



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND COURTS**

**ELC NO. 364 OF 2013**

**MARGARET WANGUI.....PLAINTIFF**

**=VERSUS=**

**VIRGINIA WARIGIA KIHATO.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, THIKA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated **1<sup>st</sup> March 2013**, and filed in Court on **15<sup>th</sup> March 2013**, the Plaintiff herein **Margaret Wangui**, has sought for various Orders against the Defendants herein. The Plaintiff has sought for Judgement against the Defendants jointly and severally for;-

- a. A Rectification Order directing the 2<sup>nd</sup> Defendant to cancel/ and/or amend the register with respect to Ruiru/Mugutha Block 1/2273 and reinstate the Plaintiff as the registered owner.***
- b. An Order of indemnity and/or compensation for an amount to be assessed by Court.***
- c. An order that the title deed issued to the 1<sup>st</sup> Defendant be cancelled and/or nullified.***
- d. Costs of the suit and interest.***
- e. Any other relief that the court may deem fit and just to grant.***

The Plaintiff had averred in her Plaint that on or about **21<sup>st</sup> September 1992**, she became the registered owner of all that piece of land known as **Ruiru/Mugutha/Block T.2273** (hereinafter referred to as the *Suit property*). She also averred that on or about **May 2012**, the Plaintiff discovered that on **17<sup>th</sup> March 1998**, the 1<sup>st</sup> Defendant in connivance with the 2<sup>nd</sup> Defendant illegal, and/or unlawfully obtained a transfer of the suit property. It was her contention that the Defendants jointly conspired and executed a scheme to defraud the Plaintiff of the suit property and she particularized the said fraud as;-

- i. Fraudulently obtaining a transfer of the suit property without the Plaintiff's knowledge or consent.***
- ii. Deliberately failing to carry out due diligence to confirm the legitimate owner of the suit property.***

*iii. Failing to obtain the requisite Land Control Board Consent.*

*iv. Obtaining the transfer of the suit property through forged documents.*

*v. Conniving to deprive the Plaintiff of her property.*

It was her further averments that as a result of the Defendants actions, she has been unlawfully deprived of her property and has suffered loss and damage and that the said transfer of the suit property is illegal, **null** and **void** and of no consequence. She also alleged that despite demand made and Notice of intention to sue having been issued, the Defendants have failed to make good the Plaintiff's claim.

The 1<sup>st</sup> Defendant filed her Statement of Defence and Counter-Claim on **8<sup>th</sup> May 2013**, and denied all the allegations made in the Plaintiff. In her Defence, she averred that the Plaintiff has been colluding and conniving with one **Ng'ang'a Kanina** and other third parties to fleece innocent parties by way of conning them. She particularized the collusion as ;-

*a. Allowing Ng'ang'a Kanina to carry her ID and Original title deed over Ruiru/Mugutha/Block T.2273;*

*b. Authorising Nga'ng'a Kanina to enter into transaction on her behalf in respect of Ruiru/Mugutha/Block T.2273;*

*c. Ensuring that people are fleeced in respect of Ruiru/ Mugutha/Block T.2273;*

*d. Each of them selling the parcel interchangeably to different innocent purchasers .*

The 1<sup>st</sup> Defendant further averred that she has enjoyed peaceful and uninterrupted occupation and possession over **Ruiru/Mugutha/Block T.2273** for over 13 years hence has become entitled to the same legally and even by way of **adverse possession**. She contended that the suit as framed did not disclose any reasonable cause of action. It was therefore her claim vide the Counter Claim that she has enjoyed peaceful and interrupted occupation and possession over **Ruiru/ Mugutha/Block T.2273** for over **13 years** and even if her initial entry was wrong, she has become entitled to the same by way of adverse possession and the court should make an order to that effect. She therefore prayed for the dismissal of the Plaintiff's suit and that her Counter Claim be allowed.

The Plaintiff did file a response to the Defence and Counter Claim and denied in **toto** all the allegations of collusion and/or conveyance and put the 1<sup>st</sup> defendant to strict proof. Further the Plaintiff reiterated the contents of paragraph **7(i)-(v)** of her Plaintiff. She further denied the contents of paragraph 5 of the statement of Defence and Counter Claim and puts the 1<sup>st</sup> defendant to strict proof. The plaintiff averred that the 1<sup>st</sup> Defendant has never been in possession of the suit property, leave alone enjoying peaceful occupation and possession. It was her further averment that she had built a permanent house on the property and she is in actual occupation and possession of the suit property. She also alleged that she is a stranger to the contents of paragraph 6 of the Defence and Counterclaim and puts the 1<sup>st</sup> defendant to strict proof. Therefore she denied the Counterclaim in its entirety and did put the 1<sup>st</sup> defendant to strict proof. The plaintiff prayed that the Defence and Counterclaim to be dismissed.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants though served with summons did not enter appearance nor file Defence . However the Office of the Attorney General was represented during the hearing of oral evidence.

The evidence of the witnesses herein was taken by Onguto J, who was later transferred from the Environment and Land Court Division before delivery of Judgment. I have considered the court record and I have noted that the Plaintiff gave evidence for herself and called no witnesses. She adopted her witness statement wholly and produced various exhibits. On her part the 1<sup>st</sup> Defendant gave evidence and called four witnesses to support her case.

**PW 1 Margaret Wangui** adopted her witness statement as her evidence in court and further stated that she is the owner of **Plot No. 2273**, which was allegedly owned by **Nyakinyua Investments**. She identified the Certificates of Ownership and the Green card for the suit plot which was allegedly given to her by the Land Registry. She further identified the copy of title deed which was in the name of **Virginia Warigia Kihato**, the 1<sup>st</sup> Defendant herein. The said title deed was issued in the year **1998 (18<sup>th</sup> March, 1998)**. It was also her evidence that the suit land was sold to **Virginia** by one **Nganga Kanina** as evident from the sale agreement attached to the bundle of documents. She testified that she did not know **Nganga Kanina** but the said **Nganga Kanina** allegedly sold the suit property on her behalf.

She also identified the demand letter that her advocate sent to **Virginia Warigia** and Certificate of Official Search issued by the Land Registry and which shows that the land is in the name of **Virginia Kihato**. The Plaintiff also identified photographs of the suit land allegedly showing the house that she built on the suit property. It was her evidence that she did not collude with **Nganga Kanina** to defraud other people 1<sup>st</sup> Defendant included. She testified that she did know the said **Nganga Kanina** and she never gave him power of attorney and that she did not know the 1<sup>st</sup> Defendant herein. In cross-examination, she confirmed that she had nothing to show that she had reported that her title deed was lost. She also denied ever giving the title deed to anyone. She also confirmed that she was given the plot in 1991 and she built on the plot. In further cross-examination, she testified that there is a structure on the suit property and she has a caretaker called **George Githegi** who was present in court on the material day. She also testified that it is **Githegi** who farms on the suit land and that she built the structure in the year 1997. The plaintiff further alleged that she lives in Kitale and denied that someone else built the structure on the suit property. She also denied having sold the suit property to one **James Munyua Githinji**. She also alleged that **James Munyua** went looking for her in Kitale as he had allegedly bought the suit property from one **Margaret Wangui**. It was her allegation that she did not know if **Virginia** had stayed on the suit plot for more than 14 years. In further cross-examination, she admitted that she reported the matter to the CID and only **Nganga Kanina** had been arrested. Further that **Virginia** also availed documents showing that she had bought the suit property but she denied ever giving **Nganga Kanina** her original title deed so that he could sell the property to **Virginia Kihato**, the 1<sup>st</sup> Defendant herein.

The 1<sup>st</sup> Defendant gave her evidence and called four witnesses. **DW 1, Virginia Warigia Kihato** also identified her witness statement and adopted it fully as part of the evidence. She further alleged that she bought the suit property, **Plot No. 273 in January, 1998**. She further testified that the same was sold to her by one **Nganga Kanina**, after she paid **Kshs.55,000/-** as the purchase price. That after attending Land Control Board, she was later issued with the title deed. It was her testimony that after purchasing, she fenced the plot and started cultivating on it. That she fell unwell and stayed away from the plot and when she went back, she found **Lucy Njoki** had built on the plot. That **Lucy Njoki** had certificate of ownership, but 1<sup>st</sup> Defendant had title deed and the said Lucy Njoki vacated the plot after DW 1 refunded her the money she had used to put up the house. It was her testimony that she took back possession and stayed on the suit plot from **1998** and she has never left the same. She testified that the house on the suit property was built by **Lucy Njoki** and she refunded her the cost of building the same. She denied that the same was built by **Margaret Wangui**, the Plaintiff herein. She also testified that there is no caretaker on the suit property and that the said land has never been cultivated as alleged by the Plaintiff. Further that the Plaintiff has never built any structure on the suit property. She identified her sale agreement and she urged the Court to find that the suit property belongs to her.

In cross-examinations she admitted that when she searched the plot before purchase, she noted that it was owned by the said **Margaret Wangui** and that **Nganga Kanina** sold it on her behalf. She also admitted that they went before Thika Land Control Board and **Margaret Wangui** was present. She also testified that when she bought the property, it was undeveloped but the house was later built by **Lucy**. Further that the said **Nganga Kanina** sold this suit property twice to Isaack and later to **Lucy Njoki**. It was her testimony that she had never met the plaintiff at the CID's office.

**DW 2 Lucy Njoki Muriithi** also identified her witness statement and adopted it as part of her evidence. She further testified that she met **Virginia Kihato**, the 1<sup>st</sup> Defendant who agreed to compensate her for the structure on the suit property. She alleged that when she bought the suit land, the seller gave her the sale

agreement as well as the ballot papers, and share certificate, and that the land had been fenced. She denied that the house on the plot was built by the plaintiff. Further that there was no caretaker at all since she stayed in the said house and no one was cultivating on the plot. Further that Virginia refunded to her the cost of the structure and they signed an agreement to that effect on **14<sup>th</sup> November, 2006** . She produced the same as Defence Exhibit 1.

In cross-examination she admitted that she bought plot **no. 2273** and she signed a sale agreement. She confirmed that she did not carry any search before purchasing the suit property. It was her testimony that the seller gave her a share certificate and not title documents and that she remained in possession until the **year 2006** when **Virginia**, the 1<sup>st</sup> Defendant appeared. She also admitted that she was aware that **Nganga Kanina** had also sold the suit property to **Isaack Kariuki** and also to **Virginia Kihato**. It was her further testimony that she has never dealt with the Plaintiff herein.

**DW 3 Lydia Njoki Mwangi** also testified in court and identified her witness statement and urged the court to adopt it as part of her evidence. She further testified that the 1<sup>st</sup> Defendant was her landlord in Ruiru, at the suit property from the **year 2006** until **2012**. That she used to pay **Kshs.2000/= per month** as rent and she vacated in **March, 2012** after plaintiff told her to leave as plaintiff wanted to sell the property which she alleged was hers. DW3 testified that she used to pay rent to the defendant and not the plaintiff herein. That there was no caretaker on the suit property and no one was farming on the suit property. In cross examination, she admitted that she met 1<sup>st</sup> defendant in the year 2006, but she had never met **Lucy Njoki Muriithi** on the plot. Further that there was no tenancy agreement between her and the 1<sup>st</sup> defendant.

**DW4: Maria Grace Ngonyo** also identified her witness statement and adopted it as part of her evidence. She told the Court that she knew both **DW1** and **DW2**. That **DW2** built on the plot owned by the 1<sup>st</sup> Defendant.

She further witnessed the refund of cost of building the house to **Lucy** by **Virginia DW1**. It was her testimony that the plaintiff did not built the house on the suit property. In cross examination, she admitted that she did not know why DW2 was on the suit premises. Further that **DW2** did not have title deed for the suit property but only share certificate.

**DW5, Francis Maina Mburu** also testified in court and identified his witness statement which he adopted as part of his evidence. He further testified that he has known **DW1 Virginia** since **1994** as they used to belong to the same small organization. He testified that the 1<sup>st</sup> defendant gave him work to do on the suit property. He was asked to supply building stones as DW1 wanted to build a fence. He testified that he delivered the building stones and found **Lucy Njoki Muriithi** on the plot who had built a house thereon. He did not find any other person on the plot. He confirmed that there was a house on the plot. In cross examination he confirmed that he found DW2 on the plot and not the plaintiff herein. He also testified that he went to the plot twice when he delivered the building stones and that he only found DW2 on the plot and nobody else. He never saw **Margaret Wangui** on the plot.

After the close of the respective parties' case, the court directed the parties to file their written submissions and they did comply with the court's directions. The Law Firm of **Mbugua Nganga & Co. Advocates** for the plaintiff filed the plaintiff's written submissions on **25<sup>th</sup> May, 2015**. They relied on **Section 26 (1) (b)** of the **Land Registration Act, 2012** which states as follows;-

1) **The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a**

*corrupt scheme.lows:-*

They also relied on the case of **Elijah Makeri Nyangwara Vs Stephen Mungai & Another (2013) eKLR** where the court held

***“Every proprietor, at the time of acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land lease or charge and subsisting at the time of acquiring”.***

They also relied on the case of **Agnes Wambui Kihara Vs Bajila Chonya Bashora (2014) eKLR** where the Court held that;-

***“ Section 6 of the Land Control Act provides that a sale or transfer of agricultural land is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent within six months. The Plaintiffs has admitted that although the land she was buying is agricultural land within the meaning of the Land Control Act, the Defendant did not obtain the consent on the Board”.***

Further she relied on the case of **Ravindaranath Dahybhai Bhagat Vs Hamisi Harod & 5 Others [2014] eKLR** where the Court stated that;-

***“ One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession”.***

The Plaintiff urged the court to allow her claim as prayed with costs. The Law Firm of ***Ngala Morara & Co.Advocates*** for the 1<sup>st</sup> Defendant filed the written submissions on ***10<sup>th</sup> June 2015***, and submitted that the Plaintiff failed to prove her case on a balance of probabilities. The counsel urged the court to dismiss the Plaintiff’s claim and allow the 1<sup>st</sup> Defendant’s Counter Claim to the effect that 1<sup>st</sup> Defendant acquired title to the suit property by virtue of adverse possession.

This Court has now carefully considered the available evidence, the exhibits produced in court, the relevant provisions of law, and the written submissions together with the cited authorities and the Court makes the following findings.

There is no doubt that the suit property herein is ***Ruiru /Mugutha/Block/T.2273***. There is also no doubt that according to the available copy of the title deed, the suit property is in the name of ***Virginia Warigia Kihato*** which was issued to her on ***18<sup>th</sup> March 1998***. There is also no doubt that this suit land was sold to ***Virginia Warigia Kihato*** by one ***Nganga Kanina***, who was allegedly selling the suit land on behalf of ***Margaret Wangui***, the Plaintiff herein. From the copy of green card produced in court by the plaintiff, it is evident that ***Margaret Wangui*** was the first registered owner of the suit property as she obtained registration on ***21<sup>st</sup> September 1992***. Prior to the registration, the said ***Margaret Wangui*** was issued with certificate no.473 by ***Nyakinywa Investments***, confirming plot ownership of a ¼ acre plot under ballot ***no.2273***. This is the land that was later sold to the 1<sup>st</sup> Defendant by ***Nganga Kanina*** vide a sale agreement date ***26<sup>th</sup> January 1998***.

The Plaintiff has alleged that she never authorized the said ***Nganga Kanina*** to sell the suit land to the 1<sup>st</sup> Defendant or any other person on her behalf. She has urged the court to find that the suit land was fraudulently sold to 1<sup>st</sup> Defendant and that the title held by the 1<sup>st</sup> Defendant should be cancelled and the register be rectified and reinstate the Plaintiff as the registered owner of the suit land. These above allegations have been vehemently opposed by the 1<sup>st</sup> Defendant.

The court finds that the issues for determination are as follows;-

- i. **Did the 1<sup>st</sup> Defendant obtain a good title.**
- ii. **Has the 1<sup>st</sup> Defendant acquired ownership of the suit property by dint of adverse possession?**
- iii. **Is the Plaintiff entitled to the prayers sought?**
- iv. **Who should bear the cost of this suit and counter claim.**

On the first issue, there is no doubt that the Plaintiff herein was the initial registered owner of the suit property. As per the copy of the green card, the Plaintiff herein **Margaret Wangui** got registered as the proprietor of the suit property on **21<sup>st</sup> September 1992**. The Plaintiff did not avail a copy of the title deed because she alleged that the same got lost while she had kept it at her aunt's place in Thika. The 1<sup>st</sup> Defendant alleged that the Plaintiff sold the suit property to her through one **Nganga Kanani**. A sale agreement dated **26<sup>th</sup> January 1998** was produced by the Plaintiff and the 1<sup>st</sup> Defendant.

It is also not in doubt that after the signing of the said sale agreement, the 1<sup>st</sup> Defendant got registered as the proprietor of the suit property and obtained a title deed issued on **18<sup>th</sup> March 1998**. The Plaintiff has denied ever selling this suit land to the 1<sup>st</sup> Defendant. In the sale agreement, **Nganga Kanina** has signed on behalf of **Margaret Wangui** and the said **Nganga Kanina** is described as an administrator of **LR No. Ruiru/Mugutha Block I/T 2273**, and that is the suit property. However the said **Nganga Kanina** could not have been an administrator because the said **Margaret Wangui** was alive. A person can administer on another person's parcel of land if that person is appointed vide letters of Administration to be an administrator of deceased estate (Succession Act Section 79).

***“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative”***

Further as has been submitted by the Plaintiffs' counsel, a person can sell another person's parcel of land if granted power of Attorney. Black Law Dictionary describe Power of Attorney as :-

***“ An instrument granting someone authority to act as agent or attorney in-fact revocable and automatically terminates upon the death or incapacity of the principal”.***

There is no evidence herein that the Plaintiff herein **Margaret Wangui** had donated any power of Attorney to the said **Nganga Kanina** to enable him sell the suit property to the 1<sup>st</sup> Defendant herein. Further, the 1<sup>st</sup> Defendant alleged that at the time of purchase, she was aware that the suit property was in the name of **Margaret Wangui**. However she did not seek clarification or confirmation from the said owner of the suit property **Margaret Wangui** that's he was indeed selling the suit property. The sale agreement was not signed by the Plaintiff herein and the same cannot be connected to her. The 1<sup>st</sup> Defendant alleged that she was sold the suit property by one **Nganga Kanina** and the sale agreement shows that the vendors was indeed **Nganga Kanina**. However, the said **Nganga Kanina** was not called as a witness by the 1<sup>st</sup> Defendant to conform that indeed he has been authorized by the plaintiff to sell the suit property.

It is trite that he /she who alleges must prove. The Plaintiff has alleged that she did not sell the suit property to the 1<sup>st</sup> Defendant; the 1<sup>st</sup> Defendant has alleged that the Plaintiff authorized **Nganga Kanina** to sell her land to the 1<sup>st</sup> Defendant. However she failed to call the said **Nganga Kanina** to prove that allegation. The Plaintiff relied on the case of **Peter Wanderi Mwangi & 3 Others Vs Kenya Bus Services Ltd & Another (2013) eKLR** where the court held that :-

***“ It is not clear from the record why the Respondent failed to call such a crucial witness . It is a presumption in law of evidence that a party who has in his possession evidence which he fails to***

***call, that evidence is presumed to have been adverse to him”.***

Since the 1<sup>st</sup> Defendant failed to call the said ***Nganga Kanina*** herein, the court finds that the Plaintiff assertion that she did not authorize the said ***Nganga Kanina*** to sell her suit property is not controverted and the court finds that it is more probable that the plaintiff did not authorize the sale of the suit property to the Defendant.

The 2<sup>nd</sup> issue herein is whether the 1<sup>st</sup> Defendant obtained a good title after purchase of the suit land from one ***Nganga Kanina*** and registration of the same to her name and issuance of the title deed on 18<sup>th</sup> March 1998.

There is no doubt that the suit land is now in the name of ***Virginia Warigia Kihato*** the 1<sup>st</sup> Defendant. It was issued to her on ***18<sup>th</sup> March 1998***. By dint of ***Section 26*** of the ***Land Registration Act***, then the 1<sup>st</sup> Defendant being the registered proprietor is deemed to be the absolute and indefeasible owner of the suit property.

However the said section provides that the certificates of title may be challenged on grounds of ***fraud, misrepresentation***, or where the title is ***acquired illegally, unprocedurally*** or through ***corrupt scheme***.

The plaintiff has alleged that she did not authorize ***Nganga Kanina*** to sell the suit property neither to 1<sup>st</sup> Defendant nor to anybody-else. Therefore ***Nganga Kanina*** had no right over the suit land and could not pass a good title to the 1<sup>st</sup> Defendant. Though the 1<sup>st</sup> Defendant is the registered proprietor of the suit land, the said certificate of title was not acquired regularly but illegally, unprocedurally or through corrupt scheme.

Further, the suit land herein being an agricultural land, the parties needed to obtain ***consent*** from the ***Land Control Board***. The 1<sup>st</sup> Defendant testified that they visited the Land Control Board and obtained ***Consent*** for the sell and transfer of this suit property. However the said consent was not produced as exhibit in Court. Courts have severally held that failure to obtain Land Control Board Consent for sell of agricultural Land under Registered Land Act renders the sale agreement void. In the case of **Gateru Keru Vs Mary Wambui Nen e Nairobi High Court Civil case No. 333 of 1978**, the court held that:-

***“ The sale of Agricultural land under the Registered Land Act is void if there is lack of Land Control Board’s Consent”.***

Further in the case of **Elizabeth Cheboo Vs Mary Cheboo Gimnyigei ,Civil Appeal No. 4 of 1978**, the Court held that :-

***“ Failure to get Land Control Board (when required) renders the agreement void”.***

It was further held in the case of **Koinange Ole Kasio Kioko Vs Nahashon Kimani Gitau, Nairobi High Court Civil Case No. 288 of 1993**, that :-

***“ Parties must obtain Land Control board consent where necessary otherwise the agreement is void”.***

The Plaintiff relied on the case of **Agnes Wambui Kihara Vs Bajila Chonya Bashora (2014) eKLR** where the Court held that:-

***“ Section 6 of the Land Control Act provides that a sale or transfer of Agricultural land is void for all purposes unless the Land Control Board for the land Control area or division in which the land is situated has given its consent within six months. The Plaintiff has admitted that although the land she was buying is agricultural land within the meaning of the land Control Act, the Defendant did not obtain the consent of the board”.***

Though the 1<sup>st</sup> Defendant herein did enter into a sale agreement with one **Nganga Kanina**, there was *no consent* from the Land Control Board for the transfer of the suit property. The said transaction was, therefore, **void** and I would concur with the Plaintiff's submissions that no valid title could have emanated from the void transaction. The answer to the second issue for determination is that the 1<sup>st</sup> Defendant did not obtain a good title.

The third issue is whether the 1<sup>st</sup> Defendant has acquired ownership of the suit property by virtue of adverse possession. It is not in doubt that the suit property was registered in the name of the 1<sup>st</sup> Defendant on **18<sup>th</sup> March, 1998** and which registration the court has found did not confer the 1<sup>st</sup> Defendant with good title. That 1<sup>st</sup> Defendant submitted that even if she did not obtain good title after purchase of the property from **Nganga Kanina**, she had acquired ownership of the same through adverse possession as she has lived in the suit property for **12 years**.

It is trite that the issue of adverse possession arises in cases of continuous and uninterrupted occupation of land for over 12 years. See the case of **Sarah Nyambura Kungu Vs David Njuguna, Civil Appeal No.20 of 1988**. Further in the case of **Mwinyi Hamisi Ali Vs. the Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal NO. 125 of 1997** the court held that: -

***“Adverse possession can only be granted against the owner or legal representatives.”***

The 1<sup>st</sup> Defendant is claiming adverse possession against the Plaintiff. However, it is evident that from **18<sup>th</sup> March, 1998**, the suit property was registered in the name of the 1<sup>st</sup> Defendant which registration the court has found to be **void** due to lack of consent from Land Control Board and the fact that **Nganga Kanina** had no authority to sell the said land from the Plaintiff who was the proprietor thereon.

The 1<sup>st</sup> Defendant was therefore the registered owner of the suit property and she cannot claim adverse possession against herself. Further, since adverse possession must be continuous and uninterrupted for 12 years, the court finds that the 1<sup>st</sup> Defendant did testify that after purchase of the suit land from **Nganga Kanina**, she utilized the land for 2 years and then she fell sick and stayed away from the land. During that period, DW2 **Lucy Njoki Mureithi** built a three bedroomed house on the said suit land which 1<sup>st</sup> Defendant bought it off in the **year 2006**. 1<sup>st</sup> Defendant admitted that she is not the one who built the house on the suit land but the said **Lucy Njoki Mureithi** and she acquired possession of the same again in the **year 2006**. The 1<sup>st</sup> Defendant was, therefore not in continuous and uninterrupted possession for **12 years** and she can certainly not have acquired ownership of the same by adverse possession. The Court will also be persuaded in the findings in the case of **Kipketer Arap Manson Vs Paul Kipkuri Kurgat (2005) eKLR** where the court held that: -

***“... The Plaintiff must establish that he has been in continuous possession of the parcel of land in question for a period of twelve years openly and without the registered owner thereof making a claim over it.”***

The court, therefore, arrive at a finding that the 1<sup>st</sup> Defendant has not acquired ownership of the suit property by virtue of adverse possession.

The fourth issue is whether the Plaintiff is entitled to the prayers sought. As the court has analyzed above, the Plaintiff herein was the first registered owner of the suit property. The court has arrived at a finding that she did not authorize the sale of this land to the 1<sup>st</sup> Defendant. The court has also found that the 1<sup>st</sup> Defendant did not acquire good title and the same can be impugned by dint of **Section 26(1) (a) and (b) of the Land Registration Act**. That being the case, the plaintiff has sought for rectification of the register to reinstate her as the registered proprietor of the suit property.

**Section 80(1)** of the Land Registration Act grants the court discretion to order for rectification of or the directing that any *registration be cancelled on amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

Though **Section 80 (2)** provides that rectification of the title shall not be done to affect the proprietor who is in possession and had acquired the land for valuable consideration. The said section further provides that if the omission, fraud or Mistake is substantially contributed by the said proprietor by any act of neglect or default, then the said rectification can be done.

It is evident from the analysis of the available evidence that the 1<sup>st</sup> defendant was aware that the suit property was in the name of the plaintiff herein but she did not inquire from the plaintiff if indeed the Plaintiff had allowed **Nganga Kanina** to sell the suit land on her behalf. The said **Nganga Kanina** had no power of attorney donated to him but 1<sup>st</sup> Defendant carried on with the transaction and that was neglect and default on her part and the court finds that it can indeed use its discretion to allow the rectification herein.

There is also evidence that there is a house standing on the suit property. There is no evidence that the same was built by the plaintiff herein. However it is evident that the same was built by **Lucy Njoki Mureithi** DW 2 who later sold it to 1<sup>st</sup> defendant herein. Though the court will allow the rectification sought by plaintiff herein, the court will further direct that the plaintiff do compensate the 1<sup>st</sup> defendant, by payment of the market value of the house standing on the suit property since it was not built by the plaintiff herein. The Court therefore in answer to 4<sup>th</sup> issue finds that the plaintiff is entitled to her prayers **No. (a) and (c)** of her claim.

On issue number five, as to who should bear the cost of this suit and the Counterclaim, the Court finds that ordinarily costs follow the event. The Plaintiff herein is the successful litigant and should ordinarily be granted costs of the suit. However taking into account the circumstances of the case, the court finds that the best order herein on costs would be for each party to bear its own costs.

Having now carefully analyzed the available evidence, the relevant provisions of law and the written submissions together with the cited authorities, the Court finds that the plaintiff has proved her case on a balance of probabilities and the Court do allow her claim in terms of the following prayers:-

- i. A Rectification Order directing the 2<sup>nd</sup> Defendant to cancel/and/or amend the register with respect to Ruiru/ Mugutha Block 1/2273 and reinstate the Plaintiff as the registered owner.*
- ii. An order that the title deed issued to the 1<sup>st</sup> Defendant be cancelled and/or nullified.*
- iii. The 1<sup>st</sup> defendant's counterclaim is not proved and the same is dismissed entirely.*
- iv. Further, the Plaintiff do compensate the 1<sup>st</sup> Defendant by payment of the market value of the house standing on the suit property. The said valuation to be done by a joint valuer appointed by both the plaintiff and the 1<sup>st</sup> defendant Advocates and a report be availed in court after 60 days.*
- v. Each party to bear its own costs.*

It is so ordered.

Dated, Signed and Delivered this **2<sup>nd</sup> day** of **December, 2016**

**L.GACHERU**

**JUDGE**

In the presence of :-

**Mr Wanyiri Kihoro** holding brief for **Nganga Mbugua** for the Plaintiff

None attendance for the 1<sup>st</sup> Defendant/Respondent

Mr Terer for the 2<sup>nd</sup> Defendant/Respondent

Court Clerk : Vincent

**L.GACHERU**

**JUDGE**

**Court:**

Judgement read in open Court in the presence of the above stated advocates.

**L.GACHERU**

**JUDGE**