



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 19 OF 2019 (OS)

KANGA MWIRABUA.....1ST PLAINTIFF
MBIUKI MWIRABUA.....2ND PLAINTIFF
CIAMBERE KANGANGI.....3RD PLAINTIFF
CIAMUI KANGANGI.....4TH PLAINTIFF
JOHN MUTEGI KANGANGI.....5TH PLAINTIFF
KABURU KANGANGI.....6TH PLAINTIFF
KAARI KANGANGI.....7TH PLAINTIFF
CIAMBAKA KANGANGI.....8TH PLAINTIFF
NYAGA MPUNGU.....9TH PLAINTIFF
KAGENDO CIAMBAKA.....10TH PLAINTIFF
KITHINJI KABURU.....11TH PLAINTIFF
MUTHONI MUTEGI.....12TH PLAINTIFF
BAINI NKARI.....13TH PLAINTIFF

VERSUS

NDEREBA NAICHU.....RESPONDENT

JUDGMENT

1. This suit is a consolidation of two suits. In his plaint dated **16th August, 2017**, in ELC Case No. 278 of 2017, the plaintiff Ndereba Naichu seeks the following orders:

- a. An order evicting the defendants from L.R. NO. KARINGANI/MARIANI/395, to be enforced by the O.C.S. Chuka Police Station.
- b. An order of permanent injunction restraining the defendants, their agents, servants or anyone else acting on their behest from re-entering or trespassing upon L.R. NO. KARINGANI/MARIANI/395.
- c. An order that mesne profits be assessed from the date when the notice to vacate expired to the date of eviction payable by the defendants to the plaintiff.

d. Cost of the suit.

2. The defendants' originating summons dated 22nd June, 2016 reads as follows:

ORIGINATING SUMMONS

(Pursuant to Order 37 rule 7 and 8 of the Civil Procedure Rules, 2010 and any other enabling provision of the law)

Let Ndereba Naichu within 15 days after the service of these summons upon him enter an appearance to these summons of Bainsi Nkari, Kanga Mwirabua and Mbiuki Naichu the plaintiffs herein who claim to be and has (sic) been in actual possession of Land Parcel Number Karingani/Mariani/395 for a period in excess of 12 years and have an overriding interest for the following questions:-

1. Whether the defendant is the current registered proprietor of all that piece of parcel of land known by registration as Karingani/Mariani/395 measuring 4.63 ha.
2. Whether the plaintiffs have acquired absolute titles to land parcel number Karingani/Mariani/395 by way of adverse possession.
3. Whether the plaintiffs are in actual possession of land parcel number Karingani/Mariani/395 for a period in excess of 12 years.
4. Whether the plaintiffs are entitled to be registered as the absolute joint proprietors of land parcel number Karingani/Mariani/395.
5. Whether the occupation by the plaintiffs of land parcel number Karingani/Mariani/395 was on any express or implied permission from the defendant.
6. Whether the occupation by the plaintiffs of land parcel number Karingani/Mariani/395 has been open, uninterrupted and undisturbed for a period in excess of 12 years.
7. Whether the defendant has ever taken any steps whatsoever to remove the plaintiffs from land parcel number Karingani/Mariani/395.
8. Whether the plaintiffs have extensively developed the land parcel number Karingani/Mariani/395 in exclusion of the defendant.
9. Whether the plaintiffs have overriding interest over the land parcel number Karingani/Mariani/395.
10. Whether the plaintiffs have in any event acquired by way of adverse possession land parcel Number Karingani/Mariani/395.
11. Whether the defendant has lost the legal right and authority by operation of section 7 of the Limitation of Actions Act, Cap 22 laws of Kenya to claim from the plaintiffs' land parcel number Karingani/Mariani/395 which the plaintiffs have been in actual possession, open, uninterrupted and without the permission of the defendant for a period of excess of 12 years.
12. Whether the plaintiffs have now acquired absolute ownership of land parcel number Karingani/Mariani/395 which the defendant has lost ownership of the same by operation of the law.
13. Whether the plaintiffs are now entitled to be registered as the legal proprietors of the land parcel number Karingani/Mariani/395 which the plaintiffs have been in occupation for a period in excess of 12 years.
14. Whether the defendant should be ordered to execute all necessary documents to effect the transfer to the plaintiff of suit land and in default the executive officer of this honourable court be empowered to do so on his behalf.
15. Whether the plaintiffs are entitled to the costs of this suit.

Dated at Meru this 22nd day of June, 2016.

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A.G. RIUNGU & COMPANY

ADVOCATES FOR THE PLAINTIFFS

3. In the consolidated suit, ELC Case No. 19 of 2019 (OS) was deemed the lead file. Advocate Kaumbi for the defendants told the court that his clients' case in CM's Case No. 166 of 2017 should be deemed as a counterclaim to the plaintiff's case in ELC 83 of 2016 (OS). The plaintiffs in Meru ELC 83 of 2016, Bainsi Nkari, Kanga Mwirabua and Mbiuki Mwirabua joined the defendants in CMC 166 of 2017 to become plaintiffs in ELC 19 of 2019. The plaintiff in ELC 278 of 2017 also CMC Case No. 166 of 2017, who is also the defendant in ELC 83 of 2016, became the defendant in the consolidated case.

4. PW1, Ciambere Kangangi, who is an old lady gave evidence in Ki-Chuka and was sworn by the Bible by Court Clerk Martha.

PW1, told the court that although she did not know her real age, she was over 90 years of age. She asked the court to deem her witness statement dated **17th October, 2018** as her evidence in this case. She told the court that her husband had **died in 2019** and was buried in the suit land. She went on to tell the court that she had 5 children who had been born and brought up on the suit land. She was categorical that she had never left the suit land or been evicted therefrom. She owned up that the defendant had once attempted to evict her but she chased him away. She was categorical that parcel No. 395 was ancestral land.

5. In her witness statement, PW1 testified that as at **17th October, 2018**, she was 88 years old and that she was born in 1930. She told the court that she got married in 1958 and therefore had been married for 60 years. She averred that her husband was Zacharia Kangangi (deceased). She averred that since her marriage she had lived on the suit land together with her six children. She averred that she had no other land.

6. During cross-examination PW1 told the court that she could not remember anything about proceedings concerning the apposite adjudication process. She told the court that she did not know anything about land registration numbers but added that the registered owner of the suit land was one Mutegi. She denied knowledge of express orders by the court restraining her from interring her husband on the suit land. She was evasive when the counsel for the defendant suggested to her that her husband was buried on parcel number 4786 which belonged to her family. She told the court that she did not know when the title for the suit land was issued and laconically stated that she did not know if the land had a title. She told the court that her husband was buried in 2019. She also said that she did not have other land than parcel No. 395.

7. PW2, Doris Ciamui Kangangi told the court that she was 88 years old and got married to one Zakaria Kangangi in 1958. She told the court that she had lived on the suit land since she got married and still lived on the land and that when her husband died, he left her on the land. She stressed that he had died a long time ago. She asked the court to deem her witness statement dated **17th October, 2019** as her evidence in this suit.

8. PW2 told the court that although she had been educated upto primary standard 4 she did not know about title numbers or acreages. She averred that she and her husband were present during the adjudication process. She was however categorical that she did not know the defendant Ndereba Naichu. She also said that she did not know that he was the registered owner of parcel No. 395, the suit land. She also denied knowledge of the existence of parcel No. 4786 which the defence advocate had told PW2 belonged to their family.

9. PW3, John Mutegi, told the court that all the plaintiffs were his close relatives. More particularly, he told the court that PW2, Ciamui Kangangi, was his father's second wife. He testified that all the plaintiffs lived on the suit land. He denied existence of parcel No. 4786 which had been alleged by the defendant's advocate to be family land. He also said that that he was unaware that Parcel No. 4786 could have been a sub-division of parcel No. 395. He asked the court to deem his witness statement dated **17.10.2018** as his evidence in this case.

10. In his witness statement, PW3 averred that he had lived on the suit land for the whole of his life, a period of 66 years. He averred that he did not have any other land. He stressed that he lived on the land with his 8 children.

11. During cross-examination by the defence counsel, he admitted that there was Meru Case No. 50 of 2007 which had challenged the decision of the District Lands and Settlement Officer (DLASO). He was categorical that he was unaware of parcel No. 395 belonging to Ndereba Naichu. The court noted that he was being evasive in his answers to questions asked during cross-examination. He also told the court that he was not aware that Meru CMCC 50 of 2007 was dismissed in 2012. Surprisingly, contrary to his evidence that he was not aware of parcel Numbers 395 and 4786, PW3 told the court that parcel Numbers 395 and 4786 had titles. He admitted knowledge of a Notice to vacate parcel No. 395. Rather incredibly, he claimed that the notice was for Ndereba Naichu, the defendant to vacate parcel No. 395. And yet it is the defendant who had caused issuance of the Notice!

12. PW4 Stanley Kaburu Kangangi told the court that he was the son of Kangangi Nkari and was 60 years old. He said that he and all the plaintiffs lived on the suit land. He said that he did not remember the registration number of the land. He asked the court to adopt his witness statement filed on **17th October, 2021** as his evidence in this suit.

13. In his witness statement PW4 avers that he is married with 6 children and that for all of his life, he has lived on the suit land. Currently he said that he lived thereon with his wife and children. He was categorical that he did not own any other land and the defendant had never been in occupation of the suit land.

14. During cross-examination PW4 said that his family's land was about 30 acres, all of which the members of the family utilized. He agreed that there were adjudication proceedings in **2006** which he had attended but said that he was not present when the final decision was made. He denied ever receiving a notice to move out of Ndereba Naichu's (defendant's) land. He also denied receiving letters based on court orders telling him that he was occupying Ndereba Naichu's land.

15. On 24.2.2020 when PW5 gave evidence, the defendant's advocate, Mr. Kaumbi, was not in court although he was in court when the hearing date was fixed.

16. PW5, Justin Kithinji Nderi, told the court that he was a qualified Land Surveyor and was the sitting MCA for Magumoni Ward. He produced a Visit Report on parcel No. Karingani/Mariani/395. He testified that he had used GPS to survey the land and to indicate the various portions cultivated and occupied by the plaintiffs. The report was produced as plaintiffs' exhibit number 1. He produced a letter affirming that he was a qualified surveyor, which letter was marked as plaintiffs' exhibit Number 2. He also produced a notice for the scene visit which was marked as plaintiffs' exhibit No. 3.

17. PW5 was not cross examined because the defendant's advocate was not in court. At this point, the plaintiff's advocate closed his case and since the defendant's advocate was not in court, parties were ordered to concurrently file their submissions.

18. Upon application by the defendant's advocate, on **18th November, 2020**, this court delivered a ruling which, in the interest of justice, allowed the defendant to give his evidence.

19. DW1, Ndereba Naichu, the defendant in the consolidated case, told the court that he was the plaintiff in ELC 278 of 2017 and was a defendant in ELC 83 of 2016 (OS). He said that upon consolidation of the two cases, the lead file became ELC 19 of 2019, this file, where he is the defendant.

20. DW1 asked the court to adopt his witness statement dated **16th August, 2017** as his evidence in this suit.

21. The witness statement of the defendant, which is rather succinct, is reproduced herebelow:

STATEMENT OF NDEREBA NAICHU

1. That I am the above adult male and the plaintiff herein.
2. That I am the registered proprietor of land parcel No. L.R. No. Karingani/Mariani/395 and that I have a title deed to prove ownership which was issued to me on 30th October, 2013.
2. I was issued with the title deed after the process of adjudication was finalized in the year 2006, where my interests and those of the defendants were determined and demarcations were fixed permanently.
4. The defendants were awarded land measuring 17.04 acres registered as L.R. No. as Kiringai/Mariani/4786 while I was granted land measuring 7.5 hectares registered as L.R. No. Karingani/Mariani/395.
5. Before the adjudication process was concluded, the defendants had occupied my piece of land, hoping that the adjudication officer would award the piece of land to them but this didn't happen.
6. The defendant had tried to challenge the adjudication officers award but was not successful.
7. I have issued the defendants with adequate notice to vacate however they are adamant to comply.
8. The defendants are still occupying, utilizing and in possession of my parcel of land and have denied me my rights to exercise exclusive possession and occupation as the registered proprietor of the said piece of land.
9. I wish to have an order that the defendants be evicted and permanently barred from re-entering my parcel of land.
10. That is all I wish to state.

Dated at Meru this 16th day of August, 2017

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NDEREBA NAICHU

22. DW1, during cross-examination and re exam reiterated that the plaintiffs were in occupation of his land without his consent and that they had chased him away from his land. He said that they moved into the land in **1986** and not in the 1940s as they claimed. He testified that they demolished his property and forcefully moved into his land. He was categorical that they had never moved out of his land from **1986**. He said that he had prayed for an order of eviction from his land but his case was consolidated with their case, and became this case.

23. DW1 told the court that before a title was issued in his name, he had a case at the DLASO's office with John Mutegi, the 5th plaintiff who was the plaintiff's representative. His land was allocated to him as number 4786 and he was asked to move out of his land. He was categorical that John Mutegi never appealed to the minister.

24. Among other documents, DW1 produced as his exhibits his title for land parcel No. KARINGANI/MARIANI/395 which showed that the land was registered in his name. He also produced a copy of Certificate of Official Search showing that Land Parcel No. KARINGANI/MARIANI/4786 was registered in the names of Kanga Mwirabua, Mbiuki Mwirabua and Baini Nkari who are members of the plaintiffs' family and who were plaintiffs in Meru ELC 83 of 2016 which is part of this consolidated case.

25. The parties filed written submissions. I opine that a court of law relies on the evidence proffered by the parties and that litigants cannot introduce new evidence in their submissions. Points of law can, however, be raised.

26. In their submissions, the plaintiff's case is that they have been in occupation of the suit land for a period exceeding the threshold for adverse possession to accrue. They say that even though the defendant's title was issued, in **2013** they had been in occupation for a long time and particularized that the oldest of the plaintiffs had lived on the land since **1940**. PW1 claimed that the land was ancestral. They argue that they did not occupy the suit land with the consent of the defendant and that the suit land had devolved to them through the doctrine of adverse possession. On account of this assertion, they say that the plaintiff's claim in CMC [ELC] No. 166 of 2017 for an order evicting the

defendants from the suit land, for an order of permanent injunction restraining them from entering or trespassing upon the suit land and for mesne profits was not tenable.

27. The plaintiffs assert that the portions of land they occupied were definite and identifiable as shown by the evidence of PW5 and as supported by the case of **GERSONS MUINDI BARUTHI VERSUS WILLAYS GATINKU, Nyeri CA Appeal No. 98 of 1998, the case of GATIMU KINGURU VERSUS GATHANGI [eKLR]** and the case of **PAUL MUTHUITA VERSUS WANOE**, Nairobi, CA, Civil Appeal No. 12 of 1982.

28. The plaintiffs submit that their occupation of the suit land was by way of open assertion of hostile title to land and urge the court to find that they had proved their case for adverse possession of Land Parcel No. KARINGANI/MARIANI/385. I think this is a clerical mistake as the suit land is parcel No. KARINGANI/MARIANI/395.

29. A conspectus of the defendant's submissions is that the plaintiffs have not satisfied the threshold for adverse possession to accrue. He has proffered the case of **KOECH KANGOGO versus CHEBII YEGO [2018] eKLR** where the court opined as follows:

“The defendant in this matter became the registered proprietor of the suit land on 20.5.2003. Prior to that, there was the process of consolidation, demarcation and adjudication. This court finds that time does not run during consolidation, demarcation and adjudication. Time starts running on the date of registration.”

30. The defendants also submit that the same case of **Koech Kangogo (supra)** stated as follows:

“I do find the suit to have been filed prematurely and that the plaintiff does not succeed in adverse possession as 12 years had not lapsed at the time of filing the suit from the date the defendant was registered as the proprietor of the land. The plaintiff could have taken possession in 1984, however the possession did not amount to adverse possession as the land was still under adjudication until 20.5.2003 when the right to recover the suit land from the plaintiff accrued and time started running. The Originating summons is therefore dismissed.”

31. The defendant submits that the Land Adjudication Act provides an elaborate and all-inclusive process which ascertains ownership to land. He argues that once that process has been completed, including an appeal to the minister, which the plaintiffs did not file, the process accords finality to any issues raised. For this assertion, he proffered the case of **James Theuri Wambugu versus Mellen Mbela [2016] eKLR** where the court held as follows:

“The suit land having been registered in favour of the plaintiff following an adjudication process under the Land Adjudication Act, Cap. 284 LOK, constituted a first registration under the Land Adjudication Act. The process of land adjudication under the Land Adjudication Act is elaborate and once the process is completed in terms thereof, it is final.”

32. The defendant, says that he was thrown out of the suit land by the plaintiffs and that they destroyed his developments on the land. He says that he had planted exotic and indigenous trees which the plaintiffs cut down and either sold off in form of timber or used them to build their houses. The defendant says that the plaintiffs' occupation has deprived him of possession, use and enjoyment of his land and as a result he has suffered loss and damage.

33. The defendant submits that since the surveyor's report relied upon by the plaintiffs in their defence shows that they have occupied 6.4747 hectares (approximately 16 acres), they should be condemned to pay mesne profits at Ksh.5,000/= per acre per year which translates to 80,000/= per year and a total of Kshs.320,000/= for the 4 years the plaintiffs have continued to illegally occupy his land since he gave them notice to vacate.

34. The defendant urges the court to dismiss the plaintiffs Originating summons with costs to him and to grant him the reliefs sought in his plaint dated **16th August, 2017**. The reliefs sought are:

- i. An order evicting the defendants from L.R. NO. KARINGANI/MARIANI/395, to be enforced by the O.C.S. Chuka Police Station.
- ii. An order of permanent injunction restraining the defendants (now the plaintiffs), their agents, servants or anyone else acting at their behest from re-entering or trespassing upon L.R. No. KARINGANI/MARIANI/395.
- iii. An order that mesne profits be assessed from the date when notice to vacate expired to the date of eviction payable by the defendants (now the plaintiffs) to the plaintiff (now the defendant).
- iv. Costs of the suit.

35. This consolidated suit seeks a declaration for the plaintiffs that the suit land has devolved to them through the doctrine of adverse possession. The defendant seeks eviction of the plaintiffs from the suit land. He also seeks a permanent injunction restraining the plaintiffs from interfering with his land. Finally, the defendant seeks an order for mesne profits.

36. I frame the central issues for determination in this matter as follows:

- a. Have the plaintiffs proved their claim to be declared proprietors of Land Parcel No. KARINGANI/MARIANI/395 through the doctrine of adverse possession.

b. Has the defendant proved that he is entitled to orders of eviction, permanent injunction and mesne profits?

37. If the court finds for the plaintiffs, then the defendant's claim will fail. If the court finds for the defendant, the plaintiffs' claim that they be declared proprietors of the suit land shall fail.

38. I have considered the pleadings, the oral evidence, the submissions and the authorities proffered by the parties to buttress their veritably diametric assertions. For the authorities proffered by the parties, I opine that they are all good authorities in their facts and circumstances. But I hasten to add that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. In other words, the totality of the facts and circumstances of every case must be taken into account.

39. PW1 told the court that she had lived on the suit land since she got married. She said that she was 90 years old. This assertion was reiterated in her witness statement. She told the court all her 5 children had been born and brought up on the land. She testified that she has never been evicted from the land but owned up that the defendant had attempted to evict her but she chased him away. She told the court that her husband Zacharia Kengangi was buried in **2019**. She testified that the suit land was ancestral land. The court noted that she was generally evasive when questioned on whether she had knowledge of parcel No. 4786 which the defendant's advocate alleged belonged to her family. PW1 denied her family being restrained by a court order issued by Hon. J. M. Njoroge, CM, on 21.2.2018 in Chuka CM's Case No. 166 of 2017 from burying the remains of her husband on L.R. KARINGANI/MARIANI/395.

40. PW2, who was PW1's co-wife told the court that since her marriage she had lived on the suit land and asserted that she still lived there. She contradicted PW1 when she said that her husband had died a long time ago whereas PW1 had testified that he had died in **2019**. PW2 was rather evasive when she testified that she did not know about title numbers or acreages and thus could not say the registration number and the acreage of the suit land. She, however, told the court that she and her husband were present during the adjudication process. Surprisingly, PW2 told the court that she did not know the defendant, Ndereba Naichu and that she also did not know that he was the registered owner of the suit land. And yet she had testified a minute before that she had participated in the apposite adjudication process. She denied knowledge of parcel No. 4786 which the defence advocate had told her belonged to her family.

41. The evidence of both PW1 and PW2 was rather garbled. They were evasive and their evidence had material contradictions. This diminishes the probity of their evidence.

42. PW3 told the court that all the plaintiffs lived on the suit land. He told the court that PW2 was his father's second wife. He denied existence of parcel No. 4786 which the defendant's advocate alleged belonged to the plaintiffs' family. He also said that he was unaware that parcel No. 4786 was a subdivision of parcel No. 395. In his witness statement, PW3 averred that he did not have any other land other than the suit land.

43. In a rather contradictory manner, PW3 told the court that he was not aware that parcel No. 395 was registered in the name of Ndereba Naichu. And yet a minute before he admitted that he was aware of Meru CMCC No. 50 of 2007 which involved Ndereba Naichu and his family. The court noted that he was generally evasive when answering the questions posed to him by the defendant's advocate. He, however admitted knowledge of a notice to vacate the land issued to the plaintiffs.

44. I do note that PW3's evidence had material contradictions. This brings into issue the probity of his evidence. He was unequivocal that he did not own any other land except the suit land and categorically denied family ownership of parcel No. 4786.

45. PW4 Stanley Kaburu Kangangi told the court that all the plaintiffs lived on the suit land. Surprisingly, he testified that he did not know the registration number of the suit land. And yet he was one of the plaintiffs claiming the suit land. He was categorical that he did not own any other land. He said that his family land, which the plaintiffs were claiming was 30 acres in size, all of which the members of his family utilized. He admitted that there were adjudication proceedings in **2006** which he attended but he hastened to add that he was not present when the final decision was reached. He denied ever receiving a Notice from the defendant requiring the family to vacate the defendant's land.

46. PW4's evidence had material contradictions and discrepancies.

47. PW5, Justin Kithinji Nderi was an expert witness. He told the court that he was a licensed surveyor. He produced documents showing how the plaintiffs occupied all the suit land. His evidence was not contradicted and this court admits it for showing that the plaintiffs' occupied various portions of the suit land.

48. I find that there is no dispute regarding who occupies the suit land. Even the defendant admits that the plaintiffs occupied the suit land. The plaintiffs' assertion is that their family has occupied the suit land from **1940**. This is denied by the defendant who says that the plaintiffs invaded the suit land in 1986 with the hope that during the adjudication process, the land would be ascertained to them. He says that they demolished his property and appropriated to themselves his traditional and exotic trees.

49. Some of the plaintiffs have admitted that they participated in the adjudication process. It is however quite pellucid that the suit land was ascertained to the defendant. The plaintiffs never appealed to the minister whose decision, by dint of section 29 of the Land Adjudication Act is final. Of course, the plaintiffs could challenge the integrity of the adjudication process by filing judicial review proceedings but they did not do so.

50. This case brings out a dicey but important issue. This is: can litigants base a claim on the doctrine of adverse possession should the land be ascertained to someone else and they refuse to vacate the said land? In my view, they cannot do so. Ascertainment of ownership to land in Trust Land and in Special Areas can only be done through adjudication and consolidation processes. Litigants cannot declare themselves owners of land not ascertained to them. This self-help contrivance of litigants declaring themselves owners of land is not recognized by law.

51. The plaintiffs participated in the adjudication process. Parcel No. KARINGANI/MARIANI/395 was ascertained to the defendant. By

admission of PW4, Parcel No. KARINGANI/MARIANI/4786 was ascertained to the plaintiffs' family. The claim by some of the plaintiffs that they did not own any other land except parcel No. KARINGANI/MARIANI/395 which is registered in the name of the defendant has been debunked by the evidence of PW4 who is the 6th defendant. He admitted during cross-examination that parcel No. KARINGANI/MARIANI/4786 belonged to his family. **ALSO**, there is evidence proffered by the defendant by way of a certificate of official search showing that L.R. KARINGANI/MARIANI/4786 is registered in the names of KANGA MWIRABUA, MBIUKI MWIRABUA and BAINI NKARI. KANGA MWIRABUA, MBIUKI MWIRABUA and BAINI NKARI are no doubt members of the plaintiffs' family and are plaintiffs in this case. It is noted that, perhaps, for them not to perjure themselves they did not give evidence in this matter, although witnesses for the family vehemently denied that LR. NO. KARINGANI/MARIANI/4786 belonged to the family.

52. As held in the case of **KOECH KANGOGO Versus CHEBII YEGO (supra), and JAMES THEURI WAMBUGU Versus MELLE MBELA (supra)**, the period of the adjudication process and the period before the process does not count in determination of the threshold for adverse possession to accrue. As the *Mellen Mbela case (supra)* opined: **"The process of land adjudication under the Land Adjudication Act is elaborate and once the process is completed in terms thereof, it is final."** The integrity of such a process can, however, be challenged through Judicial Review Proceedings.

53. From the totality of the evidence proffered in this matter, I find that the suit land, parcel NO. KARINGANI/MARIANI/395 belongs to Ndereba Naichu, the defendant. It was ascertained to him. The evidence given by the plaintiffs and especially that of PW1 and PW4 that the suit land is ancestral, is evidence that should have been adduced during the adjudication process. If it was adduced, it is pellucid that it was rejected. The claim made by PW4 that the adjudication process was unfair should have been prosecuted through the institutions provided by the Land Adjudication Act and the Land Consolidation Act. Eventually, had the plaintiffs exhausted the provided statutory remedies, they were at liberty to challenge the process through appropriate Judicial Review Proceedings. The plaintiffs did not do that.

54. The defendant seeks an order of eviction of the plaintiffs from his land. I need not reinvent the wheel. In the case of *John Wachira Wangombe versus Charles Mugambi Wangombe & Another, Nyeri High Court Civil Case No. 95 of 2003, Makhadia J*, as he then was, on **18th June, 2009** held as follows:

"(d) The only known remedy against a trespasser is eviction and an award of damages and nothing has been brought to the attention of the court that would prevent the court from ordering eviction of the defendant and his family.

(e) Trespass as a tort is a violation of the right of possession and the plaintiff must show that he has the right to immediate and exclusive possession of the right which is different from ownership. He does not have to prove damage. If the plaintiff has the right to possess and defendants intentionally entered into the plot even though the defendant honestly believed the land was his own and he had a right of entry on it, he did so under an inevitable mistake of law and fact."

55. Mutatis Mutandis, the plaintiffs are mistakenly in occupation of the suit land under the false belief that they are entitled to its ownership.

56. In this case, the plaintiffs have under a veritable mistake of law and fact trespassed on the defendant's land and continued to occupy it under their belief that it is their ancestral land. The plaintiffs are mistaken. The land was ascertained to the defendant. Their claim for ownership under the doctrine of adverse possession has no merit. The land was registered in the name of the defendant on **30th October, 2013** and they filed their originating summons on **23rd June, 2016**. As I have already said, periods before the adjudication and consolidation process and during the adjudication and consolidation process do not count when courts establish the period necessary for adverse possession to accrue. This Originating summons was filed less than three years after the defendant became registered owner of the suit land. It is premature by many years.

57. As this court is going to issue an order of eviction against the plaintiffs, the intended eviction will be conducted in congruence with the provisions of Section 152 G (1) (d) (e) (f) (g) (h) and (i) of the Land Act. I deem a period of 90 days before eviction is effected, if the plaintiffs fail to vacate the suit land, sufficient for the requirements of section 152 G (1) (d) (e) (f) (g) (h) (i) to be complied with.

58. In the circumstances I find that the plaintiffs have not proved their case on a balance of probability. I find that the suit land rightly belongs to the defendant and that the plaintiffs have denied him enjoyment of his land. I also find that the defendant's prayers for eviction of the plaintiffs from the suit land and for mesne profits are merited. These findings effectively answer all the issues raised in the Originating Summons.

59. I find that the claim for mesne profits at the rate of Kshs.5000/= per year for 16 acres for 4 years which amounts to the sum of Kshs.320,000/= is reasonable. I find the case of *Paul Audu Ochudho versus Joshua Ombura Orwa [2014] eKLR*, persuasive in this area.

60. In the circumstances, I enter judgment for the defendant (Ndereba Naichu) against the plaintiffs in the following terms:

a. An order is hereby issued for the plaintiffs, to wit, (Ciambere Kangangi, Ciamui Kangangi, John Mutegi Kangangi, Kaburu Kangangi, Kaari Kangangi, Ciambaka Kangangi, Nyaga Mpungu, Kagendo Ciambaka, Kithinji Kaburu, Muthomi Mutegi, Baini Nkari, Kanga Mwirambua and Mbiuki Mwirambua,) to be evicted from L.R. No. KARINGANI/MARIANI/395 and the OCS, Chuka Police Station, is ordered to enforce this order AND they should vacate the suit land within 90 days of this judgment failing which they will be evicted.

b. An order of permanent injunction is hereby issued restraining the plaintiffs, their agents, servants or anyone else acting at their behest from entering, re-entering or trespassing upon L.R. NO. KARINGANI/MARIANI/395.

c. An order of mesne profits is hereby issued assessed at the sum of Kshs.320,000/= for the period since the Notice to vacate expired and delivery of this judgment and the sum of money will continue to increase and to attract interest as long as the plaintiffs continue

to unlawfully occupy the defendant's land.

d. Costs shall follow the event and are awarded to the defendant, Ndereba Naichu.

DELIVERED IN OPEN COURT AT CHUKA THIS 16TH DAY OF MARCH, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Sichanya h/b Riungu for the defendant

Mark Muriithi h/b Kaumbi for the plaintiff

P. M. NJOROGE,

JUDGE.