



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT CHUKA

ELC CASE NO. 268 OF 2017(O.S)

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

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

AND IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

AND IN THE MATTER OF AN APPLICATION BY ELIZAPHAN NTHIIRI RERI THAT THE COURT DO MAKE A DECLARATION THAT HE IS ENTITLED TO 0.12 ACRES OUT OF THE ORIGINAL LR; KARINGANI/MUGIRIRWA/365 OR ITS SUBDIVISIONS LR; KARINGANI/MUGIRIRWA/3677, 3678, 3679

AND IN THE MATTER OF AN APPLICATION BY ELIZAPHAN NTHIIRI RERI THAT HE BE REGISTERED WITH 0.12 ACRES OUT OF THE ORIGINAL LR; KARINGANI/MUGIRIRWA/365 OR ITS SUBDIVISIONS LR; KARINGANI/MUGIRIRWA/3677, 3678 AND 3679

ELIZAPHAN NTHIIRI RERI.....APPLICANT

VERSUS

DYNAH KANGAI ALBERT (sued as a administratrix of the estate of ALBERT MURERA NGARUMI).....1ST RESPONDENT

FELIX KIRIMI MUCHEKE (sued as a beneficiary of the estate of ALBERT MURERA NGARUMI).....2ND RESPONDENT

JOSELINE CIAMUTEGI MUCHEKE (sued as a beneficiary of the estate of ALBERT MURERA NGARUMI).....3RD RESPONDENT

ROSE CIRINDI ALBERT (sued as a beneficiary of the estate of ALBERT MURERA NGARUMI).....4TH RESPONDENT

BESSU KANJIRU ALBERT (sued as a beneficiary of the estate of ALBERT MURERA NGARUMI).....5TH RESPONDENT

LISPER KENDI MUCHEKE (sued as a beneficiary of the estate of ALBERT MURERA NGARUMI).....6TH RESPONDENT

JUDGMENT

1. This suit was brought to court by way of Originating Summons. The summons is reproduced in full in exactly the same form it was filed and any spelling or other mistakes are ascribable to the applicant's advocate. It states as follows:

ORIGINATING SUMMONS

UNDER ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

“FAST-TRACK SUIT”

Let DYNAH KANGAI ALBERT, FELIX KIRIMI MUCHEKE, JOSELINE CIAMUTEGI MUCHEKE, ROSE CIRINDI ALBERT, BESSU KANJIRU ALBERT AND LISPER KENDI MUCHEKE of P.O BOX 49 CHUKA within 15 days after service of these summons upon them enter appearance to these summons of ELIZAPHAN NTHIIRI RERI the applicant herein who claim to be and has been in actual possession of 0.12 acres now contained in either LR; KARINGANI/MUGIRIRWA/3677, or 3678 or 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 for a period in excess of 12 years and has an overriding interest for determination of the following

questions;

1. Whether one ALBERT MURERA NGARUMI was the original proprietor of all that parcel of land known and designated as LR; KARINGANI/MUGIRIRWA/365.
2. Whether ALBERT MURERA NGARUMI and ELIZAPHAN NTHIIRI RERI entered into a sale of land agreement on 3rd February 1993 whereupon ALBERT MURERA NGARUMI sold and the applicant bought 0.12 acres out of the original LR; KARINGANI/MUGIRIRWA/365.
3. Whether the 1st respondent DYNNAH KANGAI ALBERT is the administratrix of the estate of ALBERT MURERA NGARUMI having been issued with letters of administration vide CHUKA P.M.C SUCC CAUSE NO. 191 OF 2014.
4. Whether in bid to implement the orders of court (certificate of confirmed grant) the 1st respondent subdivided LR; KARINGANI/MUGIRIRWA/365 into three resultant parcels namely LR; KARINGANI/MUGIRIRWA/3677, 3678 AND 3679.
5. Whether the 1st respondent as the administratrix of the estate of ALBERT MURERA NGARUMI ignored the overriding interest of the applicant over the original LR; KARINGANI/MUGIRIRWA/365 when petitioning the court for letters of administration and when distributing the estate of the deceased to all the respondents.
6. Whether the applicant was in actual possession of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 with effect from 3rd February 1993.
7. Whether the applicant has the following crops growing on 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365: that is to say;
 - i. 35 mature banana plants
 - ii. 10 yam plants
 - iii. 20 cassava plants
 - iv. 5 gravellier trees
8. Whether the respondents were aware that the applicant was in actual possession of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365.
9. Whether the applicant was in occupation of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 for a period in excess of 12 years uninterrupted.
10. Whether the subdivision of the original LR; KARINGANI/MUGIRIRWA/365 into LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 and transferring the same to the respondents defeated the applicant's overriding interests thereon.
11. Whether by operation of law 0.12 acres occupied by the applicant for a period in excess of 12 years were no longer the property of ALBERT MURERA NGARUMI and no person could claim it back from the applicant pursuant to section 7 of the law of limitations of actions act.
12. Whether the 1st respondent had any justification to disengage or involve the applicant as a creditor therefore a beneficiary of ALBERT MURERA NGARUMI'S estate.
13. Whether the applicant is entitled to be registered with 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365.
14. Whether land parcels LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 should be reconstituted into their original LR; KARINGANI/MUGIRIRWA/365 to facilitate the implementation of court orders issued under this suit.
15. Whether the 1st, 2nd, 3rd, 4th, 5th and 6th respondents should be ordered to execute all necessary documents to effect transfer including necessary application for consent and transfer of approximately 0.12 acres contained in LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 and transfer them from the respondents to the applicant and whether in default the D.R should be authorized to execute all the necessary documents that are necessary to effect the transfer of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 from the respondents to the applicant.
16. Whether the 1st respondent is now threatening to evict the applicant from approximately 0.12 acres of what is part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365.

17. Whether the applicant is entitled to the cost of this suit.

These summons are supported by the annexed affidavit of ELIZAPHAN NTHIIRI RERI and other reasons and grounds and evidence to be offered at the time of hearing and the annexed certified copy of register of land parcels LR; KARINGANI/MUGIRIRWA/365, 3677, 3678 and 3679.

DATED AT CHUKA THIS.....14THDAY OF.....JULY,.....2017

2. The application was opposed through the replying affidavit of Dynah Kangai Albert who avers that she has obtained the authority of the 2nd to 6th respondents to swear the affidavit in opposition to the Original Summons application dated **14th July, 2017**. The affidavit is exactly in the form it was filed and any spelling or other mistakes can only be ascribed to the applicant's advocate. It states:

I DYNAH KANGAI ALBERT a female adult person of sound mind do hereby make oath and state as follows:-

1. THAT I am the 1st Respondent herein properly versed with all the issues stated herein.

2. THAT I have obtained the authority and consent of the 2nd -6th Respondents to swear this affidavit in opposition of the Originating Summons application dated 14/07/2017.

3. THAT it is not disputed that L.R. NO. KARINGANI/MUGIRIRWA/365 was registered in the name of ALBERT MURERA NGARUNI who passed away on 08/12/2013.

4. THAT upon his demise and with the consent of all the beneficiaries, I instituted a succession cause (CHUKA P.M. SUCCESSION CAUSE NO. 191 OF 2014) whereupon we distributed his estate amongst ourselves.

5. THAT it is hence not disputed that LR NO. KARINGANI/MUGIRIRWA/365 was subdivided into LR. Nos. KARINGANI/MUGIRIRWA/3677, 3678 and 3679 which were subsequently registered in the names of the respective beneficiaries.

6. THAT the Applicant has however deliberately declined to disclose that he unsuccessfully sought to have that grant issued in my favour in CHUKA P.M. SUCCESSION CAUSE NO. 191 OF 2014 revoked when he filed CHUKA H.C. MISC. APPLICATION NO. 44 OF 2016. (Attached hereto and marked 'DKA 1' is a copy of ruling dismissing the entire suit).

7. THAT we are not privy to any contract for sale of any portion of LR. NO. KARINGANI/MUGIRIRWA/365 to the Applicant and the Applicant shall at the hearing be called to prove the authenticity of the sale agreement attached to his application.

8. THAT equally, any receipts acknowledging receipt of money by our late father are subject to strict proof by the Applicant on the aspect of their authenticity.

9. THAT the Applicant is not in occupation of any portion of what used to be LR. NO. KARINGANI/MUGIRIRWA/365.

10. THAT indeed what the Applicant terms as occupation are mere intermittent acts of trespass that we have consistently resisted over the years.

11. THAT indeed the Applicant himself supports our claim that he is a mere trespasser by exhibiting the letter written to him by my Advocates dated 16/09/2016 in his supporting affidavit.

12. THAT it is thus inaccurate for the Applicant to claim to have continuously occupied a portion of the former LR NO. KARINGANI/MUGIRIRWA/365 for a period exceeding twelve (12) years.

13. THAT I am advised by my Advocates on record that the mere cultivation of land without actual occupation and possession cannot possibly confer rights of ownership of land of the nature claimed by the Applicant.

14. THAT I am further advised by Counsel that the Applicant's claim does not meet the threshold established by law to prove a claim of this nature. This is premised on the following critical facts:-

a. There has been a change of title to the land since the alleged cause of action arose.

b. The Applicant is not definite on the actual parcel of land, among the three portions, in which his claim lies.

c. A period of twelve (12) years has not lapsed for time to start running against any of the Respondents from the date they obtained ownership

d. Any alleged period of prescription was legally interrupted by the litigation in CHUKA H.C. MISC. APPLICATION NO. 44 OF 2016 and such period must be deemed to start afresh after the date of the ruling thereof.

e. The Applicant has not established any possession of the suit properties adverse to the interests of the registered owners thereof.

15. THAT it is instructive to note that the Applicant has deliberately declined to expressly state in his pleadings that he is relying on the doctrine of adverse possession to advance his claim since it is apparent that the threshold to successfully advance such a claim cannot be legally satisfied.

16. THAT my Counsel however instructs me that considering the provisions of the law cited by the Applicant, the only plausible argument is that the Applicant seeks to invoke the doctrine of adverse possession.

17. THAT in a nutshell, the Applicant's claim lacks merit and it is my prayer that the same be dismissed with costs.

18. THAT I depose to the foregoing believing the same to be true and accurate to the best of my knowledge, belief and information.

3. PW1, Elizaphan Nthiiri Reri, told the court that he knew the 3rd respondent as the wife of Albert Murera Ngaruni (deceased) with whom they had been circumcised on the said day. He said that the other defendants were the children of Albert Murera Ngaruni.

4. He testified that in **1993**, he bought a plot measuring **0.12 acres** in area from the deceased Albert Murera Ngaruni. The plot was to be excised from Land Parcel No. **KARINGANI/MUGIRIRWA/365** which the defendants had subdivided to spawn land parcel Numbers **KARINGANI/MUGIRIRWA/3677, 3678 and 3679**. He told the court that there was an agreement showing that he had bought the land. He told the court that the agreement between him and Albert Murera Ngaruni (deceased) was **dated 3rd February, 1993**. A sum of Kshs.10,000/= was paid on the day the agreement was signed. He produced two acknowledgment receipts. One is dated **5th March, 1993** which shows that he paid the sum of **Kshs.1,450/=**. The other one is dated **30th April, 1993** and shows that he paid **Kshs.2,950/=**. At this juncture he asked the court to adopt his witness statement dated **17th October, 2017** as his evidence in this suit. Thereafter, he produced his exhibits.

5. PW1, told the court that he has occupied the suit land since 1993 and produced photos to show that he grew cassava, bananas, yams and gravelia trees on the suit land. He was categorical that he had used the suit land for **24 years** without interference from any quarter.

6. PW1 told the court that his age mate Albert Ngaruni (deceased) died on **13th February, 2013** after which the defendants, without his knowledge filed a succession case, to wit, Chuka CM's Succession Case No. 191 of 2014. Pursuant to the grant issued in that case, they subdivided the original suit land into 3 portions. He told the court that his guess was that the land he was claiming was on land parcel **Ndagani/Mugirirwa/3677**.

7. PW1 asked the court to grant the orders he sought in paragraphs 14, 15 and 16 of the Originating summons.

8. During cross-examination by Dyna Kangai Murera, the 1st Respondent, he told the court that he knew that the original suit land was charged to the National Bank of Kenya, which bank held the apposite title but it was understood that the land would be transferred to him once the bank discharged the title. In answer to the question as to why he went ahead to buy the land even after the suit land had been advertised for auction, he told the court that he wanted to extend assistance to his friend and age mate, Albert Murera Ngaruni who sought his assistance as well as the assistance of another friend. The loan that had spawned the auction process had been given to one Frankline Kamau and the suit land guaranteed that loan.

9. He told the court that his friend Frankline Mbaka Murithi had bought 0.12 acres. He went on to say that after the 1st respondent gave them a notice to vacate the suit land, she approached the wife of Frankline Murithi and told her that she would give her her husband's land.

10. PW1, told the court that even though there was a Gazette Notice concerning the suit land, he did not see it and therefore was unaware that the apposite succession cause was being prosecuted. He denied the 1st defendant's claim that he was present when the original suit land was surveyed for sub division.

11. The 2nd defendant did not cross-examine DW1 and said he relied on the 1st respondent's cross-examination as being the 1st born in the family, she knew all facts concerning this case.

12. During cross-examination by the 3rd defendant, PW1 told the court that Albert Murera was his classmate and said that due to his intimacy with his wife, the family knew that he was buying the land he is claiming in this suit. Regarding why as Albert Murera's close friend he did not attend his funeral/burial, PW1 told the court that he was always on and off in Mombasa and hence he did not know about his demise.

13. Re-examination by his advocate, did not in any material manner affect PW1's evidence.

14. The 5th respondent told the court that he did not wish to cross-examine PW1, asserting that the 1st respondent was privy to all their father's matters until he died. The 6th respondent opted not to cross-examine PW1.

15. The witness statement which PW1 had asked this court to adopt as his evidence in this suit is reproduced in full herebelow. Any spelling or other mistakes are ascribable to the applicant's advocate. It states:

PLAINTIFF'S STATEMENT

My name is Elizaphan Nthiiri Reri. I am a resident of Mubukuro village, Mugirirwa sub loction, Mugwe location Meru south county and I am a retired teacher.

I know one Albert Murera Ngarumi. I knew him at very early age when we were in primary school. He was the registered proprietor of LR;Karingani/Mugirirwa/365 as it was then. He is presently deceased having died on 13th December, 2013. On or around 3rd February, 1993 the late Albert Murera Ngarumi had problems in raising school fees. He made this problem known to me and one Flodlin Mbaka Murithi Cirimbu. The late Albert Murera Ngarumi was desirous to sell his land to raise school fees. Albert Murera Ngarumi excised 0.25 acres with a view to selling the same to raise school fees. The late Flodlin Mbaka bought 0.13 acres and I bought 0.12 acre. He could not transfer the two portions tome and the other purchaser because he had given one Frankline Kimanthi Kamau the title to use as security for a loan with national bank of Kenya (Narok). The title was therefore charged by the bank.

Bearing in mind LR; Karingani/Mugirirwa/365 was charged by National Bank of Kenya I and Albert Murera Ngarumi entered into a sale of land agreement with this information at hand. The agreement for sale of 0.12 acres by Albert Murera Ngarumi was reduced into writing. It was entered into on 3rd February, 1993. The agreement was executed by me as the purchaser, the late Albert Murera Ngarumi as the vendor. The total consideration of the sale land was Kshs.15,000. I paid Kshs.10,000 at the time of making the agreement. The balance of Ksh. 5,000 was payable after the transfer was effected by the late Albert Murera Ngarumi. In the meanwhile the late Albert Murera got into financial problems and I paid him Kshs.1,450 on 8th Mach, 1993 and on 30th April, 1993 I paid him Ksh. 2950 leaving a balance of Kshs.600 which was payable upon transfer of the sale land. The deceased died on 13th December, 2013 without completing his part of bargain.

As pointed out the suit land remained charged by the National Bank of Kenya courtesy of a loan advanced to one Frankline Kamanthi Kamau using lbert Murera's title deed of LR; Karingani/Mugirirwa/365. The late Albert Murera could do nothing until Frankline Kimanthi serviced the loan. It means therefore the late Albert Murera died without performing his part of bargain as far as the agreement of 3rd February, 1993 was concerned. His estate therefore carried a baggage of 0.12 acres owing to me.

From 3rd February, 1993 I have been in occupation of 0.12 acre out of LR; Karingani/Mugirirwa/365 as it was then. I have extensively developed the same since then ad I have therein 35 mature banana plants, 10 yam plants, 20 cassava plants and 5 gravellier trees. I have been on this land for a period of 24 years which is a period in excess of twelve years. I am advised at I have acquired an overriding interest over the portion measuring 0.12 acres that I have been occupying uninterrupted for a period in excess of twelve years.

In the meanwhile after the death of Albert Murera the 1st defendant took letters of administration in respect of the estate of her father Albert Murera Ngarumi courtesy of Chuka P.M.C. Succession Cause NO. 191 of 2014. This was after she had LR; Karingani/Mugirirwa/365 discharged by the bank. In fact the discharge if charge was entered in the register on 16th August, 2016. She was issued with a certificate of confirmed grant on 11th February, 2015. The administratrix (1st defendant) did not factor in my vested interest over and against her father's estate LR; Karingani/Mugirirwa/365 as it was then. Despite that she knew that I was in occupation of 0.12 acres out of LR; Karingani/Mugirirwa/365 as it was then and that I had paid money to her father she did not include me as a beneficiary and /or creditor. According to the certificate of confirmation of grant she gave herself 0.90 acres, Felix Kirimi 0.57 acres and Joseline Ciamutegi Mucheke, Rose Cirindi, Bessu Kanjiru and Lisper Kendi one acre to hold jointly. The whole process was carried out secretly and stealthily and I only came to know of the succession cause and the implementation of certificate of confirmation of grant when I was served with a demand notice from the 1st defendant's counsel on 26th September, 2016 demanding that I move out of 0.12 acres that I was in occupation and in use.

As a matter of principle an administrator or administratrix as in this case takes over the assets and liabilities of a deceased person for whom one takes letters of administration. The deceased died with liabilities and the administratrix therein should have put into account my interest when petitioning court for letters of administration in respect of her late father Albert Murera Ngarumi. Having not done so and putting int account I have been in occupation and use of 0.12 acres out of the original LR; Karingani/Mugirirwa/365 for a period in excess of twelve years uninterrupted it is only fair that the court should make an order that the defendants should transfer 0.12 acres out of the subdivision of LR; Karingani/Mugirirwa/365 that is LR; Karingani/Mugirirwa/3677, 3678 and 3679.

To facilitate my being given 0.12 acres out of the original LR; Karingani/Mugirirwa/365 or the subdivisions thereof LR; Karingani/Mugirirwa/3677, 3678 and 3679 should revert to the original number LR; Karingani/Mugirirwa/365 in the name of the 1st defendant the administratrix. This way it will be possible for the administratrix to transfer 0.12 acres to me. I will be praying for cost and interest of this suit.

That is all I wish to state.

DATED AT CHUKA THIS 17TH DAY OF OCTOBER, 2017

.....

ELIZAPHAN NTHIIRI RERI

16. DW1, Dynah Kangai Albert, the 1st defendant told the court that she knew Elizaphan Nthiiri who was a neighbour. She asked the court to adopt her witness statement dated 16th March, 2018 as her evidence in this suit. She also asked the court to adopt her affidavit, dated 11th November, 2017 as he evidence.

17. DW1 told the court that the respondent does not currently occupy the suit land but added that he cultivates it on and off and not continuously. She told the court that presently the suit land was fallow and added that he had cultivated it last year. She then clarified that the parcel of land was No. **Karingani/Mugirirwa/365** because after completion of Chuka CM's Court Succession Case No. 191 of 2014, the land was subdivided to spawn new **parcel numbers 3677, 3678 and 3679**. She was laconic that the respondent had not occupied the suit

land for **over 12 years**.

18. DW1, during cross-examination told the court that the applicant has been cultivating the land but is now fallow. She admitted that he was cultivating the land when his father was alive.

19. The court noted that DW1 was being evasive. She denied knowledge of the purchase of the suit land by the applicant, even though she was **21 years** in **1993**. She also told the court that her mother had told her that she knew nothing about the sale of the suit land to the applicant. She also told the court that she did not know from when the applicant had started trespassing upon the suit land. Even though she had earlier on told the court that the applicant had been cultivating the suit on and off before her father died, without winking an eye she told the court that the applicant had only started trespassing upon the suit land only after her father's death. Pellucidly DW1 is being economical with the truth. In this respect, she is not a truthful witness. She, however, at the tail end of her cross-examination, she begrudgingly admitted that the applicant indeed occupied the suit land.

20. DW1's witness statement, which she asked the court to adopt as her evidence in this court is reproduced in full herebelow and any spelling or other mistake is ascribable to the defendant/respondent or her advocate.

STATEMENT OF DYNAH KANGAI ALBERT

I am the 1st Respondent herein properly versed with all the issues stated herein.

1. THAT I have read and understood the content of the Originating Summons application dated 14/07/2017.
2. THAT it is not disputed that L.R. NO. KARINGANI/MUGIRIRWA/365 was registered in the name of ALBERT MURERA NGARUNI who passed away on 08/12/2017.
3. THAT upon his demise and with the consent of all the beneficiaries, I instituted a succession cause (CHUKA P.M. SUCCESSION CAUSE NO. 191 OF 2014) whereupon we distributed his estate amongst ourselves.
4. THAT it is hence not disputed that L.R. NO. KARINGANI/MUGIRIRWA/365 was sub-divided into L.R. NO.S KARINGANI/MUGIRIRWA/3677, 3678 AND 3679 which were subsequently registered in the names of the respective beneficiaries.
5. THAT I am not privy to any contract for sale of any portion of L.R. NO. KARINGANI/MUGIRIRWA/365 to the applicant.
6. THAT the applicant deliberately declined to disclose that he unsuccessfully sought to have that grant issued in my favour in CHUKA CHUKA P.M. SUCCESSION CAUSE NO. 44 OF 2016 revoked when he filed CHUKA H.C. MISC. APPLICATION NO. 44 OF 2016.
7. THAT equally, any receipts acknowledging receipt of money by our late father are subject to strict proof by the Applicant on the aspect of their authenticity.
8. THAT the applicant is not in occupation of any portion of what used to be L.R. NO. KARINGANI/MUGIRIRWA/365.
9. THAT indeed what the applicant terms as occupation are mere intermittent acts of trespass that we have consistently resisted over the years.
10. THAT indeed the applicant himself supports our claim that he is a mere trespasser by exhibiting the letter written to him by my Advocates dated 16/09/2016 in his supporting affidavit.
11. THAT it is inaccurate for the applicant to claim to have continuously occupied a portion of the former L.R. NO. KARINGANI/MUGIRIRWA/365 for a period exceeding twelve (12) years.
12. THAT in a nutshell, the applicant's claim lacks merit and it is my prayer that the same be dismissed with costs.

THAT is all I wish to state.

DATED AT CHUKA THIS16thDAY OFMarch,..... 2018.

SIGNED BY:- DYNAH KANGAI ALBERT

21. The parties filed written submissions.

22. The applicant's written submissions are reproduced in full herebelow. Any spelling or other mistakes are ascribable to the applicant's advocates.

APPLICANT'S FINAL SUBMISSIONS

(A) PLEADINGS

1. Your lordship by an O.S dated 14th July 2017 the applicant (herein after the plaintiff) posed 18 questions for consideration by the court. The questions that the plaintiff posted in the O.S were as follows;

(i) Whether one ALBERT MURERA NGARUMI was the original proprietor of all that parcel of land known and designated as LR; KARINGANI/MUGIRIRWA/365.

(ii) Whether ALBERT MURERA NGARUMI and ELIZAPHAN NTHIIRI RERI entered into a sale of land agreement on 3rd February 1993 whereupon ALBERT MURERA NGARUMI sold and the applicant bought 0.12 acres out of the original LR; KARINGANI/MUGIRIRWA/365.

(iii) Whether the 1st respondent DYNAH KANGAI ALBERT is the administratrix of the estate of ALBERT MURERA NGARUMI having been issued with letters of administration vide CHUKA P.M.C SUCC CAUSE NO. 191 OF 2014.

(iv) Whether in bid to implement the orders of court (certificate of confirmed grant) the 1st respondent subdivided LR; KARINGANI/MUGIRIRWA/365 into three resultant parcels namely LR; KARINGANI/MUGIRIRWA/3677, 3678 AND 3679.

(v) Whether the 1st respondent as the administratrix of the estate of ALBERT MURERA NGARUMI ignored the overriding interest of the applicant over the original LR; KARINGANI/MUGIRIRWA/365 when petitioning the court for letters of administration and when distributing the estate of the deceased to all the respondents.

(vi) Whether the applicant was in actual possession of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 with effect from 3rd February 1993.

(vii) Whether the applicant has the following crops growing on 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365: that is to say;

(i) 35 mature banana plants

(ii) 10 yam plants

(iii) 20 cassava plants

(iv) 5 gravellier trees

(viii) Whether the respondents were aware that the applicant was in actual possession of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365.

(ix) Whether the applicant was in occupation of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 for a period in excess of 12 years uninterrupted.

(x) Whether the subdivision of the original LR; KARINGANI/MUGIRIRWA/365 into LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 and transferring the same to the respondents defeated the applicant's overriding interests thereon.

(xi) Whether by operation of law 0.12 acres occupied by the applicant for a period in excess of 12 years were no longer the property of ALBERT MURERA NGARUMI and no person could claim it back from the applicant pursuant to section 7 of the law of limitations of actions act.

(xii) Whether the 1st respondent had any justification to disengage or involve the applicant as a creditor therefore a beneficiary of ALBERT MURERA NGARUMI'S estate.

(xiii) Whether the applicant is entitled to be registered with 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365.

(xiv) Whether land parcels LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 should be reconstituted into their original LR; KARINGANI/MUGIRIRWA/365 to facilitate the implementation of court orders issued under this suit.

(xv) Whether land parcels LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 are burdened by the applicant's overriding interest of 0.12 acres thereof hence their titles thereof are subject to the applicant's interest and occupation and in particular 0.12 acres?

(xvi) Whether the 1st, 2nd, 3rd, 4th, 5th and 6th respondents should be ordered to execute all necessary documents to effect transfer including necessary application for consent and transfer of approximately 0.12 acres contained in LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 and transfer them from

the respondents to the applicant and whether in default the D.R should be authorized to execute all the necessary documents that are necessary to effect the transfer of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 from the respondents to the applicant.

(xvii) Whether the 1st respondent is now threatening to evict the applicant from approximately 0.12 acres of what is part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365.

(xviii) Whether the applicant is entitled to the cost of this suit.

2. The plaintiff in support of his O.S swore an affidavit dated 14th July 2017 which was filed in court on 14th July 2017. Several documents were annexed to the supporting affidavit.

3. On the other hand the respondent (herein after the defendant) in opposition to the plaintiff's O.S and its supporting affidavit filed and served upon the plaintiff a replying affidavit sworn and dated 1st November 2017. Annexed to the replying affidavit was Justice R.K Limo's ruling dated 13th July 2017 in respect of CHUKA HIGH COURT MISC SUCCCAUSE NO 44 OF 2016. Basically the introduction of the ruling aforesaid by the defendant was to support the issue of res judicata. We shall be visiting this principle and its applicability in this suit later in these submissions.

4. Your lordship the plaintiff complied with order 11 civil procedure rules. He filed and served case summary, list of witnesses, list of documents, issues of determination, pretrial questionnaire and documents. There is no doubt that the defendant did not comply fully with order 11 civil procedure rules. The defendants only filed and served defendants' list of documents, list of witnesses and a statement from the 1st respondent one DYNAH KANGAI ALBERT. The respondents also had the ruling of JUSTICE R.K Limo in CHUKA HIGH COURT MISC SUCC CAUSE NO 44 OF 2016 as a document to be relied on. Nevertheless the court proceeded to give directions that the matter was to proceed by way of viva voce evidence.

(B) THE PLAINTIFF'S CASE

5.

(i) The plaintiff' case consists of the O.S and the 18 questions posed therein, supporting affidavit dated 14th July 2017 and the annexures thereto and the oral evidence adduced in court.

(ii) That according to the O.S and through the 18 questions posted therein the plaintiff was pleading that originally land parcel LR; KARINGANI/MUGIRIRWA/365 was registered with the father to the 1st, 2nd, 4th, 5th and 6th respondents (they are siblings) and the husband to the 3rd respondent. On or around 3rd February 1993 the plaintiff and one ALBERT MURERA NGARUMI the father of the 1st, 2nd, 4th, 5th and 6th respondents and the husband to the 3rd respondent entered into a sale of land agreement whereby the plaintiff bought there from 0.12 acres with a view to developing a commercial plot. The agreement was reduced into writing and duly executed before an advocate. Immediately upon execution of the agreement the plaintiff entered into the land and started developing it. According to the plaintiff he is in occupation and in use of the said 0.12 acres out of the original LR; KARINGANI/MUGIRIRWA/365. For intervening factors the agreement was not completed. We shall be visiting the role an agreement plays in an O.S later in these submissions.

(iii) That originally LR; KARINGANI/MUGIRIRWA/365 was registered with ALBERT MURERA NGARUMI. That ALBERT MURERA NGARUMI and the plaintiff entered into a sale of land agreement on 3rd February 1993 whereupon ALBERT MURERA NGARUMI sold and the plaintiff bought 0.12 acres out of the original LR; KARINGANI/MUGIRIRWA/365.

(iv) That in CHUKA P.M.C SUCC CAUSE NO. 191 OF 2014 the 1st respondent DYNAH KANGAI ALBERT petitioned the court for Letters of Administration in respect of the estate of ALBERT MURERA NGARUMI and she was issued with Letters of Administration (certificate of confirmation of grant) on 11th February 2015. That in bid to implement the orders of court (certificate of confirmation of grant) the 1st respondent in her capacity as the administratrix of the estate of ALBERT MURERA NGARUMI subdivided LR; KARINGANI/MUGIRIRWA/365 into three resultant parcels namely LR; KARINGANI/MUGIRIRWA/3677, 3678 AND 3679. That when the 1st respondent petitioned the court for Letters of Administration in respect of the estate of ALBERT MURERA NGARUMI the 1st respondent as the administratrix of the estate of ALBERT MURERA NGARUMI ignored and disregarded the plaintiff's overriding interest over the original LR; KARINGANI/MUGIRIRWA/365 as it was then or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 AND 3679 by distributing the entire estate without considering the plaintiff's 0.12 acres entitlement over the estate of the late ALBERT MURERA NGARUMI and distributed all the resultant parcels to the respondents.

(v) That the plaintiff has been in actual possession of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 with effect from 3rd February 1993 a period in excess of 12 years uninterrupted. The plaintiff annexed photographs of his growing crops on the land. The plaintiff deposes in the supporting affidavit that he has been on the land for a period in excess of 12 years with effect from 3rd February 1993.

(vi) The plaintiff further deposes that the subdivision of the original LR; KARINGANI/MUGIRIRWA/365 into LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 by the 1st respondent in her capacity as the administratrix of the estate

of ALBERT MURERA NGARUMI did not defeat his overriding interest over the estate of the late ALBERT MURERA NGARUMI and in particular 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. That the plaintiff avers that he has been in occupation of the suit land for a period in excess of 12 years and no party has ever told him to move out of the suit land. The plaintiff contends that he should be registered with 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 or 3679. The plaintiff avers that the defendants should be ordered to transfer 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions for he has acquired the said land under the doctrine of adverse possession and/or in default the deputy registrar of this court be authorized to execute all the necessary documents that are necessary to effect the transfer of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 from the respondents to the plaintiff.

(vii) That the 1st respondent has threatened to evict the plaintiff from 0.12 acres in particular she has written a demand notice to the plaintiff dated 16th September 2016.

(viii) The plaintiff's other evidence is to be found in his statement. His statement is a replica of the contents of his supporting affidavit. In court his oral evidence was a replica of his supporting affidavit and his statement. On cross examination he remained categorical that he has acquired 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679. He prays that the court do order the respondents do transfer 0.12 acres out of the original LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677. The plaintiff then prays for cost of the suit.

(C) DEFENDANTS' CASE

6.

(i) The defendant's case consists of a replying affidavit sworn by the 1st defendant on 1st November 2017. Also the defendants' case comprises of the 1st defendant's statement dated 16th March 2018. There is also one annexure.

(ii) In the replying affidavit sworn and dated 1st November 2017 by the 1st defendant the 1st defendant avers that the 1st respondent had authority to plead and sign documents on behalf of herself and other respondents. That it is not disputed that LR; KARINGANI/MUGIRIRWA/365 was registered in the name of ALBERT MURERA NGARUMI who passed away on 8th December 2013. That the 1st respondent petitioned the court for letters of administration in CHUKA PM SUCC CAUSE NO 191 OF 2014 and the estate was distributed amongst themselves.

(iii) That the applicant has however deliberately declined to disclose that he unsuccessfully sought to have the grant issued in the 1st respondent's favor in CHUKA P.M SUCC CAUSE NO 191 OF 2014 revoked when he filed CHUKA H.C MISC SUCC NO 44 OF 2016. The defendants contended that they are not privy to any contract of sale of any portion of LR; KARINGANI/MUGIRIRWA/365 to the applicant and the applicant shall at the time of hearing be called upon to prove the authenticity of the sale agreement attached to his application. That equally any receipts acknowledging receipt of money by the late ALBERT MURERA NGARUMI are subject to strict proof by the applicant on the aspect of their authenticity.

(iv) According to the defendants the plaintiff is not in occupation of what used to be LR; KARINGANI/MUGIRIRWA/365. That indeed what the applicant terms as occupation are mere intermittent acts of trespass that the defendants have consistently resisted over the years. The 1st defendant on behalf of the other defendants contend that the plaintiff is admitting that he is a trespasser by exhibiting a letter from their counsel dated 16th September 2016 demanding the plaintiff to vacate the suit land. That it is thus inaccurate for the applicant to claim to have continuously occupied a portion of the former LR; KARINGANI/MUGIRIRWA/365 for a period exceeding 12 years.

(v) That mere cultivation of land without actual occupation and possession cannot possibly confer the rights of ownership of land of the nature claimed by the applicant. That the plaintiff's claim does not meet the threshold established by law to prove a claim of this nature in that there is a change of title since the cause of action arose, that the plaintiff is not clear as to which parcel of land his claim lies, that a period of 12 years has not lapsed for the time to start running against any of the respondents from the date they obtained ownership, that any alleged period of prescription was legally interrupted by the litigation in CHUKA H.C MISC APP NO 44 OF 2016 and such period must be deemed to start afresh after the date of the ruling thereof, that the applicant has not established any possession of the suit properties adverse to the interests of the registered owners thereof.

(vi) That the plaintiff has not specifically pleaded that he is relying on a doctrine of adverse possession and therefore this proves that he cannot successfully prove adverse possession. According to the 1st respondent the plaintiff is only wishing to invoke the doctrine of adverse possession. The plaintiff's claim lacks merit and should be dismissed with costs.

(vii) The respondents replicate the replying affidavit in the 1st respondent's statement dated 16th March 2018. In her oral evidence in court she could not sustain her pleadings for she diverted completely from the main case. On cross examination she was not able to successfully respond to the plaintiff's counsel's questions. She concluded her evidence by seeking for orders that the plaintiff's suit be dismissed with cost.

(D) ISSUES FOR DETERMINATION

7. Your lordship the issues for determination in this suit include but are not limited to the following;

- (i) Whether the plaintiff's claim is based on the agreement dated 3RD FEBRUARY 1993 or the doctrine of adverse possession?
- (ii) Whether the suit res judicata vis a vis CHUKA HIGH COURT MISC SUCC CAUSE NO 44 OF 2016?
- (iii) Whether the questions posed in the O.S are in the affirmative or in the negative?
- (iv) Whether the plaintiff has obtained an overriding interest against land parcel LR; KARINGANI/MUGIRIRWA/365 or its subdivisions?
- (v) Whether notice to the plaintiff by the 1st respondent amounts to interruption of possession by the plaintiff?
- (vi) Whether cultivation for a period of 12 years and above can meet the threshold of a claim by way of adverse possession or there must be structures or buildings?
- (vii) What is the effect of subdividing land that is occupied under the doctrine of adverse possession and can such subdivision defeat the overriding interest of a person occupying under adverse possession?
- (viii) Whether the plaintiff should be registered with 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivisions LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679?
- (ix) Whether the respondents should be ordered to execute all the necessary documents to effect the transfer of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivision LR; KARINGANI/MUGIRIRWA/3677 to the plaintiff?

(E) ANALYSIS

8.

(i) The first issue for determination is whether the plaintiff's suit is based on the agreement dated 17th December 1996 between the plaintiff and one ALBERT MURERA NGARUMI or a claim under adverse possession? The plaintiff is not out to enforce the agreement dated 17th December 1996 between himself and ALBERT MURERA NGARUMI. The agreement only demonstrates the point of entry into the suit land. Whether the agreement was specifically performed or otherwise is not an issue in this O.S. In a suit commenced by way of an O.S and specifically claiming adverse possession the validity or otherwise of an agreement is never an issue. Rule 3 of order 37 C.P.R is clear on this when it provides, "a vendor or purchaser of immovable property or their representatives may, at any time or times, take out an originating summons returnable to the judge in chambers, for determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (**not being a question affecting the existence or validity of the contract**). From the foregoing therefore the court should pay a lip service to the validity or otherwise of the agreement dated 3rd February 1993 and concentrate on the issue of adverse possession.

(ii) The respondents in these proceedings have suggested that the plaintiff's claim is res judicata vis a vis CHUKA HIGH COURT MISC SUCC CAUSE NO 44 OF 2016. In our humble view this is not the correct position. If the matter is res judicata it would mean that the issues canvassed between the plaintiff and the defendants have been heard, determined and a decision made. This is not the position in this case and we so submit.

In CHUKA HIGH COURT MISC SUCC CAUSE NO 44 OF 2016 the judge was very clear that he was not touching on the plaintiff's claim as presented therein. The claim in the succession cause is the claim posed in this O.S by the plaintiff. The judge did not pronounce himself on the plaintiff's claim as presented. The judge dealt with jurisdiction as to whether he had the same to adjudicate over the plaintiff's claim. The learned judge was clear that he had no jurisdiction after all the right court to adjudicate over the plaintiff's case was E.L.C court. The judge equally pronounced himself that nothing has stopped the plaintiff from presenting his claim in this court which he has now done through the instant O.S. To confirm and compound our argument that this matter is not res judicata we invite the court to read the ruling of **HONORABLE JUSTICE R.K LIMO IN CHUKA HIGH COURT MISC SUCC CAUSE NO 44 OF 2016 which has been annexed by the respondent at paragraph 12, 13 and 16 thereof**. It is clear that the plaintiff's claim was never dealt with in the succession matter for one call reason that the judge in the high court had no jurisdiction.

(iii) Are the questions posed in the O.S in the positive or in the negative? We humbly submit that the questions posed in the O.S are in the affirmative. There is no doubt that the late ALBERT MURERA NGARUMI was the original registered proprietor of LR; KARINGANI/MUGIRIRWA/365 as it was then. ON 3RD February 1993 the plaintiff and the said ALBERT MURERA NGARUMI entered into a sale of land agreement whereby the said ALBERT MURERA NGARUMI sold and the plaintiff bought 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365.

That the 1st respondent is the administratrix of the estate of ALBERT MURERA NGARUMI vide CHUKA P.M.C SUCC CAUSE NO 191 OF 2014. There is no doubt that the 1st respondent subdivided the original LR;

KARINGANI/MUGIRIRWA/365 into three resultant parcels namely LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679. The 1st respondent did not consider the plaintiff's overriding interest when distributing the estate of the late ALBERT MURERA NGARUMI. That the 1st respondent transferred the resultant parcels LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 to herself, her mother and her siblings who are now the respondents. The official searches speak for themselves as to who got what.

Another question posed in the O.S is whether the plaintiff was in actual possession of 0.12 acres part of LR; KARINGANI/MUGIRIRWA/3677, 3678 and 3679 subdivisions of LR; KARINGANI/MUGIRIRWA/365 with effect from 3rd February 1993. The answer is in the affirmative. Immediately after the plaintiff and the late ALBERT MURERA NGARUMI entered into the sale of land agreement the plaintiff took possession. He has been there since then. In fact in cross examination to the 1st respondent who gave evidence on behalf of the other respondents admitted that the plaintiff has perennial crops growing on 0.12 acres that the plaintiff bought from ALBERT MURERA NGARUMI. The letter dated 16th September 2016 written by the respondent's counsel to the plaintiff is a clear manifestation that the plaintiff was still using or making use of the suit land otherwise the respondent could not have written to the plaintiff to stop him from "trespassing". The trespassing referred to by the respondents for all that long is a demonstration that the plaintiff has been and was in occupation of the suit land i.e 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. It is worth noting that the respondent in her answers in cross examination said that she was not aware of what was happening between 1993 when the plaintiff purchased the land from the late ALBERT MURERA NGARUMI and 8th December 2013 when the said ALBERT MURERA NGARUMI died. From 1993 to 2013 the plaintiff had acquired an overriding interest of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365 as it was then. By the time the respondents wrote to the plaintiff the overriding interest in favor of the plaintiff had accrued and vested in the plaintiff. To date the plaintiff is on the land (0.12 acres) out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. We submit that the plaintiff is on the suit land and he has several perennial crops growing on the land. These include 35 mature banana plants, 10 yam plants, 20 cassava plants and 5 gravellier trees. The plaintiff attached photographs which are clear regarding these crops. The respondents did not challenge the photographs either in pleadings or in cross examination. This is a clear indication that the plaintiff is still on the suit land. The respondents' argument that the plaintiff only appears occasionally cannot be sustained. Once there are perennial crops the plaintiff comes in occasionally to harvest meaning that his use of the land is continuous.

There is no doubt that the respondents were aware that the plaintiff was in actual use of the suit land. The demand notice by counsel for the respondent to the plaintiff dated 16th September 2016 shows that the respondents were aware. The occupation was not in secrecy and it was continuous. The respondents did nothing to stop the plaintiff from continuing to use the land. The only attempt that the respondent made was the demand notice but as we will submit later on a demand notice in itself does not amount to interruption.

That now going by the letter of the respondents to the plaintiff dated 16th September 2016 the respondents are attempting to throw the plaintiff out of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. The plaintiff has already acquired an overriding interest and a notice like that of the respondent is not enough to invalidate the plaintiff's overriding interest over 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. For this reason issue for determination number four is answered in the affirmative.

(iv) The next question posed by these proceedings is whether notice to the plaintiff by the 1st respondent amounts to interruption of possession by the plaintiff? We submit that notice parse is not interruption of occupation by a person occupying under adverse possession. This stand was clearly pronounced by the court of appeal sitting at **NAIROBI IN COURT OF APPEAL IN CIVIL APPEAL NO 24 OF 1979 GITHU VERSUS NDEETE** where the judges of appeal pronounced themselves as follows. Held 1.....2.....3 time ceases to run under the Limitation of actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry to land. **Giving notice** to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act". From the foregoing the notice of 16th September 2016 did not amount to interruption of the plaintiff's possession.

(v) Another issue posed by these proceedings is whether cultivation alone for a period of 12 years and above can meet the threshold of a claim by way of adverse possession or there must be structures or buildings? It is not a must that an adverse possessor should have buildings or structures on the land claimed under adverse possession. Cultivation alone for a period in excess of 12 years will confer proprietary interest to a person so cultivating. The plaintiff in this case has demonstrated in his pleadings and evidence that he has been cultivating 0.25 acres part of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. The plaintiff is required and he has done so to demonstrate that for all these years he has been cultivating the land in issue continuously and uninterrupted. The annexed photographs show that the plaintiff has growing crops on the disputed land. This was the pronouncement by **COURT OF APPEAL IN NARABI IN NAIROBI CIVIL APPEAL NO 24 OF 1979 AT PAGE 5 PARAGRAPH D.**

(vi) What is the effect of subdividing land that is occupied under the doctrine of adverse possession and can such subdivision defeat the overriding interest of a person occupying under adverse possession? Change of title of land occupied under adverse possession cannot defeat the overriding interest. Subdivision of land occupied under adverse possession into various parcels as in this case cannot defeat an overriding interest by the person so possessing. The respondents were under a mistaken believe that if they subdivided the land and transferred the resultant parcels to third parties then the plaintiff's overriding interest is defeated. Once an overriding interest matures such portion occupied by the person in possession is no longer the property of the registered proprietor. The title is extinguished by operation of law. The person who takes over from the registered proprietor has his title bargained and subject to the interest of the

person having an overriding interest. See **COURT OF APPEAL IN NARABI IN NAIROBI CIVIL APPEAL NO 24 OF 1979** supra.

(vii) We shall now submit on issue number (viii) and (ix) without splitting hairs. The questions posed therein are whether the plaintiff should be registered with 0.12 acres out of LR; KARINGANI/MUGIRIRWA/365 or its subdivision LR; KARINGANI/MUGIRIRWA/3677 and whether the respondents should be ordered to execute all the necessary documents to effect the transfer of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision LR; KARINGANI/MUGIRIRWA/365 to the plaintiff? Having proved that the plaintiff has acquired 0.25 acres by adverse possession out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365 the law should take its course. As of right the plaintiff is entitled to be registered with his 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. Should the respondents fail to transfer the said 0.12 acres to the plaintiff on their own motion the court should order the deputy registrar of this court to execute and sign all the requisite documents necessary to effect the subdivision and transfer of 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365 to the plaintiff.

CASE LAW

9. The following cases are relevant and applicable to the instant suit.

- (i) COURT OF APPEAL IN NARABI IN NAIROBI CIVIL APPEAL NO 24 OF 1979.
- (ii) COURT OF APPEAL IN NAIROBI IN CIVIL APPEAL NO 73 OF 1982
- (iii) HIGH COURT AT BUSIA CIVIL CASE NO 6 OF 2000
- (iv) COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO 35 OF 2002

CONCLUSION

10. In conclusion your lordship we propose that the plaintiff be registered with 0.12 acres out of LR; KARINGANI/MUGIRIRWA/3677 a subdivision of LR; KARINGANI/MUGIRIRWA/365. The plaintiff's overriding interest goes without any question. We will also be praying for cost of this suit.

11. We rest our submissions and pray.

DATED AT CHUKA THIS...4THDAY OF.....JUNE,2018

23. The respondents' written submissions are reproduced in full herebelow. Any spelling or other mistakes, if there are any, are attributable to the respondents' advocates.

SUBMISSIONS FOR THE RESPONDENTS

Your Lordship the following comprises the submissions of the Respondents.

Introduction

Your Lordship the following issues can be deduced from both the pleadings and testimony of the Applicant and Respondents and are not in dispute:-

- a. The Applicant entered into a sale agreement on 17/12/1996 with ALBERT MURERA NGARUMI for the purchase of a portion measuring 0.25 Acres to be excised from L.R. No. KARINGANI/MUGIRIRWA/365.
- b. The full purchase price was not paid to the vendor.
- c. The said ALBERT MURERA NGARUMI was the registered owner of the said land.
- d. The said parcel of land had been charged to National Bank of Kenya Ltd for a sum of KSHS. 370,000/- on 08/10/1992 and a discharge of charge effected on 16/08/2016.
- e. The said ALBERT MURERA NGARUMI passed away on 08/12/2013 and his estate comprising of L.R. No. KARINGANI/MUGIRIRWA/365 distributed among the Respondents.
- f. The main land was subdivided into L.R. No. KARINGANI/MUGIRIRWA/3677, 3678 and 3679 on 02/09/2016 and transferred to the Respondents.
- g. The Applicant challenged the said distribution in the High Court on the premise that he was a creditor to the estate which claimed was dismissed by the court.

h. The Applicant is uncertain on which of the three (3) portions his claim lies.

Your Lordship these key factors will inform our submission on whether the Plaintiff has satisfied the key ingredients of ownership by way of adverse possession.

Your Lordship, the Court of Appeal *Sisto Wambugu v Kamau Njuguna [1983] Eklr* reiterated with approval the following passage from the decision in the English Case of *Little dale Vs. Liverpool College [1990]1 Ch 19,21.*

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

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

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

In the instant case Your Lordship, we seek to apply the test employed in In *James Mwangi & Others – v- Mukinye Enterprises Ltd., -High Court Civil Case No. 3912 of 1986*, which was quoted with approval in *Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR* where it was stated that ‘*a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years*’. The Respondents were categorical that the Applicant was not in continuous possession of any of the suit land and was merely an intermittent trespasser. This contention is supported by the demand letter dated 16/09/2016 issued to the applicant requiring him to cease his tortuous activities on the property.

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

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

Your Lordship in the instant dispute there is concurrence that if at all the applicant took possession of a portion measuring 0.12 acres, then the same was with the permission and consent of the registered owner and as observed above such entry could not be adverse to the proprietor’s interest.

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

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

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

It is our submission therefore that the circumstances of this case do not allow the applicant to make reliance on the doctrine of adverse possession.

Your Lordship, from the body of the sale agreement, it is clear that there is an outstanding balance of Kshs. 50,000/- which was to be paid upon transfer of the portion purchased to the Applicant. And in the absence of such transfer or any cogent proof of payment, it is an indisputable fact that the applicant did not settle the entire consideration price. In *Douglas Mwangi Muteru vs Victoria Mere Dzilla [2017] Eklr* the court had this to state ‘*that the payments of the purchase price by installments after the date of the agreement recognized the defendant’s title to the land and the period of limitation for adverse possession did not begin to run until the last installment was paid.*’

On this account we also wish to rely on the decision of the Court of Appeal in *Sisto Wambugu v Kamau Njuguna [1983] eKLR*

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

In *Sophie Wanjiku John Vs. Jane Mwiwaki Kimani [Nrb ELC No. 490 Of 2010]* the court stated that ‘**I agree with Mr. Ojienda’s submissions that a claim of adverse possession can only be sustained on a registered owner. The Plaintiff got ownership in 2010 when she bought the land from Margaret Wanja and the period of adverse possession will run from 2010 and as correctly submitted 12 year time period has not expired.**’

In our present circumstances the registered owners of the suit lands obtained registration thereof on 08/09/2016. Relying on the decision in *Sophie Wanjiku John (Supra)* it is clear that time for purposes of adverse possession can only start running from the date of such

registration. It is without doubt therefore that on this account the claim for adverse possession must fail.

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

It is without doubt therefore that the prayer for a declaration of ownership by adverse possession must fail for failure to satisfy the key ingredients necessary for a grant of orders of that nature. We thus pray that the originating summons be dismissed with costs.

We so humbly pray.

DATED AT MERU THIS.....12THDAY OF...OCTOBER,....2018.

24. I frame the only issue for determination in this matter as being if or if not the applicant has given sufficient evidence to entitle him, on a balance of probability, to a declaration that he now owns the land he is claiming by virtue of the doctrine of adverse possession.

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

26. The authorities proffered by the parties have been exhaustively elaborated upon in the submissions the parties have filed. I, therefore, find it superfluous and rather pyrrhic to regurgitate the principles espoused by those authorities. They are all good authorities in their circumstances and I have taken them into account in the process of the analysis and determination of this suit.

27. From my analysis of the totality of the evidence proffered in this case, I find that the applicant has been in occupation of the suit land continuously and even up to now since **1993**. This has not been controverted by the defendants. Their witness, DW1, has confirmed this position.

28. That there is in existence, between DW1's father and the father of some of the other defendants' and the applicant, an agreement dated **3rd February, 1993** has not been, in any meaningful way, controverted by the defendants. That the apposite consideration was paid by the applicant has also not been controverted.

29. However, length of occupation for a period extending beyond twelve years, or **even 50 years** or even longer, is not enough by the mere fact of the length of occupation, to allow for crystallization of a declaration of ownership by the applicant through the doctrine of adverse possession. Mere length of stay is not sufficient.

30. The defendants' wish the court to find that the applicant's occupation of the land in question was with the consent of Albert Murera Ngaruni, the original owner of the land. They say that time for the period of counting the 12 years threshold can only start running from 2013 when the said Albert Murera Ngaruni (deceased) died. They also say that they were registered owners of the suit land only in 2016, 3 years ago.

31. Should the court find the assertions postulated by the defendants credible, this may spawn awkward consequences, which though veritably legal, will be unjust. The applicant would lose land that he had innocently bought in 1993 when assisting Albert Murera Ngaruni. A legal technicality will deny him land he has occupied for 24 years. But that is the law. Many innocent purchasers have lost, upon the demise of those who sold land to them, the land they thought they had bought and occupied for many years, even decades. I attribute this scenario to greed for land among Kenyans and especially among the families of deceased sellers of land. Many families, dishonourably, do not respect the wishes of their dead relatives. The family in this case may be one of such families.

32. In this suit, I will not find that the applicant has not reached the threshold of meriting the granting of ownership of the land he claims, through the doctrine of adverse possession. Strangely, I note that the Green Card filed shows that the charge in favour of National Bank of Kenya Limited for Kshs.370,000/= was only discharged on **16th August, 2016**. The defendants were registered owners of the suit land on **8th September, 2016**. No indication was given regarding when the bank loan owed to National Bank of Kenya Limited was fully paid.

33. I do note that the defendants, although they knew that the applicant had purchased and occupied the land he claims from 1993, intentionally, maliciously and capriciously, refused or failed to include the applicant in the list of beneficiaries of the estate of Albert Murera Ngaruni (deceased). From all the circumstances surrounding this matter, I opine that from the word go, Albert Murera Ngaruni (deceased) and members of his family did not intend to transfer the suit land to the applicant. Constructively, therefore, the consent given to the applicant to occupy the suit land was void, almost ab initio. Whether the applicant occupied the suit land without the consent of the said Albert Murera Ngaruni (deceased) in 1993 or some years later on, he has occupied the suit land for a period of over 12 years without their consent. He is therefore, entitled to a declaration that he has become the proprietor of the apposite land through the doctrine of adverse possession.

34. Although I do find that the applicant is entitled to ownership of the suit land through the doctrine of adverse possession, and since the applicant had framed the question as to whether or not he was entitled to be registered as owner of 0.12 acres out of Land Parcel Numbers KARINGANI/MUGIRIRWA/3677, 3678 and 3679, I find that he is entitled to a declaration that he is entitled to be registered as proprietor of 0.12 acres out of the suit land FOR THE REASON that the agreement between him and the original owner of the suit land was never revoked. The defendants have been declared the true beneficiaries of the estate of the original owner of the suit land. The beneficiaries of the estate of the original owners of the suit land should fulfill the intention of the apposite agreement. It is noted that the agreement did not have a completion date and indeed transfer to the applicant could not be done before the charge on the original land was discharged and this was only done in 2016. I do not need to reinvent the wheel in my postulation of this assertion. The Court of Appeal at Nyeri in the case of Peter Mbiri Michuki versus Samuel Mugo Michuki [2014] eKLR held as follows:

“36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the Limitation of Actions Act applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the Limitation of Actions Act applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.”

35. The applicant is pellucidly in occupation of the suit land. In accordance with section 18(4) of the Limitation of Actions Act he has an equitable beneficial interest in the suit land and his right to recover the suit property was not extinguished by the death of the original owner of the suit land. Also as he has been in occupation of the suit land, in accordance with section 13(1) of the Limitation of Actions Act, he has a legal right to recover the suit land as he has an equitable beneficial interest in the suit land.

36. In the circumstances, I issue judgment for the applicant against the respondents in the following terms:

1. The applicant ELIZAPHAN NTHIIRI RERI is hereby declared proprietor of 0.12 acres out of Land parcel No. KARINGANI/MUGIRIRWA/3677 which is a subdivision of land parcel No. KARINGANI/MUGIRIRWA/365 through the doctrine of adverse possession and /or as an equitable beneficiary in the suit property.

2. DYNAH KANGAI ALBERT, the 1st Respondent, is hereby ordered to subdivide land parcel No. KARINGANI/MUGIRIRWA/3677 and have 0.12 acres thereof given to the applicant and the Land Registrar, Chuka, is ordered to issue a title for the 0.12 acres to the applicant, ELIZAPHAN NTHIIRI RERI **AND** should the said DYNAH KANGAI ALBERT default in the implementation of this order, this court's Deputy Registrar is authorized and empowered to execute all apposite documents **AND** should the land the applicant has been declared owner of through the doctrine of adverse possession and/or as an equitable beneficiary be situated in another portion of the original parcel of Land No. KARINGANI/MUGIRIRWA/365, this court orders that the parcels spawned by the subdivision thereof, to wit, Land Parcel Numbers KARINGANI/MUGIRIRWA/3677, 3678 AND 3679 should be consolidated or amalgamated to revert to the original land parcel No. KARINGANI/NDAGANI/365 and the same should be subdivided and a title for 0.12 acres thereof be issued to the applicant.

3. Any cautions, inhibitions or restrictions, if any exist, placed upon the suit land are hereby vacated and should be removed forthwith to facilitate the implementation of order number 2 herein.

4. Costs shall follow the event and are awarded to the applicant as against the respondents.

Delivered in open Court at Chuka this 22nd day of May, 2019 in the presence of:

CA: Ndegwa

I.C. Mugo for plaintiff – absent

Dennis Muthomi h/b Murithi for the Respondent

P. M. NJOROGE,

JUDGE.