



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**CHUKA ELC CASE NO 79 OF 2017**

**OBADIAH PETER KAIRARIA.....PLAINTIFF**

**VERSUS**

**ANDERSON GITONGA JUSTACE.....1<sup>ST</sup> DEFENDANT**

**CECILIA CHURI SALESIO.....2<sup>ND</sup> DEFENDANT**

**RORLAND KIMATHI KANGA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was brought to court by way of an Originating Summons dated **20<sup>th</sup> February, 2013**. It states as follows:

**ORIGINATING SUMMONS**

Under S. 38 LAA CAP 22 ORDER 37 RULE 7 CAP 21

LET ARIDERSON GOTONGA JUSTACE, CECILIA CHURI SALESIO and RORILAND KIMATHI KAUGA defendants herein within 15 days after service upon them of this summon to enter appearance to the said summons which is being issued on application by the plaintiff herein who seeks the determination of the following questions or order, that:

1. A declaration that the defendants holds (sic)17 x 25 feet of Mwimbi/Chogoria/1918 in trust for the plaintiff who has acquired the same by way of adverse possession.
2. A declaration that the defendant's title to the extent of the said 17 x 25 feet has been extinguished by operation of the law and that the plaintiff be registered owner thereof under S. 38 of cap 22 and the doctrine of adverse in place of the defendants accordingly.
3. Such other, further or orders as may be necessary and appropriate to give practices (sic) effects to the declarations sought herein.
4. That cost be provided for.

Which application is grounded on the annexed affidavit of Obadiah Peter Kairaria plaintiff and other grounds to be adduced during the hearing of this suit.

**DATED AT MERU THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2013**

**FOR: CHARLES KARIUKI & CO**

**ADVOCATES FOR THE PLAINTIFF**

2. The Summons was supported by the affidavit of the plaintiff, Obadiah Peter Kairaria sworn on **20<sup>th</sup> February, 2013** which states:

I, OBADIAH PETER KAIRARIA of C/O P. O. Box 2387-60200, MERU do make oath and state as follows:

1. That I am the plaintiff herein.

2. That I bought a portion of land from the 1<sup>st</sup> defendant which I got title documents after the transfer vide attached search marked OP1.
3. That later in 1995 the 1<sup>st</sup> defendant sold to me extension of what I had bought earlier by a portion of 17 x 25 feet which I had developed for him together with my earlier bought portion.
4. That the agreement for this extension was executed on 7.2.1997 though payment and giving possession to me was done in 1995 attached agreement copy OP 2.
5. That the 17 x 25 feet is still under my custody and I have extensively developed it since 1995 vide attached photographs marked OP 3.
6. That at the time of the sale the same was in the 1<sup>st</sup> defendant names but he has since sold and transferred the same to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
7. The sold (sic) portion 17 x 25 feet is still under my custody and I have extensively developed it since 1995 vide attached photograph marked OP4.
8. That the 2<sup>nd</sup> and 3<sup>rd</sup> (sic) have threatened to evict me from the said portion and may execute the threat anytime.
9. That I have no consent to validate the sale agreement but by virtue of adverse possession of over 12 years I have acquired the subject herein by way of adverse possession.
10. That I seek the court to uphold my right to the ownership to the subject herein as the defendants title to the same has been extinguished by operation of the law.
11. That what is deponed to herein above is true to the best of my knowledge, information and belief.

3. The 1<sup>st</sup> defendant's response to the plaintiff's affidavit was made vide his replying affidavit sworn on **17<sup>th</sup> June, 2013** which states:

I, ANDERSON GITONGA JUSTACE an adult of sound mind resident in Chogoria Division, Tharaka Nithi District do hereby make oath and state as follows:

1. That I am the 1<sup>st</sup> defendant herein, well versed with all matters deponed hereto hence competent to make and swear this affidavit.
2. That the Originating Summons and the notice of motion dated 20<sup>th</sup> February, 2013 herein and the supporting affidavits hereto have been read over and explained to myself and it is in reply thereto that I make this affidavit.
3. That I am the original registered owner of Mwimbi/Chogoria/1716 measuring 0.1053 Acres (0.037 Ha) which I got registered to as the owner in 1993. (Annexed and marked "AGJ 1" is a copy of the register).
4. That in the year 1994 I developed the same by building a shop thereon inter-alia.
5. That in 1994 I sold to the plaintiff a portion of the same measuring 10ft x 25ft for a consideration of Kshs.50,000/= . I accordingly gave him possession of the same.
6. That there was an agreement executed for the same 10ft x 25ft plot.
7. That in 1997 the plaintiff approached me with a view to selling him an extra 7ft x 25ft for Kshs.30,000/= to make his total plot 17ft x 25ft at a total of Kshs.50,000/=. I also gave him possession of the said 7ft x 25ft so that he occupies the total of 17ft x 25ft.
8. That since we had not executed the agreement for the portion measuring 10ft x 25ft sold in 1994 we made one agreement dated 7<sup>th</sup> February, 1997 covering the two plots I had sold to the plaintiff with a total area of 17ft x 25ft and total consideration of Kshs.80,000/=. Annexed and marked AGJ 2 is a copy of the encompassing agreement dated 7<sup>th</sup> February, 1997.
9. That I have never sold any other land to the plaintiff at all.
10. That therefore the plaintiff is being cunning since he has all the land that I sold to him and there is no time that we did two agreements with him.
11. That on 29<sup>th</sup> May, 1998 I sold to Ashford Kinyua Nkiria three developed shops and four (4) back single rooms also from the same LR No. Mwimbi/Chogoria/1918.

12. That I know that later Ashford Kinyua sold his share above to the 2<sup>nd</sup> defendant.
13. That I have never sold any part of the said land to the 2<sup>nd</sup> defendant as alleged.
14. That since we were still co-registered with Ashford for the share I had sold to him the land register remained as such as we both held half share of Mwimbi/Chogoria/1918. Annexed and marked AGJ is a copy of the register.
15. That I later sold my remaining share of LR. Mwimbi/Chogoria/1918 to Rorland Kimathi Kanga and I gave him possession of the same.
16. That since the 2<sup>nd</sup> defendant had bought Ashford's share and I had sold my share to Rorland Kimathi (3<sup>rd</sup> defendant) I and Ashford transferred our joint ownership of Mwimbi/Chogoria/1918 to 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively.
17. That there is no time that the plaintiff has ever occupied or been in possession of LR. NO. Mwimbi/Chogoria/1918.
18. That the photographs annexed to the application relate substantially to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants shop and only a small part of the plaintiff's shop.
19. That the said application by the plaintiff lacks in merit and ought to be dismissed.
20. That what is deponed to hereinabove is true to the best of my knowledge, information and belief.

**DATED AT MERU THIS 17<sup>TH</sup> DAY OF JUNE, 2013**

4. The 2<sup>nd</sup> defendant's response to the plaintiff's affidavit was made vide her replying affidavit sworn on **17<sup>th</sup> June, 2013** which states:

I, CECILIA CHURI SALESIO an adult female of sound mind residing in Chogoria Division Tharaka Nithi District do hereby make oath and state as follows:

1. That I am the 2<sup>nd</sup> defendant herein, well versed with all matters deponed hereto hence competent to make and swear this affidavit.
2. That the originating summons herein the application dated 20<sup>th</sup> February, 2013 and the supporting affidavit thereto have been read over and explained to myself and it is in reply to both I swear this affidavit.
3. That on or about 17<sup>th</sup> November, 2006 Ashford Kinyua Nkiria approached me with a view to sell me a part of LR. NO. Mwimbi/Chogoria/1918 with two (2) SHOPS AND FOUR (4) back single rooms.
4. That at the time he was the one in full possession and occupation of the same.
5. That Ashford sold to me the said land for a consideration of Kshs.1,200,000/= which I paid in full and he gave me full vacant possession of the said two shops.
6. That when I told him to transfer the land he told me the said land was co-registered with the 1<sup>st</sup> defendant's share all under one title Mwimbi/Chogoria/1918.
7. That later the 1<sup>st</sup> defendant sold his half share to 3<sup>rd</sup> defendant and both Ashford and 1<sup>st</sup> defendant transferred their shares to us which we still hold jointly. (Annexed and marked "CCS1" is a copy of the register).
8. That there is no time that the plaintiff has ever occupied our share of the LR No. Mwimbi/Chogoria/1918 and has only been in occupation of his LR.No. Mwimbi/Chogoria/1917.
9. That I have only known about the plaintiff after I was served with the pleadings herein.
10. That what is deponed to hereinabove is true to the best of my knowledge, information and belief.

**DATED AT MERU THIS 17<sup>TH</sup> DAY OF JUNE 2013**

5. The 3<sup>rd</sup> defendant's response to the plaintiff's affidavit was made vide his replying affidavit sworn on 17<sup>th</sup> June, 2013 which states:

I, RORLAND KIMATHI KANGA an adult male of sound mind residing in Chogoria division Tharaka Nithi District do hereby make oath and state as follows:

1. That I am the 3<sup>rd</sup> defendant herein, well versed with all matters deponed hereto hence competent to make and swear this

affidavit.

2. That the originating summons the notice of motion dated 20<sup>th</sup> February, 2013 and the supporting affidavits thereto have been read over and explained to myself and it is in reply thereto that I make and swear this affidavit.
3. That in the year 2008 I bought from the 1<sup>st</sup> defendant 3 shops comprised as half share of LR No. Mwimbi/Chogoria/1918.
4. That when I required him to transfer the land he told me the said land was co-registered with the 1<sup>st</sup> defendant's share under one title LR NO. Mwimbi/Chogoria/1918.
5. That later the 1<sup>st</sup> defendant sold his half share to 3<sup>rd</sup> defendant and both Ashford and 1<sup>st</sup> defendant transferred their shares to us which we still hold jointly.
6. That there is no time that the plaintiff has ever occupied our share of the LR NO. Mwimbi/Chogoria/1918 and has only been in occupation of his land.
7. That I have only known about the plaintiff after I was served with the pleadings herein.
8. That what is deponed to hereinabove is true to the best of my knowledge, information and belief.

**DATED AT MERU THIS 17<sup>TH</sup> DAY OF JUNE, 2013**

6. PW1, Obadiah Peter Kairaria, asked the court to adopt his witness statement dated **9<sup>th</sup> October, 2017** as his evidence in this suit. The statement reads as follows:

**PLAINTIFF'S STATEMENT**

My name is Obadiah Peter Kairaria. I come from Kiriani village, Murugi sub location, Chogoria location Maara sub county Tharaka Nithi County and I am (sic)businessman.

I know all the defendants. I came to know the 1<sup>st</sup> defendant on or around 1987. I have engaged with the 1<sup>st</sup> defendant on many business transactions with effect from 1987. That I and my wife were desirous to buy a plot within Chogoria Township. The 1<sup>st</sup> defendant told me that we could enter into an agreement whereby I was to construct two plots in the 1<sup>st</sup> defendant's land parcel LR: Mwimbi/Chogoria/1716 and after I constructed the two plots equally. After I constructed the plot the 1<sup>st</sup> defendant divided land parcel into LR: Mwimbi/Chogoria/1917 and LR; Mwimbi/Chogoria/1918 and then transferred LR: Mwimbi/Chogoria/1917 to me as per the agreement.

Having completed the transfer of LR: Mwimbi/Chogoria/1917 to me the 1<sup>st</sup> defendant was desirous to sell to me a portion measuring 17 feet out of the 1<sup>st</sup> defendant's main land L: Mwimbi/Chogoria/1918. The purchase price was agreed at Kshs.80,000/= . I paid the total consideration and I occupied 17 feet by 25 feet portion out of LR: Mwimbi/Chogoria/1918. That was on or around 1995.

The transaction was completed without an agreement. I then thought it prudent that we should enter into a written sale of land agreement regarding 17 feet by 25 feet portion sold to me out of LR: Mwimbi/Chogoria/1918. The 1<sup>st</sup> defendant obliged. We visited a counsel n Chuka town and an agreement was drawn and we all executed. By the time the agreement was written and executed I had already occupied the 17 by 25 feet portion for a period of two years that is with effect from 1995.

The defendant seemed not to (sic) ready nor willing to honour his part of bargain. Despite my paying him the total consideration and/or purchase price of Kshs.80,000/= he took no initiative to effect the transfer of 17 feet by 25 feet to me. The agreement provided that he was to transfer the portion by 30<sup>th</sup> November, 1999. He did not accomplish this particular condition or term of the agreement. The 1<sup>st</sup> defendant seemed to care least even though the timeline in the agreement was expiring. I therefore remained in occupation of the sale (sic) land as a trespasser and therefore in advance to the registered proprietor and in particular from 1999 when the 1<sup>st</sup> defendant was supposed to transfer the suit land to me.

On or around 29<sup>th</sup> May, 1998 in total disregard to my agreement with the 1<sup>st</sup> defendant the 1<sup>st</sup> defendant transferred the whole of LR; Mwimbi/Chogoria/1918 (the suit land 17 feet by 25 feet portion which is encompassed therein) to the 1<sup>st</sup> defendant and one Ashford Kinyua Nkiria. A title deed to that end was issued on 29<sup>th</sup> May, 1998. Despite the transaction I remained on the suit land.

That on or around 17<sup>th</sup> November, 2006 Ashford Kinyua and the 1<sup>st</sup> defendant transferred LR: Mwimbi/Chogoria/1918 (the suit land is part of this land) to the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant. Title deed to that effect was issued on 20<sup>th</sup> November, 2006. Despite the transaction and the transfer I still remained in occupation of 17 feet by 25 feet out of the 1<sup>st</sup> defendant's main land LR: Mwimbi/Chogoria/1918.

That on or around 19<sup>th</sup> November, 2008 the 1<sup>st</sup> and 2<sup>nd</sup> defendants transferred the whole of LR: Mwimbi/Chogoria/1918 to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants without putting into account my overriding interest thereon and a title deed was issued to that end on 19<sup>th</sup> November, 2008. On or around 2012 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants constructed a shop on half of 17 feet by 25 feet which the 1<sup>st</sup> defendant had sold to me as per the agreement of 7<sup>th</sup> February, 1997.

I have been in actual occupation of 8.5 feet where I run a shop and I have been cultivating 8.5 feet balance thereof for all this while and the period is in excess of 12 years. I have acquired the portion measuring 17 feet by 25 feet out of the 1<sup>st</sup> defendant's main LR: Mwimbi/Chogoria/1918 by operation of law-adverse possession. In the alternative the 2<sup>nd</sup> and 3<sup>rd</sup> defendants hold 8.5 feet by 25 feet portion out of LR: Mwimbi/Chogoria/1918 in trust for my benefit. By the time the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were registered and constructed on 8.5 by 25 feet portion out of LR: Mwimbi/Chogoria/1918 an overriding interest by way of adverse possession had vested in me.

That is all I wish to state.

**DATED T CHUKA THIS 9<sup>TH</sup> DAY OF OCTOBER, 2017**

.....

**OBADIA PETER KAIRARIA**

7. PW1 told the court that the 1<sup>st</sup> defendant was his friend and that he sold land to him. Regarding the 2<sup>nd</sup> and 3<sup>rd</sup> defendants he said that he knew them through business transactions and neighbourliness. He told the court that he wanted it to give him the portion of land he occupies which is now registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He said that he had occupied the portion he occupies for more than 10 years. He added that he had been in occupation thereof since 1995. Perhaps he wanted to say 12 years and not 10 years.

8. PW1 produced copies of green cards and search certificates for parcel numbers Mwimbi/Chogoria/1917 and 1918. He also produced a scene visit report prepared by Mr. J. M. Mwambia, District Land Registrar, Meru South and M/S Poly Karimi, on behalf of the District Surveyor, Meru South. The report is undated. The defendant's advocate objected to the production of the report by PW1 and his objection was sustained. The report was later on produced by the current Land Registrar, Chuka, Winfred Muguro, on 26<sup>th</sup> September, 2018.

9. During cross-examination, PW1 told the court that parcel No. 1917 was sold to him in 1994 and that it measured about ten to eleven feet wide. He also said that he bought another portion measuring 17 by 25 feet comprising parcel No. 1918 in 1997. He said that whereas there was an agreement in respect of parcel No. 1918, there was no agreement for parcel No. 1917. He agreed that parcel No. 1918 was registered in the names of Anderson Gitonga Justice and Ashford Kinyua Nkiria at that time. He said that he had conducted a search at the Lands Registry.

10. Asked by the defendant's advocate why he waited for eleven years before deciding to enforce his rights, he said that there existed a good rapport between him and the 1<sup>st</sup> defendant. He disagreed that the agreement in question was meant to combine parcels 1917 and 1918 so that he could be added seven feet in 1918. He also admitted that they did not go to the land control board to obtain consent. He told the court that he did not know that an agreement became void if consent was not obtained within six months of its execution.

11. PW1 told the court that he had developed eight and a half feet in 1918 and had a shop there. He denied that his two shops were in parcel No. 1917. He said that one of the shops was in parcel No. 1917 and the other half was in parcel No. 1918. He told the court that he was claiming from the 2<sup>nd</sup> defendant the other half which should be in 1918. He said that he was cultivating that half but added that the defendants have built on it since 1988.

12. Asked by the defendants advocate why, if they had built on it in 1998, he had not sued and it took over 10 years to come to court, PW1 was rather evasive. He said that the apposite defendants were in occupation and had developed the portion he is claiming. Of course, his answer did not answer the question posed to him.

13. During re-examination by his advocate PW1 told the court that both parcels 1917 and 1918 were sold to him by Anderson Gitonga, the 1<sup>st</sup> defendant. He added that he was not given a title for parcel No. 1918 but got one for parcel No. 1917. PW1 told his advocate that he had not got an agreement concerning both parcels of land but only had one for 1918. He said that he started using only half of 1918 measuring 8½ feet by 25 feet in 1992. He said that the half he used contained his shop which was combined with parcel No. 1917.

14. The court noted that the plaintiff was being evasive especially by refusing to confirm that he 2<sup>nd</sup> defendant had constructed a building on the portion he was claiming.

15. PW2, Winfred Muguro, Land Registrar, Chuka produced the report of a site visit she said that had been made by her predecessor, J. M. Mwambia and one Polly Kimani, on behalf of the District Surveyor, Meru South. The report states as follows:

**THE DEPUTY REGISTRAR,**

**HIGH COURT OF KENYA**

**MERU.**

**RE: COURT ORDER E & L CASE NO. 60 OF 2013**

**MWIMBI/CHOGORIA/1917 AND 1918**

This is to inform you that we implemented the above mentioned court order on 21<sup>st</sup> May, 2013 in presence of all the parties and came up

with the following findings:

1. Land parcel number Mwimbi/Chogoria/1917 registered in the name of Obadiah Peter Kairaria measures 10.5 feet on the front side. This measurement corresponds with that indicated on the registry index map (RIM).
2. Land parcel number Mwimbi/Chogoria/1918 registered in the names of Cecilia Churi Salesio and Rorland Kimathi Kanga measures 50.8 feet on the front side but differs with the measurement on the registry index map (RIM) which is 74.8 feet.
3. Mr. Obadiah Peter Kairaria of parcel Mwimbi/Chogoria/1917 has also occupied a portion of parcel No. 1918. This portion measures 8.5 feet on the front side to make the total feet he occupies on the ground to 19 feet.
4. Measurements in hectares could not be determined since the two parcels are already developed with no space between them making it impossible to take measurements regarding the lengths and width of the backside.
16. During cross-examination by the defendant's advocate, PW2 told the court that the position regarding occupation of the subject parcels of land had not been specified. She, however, added that the makers of the report must have been guided by the apposite court order.
17. DW1, Anderson Gitonga Justace, the 1<sup>st</sup> defendant, asked the court to adopt his witness statement dated 10<sup>th</sup> April, 2018 as his evidence in this suit. The statement reads as follows:

**STATEMENT OF ANDERSON GITONGA JUSTACE**

I am the above named person an adult male of sound mind resident in Chogoria division, Tharaka Nithi District and the 1<sup>st</sup> defendant herein.

I am the original registered owner of Mwimbi/Chogoria/1716 measuring 0.1053 acres (0.037 ha) which I got registered to as the owner in 1993 and in the year 1994 I developed the same by building a shop thereof inter-alia.

In 1994 I sold to Obadiah Peter Kairaria a portion of the same measuring 10ft x 25ft for a consideration of Kshs.50,000/- I accordingly gave him possession of the same. There was no agreement executed for the said 10ft x 25ft plot.

In 1997 Obadiah Peter Kairaria approached me with a view to selling him an extra 7ft x 25ft for Kshs.30,000/= to make his total plot 17ft x 25ft at a total of Kshs.50,000/=. I also gave him possession of the said 7ft x 25ft so that he occupies the total of 17ft x 25ft.

Since we had not executed the agreement for the portion measuring 10ft x 25ft sold in 1994 we made one agreement dated 7<sup>th</sup> February, 1997 covering the two plots I had sold to Obadiah Peter Kairaria with a total area of 17ft x 25ft and total consideration of Kshs.80,000/=. Since then I have never sold any other land to Obadiah Peter Kairaria at all. Therefore Obadiah Peter Kairaria is being cunning since he has all the land that I sold to him and there is no time that we did two agreements with him.

On 29<sup>th</sup> May, 1998 I sold to Ashford Kinyua Nkiria three developed shops and four (4) back single rooms also from the same LR NO. Mwimbi/Chogoria/1918. Later Ashford Kinyua sold his share to Cecilia Churi Salesio the 2<sup>nd</sup> defendant herein. I have never sold any part of he said land to Cecilia Churi as alleged.

Since we were still co-registered with Ashford for the share I had sold to him, the land register remained as such as we both held half share of Mwimbi/Chogoria/1918. I later sold my remaining share of LR No. Mwimbi/Chogoria/1918 to Rorland Kimathi Kanga and I gave him possession of the same.

Since Cecilia Churi had bought Ashford's share and I had sold my share to Rorland Kimathi (3<sup>rd</sup> defendant) I and Ashford transferred our joint ownership of Mwimbi/Chogoria/1918 to Cecilia Churi and Rorland Kimathi respectively and there is no time that Obadiah Peter Kairaria has ever occupied or been in possession of LR No. Mwimbi/Chogoria/1918.

That is all I wish to state.

Signed.....

**ANDERSON GITONGA JUSTACE**

**DATE:10.4.2018**

18. DW1, during cross-examination by the plaintiff's advocate, told the court that he knew the plaintiff well and that he sold to him a plot measuring 10 feet by 25 feet at first as averred in his witness statement. He went on to tell the court that he was unaware of the report produced by PW2 and added that even his advocate had not read it to him.

19. During re-examination by his advocate, DW1 told the court that there was a stone fence boundary separating parcel Numbers Mwimbi/Chogoria/1716 and 1918. He went on to say that parcel No. Mwimbi/Chogoria/1918 had shops belonging to Cecilia Churi Salesio (the 2<sup>nd</sup> defendant) and Rorland Kimathi Kangalo (the 3<sup>rd</sup> defendant).

20. DW2, Cecilia Churi Salesio, asked the court to adopt her witness statement dated 10<sup>th</sup> April, 2018 as her evidence in this suit. The statement reads as follows:

**STATEMENT OF CECILIA CHURI SALESIO**

I am the above named adult female of sound mind residing in Chogoria Division Tharaka Nithi District and the 2<sup>nd</sup> defendant herein.

On or about 17<sup>th</sup> November, 2006 Ashford Kinyua Nkiriya approached me with a view of sell me a part of LR No. Mwimbi/Chogoria/1918 with two (2) shops and for (4) back single rooms. At the time he was the one in full possession and occupation of the same.

Ashford sold to me the said land for a consideration of Kshs.1,200,000/= which I paid in full and he gave me full vacant possession of the said two shops. When I told him to transfer the land he told me the said land was co-registered with Anderson Gitonga Justace's share all under one title Mwimbi/Chogoria/1918. Later Anderson Gitonga sold his half share to Rorland Kimathi and both Ashford and Anderson Gitonga transferrd their shares to us which we still hold jointly. There is no time that the plaintiff has ever occupied our share of the LR No. Mwimbi/Chogoria/1918 and has only been in occupation of his LR No. Mwimbi/Chogoria/1917. I have only known about Obadiah Peter after I was served the pleadings herein.

That is all I wish to state.

**Signed .....**

**CECILIA CHURI SALESIO**

**Date: 10.4.2018**

21. During cross-examination, DW2, told the court that she only came to know the plaintiff in 2013 after she received court documents apposite to this suit. She said that parcel No. 1918 was registered in her name and that of the 3<sup>rd</sup> defendant. She told the court that the plaintiff had never used any portion of her land. She went on to say that the Land Registrar and the surveyor had never visited the suit land as claimed in the report produced by PW2.

22. DW3, Rorland Kimathi Kanga Justace, the 3<sup>rd</sup> defendant, asked the court to adopt his witness statement dated 10<sup>th</sup> April, 2018 as his evidence in this suit. The statement reads as follows:

**STATEMENT OF RORLAND KIMATHI KANGA**

I am the above named adult male of sound mind residing in Chogoria Division Tharaka Nithi District and the 3<sup>rd</sup> defendant herein.

In the year 2008 I bought from Anderson Gitonga Justace 3 shops comprised as half share of LR No. Mwimbi/Chogoria/1918. When I required him to transfer he land he told me that the said land was co-registered with Ashford Kinyua's share under one title LR No. Mkwimbi/Chogoria/1918. Later Ashford Kinyua sold his half share to Cecilia Churi and both Ashford and Anderson transferred their shares to us which we still hold jointly.

There is no time that Obadiah Peter Kairaria has ever occupied our share of the LR No. Mwimbi/Chogoria/1918 and has only been in occupation of his land. I have only known about Obadiah Peter after I was served with the pleadings herein.

That is all I wish to state.

**Signed.....**

**Rorland Kimathi Kanga**

**Date: 10.4.2018**

23. During cross examination DW3, told the court that the Land Registrar and the surveyor visited the suit land but the 1<sup>st</sup> and 2<sup>nd</sup> defendants were not there. He said that he was not aware of the report submitted by PW2 until the day it was produced in court. He was categorical that the plaintiff never sued any part of Mwimbi/Chogoria/1918.

24. The parties filed written submissions. They are pasted herebelow in the form they were presented to court without any alterations whatsoever. Should there be any shortcomings, grammatical, spelling or otherwise, this remains the responsibility of the parties.

25. The plaintiff's written submissions state as follows"

**PLAINTIFF'S FINAL SUBMISSIONS**

1. Your lordship by an O.S dated 20<sup>th</sup> February 2013 and its supporting affidavit sworn by the plaintiff and dated 20<sup>th</sup> February 2013 the plaintiff moved the court for the following orders;

(i) A declaration that the defendants hold 17 by 25 feet of LR; MWIMBI/CHOGORIA/1918 in trust for the plaintiff who has acquired the same by way of adverse possession.

(ii) A declaration that the defendant's title to the extent of the said 17 feet by 25 feet has been extinguished by operation of law and that the plaintiff be registered owner thereof under section 38 Cap 22 and the doctrine of adverse possession in place of the defendants accordingly.

(iii) Such other, further or orders as may be necessary and appropriate to give parties effects to the declarations sought herein.

(iv) That costs be provided for.

2. In a nut shell the plaintiff is claiming LR; MWIMBI/CHOGORIA/1918 by operation of law that is adverse possession. The plaintiff's pleadings are that he purchased land parcel LR; MWIMBI/CHOGORIA/1918 from the 1<sup>st</sup> defendant one ANDERSON GITONGA. The plaintiff settled on the land. Un known to the plaintiff the land exchanged ownership only to end up being in joint names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff attached a search showing that now LR; MWIMBI/CHOGORIA/1918 is in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

3. The plaintiff's entry is explained by the fact that the plaintiff and the 1<sup>st</sup> defendant entered into a sale of land agreement dated 7<sup>th</sup> February 1997. From 7<sup>th</sup> February 1997 the date of the agreement the plaintiff entered into the sale land and he has remained therein to date. The 7<sup>th</sup> February 1997 agreement was a second agreement with the 1<sup>st</sup> defendant. Earlier in 1995 the 1<sup>st</sup> defendant had sold LR; MWIMBI/CHOGORIA/1917 to the plaintiff and the plaintiff had gotten a title deed to that end. It means therefore the 1997 agreement was a further agreement selling a separate portion. It is the plaintiff's pleadings that in fact he started occupying the land back in 1995. The portion subject to the sale was 17 feet by 25 feet but as it will turn out later in these submissions the plaintiff occupied 8 ½ feet by 25 feet out of LR; MWIMBI/CHOGORIA/1918 and now this is the portion that the plaintiff claims. It is the plaintiff's pleadings and testimony that he to date occupies 8 ½ feet by 25 feet portion out of LR; MWIMBI/CHOGORIA/1918. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are now threatening to evict the plaintiff from 8 ½ feet by 25 feet portion. The plaintiff has therefore been on the land for a period in excess of 12 years thereby acquiring the said portion by way of adverse possession. The defendant's title has been extinguished by operation of law.

4. The plaintiff's occupation was confirmed by the land register one J.M MWAMBIA and the district surveyor one POLY KARIMI on 22<sup>nd</sup> August 2013. The land registrar's report was clear that the plaintiff was occupying 8 ½ feet by 25 feet out of LR; MWIMBI/CHOGORIA/1918. Taking into account that the plaintiff entered into the sale land in 1995 two years before the sale was formalized between the 1<sup>st</sup> defendant and the plaintiff on 7<sup>th</sup> February 1997 the plaintiff was on the disputed land for a period in excess of 18 years by the time the land registrar visited the suit land under the authority of a court order. The threshold to prove adverse possession of 12 years and above has therefore been established by the plaintiff. The court should therefore put into effect what the law has provided when a person takes another's land adversely for a period in excess of 12 years. The court should declare that the plaintiff has acquired 8 ½ by 25 feet out of LR; MWIMBI/CHOGORIA/1918 by way of adverse possession. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants should be ordered to transfer the said land to the plaintiff and in default the executive officer of this court be authorized to execute all the requisite documents to effect the transfer.

5. Your lordship in support of his case the plaintiff has exhibited;

(i) Agreement of sale of land dated 7<sup>th</sup> February 1997 between ANDERSON GITONGA JUSTACE and OBADIAH PETER KAIRARIA.

(ii) Copy of register of LR; MWIMBI/CHOGORIA/1918.

(iii) Scene visit report dated 22<sup>nd</sup> August 2013 produced by the land registrar.

6. The tautology of the plaintiff's pleadings, statement and evidence in court together with the exhibits boil to the fact that the plaintiff has established his case on a balance of probability. We urge the court to make a finding and hold as such.

7. To prove a suit based on a claim of adverse possession it is important for the plaintiff to prove that he has been on the suit land for a period in excess of 12 or more than 12 years exclusively and uninterrupted. It is our submissions that the plaintiff has been in the suit land (and in particular 8 ½ feet by 25 feet portion) out of LR; MWIMBI/CHOGORIA/1918 from 1995 to date. That is a period in excess of 12 years. The plaintiff has been in exclusive use of the suit land for all this period. None of the defendants who lay claim over this land have ever challenged the plaintiff's occupation of the suit land. None of the defendants wrote even a demand notice to the plaintiff although such a notice alone should not have been enough (SEE COURT OF APPEAL SITTING AT NAIROBI IN CIVIL APPEAL NO 24 OF 1979 **GITHU VERSUS NDETE** where it was held that notice alone is not enough. The plaintiff's stay on the land is exclusive and uninterrupted.

8. It is worth noting your lordship that the plaintiff entered into a sale of land agreement with the 1<sup>st</sup> defendant. The land is now in the name of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Was the overriding interest acquired by the plaintiff by way of adverse possession terminated or extinguished after the 1<sup>st</sup> defendant transferred the suit land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants? The answer to this question is in the negative. The purchaser of land that has been acquired by way of adverse possession buys the land with the baggage. The overriding interest cannot be defeated by mere change of ownership. By so submitting we are guided by **COURT OF APPEAL SITTING AT NAIROBI IN CIVIL APPEAL NO 73 OF 1982 PUBLIC TRUSTEE VERSUS WANDURU** and **COURT OF APPEAL SITTING AT NAIROBI IN CIVIL APPEAL NO 35 OF 2002 KASUVE VERSUS MWAANI INVESTMENTS LIMITED & 4 OTHERS**. The registered proprietors of the suit land therefore purchased the suit land subject to the plaintiff's overriding interest. Going by the law the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have no option other than transferring the suit land to the plaintiff. It is for this reason that we are urging this court to make a finding and hold that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had a legal duty to transfer the suit land to the plaintiff and in default the executive officer be authorized to execute all such documents as are necessary to effect the transfer of the suit land to the plaintiff.

9. That while the 1<sup>st</sup> defendant admits there has been a sale of land between the plaintiff and the 1<sup>st</sup> defendant he however denies having sold a part of LR; MWIMBI/CHOGORIA/1918. He also denies that the plaintiff is in occupation of any part of LR; MWIMBI/CHOGORIA/1918 a fact that he is disproved by an independent witness to wit the land registrar when the land registrar visited the locus in quo on 22<sup>nd</sup> August 2013 upon authorization by the court. The 1<sup>st</sup> defendant is economical with the truth. He for example does not tell the court he sold to the plaintiff LR; MWIMBI/CHOGORIA/1917 and the plaintiff was issued with a title deed. Exhibit number 1 the sale of land agreement refers to the second sale of land relating to LR; MWIMBI/CHOGORIA/1918. Admittedly however the plaintiff did not occupy the whole of LR; MWIMBI/CHOGORIA/1918 rather he occupied half of it which measured 8 ½ by 25 feet and this is the portion the plaintiff is claiming from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

The 1<sup>st</sup> defendant's pleading consists of a replying affidavit sworn and dated 17<sup>th</sup> June 2013. The 1<sup>st</sup> defendant's evidence consists of his statement and his evidence in court. The 1<sup>st</sup> defendant's evidence in court is contrary to his statement and the replying affidavit. For example he told the court that the land in question is his when there is humble evidence that the land is registered with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant made a mere denial that he was not in attendance when the registrar visited the locus in quo when it is very clear from the registrar's report that all parties were present.

The 2<sup>nd</sup> defendant's pleadings are contained in her replying affidavit sworn and dated 17<sup>th</sup> June 2013. Most of the contents of the said affidavit deposes how she acquired the land. As pointed supra the land originated from the 1<sup>st</sup> defendant. She bought the land subject to the plaintiff's overriding interest. She is equally economical with the truth. She do not disclose that the land registrar visited the locus in quo and confirmed that the plaintiff was in occupation of 8 ½ by 25 feet out of LR; MWIMBI/CHOGORIA/1918. She told the court that's he was not present when the land registrar visited the locus in quo but it was clear from the registrar's report that all parties were present. Both the 1<sup>st</sup> and 2<sup>nd</sup> defendants are hiding something from the court that is the truth. The 3<sup>rd</sup> defendant's replying affidavit is a replica of the 2<sup>nd</sup> defendant's replying affidavit. In court however the 3<sup>rd</sup> defendant was clear that he was present when the land registrar visited the locus in quo. He accepted that measurements were taken but he would not tell the court that the plaintiff was occupying 8 ½ by 25 feet out of LR; MWIMBI/CHOGORIA/1918 as confirmed by the findings of the land registrar.

10. Your lordship in light of the foregoing submissions we urge the court to make a finding and hold that the plaintiff has proved his case on a balance of probability. He has proved that he has been in occupation of 8 ½ feet by 25 feet a portion out of LR; MWIMBI/CHOGORIA/1918 for a period in excess of 12 years exclusively and uninterrupted. The change of ownership your lordship has not affected the overriding interest that the plaintiff has acquired by way of adverse possession. That the 8 ½ feet by 25 feet portion is no longer the property of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Their title has been extinguished by operation of law. We urge the court to declare so and order the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to transfer 8 ½ feet by 25 feet portion out of LR; MWIMBI/CHOGORIA/1918 to the plaintiff and in default eh executive officer be authorized to execute all the requisite documents to effect the transfer.

11. We so submit and pray.

**DATED AT CHUKA THIS...4<sup>TH</sup> .....DAY OF.....OCTOBER,.....2018**

.....

**I.C. MUGO & CO. ADVOCATES**

**FOR THE PLAINTIFF**

26. The defendants' written submissions state as follows:

**DEFENDANTS' WRITTEN SUBMISSIONS**

May it please your Lordship, on behalf of the Defendants, we elect to humbly submit as hereunder;

It is not in dispute that the Plaintiff vide an O.S dated 20<sup>th</sup> February, 2013 and its supporting affidavit approached this Honourable Court seeking several orders and making fervent prayers. However, upon perusal of the pleadings and evidence adduced in court, several rise as the issues for determination.

- a) Is this suit ripe for a claim of adverse possession based on the evidence adduced and the pleadings therein?
- b) Is the court bound by expert reports?

***a) Is the suit ripe for a claim of adverse possession?***

With the court's indulgence, I would kindly invite your Lordship to keenly look at the evidence adduced by the Plaintiff during hearing. He made such testimony that it was evident during cross examination that the Plaintiff is not in occupation of the suit land in which he claims adverse possession. He tried to cover up by further adducing before this Honourable Court that he does not cultivate the said land in which he claimed that forms part of the suit land. It would further suffice to bring to the attention of this Honourable Court that the same Plaintiff claimed that part of the suit land in which he claimed to be in possession is an open space which he used to cultivate but he no longer cultivates the same.

This evidence squarely corroborates the defendants' evidence in which they claimed to be in actual and physical possession of the said parcels of land. For this kind of claim to suffice and stand the waters, the Applicant must prove beyond reasonable doubt that he has been in occupation and possession of the suit land notoriously without interruption for a period of twelve years. The occupation has to be as of right, *nec vi nec clam nec precario*. Justices Makhandia, Ouko and M' Inoti in the case of **Robert Shume & 3 others v Samson Kazungu Kalama [2015] eKLR** said thus: "...*Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was nec vi, nec clam, nec precario, that they were in exclusive possession of the property; that their possession was open, continuous, peaceful and notorious with the knowledge but without permission of the owner.*"

**In Kimani Ruchire v Swift Rutherfords & Co. Ltd [1980] KLR 10, , this Court said:-**

***"...the plaintiffs have to prove that they have used this land which they claim, as of right: nec vi nec clam, nec precario....The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by way of recurrent consideration."***

This squarely put the Plaintiff to task which he did not oust. From evidence adduced and facts placed before you, it is crystal clear that the occupiers and possessors of the suit land are the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It was therefore not necessary as suggested by the Plaintiff that the Defendants ought to have written a demand notice to the Plaintiff seeking his exit from the suit land because the Defendants are on the suit land. What the Plaintiff is disguising as a quest for justice is to encroach upon the Defendants' parcel of land with the aid of the court by seeking such orders. This gluttonous voracity should not in any way be encouraged or upheld by the Court.

***b) Is the Court bound by expert reports?***

Your Lordship, it is our humble submission that the expert report presented by the Plaintiff herein should be looked at carefully with a pinch of salt. It was the evidence by the Defence the Defendants were not present when the land registrar allegedly visited the suit land. Secondly, the evidence by the land registrar does not corroborate the evidence by the Plaintiff. This is because it was the Plaintiff's evidence that the said portion of land has some unoccupied space as opposed to the report which clearly indicates that the said portions are developed and that is why he was unable to take measurements of the said land. The Plaintiff stated in cross examination that he does not occupy any part of the suit land. This buttresses the evidence of the defendants that L.R NO. MWIMBI/CHOGORIA/1917 AND 1918 are distinctively separated by a wall and the Plaintiff occupies no part of 1918.

The Plaintiff having admitted not occupying the Defendants' land, it shows that the expert report which is "not binding" to this Court was prepared with only one sole purpose of favouring the Plaintiff. Thus we urge the court to reject the report in its entirety and hold as per the evidence of the Plaintiff that he occupies no part of the Defendants' property. We beg to rely on the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR** where Justices, Omolo, Waki and Deverell held thus;

***"...We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so. In Ndolo v Ndolo [1995] LLR 390 (CAK), this Court stated: -***

***"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: "Because this is the evidence of an expert, I believe it"..."***

Therefore, where such inconsistencies are found to exist in an expert report, this Honourable Court has the duty to verify, ascertain and put the said report on the weighing scale of probative value and if it finds that the same is not adding up, it has the right to reject the same.

**Conclusion**

In conclusion Your Lordship, it is without a doubt that the Plaintiff has not proved his case on a balance of probability. However, in the case of adverse possession, the standard of proof shifts as possession is an issue of fact. The Plaintiff has to prove beyond reasonable doubt that he has been in actual, notorious and uninterrupted occupation of the suit land. What the Plaintiff is attempting to do is mislead this court as his ownership of L.R MWIMBI/CHOGORIA/1917 neighbours that of the suit land and thus his occupation of the same is being disguised as occupation of the suit land. Before granting any orders, the court has to be accurately sure that the facts alleged beyond reasonable doubt failure to which the suit fails. As such, it is with a heavy heart that we are currently attending the burial of a dead suit and this Honourable Court has no alternative but to read out its eulogy at its temples.

We thus beg to rest.

DATED AT MERU THIS.....17<sup>TH</sup> .....DAY OF.....OCTOBER,.....2018

FOR: KIAUTHA ARITHI & CO.

**ADVOCATES FOR THE DEFENDANTS**

27. The plaintiff proffered three cases in support of his assertions.

28. The first case is *Githu Versus Ndete, Court of Appeal at Nairobi C.A. No. 24 of 1917 [1984] KLR 776*. This is a good authority that where all prerequisites for rights of accrual of proprietorship by way of adverse possession are proved, such rights are overriding interests to which the new registered purchaser's title will be subjected. The court also opined that giving notice to quit cannot be an effective assertion of rights for the purpose of running of time under the Limitation of Actions Act. It is also a good authority for the principle that adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land to which the owner holds the title. I will apply these principles to this case if the necessary ingredients for accrual of adverse possession are found to exist in this case.

29. The second case is *Public Trustee versus Wanduru [1984] KLR 314* and the case of *Kasuve versus Mwaani Investments Limited & 4 Others [2004] KLR 184* are good authorities that mere change of title does not defeat the overriding interest of a litigant who successfully proves existence of adverse possession. These 2 cases are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical certitude in their facts and circumstances. Adverse possession must be proved through cogent evidence.

30. The defendants proffered the case of *Kimatu Mbuvi t/a Kimalu Mbuvi & Bros versus Augustine Munyao Kioko, Court of Appeal at Nairobi, CA2001 of 2001 [2006] eKLR*. This case is a good authority for the principle that expert evidence must be juxtaposed with the totality of the evidence adduced by the participants and that it is the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions.

31. I frame the issues for determination as follows:

(i) From the totality of the evidence proffered by the parties, has the plaintiff acquired 17 by 25 feet of Land Parcel No. MWIMBI/CHOGORIA/1918 through the doctrine of adverse possession?

(ii) Who will bear the costs of this suit?

32. I have considered the pleadings, the oral evidence and the authorities proffered by the parties in support of their veritably incongruent assertions. There is one common thread that runs through the authorities proffered by the plaintiff. It is that adverse possession must be proved through cogent evidence. If it is proved, the principles enunciated by the apposite authorities will apply. The court is, therefore, duty bound to establish if or if not accrual of adverse possession has indeed occurred.

33. The plaintiff claims that the 1<sup>st</sup> defendant sold him a portion of land in 1995 and he got its title. He then says that later on, the 1<sup>st</sup> defendant sold him another portion of 17 by 25 feet. He says that the agreement for this portion was executed on 7<sup>th</sup> February, 1997. This is about 2 years later. He says that he has been occupying this portion since 1995. The 1<sup>st</sup> defendant says that the agreement dated 17<sup>th</sup> February, 1997 was meant to regularize the two portions he had sold to the plaintiff. He says that in 1994 he sold a portion measuring 10 feet by 25 feet for Kshs.50,000/= and gave him possession. Then in 1997, the plaintiff approached him to sell to him an extra 7 feet by 25 feet for a consideration of Kshs.30,000/= to make the total consideration for both portions Kshs.80,000/=. He gave possession to the plaintiff. He says that they agreed to formalize their position through an agreement dated 7<sup>th</sup> February, 1997 which included the total area covered by the 2 portions as being 17feet by 25 feet.

34. There is one problem though. The agreement says that the 17 by 25 feet were to be excised from parcel no. Mwimbi/Chogoria/1918. Perhaps the party meant parcel No. Mwimbi/Chogoria/1917 for which there is no agreement. It is the plaintiff's word against the defendant's word.

35. It is clear that the plaintiff had been using part of the land he claims from around 1995. This obviously means that he had occupied the suit land with the consent of the 1<sup>st</sup> defendant. Time for accrual of adverse possession can obviously not run from that period. Then when does the time start running? In his oral evidence during cross examination the plaintiff told the court that the 2<sup>nd</sup> defendant had developed the whole of parcel Mwimbi/Chogoria/1918. He told the court that the plot was developed in 1998. Asked why he had not gone to court even after knowing that parcel 1918 had been sold to other parties, PW1told the court that he and the 1<sup>st</sup> defendant had good rapport and that is why he did not go to court. I do not find his explanation satisfactory. The court notes that from 1998 when PW1 admits that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants moved into the suit land and 2013 when he filed this suit there is a hiatus of 15 years. This means that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in proper circumstances can themselves stake a claim for adverse possession.

36. In his witness statement, PW1 admits knowledge of fact that the 1<sup>st</sup> respondent transferred the whole of land parcel No. MWIMBI/CHOGORIA/1918 to himself and to one Ashford Kinyua Nkiria, who is not a party in this matter. This parcel of land was later on transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He says that they constructed shops on the half of the plot measuring 17 feet by 25 feet which the 1<sup>st</sup> respondent had sold to him. To quote him, he says: "On or around 2012 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants constructed a shop on half of 17 feet by 25 feet which the 1<sup>st</sup> defendant had sold to me as per the agreement of 7<sup>th</sup> February, 1997". This supports his oral evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had developed the whole of land parcel Mwimbi/Chogoria/1918.

37. In the last part of his witness statement, PW1 contradicts himself and says that he runs a shop on the portion that he claims and that he also cultivates. This assertion is controverted by the report given to court by PW2 who at paragraph 4 states as follows: "Measurements in hectares could not be determined since the two parcels are already developed with no space between them making it impossible to take measurements and widths of the backside". In other words, there is no open space the plaintiff is cultivating.

38. The garbled evidence and the inconsistencies in the plaintiff's evidence put into question the veracity of his evidence, oral and documentary. For this reason, I am unable to determine when time for accrual of adverse possession in favour of the plaintiff can start to run. If indeed the 2<sup>nd</sup> and 3<sup>rd</sup> defendants moved into the suit land and constructed thereon in 1998 as the plaintiff has testified in his oral evidence, then only 3 or 4 years had expired since he had occupied the suit land. The court also notes that the plaintiff keeps on changing dates. Instead

of the defendants having constructed a building on the suit land in 1998 as he claims in his oral evidence, in his witness statement he says that the said building was constructed in 2012. Which version of the plaintiff's assertions is true? This court is unable to fathom the true position.

39. I opine that the report given to this court by PW1 does not contain much probative value. It is nebulous in many respects and admits in its paragraph 4 that the Land Registrar and the Surveyor were unable to make definitive findings.

40. From the foregoing I am unable to find that the plaintiff has obtained proprietorship of 17 by 25 feet of MWIMBI/CHOGORIA/1918 by way of the doctrine of adverse possession.

41. The court notes that the agreement between the plaintiff and the 1<sup>st</sup> defendant which is dated 7<sup>th</sup> February, 1997 had a sunset clause. In its paragraph 8 it states as follows: ***“That in the event of breach the party in breach shall be liable to the innocent party twice the total consideration which shall be Kshs.160,000/= (one hundred and sixty thousand shillings only)”***. I opine that the issues canvassed in this suit concern contractual and ownership matters which would have been better ventilated through an ordinary plaint.

42. In the circumstances, judgment is entered for the defendants in the following terms:

- a) This suit is dismissed
- b) Costs shall follow the event and are awarded to the defendants.

43. Orders accordingly.

Delivered in open Court at Chuka this **13<sup>th</sup> day of December, 2018** in the presence of:

CA: Ndegwa

Advocates representing the parties absent

Obadiah Peter Kairaria – plaintiff

Anderson Gitonga Justace – 1<sup>st</sup> defendant

Rorland Kimathi Kanga – 3<sup>rd</sup> defendant

Cecilia Churi Salesio – 2<sup>nd</sup> defendant

**P.M. NJOROGE**

**JUDGE**