



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 06 OF 2018**

**IN THE MATTER OF THE REGISTRATION OF LANDS ACT NO. 3 OF 2012 SECTION 28(H)**

**AND IN THE MATTER OF ORDER 37 RULE 7 CIVIL PROCEDURE RULES**

**AND IN THE MATTER OF SECTION 38 OF THE LAW OF LIMITATION OF ACTIONS ACT CHAPTER 22**

**LAW OF KENYA**

**AND IN THE MATTER OF AN APPLICATION BY MORRIS KIRUJA MPUNGU AND GENESIO KIRAITHE MPUNGU THAT THE COURT DO MAKE A DECLARATION THAT THEY ARE ENTITLED TO 2.80 ACRES COMPRISED IN L.R. NO. MUTHAMBI/EREGA/204 UNDER THE DOCTRINE OF ADVERSE POSSESSION**

**AND IN THE MATTER OF AN APPLICATION BY MORRIS KIRUJA MPUNGU AND GENESIO KIRAITHE MPUNGU THAT THEY BE REGISTERED WITH 2.80 ACRES COMPRISED IN L.R. NO. MUTHAMBI/EREGA/204 WHICH THEY HAVE ACQUIRED UNDER THE DOCTRINE OF ADVERSE POSSESSION**

**MORRIS KIRUJA MPUNGU.....1<sup>ST</sup> APPLICANT**

**GENESIO KIRAITHE MPUNGU.....2<sup>ND</sup> APPLICANT**

**AND**

**MARGRET NGIRI MUCHIRI.....1<sup>ST</sup> RESPONDENT**

**ROBERT NYAGA RUTERE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Originating Summons in this suit states as follows:

**ORIGINATING SUMMONS**

**UNDER ORDER 37 RULE 7**

**OF THE CIVIL PROCEDURE RULES**

Let MARGRET NGIRI MUCHIRI AND ROBERT NYAGA RUTERE of P.O BOX 91 CHUKA within 15 days after service of

these summons upon them enter appearance to these summons of MORRIS KIRUJA MPUNGU and GENESIO KIRAITHE MPUNGU the applicants herein who claim to be and have been in actual possession of 2.80 acres comprised in LR; MUTHAMBI/EREKA/204 for a period in excess of 12 years and have an overriding interest for determination of the following questions;

1. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the registered proprietors of LR; MUTHAMBI/EREKA/204 in divided shares of 1.80 acres to the 1<sup>st</sup> respondent and 1 acre to the 2<sup>nd</sup> respondent"
2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents got registered with LR; MUTHAMBI/EREKA/204 after filing and prosecuting CHUKA C.M.C'S SUCC CAUSE NO 81 OF 2012"
3. Whether originally land parcel LR; MUTHAMBI/EREKA/204 was registered in the name and style of NJOKA RIRIA and whether NJOKA RIRIA was the mother of MARGRET NGIRI and grandmother to the 2<sup>nd</sup> respondent"
4. Whether the late NJOKA RIRIA in 1973 invited the 2<sup>nd</sup> applicant into land parcel LR; MUTHAMBI/EREKA/204 and requested him to redeem the whole land from one BUNDI MUTHARA to whom he had sold the whole land to"
5. Whether the late NJOKA RIRIA instructed the 2<sup>nd</sup> applicant to subdivide LR; MUTHAMBI/EREKA/204, excise and transfer one acre to FRANCIS NKARI a son of NJOKA RIRIA "
6. Whether FRANCIS NKARI died having sold his interest of one acre out of LR; MUTHAMBI/EREKA/204 to the 1<sup>st</sup> applicant"
7. Whether on or around 1994 the 1<sup>st</sup> applicant entered into LR; MUTHAMBI/EREKA/204 and started developing and improving the said one acre out of LR; MUTHAMBI/EREKA/204"
8. Whether the applicants have been in actual possession and occupation of LR; MUTHAMBI/EREKA/204 from 1973 for the 2<sup>nd</sup> applicant and 1994 for the 1<sup>st</sup> applicant a period in excess of twelve years"
9. Whether the applicants have occupied, possessed and made use of LR; MUTHAMBI/EREKA/204 to the exclusion of any other person including the 1<sup>st</sup> and 2<sup>nd</sup> respondents for a period in excess of twelve years"
10. Whether the applicants have improvements and developments in LR; MUTHAMBI/EREKA/204 which include;
  - (i) 700 coffee plants
  - (ii) 3,000 tea bushes
  - (iii) 100 banana plants
  - (iv) 2 mature mango trees
  - (v) 4 semi permanent residential houses
11. Whether for the period of 45 years that the 2<sup>nd</sup> applicant has been in occupation and possession of LR; MUTHAMBI/EREKA/204 and for a period of 24 years that the 1<sup>st</sup> applicant has been in occupation and possession of neither NJOKA RIRIA nor MARGRET NGIRI or ROBERT NYAGA has ever taken any steps to have the applicants evicted from LR; MUTHAMBI/EREKA/204"
12. Whether for 45 years that the 2<sup>nd</sup> applicant has been in occupation and possession of LR; MUTHAMBI/EREKA/204 and for a period of 24 years that the 1<sup>st</sup> applicant has been in occupation either NJOKA RIRIA, MARGRET NGIRI and ROBERT NYAGA were aware of the applicants' occupation and possession of LR; MUTHAMBI/EREKA/204"

13. Whether the applicants have an overriding interest over LR; MUTHAMBI/EREGA/204 under the doctrine of adverse possession"

14. Whether the court should declare that the applicants have acquired LR; MUTHAMBI/EREGA/204 as a whole under the doctrine of adverse possession"

15. Whether the respondents should be ordered to transfer LR; MUTHAMBI/EREGA/204 to the applicants and in default the deputy registrar of the court be ordered and directed to execute al the requisite documents necessary to effect the transfer of LR; MUTHAMBI/EREGA/204 to the applicants"

16. Who should pay the cost of this suit"

These summons are supported by the annexed affidavit of MORRIS KIRUJA MPUNGU and GENESIO KIRAITHE MPUNGU and other reasons and grounds and evidence to be offered at the time of hearing and the annexed certified copy of register of land parcel LR; MUTHAMBI/EREGA/204.

DATED AT CHUKA THIS 27<sup>TH</sup> DAY OF JULY 2018

**DRAWN AND FILED BY**

**I.C MUGO & CO      ADVOCATES**

**FOR THE APPLICANT**

2. The Originating Summons was responded to through the replying affidavit of **Robert Nyaga Rutere**, the 2<sup>nd</sup> Respondent, which states as follows:

**REPLYING AFFIDAVIT**

I, **ROBERT NYAGA RUTERE** an adult male person of sound mind do hereby make oath and state as follows:-

1. **THAT** I am the 2<sup>nd</sup> Respondent herein versed with all the issues stated herein.
2. **THAT** I have authority of the 1<sup>st</sup> Respondent to swear this affidavit.
3. **THAT** I have carefully read the Applicants' application dated 27/07/2018 and all the accompanying documents and it is in response thereto that I swear this affidavit.
4. **THAT** the parcel of land the subject of these proceedings L.R. NO. MUTHAMBI/EREGA/204 was initially in the name of NJOKA RIRIA, now deceased.
5. **THAT** the said NJOKA RIRIA was the mother to three children:-
  - (a) EUNICE KOORI      -      DECEASED
  - (b) MARGARET NGIRI    -      1<sup>ST</sup> RESPONDENT
  - (c) FRANCIS NKARI      -      DECEASED
6. **THAT** I am the son of EUNICE KOORI.

7. **THAT** the 1<sup>st</sup> Respondent petitioned for letters of administration in respect of the estate of the said NJOKA RIRIA in Chuka PMC SUCCESSION CAUSE NO. 81 OF 2012 and distributed the estate to herself and me. (Attached hereto and marked 'RN I' is a copy of certificate of confirmation of grant).

8. **THAT** the grant was duly implemented and the parcel of land was transmitted in our joint names on 15/08/2013. (Attached hereto and marked 'RN II' is a copy of the title deed).

9. **THAT** thereafter the Applicants instituted MERU H.C. MISC. SUCCESSION CAUSE NO. 111 OF 2013 challenging the grant issued to the 1<sup>st</sup> Respondent. (Attached hereto and marked 'RN III' is a copy of the application).

10. **THAT** we duly filed our response to the application as evidenced by the affidavits attached hereto and marked 'RN IV' and 'RNV' respectively).

11. **THAT** I must point out that MERU H.C. MISC. SUCCESSION CAUSE NO. 111 OF 2013 was thereafter transferred to Chuka Law Courts and registered as CHUKA H.C. SUCCESSION CAUSE NO. 12 OF 2015 but thereafter transferred to the lower court and registered as CHUKA CMC SUCCESSION CAUSE NO. 271 OF 2016.

12. **THAT** to the best of my knowledge CHUKA C.M. SUCCESSION CAUE NO. 271 OF 2016 is still pending for hearing and determination.

13. **THAT** it is therefore safe to conclude that the Applicants are merely forum-shopping for pursuing remedies on two fronts.

14. **THAT** having put the above issues into perspective it is now in order to address the allegations raised by the Applicants.

15. **THAT** by the year 1973 when the Applicants claim that my grandmother NJOKA RIRIA commenced the process of giving them the suit land, she was unfortunately deceased.

16. **THAT** at absolutely no point in time did my grandmother intend to dispose of the suit land to a person named BUNDI MUTHARA. The 1<sup>st</sup> Respondent will readily attest to this having been very close to her mother.

17. **THAT** it is inconceivable that the said NJOKA RIRIA would have asked the 2<sup>nd</sup> Applicant to redeem the land from BUNDI MUTHARA and transfer a portion thereof to FRANCIS NKARI when it is clear that the ownership of the said land has never oscillated between NJOKA RIRIA, BUNDI MUTHARA and the 2<sup>nd</sup> Applicant as suggested. (Annexed hereto and marked 'RN VI' is a copy of the green card).

18. **THAT** it is thus not possible that the said FRANCIS NKARI could have disposed any portion of the suit land to the 1<sup>st</sup> Applicant.

19. **THAT** the Applicants are not in exclusive peaceful possession of the suit lands as alleged.

20. **THAT** my deceased aunt EUNICE KORI had planted coffee on the suit land through her membership account No. 0287061195 whose cultivation I took over upon her demise.

21. **THAT** my said aunt had also constructed a dwelling farm house and a pit latrine on the suit land and planted arrow roots, sugar cane and bananas thereon.

22. **THAT** on my part I have planted a vast number of tea bushes on the suit land.

23. **THAT** the Applicants have only recently entered the suit land forcibly and in 2016 brought police officers from Erega police post in an attempt to prevent me from utilizing the suit land.

24. **THAT** the officers respectfully left the property after they realized that the Applicants were not the registered owners and that I

had effected substantial developments thereon.

25. **THAT** the Applicants are mere trespassers whose entry into the suit property was and has been maintained by sheer force and brutality.

26. **THAT** the fact that the 1<sup>st</sup> Respondent has grown old and frail has boldened the Applicants' intention to illegally acquire a property that we have obtained through a rigorous legal procedure. It would otherwise be a nullification of the grant through this forum.

27. **THAT** it is our prayer that the court declines to entertain the unlawful actions of the Applicants and proceed to dismiss the suit.

28. **THAT** I depose to the foregoing believing the same to be true and accurate to the best of my knowledge, belief and understanding.

SWORN AT CHUKA BY THE SAID **ROBERT NYAGA RUTERE** THIS 25<sup>TH</sup> DAY OF MARCH 2019

.....

**BASILIO GITONGA, MURIITHI & ASSOCIATES**

**ADVOCATES**

3. PW1 told the court that he bought the subject land from Francis Nkari and that he knew that at that time the land was not registered in the name of Francis Nkari but was registered in the name of his mother. He knew that Francis Nkari had his Land Parcel No. Muthambi/Gatua/327. Except for saying that a son can sell land belonging to his mother he was unable to explain why someone could sell land in whose name he was not registered. He told the court that he entered the suit land with the permission of Francis Nkari the son of Njoka Riria, the then registered owner of land. He also told the court that although Njoka Riria died in 1973, he bought the land from Francis Nkari in 1994, 21 years after the registered owner had died. He claimed that he had occupied the land since. He claimed to have developed the land extensively.

4. PW2 Genesisio Kiraithe told the court that the 1<sup>st</sup> plaintiff was his brother. He went on to say that Robert Nyaga, the 2<sup>nd</sup> defendant was his nephew. He went on to say that Margaret Ngiri Muchiri and Eunice Kori were married and lived where they were married. He told the court that whatever developments are on the suit land belong to Morris Kiruja, the 1<sup>st</sup> plaintiff and himself, the 2<sup>nd</sup> plaintiff. He told the court that Njoka Riria, the registered owner of the land had asked him to give Francis Nkari, her son one acre. He could not convincingly explain why the registered owner did not conclude the necessary devolutions when she was alive. He introduced the name of Bundi Muthara (deceased) whom he said had given Njoka Riria Kshs. 1,000/= which he was told to refund. He could not convincingly explain why he took over the land without having refunded the sum of Kshs.1,000/= to Bundi Muthara. This line of evidence brings an element of him having occupied the land through purchase. He admitted that he was giving contradictory evidence. He also admitted that he was involved in a pending succession case at Meru and was unable to debunk the claim by the defence advocate that he was involved in forum shopping.

5. PW3's evidence was riddled with inconsistencies and did not contain much probative value. She was generally evasive and could not remember many things. Except for saying that the land had been sold to the 2<sup>nd</sup> plaintiff, Genesisio Kiraithe, she seemed not to be sure of the facts surrounding this case. She did not know when the land was sold, how much was paid or generally about the ownership of the suit land. The court noted that this witness was generally evasive.

6. PW4's evidence was riddled with contradictions and he was generally evasive. He said that the plaintiffs and the defendants were his family and clan members. He testified that Francis Nkari sold the land to Morris Kiruja in 1994. He particularized that he received Ksh.30,000/= and went on to say that he witnessed the payment. He went on to say that later on he received a goat and a heifer and Kshs.5,000/=. He said that the rest of the purchase price would be paid in piece meal basis. PW4's evidence seemed to be at substantial variance from the evidence of the other witnesses. He was not aware of when Njoka Riria had died. He was, however, insistent that Morris Kiruja, the 1<sup>st</sup> plaintiff, bought land from Francis Nkari, the son of the Registered owner Njoka Riria. He went on to say that when Morris Kiruja bought the land in 1994, no one was living on the suit land.

7. DW1, Robert Nyaga Rutere, the 2<sup>nd</sup> defendant, told the court that Land Parcel No. Muthambi/Erega/204 was registered in his name and that of Margaret Ngiri, his sister. He told the court that there existed Chuka Succession Case No. 12 of 2015 where the plaintiffs sought revocation of the grant. He testified that the case had not been concluded. He went on to say that he knew Njoka Riria since he was a child in the 1960's and that she died in 1969 and was buried at Embu. He told the court that he knew the plaintiffs who were living at the 1<sup>st</sup> plaintiff's place. He further testified that Francis Nkari was the son of Njoka Riria and he was his uncle. He said that he was not using 1 acre or any other portion of the suit land. He denied that Morris Kiruja Mpungu, the 1<sup>st</sup> plaintiff ever built up a house for Francis Nkari on the suit land. He testified that the plaintiff's forcefully occupied the land around 2010 or 2011 and that they moved into his mother's house. He testified that they put up structures recently.

I opine that DW1's evidence was not shaken during cross-examination.

8. DW2 generally gave garbled evidence and denied that the plaintiff's had a valid claim over the suit land. She could not remember how old she was in 1988 when the coffee she was harvesting was left to her. She said that she had no documents showing that she was taking coffee to Kionja factory. She told the court that she did not know if or if not the plaintiffs had houses on the suit land. Generally, she did not know much about the suit land.

9. DW3 Abraham Gitonga Nkanata told the court that he knew the defendants, Margaret Ngiri and Robert Nyaga. He said that the defendant's mother was a neighbor and a friend. He testified that he did not know the plaintiffs and never saw them on the suit land. He went on to testify that although he started farming on the land in 1978, he never saw the defendants on the land. He was categorical that he never saw the plaintiffs on the land even once. He was categorical that the coffee on the land had been planted by one Jane Muthoni, a sister of the plaintiffs. He was categorical that at the time he stopped working on the land in 2011, the plaintiffs were not on the land.

10. The parties filed written submissions.

11. The plaintiffs' written submissions are pasted herebelow in full without any alterations whatsoever:

### **PLAINTIFFS' FINAL SUBMISSIONS**

1. Your lordship by an O.S Dated 27th July 2018, the plaintiffs moved this court for a declaration that they are entitled to 2.80 Acres comprised in LR:MUTHAMBI/IRIGA/204 under the doctrine of adverse possession and that the plaintiffs be registered with 2.80 Acres comprised in LR:MUTHAMBI/IRIGA/204 under the doctrine of adverse possession.

2. The plaintiffs in support of their case filed and served a supporting affidavit sworn and dated 27th July 2018. They also annexed thereto a certified copy of register for LR:MUTHAMBI/IRIGA/204, a copy of certificate for confirmation of grant in CHUKA SUCCESSION CAUSE NO 81 OF 2012 and copy of photographs showing developments on LR:MUTHAMBI/IRIGA/204. The plaintiffs relied on the pleadings, statements and the documents in bid to establish their case. They also relied on their oral evidence in court which was subjected to cross-examination by the defendants.

3. The 1st plaintiff's case was that his father had a very small land and as a family they were living in the steep valley of river Nithi. At one point in time, Francis Nkari a son of Njoka Riria the original owner of LR:MUTHAMBI/IRIGA/204 sent M'rithaa Muga to the 1st plaintiff. Francis Nkari offered the 1st plaintiff land at Nguruka LR:MUTHAMBI/IRIGA/204 so that he could move out of the valley. In a meeting where several people were present, Francis offered 1 acre (his entitlement from his mother) to the 1st plaintiff. The condition for surrendering the acre to the 1st plaintiff was kshs 30,000 which was paid in kind, that a heifer and a bull. The 1st plaintiff also gave him cash. On or around 1994 the plaintiff moved from Nithi valley to LR:MUTHAMBI/IRIGA/204. The 1st plaintiff has extensively developed the suitland since then. He has a residential house, 400 coffee trees, 1,500 tea bushes, 50 banana plants, 50 gravelliar trees, Napier grass, 4 avocado trees and 3 macadamia trees. Since 1994 no one has challenged the 1st plaintiff on being on the land. His occupation was open and continuous. The 1st defendant - a daughter of the original owner and Eunice Kori another daughter of the original did not dispossess the 1st plaintiff of the suitland. The two did not even take over the possession of the suitland for their own use. The occupation was therefore uninterrupted putting into account that none of these daughters ever found a suit to evict the plaintiffs from the suitland. By the time this suit was filed, The 1st plaintiff was in the suitland for a period of 25 years. The fact that the plaintiff had acquired 0.80 Acres out of LR:MUTHAMBI/IRIGA/204 by way of adverse possession.

4. The 2nd plaintiff's case is a long one. The original registered owner of LR:MUTHAMBI/IRIGA/204 was known as Njoka

Riria. The 2nd plaintiff estimates that Njoka Riria died on or around 1970's. LR:MUTHAMBI/IRIGA/204 measures 2.80 Acres but Njoka Riria had always represented to the 2nd plaintiff that the land measures 3 acres. Njoka Riria gathered the suitland during adjudication section. During adjudication, the 1st respondent, Margret Ngiri and the late Eunice Kori (mother of the 2nd respondent) had already been married and settled with their husbands. On or around 1973, Njoka Riria approached the 2nd plaintiff. Njoka Riria told the 1st plaintiff that he was selling the whole parcel of LR:MUTHAMBI/IRIGA/204 to BUNDI MUTHARA. Njoka Riria asked the 1st plaintiff to return the land to one Bundi Muthara. The 2nd plaintiff then took over the land subject to giving Francis Nkari - a son of Njoka Riria - one acre out of parcel 204. The 2nd plaintiff was also to construct a house for Francis Nkari on another separate land. She gave up the land because the daughters were married and married daughters were not being given land in that era. The plaintiff has been on the land for a period in excess of 40 years uninterrupted. The 2nd plaintiff has 3 permanent and a semi-permanent house, zero grazing cowshed, 400 coffee plants, 1,500 tea bushes, 40 banana plants, napier grass, 60 gravelis trees, 5 macadamia trees, 1 mango tree and subsistence crops. For all this period he has been on the land none of the respondents have been on the land. The occupation was open, continuous and uninterrupted. For the period he had been on the land not a single defendant has ever filed a suit to evict the 2nd plaintiff. That the 2nd plaintiff has acquired the 2 acres out of LR:MUTHAMBI/IRIGA/204 under the doctrine of adverse possession. The 2nd plaintiff prays that the court do declare so and order that he be registered with 2 acres out of LR:MUTHAMBI/IRIGA/204. The 2nd plaintiff acquired the 2 acres for a valuable consideration.

5. The plaintiffs paraded 3 witnesses in support of their case. The 3 were not in particular sure of the dates the plaintiffs entered the suitland. He described the time being a very long time. This controverts DW1, DW2 and DW3 evidence that the plaintiffs came into the suitland on or around 2011.

6. The defendants got registered with the suitland on or around 31st July 2013. This was after the defendants succeeded in getting the grant in respect of the estate of Njoka Riria in Chuka Succession Cause No 81 Of 2012. Their registration did not extinguish the overriding interest by which both plaintiffs had acquired the suitland. The defendants should be ordered to transfer to the plaintiffs the suitland in the ratio of 0.80 Acres and 2.00 Acres to the 1st and the 2nd plaintiff respectively.

7. The defendants case is that the plaintiffs' entered on the suitland on or around 2011. The 1st defendant did not testify. Jane Muthoni testified on her behalf. The 1st respondent was better placed to give the history and the story behind the plaintiffs entering the suitland. For whatever reason she chose not to testify. Her failure to testify deprived this court very important information regarding land parcel LR:MUTHAMBI/IRIGA/204. She was a daughter to Njoka Riria.

8. The only issue for determination in this case is whether the plaintiffs acquired LR:MUTHAMBI/IRIGA/204 by way of adverse possession and who should pay the cost of this suit"

9. The 2nd respondent and DW2 (Jane Muthoni) were not sure of what they were testifying. That Jane Muthoni for example could not tell when she was married, when she started cultivating the suitland and when she left. She for example told the court that the 2nd respondent was left cultivating the suitland in 2011. She knew nothing of what happened in 2011. Both 2nd respondent and DW2 did not know why the police in 2016 had arrested the 2nd defendant. The defendant could not tell the court that it was the plaintiffs who had complained of the 2nd defendant's interference with the quiet possession and occupation of the suitland that is why the second defendant was arrested after the plaintiffs complained.

10. The 2nd defendant had nothing to show that he worked on the suitland. He had nothing to show when he entered the suitland thereby interrupting the occupation of the suitland by the plaintiffs. He did not table a single document to show that he harvested coffee and tea on the suitland. In fact he did not show at least photographs to show that he has tea and coffee bushes on the suitland. He did not demonstrate to the court that he delivered tea or coffee to any buying center that deals with the commodities.

11. DW3, Ibrahim Gitonga was a couch witness. He knew nothing over how the plaintiff entered into the suitland. According to him he has never seen the plaintiffs yet he started cultivating the suitland on or around 1987. He lied to the court that he has never seen the plaintiffs. He was a couch witness because he did not even witness Jane Muthoni quarreling with the plaintiffs (as alleged by Jane Muthoni) despite that according to him they stopped cultivating the land with Jane Muthoni upto 2011. Ibrahim Gitonga is an untrustworthy witness so is Jane Muthoni. His evidence is not credible just like that of Jane Muthoni. The two had rehearsed on what to tell the court but on cross-examination they could not recall the rehearsal they had done earlier.

12. The defendant talked of only a house and a pit latrine as being on the suitland. It was a farmhouse according to the 2nd defendant and Jane Muthoni. Plaintiffs exhibit number 3 are photographs showing several houses on the suitland. None of the defendants or his witnesses could tell the court when they were constructed. Definitely the houses were not constructed in 2011. There is also a

zero grazing cowshed on the suitland, goat pen etc. The plaintiffs testified that these were developments that came about due to long settlement on the suitland. The defendants despite claiming to be on this land since 1987 did not complain when the plaintiffs "invaded" and trespassed on the suitland. They were comfortable that the plaintiffs were on the land for all this while. The explanation to this acquiescence or indifference demonstrated by the defendants is that they only got courage to confront the plaintiffs in 2013 after the 2 defendants got registered with the suitland. This happened after the 2 defendants filed a Succession Cause No 81 Of 2012 (the grant). The defendants had no courage to confront the plaintiff before the issuance of the grant. It was after getting the grant and subsequently the title deed to the suitland that the defendants felt that they could evict the plaintiffs from the suitland but little did they know that time had caught up with them and the plaintiffs had acquired the suitland by way of adverse possession.

13. Your lordship we invite the court to look at the defendants exhibit (1, 2, 3 and 4). By attaching the exhibits, the defendants were trying to demonstrate that they were using the land for a long time and therefore they had interrupted the occupation of the suitland by the plaintiffs. Exhibit number 1 for example is what the defendants refer to as copy of records from the factory (deposit slip). The exhibit does not show the factory records are from neither does it show delivery of coffee berry into the factory. The only entry in 1997 only shows that Koori deposited KShs 101.90 (sic). Exhibit 1 is a document that is stage-managed by the defendant for the purposes of this case. The documents should have been a certified copy from a relevant factory for it to be of any use. The same should be disregarded in totality.

The 2nd exhibit is alleged to be a letter by Jane Muthoni requesting the management of Kiini coffee factory to deliver her coffee of the suitland LR:MUTHAMBI/IRIGA/204 to KIINI FACTORY. Kioja factory is the nearest to the suitland. The factory is about 10 kilometers from Kiini Factory. There is nothing to show that Jane Muthoni was delivering coffee to Kioja Factory before embarking on delivering to Kiini Coffee Factory. The document is not signed by Jane Muthoni. It is only served with a stamp for Kiini Coffee Factory. There is a signature against the stamp of Kiini Coffee Factory but it does not indicate who signed the document. This is yet another document that is stage-managed for the purpose of this case only.

The defendants' 3rd exhibit attached to Jane Muthoni's affidavit sworn and dated 4th July 2019 is a reply to Jane Muthoni's application to allow her to deliver her coffee from LR:MUTHAMBI/IRIGA/204 to Kiini Factory. Once more we submit that this letter is not genuine and is specifically prepared for this case. The accepted letter does not say when the committee met and under which minute they allowed Jane Muthoni the request. The person who has replied to Jane Muthoni's requests does not indicate which office he holds in Kiini Factory. We expected a genuine letter to be drawn and signed by the secretary manager and if not secretary manager for the secretary manager in the event that the secretary manager will have delegated his duties. The 3rd exhibit is a stage-managed document between Jane Muthoni and an employee of Kiini coffee factory limited.

The 4th exhibit is a copy of records of Jane Muthoni showing delivery of coffee berries to Kiini Coffee Factory. This document could be a genuine one save for the person who issued it. The document shows the account number of Jane Muthoni and the member number. Jane Muthoni has been delivering coffee to Kiini coffee factory since time immemorial. Why pick on this copy of record of 2019? There is nothing on this record to show that it refers to coffee harvested on LR:MUTHAMBI/IRIGA/204. It is just a record that confirms that Jane Muthoni has an account with Kiini Coffee Factory. The records do not show that the coffee that Jane Muthoni was taking to Kiini Coffee Factory originated from LR:MUTHAMBI/IRIGA/204. It should not be forgotten that Jane Muthoni is married near to Kiini coffee factory and she had coffee before 2011 that she was delivering at Kiini Coffee Factory. Jane Muthoni told the court that she left the 2nd defendant in charge of coffee and tea and nothing has been tabled to show that the 2nd defendant harvested any coffee or tea before or after 2011.

14. Your lordship the attempts by the defendants to demonstrate to this court that they interrupted the peaceful occupation of the suitland by the plaintiff in 2011 has not been successful. The evidence by DW1, the 2nd defendant is evidence that ranges from 2013 when the 1st and the 2nd defendants became the registered proprietors of the suitland. Jane Muthoni and Ibrahim Gitonga cannot be relied on because their evidence was shaky when subjected to cross examination. Defendant Number 1 Margret Ngiri-a daughter of Njoka Riria did not testify. She left her evidence to be adduced by Jane Muthoni a niece who was relatively young to know the history of the suitland viz-a-viz Njoka Riria and the plaintiffs.

15. Your lordship by so submitting we are guided by the following authorities;

**D) In The Court Of Appeal At Nairobi Civil Appeal No 24 Of 1979-Githu Versus Ndeti JUSTICES JJ MADAN AND LAW** held; "1....."

2.....

3. Time ceases to run under the limitation of actions act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective asertion of right for the purpose of stopping the running of time under the limitation of actions act” To date none of the defendants has taken legal proceedings against the plaintiffs to have them evicted from the land.

**II) In The Environment And Land Court At Murang’a ELC CASE NO 45 OF 2017.**JUSTICE KEMEI at paragraph 18,19 and 20 pronounced himself that the plaintiff therein was occupying the suiland in a manner adverse to the registered owner.This is exactly what has been happening with the plaintiff viz-A-viz LR:MUTHAMBI/IRIGA/204.

**III) In The Court Of Appeal At Nairobi,Civil Appeal No 73 Of 182-PUBLIC TRUSTEE VERSUS WANDURU.CHESONI AG JA** held that; “ 1. ....

2. The provisions of the Land Control Act(Cap 302) apply where there is a claim to title to agricultural land based on an agreement being a transaction or dealing in the land and not where the claim is based on operation of law such as by adverse possession.

3.....

4. The period of twelve years began to run the day the appellant and her husband took possession of the land as that was the day when the respondents’ possession was discontinued.....”

The plaintiffs dispossessed the owner of the suitland from 1973 for the 2nd plaintiff and from 1993 for the 1st plaintiff.The owner of the suitland through her agents or servants have never asserted their repossession of the suitland to date.

16. Your Lordship in light of the foregoing submissions we urge this court to make a finding and hold that te plaintiffs have proved their case on a balance of probabilities.They have demonstrated that they have been in occupation of the suitland for over 40 years in respect of the 2nd plaintiff and 25 years in respect of the 1st plaintiff.Granted that the 1st plaintiff redeemed 2 acres from BUNDI THARA and granted that the balance is 0.80 acres,the 1st plaintiff should go with 0.80 acres while the 2nd plaintiff goes with 2 acres.e pray that the court do declare that the plaintiffs have acquired their respective share of the suitland under the doctrine of adverse possession.May the court order that they be registered as owners of their respective shares of the suitland.

17. We rest our submissions and pray.

DATED AT CHUKA THIS 20TH DAY OF MARCH, 2020

**DRAWN AND FILED BY:**

**I.C MUGO & CO ADVOCATES**

**FOR THE PLAINTIFFS**

12. The defendants’ written submissions are pasted herebelow in full without any alterations whatsoever.

**SUBMISSIONS FOR THE DEFENDANTS**

Your Lordship the following comprises the submissions of the Defendants.

**Introduction**

Your Lordship the Plaintiffs’ claim is premised on the legal doctrine of adverse possession over L.R. NO. MUTHAMBI/EREGA/204 which was registered in the joint names of the Defendants on 15/08/2013 through CHUKA P. M.

SUCCESSION CAUSE NO. 81 OF 2012

The 1<sup>st</sup> Plaintiff claims to have entered the suit land in 1994 upon purchasing a portion measuring one (1) Acre from one FRANCIS NKARI. On his part the 2<sup>nd</sup> Plaintiff claims to have reclaimed the land or a portion thereof from an alleged creditor of the initial owner of the land.

The Defendants deny the Plaintiffs have established on a balance of probabilities the ingredients required to prove a claim of this nature.

**Submissions on the Applicable Law.**

Your Lordship, the Court of Appeal sitting in Nakuru *In NGATI FARMERS COOPERATIVE SOCIETY LTD VS. CLLR JOHN LEDIDI & 15 OTHERS (Civil Appeal No. 64 of 2004)* reiterated with approval the following passage from the decision in the English Case of *Littledale Vs. Liverpool College [1990]1 Ch 19,21*.

*'In order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it.'*

While employing this principle the Court of Appeal proceeded to state the two ingredients necessary for the proof of ownership of land by adverse possession as:-

- that the owner has been in possession but is now out of possession (either because he has been dispossessed or because he simply discontinued possession).
- that the land has been taken into the possession of some person in whose favour the limitation

In the instant case Your Lordship, we seek to apply the test employed in *In James Mwangi & Others – v- Mukinye Enterprises Ltd.,-High Court Civil Case No. 3912 of 1986*, which was quoted with approval in *Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR* where it was stated that ‘*a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years*’.

The Defendants were categorical that the Plaintiffs were not in continuous possession of any portion of the suit land and were mere trespassers that were employing police officers to assert a claim thereof.

In *Joseph Muthuri Ikunyua vs James Muthuri Ikunyua [Meru ELC No. 135 of 2009]*, the Court observed quoted the following passage from the determination in *Malindi ELC No. 106 of 2007 Haro Yonda vs Sadaka Dzenge Mbauro & Another:-*

*“One must therefore have the animus possidendi to succeed in a claim for adverse possession. One must show that he either disposed the owner the land or the owner of the land discontinued his possession. Dispossession is where a person comes in and drives another out of the land, while discontinuance of possession is where a person in possession goes out and another person takes possession”.*

Your Lordship, the Plaintiffs’ claim as presented does not demonstrate the aspects of dispossession and discontinuance of possession discussed above.

The court in *Titus Kigoro Munyi (supra)* went further to consider this passage made in *Benjamin Kamau Murima & Others – v- Gladys Njeri, - Civil Appeal No. 213 of 1996*, where it was held that:-

*“In determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the land in form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse”.*

Your Lordship in the instant dispute, if at all the applicants took possession of their respective portions as purchasers, which is

nevertheless denied by the Defendants, then the same was with the permission and consent of the registered owner and as observed above such entry could not be adverse to the proprietor's interest.

Further, in *Christopher Kioi & another v Winnie Mukolwe & 4 others [2018] eKLR* the Court of Appeal addressed itself on the issue of occupation with the permission of the proprietor as follows:-

*'But even if it were accepted that Kioi took possession of the suit property pursuant to the alleged agreement for sale, that in itself would negate a claim based on adverse possession because the possession would have been with the consent of Kituri.'*

The Court further adopted its decision in *Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001* where it had been stated *"It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance of an agreement of sale or lease or otherwise."*

It is our submission therefore that the circumstances of this case do not allow the Plaintiffs to make reliance on the doctrine of adverse possession. We also lay reliance on this Court's decision in *M'Mbaoni M'thaara Vs James Mbaka [CHUKA ELC NO. 110 OF 2017]*

Further Your Lordship, it is a condition precedent that a claim of adverse possession can only be sustained against a registered owner after the expiry of the 12 years of continuous and peaceful occupation by the claimant.

In *Sophie Wanjiku John Vs. Jane Mwhaki Kimani [Nrb Elc No. 490 Of 2010]* the court stated that

*'I agree with Mr. Ojienda's submissions that a claim of adverse possession can only be sustained on a registered owner. The Plaintiff got ownership in 2010 when she bought the land from Margaret Wanja and the period of adverse possession will run from 2010 and as correctly submitted 12 year time period has not expired'.*

In our present circumstances the registered owners of the suit lands obtained registration thereof on 15/08/2013 and relying on the decision in *Sophie Wanjiku John (Supra)* it is clear that time for purposes of adverse possession can only start running from the date of such registration. It is without doubt therefore that on this account the claim for adverse possession must fail.

We further rely on the decision in *Ravji Karsan Sanghani vs Peter Gakunu [NRB HCCC No. 365 OF 2014]* in relation to when the period of limitation is deemed to start running.

Finally, the Plaintiffs conceded in cross-examination that there is pending CHUKA C.M. SUCCESSION NO. 271 OF 2016 in which they are challenging the Certificate of Confirmation of Grant issued to the Defendants herein. The Plaintiffs are therefore basically forum shopping, a practice that is an abuse of the court process and a violation of **Section 6 of the Civil Procedure Act**. Our position on this point is supported by the finding of the Judge in *Joseph Muthuri Ikunyua(Supra)*

In a nutshell Your Lordship, the foregoing submissions lay out the application of the legal principles relating to the doctrine of adverse possession by the courts.

It is without doubt therefore that the prayer for a declaration of ownership by adverse possession must fail for failure to satisfy the key ingredients necessary for a grant of orders of that nature.

We thus pray that the originating summons be dismissed with costs.

We so humbly pray.

DATED AT CHUKA THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2020.

.....

**FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCIATES**

**ADVOCATES FOR THE DEFENDANTS**

13. The principal issues to be determined are:

- a) Have the plaintiffs on a balance of probability proved that they have been entitled to their claim that they have become owners of the parcels they respectively claim from Land Parcel No. Muthambi/Erga/204 through the doctrine of adverse possession.
- b) Who will pay costs"

14. I have carefully considered, the oral evidence, the pleadings, the authorities and the submissions the parties have proffered in support of their veritably incongruent assertions.

15. The authorities proffered by the parties are good authorities in their facts and circumstances. I, however, opine that no two cases are congruent in their facts and circumstances. Before coming to my determination of this matter, I have taken all the relevant principles into account. As they have been fully reproduced in the earlier part of this judgment I find no need to regurgitate them and the principle they espouse.

16. Adverse possession must be proven through cogent evidence. The evidence of the plaintiff's witnesses was riddled with material inconsistencies. However, all the plaintiffs' witnesses agree that the plaintiff's entered the suit land through various modes of purchase. Should this be the case, this means that they moved into the suit land with the permission of relatives of the respondents. They also admit that if they indeed bought the suit land, the purchase was not, especially in respect of the 1<sup>st</sup> plaintiff/applicant, from the registered owner of the land. The 2<sup>nd</sup> applicant/plaintiff generally gave garbled evidence.

17. Except for DW2, who did not give substantial probative evidence, the defendant/respondent's evidence was plausible. On a balance of probability, I find that evidence more credible than the evidence of the plaintiffs.

18. In the circumstances, I enter judgment for the respondents/defendants in the following terms:-

- a) This suit is hereby dismissed.
- b) Costs will follow the event and are awarded to the defendants/respondents.
- c) Orders accordingly.

**Delivered in open Court at Chuka this 17<sup>th</sup> day of November, 2020 in the presence of:**

**CA: Ndegwa**

**Murango Mwenda h/b I.C. Mugo for the plaintiff.**

**Mark Murithi for the defendant.**

**P.M. NJOROGE**

**JUDGE**



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