



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 10 OF 2019

SARAPHINE MBAE RITHAA.....PLAINTIFF

VERSUS

FAUSTINO KANGORI M'NAIROBI.....DEFENDANT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. This Originating Summons states as follows:

IN THE MATTER OF LAND REFERENCE NUMBER MUTHAMBI/KANDUNGU/445

ORIGINATING SUMMONS

(Under Sections 28 (h) of Land Registration Act 3 of 2012; Order 37 Rule 7 of the Civil Procedure Rules and Sections 7, 17, 18, 37 and 38 Limitation of Actions Act Cap 22)

LET **FAUSTO KANGORI M'NAIROBI** of KARIGINI VILLAGE, KANDUNGU sub location, Kandungu Location of Maara District in, CHAMUNGA SUB LOCATION, the Defendant herein within fifteen (15) days of service of this summons inclusive of the day of such service enter appearance to this summons which is issued on the application of **SARAPHINE MBAE RITHAA** of KARIANI VILLAGE, MUTHAMBI DIVISION OF THARAKA NITHI COUNTY who claims to be entitled to the following relief:-

- a. A declaration that the Applicant is and has been occupying one (1) acre out of land parcel no MUTHAMBI/KANDUNGU/445 measuring approximately 2.45 Ha which is currently registered in the names of the Defendant and that his occupation has been open, public, exclusive, continuous and without interruption since 1998
- b. A declaration that the plaintiff has acquired by way of adverse possession ownership of a portion measuring one (1) acre out of land parcel number L.R MUTHAMBI/KANDUNGU/445 in THARAKA NITHI COUNTY.
- c. Alternatively and without prejudice to the foregoing, that the Defendant FAUSTO KANGORI M'NAIROBI holds one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 in trust for the Plaintiff.
- d. An order that a portion measuring one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 be excised and be registered in the names of SARAPHINE MBAE RITHAA
- e. An order that the defendants do execute a valid transfer instrument for one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 in favor of the Plaintiff and in default the Executive Officer of this Hon. Court be empowered to execute such transfer instrument
- f. Costs of this suit and any other relief that the court may deem fit and expedient.

WHICH SUMMONS IS TAKEN OUT FOR THE DETERMINATION OF THE FOLLOWING QUESTIONS:-

1. Whether land parcel no. MUTHAMBI/KANDUNGU/445 is registered in the names of the Defendant
2. Whether the Plaintiff was put into possession of one (1) acre out of the suit land by one M’NairobiKathuri (Deceased) who was the father of the Defendant herein.
3. Whether the said M’NairobiKathuri (Deceased) was the owner of the suit land then registered as land parcel no.1475 KANDUNGU ADJUDICATION SECTION during the land adjudication process.
4. Whether land parcel 445 KANDUNGU ADJUDICATION SECTION shared a common border with land parcel no. 1475 KANDUNGU ADJUDICATION SECTION during the land adjudication era and whether the two parcels later became land parcels no. MUTHAMBI/KANDUNGU/445 and 1475 respectively after the completion of the Land Adjudication process.
5. Whether the father of the Defendant, M’NairobiKathuri(Deceased) entered into a sale of land agreement on 14th September 1998 with the Plaintiff in which he agreed to sell and in which the Plaintiff agreed to buy a land parcel no. KANDUNGU ADJUDICATION/MUTHAMBI/1475 measuring one (1) acre.
6. Whether M’NAIROBI KATHURI then showed to the Plaintiff the boundary of the said portion and whether the Plaintiff took immediate possession of that portion and began to carry out his farming activities on it.
7. Whether the Defendant herein tried unsuccessfully to have the Plaintiff vacate the suit land including destroying his crops and suing him in court.
8. Whether the Defendant used his influence to have parcel no. 1475 KANDUNGU ADJUDICATION SCHEME that later became Muthambi/Kandungu/1475 transferred from the area currently being claimed by the Plaintiff to a different location all in a bid to dispossess the Plaintiff of his claim over the suit land.
9. Whether despite this relocation of land parcel no. 1475 from the area bordering land parcel no. 445 the Plaintiff has continued to occupy a portion measuring one (1) acre out of land parcel no. 445 since 1998 to present.
10. Whether the Plaintiff has been utilizing the soil of the suit land exclusively for his benefit and that of his family including planting seasonal crops such as maize, beans, cultivating various fruit and indigenous trees; planting Napier grass while maintain the natural boundary dividing the portion of one (1) acre from the mainland owned by the Defendant.
11. Whether despite all attempts by the Defendant over the years including damaging the Plaintiff’s crops and filing Chuka PMCC suit no. 5 of 2015, the Defendant has failed to dispossess the Plaintiff of the suit land and that the Plaintiff has now acquired adverse possession of the suit land to which he has become entitled under the Limitation of Actions Act.
12. Whether the overriding interests as envisioned by section 28 (h) of the Land Registration Act Cap 3 of 2012 capable of vesting land parcel no. MUTHAMBI/KANDUNGU/445 to the Plaintiff?
13. Whether the Plaintiff’s claim for adverse possession is rightfully before this Hon Court.
14. Whether the Plaintiff is entitled to costs in this suit?

DATED AT EMBU THIS 13TH DAY OF MAY, 2019

NJIRU KITHAKA & CO

ADVOCATES FOR THE PLAINTIFF

3. **PW1, Seraphine Mbae Kithaa**, the plaintiff, asked the court to adopt his witness statement dated **13th May,2019** as his evidence in this suit. The witness statement states as follows:

PLAINTIFF’S WITNESS STATEMENT

My names are Hellen Kaari Mbae.i come from Karaini and I am a business woman cum farmer. The plaintiff is my husband; we got married in 1993.

I remember that in 1993, my husband was approached by an old man called M’Nairobi Kathiri whose son was sick. He wanted us to purchase a piece of land from him. He showed us the said land and we liked it. We discussed with my larger M’Nairobi Kathiri family and the purchase price was agreed upon. My husband signed a sale of land agreement and he paid some deposit. We then entered the land and began to utilize it for our needs. The land had a visible and permanent boundary with the neighbouring farm.

The boundaries were pointed to us by the seller M’Nairobi, the defendant and other sons of M’Nairobi. We began utilizing the land for our subsistence farming. We had planted trees on the land; we have dug terraces to control soil erosion and we have planted nappier grass. We also grow subsistence crops such as maize and beans on the suit and. At one time we fenced our portion with barbed wire but the wooden poles got eaten by termites. The barbed wire is still visible in some portions.

I remember that in the beginning of our occupation in 1998, the defendant tried to chase us from the said land by destroying our crops but he did not succeed. We reported to the police and he was arrested and charged. We continued with our farming activities without interruption upto present. Recently the defendant began to harass us claiming that our land was located in another place and that we should leave his land. We disagreed with him because this is the land that was shown to us by the deceased when we bought it from him. We bought one acre and we have been occupying it since then.

I support the plaintiff's claim for this land because we have been utilizing it since 1998 and we have never been removed from it.

Dated at Chuka this 18th day of June, 2019

.....

HELLEN KAARI MBAE

4. PW1 told the court that he had been in occupation of one acre of Land Parcel No. MUTHAMBI/UPPER KADUNGU/445 which he said he had initially bought from the defendant's father since 1998. He wanted the court to declare him owner of that 1 acre of land through the doctrine of adverse possession. During cross-examination, PW1 told the court that he did not know that the land was registered in the defendant's name on 27th August, 2008. He, however, told the court that the defendant was still owner of the land during the adjudication process. He agreed that the defendant had removed his crops from the suit land in 1998 and he reported the matter to the police who charged the defendant with a criminal offence and the defendant was eventually acquitted. PW1 denied that he vacated the land and only moved into it in 2009.

5. The plaintiff admitted that the defendant had filed Chuka PMCC 5 of 2015 in which case the defendant was seeking his eviction from Land Parcel No. MUTHAMBI/UPPER-KANDUNGU/445. Asked that if in his defence in PMCC 5 of 2015 he had not averred that he had not moved into parcel No. 445, PW1 was evasive. Asked why if in PMCC 5 of 2015, the dispute was about a boundary dispute, why it had become a claim for adverse possession, PW1 avoided answering the question and said that the parcel of land he had bought was MUTHAMBI/KANDUNGU/1475. This court noted that PW1 was being evasive. He denied knowledge that his parcel of land MUTHAMBI/KANDUGU/1475 was at a place called Ganji and he laconically told the advocate: "I do not know where my land is". He also told the court that he did not know how his land had moved from Gaciambaki to Gaji.

6. PW1, told the court that his land parcel No. Muthambi/Upper-Kandugu/1475 was next to parcel No. Muthambi/Upper Kandugu/445.

7. Despite having acknowledged that Chuka PMCC 5/015 existed and having said in paragraph 6 of his defence in that case that he had never entered or trespassed on parcel No. 445, PW1 incredulously told the court that he only came to know that the defendant had taken his land in 2019. This was a blatant lie.

8. PW2, Cyrus Njagi Keya told the court that he takes care of the plaintiff's land. He told the court that the defendant had sold land to the plaintiff. He told the court that he had knowledge of the land in dispute. He told the court that the plaintiff had no house on the suit land but cultivated it. He said that he knew that the defendant had in 1998 uprooted crops planted by the plaintiff.

9. PW2 went on to tell the court that he did not know when adjudication in respect of the area where the suit land is situated started or ended. He also told the court that he knew nothing about land parcel No. Muthambi/Kandugu/1475 which is registered in the name of the plaintiff. Strangely, he testified that he did not know anything about Land Parcel Number Muthambi/Kandungu/445 which is the land in dispute. He also told the court that even though he had land in the neighbourhood of the suit land, he did not know its registration number.

10. I opine that PW2's evidence does not evince much probative value in favour of the plaintiff's case.

11. PW3, Patrick Njue Njeru, told the court that he was the defendant's half-brother. He testified that his father sold one acre of land to the plaintiff and said that the plaintiff had been on the land for 20 years. He said that the defendant had bought land parcel No. Muthambi/Upper Kandungu/445 but added that he bought it together with his father. He denied that he had developed a grudge against the defendant, his half-brother, because his brother had bigger land than other members of the family because he had bought his own land. Although he said that the plaintiff had bought land parcel No. Muthambi/Kandungu/475 which he said the plaintiff had bought from his father, he testified that he did not know much about it. PW2 was evasive when he was asked if he knew that land parcel No. Muthambi/Kandungu/1475 was at Gaanji, 3 kilometres away from the defendant's land parcel No. Muthambi/Kandungu/445, he was evasive. He eventually said that he did not know. The court noted that PW2 was evasive in answering question put to him by the defendant's advocate.

12. As for PW2, I opine that PW3's evidence does not evince much probative value in favour of the plaintiff's case.

13. **PW4, Hellen Kaari Mbae**, generally gave evidence to the effect that the plaintiff bought land from the defendant's father. She said that the land was parcel No. Muthambi/Kandungu/1475 and that it came from parcel No. Muthambi/Kandungu/445. PW4 who was the plaintiff's wife told the court that they had lived on the suit land since 1998 and said that the period for accrual of adverse possession should run from 1998 and not from 27th August, 2008 when titles were issued.

14. **DW1, Faustino Kangori M'Nairobi**, the defendant, asked the court to adopt his witness statement dated 3rd June, 2019 as his evidence in this suit. The statement states as follows:-

DEFENDANT'S STATEMENT

1. My name is Fausto Kangori M’Nairobi. I come from Kaingini village, Kandungu sub location, Kandungu Location Maara Sub County. I am a peasant farmer.
2. I know the plaintiff Seraphin Mbae M’Rithaa. My father M’Nairoi Kathiri sold to him my land during adjudication process of Kandungu adjudication section. We are not related by any pending (sic). We are not members of the same clan.
3. Adjudication process in Upper Kandungu Adjudication Section commenced on or around 1969. Titles were issued on or around 2008.
4. That during the adjudication process of Upper Kandungu Adjudication Section I purchased 4 parcels of land from different persons.
5. I bought the 4 parcels of land from Samwel M’Rithaa Rachi, M’Nanua Kiungu, M’Nthaka M’Murumbi and Kavuuu M’Murumbi. Every seller then transferred to me the respective parcel of land I had bought.
6. The four parcels that I purchased were then consolidated into one parcel which was given No. 445 Upper Kandungu Adjudication Section. The total acreage of 4.00 acres (sic) was 6.20 acres. They were demarcated at a place known as Kaciambaki unit.
7. When my 4 parcels of land were consolidated and given No. 445 Upper Kandungu adjudication section and registered with my name, my father one M’Nairobi Kathiri lodged an objection against my land parcel 445 Upper Kandungu Adjudication Section claiming 1.00 acre. That Samwel M’Rithaa M’Rachi who had sold a portion of land to me gave evidence in support of my father M’Nairobi Kathiri, I lost the objection and DLASO ordered and directed that my father be given 1.00 acre out of my parcel of land 445/Upper Kandungu Adjudication Section claiming 1.00 acre. That Samwel M’Rithaa M’Rachi who had sold a portion of land to me gave evidence in support of my father M’Nairobi Kathiri, I lost the objection and DLASO ordered and directed that my father be given 1.00 acres out of my parcel of land 445/Upper Kandungu Adjudication Section.
8. The objection was implemented by the demarcation officer. My land 445 Upper Kandungu Adjudication Section was sub divided into two parcels one 445 Upper Kandungu Adjudication Section measuring 5.20 acres and upper Kandungu/1475 measuring 1.00 acres. I retained 445 Upper Kandungu/Adjudication Section while M’Nairobi Kathiri was given Upper Kandungu/1475.
9. During the adjudication process my father M’Nairobi Kathiri despite my vehement objection to the award by DLASO to my father, my father sold to the plaintiff 1475 Upper Kandungu Adjudication Section. When it came to the implementation of the objection by M’Nairobi Kathiri the demarcation officer placed 1475 Upper Kandungu adjudication Section at Gajii about 3 kilometers away from Kaciambaki where 445 Upper Kandungu Adjudication Section was situated. I kept on objecting to the award of the objection to my father to date am still objecting.
10. That my father M’Nairobi Kathiri sold 1.00 acre to the plaintiff on or around 1998. I was still strongly opposed to my father being given my 1.00 acre I had purchased. After the plaintiff purchased the land in 1998, he settled on 445 adjudication section at Kaciambaki instead of 1475 Upper Kandungu Adjudication Section at Gajii. Despite knowing that his land was at Gajii, the plaintiff insisted on settling on part of my land 445 Upper Kandungu Adjudication Section. He was being supported by my father M’Nairobi Kathiri, and this is why he did not move to his land 1475 upper Kandungu adjudication section at Gajii. I kept on opposing what my father and plaintiff were doing on my land. That is 1998 the plaintiff planted maize crops on a portion of 445 Upper Kandungu Adjudication Section. I then uprooted the maize crops that the plaintiff had planted on my land, I kept on reminding him that his land was at Gajii and which land was 1475 Upper Kandungu Adjudication Section. Supported by my father insisted by cultivating 445 Upper Kandungu Adjudication Section.
11. After uprooting the maize crops planted by the plaintiff, the plaintiff lodged a complaint at Ntumu Police Station, I was arrested charged and prosecuted vide Chuka Criminal Case No 1591 of 1998. After a full trial I was acquitted. My acquittal was based on the fact that the land was mine consequently there was a revertible presumption that the crops on the land were mine.
12. The aforesaid criminal case against me ended in the year 2000. After the plaintiff lost the criminal case he choose to move out of my land Upper Kandungu Adjudication Section. The plaintiff moved to his land 1475 Upper Kandungu Adjudication Section where he cultivated various cash and subsisted crops. The title deed of Upper Kandungu Adjudication Section came out on or around 2008. In particular, I was registered with land parcel LR. Muthambi/Upper Kandungu/445 on 27.8.2008 the plaintiff was equally registered with land parcel LR. MUTHAMBI/UPPER KANDUNGU/1475 on the same date.
13. After the plaintiff realized that the title deed of what was formerly Upper Kandungu Adjudication Section had been issued, came back in January, 2009 and entered into my land parcel LR. Muthambi/Upper Kandungu/445 by force. I resisted the entry he occupied about 0.25 acres, this is the portion that the plaintiff has been occupying todate.
14. That in 2015, I instituted a suit Chuka PMCC No. 5 of 2015 against the plaintiff, my claim in the suit was that that the plaintiff was a trespasser. I was in that case seeking for eviction order against the plaintiff. Back in 1998 I had uprooted the plaintiff crops planted in my land. This was enough signal that the plaintiff was not on the land peacefully and uninterrupted. The plaintiff has never depossessed 1.00 acre out of LR. Muthambi/Upper Kandungu/445 from me. The entry into LR Muthambi/Upper Kandungu/445 has been resisted on and interrupted by the defendant.
15. I am advised by my counsel on record that adverse possession does not run during adjudication period. I was registered with land parcel LR Muthambi/Upper Kandungu/445 on 27.8.2008. The instant OS was filed on 13th May,2019. It is therefore not yet 12 years from the time I was registered with LR Muthambi/Upper Kandungu/445. More over the plaintiff entered the suit land in January, 2009. The OS claiming 1.00 acre by way of adverse possession is therefore premature, the period of 12 years has not passed despite

that the stay on the suit land by the plaintiff has never been peaceful nor uninterrupted.

16. I will be praying that the plaintiff's suit be dismissed with cost.

17. That is all I wish to state.

Signed by Fausto Kangori M'Nairobi

Dated at Chuka this 3rd day of June, 2019

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M/S MUGO & CO. ADVOCATES.

15. DW1, told the court that he is the registered owner of Land Parcel No. Muthambi/Kandungu/445. He told the court that the plaintiff forcefully occupied only one quarter of an acre of his land.

16. DW1 told the court that the plaintiff had bought 1 acre of land from his father but that land was transferred during the adjudication process from near parcel No. Muthambi/Kandungu/445 to another area and was given parcel No. Muthambi/Kandungu/1475. He said that parcel No. Muthambi/Kandungu/1475 is at a place called Gaanji whereas his land was at Gaciambaki. He told the court that parcel Numbers Muthambi/Kandungu/445 and 1475 did not share a boundary. He went on to tell the court that when he had filed Chuka CMCC 5 of 2015, he sought the plaintiff's eviction because he had attempted to cultivate the suit land.

17. The parties filed written submissions.

18. The Plaintiff's written submissions are reproduced in full herebelow without any alterations whatsoever including of spelling or any other mistakes.

SUBMISSIONS ON BEHALF OF THE PLAINTIFF

My Lord, the Plaintiff filed this Originating Summons on 13th May 2019 seeking for the following orders:-

a. A declaration that the Applicant is and has been occupying one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 measuring approximately 2.45 Hectares which is currently registered in the names of the Defendant and that his occupation has been open, public, exclusive, continuous and without interruption since 1998.

b. A declaration that the Plaintiff has acquired by way of adverse possession ownership of a portion measuring one (1) acre out of the suit land L.R no. MUTHAMBI/KANDUNGU/445 in THARAKA NITHI COUNTY

c. Alternative and without prejudice to the foregoing, that the Defendant FAUSTO KANGORI M'NAIROBI holds one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 in trust for the Plaintiff

d. An order that a portion measuring one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 be excised and be registered in the names of SARAPHINE MBAE RITHAA

e. An order that the Defendant do execute a valid transfer instrument for one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445 in favour of the Plaintiff and in default the Executive Officer of this Hon. Court be empowered to execute such transfer exercise

f. Costs of this suit and any other relief that the court may deem fit and expedient.

He filed the suit under sections 28 (h) of the Land Registration Act; Order 37 Rule 7 of the Civil Procedure Rules and Section 7, 17, 18, 37 and 38 of the Limitation of Actions Act all of which are sections that advance the principle of adverse possession of another person's land.

PLAINTIFF'S CASE

My Lord, the Plaintiff bought a one acre land from one M'NAIROBI KATHIRI the father of the Defendant in September 1998. He was told that the land had a title number 1475 and that it had been excised from land parcel no. 445 which belonged to the Defendant following a decision made in favour of M'NAIROBI KATHIRI in Objection no. 67 of 1995. The Decision in Objection no. 67 of 1995 directed that one acre of land be excised out of land parcel no. 445 belonging to the Defendant and that the resultant title gets registered in the names of M'NAIROBI KATHIRI.

When the one (1) acre was excised from land parcel no. 445, it had clear demarcation boundary so that when M'NAIROBI KATHIRI later sold the land to the Plaintiff he took it over in its entirety and has been utilizing it ever since. It is apparent that the Plaintiff entered the suit land comprising of one acre under good faith believing that it is the land that he purchased from M'NAIROBI KATHIRI. Later the Defendant began to cause trouble for him claiming that he was using his land without his permission.

He even had the maize plantation for the Plaintiff destroyed at one time resulting in Chuka criminal case no. 1591 (Republic versus Fausto Kangori M'Nairobi) of 1998 in which he the defendant was charged with a criminal offence. Although the criminal case ended in the acquittal of the Defendant my Lord the mere fact that it is the Plaintiff who was the complainant in the case proves that the Plaintiff had by 1998 entered the suit land and taken effective possession of it to the extent of the Police arresting and arraigning the Defendant for destroying the Plaintiff's crops.

Because of this my Lord it is very evident that the Plaintiff entered the suit land and began utilizing it way back in 1998 and he has been in possession of the same upto present. We rely on the evidence tendered by the four Plaintiff witnesses to prove this fact.

Infact the said witnesses told the court that after the Defendant destroyed the crops belonging to the Plaintiff the Plaintiff and his wife strengthened the fence around the one acre portion with barbed wire in order to entrench his possession and position on the land. To us this clearly put the Defendant on notice that indeed the Plaintiff had staked a claim over the one acre and that he was now in control of it.

DEFENDANTS CASE

Although the Defendant in his Statement dated 3rd June 2019 denied that the Plaintiff had acquired adverse possession of a portion measuring one (1) acre out of land parcel no. MUTHAMBI/KANDUNGU/445, he did not controvert the evidence that the Plaintiff placed before the court. Rather his Statement confirms the claim by the Plaintiff to the effect that:-

- a. That indeed there was an objection filed against him by his father, M'NAIROBI KATHIRI concerning a portion measuring one acre which his father was claiming from him.
- b. That the objection was ruled in favour of his father and the DLASO directed that is land be subdivided into two so that a portion measuring one acre could be registered in the names of his father.
- c. That indeed a portion was excised out of his main land and registered under the names of his father as parcel no. 1475.
- d. That later his father sold that land to the Plaintiff who entered the same and began to cultivate it.
- e. That the Defendant entered the land and uprooted the Plaintiff's maize crops in an attempt to chase the Plaintiff from the land but he was arrested and arraigned in court; tried and acquitted in Chuka Criminal case no. 1591 of 1989 and that his acquittal was based on the fact that the land was his.
- f. That the defendant is aware that land parcel no. 1475 that was registered in the names of his father is no longer situated next to his land but has been transferred, in the maps to another area called GANJI which is some kilometers away from him.
- g. That the Plaintiff was occupying the suit land by the time he filed this suit.

My Lord, it is our submission that the Defendants claim that the Plaintiff's stay on the suit land has not been peaceful, continuous and interrupted is a lie and that no evidence was brought to support that fact. The truth is that after the Defendant destroyed the maize crops belonging to the Plaintiff, the Plaintiff continued occupying the land as was disclosed by the Plaintiff witnesses including PW 2, 3, and 4. Infact, The Plaintiff has been in physical possession of the suit land since then and he has not been disposed of it.

My Lord the claim by the Defendant that he interrupted the adverse possession by the Plaintiff in the year 2015 when he filed a suit against him is also a lie because that suit mentioned to the court, Chuka civil suit no. 5 of 2015 refers to a different land parcel. The pleadings to that suit indicate that the subject matter is land parcel no. MUTHAMBI/UPPER KANDUNGU/445 whereas the land parcel which the Plaintiff is claiming adverse possession of is land parcel no Muthambi/Kandungu/445.

My Lord parties are bound by their pleadings. This is a principle that is well established in our legal jurisprudence and I wish to refer the Court to the words of Hon. Justice D.K KIMEI in ...where she made the following observation:-

'The Court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than adjudicate upon the specific matters in dispute which the parties have raised by pleadings.'

See **STEPHEN NDOLO WAMBUA VS BEATRICE MBULA MUTILU & 2 OTHERS (2019) EKL R**

Based on the above my Lord, this Hon. Court cannot make an assumption that the land referred to as MUTHAMBI/UPPER KANDUNGU/445 is the same as the suit land no. MUTHAMBI/KANDUNGU/445.

We therefore submit that Chuka case no. 5 of 2015 has no relevance to this suit and that it is wise to conclude that the Plaintiff adverse possession has been peaceful and uninterrupted upto the time of filing this suit.

With these facts in mind my Lord and with your kind permission we submit the following issues for determination on behalf of the Plaintiff

19. Whether the Defendant FAUSTO KANGORI M'NAIROBI is the registered owner of land parcel no. MUTHAMBI/KANDUNGU/445 measuring approximately 2.45Ha.

20. Whether the Plaintiff has acquired one acre out of the suit land through the doctrine of adverse possession
21. When did time begin to run and end in respect of the adverse claim by the Plaintiff.
22. Whether the Plaintiff should be registered as the owner of one (1) acre out of the suit land.
23. Who gets to bear the costs of this suit.

1. Whether the Defendant FAUSTO KANGORI M'NAIROBI is the registered owner of land parcel no. MUTHAMBI/KANDUNGU/445 measuring approximately 2.45Ha.

My Lord there is no doubt that land parcel no. Muthambi/Kandungu/445 measuring 2.45Ha belongs to the Defendant. This is evidenced by the green card, official search and a copy of the title deed produced before the court.

2. Whether the Plaintiff has acquired one acre out of the suit land through the doctrine of adverse possession

We submit that yes the Plaintiff has acquired a portion measuring one acre out of the suit land because he has been in adverse possession for a period of about 21 years since he took possession in 1998.

My Lord, the Plaintiff entered the suit land after purchasing a portion measuring one acre from the Defendants' father, M'NAIROBI KATHIRI who had told him that the said portion belonged to him. Therefore the Plaintiff entered the land under a colour of right; that is believing it was the land that he had purchased from M'NAIROBI KATHIRI after it was excised from the main land parcel no. 445.

However my Lord, it became evident as years went by that the Defendant was not pleased with the fact that his father M'NAIROBI KATHIRI had sold the land to the Plaintiff and that the Plaintiff had entered and took possession of the land. The attempt to evict the Plaintiff by destroying his food crops is a very clear evidence that the Plaintiff was in physical possession of that portion of land and that the Defendant had sufficient notice of this fact.

My Lord section 7 of the LIMITATION OF ACTIONS ACT (CAP 22) provides as follows:-

'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'

Section 17 of the Limitation of Actions Act provides as follows:-

'Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.'

In a claim for adverse possession the Plaintiff has a duty to prove the following ingredients as enumerated in the case of : **VIRGINIA WAMBUI MWANGI VS DAVID MWANGI JOTHAM KAMAU (ELC NYERI, NO. 86 OF 2011).**

a) Open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

(b) Continuous use of the property – The adverse party must, for statute of limitations

Purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time.

(c) Exclusive use of the property – The adverse party holds the land to the exclusion of the true owner.

(d) Actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses.

(e) Non-permissive, hostile or adverse use of the property – The adverse party entered or used the land without permission.

We submit that the facts prove the Plaintiff has been in open and notorious use of the one acre of land; that his use of the said portion has been continuous and exclusive as confirmed by the Plaintiff evidence; that the possession has been actual, non-permissive, hostile and or adverse to the right of ownership being claimed by the Defendant. The Plaintiff has been utilizing the land through cultivation and growing of trees and everybody including the Defendant knows that he is the one utilizing the said land. My Lord the portion that the Plaintiff is claiming out of land parcel no. 445 is distinct and identifiable on the ground. This is in resonance to the sentiments expressed in the case of **KAKAMEGA HCCC NO. 86 OF 2005 (quoted in ELDORET ELC Case No. 2 of 2013 JOHN AMBAIZA VODOYE VS ANN CHEBET & Another)**

that where a person is claiming only a portion out of a suit land and where he is not claiming all the land comprised in the title the claimant must show that the portion he is claiming is 'demarcated well enough to be identifiable'

We submit that the Plaintiff's claim is neither ambiguous nor non-specific and that the land he is claiming is distinct and is identifiable on the ground with clear demarcation and boundary marks in place.

That land is and has always been within land parcel no. MUTHAMBI/KANDUNGU/445.

3. When did time begin to run and end in respect of the adverse claim by the Plaintiff.

We submit that time began to run from the year 1998 when the Plaintiff entered the suit land and that it continued to run uninterrupted upto the date this suit was filed in May 2019. That is a total of 21 years which is over and above the statutory requirement of 12 years; meaning the Plaintiff claim meets the legal threshold.

The Court of Appeal sitting in the WILLIAM GATUHI MURATHE vs GAKURU GATHIMBI[1998]Eklr was of the unanimous agreement that GITHU VS NDEETE had settled the issue of when time could be deemed to have stopped running in a claim for adverse possession. The court noted the following:-

'Time which has begun to run under the Act is stopped, either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.'

The Court went on to note that:-

'I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. And on this particular point I will go with Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed.

In my judgment, therefore, time stopped to run against the appellant when he filed the Kiambu

case in 1984. That case was not withdrawn or discontinued but was transferred to the High Court in Nairobi and consolidated with the O.S. taken out by the respondent. On the respondent's own testimony before the learned Judge, he went into possession in 1974 and since the appellant filed his possession suit in 1984, time ceased to run against him because by taking that step the appellant, as owner, asserted his right. So therefore when the respondent took out his O.S. in July 1988, he had not been in continuous and uninterrupted possession for 12 years for the purposes of section 38 of the Act, and he was not therefore entitled to judgment."

We submit with all humbleness that the Defendant has not done anything during the last 21 years to stop time from running against the Plaintiff's claim. We wish to reiterate our earlier submission that Chuka Civil Suit no. 5 of 2015 is in respect of land parcel no. MUTHAMBI/UPPER KANDUNGU/445 and has no relevance to this claim which concerns land parcel no. MUTHAMBI/KANDUNGU/445. The two land parcels are different and the Defendant is bound by his pleading that he was seeking the eviction of the Plaintiff from land parcel no. MUTHAMBI/UPPER KANDUNGU/445.

Therefore the above suit does not fall under the exemption enumerated in GITHU VS NDEETE above.

My Lord during the hearing of the Defense case the Court received evidence that the Plaintiff is the registered owner of land parcel no. MUTHAMBI/KANDUNGU/1475 and that the land is situate in another area different from the area where land parcel no. MUTHAMBI/KANDUNGU/1475 is situated.

My Lord, this information is not relevant to the current claim for adverse possession of a portion measuring one acre out of land parcel no. MUTHAMBI/KANDUNGU/445.

PLAINTIFF'S LIST OF AUTHORITIES

24. STEPHEN NDOLO WAMBUA VS BEATRICE MBULA MUTILU & 2 OTHERS (2019) ECLR in which the court stated that parties are bound by their pleadings.

25. VIRGINIA WAMBUI MWANGI VS DAVID MWANGI JOTHAM KAMAU (ELC NYERI, NO. 86 OF 2011) which defines the ingredients of adverse possession

26. JOSEPH GAHUMI KIRITU VS LAWRENCE MUNYAMBU KABURU APPEAL NO. 20 OF 1993 that 'assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.'

27. NYANUMBA MONUBI v NYANSIANDO MOGOI [1993] Eklr where the court held as follows:- there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land even if it is a first registration and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents

28. KAKAMEGA HCCC NO. 86 OF 2005 (quoted in ELDORET ELC Case No. 2 of 2013 JOHN AMBAIZA VODOYE VS ANN CHEBET & Another)

In conclusion my Lord the Plaintiff has indeed proved that he has acquired a portion measuring one acre out of the Defendants land parcel no. MUTHAMBI/KANDUNGU/445 and that the said portion ought to be transferred to him.

We pray for costs of the suit my Lord.

DATED AT MERU THIS 2ND DAY OF JANUARY, 2020

NJIRU KITHAKA & CO

ADVOCATES FOR THE PLAINTIFF

19. The defendant's written submissions are reproduced in full herebelow without any alterations whatsoever, including of spelling or any other mistakes.

DEFENDANT'S FINAL SUBMISSIONS.

INTRODUCTION:

1. Your honor by an originating summon(OS) dated 13th May 2019 the plaintiff moved this court for the following relief:

i. A declaration that the applicant is and has been occupying one acre out of land parcel No Muthambi/Kandungu/445 measuring approximately 2.45 HA which is currently registered in the names of the defendant and that his occupation has been open,public ,exclusive,continuous and without interruption since 1998.

ii. A declaration that the plaintiff has acquired by way of adverse possession ownership of portion of land measuring one (1) acre out of land parcel number LR:Muthambi/Kandungu/445 in Tharaka Nithi County.

iii. Alternatively and without prejudice to the foregoing, that the defendant Fausto Kang'ori M'nairobi holds one acre out of land parcel NO Muthambi/Kandungu/445 in trust for the plaintiff.

iv. An order that a portion measuring one (1) acre out of land parcel NO.Muthambi/Kandungu/445 be excised and be registered in the names of Seraphine Mbae Rithaa.

v. An order that the defendant do execute a valid transfer instrument for one (1) acre out of land parcel NO Muthambi/Kandungu/445 in favor of the plaintiff and in default the executive officer of this hon. court be empowered to execute such transfer instrument.

vi. Costs of this suit and any other or further relief that the court may deem fit to grant.

PLAINTIFF'S CASE:

2. The plaintiff's case is contained in his affidavit in support of the OS sworn and dated 13th May 2019, his statement and that of his witnesses, and the oral evidence of the plaintiff and his witnesses. In summary the plaintiff and his witnesses testified that he bought 1 acre from his father one Kang'ori Kathiri. This was during adjudication process back in 1998. He claims that he has been in one acre since 1998 uninterrupted. He prays that he be registered with one acre out of the defendant's land parcel Muthambi/Upper Kandungu/445. He prays for orders that in the event that the defendant doesn't on his own motion transfer one acre from Muthambi/Kandungu /445, the executive officer (sic) be authorized to execute the requisite transfer documents. In the alternative the plaintiff prays for a declaration that the defendant hold one acre out of Muthambi/Upper Kandungu /445 in trust for the benefit of the plaintiff. The plaintiff also prays for the cost of the suit.

DEFENDANT'S CASE:

3. The defendant's case put in a nutshell is that during adjudication of Muthambi/Upper Kandungu Adjudication Section he gathered 4 parcels with an estimated area of 6.20 acres. They were recorded as 445 Muthambi/Upper Kandungu Adjudication Section. His father M' Nairobi claimed 1 acre from the defendant's parcel no 445. The one acre was given no 1475. During adjudication M' Nairobi Kathiri sold one acre to the plaintiff. The defendant has objected and resisted the plaintiff's occupation on part of parcel no 445. First he uprooted maize crops that the plaintiff had planted. Secondly he sued the plaintiff for trespass vide Chuka PMCC NO 5 of 2015. After criminal case no 1591 of 1998 the plaintiff moved out of defendant's parcel no 445 only to come back in 2009 when the titles of parcel no 445 and 1475 among others were issued in Upper Kandungu Adjudication Section were issued. The defendant contends that adverse possession was not crystallized at the time the instant OS was filed and that occupation of 0.25 acres by the plaintiff out of 445 has never been peaceful nor uninterrupted nor exclusive. The defendant prays for dismissal of the plaintiff's case with costs.

ISSUES FOR DETERMINATION AND ANALYSIS:

4. Your honor the first issue for determination in this case is whether the plaintiff's claim under the doctrine of adverse possession had crystallized when the instant OS was filed. The instant OS was filed on 13th May 2019. It is a requirement of the law that for a person to claim under the doctrine of adverse possession such person should have occupied the respondent's land for 12 years uninterrupted and exclusively without the authority of the respondent. The defendant was registered with Muthambi/Upper Kandungu/445 on 27th August 2008 and so was the plaintiff registered with Muthambi/Upper Kandungu/1475 on 27th August 2008. In principle therefore time under the doctrine of adverse possession would start running from 27th August 2008 when the defendant became the registered proprietor of Muthambi/Upper Kandungu /445. We submit that from 27th August 2008 up to 13th May 2019 when this OS was filed it is hardly 12 years. We submit therefore that the instant OS has failed the first acid test of claiming an interest under the doctrine of adverse possession. We submit that from 27th August 2008 when the defendant was the registered proprietor of Muthambi/Upper Kandungu /445 to 13th May 2019 it is 10 years and 9 months. There was still time for the plaintiff to wait for the doctrine of adverse possession to crystallize. For this reason your lordship we pray that the plaintiff's case be dismissed. We are guided by **Court Of Appeal Sitting At Nairobi In Civil Appeal No 35 of 2002 Kasuve v Mwaani Investments Limited & 4 others (Omolo, Githinji JJ A & Onyango –Otieno AG JA)** where their lordships held and made a finding that a claim under the doctrine of adverse possession had not crystallized because 12 years had not elapsed.

5. Your lordship our argument in number 4 above is compounded by the provisions of order 37 rule 7 of the civil procedure rules. The said rule reads as follows: "7.(1) an application under section 38 of the limitation of actions act **shall** be made by originating summons. (2) the summons **shall** be supported by an affidavit to which a **certified extract of the title to the land in question** has been annexed. (3).....provisions of order 37 rule 7(2) are mandatory in nature. A certified copy of register of the land in issue shall be annexed to the supporting affidavit. The provisions order 37 rule(2) does not talk about any other document relating to the land in question rather a certified copy of register. The order 37 rule 7(2) does not talk about an official search of the land in question. We urge the court to look at the plaintiff's supporting affidavit sworn and dated 13th May 2019 and satisfy itself that a copy of register commonly known as green card is not annexed to the supporting affidavit. This error and omission is enough to move this court and dismiss the plaintiff's case. The requirement to annex the copy of register of Muthambi/Kandungu/445 on the supporting affidavit of the OS is a legal requirement that cannot be treated as a technicality that can be cured by article 159 of the constitution. The requirement is a clear provision of law couched in a mandatory form. The court of appeal in its wisdom had a chance to interrogate the requirements that a copy of register should be annexed to the supporting affidavit in support of the OS where the plaintiff is claiming under the doctrine of adverse possession. This was the court of appeal sitting at Nairobi in civil appeal no 35 of 2002 where their lordships pronounced themselves at page 189 and page 191 regarding annexing of copy of register a supporting affidavit to an OS where the plaintiff claims under adverse possession. It is our submissions your lordship that on this ground alone the plaintiff's case should fail.

6. Your lordship the provisions of order 37 rule 7 of the civil procedure rules is clear that the doctrine of adverse possession cannot apply to the time the land in issue is under adjudication. We are minded that a copy of register is only available after the conclusion of adjudication process. Right from RER (register of existing rights), committee proceedings, Arbitration board proceeding, AR objections, or commonly known as 60 days objection, appeal to the minister. Unless and until an appeal to the minister if any regarding land under jurisdiction is heard and determined ownership cannot be said to have crystallized. All the adjudication process must go to its logical conclusion for a person to be said to be a registered owner of the material land. It is immaterial on the part of the plaintiff to argue that he has been in occupation of 1 acre out of the defendant's 445 Upper Kandungu Adjudication Section since 1998. The adjudication process was completed in 2008 when the title deeds were issued and the plaintiff got his regarding 1475 while the plaintiff got his regarding 445. From 1998 to 27th August 2008 the land in issue was under adjudication and proprietary interest was in the process of being determined which process culminated to the plaintiff being issued with his title to 1475 and the defendant was issued with title to 445. If for example the plaintiff claims that time started running from 1998, 12 years would have expired as of 2010. The question that begs this issue is then where would the plaintiff get a copy of certified copy of Muthambi/Upper Kandungu/445 between 1998 and 2008 to be able to comply with order 37 rule 2 civil procedure rules. The defendant contends and submit that under the doctrine of adverse possession time will start running from the date the defendant is registered with the land in question. We urge the court to make a finding and hold so.

7. Did the plaintiff occupy and settle on the suit land 445 quietly, uninterrupted and exclusively without the authority of the defendant for a period of 12 years or more? We have already submitted that if the plaintiff is to compute time for the purpose of his claim under the doctrine of adverse possession then the starting point is 27th August 2008 when the defendant was officially registered as the proprietor of Muthambi/Upper Kandungu/445. The issue of time is therefore not in time and favour of the plaintiff in his claim of adverse possession given that at the time he filed the suit 12 years were not over. Even assuming for a moment that the plaintiff was on the land from 1998 to date can his stay be declared as peaceful and uninterrupted. Our answer to this question is in the negative. The defendant has objected and opposed the plaintiff occupying his part of his land Muthambi/Upper Kandungu/445. First during the adjudication when his father M'nairobi Kathiri was allocated by DLASO one acre out of then 445/Upper Kandungu Adjudication Section the defendant filed an objection objecting to the one acre being placed by side with 445. He never wanted to share boundary with his father parcel of land that he sold to the plaintiff. DLASO and demarcation officer allowed his objection and 445 was moved to Gajii from Gaciambaki where land parcel 445 is situated. This is the first resistance by the defendant to the plaintiff being in occupation of a portion of the defendant's land parcel 445. The second indication of resistance of the defendant's against the plaintiff occupation of his land was in 1998 immediately the plaintiff purchased one acre from the defendant's father M'nairobi Kathiri. The defendant uprooted maize crops growing on the portion the plaintiff had bought from M'nairobi Kathiri (this was after the one acre that the plaintiff had purchased had been relocated by DLASO AND demarcation officer to Gajii). The defendant insisted on remaining on 445/Upper Kandungu Adjudication Section. The defendant uprooted the crops the plaintiff had planted. The plaintiff complained to the police whereby the defendant was arrested and charged for malicious damage to property. After full hearing the defendant was acquitted vide criminal case no 1591 of 1998. The argument of the court was that the plaintiff did not prove to the court that the land on which the crops were growing was his. The case ended in the year 2000. It is the defendant's evidence that was not challenged by way of cross examination that after the plaintiff lost his case he went to his land and came back to the suitland in 2009 where he occupied a portion measuring approximately 0.25 acres.

Another indication that the plaintiff did not occupy the suitland peacefully and uninterrupted is that in August 2015 the defendant instituted Principal Magistrate Court Civil Suit No 5 of 2015. The defendant was seeking for eviction orders to evict the plaintiff from Muthambi/Upper Kandungu/445. The matter is yet to be determined but survived it to say that the suit by the defendant was a clear indication that the defendant was resisting the presence of the plaintiff on his land. The plaintiff is estopped from arguing that he was on this land uninterrupted. The defendant was and is still in the process of having the plaintiff evicted from 0.25 acres that the plaintiff is still occupying.

8. Initially the plaintiff had purchased one acre from his father M'nairobi Kathiri. When the plaintiff lost his case in the year 2000 he went out of the land initially to his land only to reappear in 2009. The defendant took advantage of the situation and reentered and occupied 0.75 acres out of the one acre that the plaintiff had initially occupied. We submit that the defendant repossessed and or redeemed 0.75 acres that the plaintiff had occupied. The plaintiff was only left with approximately 0.25 acres. It is now trite law that if the vendor or the registered proprietor of land being claimed under the doctrine of adverse possession enters into the suit land the claim of adverse possession is ousted and or terminated by the said reentry by the owner. By so saying we are guided by the following authority. **Court of appeal sitting at Nairobi ,civil appeal no 24 of 1979.....Githu Versus Ndeti.** In summary of what their lordship held is as follows;"held

i.

ii.

iii. Time ceases to run under the limitations of actions act either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right purpose of stopping the running of time under the limitation of actions act."

CONCLUSION:

9. Your lordship in conclusion the defendant submits that on the balance of probabilities the plaintiff has not proved his claim. The plaintiff has not established that he has been on the suit land for a period of 12 years from the time the defendant was registered with Muthambi/Upper Kandungu/445. The suit was filed prematurely (before 12 years were over) The plaintiff did not comply with order 37 rule 7(1) which is drafted in a mandatory nature. The plaintiff did not annex a certified copy of register of Muthambi/Kandungu/445 rather the plaintiff annexed an official search (an official search is not a certified copy of register) The plaintiff did not prove that he was on the land peacefully and uninterrupted. The defendant has variously demonstrated that from 1998 he has been resisting the plaintiff occupation of his land. Finally your lordship the defendant has repossessed 0.75 acres out of the 1 acre that initially the plaintiff occupied. In light of the foregoing submissions we pray that the court do make a finding and hold that the plaintiff has not proved his claim.

10. We rest our submissions and pray.

DATED AT CHUKA THIS 17TH DAY OF DECEMBER, 2019

DRAWN AND FILED BY:

I.C MUGO & CO ADVOCATES

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20. The only issue for determination in this matter is if or if not, on a balance of probabilities the plaintiff has proved that he is entitled to his claim that one acre out of the suit land has devolved to him through the doctrine of adverse possession.

21. By and large, the parties have argued this case as if it constituted a claim for ownership of land under a normal claim. I wish to point out that adverse possession is a sui generis process where all the ingredients must be proved. This is because the effect of a successful claim under adverse possession disinherits a registered proprietor of his land. These ingredients include, inter alia, quiet, open and uninterrupted occupation and a threshold of occupation for at least **12 years**.

22. If this court was handling a claim for land under a normal claim, I would find that on a balance of probabilities the plaintiff's land parcel No. Muthambi/Kandungu/1475 is not part of the defendant's land parcel Number Muthambi/Kandungu/1475. There is evidence that he obtained a title for this land on **12th January, 2009**. Obviously one cannot eat his cake and still have it. The plaintiff has not anywhere in his pleadings suggested that he was willing to return this land to the original seller. He has also not denied that this land was sold to him by the defendant's father.

23. The above notwithstanding, I am dealing with a claim for land under the doctrine of adverse possession. The period for adverse possession to accrue cannot run from the time the suit land was under the adjudication process. It starts to run from the time the owner of the land becomes the registered owner. The defendant, Faustino Kangori M'Nairobi became registered owner of the suit land on **27th August, 2008**. This is **22 years ago** and well above the threshold of **12 years** which triggers adverse possession. However, on **23rd January, 2015**, the defendant filed a suit against the plaintiff. This was Chuka Principal Magistrates Court Suit No. **5 of 2015**. This was about **7 years** after he was registered as owner of the suit land. The effect of this suit was to interfere with the peaceful, open and uninterrupted occupation of the suit land by the plaintiff. This suit was dismissed for lack of prosecution on **13th December, 2016**. It is therefore pellucid that when suit was filed on **13th May, 2019**, less than 3 years had elapsed since dismissal of Chuka **PMCC 5 of 2015**.

24. I, consequently, find that the plaintiff has not occupied the suit land peacefully, openly and uninterrupted for a period of at least **12 years**. Even if I found that the plaintiff had proved his claim for adverse possession, which I do not find, I find that he would only be entitled to ownership of only one quarter of an acre as from the totality of the evidence, the defendant's assertion that he had reclaimed $\frac{3}{4}$ of an acre of the claimed land has not been controverted even through an iota of evidence.

25. In the circumstances, judgment is entered for the defendant against the plaintiff in the following terms:

- a. This suit is hereby dismissed.
- b. Costs will follow the event and are awarded to the defendant.

Delivered in open Court at Chuka this 5th day of May, 2020 in the presence of:

CA: Ndegwa

Kirimi Muturi h/b I.C Mugo for the defendant

M/s Mutegi for the plaintiff

P. M. NJOROGE,

JUDGE.