. She said the sub-division had been done by surveyors, and in this process the plaintiff was also present but did not attempt to stop the surveying. There was also an appearance before the Gatundu Land Disputes Tribunal, at the instance of the defendant. The Tribunal's award favoured the defendant, and it was confirmed by the Resident Magistrate's Court at Gatundu.

The defendant said she was the registered proprietor of the land, and that the plaintiff had never lived thereon. She testified that Njuguna lives on one portion of the land, and that the plaintiff had never interfered with his occupancy.

On cross-examination, the defendant said it was unknown to him whether the plaintiff had made an application before the Land Control Board. She testified that the plaintiff had been on the suit land for more than 30 years. She said she did not live on the suit land because she lives in the Rift Valley. She said there had been tribal clashes in the Rift Valley, and this caused her to return to the suit land, but it was not possible for her to live on the suit land because she was unable to build a house. She said she

was preparing to build a house. She said the plaintiff was using her side of the suit land. The defendant said she intended to build and to live on the suit land. After she came from Narok she lived at the road-side, as a squatter, on the Limuru-Nairobi road. The defendant said that Njuguna had not moved to Narok, and was on land adjacent to that used by the plaintiff. She said she had visited the land as many as ten times, and her husband was buried thereon. The witness said the surveyors had followed the boundary between the plaintiff's tea and Njuguna's portion. She said some of the plaintiff's tea was left on Njuguna's side.

On re-examination, the defendant testified that the plaintiff did not live on the suit land, but he has been using the land. She averred that the whole parcel of land, which used to be L.R. No. NDARUGU/GACHARAGE/90 belonged to her and Njuguna. The land was sub-divided in 2001 and she has a title deed; and Njuguna has a home on the land.

DW2, ***John Njuguna,*** was affirmed and taken through his evidence. He said his father had been the owner of the suit land, which passed on to him and his brother, ***Karanja Ithibu***. When ***Karanja*** died he was buried on the suit land, L.R. No. NDARUGU/GACHARAGE/90. By the time ***Karanja Ithibu*** died, the suit land had not been sub-divided. The defendant, who was the sister-in-law of the witness, had eight children, but a son of hers died in 1982 and was buried on the suit land before the sub-division had been effected. The witness said he had a home on the land, but the plaintiff did not have one.

DW2 testified that the defendant had come to the suit land following tribal clashes which broke out in the Rift Valley, and found tea plants thereon. When she complained to the witness, he advised that the land be subdivided. So, first, the two initiated a succession cause at the Thika Court, and got themselves appointed as legal representatives of the estate of ***Kamau Ithibu***. The witness testified that there was no objection to the taking out of the letters of administration. And thereafter the two proceeded to the Land Control Board, and had the suit land sub-divided in 2001. There was no objection to their application, and the Board duly gave consent. Subsequently the defendant and the witness received their respective title deeds for two subdivisions of the suit land. A dispute was subsequently brought before the Land Disputes Tribunal, after the title holders found that a caution had been lodged against their titles – by the plaintiff. The plaintiff reluctantly appeared before the Tribunal, where the matter was heard, and an award made in favour of the defendant. The witness testified that although the plaintiff did have tea on the suit land, he had not built a home there. He averred that the plaintiff had no permission to plant the tea on the suit land. He testified that the whole parcel of land measured slightly over 8 acres, and *that he owned half of it, while the defendant owned the other half.* He said neither his late brother ***Karanja Ithibu*** nor he, had sold any land to the plaintiff. He averred that the defendant's reason for relocating to Narok was to seek daily bread for her children, but she had to come back due to the outbreak of tribal clashes. He said he did not know that the plaintiff had tea bushes on the suit land. He said he had been staying in Limuru, while the defendant was staying at Njambini.

On re-examination, the witness said that the plaintiff and his son had appeared before the Gatundu Land Disputes Tribunal, but the plaintiff did not testify.

D. PRECURSOR TO ANALYSIS AND JUDGEMENT

After the close of the case for both parties this case came up before different Judges, as ***Mr. Justice Rimita*** before whom the proceedings had taken place, was no longer available to give the judgement. It was mentioned before the ***Honourable Justice Lenaola*** on 4th February, 2004 and he ordered the typing of the proceedings; before the ***Honourable Justice Kihara Kariuki*** on 8th July, 2004 when a similar order was made; before the ***Honourable Justice Ransley*** on 28th October, 2004 when it was ordered that the matter be placed before me; before the ***Honourable Lady Justice Aluoch*** on 15th December, 2004 when the earlier order was re-issued; and then before me on 7th February, 2005. On that occasion ***Mr. Njore*** appeared for the plaintiff while ***Mr. Mugo*** appeared for the defendant; and both had one request: a date for judgement. On those representations I did assign today's date, 4th March, 2005 for delivery of judgement. When, however, I began to work on the proceedings, and on the file, I found that in his last directions given on 2nd October, 2003 ***the Honourable Justice Rimita*** had recorded: "By consent of the

advocates for the parties, parties will present written submissions on or before 4th November, 2003". From the representations made before me by counsel on their last appearance on 7th February, 2005 I have to assume that they had foregone their opportunity to file written submissions, as I found that these were not on file, some 15 months since these became due, and counsel had sought judgement date without any mention of the place of such written submissions. It is on that basis that I have proceeded to deliver today's judgement.

E. ANALYSIS AND FINAL DETERMINATION

This Originating Summons suit is founded upon a claim of right to land ownership by adverse possession. Although lawyers know well what adverse possession is, it is necessary for me to set out its essence, as a basis for resolving the conflicting facts and claims which have been recorded in the evidence of the four witnesses who gave testimony. By ***Osborn's Concise Law Dictionary,*** 6th ed. *"adverse possession"* bears the following meaning:

> **"An occupation of land inconsistent with the right of the true owner: the possession of those against whom a right of action has accrued to the true owner. It is actual possession in the absence of possession by the rightful owner, and without lawful title….**
>
> **"If the adverse possession continues, the effect at the expiration of the prescribed period is that not only the remedy but the title of the former owner is extinguished… The person in adverse possession gains a new possessory title which cannot, normally, exceed in extent or duration the interest of the former owner."**

The foregoing principles have been applied in the case, ***Wambugu v. Njuguna*** [1983] KLR 172:

> **"In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it….The respondent could [but] did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a period of 12 years as to entitle him, the respondent, to the title to that land by adverse possession**."

Such a position was restated in the recent case of ***Margaret Wambui Magu v. Rachael Njeri Nyawanga and Another,*** Civil Suit No. 1509 of 2002 (O.S.):

> **"The law of adverse possession is founded on a rational principle; he who enters upon a parcel of land, innocently and in the normal course of living, without anybody's permission, without stealth and using no violence, is socially recognised as the legitimate and moral possessor of that land, and the public institutions of sanctification and protection should vindicate that moral position, and confer overriding rights upon the person in question, where possession has been retained for a certain minimum duration. The legal position created in protection of such a person carries so much moral force, that it will defeat any other claims which appear to be not so well founded and which emerge only from the fact of registration in formal records. Although the title holders, by such formal records, hold a valid position in law, they stand to have their recorded rights taken away and conferred, instead, upon the new moral claimant who has had physical possession of the suit land and who entered thereupon *nec vi, nec clam, nec precario,* that is, the legitimate claimant who has long use not by violence, not by stealth, not by entreaty."**

How does the law apply to the facts of the present case?

It is common cause that the plaintiff was Headman in the local area where the suit land is situate. He says he purchased the whole of the land belonging to the late ***Karanja Ithibu***, during ***Ithibu's*** lifetime in 1971, and that he made payment by instalments; that he took possession of the same in 1972; that the deceased never lived on the suit land; and that he the plaintiff, all through the years to-date, practised

agriculture on the suit land. PW2, ***Burugu Kanyotu*** gave evidence that sometime in 1971 he witnessed the payment of Kshs.300/= by the plaintiff to the defendant, and the plaintiff told him on that occasion that the money was being paid in part-payment towards the purchase of he suit land. PW2 said he had helped the plaintiff in 1971 to uproot the wattle and grevillea trees which were on the suit land, and later he helped the plaintiff with the planting of tea bushes on the suit land. It was not clear which part of the eight-acre parcel of land the witness was referring to; and it was unclear too whether the plaintiff considered himself to have purchased that entire parcel, or only part thereof. For the witness said that part of that parcel was occupied by ***Njuguna,*** the brother of the deceased. PW2 testified that both the deceased and his son who also died, were buried on the suit land, though on the side occupied by ***Njuguna.*** The defendant and DW2, on the contrary, merely maintained that the two deceased had been buried on the suit land; they did not specify on which side of this land the two were buried. From such evidence, what seems certain is that there was at least some occupation of the suit land by *persons other than the plaintiff*. It follows that such occupied land could not have been available to adverse possession claims by the plaintiff.

It was therefore the responsibility of the plaintiff to prove which distinct portion of the eight-acre parcel of land, NDARUGU/GACHARAGE/90 he had occupied for a continuous period ***nec vi, nec clam*** and ***nec precario*** to justify a finding that he was in adverse possession. If he failed to provide such proof, then there was no prospect at all that the Court would find in his favour, on the basis of the law relating to adverse possession.

The plaintiff's claim rests on a sale agreement said to have been made on 15th November, 1971. The records do not show proof of this alleged written agreement to have been given to the satisfaction of the Court, and even the various instalment payments claimed to have taken place are not proved, except for the small bit in the sum of Kshs.300/=, witnessed by PW2, but the purpose for which he did not explain credibly. In an affidavit sworn by the plaintiff on 24th July, 2002 it is thus stated (para.7):

> *"That on the 5th of January, 1972 the defendant's husband sent the said* **Mwangi Ithibu** *[his son] who acknowledged the sum of Kshs.3,400/= …. Leaving a balance of Kshs.200/=…as the price in consideration for the said [additional] three acres …: the transaction which was witnessed by one Burugu Kanyotu."*

It is to be noted that the said ***Burugu Kanyotu*** who was PW2 never mentioned that particular transaction.

At paragraph 8 of the same affidavit the plaintiff deposed:

> *"That on the 30th December, 1972 the defendant's husband came to me and acknowledged receipt of the remaining balance of Kshs.200/=…which was witnessed by one* **Burugu Kanyotu** *who had earlier been witnessing our dealings."*

Now in his evidence PW2, namely ***Burugu Kanyotu,*** made no mention of that particular transaction.

In paragraphs 9 and 10 of the same affidavit the plaintiff thus averred:

> *"9. That on 3rd March, 1972 the defendant's husband came and collected the sum of Kshs.300/=… which I handed over to him through one* **Ngomo** *(now deceased).*
>
> *"10. That since I had completed the whole amount in consideration, the defendant's husband came to me and acknowledged a loan of Kshs.300/=…[and]…he assured me that now he [would] go and effect transfer of the said portion of land L.R. No. NDARUGU/GACHARAGE/90 and he then absconded to [an] unknown place …(where he) died without my knowledge."*

It is to be noted that there is no common thread in this repeated reference to Kshs.300/=, and it is not clear how it is related to the sum of Kshs.300/= which PW2 testified he witnessed being paid by the plaintiff to the defendant in 1971.

It has emerged from the evidence that the *plaintiff did not at any time live on the suit land*; he only planted tea bushes, and possibly some subsistence crops, there. The defendant gave evidence that the whole of the suit land, L.R. No. NDARUGU/GACHARAGE/90 belonged to her and ***John Njuguna***, and that the two have never at any time heard that the deceased, ***Karanja Ithibu,*** ever sold it to the plaintiff. She testified that her deceased husband, ***Karanja Ithibu,*** had owned 8 ½ acres of land, and this was the suit land. ***Karanja Ithibu*** had been co-owner of this land with his brother, ***John Njuguna,*** and originally this suit land had belonged to the departed father of the two. The deceased, DW1 averred, had been buried on the suit land and besides, "on his father's piece of land and not on ***Njuguna's*** side." The defendant said that she had, just before her husband's death, moved to Ndundura, and after his burial on the suit land, she went to stay in the Narok area in Rift Valley; and explanations for these relocations were given by DW2 as the need to find daily bread for the defendant's children. The defendant testified that from Narok, she kept on visiting the suit land, but when she returned there on account of ethnic clashes which had broken out in the Rift Valley, she found tea bushes growing on the suit land. DW2, who evidence shows has a home on the suit land, said he had never seen the said tea bushes, whereas PW2 averred that he had helped the plaintiff to plant the tea as early as 1972. There is, thus, conflicting evidence on this matter. Why should there be such conflicting evidence? This must be because *the presence or absence of such tea bushes, and the time they may have been planted at the suit land, is thought by each party to be important in disposing of the relevant legal issues*, and thus in determining the outcome of this case. Thus on the question of the tea plants, the truth, clearly may not have come out.

Evidence is given by DW2 which is not controverted, that after the death of ***Karanja Ithibu,*** his widow (the defendant) and her brother-in-law (DW2) filed a succession cause at the Thika Law Courts and took out letters of administration, following which they were able to subdivide the suit land and to register the sub-divisions in the names of themselves respectively, each one taking half of the same.

The plaintiff has claimed that he entered upon the suit land through purchase; but he did not prove successfully that such purchase, indeed, did take place. He did not prove specifically which portion of the suit land he had purchased – *whether only 5 acres, or the entire 8 ½* acres. So he did not prove that he dispossessed the late ***Karanja Ithibu*** of the suit land. On mode of initiating adverse possession, it is thus stated in ***Wambugu v. Njuguna*** [1983] KLR 172:

> **"The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years**."

Did the plaintiff in the present case dispossess the owner of the land, who is generally acknowledged to have been ***Karanja Ithibu?*** Was ***Karanja Ithibu*** dispossessed of the land? These questions, in the light of the evidence, must be answered in the negative, as the plaintiff has not proved that he had purchased the suit land; he has not shown which specific portion he is claiming; he has not shown how ***Karanja Ithibu's*** brother, ***John Njuguna***, comes to have a home on the suit land, a home which may have been in place for as long as anyone remembers.

There is evidence that the defendant had not *abandoned* the suit land, but had relocated to the Rift Valley for the purpose of securing daily needs for her children. Taking this to be a genuine explanation, I would hold that the defendant still had purpose for the suit land, and she intended to use the same in the future. Such a situation is addressed in a persuasive authority, ***Wallis' Catlon Bay Holiday Co. Ltd. v. Shell-mex and B.P. Ltd*** [1974] 3 All E.R. 575 in which ***Lord Denning, M.R***. thus stated:

> **"When the true owner of land intends to use it for a particular purpose in future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose. Not even if this temporary or seasonal purpose continues year after year for 12 years or more."**

It is quite clear from the evidence, that the plaintiff's only indicia of possession was his tea bushes

growing on the suit land. This, in law, cannot give adverse possession; there must be evidence of *effective possession,* and physical occupation is classic evidence of such effective possession though I would not rule out other modes of serious and effective possession which could, depending on the facts of a case, provide a basis for concluding that there has indeed been *adverse possession.* The Court of Appeal had, in ***Jonathan O. Oyalo Wabala & Another v. Cornelius Otaya Okumu***, Civil Appeal No. 208 of 1977, held as follows:

> **"…the only form of 'occupation' the respondent has over the land was that he was cultivating it. We think that in these circumstances, the learned Magistrate was perfectly justified in coming to the conclusion that the respondent had failed to prove that he had been in occupation of the land and for a continuous period of 12 years. We think it would not only be wrong but also dangerous to introduce the concept of constructive occupation. To be able to acquire title to land registered in another person's name, one has to be literally in occupation of the land, for the *mere presence of crops on land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land…."***

I have come to the conclusion that the plaintiff in this case did not qualify for title to the suit land on the basis of the doctrine of adverse possession. I therefore find in favour of the defendant, and against the plaintiff, and I will make the following specific orders:

1. The plaintiff's prayer that a declaration be issued that the applicant has acquired L.R. No. NDARUGU/GACHARAGE/2418

by adverse possession, is refused.

2. The plaintiff's prayer that an order be issued directing the respondent to execute all necessary papers to transfer the suit premises to the applicant, is refused.

3. The plaintiff shall bear the defendant's costs in this suit.

DATED and DELIVERED at Nairobi this 4th day of March, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff: Mr. NJore, instructed by M/s. Macharia Njore & Co. Advocates

For the Defendant: Mr. P.N. Mugo, instructed by M/s. P.N. Mugo & Co. Advocates.