



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 03 OF 2019 (OS)**

**SUSAN NYAMBURA MWATHI.....PLAINTIFF**

**VERSUS**

**DUNCAN KIRIA KABETE.....DEFENDANT**

**JUDGMENT**

1. The Originating Summons in this case reads as follows:-

**ORIGINATING SUMMONS**

**(Pursuant to Section.38 of the Limitation of Actions Act (Cap 22) and Order 37 Rule 7 of the Civil procedure Rules).**

**LET DUNCAN KIRIA KABETE** of **CHIAKARIGA** Location in Tharaka Nithi County, 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 **SUSAN NYAMBURA MWATHI** of **CHIAKARIGA** Location in Tharaka Nithi County who claims to have become entitled to a portion of the suit land measuring about **4.55 Ha** and prays to this Honourable court for the determination of the following questions:-

1. Whether the Plaintiff has been in ***open, exclusive, continuous and uninterrupted occupation*** of a parcel of land measuring about **4.55 Ha** on parcel of land number **THARAKA/CHIAKARIGA “A”/586** land for over **45 years**?
2. Whether the Plaintiff has become entitled to the aforesaid parcel of land measuring about **4.55 Ha** to be excised from parcel of land number **THARAKA/CHIAKARIGA “A”/586**.
3. Whether the register of the aforesaid parcel of land number **THARAKA/CHIAKARIGA “A”/586** should be rectified and the Plaintiff registered as the owner of the aforesaid parcel of land measuring about **4.55 Ha**.
4. Whether the Deputy Registrar of this Honourable Court should be empowered to sign all the necessary documents to transfer a parcel of land number **THARAKA/CHIAKARIGA “A”/586** measuring about **4.55 Ha** in default of the defendant so signing.
5. Whether the defendant should pay the plaintiff costs hereof.

**DATED** at **MERU** this.....12<sup>th</sup> ..... day of ...March,....2019.

**FOR: JOHN MUTHOMI & CO.**

**ADVOCATES FOR THE PLAINTIFF**

2. The defendant has filed a counter claim which reads as follows:-

**DEFENDANT’S COUNTER CLAIM**

1. The 1<sup>st</sup> defendant retaliate (sic) the contents of paragraph 1 to 7 of his defence.
2. The 1<sup>st</sup> defendant states that his is a first registration and he has absolute proprietorship rights over Parcel Number Tharaka Nithi/Chiakariga ‘A’/586.

3. The 1<sup>st</sup> defendant avers that the plaintiff invaded his land recently and all attempts to make her vacate the same have proved to be futile.

4. The defendant avers that there is no other suit and there has been no previous proceedings in any court between the plaintiff and the defendant in respect of the subject matter of this suit.

5. Reasons wherefore the defendant by the counter claim prays that the plaintiff's suit against him be dismissed with costs and that judgment be entered on the counter claim in the defendant's favour for:-

a. An order of eviction of the defendant in the counterclaim, her agent, and family members from the plaintiff in the counterclaim's land parcel number Tharaka Nithi/Chiakariga 'A'/586.

b. Costs of the suit.

3. PW1, Susan Nyambura Mwachu, the plaintiff asked the court to adopt her witness statement dated 16<sup>th</sup> July, 2019 as her evidence in this suit. The witness statement reads as follows:

**WITNESS STATEMENT BY SUSAN NYAMBURA MWATHI**

I come from Nyakinjeru sub location Nkarini location within Tharaka Nithi County.

1. I am a peasant farmer.

2. The suit land number Tharaka/Chiakariga 'A'/586 measuring about 4.55 Ha is currently registered in the name of the defendant herein.

3. I have lived on the suit land Tharaka /Chiakariga "A"/586 with my mother one, Kaithi Kirugura before she died sometimes in 1997 and my elder brother one Peter Kithure Kirugura before he relocated to Igoji in 1976, since 1974 long before demarcation started in the area and have since been in open, exclusive, continuous and uninterrupted occupation.

4. Sometimes in 1980 I got married to One Jackson Mwaria Mwachu, my brother one Peter Kithure Kirugura requested me to cohabit with my aforesaid husband on the suit land to take care of our mother since he had relocated to Igoji in 1976. My afore said brother gave me his house wherein I have cohabited with my aforesaid husband and our children to date.

5. I took care of my mother with my aforesaid husband until when she died sometimes in 1997 and was buried on the suit land.

6. Sometimes in 1994 demarcation of the suit land was carried out and the same was allocated to me.

7. My aforesaid husband and I have made several developments on the suit land which includes semi-permanent houses, planted trees, mangoes, banana stems, food crops and installed water.

8. Sometimes in October, 2002, the defendant visited me at my home on the suit land and informed that he had come to give me notice to vacate the suit land claiming that the same belonged to him.

9. I became very alarmed and shocked as at that time in October, 2002 I had been in possession, user and development of the suit land without interference from anybody.

10. In the company of my husband one Mwaria Jackson Mwachu, we immediately visited the DLASO offices situated at Marimanti to inquire on the status of our land and reason the defendant was claiming the same.

11. The officers at the DLASO offices at Marimanti were unhelpful. My husband and I decided to travel to Nairobi to complain to the Director of Land Adjudication Settlement.

12. On 23<sup>rd</sup> October, 2002 after listening to my husband and I, the aforesaid director wrote a letter to the DLASO Tharaka District instructing him to investigate my complaint and inform him. In the meantime, he directed the DLASO to ensure the status quo is maintained until my complaint was addressed.

13. Upon receipt of the aforesaid letter by the Director of Land Adjudication & Settlement, the DLASO wrote to the officer in charge, Tharaka South Division to investigate my complaint and inform him.

14. After investigating DLASO wrote to the defendant and on 21<sup>st</sup> February, 2003. The letter was copied to the area chief Nkarini/Chiakariga Location and the L.A.S.O.

15. In the aforesaid letter dated 21<sup>st</sup> February, 2003 the DLASO observed inter alia as follows:-

i) That the suit land was demarcated to the defendant as a minor.

- ii) That I erected my boma in or around 1974 long before demarcation started and I was still living there.
- iii) That I had developed the suit land and planted grown mangoes, oranges and acacia trees.
- iv) That the defendant has never used the suit land.
- v) That the status quo favoured me as I was utilizing the suit land.
- vi) That though the records read the defendant's name it was imperative to note that he may have acquired and/or recorded fraudulently more so that his father recorded him when he was a minor and him a land committee member.

16. On 9<sup>th</sup> May, 2003, the DLASO wrote back to the Director of Land Adjudication and Settlement submitting a report of his investigations on my complaint against the defendant and stated inter alia as follows:

- i. That he established that the suit land was recorded fraudulently to the defendant who was a minor and son to one of the land committee members.
- ii. That the recording was in disregard of the fact that I had lived on the suit land since 1974.
- iii. That the defendant had no right whatsoever over the land.

17. The Director of Land Adjudication & Settlement Officer responded to the afore said DLASO letter and asked him to reconcile the records, the same was not done and the defendant ultimately obtained a title deed on 9<sup>th</sup> March, 2017.

18. In spite of the fact that the defendant became the registered proprietor as aforesaid I am the one who has been in open, exclusive, continuous and uninterrupted occupation of the suit land for over 45 years to date.

19. That is all I have to state.

**Signed.....**

**Susan Nyambura Mwathi**

4. PW1 told the court that she wanted the court to find that the suit land had devolved to her by operation of law through the doctrine of adverse possession. She told the court that she had lived on the suit land since 1974. During cross-examination PW1 told the court that in 1974 she was 14 years old and was in primary standard two. She explained that the house she had lived in since 1974 had been built by his brother who had left the suit land. She explained that although at page 2 of her witness statement she had stated that she had constructed a house on the suit land in 1974, the correct position was that the house had been built by her brother. She said that she could not be blamed for the wrong statement contained in the District Land Adjudication and Settlement Officers (DLASO) letter that she had put up the house left to her by her brother.

5. PW1 told the court that she was the third wife of her husband and that they lived together on the suit land in the house which was given to her by her brother when he moved out of the suit land. She went on to tell the court that she came to know the defendant in 1995 when he was a small boy as his father's land was near where she lived with her husband. PW1 was unequivocal that her husband was landless and stated that his other 3 wives lived on his father's land. She told the court that the suit land was 11 acres in size out of which she cultivated 3 acres and used the rest of the land for grazing purposes. She was categorical that she had been in occupation of the land since 1974.

6. PW1 told the court that the land was registered in the defendant's name when he was a minor because his father was a member of the adjudication committee. She said that it is only in the year 2002 when the defendant told her to vacate the suit land.

7. PW1 told the court that upon realizing that the suit land had been registered in the name of the defendant she complained to the Director of Lands and Settlement who told his field officers to take ameliorative action.

8. PW2, Mwaria Jackson Mwathi, the plaintiff's husband told the court that he lived on the suit land with the plaintiff his wife. He told the court that he had 4 wives and that the other three lived on his father's land. He told the court that he and his wife cultivated 3 acres out of the suit land and that the rest of the land was used for grazing goats.

9. PW2 told the court that he was landless and lived with the plaintiff. He told the court that his other three wives: (a) Teresia Gatiria (b) Magdaline Gatiria and (c) Karimi Mwathi, lived on his father's land. He was insistent that he lived with the plaintiff in the suit land but added that all the other three women were still his wives. When he was referred to the DLASO's letter which said that the plaintiff had put up the house they were occupying, he told the court that the correct position was that the house had been constructed by the plaintiff's brother. A conspectus of PW2's evidence was to support his wife's claim for ownership of the suit land through the doctrine of adverse possession. It was his evidence that the plaintiff cultivated three acres out of the suit land.

10. PW3, Peter Kithure Kirugora told the court that the plaintiff was her younger sister. He supported her claim that she occupied the suit land. He told the court that she could be cultivating 2, 3 or 4 acres but added that as he was not a surveyor he was not sure of the actual size of the land she cultivated. He told the court that he gave her the house she occupied but added that he still retained a 5 roomed house on the suit land. He could not, however, say what area was occupied by the houses on the suit land. He stressed that he was not a surveyor.

11. PW2 told the court that the plaintiff was registered as owner of the land as it belonged to his family even before the defendant was born. PW2, proffered no evidence to prove his claim that the plaintiff had at one time been registered as owner of the suit land. Asked if his family had objected to the registration of the defendant as owner of the suit land during the adjudication process, PW3 told the court that he did not object as he had been told that the land belonged to him, perhaps he meant it belonged to his family.

12. PW4 Peter Nthiga Rumuri testified that the plaintiff occupied the suit land. He told the court that the plaintiff's brother cultivated part of the land. He added that there were 2 tenants and said that one of them was called Njagi. He also told the court that some people had said that Duncan (the defendant) had rented out part of the land.

13. PW5, Paul Muthee M'Rubani, told the court that only Nyambura and her relatives occupied the suit land. He told the court that he could not say how much of the suit land the plaintiff and her relatives occupied. He contradicted himself when he said that the defendant had some renters on the suit land despite his earlier evidence that only the plaintiff and her relatives occupied the suit land.

14. PW6, Zablon Mwangi, told the court that he was a Principal Land Adjudication and Settlement Officer in charge of both Tharaka North and South Districts. He told the court that he had familiarized himself with the documents he was about to present to court and which he did present to court. These were:-

a) A letter dated 23.10.2002 (Plaintiff's Exhibit No. 3). It was written to the DLASO, Tharaka, by the Director of Land Adjudication. It was asking him to investigate the complaints lodged by the plaintiff.

b) The 2<sup>nd</sup> letter alluded to at page 33 of the plaintiff's list of documents was dated 8.1.2003. Another letter was dated 21.2.2003 and the last letter was dated 9.5.2003.

15. During cross-examination PW6 told the court that the directions of the Director of Adjudication and Settlement and their investigations could not be implemented because ascertainment of ownership of land under adjudication had to follow the process provided for by the law. He told the court that he was not in a position to state that the registration of the defendant as proprietor of the suit land was fraudulent.

16. DW1, Duncan Kiria Kabete told the court that he was the defendant. He asked the court to adopt his witness statement dated **8<sup>th</sup> June, 2019** as his evidence in this suit. The witness statement states as follows:

#### **DEFENDANT'S WITNESS STATEMENT**

I am Duncan Kiria Kabete. I come from Kaunju village, Tunyai location, Chiakariga ward in Tharaka Nithi.

I am the registered owner of parcel No. Tharaka Nithi/Chiakariga "A"/586 located in Njaki Njeru village, Gaceraka sub location in Nkarini location, Tharaka Nithi.

This land was allocated to me by my father's clan Kamarao during the land adjudication process. I was then living with my grandmother who had gathered and claimed the land from the clan and the clan decided to have it registered in my names because my grandmother was an old woman.

This land has never had any objection registered against it and I have never cased with Susan Nyambura or anybody during the adjudication process and everybody knows it is my land.

I remember that before the gathering phase of the land adjudication, there was a man called Kithuure Kaithi who came and built a small hut on this land. He did not stay for long and he left and went to live in Igonji.

By this time my family including my father Zablon Kabete and my mother and siblings were all staying in Mombasa where my father was working. Only my grandmother Cecilia Ciamajure was staying on this land. In 1985 I returned to Tharaka and I went to stay with my grandmother on this land. It is during this time that I noticed that the hut of Kithuure Kaithi was being occupied by an old woman whom I later came to learn was his mother.

When I asked my grandmother about her, she told me that she was seeking refuge from hunger which was sweeping across her home area and that she would leave when things improved. After staying with my grandmother for three years, I returned to Mombasa and I left the strange woman called Kaithi living on our land.

In 1991 my whole family returned to Tharaka and my father and other family members went to live in my father's land at Kunju while I went to stay with my grandmother at Parcel No. 586. I still found that the woman Kaithi was still living in the small hut.

At around this time the government announced that land adjudication would soon start in our area and people were given a chance to register their claims over the land they were occupying or owning.

My grandmother approached our clan for consideration to get this land because she was the one staying on it.

The clan decided that since she was very old the land should be registered under my names with my father being my trustee. This is the time that Kaithi left our farm and went to stay with her son in Igonji. We later heard that she had died and had been buried there. All the time she lived on our farm she never had any family members with her not even Susan Nyambura.

Two years after Kaithi's departure Susan Nyambura who claimed to be the daughter of Kaithi returned to the small hut in our farm but my grandmother and grandfather did not welcome her. They told her to leave our land but she refused. My grandfather literally chased her away at one time and she went to live in Tunyai market where she was running a tailoring shop. My grandfather then died in 1994 and Susan returned to disturb us.

In 1996 the land adjudication objection stage started and no person including Susan Nyambura made a claim against my land since everybody knew it was mine. Susan continued occupying a small portion not more than a quarter an acre and my grandmother and I continued to utilize the other portion. We planted trees and cultivated crops and kept goats and cows.

In 2003 my grandmother died. I left this farm to go and live with the larger family at Kaunju where my father had allocated me an additional farm.

In 2007 I decided to return to the suit land to build by home but Susan went and made a report to the Assistant Chief who called us to his office. After listening to us, he sent us to the land office in Chiakariga and the Lands Officers gave us a letter confirming that the land was registered in my names. The assistant chief advised Susan to stop disturbing me since the land is mine and she was a trespasser on it. By this time, I was still using the land and I even had leased parts of it to other people for income.

Later I decided to build my home at Kaunju because there was an irrigation scheme being introduced by the Catholic Diocese of Meru. The land is Tharaka/Tunyai "A"/2980. I however continued to have effective control of the suit land where I continued to carry out farming and grazing activities.

Susan is a married woman and her husband is called Mwathi M'Mwaria who has a farm and home at Kamunjwa. She stays with some children on the suit land while the other children stay with her husband. She is not destitute but is out to steal my land. Her husband comes to visit her often and she goes to visit him. She should return to her husband's home and leave my land alone.

I received my tile deed in 2017 and this case was filed this year. I am very surprised that she can claim my land and she has never objected during the objection stage.

**Dated at Embu this 24<sup>th</sup> day of September, 2018**

.....

**DUNCAN KIRIA KABETE**

17. A conspectus of his evidence is that the right adjudication process was followed before he was registered as proprietor of the suit land. In his view, the plaintiff occupied only about 1 acre of the land. He told the court that he had been asking the plaintiff to vacate the suit land since 1997. He told the court that the plaintiff had forcefully entered the suit land in 1996, of course, without his permission.

18. DW2, Joseph Chabari Mugwika told the court that the suit land devolved to the defendant through his father. He said that the plaintiff never complained to the Land Committee and never lodged any objection. He said that he and the defendant's father were members of the land committee and that placed him in a position to have knowledge about the suit land.

19. DW3 John Mutegi told the court that he was a tenant of the defendant and cultivated part of the suit land. He told the court that the defendant's grandfather was buried on the land. He also testified that as he cultivated the land leased to him by the defendant, the plaintiff had harassed him but he has continued cultivating the land even at the time he gave his oral evidence.

20. The parties filed and exchanged written submissions.

21. The plaintiff's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes:

#### **PLAINTIFF'S WRITTEN SUBMISSIONS**

##### **INTRODUCTION**

##### **Your Lordship,**

The Plaintiff herein instituted this suit by way of an **originating summons** dated **12/03/2019** supported by an **Affidavit in Support** sworn by the Plaintiff. The Plaintiff seeks a **determination of the 5 questions** set forth thereon and in particular that she has become entitled by virtue of adverse possession to be registered as the proprietor of **L.R.NO. THARAKA/CHIAKARIGA "A"/586**.

The matter proceeded for hearing and both parties herein had a chance to tender their evidence before this Honourable court.

##### **Your Lordship,**

Most humbly we beg to submit on the evidence tendered in relation to the law applicable on the **doctrine of adverse possession**.

## EVIDENCE

### Your Lordship.

The Plaintiff testified in line with her witness statement filed in court on **15/07/19**. She also sought that her **Affidavit in Support** of the **originating summons** sworn on **12/03/2019** be adopted as her evidence. Her documents namely, **letters** dated **23/10/2002, 8/01/2003, 1/02/2003** and **9/5/2003** were admitted in evidence as **exhibits 3-6** *vide* the evidence of **PW6, PRINCIPAL LAND ADJUDICATION AND SETTLEMENT OFFICER, THARAKA DISTRICT**.

The Plaintiff has stated in her **paragraph 4** of her witness statement that she has lived on the suit land, **L.R. NO. THARAKA/CHIAKARIGA "A"/586** with her mother one **KAITHI KIRUGURA** before she died in **1997** and her elder brother one **PETER KITHURE KIRUGURA (PW3)** before he relocated to **Igoji** in **1976**, since **1974**.

The Plaintiff indicated in her **paragraph 8** of her witness statement that she has made several developments on the suit land which includes **semi-permanent houses, planted trees, mangoes, banana stems, food crops and installed water**.

The Plaintiff indicated in her **paragraph 9** of her witness statement that sometimes in **October 2002** that the defendant visited her at her home on the suit land had asked her to vacate as the suit land belonged to him. That she sought the intervention of the **DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT** who directed the **DLASO THARAKA SOUTH DIVISION** to investigate her complaint over the defendant's threats and claim of ownership. The **DLASO** observations are indicated in **paragraphs 16 and 17** of her witness statement, the most important of which is that the Plaintiff had lived on the suit land since **1974**.

The Plaintiff added in her **oral testimony** that she has used the suit land quietly and uninterrupted all that time, that the defendant knew that she is on the land and has never attempted to evict her.

The Plaintiff further stated in **cross examination** *inter alia* as follows, that:-

- (a) **DLASO** called **GITARI** visited the suit land in **2002** and found her there with her children.
- (b) Her brother left the land to her and her husband (**PW2**) when he married him in **1980**.
- (c) Her mother died in **1997** and is buried on the suit land.
- (d) The defendant's father was a member of the land committee.
- (e) She went to the land committee in **1994** so as the land could be registered in her name and the land committee told her that the land belonged to her.
- (f) The land is **11 acres**, she **cultivates** about **7½ acres**, the rest she uses for **grazing** and she started cultivating in **1974**.
- (g) The land was registered in defendant's name in **1994** when he was a small child.
- (h) In **2002** the defendant went to tell her to vacate the land, that the defendant's grandfather never evicted her from the land and she had never seen him.

**PW2, JACKSON MWAHTI MWARIA** the Plaintiff's husband testified in line with his witness statement filed in court on **15/07/19** which he adopted as his evidence. He has stated in his **paragraph 5** of his witness statement *inter alia* that he has lived on the suit land since **1980** after his brother in law; **PW3** requested him to cohabit with the Plaintiff thereon to take care of her mother in law and gave them his house wherein they have cohabited together with their children to date. He **corroborated** all the other Plaintiff's assertions.

**PW2** further stated in **cross examination** *inter alia* as follows, that:-

- (a) The **DLASO** investigated and that formed the basis for his letter which stated that the defendant was a child when the suit land was registered in his name.
- (b) The **DLASO** letter arose out of the Director's directive for investigation of the facts surrounding registration of the defendant as the owner of the land.
- (c) He knew the defendant in **1980**. The defendant was living at his father's place and was not living with his grandmother on the suit land.

**PW3, PETER KITHURE KIRUGURA** the Plaintiff's elder brother testified in line with his witness statement filed in court on **15/07/19** which he adopted as his evidence. He has stated in his **paragraphs 5, 6, 7 and 8** of his witness statement *inter alia* that he is the one who gathered the suit land in **1974**, in **1976** he relocated to **Igoji** to expand his business and left the Plaintiff on the suit land to take care of his mother and that sometimes in **1980** the Plaintiff got married to **PW2** whom he requested to live with the Plaintiff on the suit land so that they could take care of his mother as he was not around.

**PW3** further stated in **cross examination** *inter alia* that he cultivated part of the land. He knew the defendant. He was a child when he put up houses on the suit land. He knew him when he went to claim the land. He didn't object because he knew that the land was his.

**PW4, PETER NTHIGA RUMURI** the Plaintiff's neighbour testified in line with his witness statement filed in court on **15/07/19** which he adopted as his evidence. He has stated in his **paragraphs 4, 5 and 6** of his witness statement *inter alia* that he has known the Plaintiff for many years, they used to go to school together and that Plaintiff lived on the suit land since her childhood with her mother one **KAITHI KIRUGURA** before she died and her brother **PW3** before he relocated to **Igoji** in **1976** long before demarcation started in the area. That sometimes in **1980** the Plaintiff got married to **PW2** and they cohabited on the suit land.

**PW4** further stated in **cross examination** that he knew that **PW3** cultivated part of the land.

**PW5, PAUL MUTHEE M'RUBANE** the Plaintiff's neighbour also testified in line with his witness statement filed in court on **15/07/19** which he adopted as his evidence. He has stated in his **paragraphs 4, 5 and 6** of his witness statement *inter alia* that he has known the Plaintiff for over **50 years**, the Plaintiff lived on the suit land since her childhood with her mother one **KAITHI KIRUGURA** before she died and her brother **PW3** before he relocated to **Igoji** in **1976** long before demarcation started in the area and that sometimes in **1980** the Plaintiff got married to **PW2** and they cohabited on the suit land.

**PW5** further stated in **cross examination** that he could not state the number of acres the Plaintiff cultivated, all he knew was that she lived on the suit land, that she had houses and trees on the land, that he didn't know any other person who used the suit land and that only the Plaintiff and other relatives lived on the land.

**PW6, ZABLON MWANGI** the **PRINCIPAL LAND ADJUDICATION AND SETTLEMENT OFFICER, THARAKA DISTRICT** testified in line with the correspondence that emanated from the **DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT** and the letters that were thereafter written to him and the parties herein by the then **DLASO** following investigations he carried out on the suit land after the Plaintiff's complaint thereon. He produced in evidence the said letters as **exhibits 3-6**. The conclusions reached by the then **DLASO** on the investigations he carried out are found in **paragraphs 16 and 17** of the Plaintiff's witness statement filed in court on **15/07/19**.

**PW5** further stated in **cross examination** that he could not state that the conclusions reached by the then **DLASO** on the investigations he carried out were unprofessional and that the then **DLASO** sent the Demarcation Officer.

**DW1, DUNCAN KIRIA KABETE** the Defendant stated in **cross examination** *inter alia* that he knew the Plaintiff from around **1997/1998**; she has been on the land from **1997** which was a period of around **23 years**, that the suit land was registered in his name on **26/02/1991**, that he had no documentary evidence to that effect and that in **1991** he was **12 years** old. He further stated that the suit land was gathered by his grandmother, she died in **2003**, she was buried on the suit land but his grandfather was buried elsewhere. He further stated that the land was given by his father's clan called **KAMARAO** but he didn't have the minutes where the clan said that the suit land should be registered in his name. He admitted that his father was a land committee member but denied that his father used his position as a committee member to have him registered. He further admitted that he was **12 years** when the land was registered in his name, that in **2002** he asked the Plaintiff to vacate the land, he didn't take her to court for eviction orders, that he lived at **KAUNGU** in his father's land and that the Plaintiff entered the suit land without his permission.

**DW2, JOSEPH CHABARI** stated in **cross examination** *inter alia* that he was a member of the committee, he didn't know when the committee gave the Defendant the land and that he knew one **ZABLON KABETE MWAMBA**, the Defendant's father and he was a member of the committee. He admitted that he was not familiar with the matter especially disputes between the Plaintiff and the Defendant, and that the Plaintiff occupied part of the suit land and lived in **2 roomed house** with her sons.

**DW3, JOHN MUTEGI** stated in **cross examination** *inter alia* that he knew the Plaintiff, she lived on the suit land, he didn't know the long history of the suit land, he had rented the suit land from **2006** and he didn't have a lease agreement. He admitted that the Plaintiff has been on the suit land.

#### Your Lordship,

From the evidence tendered by both parties herein, **it is not in dispute** that the Plaintiff has been in occupation of the suit land for over **12 years** and still remains in occupation. **DW1, DUNCAN KIRIA KABETE** stated that the Plaintiff has been in occupation for around **23 years**. Additionally, he stated that in **2002** he asked the Plaintiff to vacate the land and he didn't take her to court for eviction orders.

We humbly submit that from the year **2002**, the date when the Defendant asked the Plaintiff to vacate the suit land, which did not happen, until the year **2019** when the suit was filed, **17 years** had already lapsed. Furthermore, the Defendant admitted in **cross examination** that the Plaintiff had been on the land from **1997** which was a period of around **23 years**. All credible evidence therefore is to the effect that the Plaintiff has been in occupation of the suit land for over **12 years** and thus the Plaintiff's **claim by way of adverse possession is tenable**.

#### Your Lordship,

Having evaluated the evidence tendered before this Honourable court, we proceed to address the **applicable law on the doctrine of adverse possession** with an aim of demonstrating that the Plaintiff has proved her case on a **balance of probabilities** as required under the law.

#### THE APPLICABLE LAW

#### Your Lordship,

The claim herein is based on the **doctrine of adverse possession**. We shall therefore consider the law governing the said doctrine in relation to the evidence tendered.

The general rule is that a person claiming under the doctrine of adverse possession must prove that certain **ingredients** have been met. In the case of **NAIROBI ELC CASE NO.107 OF 2011 –MUNYAKA KUNA COMPANY LIMITED V BERNARDO VICEZO DE MASI (THE ADMINISTRATOR OF THE ESTATE OF DOMENICO DE MASI (DECEASED) [2018] eKLR**, (Copy annexed) the Court while addressing the **requisite ingredients** stated as follows:-

*“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [nec vi, nec clam, nec precario] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [for the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”*

**Your Lordship,**

With respect to the **first ingredient**, on factual possession, the Plaintiff has stated in her **paragraph 4** of her witness statement that she has lived on the suit land, **L.R. NO. THARAKA/CHIAKARIGA “A”/586** with her mother one **KAITHI KIRUGURA** before she died in **1997** and her elder brother one **PETER KITHURE KIRUGURA (PW3)** before he relocated to **Igoji** in **1976**, since **1974**. **PW2, JACKSON MWAHTI MWARIA** the Plaintiff’s husband has stated in his **paragraph 5** of his witness statement *inter alia* that he has lived on the suit land since **1980** after his brother in law; **PW3** requested him to cohabit with the Plaintiff thereon to take care of her mother in law and gave them his house wherein they have cohabited together with their children to date. The other **4** Plaintiff’s witnesses confirmed that the Plaintiff is in occupation of the suit land.

**DW1, DW2 and DW3** confirmed that the Plaintiff was in occupation of the land in question. This ingredient has therefore been satisfied.

On the **second ingredient**, the Plaintiff stated in her **paragraph 4** of her witness statement that she has lived on the suit land, **L.R. NO. THARAKA/CHIAKARIGA “A”/586** with her mother one **KAITHI KIRUGURA** before she died in **1997** and her elder brother one **PETER KITHURE KIRUGURA (PW3)** before he relocated to **Igoji** in **1976**, since **1974**. **PW2, JACKSON MWAHTI MWARIA** the Plaintiff’s husband stated in his **paragraph 5** of his witness statement *inter alia* that he has lived on the suit land since **1980** after his brother in law; **PW3** requested him to cohabit with the Plaintiff thereon to take care of her mother in law and gave them his house wherein they have cohabited together with their children to date. **PW3, PETER KITHURE KIRUGURA** the Plaintiff’s elder brother stated in his **paragraphs 6 and 7** of his witness statement *inter alia* that he is the one who gathered the suit land in **1974**, built 2 semi-permanent houses, one for the Plaintiff and his mother which they shared, and that in **1976** he relocated to **Igoji** to expand his business and left the Plaintiff on the suit land to take care of his mother.

**DW1**, the Defendant stated the Plaintiff has been on the land from **1997** which was a period of around **23 years**, that in **2002** he asked the Plaintiff to vacate the land, he didn’t take her to court for eviction orders, that he lived at **KAUNGU** in his father’s land and that the Plaintiff entered the suit land without his permission. The Plaintiff therefore entered the subject portion of land without force, without secrecy and without persuasion [*nec vi, nec clam nec precario*].

The **third ingredient** is that the Plaintiff *must demonstrate that the registered owner had knowledge [for the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property*. The Plaintiff indicated in her **paragraph 9** of her witness statement that sometimes in **October 2002** that the Defendant visited her at her home on the suit land had asked her to vacate as the suit land belonged to him. The Plaintiff added in her **oral testimony** that she has used the suit land quietly and uninterrupted all that time and that the Defendant knew that she is on the land and has never attempted to evict her. **DW1**, the Defendant stated the Plaintiff has been on the land from **1997** which was a period of around **23 years**, that in **2002** he asked the Plaintiff to vacate the land, he didn’t take her to court for eviction orders, that he lived at **KAUNGU** in his father’s land and that the Plaintiff entered the suit land without his permission. Therefore, this ingredient has too been satisfied.

The **fourth ingredient** is that the occupation must be **continuous, must not be broken or interrupted**. The Plaintiff testified that she has remained in occupation of the suit land and had developed the same. **DW1**, the Defendant stated the Plaintiff has been on the land from **1997** which was a period of around **23 years**, that in **2002** he asked the Plaintiff to vacate the land and that he didn’t take her to court for eviction orders,. In essence the Plaintiff has never evicted from the suit land and therefore she continued occupying the same to date.

**Your Lordship,**

We most humbly urge you to be guided by the authority cited above and find that **the Plaintiff has proved her case as an adverse possessor on a balance of probabilities as required under the law**. We therefore pray for a finding that the Plaintiff has become entitled by virtue of adverse possession to be registered as the proprietor of **L.R.NO. THARAKA/CHIAKARIGA “A”/586** by way of adverse possession and therefore the same be registered in her name.

**CONCLUSION**

**Your Lordship,**

Kindly consider the submissions made herein and the authority referred to herein above and allow the **originating summons** dated **12/03/2019** in terms that a declaration be made to the effect that the Plaintiff is entitled to **L.R.NO. THARAKA/CHIAKARIGA “A”/586** by way of adverse possession and therefore the same be registered in her name. We urge your Lordship to order that in default of the

Defendant failing to execute the relevant documents, the Deputy Registrar of the Court be empowered to do so.

We also seek that the Defendant be ordered to bear the costs of the suit and interest thereon.

We so humbly pray.

The Plaintiff's humble submissions.

**DATED** at **MERU** this...2<sup>nd</sup> ... day of .....March,.....2020.

**FOR: JOHN MUTHOMI & CO.**

**ADVOCATES FOR THE PLAINTIFF**

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

**SUBMISSIONS ON BEHALF OF DEFENDANT DUNCAN KIRIA**

My Lord, the Plaintiff has attacked the Defendants title deed to land parcel no Tharaka/Chiakariga 'A'/586 on two fronts:-

1. That he had obtained his title fraudulently because he was registered as owner of the land while he was a minor
2. That she had acquired adverse possession of the land having been in possession of the land for the last 45 years or so since 1974.

**Preliminary arguments**

Briefly and in summary my Lord we submit that the Plaintiff's title is impeachable; his is a first registration after an adjudication process that was carried out in Chiakariga 'A' adjudication section and to which the Plaintiff never filed any objection from the beginning to the end as is provided for under the Land Adjudication Act. This is despite having been notified by the DLASO that she could pursue her claim in court since the adjudication register could not be reopened at the time she tried to follow up.

My Lord there is no fraud in having a minor registered as a land owner under the Land Adjudication Act as well as under the Land Registration Act. Under the two Acts, minority is only treated as a legal disability. Under section 2 of the Land Adjudication Act a minor can be registered as owner of land if a guardian is registered to hold the land in trust for him.

My Lord the Plaintiff did not bring forth any evidence to show the exact date the names of the Plaintiff were entered in the adjudication register and the manner in which the said names were entered. Her assertions that he was registered illegally and procedurally are not supported by any tangible evidence. The DLASO whom she called to testify on her behalf told the court that there was no illegality involved in the registration of the land parcel in the names of the Defendant and that no objection was filed during the adjudication process to challenge that registration. If indeed the Plaintiff was living on the suit land at the time when the land adjudication process was taking place why did she not file an objection as is required by the law.

There is no evidence brought before the court to show at that during the land adjudication process, the names of the Respondent were entered in the adjudication register illegally and fraudulently. The court has been treated to mere insinuations and assumptions which does not meet the threshold of fraudulent registration under section 26 of Land Registration Act.

In the case of **M W O v E O (being sued as next friend and guardian to L A, D O P & M O - Minors) [2018] eKLR** the court observed that fraud is a serious allegation and the law requires that it is demonstrated or proved on a scale higher than a balance of probability. The courts have held variously that it is always the duty of the Plaintiff to prove their allegations and that the Defendant carried no duty to prove himself in such a case.

My Lord the Defendant was registered as proprietor of the suit land on 27<sup>th</sup> July 2017 as is evidenced in Defense Exhibit no. 1 which is the title deed. By that date my Lord the Defendant who was born in 1979 was no longer a minor. No evidence was brought forth to show the date when his name In any case my Lord section 47 of the Land Registration Act does not exclude minors from land ownership; therefor the claim by the Pl

Likewise my Lord the Plaintiff has not met the requirements of Order 37 Rule 7 'b' of the Civil Procedure Rules. The section requires that a person who is claiming adverse possession against another's land should annex a certified copy of an extract of the land register. The Plaintiff did not annex such a copy which is usually referred to as a green card. She only attached an official search which does not meet the requirements of the provision.

My Lord according to the official search annexed to the Plaintiff's supporting affidavit the Defendant got registered under the Land Registration Act on 27<sup>th</sup> July 2016. This suit was filed on 12<sup>th</sup> March 2019, and the Defendants counterclaim for eviction orders against the Plaintiff was filed on 24<sup>th</sup> September 2018.

My Lord it is evidence from the above that the Plaintiff's claim is premature and does not meet the demands of section 7 of the Limitation of

Actions Act which provide for a person claiming under the doctrine of adverse possession to demonstrate that they have been in open, public, continuous, exclusive and hostile occupation for at least 12 years.

My Lord under the law of evidence, it is the party that alleges a fact who must prove that fact. The burden of proving that the Plaintiff had acquired adverse possession of the Defendants land fell on the Plaintiff and it cannot shift on the Defendant. It is clear from all available evidence that the Plaintiff did not prove her claim on a balance of probability because she does not even seek to know the exact acreage she is utilizing out of land parcel no. Tharaka/Chiakariga 'A'/586. She was very vague and lackluster during her evidence and she gave contradictory evidence in this regard. As it is the Court is not able to know the exact acreage she is claiming because she did not bring forth any evidence to show the area she is occupying.

In her pleadings she claimed the whole land but during her evidence she admitted that she is occupying only seven acres. Her main witnesses PW 2 and PW 3 disputed this when they said she was not occupying seven acres. Her husband, PW 2 told the court that they only cultivate four acres while his brother in law cultivates three acres. Her own brother who testified as PW 3 told the court that the Plaintiff cultivated two acres while he himself was cultivating four acres. In the face of these disparities the court cannot tell for sure how many acres are being utilized by the Plaintiff. A claim for adverse possession is a very personal claim; the Plaintiff cannot claim land on behalf of her brother and husband and due to this she has failed to prove her case to the required standards.

Section 26 of the Land Registration Act provides that

'The Certificate of Title issued by the Registrar upon registration,.....shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained in the certificate, and the title of that proprietor shall not be subject to challenge, except:-.....'

My Lord the Plaintiff has failed to impeach the title currently held by the Defendant and we pray for her claim to be dismissed with costs and for eviction orders to issue against her.

My Lord, we list below the sections of law and case law that we wish to rely upon to support our arguments.

### **COMPREHENSIVE LEGAL ARGUMENTS AND SUPPORTING CASE LAW**

Chuka Magistrates suit no. 56 of 2018 was filed by the Plaintiff against the Defendant and the DLASO. The plaintiff claimed in that she was entitled to be registered as owner of land parcel no. 586 Chiakariga 'A' Adjudication section but due to fraud on the part of the Defendant and the DLASO she was denied that opportunity. The particulars of fraud she listed include the fact that the Defendant who was then the 1st Defendant in that suit was registered a owner of the parcel while he was a minor who 'did not have capacity to have ownership of the suit premises.' She also alleged that there were no 'adjudication proceedings' that entitled the then 1st Defendant (current defendant) to be registered as the owner of the suit premises. She then proceeded to claim for a permanent injunction to be issued restraining the 1st Defendant to be stopped from ejecting, or preventing her from enjoying the peaceful, quiet and exclusive possession and use of the said land.

Upon being served with suit papers the Defendant filed his defense and counterclaim in which he denied the allegations of fraud leveled against him while asserting that he is the lawful registered owner of the suit land following a public and open adjudication process that was not challenged by the Plaintiff or any of his family members. He prayed for eviction orders against the Plaintiff and members of his family while asserting that they were trespassers with no right to stay on the land. The Plaintiff in reply to that counterclaim retaliated her allegations against the 1st Defendant while seeking that his suit be dismissed with costs and that her initial prayers be awarded. Before that suit could be set down for hearing and determination the Plaintiff issued a written notice withdrawing his suit against the 1st and 2nd Defendant. At the same time she filed an Originating Summons claiming that she had acquired adverse possession of the suit land and that the same should now be registered in her names.

It is our humble submission the withdrawal of the main suit by the Plaintiff did not affect the 1st Defendants counterclaim that the counterclaim filed by the 1st Defendant in Chuka Civil Suit no. 56 of 2018 is still intact and valid and that the Plaintiff ought to be evicted from the suit land since she is a trespasser. We wish to rely on the case of **Beatrice Mumbi Wamahu V Mobil Oil Kenya Ltd [2011] Eklr** where it was observed that:-

'The withdrawal of the main suit did not affect the counterclaim. A counterclaim is treated as a separate suit under section 35 of the Limitation of Actions Act hence its survival cannot be pegged on the pendency of the primary suit.'

My Lord we wish for this Hon. Court to consider the following issues on behalf of the Defendant:-

1. Whether the Defendants is currently the registered owner of land parcel no. Tharaka/Chiakariga 'A'/586
2. Whether the Defendants was properly, procedurally and legally registered as proprietor of the suit land.
3. Whether the Plaintiff has now acquired adverse possession of the suit land
4. Whether the Plaintiff ought to be evicted from the suit land.
5. Who gets to bear the costs of the suit

**ISSUE 1: Whether the Defendants is currently the registered owner of land parcel no. Tharaka/Chiakariga 'A'/586**

My Lord there is no doubt that the Defendant is the registered owner of the suit land. He was registered as owner on 27th July 2016 and issued with a valid title deed in 2017. This is born out by DEX NO 1 which is the title deed as well as PEX no. 1 which is the official search for the same. The registration of the title deed is made under the Land Registration Act no. 3 of 2012.

My Lord section 25 of the said Act provides as follows:-

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

We submit that the Defendant is the first registered owner of the suit land following a vigorous land adjudication process in which no objection was filed by the Plaintiff or members of her family. The DLASO who testified as PW 6 for the Plaintiff informed the court that he did not receive any objection against the registration of the land in the names of the Defendant and that there is no fraud that took place during the whole process that led to the transmission of adjudication register to the Chief Land Registrar in 2017. His stand seems to differ totally with the assertions by the Plaintiff that the registration of the land in the names of the Defendant was through fraud. It is our submissions that the Plaintiff holds a clean title to the suit land and that its sanctity should be upheld by this Hon. Court.

## **ISSUE 2: Whether the Defendants was properly, procedurally and legally registered as proprietor of the suit land.**

My Lord both the Plaintiff and the Defendant agree on the fact that the Defendant became registered as the proprietor of the suit land following a full adjudication process. Whereas the Plaintiff claims that the Defendant ought not to have been registered as owner of the suit land during the land adjudication process because he was a minor the Defendant disagrees with this while noting that it was a common practice for male minors to be registered as owners of land so long as there was a guardian registered to hold the land in trust for them until they reached the age of majority. The Defendant told the court that it was his grand mother who gathered the suit land after which it was registered in his name because his said grandmother was already an old woman and in any case the practice of that historical era precluded women from being registered with clan land. My Lord even though the Plaintiff claims to have been in possession and occupation of the suit land since 1984 she did not raise any objection during the adjudication process and due to this the land correctly passed to the Defendant under the Land Adjudication Act.

My Lord the main purpose of the Land Adjudication Act is to 'provide for the ascertainment and recording of rights and interests in trust land and for purposes connected therewith and purposes thereto.'

The Land Adjudication Act sets out an elaborate process for ascertaining and recording rights and interest in land once an area has been declared as an adjudication section under section 5. The declaration is usually followed by a flurry of activities which include physical visits by demarcation officers and hearings before the adjudication committee. Apart from alleging that the Defendants father caused the land to be registered in the names of his minor child while he was a member of the land adjudication committee the Plaintiff did not bring forth any credible evidence to impeach the process that led to the Defendant being registered as owner of the suit land in 1991.

My Lord even after the Plaintiff approached the DLASO complaining that she had been left out of the land adjudication process and even after being advised to seek legal remedy she failed to do so and waited until the year 2018 when she made a feeble attempt at pursuing the matter through a case that she withdrew out of her own volition and without giving any reasons to the court.

My Lord it is now a trite requirement of practice that allegations of fraud are serious allegations which cannot be sustained by mere assumptions and inferences as has happened in this case. The Plaintiff alleged that the registration of the Defendant as the owner of the suit land while he was a minor was fraudulent and more so because the Defendants father was a member of the land adjudication committee at the time of the registration. My Lord, under the Land Adjudication Act there are many players involved in the process and it is not just the land adjudication committee that is involved in vetting the rights, interests and claims by interested persons.

We refer to the following sections to demonstrate this my Lord:-

Section 6 provides that the membership of a land adjudication committee shall not be less than 10 persons. The Plaintiff did not show how one committee member could have influenced a full committee of more than ten persons to act fraudulently by having his son registered as the owner of the land. The usual practice is for the committee to consult the family and clan to decide who ought to be registered as owner of the land.

Section 19 and 23 of the Land Adjudication Act provides for the preparation of the Demarcation map and adjudication record respectively.

The Plaintiff slept on her right to file an objection under the Land Adjudication Act. Equity does not aid the slothful. We rely on the case of **Silverster Okumu Ochami Versus Maxwel Tabu Abala & Another (2015) EKLK** where the court issued a permanent injunction against a defendant who had failed to impeach the registration of the Plaintiffs as owners of land at the end of land adjudication process.

My Lord section 38 of the Limitation of Acts Act provides as follows:-

'Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.'

My Lord we submit that Land Adjudication Act is not one of the Acts cited in section 37 of Limitation of Actions Act and one cannot claim adverse possession of land that is undergoing the adjudication process. This was held by **Hon. Justice Obwayo** in **Koech Kangogo v Chebii**

**Yego [2018] eKLR** that ‘time does not run during consolidation, demarcation and adjudication. Time starts to run on the date of registration.’

The good Judge went ahead to find that the suit for adverse possession was premature and that the claimant had failed to demonstrate that he had acquired adverse possession since 12 years had not yet lapsed.

My Lord it has been properly held in **Joseph Gachumi Kiritu v Lawrence Munyambu Kabura [1996] eKLR**

*“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 mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land.”*

My Lord the Plaintiff claim for adverse possession is premature and untenable in law. The Defendant was registered as proprietor under the Land Registration Act of 2012 on 27<sup>th</sup> July 2016. The Defendant filed his counterclaim seeking eviction of the Plaintiff from his land on 24<sup>th</sup> September 2018. By implication and within the meaning of sections 7, 9, 11, 17, 18, 37 and 38 of the Limitation of Actions Act

### **3. Whether the Plaintiff has now acquired adverse possession of the suit land**

My Lord this Originating Summons is brought under the provisions of section 38 of the Limitation of Actions Act which provides that ‘where a person claims to have been entitled by adverse possession of land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts he may apply to the High Court for an order to be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.’

It is also brought under Order 37 Rule 7 of the Civil Procedure Rules which provide for the manner in which an Originating Summons under section 38 is to be brought before the court. Subsection 2 of Rule 7 of Order 37 categorically provides that ‘the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.’

My Lord we submit that the Plaintiff failed to comply with the provision of Order 37 Rule 7 (b) of the Civil Procedure Rules because he did not produce an certified extract of land parcel no. Tharaka/Chiakariga ‘A’/586 as is required. The purpose for this requirement is well stated in the case of **of Musa Kipkoskei Labatt Vs Laban Kipkebut Barkoton (2019) Eklr** where the court stated as follows:- ‘The rules do require that one needs to annex an extract of the Register to a claim for adverse possession. The reason for this is not far to find; for it is important to ensure from the register, that the applicant has a clean 12 years when the title was not under the government or any other entity for which a claim for adverse possession cannot be maintained.’

My Lord we submit that the official search that is annexed as exhibit 1 by the Plaintiff is not the extract of the register to the land and that it does not serve the purpose envisioned by the section aforementioned. In similar instances where a claimant for adverse possession failed to comply with this requirement the courts always strike out the suit.

In addition to this my Lord the Plaintiff has failed to prove that she has been in possession and occupation of the suit land for the required statutory period of 12 years to warrant her claim for adverse possession.

It is our submissions that time began to run against the Defendant from the day he got registered as proprietor of the suit land and that is on 27<sup>th</sup> July 2016 as is shown in the Title deed that he produced before the court.

It is also our submissions that time stopped running on 24<sup>th</sup> September 2018 when he filed his counterclaim seeking to have the Plaintiff evicted from the suit land. Clearly from the above the Plaintiff has not been in possession for the 12 years required by the statute under section 7 of the Limitation of Actions Act having been in possession for a period of only 2 years and 2 months since the Defendant got registered as the proprietor of the suit land under the appropriate law under section 38 of the Limitation of Actions Act.

My Lord it was held by **Hon. Justice Obwayo** in **Koech Kangogo v Chebii Yego [2018] eKLR** that ‘time does not run during consolidation, demarcation and adjudication. Time starts to run on the date of registration.’ The good Judge went ahead to find that the suit for adverse possession was premature and that the claimant had failed to demonstrate that he had acquired adverse possession of the suit land. He also found that not every possession amounts to adverse possession.

We pray that this Hon. Court finds for the Defendant. The possession of the Plaintiff prior to the adjudication process does not amount to adverse possession within the provisions of section 38 of the Limitation of Actions Act. She has failed to impeach the sanctity of the Defendants title deed and her claims that the Respondent obtained registration through fraud were denied by the DLASO who testified before the Court. She was indolent during the land adjudication process when she failed to put in an objection under the Land Adjudication Act.

Your Lord ship in the case of **M’mbaoni M’thaara v James Mbaka [2017] eKLR** your Lordship agreed with the words of Court of Appeal Judge Gicheru in **KWEYU VERSUS OMUTUT [1990] KLR** 709 when he observed that:-

‘By adverse possession is meant possession that is hostile, under a claim or color of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12) years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as

a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

My Lord you then went on to observe that:- ‘A priori, length of stay alone cannot entitle a claimant to acquisition of title by adverse possession. There can never be an entry under a colour of right claiming title hostile to a minor, as the defendant was at the time the plaintiff claims he started occupation of the apposite lands. This veritably debunks the notion that a putative dispossessor can by a mere slight of hand, nay prestidigitation, predicated upon

longevity of occupation, obtain title by way of adverse possession.’

We humbly submit that the Plaintiff lengthy stay on the suit land does not transist into a claim for adverse possession and that it is right for her claim to be dismissed and for an order of eviction to be issued against her as prayed in the counterclaim.

**DATED AT MERU THIS...3<sup>RD</sup> ....DAY OF.....MARCH,...2020**

.....

**NJIRU KITHAKA & CO**

**ADVOCATES FOR DEFENDANT**

23. The principal issue for determination is if or if not the plaintiff has proffered sufficient evidence on a balance of probability to entitle her to a declaration that the suit land through the operation of the law by way of the doctrine of adverse possession has devolved to her proprietorship.

24. Although the parties filed and exchanged written submissions, I wish to point out that parties cannot introduce new evidence through written submissions. It is hereby clarified that courts of law, in arriving at their decisions, solely rely on the pleadings and the oral evidence proffered by the parties. Of course, the parties can, in their written submissions, canvass the case authorities and the law that they think support their assertions.

25. I have carefully considered the pleadings, the oral evidence and the authorities they have proffered to buttress their diametrically divergent assertions.

26. Although the totality of the evidence proffered by the parties shows that the plaintiff occupied part of the suit land, the portion allegedly cultivated by PW3, her brother, cannot be added to the portion occupied by the plaintiff so that the plaintiff gets a bigger share of the claimed land.

27. In his evidence, the defendant told the court that the plaintiff had used force to enter the suit land and that she only occupied about one acre of the suit land. He denied the plaintiff’s claim that he had been registered as owner of the land fraudulently. He told the court that he also occupied and cultivated part of the land.

28. I must at the outset point out that a litigant cannot claim ownership of land through the doctrine of adverse possession through a third party. A claim for adverse possession is a serious matter because if it succeeds it has the effect of dispossessing the registered owner of land of his property. A claim for adverse possession if successful, only benefits the litigant or litigants who have lodged the apposite claim. The evidence tendered by the parties and their witnesses shows that the plaintiff has only occupied part of the suit land. The area of the land she has been occupying did not come out clearly in the evidence adduced by her and her witnesses and also in the evidence adduced by the defendant and his witnesses.

29. PW2, told the court that he had four wives but lived in the suit land with the plaintiff, also his wife. According to him the plaintiff occupied about 3 acres out of the suit land. PW1 had also indicated that she cultivated an area about 3 acres in size.

30. PW3, who told the court that the plaintiff was his younger sister, said that the plaintiff was cultivating 2 or 3 or 4 acres. He told the court that as he was not a surveyor he was not sure of the exact acreage the plaintiff occupied.

31. DW1 told the court that he had rightfully and legally got registered as owner of the land through his father who had got it through their clan.

32. I need to point out that I am not handling a claim of ownership of land on the basis that the same had been registered in the name of the defendant fraudulently. The issue of who is properly registered as owner of the suit land is not in issue. By filing a claim of land through the doctrine of adverse possession, that is enough evidence that the plaintiff is the rightful registered owner of the land. A claim for adverse possession is always against a properly registered proprietor of land.

33. Although PW4 and PW5 told the court that the plaintiff occupied the suit land, they could not say how much of the suit land the plaintiff occupied. PW4 and PW5 confirmed that the defendant had rented out the suit land to some tenants. PW2, the plaintiff's husband also confirmed that some tenants who had rented out land from the defendant cultivated portions of the suit land.

34. DW2 told the court that he was a member of the land committee during the adjudication process. He told the court that the defendant's father was also a member of the land committee. He was unequivocal that the defendant was rightfully and legally registered as proprietor of the suit land. He told the court that the plaintiff did to lodge any objection during the adjudication process.

35. DW3 gave evidence that he cultivated part of the suit land as a tenant of the defendant. He told the court that as at the time he gave his evidence, he continued to cultivate part of the suit land.

36. It is clear that the plaintiff only occupies part of the suit land. The elephant in the room is how much land she occupies.

37. In his evidence, the defendant suggests that the plaintiff moved into the land in 1996. The plaintiff claims that she moved into the suit land in 1974. In the absence of other cogent evidence, I find that the plaintiff has occupied part of the suit land from 1996. This is about 24 years ago. This is well beyond the threshold required for a declaration for ownership of land through the doctrine of adverse possession to accrue

38. An issue arose as to whether a true Meru man can live on land owned by his wife. There was a connotation that in Local Meru parlance that "such a man was married by his wife instead of him marrying the wife." I opine that this veritably male chauvinist jingoism and atavistic notion is not supported by any existing law. Indeed Article 60 (1) (e) of the Constitution decrees that "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the principle of "elimination of gender discrimination in law, customs and practices related to land and property in land."

39. The issue of how much land the plaintiff has been in occupation of is a rather dicey area. I find that she is only in occupation of only a portion of the suit land. The defendant occupies the rest of the land. Our adversarial system of justice, unlike the civil system used in continental Europe does not allow judicial officers to do their own investigations beyond the evidence proffered by the parties in court. This obviously places a judge in a veritably invidious and difficult position. But propitiously, a judge in civil matters is always allowed by the law to make his decision on the basis of a balance of probability. This is what I will do. Otherwise litigation will never end.

40. I answer the questions framed in the Originating Summons as follows:

- a) Question 1 – The plaintiff has only PARTLY been in open, exclusive continuous and uninterrupted occupation of Land Parcel No. THARAKA/CHIAKARIGA/"A"/586 for a period that achieves the threshold for adverse possession to accrue for only 3 acres out of the suit land.
- b) Question 2 – The plaintiff has become entitled to be registered, by way of adverse possession, as owner of 3 acres of land out of parcel Number THARAKA/CHIAKARIGA/ "A"/568 and the apposite register should be rectified accordingly.
- c) Question 4 – The Deputy Registrar of this court is empowered to sign all documents necessary to facilitate implementation of the judgment delivered in this suit.
- d) Question 5 – Parties will bear their own costs.

41. Judgment is entered in this suit in the following terms:

- a) The plaintiff is hereby declared the proprietor of 3 acres out of Land Parcel No. THARAKA/CHIAKARIGA/ "A"/586 through the doctrine of adverse possession.
- b) The defendant is entitled to the remainder of the suit land (approximately 8.1 acres) after three acres have been transferred to the plaintiff.
- c) The defendant's claim for eviction in his counter-claim is partly successful to the extent that the plaintiff should be evicted from the land declared herein to belong to the defendant if she continues to occupy the said land after ninety days of the delivery of this judgment.
- d) The Deputy Registrar of this court is hereby empowered to sign all the necessary documents to transfer 3 acres out of Land Parcel No. THARAKA/CHIAKARIGA "A"/586 to the plaintiff and the remainder to the defendant.
- e) Parties shall bear own costs.

Delivered in open Court at Chuka this **11<sup>th</sup> day of March, 2020** in the presence of:

CA: Ndegwa

Mwirigi Kaburu h/b M/s Kithaka for the Defendant

Murango Mwenda h/b John Muthomi for the Plaintiff

**P. M. NJORGE,**

**JUDGE.**