



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 15 OF 2017**

**FORMERLY MERU ELC CASE NO. 170 OF 2014 (OS)**

**IN THE MATTER OF 1 ½ ACRE OF LAND WITHIN LAND PARCELNO.**

**MAGUMONI/THUITA/494 REGISTERED IN THE NAMES OF KITHINJI NJOKA, MURITHINJOKA, MUTEMBEI NJOKA**

**LOYFORD MURIUKI RIARA.....1<sup>ST</sup> PLAINTIFF**

**ZIPPORAH MUTHONI RIARA.....2<sup>ND</sup> PLAINTIFF**

**CATHERINE CIANDEKE.....3<sup>RD</sup> PLAINTIFF**

**SUSAN CIAMWARI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KITHINJI NJOKA.....1<sup>ST</sup> DEFENDANT**

**MURITHI NJOKA.....2<sup>ND</sup> DEFENDANT**

**MUTEMBEI NJOKA.....3<sup>RD</sup> DEFENDANT**

**JUSTIN NYAGA NKIINI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In this suit, 2 suits are consolidated. These are Chuka ELC No. 7 of 2017 and Chuka ELC No. 15 of 2017. The consolidated suit has proceeded with Chuka ELC No. 15 of 2017 as the lead file.

2. PW1 Loyford Muriuki, the 1<sup>st</sup> plaintiff, asked the court to adopt his witness statement dated **21<sup>st</sup> April, 2017** as his evidence in this suit. The statement is reproduced herebelow without any alterations or corrections whatsoever. Any spelling or other mistakes are ascribed to the witness or his advocate. The undated witness statement reads as follows:

**WITNESS STATEMENT**

**LOYFORD MURIUKI RIARA**

I, LOYFORD MURIUKI RIARA of ID NO. 11610065 and P. O. BOX 229 Chuka in the Republic of Kenya do hereby wish to state as hereunder:-

That I the 1<sup>st</sup> plaintiff in this suit, whilst the 2<sup>nd</sup> plaintiff is my sister and the 3<sup>rd</sup> plaintiff is my sister in law wife to the late Tirus Murithi Riara who was my brother. Susan Ciamwari is also my sister in law being the wife of my late brother Eustace Marangu. The subject of this suit, land parcel No. Mugumoni/Thita/494 is registered in the name of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the same measures 2.63 Ha.

That whoever, my family has been settled on the subject land for a period of nearly 40 years occupying 1 ½ acres of land out of the aforesated, the same having been acquired by our late mother Agnes Kanyua Riara and our eldest brother Eustace Marangu from the late Ephantus Njoka who is the father of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants back in 1967.

That the late Ephantus Njoka died before transferring the property to my brother and my mother, and thus when his widow filed a succession case, she only listed her sons and herself as the beneficiaries and the land was thus registered in their names without our knowledge.

That unfortunately my eldest brother Eustace Marangu died in the year 1989 and as at the time of this death, he had not yet recovered the land from the defendants. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and the interested party continued to live I that land without any interruptions from the defendants whatsoever until recently.

I was born on that land, am 46 years old and have never known of any other home. I am the last of all my mother's children, and we have all married and set up our homesteads on a portion of land measuring 1 ½ acres within land parcel No. Magumoni/Thuita/494.

The defendants herein have been aware of our presence on that land, never once have they chased any of us away. They watched us bury my late mother and my late brothers namely Eustace Marangu and Tirus Murithi, and never once have they raised any complains or objected as to our claim and occupation of the piece of land therein. They were aware of our rights to the aforesated portion of land until recently when they got greedy and started selling off the parcel of land right to our doorstep.

They have been displacing us and cutting down our crops as well as demolishing our homes and even threatening us with violence. My sister in law's homestead, Catherine Ciandeke has been completely alienated after the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants sold her portion of land to the 4<sup>th</sup> defendant. She is unable to access her crops and even her pit latrine.

It was thus necessary that we filed this suit in order to assert our rights to the parcel of land measuring 1 ½ acres within Magumoni/Thuita/494 and pray that the same be registered jointly in our names as well as Susan Ciamwari.

That is all I wish to state.

**LOYFORD MURIUKI RIARA .....**

**DATED AT MERU THIS UNDATED DAY OF UNDATED 2017**

3. In his oral evidence, PW1 told the court that his mother had bought 1 ½ acres. He admitted that he had no documentary evidence concerning this matter. The court notes that in his witness statement PW1 avers that the land the plaintiffs are claiming was bought by his mother and his late elder brother, Eustace Marangu. He told the court that his mother had paid Kshs.3,000/= which was a tidy sum in 1967. He disowned his statement that the suit land was bought by his mother and his deceased brother. He went on to tell the court that what he was saying concerning purchase of the land was not in his personal knowledge but was what his late mother had told him. I do note that PW5, Susy Ciamwari Eustace told the court that her husband Eustace Marangu only bought 1 acre at a consideration of Kshs.1,000/= from one Ephantus Njoka.4. PW2, Zipporah Muthoni Riara, asked the court to adopt her witness statement dated **21<sup>st</sup> April, 2017** as her evidence in this suit. The statement is reproduced herebelow without any alterations or corrections whatsoever. Any spelling or other mistakes are ascribed to the witness or her advocate. The witness statement dated **21<sup>st</sup> April, 2017** reads as follows:

**WITNESS STATEMENT**

**ZIPPORAH MUTHONI RIARA**

I am an adult female of sound mind working for gain as a peasant farmer in Magumoni location in Tharaka Nithi County within the Republic of Kenya.

That I am the 4<sup>th</sup> born of late Agnes Kanyua Riara and Riara Nkari. We moved to the land parcel No. Magumoni/Thuita/494 in 1967 when I was aged 7 years and we have lived there since. This land was bought by late mother from the late Ephantus Njoka. The land was measuring approximately one and half acres.

When we moved to the said parcel we started developing the land by constructing semi-permanent houses, planting coffee bushes, tea bushes, trees and banana plantations. When my mother and my brothers died, they were buried in the parcel we had occupied as is the tradition of our community.

That on the year 2014, the defendants herein encroached our portion and cut down the trees and even went further ahead to harvest our coffee and tea which we had planted. We immediately reported the matter to Chuka Police Station who later advised us to move to court. Subsequently, we instituted this case in 2014.

In late 2014, the 4<sup>th</sup> defendant herein even went further ahead and erected semi permanent structure our portion of land without our consent. That since the defendants entered our portion I have no other source of income.

The portion of land is ours and has been my home all my life. We have been peacefully living there for over 40 uninterrupted years and we pray that the honourable court asserts our rights to the 1 ½ acres.

That is all I wish to state.

**ZIPPORAH MUTHONI RIARA -----**

**DATED AT MERU THIS 21<sup>ST</sup> DAY OF APRIL, 2017**

5. In her oral evidence, PW2 told the court that the suit land was 1 ½ acres in size and that it was bought by her mother and not by her brother Eustace Marangu, deceased. She told the court that what she was telling the court was what she had been told by her mother as she was only 7 years old when the suit land was bought by her mother. Although she was insistent that her mother bought 1½ acres and not 1 acre, she had no evidence to support the claim that her mother had bought the suit land or that what her mother had purchased was 1 ½ acres and not one acre.

6. PW3 and PW4 by and large relied on what they had been told by Agnes Kanyua Riara, the mother of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs. PW3 sought to offer proof that Eustace Marangu the husband of the 4<sup>th</sup> defendant could not have bought the land because he was a minor in 1967. He, however, owned up that he was never a witness to any written agreement.

7. PW4 laconically told the court that the evidence he was tendering to court was fully reliant on what the mother of the plaintiffs had told him. During cross-examination he evinced no knowledge concerning apposite issues including purchase of the land by Agnes Kanyua, the plaintiffs' mother and the area of the land she had bought. Indeed, he admitted that he was not conversant with any issues concerning the suit land.

8. PW4, Susy Ciamwari, the 5<sup>th</sup> defendant, asked the court to adopt her witness statement dated 5<sup>th</sup> June, 2015 as her evidence in this suit. The statement is reproduced herebelow without any alterations or corrections whatsoever. Any spelling or other mistakes are ascribed to the witness or his advocate. The statement, dated 5<sup>th</sup> June, 2015 reads as follows:

**STATEMENT BY SUSY CIAMWARI EUSTACE**

I am the above named person.

I live in Land parcel No. Magumoni/Thuita/494 and I occupy one (1) acre of the said land.

I have lived in the said land since 1979 when I was married by Eustace Marangu Riara – deceased.

It is my husband who bought the said one (1) acre of land parcel no. Magumoni/Thuita/494 in 1967 from one Ephantus Njoka Murua.

It was never transferred into my husband's names.

My husband entered into the land in the year 1967 and started developing the same.

The defendants herein had the said land transferred to them to by way of succession in 1974 vide Chuka DM's court succession cause no. 12 of 1973.

I have exclusively lived on the said one (1) acre of land parcel No. Magumoni/Thuita/494 since I was married.

I have extensively developed the said one (1) acre of land with the following:-

Tea Coffee bananas

Piped water subsistence crops – beans, maize

Gravellier trees sugarcane homestead

I have buried my husband in the said land. he died on 19.5.1989.

My mother-in-law ONE Agnes Kanyua Riara is also buried in the said one (1) acre of land.

I have children who have built houses in the said land.

I would like the court to hold that I have acquired the said land by adverse possession.

That is all that I have to state.

**DATED AT MERU THIS 5<sup>TH</sup> DAY OF JUNE, 2015**

.....

**SUSY CIAMWARI EUSTACE**

**THE PLAINTIFF**

9. By and large, in her oral evidence, PW4's evidence was congruent with her witness statement. She was insistent that the suit land was brought by her deceased husband and that it measured 1 acre and not 1 ½ acres. She, however, did not produce evidence that her husband had bought the suit land.

10. DW1, Kithinji Njoka asked the court to adopt his witness statement dated **27<sup>th</sup> June, 2017** as his evidence in this suit. He also asked the court to adopt the witness statements of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, who were in court, as their evidence in this suit. He told the court that they had given him authority to make this intimation.

11. DW1's witness statement is reproduced herebelow without any alterations or corrections whatsoever. Any spelling or other mistakes are ascribed to the witness or his advocate. The statement, dated **13<sup>th</sup> July, 2017** reads as follows:

**STATEMENT OF KITHINJI NJOKA**

My brother the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and I are the registered owner of land parcel No. Magumoni/Thuita/494.

It's a family land. We occupy the land parcel No. Magumoni/Thuita/494.

It measures 6 ½ acres.

We live in 5 ½ acres. The other 1 acre is occupied by one Susy Ciamwari Eustace (Susan Ciamwari) and the plaintiffs herein.

The plaintiffs do not occupy any part of our 5 ½ acres.

On 4<sup>th</sup> September, 2014, my brothers and I decided to sell ½ acre of land to one Justin Nyaga Nkinyi to enable get money to subdivide our land. We now occupy 5 acres of said land.

We entered into an agreement which was reduced into writing.

We had the land subdivided and the purchaser the 4<sup>th</sup> defendant herein took possession of the said ½ acre, fenced the same in the month he bought (September 2014) and planted his land with maize. He has also installed electricity, water and built a house therein.

He has extensively developed the said ½ acre.

It is not true that we have destroyed any of the plaintiffs' properties.

The trees we cut were in our land and we had a permit.

The plaintiffs were aware of the sale of the ½ acres and they did not object.

About the death threats, the plaintiffs reported to the police who upon investigation found it was all lies.

We have no objection giving 1 acre of land to the wife of Eustace Marangu – one Susa Ciamwari Marangu who had bought land from our late father.

We have never made any attempts to burn the house.

They should have reported to the police.

The plaintiffs have no claim against us.

Their suit should be dismissed.

I am aware that Susan Ciamwari has filed Meru E & L Case No. 35 of 2015 (OS) claiming the said 1 acre.

I pray for the plaintiffs' suit to be dismissed with costs to the plaintiffs.

**DATED AT MERU THIS 13<sup>TH</sup> DAY OF JULY, 2017**

**SIGNED.....**

**(KITHINJI NJOKA)**

12. I find that DW's oral evidence, even during cross-examination was congruent with his witness statement.

13. I find that the oral evidence of DW2 and DW3 was congruent with their witness statements dated **27<sup>th</sup> June, 2017**.

14. I opine that the issues raised in this matter, do not strictly speaking fall within the realm of adverse possession. The 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs seek a declaration by the court that they be registered as proprietors of 1 ½ acres out of land parcel No. Magumoni/Thuita/494. The 4<sup>th</sup> plaintiff seeks a declaration that she has become proprietor of 1 acre of land out of Land Parcel No. Magumoni/Thuita/494 by way of adverse possession. All parties are in agreement that the parties have lived on part of the suit land for decades. The defendants support the 4<sup>th</sup> plaintiff's case that the suit land was bought by her deceased husband. The plaintiffs' counter this assertion by stating that the 4<sup>th</sup> plaintiff's husband was a minor when this land was purchased by their mother in 1967.

15. 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs' submissions are reproduced herebelow without any alterations or corrections. Any spelling or other mistakes are ascribed to the plaintiffs or their advocate. They state as follows:

**YOUR LORDSHIP,**

The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff herein after referred to as the plaintiffs instituted this suit by way of an amended originating summons drawn on the 11<sup>th</sup> day of February 2015.

The plaintiffs prayed for the following orders:-

1. A declaration that LOYFORD MURIUKI RIARA, ZIPPORAH MUTHONI RIARA, CATHERINE CIANDEKE and SUSAN CIAMWARI the plaintiff herein and the interested party have become entitled by way of adverse possession, to 1 ½ acres out of all that parcel of land known as LR. MAGUMONI/THUITA/494 and all interests arising thereof.
2. An order for the rectification of the register and the plaintiffs and the interested party be registered as the sole joint proprietors of 1½ acres of land out of parcel of land known as LR MAGUMONI/THUITA/494.
3. An order that the Defendants herein to execute all the required instruments and or documents to effectuate transfer to the plaintiffs and the interested party 1 ½ acres of land out of land parcel NO.MAGUMONI/THUITA/494 and in default, this Honourable court do empower the Deputy registrar to so execute the transfer instrument on its behalf.
4. This Honourable court do make further orders as it deems fit and expedient to meet the ends of justice.
5. Costs of this suit be borne by the Defendants

**MY LORD**

The plaintiffs through Mr. Loyford Muriuki swore an affidavit on the 11<sup>th</sup> February 2018 stating as follows;

1. **THAT** I have learnt with shock and disdain that the Respondent have sold the suit land to one JUSTIN NYAGA NKINYI and I have been seeing him around our parcel of land being shown around by the Defendants. It was upon inquiry as to the reasons for the trespass that I was informed that the aforesaid JUSTIN NKINYI had purchased ½ an acre out of our 1 ½ acres of land.
2. **THAT** days later he came on to the piece of land and cut down mature trees without any consultation to us he has hived off some part of the tea bushes and our access to the pit latrine by fencing within our homestead.
3. **THAT** the Respondents have cut down several mature trees on our side of the land without giving us any compensation for the same despite the fact that the same is our land. The degree of harassment by the Respondents is not only palling but a great contravention of our constitutional rights.
4. **THAT** the said JUSTIN NYAGA NKINYI has now put up a barbed wire fence which has maliciously prevented our access to our pit latrine and which fence has hived off approximately ½ acres together with the crops therein and which portion has been farmed by my sister in-law CATHERINE CIANDEKE.
5. **THAT** in the last few weeks we have been living as prisoners in our home without access to our home without access to our own facilities and not being able to enjoy the facility we have toyed for years to build.
6. **THAT** our family has lived on the said land since 1970's and today as we speak, the following members of our family live on the said land:-

- a) Zipporah Muthoni Riara
- b) Catherine Ciandeke
- c) Susan Ciamwari
- d) Loyford Muriuki

All the children of our late mother Agnes Kanyua Riara, who gave birth to us on the subject land and raised us, until we buried her on the same land.

7. **THAT** this land has been our home for over 40 years and we have assigned uninterrupted use and occupation of the same land, and we had never had any complaints from the Respondents until now.

8. **THAT** we reported the matter to the area chief in hope that we would talk out the misunderstanding and go back living in unity and harmony like we had in all those years but it was not to be so. (*Annexed herein and marked LMR2 is the chiefs letter confirming the same.*)

9. **THAT** we resulted into reporting the death threats to the public vide OB NO.17/10/2/2015 who summoned the interested party daughter in-law to their offices to explain himself on the charges of threatening my sister CATHERINE CIANDEKE (the 3<sup>rd</sup> applicant).

The Respondents filled a replying affidavit sworn by KITHINJI NJOKA on the 02<sup>nd</sup> March 2015 stating as follows:-

1. **THAT** land parcel NO. MAGUMONI/THUITA/494 is registered in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

2. **THAT** the said land was registered in our names when we were minors vide CHUKA SUCCESSION NO. 12 OF 1973.

3. **THAT** the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants live on the said land Parcel no. MAGUMONI/THUITA/494.

4. **THAT** it is not true that the plaintiff occupy 1 ½ acre of land parcel no. MAGUMONI/THUITA/494 for decades as alleged by the plaintiffs.

5. **THAT** it is not true that the 1<sup>st</sup> plaintiff mother one Agnes Kanyua bought 1 ½ Acres of land from our late father EPHANTUS NJOKA in the names of their elder brother one EUSTACE MARANGU.

6. **THAT** the truth of the matter is that one EUSTACE MARANGU who bought 1 acre of land parcel no. MAGUMONI/THUITA/494 which was registered in the name of our late father.

7. **THAT** the plaintiffs herein live in one acre of land with the permission of the late EUSTACE MARANGU.

8. **THAT** there is no evidence to show that the plaintiff herein are in occupation of 1 ½ acre of land parcel MAGUMONI/THUITA/494.

9. **THAT** we have already sold ½ acre of our land Parcel no. MAGUMONI/THUITA/494 to JUSTUS NYAGA NKINYI to enable us subdivide our land.

10. **THAT** the said NYAGA NKINYI has taken possession of the said land and has extensively developed it.

11. **THAT** the plaintiffs have been squatting on the 1 acre purchased by MARANGU.

12. **THAT** we have no objection to SUSANCIAMWARI EPHANTUS getting her late husband said 1.0 acre of land parcel.

**YOUR LORDSHIP,**

On the 30<sup>th</sup> January 2018, the parties agreed to visit the *locus in quo* in presence of the Executive Officer.

And the 13<sup>th</sup> September 2018 at 2;30 pm, the Executive Officer visited the *locus in quo* in presence of all parties and their Advocates.

The Executive Officer addressed the parties on the parties on the issues and took evidence of the plaintiffs who started as follows;

“I am the 1<sup>st</sup> plaintiff in this matter and speak on behalf of all plaintiffs, I was born in 1971 and I am now 47 years old. I have lived and brought up on this land parcel no. MAGUMONI/THUITA/494. I am the last born of my mother. We are all married and set up our homestead at this portion land measuring 1 ½ acres we have never known any other home other than where we live at the moment.”

We have been living in this land since 1967 before I was born. The land was acquired by our late mother AGNESS KANYUA RIARA and late elder brother Eustace Marangu from the late EPHANTUS NJOKA the father to the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The father to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The father to the Defendants died before transferring land to us.

When our mother and two brothers died EUSTACE MARANGU and TIRAS MURITHI we buried them at this parcel of land and non of these Defendants complained we know no other home, we have built our homes and settled at this piece of land MAGUMONI/THUITA/494

without interruption for more than 50 years and we wonder why they would like to displace us right now.

This problem started recently in the year 2014 after they realized that the land is registered in their names through a succession cause which was secretly filed. The Defendants started alienating our piece of land by selling part of the land to the 4<sup>th</sup> Defendants without our knowledge.

They have been displacing us and cutting down our crops trees, coffee bananas as well as demolishing our homes and threatening us with violence hence necessitating filing of this suit in 2014 at Embu High court which was subsequently transferred to ELC Court.

1<sup>st</sup> Defendant state that he was speaking on behalf of the Defendants. He further said that EUSTACE MARANGU the elder brother to 1<sup>st</sup> and 2<sup>nd</sup> plaintiff bought 0.50 acres of land from their late father EPHANTUS NJOKA from LR. MAGUMONI/THUITA/0.50 ACRES.

SUSA N CIAMWARI- INTERESTED PARTY stated that she is a wife of late EUSTANCE MARANGU who died in 19<sup>th</sup> may 1989. She got married in 1979. She lived in land no. MAGUMONI/THUITA/494 and occupy one acre.

It was her husband who bought it in the year 1967 from EPHANTUS NJOKA father to Defendants.

JUSTIN NYAGA NKINYI stated that he bought ½ acre from 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 2014 which was exercised from MAGUMONI/THUITA/494.

And Executive officer took a walk and observed as follows;-

- a) There was a mud house belonging to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs mother and interested party mother in-law.
- b) Semi permanent house constructed by the 1<sup>st</sup> plaintiff.
- c) Temporary timber house belonging to 2<sup>nd</sup> plaintiff.
- d) Mud house for the 3<sup>rd</sup> plaintiff wife to late TIRAS MURITHI encroached by the fence put by 4<sup>th</sup> Defendant.
- e) Semi-permanent house for the interested party wife to EUTACE MARANGU.
- f) Tea plantation, coffee, bananas.
- g) Subsistence crops such as maize and beans.
- h) Graveyard of their late mother and 2 brothers
- i) Cowshed.
- j) Trees some of which were cut down from the disputed portion of land.
- k) The boundary separating the three plaintiffs, interested party and the Three Defendants.
- l) Cowshed appeared to have been constructed by the Defendants recently.
- m) All those houses are adjacent to one another.

And the E.O made the following findings;-

1. THAT the plaintiffs and members of their family including the interested party (SUSAN CIAMWARI) lives and have been living on the property in issue LR MAGUMONI/THUITA/494 for considerable long time without any interruption or any dispute until the year 2014.
2. The dispute started in 2014 when the Defendants sold a piece of land measuring ½ acre to subdivide from the land that the plaintiff consider to be their home to the 4<sup>th</sup> Defendant.
3. A piece of land sold to the 4<sup>th</sup> Defendant has encroached the 3<sup>rd</sup> Plaintiff house.

#### **ISSUES FOR DETERMINATION**

1. WHETHER the plaintiff have been in actual possession of 1 ½ acres of land parcel no. MAGUMONI/THUITA/494?
2. WHETHER the plaintiffs have been in continuous exclusive and uninterrupted adverse possession of the land for more than 12 years?

3. WHETHER the said possession was exclusive without force or fraud?

4. WHETHER the plaintiffs are entitled to 1 ½ acres of land under the doctrine of adverse possession?

### **AGREED ISSUES**

1. **THAT** all the plaintiffs and the interested parties currently occupy 1.0 acres of land parcel no. MAGUMONI/THUITA/494.

2. **THAT** they have been in occupation since the year 1967 to date and for the 4<sup>th</sup> plaintiff interested party since 1979 when she married.

3. **THAT** the Defendants have sold ½ acre out of land parcel no. MAGUMONI/THUITA/494.

### **FACTS**

YOUR LORDSHIP, from the testimony of the plaintiffs the following facts have been established and proved;

1. **THAT** the plaintiff are in occupation of land parcel no. MAGUMONI/THUITA/494 and that they have been in such possession since the year 1967.

2. **THAT** the plaintiffs have they been occupying and utilizing 1 ½ acres of land Parcel NO. . MAGUMONI/THUITA/494 since the year 1967. When they were born and brought up until the year 2014 when the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sold off ½ an acre to the 4<sup>th</sup> Defendants.

3. **THAT** the 4<sup>th</sup> plaintiff allegation that her husband Eustace Marangu purchased 1.0 acres from Ephantus Njoka (father to 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants) are un true and farfetched for the reasons **THAT**:-

- From the evidence of the plaintiffs and their witnesses it came out clearly that the year 1967 the said Eustace Marangu was a minor and still in primary school.
- That the Defendants and the 4<sup>th</sup> plaintiff are acting in connivance to create their own theory in order to evict the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs from their ½ acres of their land. M/S NYAMU NYAGA & CO. ADVOCATES has been acting for both the plaintiff and the Defendants in her testimony the 4<sup>th</sup> plaintiff admitted in cross examination that her Advocate was NYAMU NYAGA. He recorded her statements dated 27<sup>th</sup> June 2017, case summary dated 24<sup>th</sup> Day of August 2017, issues for determination dated 24<sup>th</sup> Day of August 2017 amongst other documents. It is clear that the Defendants and 4<sup>th</sup> plaintiff have been working in cahoots.
- That the plaintiffs have extensively developed on the subject suitland. They have constructed their homes thereon.
- That the 3<sup>rd</sup> plaintiffs house ha sand toilet has been encroached by a fence that was been put by the 4<sup>th</sup> Defendant.
- That the plaintiff occupation has been un hindered, notorious, undisturbed and uninterrupted since the year 1967.

### **CONCLUSION**

Your Lordship, the plaintiffs and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been living on land parcel NO. MAGUMONI/THUITA/494 in peace and without any dispute since the year 1967. Trouble begun when the 4<sup>th</sup> Defendant purchased ½ acre that has been in utilized of the plaintiffs.

It is our humble submissions that the plaintiffs have occupied 1 ½ acres of land of LR MAGUMONI/THUITA/494 for close to 50 years. That occupation has been open un interrupted, notorious and undisturbed and uninterrupted.

And it is the plaintiff prayer that the 1 ½ acre prayed for, be registered in the name of all plaintiffs.

**DATED AT CHUKA THIS 25<sup>TH</sup> DAY OF JANUARY, 2019**

**FOR: KIJARU, NJERU & CO. ADVOCATE FOR THE PLAINTIFFS**

16. The 4<sup>th</sup> plaintiffs' final submissions are reproduced herebelow without any corrections or alterations. Any spelling and other mistakes if there are any, are ascribed to the 4<sup>th</sup> plaintiff and his advocate.

1. Your lordship the 4<sup>th</sup> plaintiff's suit commenced as MERU CIVIL SUIT NO 35 OF 2015 (O.S). Upon E & L court commencing operations in Chuka the same was transferred to this court as Chuka E.L.C case no 15 of 2017. By Chuka E & L Court case no 15 of 2017 (O.S) the 4<sup>th</sup> plaintiff sought for an order of this court for a declaration that she is entitled to one acre out of LR; MAGUMONI/THUITA/494 registered with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. She claimed the one acre under the doctrine of adverse possession.

2. At the same time the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed Meru E & L Court case no 170 of 2014 (O.S). The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants at one point in time named the 4<sup>th</sup> plaintiff as an interested party. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on their hand were claiming 1.50 acres out of LR; MAGUMONI/THUITA/494 which was and still is under the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That Meru civil suit no 170 of 2014 was transferred to Chuka E & L Court as number 7 of 2017. The difference between the O.S by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and the 4<sup>th</sup> plaintiff is that the 4<sup>th</sup> plaintiff claim only one acre while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs claim 1 ½ acres.

3. The defendants in both cases Chuka E & L court case no 15 of 2017 and Chuka E & L Court civil case no 7 of 2017 were the same. This situation prompted the 4<sup>th</sup> plaintiff who was named as an interested party in number 15 of 2017 to move the court for consolidation of the two suits vide the application dated 9<sup>th</sup> October 2017. The court allowed the application for consolidation by the 4<sup>th</sup> plaintiff. The matter proceeded with number 15 of 2017 as the lead file. It is at this point that the 4<sup>th</sup> plaintiff graduated from being an interested party and became the 4<sup>th</sup> plaintiff.

4. The 4<sup>th</sup> plaintiff's case is that her husband one EUSTACE MARANGU purchased one acre in 1967 from EPHANTUS NJOKA MURUA. The 4<sup>th</sup> plaintiff started living on this land in 1978 when she got married to EUSTACE MARANGU. She has been living on this land from that time to date. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants recognize and acknowledge that EUSTACE MARANGU the husband of the 4<sup>th</sup> plaintiff indeed purchased an acre out of LR; MAGUMONI/THUITA/494. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs also do not deny that the 4<sup>th</sup> plaintiff has been living on this land for all this time. The 4<sup>th</sup> plaintiff however has testified that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs wants her to move out of LR; MAGUMONI/THUITA/494. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs however do not deny that the 4<sup>th</sup> plaintiff is on one acre out of LR; MAGUMONI/THUITA/494.

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs case is that their mother (who is also the mother of the husband to the 4<sup>th</sup> plaintiff) AGNES KANYUA bought 1.50 acres from EPHANTUS NJOKA. Of interest to note is that all the plaintiffs state that they bought the land from one source that is EPHANTUS NJOKA MURUA. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs also have testified that they have occupied and cultivated 1 ½ acres out of LR; MAGUMONI/THUITA/494 from the time they were born. They are still on the land.

6. Your lordship there are two emerging issues for determination in this case which are;

(i) Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs have been in occupation of part of LR; MAGUMONI/THUITA/494 for a period in excess of twelve years and whether the occupation was open exclusive and without interruption?

(ii) Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs actually occupy in aggregate 1 acre or 1 ½ acres out of land parcel LR; MAGUMONI/THUITA/494?

(iii) Whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are entitled to be registered with 1 acre or 1 ½ acres out of land parcel LR; MAGUMONI/THUITA/494?

7. Your lordship the defendants jointly and severally are in agreement that the plaintiffs are in occupation of a portion out of the suit land. In fact the defendants are willing to transfer to the 4<sup>th</sup> plaintiff one acre out of LR; MAGUMONI/THUITA/494. They are in agreement that all the plaintiffs have been in occupation and use of one acre out of LR; MAGUMONI/THUITA/494 for a period in excess of twelve years. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are in agreement that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs have acquired some part of LR; MAGUMONI/THUITA/494 under the doctrine of adverse possession. The difference between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs is the contention by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs that AGNES KANYUA bought 1 ½ acres out of LR; MAGUMONI/THUITA/494 from EPHANTUS NJOKA. Seemingly if all the plaintiffs were claiming one acre out of LR; MAGUMONI/THUITA/494 the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants would not be having any problem in transferring the said acre to all the plaintiffs.

8. The 4<sup>th</sup> plaintiff on her hand accuses the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs of cheating that AGNES KANYUA bought 1 ½ acres out of LR; MAGUMONI/THUITA/494. The 4<sup>th</sup> plaintiff's stand is that it was EUSTACE MARANGU her husband who bought one acre and not AGNES KANYUA the mother of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs who bought 1 ½ acres. The 4<sup>th</sup> plaintiff can only be described as a very honest person. She could have colluded with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs to get a bigger portion. Despite that a human being is selfish and will always look at his/her goal the 4<sup>th</sup> plaintiff has decided to come out clean. She could have told the court that they occupy 1 ½ acres so that if they share she would definitely get a big share. She has decided to speak the truth and the truth should set her free.

9. Your lordship there is no doubt that the plaintiffs have been in exclusive occupation and use of a portion either of 1 ½ acres according to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs or one acre according to the 4<sup>th</sup> plaintiff for a period in excess of twelve years. The 4<sup>th</sup> plaintiff for example has been on this particular portion since 1978 a period that boils to 30 years. This fact is not denied by the defendants. On the other hand the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs have been in occupation of the contested portion from the time they were born. The difference between the plaintiffs and the defendants is anchored on the portion that was bought and not whether they have been in occupation of the land for a period in excess of twelve years. The occupation was open, exclusive and uninterrupted. One point that came out from the 4<sup>th</sup> plaintiff is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs were licensees of EUSTACE MARANGU. Although they were the family of the said EUSTACE MARANGU the arrangement with the mother of the husband to the 4<sup>th</sup> plaintiff was the mother and MURUNGI's siblings were to move out of the one acre they had purchased upon purchasing their own land. They have never moved even after purchasing their own pieces of land.

10. In conclusion your lordship we urge this court to make a finding and hold that the 4<sup>th</sup> plaintiff has acquired an overriding interest in the nature of adverse possession in LR; MAGUMONI/THUITA/494. It is the 4<sup>th</sup> plaintiff's submissions that she and the other plaintiffs have been in occupation of one acre out of LR; MAGUMONI/THUITA/494 and not one and half acres as alleged by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs.

The 4<sup>th</sup> plaintiff wishes to be honest and transparent and void of any fraud. If she wanted to be fraudulent she would have joined the other plaintiffs to claim one and half acres instead of the one acre she is claiming. After all sharing one and half acres will give the claimant a bigger portion than when the portion being shared is one acre.

11. We rest our submissions and pray.

**DATED AT CHUKA THIS.....13<sup>TH</sup> .....DAY OF...DECEMBER,.....2018**

**DRAWN AND FILED BY**

.....

**I.C MUGO & CO ADVOCATES**

17. 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' submissions are reproduced herebelow without any corrections or alterations. All spelling and other mistakes, as they may be there, are ascribed to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and their advocate.

**A. INTRODUCTION**

1. Your Lordship, this suit **ELC NO. 15 OF 2017** is consolidated with **ELC NO. 7 OF 2017**.

In **ELC NO. 15 OF 2017**, **LORFORD MURIUKI RIARA, ZIPPORAH MUTHONI RIARA** and **CATHERINE CIANDEKE** are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs respectively while **KITHINJI NJOKA, MURITHI NJOKA, MTEMBEI NJOKA** and **JUSTIN NYAGA NKINYI** are the defendants.

One **SUSAN CIAMWARI** also known by the name **SUSY CIAMWARI EUSTACE** was enjoined in this case by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs as an interested party.

2. In **CHUKA ELC NO. 7 OF 2017**, **SUSY CIAMWWARI EUSTACE (who is enjoined as the interested party in this case)** is the plaintiff while **KITHINJI NJOKA, MURITHI NJOKA** and **MUTEMBEI NJOKA** are defendants.

3. When this case was consolidated with **CHUKA ELC NO. 7 OF 2017**, **LOYFORD MURIUKI RIARA, ZIPPORAH MUTHONI RIARA** and **CATHERINE CIANDEKE** became the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs respectively while **SUSY CIAMWARI EUSTACE** alias **SUSAN CIAMWARI** became the 4<sup>th</sup> plaintiff and the lead file became **ELC NO. 15 OF 2017 (this case)**.

4. Your Lordship, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' claim is based on the Amended Originating Summons dated **11/2/2015**. In the said Amended Originating Summons, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs pray for the Honourable Court to determine the following grounds:-

- 1. Have the plaintiffs occupied LAND PARCEL NO. MAGUMONI / THUITA / 494. (referred to as suit land) for more than 12 years?**
- 2. Have the plaintiffs' occupation been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years?**
- 3. Have the plaintiffs been in occupation of the suit land since the year 1967?**
- 4. Have the plaintiff become entitled to the suit land by way of adverse possession?**
- 5. Have the defendants ever occupied the suit land?**

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs in their amended originating summons therefore pray for issuance of the orders that:-

- 1. A declaration that LOYFORD MURIUKI RIARA, ZIPPORAH MUTHONI RIARA, CATHERINE CIANDEKE and SUSAN CIAMWARI the plaintiffs herein and the interested party have become entitled by way of adverse possession, to 1 ½ Acres out of all that parcel of land known as L.R NO. MAGUMONI / THUITA / 494, and all interests arising thereof.**
- 2. An order for the rectification of the register and the said plaintiffs and the interested party be registered as the joint proprietors of 1 ½ Acres of land out of parcel of land known as L.R NO. MAGUMONI / THUITA / 494.**
- 3. An order that the Defendants' herein do execute all the required instruments and / or documents to effectuate transfer to the plaintiffs and the interested party 1 ½ Acres of land out of LAND PARCEL NO. MAGUMONI / THUITA / 494 and in default, this honourable Court do empower the Deputy Registrar to so execute the transfer instrument on its behalf.**
- 4. This Honourable Court do make further orders as it deems fit and expedient to meet the ends of justice.**
- 5. Costs of this suit be borne by the Defendants.**

6. The said amended originating summons is supported by the further Supporting affidavit sworn by the 1<sup>st</sup> plaintiff **LOYFORD MURIUKI RIARA** on **11/2/2015**.

7. Your Lordship, upon being served with the amended originating summons, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed reply to the amended originating summons vide replying affidavits sworn by the 1<sup>st</sup> defendant **KITHINJI NJOKA** and 4<sup>th</sup> defendant **JUSTIN NYAGA NKINYI** on **27<sup>th</sup> June 2017** and filed in Court on **13/7/2017** respectively.

8. The interested party also filed her replying affidavit to the amended originating summons vide her replying affidavit sworn on **27<sup>th</sup> June 2017** and filed in Court on **13<sup>th</sup> July 2017**.

9. As regards **CHUKA ELC NO. 7 OF 2017**, the plaintiff therein (**now the 4<sup>th</sup> plaintiff in this case**) claims to be declared the owner of **one (1) acre** of **LAND PARCEL NO. MAGUMONI / THUITA / 494** by way of adverse possession and seeks the Court to determine the following questions:-

**1. Whether the plaintiff has been in occupation of one (1) acre of LAND PARCEL NO. MAGUMONI / THUITA / 494 unhindered, notoriously, undisturbed and uninterrupted for more than 12 years.**

**2. Whether the plaintiff has acquired one (1) acre of land from LAND PARCEL NO. MAGUMONI / THUITA / 494 by way of adverse possession.**

**3. Whether the plaintiff should be declared as the owner and therefore be registered as a sole proprietor of one (1) acre of land to be excised from LAND PARCEL NO. MAGUMONI / THUITA / 494.**

**4. Whether the defendant should be ordered to execute all the relevant documents to facilitate the subdivision and subsequent transfer of the one (1) acre of land to the plaintiff and in default, the Executive Officer of this Honourable Court to sign all the relevant documents to ensure that the said one (1) acre of land is transferred and duly registered in the names of the plaintiff.**

**5. Who pays the costs of this Originating Summons.**

10. After the pleadings were closed, all parties complied with **Order 11 of the Civil Procedure Rules 2010**.

11. It is also worth to note that before this case commenced hearing, the Court had made an order for the visit of the locus in quo which was duly complied with by the Court Administrator (**E.O**), the parties herein and their Advocates.

12. Initially, the Court had ordered that the suit herein be disposed off by way of written submissions but upon application by the defendants, the Honourable Court allowed this suit to be heard by way of viva voce evidence.

Pursuance to this Court's Order that the suit herein be heard by way of viva voce evidence, the same commenced hearing on **29<sup>th</sup> October 2018**.

13. Your Lordship, having done the above brief introduction, we shall now proceed to submit on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

14. In our submissions herebelow, we intend to address the following:-

**a) 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' case / evidence.**

**b) 4<sup>th</sup> plaintiff's case / evidence**

**c) 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' case / evidence**

**d) 4<sup>th</sup> defendant's case**

**e) Issues for determination**

**f) The 1<sup>st</sup> to 4<sup>th</sup> defendants' comments in respect of the report of the Scene visit by Court Administrator on 30/08/2018 in LAND PARCEL NO. MAGUMONI / THUITA / 494.**

**g) What appropriate orders should the Court give in this case?**

We shall also make brief comments on the scene visit by the Court Administrator on **30/08/2018** and then conclude our submissions.

**a) 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' case / evidence.**

15. Your Lordship, at the time of hearing hereof, the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiffs testified and adopted their statement as their evidence in Court.
16. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs called two witnesses namely **PW3** and **PW4** who also gave evidence and adopted their statements.
17. Upon being cross-examined by the defendants' Advocates, **PW1** stated that 1 ½ acres was acquired by his mother **AGNES KANYUA** in **1967**. He stated that he was not born at that time and that he was born in **1971**. He stated that his brother **EUSTACE MARANGU** came into the land in **1967**. He further told the Court that he did not have any sale agreement and he was not aware whether there was any agreement.
18. Upon being cross-examined on **annexture No. 3 (a)** in his supporting affidavit sworn on **3/11/2014** and filed in Court on **5/11/2014** which was a Notice of Motion and a supporting affidavit filed by his brother **EUSTACE MARANGU** to review the Court's Orders in **CHUKA DISTRICT MAGISTRATE'S COURT SUCCESSION CAUSE NO. 12 OF 1973**, he could not explain why **paragraph 3** of the sworn affidavit by **EUSTACE MARANGU** which indicated the size of the land he had bought and had been in occupation was erased and not legible.
19. When asked whether he could see that several portions of the said supporting affidavit sworn by **EUSTACE MARANGU** were erased and whether he had the original, he avoided the question by stating that he did not have the agreement. He denied having interfered with the document. **PW1** never produced the original of the said **annexture 3 (a)** for the Court to see its contents.
20. **PW1** further stated that the succession was filed secretly and he came to know of it in **2014**. However, upon cross-examination by the defendants' Advocates and upon being shown **annexture 3 (b)** in his supporting affidavit sworn on **5/11/2014**, which was the ruling of the Court dated **27/5/1976**, he never answered and instead he responded that he does not agree that his brother bought 1 acre.
21. **PW1** admitted that the 4<sup>th</sup> plaintiff was the wife of **EUSTACE MARANGU** but when asked whether he is aware that she was asking for 1 acre bought by her husband, he responded that he can confirm that they live in the same compound.
22. **PW1** ensured that he avoided the questions. He is not a truthful witness.
23. Further your Lordship, **PW1** confirmed that there were several graves in the portion of the land they live and none of the graves was on the ½ acre sold to the 4<sup>th</sup> defendant. He further stated that it is true demarcation was being done to straighten the boundary although he did not agree with it.
24. **PW1** confirmed that himself, the 4<sup>th</sup> plaintiff and **ZIPPORAH** had tea and they did not have any problem concerning tea. **PW1** further confirmed that there was no live fence when the Court visited the land. He stated that all what he told the Court about the purchase of **1½ acres** of land is what his mother told him and he did not have any supporting documents.
25. Upon being cross-examined by the 4<sup>th</sup> plaintiff's Advocate, **PW1** told the Court that he could not produce in Court any agreement to show that his mother participated in the sale of the land. He denied that **EUSTACE MARANGU** had allowed them in the disputed portion of land so that they move out once they purchase their own land.
26. Upon being re-examined by his Advocate, **PW1** insisted that they entered into the land in **1967** and that it is his mother who bought the land. He told the Court that in **1967**, his brother **EUSTACE MARANGU** was in Njuri Primary school. He stated that they have always been in occupation of the **1½ acre** of land and that ½ acre belonging to the 4<sup>th</sup> defendant was part of their land. He further told the court that there is tea, toilet and coffee in the said ½ acre of land and that part of her sister-in-laws house is in the ½ acre. He stated that the trees which were in the ½ acre of land were cut down by the 4<sup>th</sup> defendant and his sister –in-law **CATHERINE CIANDEKE** reported the matter to the police when the property was destroyed.
27. Although **PW1** told the Court that there was **OB** number which was part of his documents, none was produced in court.
28. **PW2** also gave evidence in Court. She adopted her statement. She stated that she knew the 4<sup>th</sup> plaintiff was married in **1978**. She stated that the 4<sup>th</sup> plaintiff was found on the land when she was married.
29. Upon being cross-examined by the counsel for the defendants, **PW2** told the Court that she was **7 years** in **1967**. She stated that she never witnesses any agreement between her mother and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' father because she was not there.
30. **PW2** stated that it is her mother who bought **1½ acre** of land. She stated that she has never taken the surveyor because the land was intact.
31. **PW2** further stated that there was encroachment of property but upon being asked by the defendants' advocates whether anybody was charged, she stated nobody was charged. **PW2** stated that he sister – in- law house had been affected and her latrine taken by the 4<sup>th</sup> defendant.
32. As regards the graves, **PW2** stated that all the graves are on the portion they occupy. **PW2** further told Court that there were no graves in the ½ acre of land and that they live with the wife of **EUSTACE MARANGU** on the land. **PW2** further told the Court that there have not been blocked at all.
33. On being cross-examined by the 4<sup>th</sup> plaintiff's Advocates **PW2**, stated that she does not have any document to show that it is her mother who bought a portion of **PARCEL NO. 494** but insisted that it is her mother who bought the land and not **EUSTACE MARANGU**.

34. PW2 further told the Court that **EUSTACE MARANGU** was in school. She stated that only males were being registered with land. PW2 further told the Court that in **1967**, **EUSTACE MARANGU** was in Njuri Primary school and he married in **1978**. She stated that her mother was a business lady but did not have documents to prove that her mother was a business lady. She stated that **EUSTACE MARANGU** was not employed. She insisted that her mother bought **1 ½ acre** and not 1 acre. She denied that they were not pushing the 4<sup>th</sup> plaintiff out of the land and that she was the wife of their brother and they love her so much.

35. Upon being re-examined by her advocate, **PW2** stated that they did not go to Court because the 4<sup>th</sup> plaintiff was being given 1 acre but because of the intruder. She stated that the 4<sup>th</sup> defendant has not fenced the land.

36. However, on being re-examined further, **PW2** stated that there is a barbed wire put up in **2014**. **PW2** stated that they have lived in the land peacefully since **1967**. That they all live in the land together with the 4<sup>th</sup> plaintiff and nothing belonging to the 4<sup>th</sup> plaintiff was touched.

37. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs also called **PW3**. **PW3** stated that he knew both the plaintiffs and the defendants. **PW3** adopted his statement.

38. Upon being cross-examined by the defendants' Advocates, **PW3** stated that he knew **EPHANTUS NJOKA and AGNES KANYUA RIARA**. He stated that **AGNES KANYUA RIARA** told him that she had bought **1½ acre** of land from **EPHANTUS NJOKA**. He stated that he was not there when land was bought.

39. **PW3** stated that he knew **ELISIUS NGAI MURUA (DW2) brother to EPHANTUS NJOKA**.

40. **PW3** told the Court that he was present when the land was measured but did not have documents to confirm the measurements because he was not the owner of the land. He stated that **EPHANTUS NJOKA** died before he could transfer the land to **AGNES KANYUA RIARA**. **PW3** stated that the intention was to register the land in the name of **AGNES KANYUA RIARA** and not in the name of **EUSTACE MARANGU**, husband to **SUSAN CIAMWARI**. He stated that **AGNES KANYUA RIARA** did not tell him about any witness when she bought **1½ acre** of land. He told the Court that she never told him that there was any written sale agreement between her and **EPHANTUS NJOKA**.

41. **PW3** further told the Court that **AGNES KANYUA RIARA** never told him about the purchase price. He further told the court that in **1967**, **MARANGU** was in **standard 7** and could not buy land. He disputed that **MARANGU** was a grown up in **1967**. **PW1** stated that he was circumcised together with **MARANGU** in **December 1967** and he had not worked. He told the court that he did not have any documents to show that in **1967**, **MARANGU** was in **standard 7** or in primary school.

42. Upon being re-examined by the plaintiffs' advocates, **PW3** stated that the plaintiffs occupy **1½ acres** of land and that land was measured. **PW3** reiterated that **AGNES KANYUA RIARA** intended the land to be registered in her name.

43. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs also called **PW4** as their witness. In his evidence, in Court, **PW4** stated that he used to visit the plaintiffs in **1960s** when he was a young boy. He told the court that in **1967**, he was **7 years** having been born on **14/04/1960**. **PW4** stated that he has never seen a written agreement relating to sale of the subject land.

44. In a nutshell, **PW4** stated that all what he can say is what **AGNES KANYUA RIARA** told him. On being asked whether he has ever taken any measurements of the subject land, **PW4** stated that he has never done so. He stated that it is **AGNES KANYUA RIARA** who told him about the area of the land. He told the Court that it is not possible to tell the size of the land by looking and seeing. He told the Court that properties were destroyed but he never recorded any statement with the police about the destruction. He did not have any statement recorded by the plaintiffs in the police station either.

45. **PW4** could not remember the year **AGNES** died. He stated that he was **48 years** when **AGNES** died. He stated that he does not agree that **MARANGU** bought **1 acre** of land from **NJOKA** because he (**MARANGU**) was in school in **1967**. **PW4** stated that he had no evidence to prove or show that **MARANGU** was in school in **1967**. He also told the Court that **MARANGU** was **15 years** older than him.

#### **b) 4<sup>th</sup> Plaintiff's Case / Evidence**

46. The 4<sup>th</sup> plaintiff's case is that she is the wife to the late **EUSTACE MARANGU**.

In her evidence in Court, **PW4** stated that it is her husband who bought the land from the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' father one **EPHANTUS NJOKA** and that her husband paid **EPHANTUS NJOKA Kshs. 1,000/=**. She stated that the land her husband bought was **1 acre** in size.

47. **PW5** stated that her husband bought the said 1 acre of land in **1967**. She further stated that she was married by **EUSTACE MARANGU** in **1979** and it is her husband who told her that he had bought the land in **1967**. She further told the Court that her husband informed her that he had allowed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs in his 1 acre so that they could later vacate his land when they buy theirs. She stated that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs are lying that the land was bought by their mother in the name of her husband as a trustee for the family.

48. **PW5** further stated that her husband, her husband's mother and her husband's brother, one **Murithi** are buried in the 1 acre and not outside **1 acre** they occupy. She further stated that when the Executive Officer visited the land, there was a fence separating 1 acre and the defendants' land and that the fence was where 1 acre was supposed to be. She stated that there was a mud house affected by the fence when the boundary was being straightened.

49. **PW5** further told the court that the said fence did not affect the 1 acre which her husband had bought. That herself and the plaintiffs were aware when the fence was straightened. She told the court that the plaintiffs came to Court because they don't like her. She stated that she was aware that the 4<sup>th</sup> defendant bought the land next to the said **1 acre** and he has a house therein. She further stated that her husband was of age in **1967** having been born in **1947**. She told the court that there was a mistake in the death certificate which showed that her husband was **39 years** when he died. She told the Court further that she is not the one who went for the death certificate and that it was the 1<sup>st</sup> plaintiff who went to collect the death certificate for her husband.

50. **PW5** further told the court that she got a copy of the Death Certificate from **LOYFORD MURIUKI** the 1<sup>st</sup> plaintiff and she did not notice the said mistake in the death certificate until later when she was in the Advocates office. She stated that she could not take action after realising the said mistake in the death certificate because she has health problems.

51. **PW5** further told the court that she has no road of access from her homestead and she has to use the side of the Nyayo tea zone to access the road. That the plaintiffs had also burnt her fence and almost brought it down. She further told the court that the 1<sup>st</sup> to 4<sup>th</sup> defendants never destroyed the plaintiffs' coffee as alleged by the plaintiffs. She stated that it is not true that she was colluding with the defendants to kick out the other plaintiffs from the suit land.

52. **PW5** further told the court that she did not have documents to show that her husband bought land in **1967** because there were no such documents. She told the court that when she got married, only **Murithi** had built on the land and others put up their houses recently. She stated that the coffee before the fence belong to **KITHINJI NJOKA**. When asked by the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants' Advocates about the latrine belonging to **CATHERINE**, **PW5** stated that she did not know about the latrine because she does not live there. She told the court that she did not go there when the fence was being put up but she knows it cut a small size of Catherine's house. She stated that she sees the fence from the road. She further stated that there was coffee belonging to her husband and that of **KITHINJI** the 1<sup>st</sup> defendant. She reiterated that it is **LOYFORD MURIUKI RIARA**, the 1<sup>st</sup> plaintiff who went to take the Death Certificate for her husband.

53. As regards her statement to her advocates, **PW5** stated that it would have made no difference even if she was to record her statement in another advocate's office. She reiterated that the plaintiffs were cheating when they say that it is their mother who bought the land.

54. **PW5** further stated she has her coffee and tea and the coffee that the 4<sup>th</sup> defendant has belongs to **KITHINJI** the 1<sup>st</sup> defendant herein. She stated that the subject parcel of land is **1 acre** and that the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants were small children when her husband bought the land.

#### **c) 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' case / evidence**

55. The 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants' case is that they are the registered owners of **LAND PARCEL NO. MAGUMONI / THUITA / 494**. That their father **EPHANTUS NJOKA** sold 1 acre of land to one **EUSTACE MARANGU** in **1967**. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants vehemently deny that **AGNES KANYUA RIARA** bought **1½ acres** of land from their father in **1967** as alleged by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs.

56. 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants further stated that they sold **½ acre** of **LAND PARCEL NO. MAGUMONI / THUITA / 494** to the 4<sup>th</sup> defendant and that the 1 acre of land their father sold to **EUSTACE MARANGU** the husband to the 4<sup>th</sup> plaintiff is intact and they are willing to give the said 1 acre to the wife of **EUSTACE MARANGU** the 4<sup>th</sup> plaintiff.

57. During the hearing of the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants case, **DW1** testified. He adopted his statement as part of his evidence. He also prayed to the court to look at the statements of the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants who were present in court.

58. When **DW1** testified, he told the court that together with their mother **LYDIA RUGURU** who was their guardian had filed **CHUKA DM'S CASE NO. 17 OF 1979** seeking orders to evict **EUSTACE MARANGU** but the case was dismissed by the court for lack of jurisdiction. Subsequently their uncle one **ELISIUS NGAI MURUA (DW2)** informed them that it is true that their father had sold 1 acre of land to **EUSTACE MARANGU** and they should not evict him.

59. **DW1** further stated that **EUSTACE MARANGU** had attempted to challenge the orders given in **SUCCESSION NO. 12 OF 1973** at Chuka Law Courts by way of review but his application was dismissed on **29/1/1974**. He stated that there was no time **EUSTACE MARANGU'S** mother sued them claiming **1½ acres** of **LAND PARCEL NO. MAGUMONI / THUITA / 494**.

60. **DW1** stated that when the Executive Officer visited the land, the portion sold to the 4<sup>th</sup> defendant had coffee and tea which his father left to him (**DW1**). As regards coffee and tea in **1 acre**, **DW1** stated that they belong to **EUSTACE MARANGU**.

As for the mud house on the border, **DW1** stated that the same was touched when the boundary was being straightened to give **SUSAN** the 4<sup>th</sup> plaintiff the parcel which **EUSTACE MARANGU** had bought.

61. **DW1** stated that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' claim is baseless and they were lying to court. He stated that the **1 acre EUSTACE MARANGU** bought should go to **SUSY CIAMWARI**. That the claim by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs should be dismissed.

62. Upon being cross-examined by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' advocates, **DW1** stated that there was a boundary between the land **EUSTACE MARANGU** had bought and their land which was made of Mikungugu trees. He further stated that they sold a portion to the 4<sup>th</sup> defendant up to Catherine's house. He stated that before he sold the land to the 4<sup>th</sup> defendant he was the one who was utilizing the said land and he had

not gone beyond the boundary. He reiterated that it was when the boundary was being straightened that Catherine's mud house was touched. As regards the latrine, **DW1** stated that the boundary does not touch Catherine's latrine and that the toilet on the side he was utilizing before he sold ½ acre to the 4<sup>th</sup> defendant belongs to him (**DW1**).

63. **DW1** further stated that after the 4<sup>th</sup> defendant moved to his portion (½) acre, he increased coffee and planted maize and that during the visit by the Executive Office, the maize had been harvested. He stated that he was born in 1967 and when **MARANGU** bought the land, he was a toddler and could not have known about the sale. He reiterated that the coffee on ½ acre belongs to him. He gave the court his coffee and tea numbers.

64. On being cross-examined by the 4<sup>th</sup> plaintiff's advocate, **DW1** satiated that the 4<sup>th</sup> plaintiff is the one in the 1 acre although they live in the said 1 acre together with the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs.

65. **DW1** further told the Court that he came to know about **EUSTACE MARANGU'S** buying of the land in 1979 when they were in court at Chuka and not 1973 as he had earlier told the court. He stated that trees divided the 1 acre from the rest of the land. He stated that the 4<sup>th</sup> defendant is not in 1 acre belonging to **EUSTACE MARANGU**.

66. As regards the toilet which the 4<sup>th</sup> defendant was using, **DW1** stated that it belongs to him and he built it.

67. The 1<sup>st</sup> to 3<sup>rd</sup> defendants also called **DW2** as their witness. **DW2** is brother to the 1<sup>st</sup> to 3<sup>rd</sup> defendants' father the late **EPHANTUS NJOKA**. **DW2** adopted his statement dated 27/6/2017 as his evidence.

68. **DW2** told the court that he was present when his brother sold 1 acre of land to **EUSTACE MARANGU**. He confirmed that he told **KITHINJI** that **EUSTACE MARANGU** had bought 1 acre of land from their father. He stated that before the 4<sup>th</sup> defendant bought the land, it was being used by **KITHINJI** and not **EUSTACE MARANGU'S** family.

69. On being re-examined, **DW2** stated that **EUSTACE MARANGU** was shown the land by his brother **EPHANTUS NJOKA** when he sold the land to him and it was the same area they still occupy.

#### **d) 4<sup>th</sup> Defendant's Case**

70. The 4<sup>th</sup> defendant gave evidence as **DW3**. He relied on his statement and replying affidavit to the Originating Summons. He stated that **EUSTACE MARANGU'S** family live in the said 1 acre and he has fenced all his ½ acre of land. He stated that when the land was being measured so that he can get his ½ acre, it was measured from the edge and straight measurements were made from 1 acre and then his ½ acre land was also measured. He stated that the latrine in his land belong to **KITHINJI** and that his fence touches a little the house of the 3<sup>rd</sup> plaintiff.

71. The 4<sup>th</sup> defendant's (**DW3**) evidence in Court was not challenged by the plaintiffs. It was not shaken even after cross-examination by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' Advocates and the 4<sup>th</sup> plaintiff's Advocates.

#### **e) Issues for determination**

72. Your Lordship, we shall now proceed to submit on issues for determination as follows:-

##### **i) Who bought the disputed land and what size was it?**

73. Your Lordship, the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs allege that the disputed portion of land is 1 ½ acres of land and it was bought by their mother **AGNES KANYUA RIARA** from **EPHANTUS NJOKA** in 1967.

74. During the time of haring hereof, the 1<sup>st</sup> and the 2<sup>nd</sup> plaintiffs testified and called two witnesses. However, it is to be noted that none of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses tendered documentary evidence in court to prove that it is **AGNES KANYUA RIARA** who bought the disputed land.

75. **PW1, PW2, PW3 and PW4** who gave evidence in court stated that it is **ANGES KANYUA RIARA** who told them that she bought 1½ acre in 1967. This was all hearsay which was not supported by any documentary or direct evidence.

76. In 1967, **PW1** had not been born and **PW2** was only 7 years old. In fact none of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses were a party to the alleged purchase of 1½ acre of land by **AGNES KANYUA RIARA**.

77. Further your Lordship, having not been parties to the said alleged agreement between **AGNES KANYUA RIARA** and **EPHANTUS NJOKA**, the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses should have produced in court evidence of measurement of the disputed portion to show that it measures 1½ acre.

78. **PW3** stated that he was present when the land was measured but he did not have any document to show such measurement in court.

79. **PW1** stated that her mother bought 1½ acre of land at a costs of **Kshs. 3,000/=** but he did not produce any purchase or payments

evidence.

80. We submit that in the absence of prove that **AGNES KANYUA RIARA** bought 1 ½ acre of land from **EPHANTUS NJOKA** and taking into account that the evidence of **PW1, PW2, PW3** and **PW4** on how the alleged 1½ acre of land was bought is hearsay, we submit that **AGNES KANYUA RIARA** did not buy any land from **EPHANTUS NJOKA**.

81. The allegations by **PW3** that **AGNES KANYUA RIARA** intended the alleged 1 ½ acre of land to be registered in her name does not hold water as it is in material contraction with the evidence of **PW1** and **PW2** who stated that their mother bought the 1 ½ acre but because she could not use her name as women never used to be registered with the land, she bought it in the name of **EUSTACE MARANGU** in trust for all the family members.

82. Your Lordship, **PW1, PW2, PW3** and **PW4** stated in court that **MARANGU** was in primary school in **1967** and he could therefore not be able to buy land but he never produced any document to show that **EPHANTUS MARANGU** was in primary school in **1967**. In fact **PW3** stated that in **1967, MARANGU** was in class 7 but did not state how old **MARANGU** was in **1967**.

83. Further your Lordship, it is also to be noted that none of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs or their witnesses gave evidence in court when **EPHANTUS NJAGI** was born. Surprisingly your Lordship, there was no document and / or *aota* of evidence that was given and / or demonstrated by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses connecting **AGNES KANYUA RIARA** with the purchase of the said 1½ acres of land.

84. We therefore submit that **AGNES KANYUA RIARA** did not buy 1 ½ acre of land from **EPHANTUS NJAGI** in **1967** and such allegations by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses have no basis.

85. The fact that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs are in occupation of the disputed portion of land does not give them a lee way to make false allegations simply because they don't like the 4<sup>th</sup> plaintiff. The 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs are licensees of the 4<sup>th</sup> plaintiff.

86. In fact, even in their own documents as we shall demonstrate hereinbelow, it is clear that the disputed land is 1 acre and was bought by **EUSTACE MARANGU**. That the allegations by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses that **EUSTACE MARANGU** was in primary and / or class 7 in 1967 is not true and has no basis.

87. Your Lordship, there is overwhelming evidence before this court to prove that the disputed portion of land was bought by **EUSTACE MARANGU** in **1967**.

88. First and foremost, in his sworn affidavit in support of his Notice of Motion for review in **CHUKA DM'S SUCCESSION CAUSE NO. 12 OF 1973, EUSTACE MARANGU** in paragraph 3, depones that he bought the land on 20/11/1967. – See annexure LMR 3(a) of the supporting affidavit to the Notice of Motion by the 1<sup>st</sup> plaintiff sworn on 3/11/2014 and filed in court on 5/11/2014.

89. The said sworn affidavit by **EUSTACE MARANGU** is duly signed by him.

90. During the time of hearing hereof, **PW1** was cross-examined on the said annexure No. LMR 3(a) but he tried to avoid answering questions about it.

91. It is also to be noted that in the said paragraph 3 of the supporting affidavit by **EUSTACE MARANGU** the relevant parts showing the size and / or acreage of the land he bought are purposely erased to ensure that the court does not see that **EUSTACE MARANGU** had bought 1 acre of land and not 1½ acres as alleged by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs.

92. It is also to be noted that in the said Notice of Motion by **EUSTACE MARANGU** in **CHUKA DM'S SUCCESSION CAUSE NO. 12 OF 1973, AGNES KANYUA RIARA** does not feature anywhere.

93. Equally your Lordship, in paragraph 4 of the said supporting affidavit in support of the Notice of Motion by **EUSTACE MARANGU**, although it is also not very legible, it is clear that he depones that he has no other land.

94. The question your lordship is why didn't **AGNES KANYUA RIARA** apply to be enjoined in the said Notice of Motion or jointly file the said Notice of Motion with **EUSTACE MARANGU**?

95. Again your Lordship, in **1979**, vide **CHUKA DM'S CIVIL CASE NO. 17 OF 1979**, which is also annexure No. LMR 4, in the affidavit of the 1<sup>st</sup> plaintiff sworn on 3/11/2014 and filed in court on 5/11/2014, it is clear that the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants through their mother **LYDIA RUGURU** had filed a suit against **EUSTACE MARANGU** and not **AGNES KANYUA RIARA**.

96. Another question that arises is, why didn't **ANGES KANYUA RIARA** apply to be enjoined in the said case if she was the owner of the disputed portion of land?

97. Your Lordship, it is also to be noted that in the annexure LMR5 in the supporting affidavit of the 1<sup>st</sup> plaintiff sworn on 3/11/2014 and filed in Court on 5/11/2014 that when **CHUKA DM'S CIVIL CASE NO. 17 OF 1979** proceeded in court, one **LYDIA RUGURU** who gave evidence in court before the court dismissed the case for want of prosecution stated that the defendant (**EUSTACE MARANGU**) entered into the land in **1967**. **LYDIA RUGURU** does not state that **AGNES KANYUA RIARA** entered into the land in 1967.

98. The 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> defendants and through their mother **LYDIA RUGURU** in **CHUKA DM'S CIVIL CASE NO. 17 OF 1979**, did not sue **AGNES KANYUA RIARA** simply because they did not know her. They knew **EUSTACE MARANGU** as the person occupying the disputed portion and not **AGNES KANYUA RIARA**.

99. Your Lordship, the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' allegations that the disputed portion of land was not bought by **EUSTACE MARANGU** but their mother is further far-fetched in that in **annexture marked LMR1** in the same supporting affidavit by the 1<sup>st</sup> plaintiff sworn on **3/11/2014** and filed in Court on **5/11/2014** is copy of the register for **LAND PARCEL NO. MAGUMONI / THUITA / 494**.

100. In the said register, **Entry No. 2**, there is a caution by **EUSTACE MARANGU** and it clearly shows that he claims his interest as a purchaser. There is no caution placed by **AGNES KANYUA RIARA** as a purchase or otherwise in the Register for the said land.

101. It is therefore clear that even in the documents filed by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs in Court, they show that **EUSTACE MARANGU** is the one who purchased the disputed land and not **AGNES KANYUA RIARA**.

102. Your Lordship, when the **PW5** gave evidence in court, she categorically stated that it is her husband who bought the disputed portion of land and it was 1 acre. Her evidence was meritorious. It was not shaken even after thorough cross-examination by the defendant and the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' advocates.

103. Indeed, the 1<sup>st</sup> defendant's evidence in Court also shows that the subject parcel of land was bought by **EUSTACE MARANGU** and not **AGNES KANYUA RIARA**.

104. It is also to be noted that the brother to the late **EPHANTUS NJOKA MURUA, DW2** gave evidence in Court and stated that he was present when his brother sold the **1 acre** of land to **EUSTACE MARANGU**. **DW2'S** statement and evidence in court was not contradicted or shaken even after cross-examination by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiff's advocates.

105. In a nutshell, we submit that in view of the overwhelming evidence to show that it is **EUSTACE MARANGU** who bought the disputed portion of land, we submit that the same measures **1 acre** and we urge the Honourable Court to find so.

ii) **How old was EUSTACE MARANGU in 1967?**

106. Your Lordship, having submitted and demonstrated by evidence and documentation that the disputed portion of land was purchased by **EUSTACE MARANGU** and that it was 1 acre of land, a question may arise as to how old was **EUSTACE MARANGU** in **1967**.

107. The answer to the above question can be found in the evidence of **PW4** and in the evidence of **PW5**.

108. As regards the evidence of **PW4**, he stated that **EUSTACE MARANGU** was **15 years** older than him and he insisted on that. **PW4** shown the Court his National Identity card which shown that he was born on **14/4/1960**.

109. If **PW4** was born on **14/4/1960**, it follows that it is true when he told the court that in **1967**, he was **7 years old**. That being so, if **EUSTACE MARANGU** was **15 years** older than **PW4**, by doing simple calculations, it is **1960-15 years = 1945**. This means that **EUSTACE MARANGU** was **15 years by 14/4/1960** and in **1967 EUSTACE MARANGU** was **22 and therefore an adult capable of buying land**.

110. As for the evidence of **PW5**, who is the wife of **EUSTACE MARANGU**, she told the Court that her husband was born in **1947**. If **EUSTACE MARANGU** was born in **1947** as per **PW5's** evidence, it follows that in **1967, EUSTACE MARANGU** was already **18 years** and therefore an adult capable of buying land.

111. The allegations by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses that **EUSTACE MARANGU** was in primary school and / or was **7 years old** was not supported by any evidence at all. None of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses stated how old **EUSTACE MARANGU** was in **1967**.

112. We submit that in **1967**, as per the available evidence particularly that of **PW4** and **PW5, EUSTACE MARANGU** was above **18 years** in **1967** and therefore capable of buying the said **1 acre** of land.

113. Your Lordship, an issue of the age and as to when **EUSTACE MARANGU** was born also came out during the hearing of **PW5** in regard to his (**EUSTACE MARANGU's**) Death Certificate. **PW5** told the Court that it is the 1<sup>st</sup> plaintiff **LOYFORD MURIUKI RIARA** who obtained the death Certificate for **EUSTACE MARANGU**. She stated that the **39 years** reflected in the Death Certificate of **EUSTACE MARANGU** was not the correct years of her husband as at the time of his death. She stated that she realised the mistake in the Death Certificate when the 1<sup>st</sup> plaintiff gave her a copy thereof. She further stated that she was unable to follow up over the said mistake in the Death Certificate because she had been unwell.

114. Your Lordship, the Court will note that the evidence of **PW5** that it is the 1<sup>st</sup> plaintiff who obtained the Death Certificate for **EUSTACE MARANGU** reflecting the wrong years was not controverted by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs during cross-examination by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' advocates. There was no denial by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs that it is the 1<sup>st</sup> plaintiff who obtained the Death Certificate for **EUSTACE MARANGU**.

115. There was also no denial on the part of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs that **EUSTACE MARANGU** was born in **1945** or **1947**. In fact, it is **PW4** who is the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' witness who told the Court that **EUSTACE MARANGU** was **15 years** older than him (**PW4**).

116. Your Lordship, it is to be noted that it is **PW1** who obtained the Death certificate for **EUSTACE MARANGU** which reflected the wrong years.

117. It is also to be noted that **PW1** completely failed to disclose the age and / or the year when **EUSTACE MARANGU** was born in his evidence in Court, his affidavits in support of the Originating Summons and / or in his statement filed in Court.

118. We submit that indeed, the years reflected in the Death certificate as the age of **EUSTACE MARANGU** are incorrect and the 1<sup>st</sup> plaintiff knew about it but kept it to himself to cause confusion as to the age of **EUSTACE MARANGU** and with the intention of taking away the disputed portion of land from the 4<sup>th</sup> plaintiff.

119. We urge the Court to find that in view of the evidence tendered in Court and in view of our submissions hereinabove, **EUSTACE MARANGU** was over **18 years** in **1967** and therefore capable of purchasing the said **1 acre** of land.

120. In any event, in (a) hereinabove, we have submitted and demonstrated that it is **EUSTACE MARANGU** who bought the subject parcel of land and he is the one who had all along pursued it and not his mother **AGNES KANYUA RIARA**.

iii) **Whether the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs proved their case of the balance of probabilities.**

121. Your Lordship, we submit that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs did not prove their case to the degree required in civil cases.

122. First and foremost, it came out clearly during the time of hearing hereof that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs did not prove that it is their mother **AGNES KANYUA RIARA** who bought the disputed portion of land.

123. The evidence that **PW1, PW2, PW3** and **PW4** gave in Court was all hearsay. All that they stated in Court in regard to who bought the alleged **1½** acre of land was all hearsay.

124. There was no documentary or direct oral evidence to prove that **AGNES KANYUA RIARA** bought **1½ acres** of land from **EPHANTUS NJOKA**, none of the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their witnesses witnessed the alleged agreement in **1967**.

125. The allegations that **EUSTACE MARANGU** was in primary school and in **class 7** in **1967** was not supported by documentary and / or any evidence.

126. The allegations by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs that **½** acre of land belonging to the 4<sup>th</sup> defendant was part of **1½ acre** of land their mother purportedly bought in **1967** was not supported by any evidence and neither did they call any evidence to prove their allegations.

127. The 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' allegations that the defendants had destroyed their properties and cut their trees was not supported by any evidence.

128. As regards the mud house belonging the 3<sup>rd</sup> plaintiff which had been affected by the boundary which was placed between the disputed parcel of land and the **½ acre** of land belonging to the 4<sup>th</sup> defendant, it came out clearly during the hearing hereof that the said mud house was slightly affected when the boundary for **1 acre** which **EUSTACE MARANGU** had bought was being straightened.

129. Further your Lordship, it also came out clearly during the time of hearing hereof that as per the documents relied upon by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs, it is **EUSTACE MARANGU** who bought the disputed portion of land and that in fact, the evidence available shows that it is **EUSTACE MARANGU** who was all along pursuing and / or protecting the said portion in court and even in the land's office and not **AGNES KANYUA RIARA**.

130. Your Lordship, for the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs to prove that they are entitled to **1½ acre** of land by adverse possession, they had to prove how they entered into the disputed parcel of land. The 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs failed miserably when they alleged that they entered into the purported land parcel measuring **1½ acre** pursuant to the purchase of the said parcel of land by their mother.

131. As at the time of hearing hereof, it came out clearly that their allegations were not true for the reasons we have submitted hereinabove.

132. Your Lordship, during the time of hearing hereof, it also came out clearly that it is **EUSTACE MARANGU** who bought the disputed parcel of land and it was **1 acre** and not **1½ acres**.

133. It also came out clearly that it is **EUSTACE MARANGU** who invited the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs and their mother **AGNES KANYUA RIARA** into the disputed portion of land.

134. It also came out clearly that the latrine which the 3<sup>rd</sup> defendant alleged that it was in the **½ acre** of land belong to the 1<sup>st</sup> defendant and it fell into the **½ acre** which the 1<sup>st</sup> to 3<sup>rd</sup> defendants sold to the 4<sup>th</sup> defendant.

135. The allegations by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs that coffee and tea in ½ acre of land belonging to the 4<sup>th</sup> defendant belonged to them is not true.

136. In fact, PW5 clearly stated that the teas and coffee in the ½ acre of land belong to the 1<sup>st</sup> defendant and that the coffee in the 1 acre of land belong to **EUSTACE MARANGU**.

137. The allegations by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs that the boundary on the alleged 1½ acres extended beyond the current barbed wire which separate the 1 acre and the ½ acre belonging to the 4<sup>th</sup> defendant were just mere allegations which were not supported by any evidence.

138. In *Wambugu -VS- Njuguna [1983] KLR at page 173*, the Court of Appeal held:-

***“Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of Section 12 of The Limitation of Actions Act but time cannot run in favour of a licensee. A licensee therefore has no adverse possession (Hughes –VS- Griffin) [1969]1 WLR 23)”***

139. Your Lordship, in our present case, the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs failed to prove that they occupy 1½ acres of land which they alleged their mother **AGNES KANYUA RIARA** purportedly bought.

140. Instead, the evidence that came out during the hearing of this case is that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs are in occupation of the 1 acre of land which **EUSTACE MARANGU** bought.

141. It also came out clearly during the time of hearing hereof that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs have been in occupation of the said 1 acre of land with the permission of **EUSTACE MARANGU**.

142. We therefore submit that they are licensees of the wife of **EUSTACE MARANGU** the 4<sup>th</sup> plaintiff herein who is entitled to the said 1 acre of land.

143. Having failed to prove that they are in occupation of the purported 1½ acres of land, their claim against the 1<sup>st</sup> to 3<sup>rd</sup> defendants who are the registered owner of **LAND PARCEL NO. MAGUMONI / THUITA / 494** must fail.

144. We urge the Court to find that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs failed to prove their case and the same should be dismissed with costs to the defendants.

**iv) Whether the 4<sup>th</sup> plaintiff proved her case to the degree required**

145. Your Lordship, the 4<sup>th</sup> plaintiff's claim for 1 acre of **LAND PARCEL NO. MAGUMONI / THUITA / 494** is not disputed by the 1<sup>st</sup> to 3<sup>rd</sup> defendants. The 4<sup>th</sup> defendant is the purchaser of ½ acre which he bought and fully paid the purchase price and took possession has no objection to the 4<sup>th</sup> plaintiff getting her 1 acre of land which her husband bought.

146. During the time of hearing hereof, the 4<sup>th</sup> plaintiff tendered her evidence in Court and her evidence was consistent, truthful and was not shaken by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' Advocates and the defendants' Advocate even upon intense cross-examination.

147. Further your Lordship, it is also clear from the evidence in court which we have submitted in (a) and (b) hereinabove that indeed, it is **EUSTACE MARANGU** who bought the disputed parcel of land measuring 1 acre from **EPHANTUS NJOKA**.

148. **It also came out clearly that vide his sworn affidavit in support of his application for review in CHUKA DM'S COURT SUCCESSION CAUSE NO. 12 OF 1973, EUSTACE MARANGU in paragraph 3 clearly stated that he bought the land on 20/11/1967. This is the first direct evidence available in Court to show that the disputed parcel of land was bought by EUSTACE MARANGU.**

149. **Secondly, the next direct evidence is the Green Card for the LAND PARCEL NO. MAGUMONI / THUITA / 494 which was produced by the 4<sup>th</sup> defendant as exhibit and also annexed by the 1<sup>st</sup> plaintiff as annexure LMR1 in his supporting affidavit sworn on 3/11/2014 and filed in Court on 5/11/2014 in Entry No. 2 which shows a Caution placed by EUSTACE MARANGU who indicates had cautioned the said land as a purchaser.**

150. **There is also the evidence of DW2 who is the brother to EPHANTUS NJOKA and he participated in the sale of 1 acre of land by EPHANTUS NJOKA.**

151. The 4<sup>th</sup> plaintiff also told the Court that her husband told her that he had bought 1 acre of land from **EPHANTUS NJOKA**.

152. We submit that it is the 4<sup>th</sup> plaintiff who is entitled to 1 acre of **LAND PARCEL NO. MAGUMONI / THUITA / 494**.

153. Your Lordship, it also came out clearly during the time of hearing hereof that it is the 4<sup>th</sup> plaintiff's husband **EUSTACE MARANGU** who allowed the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs in the said 1 acre of land on condition that they will buy their land and move out of his land.

154. We submit that it is the 4<sup>th</sup> plaintiff who is entailed to **1 acre** of **LAND PARCEL NO. MAGUMONI / THUITA / 494**.

155. We shall only pray to the Court not to condemn the 1<sup>st</sup> to 3<sup>rd</sup> defendants to pay the 4<sup>th</sup> plaintiff costs as they never disputed the plaintiffs' claim herein.

v) **Whether the 1<sup>st</sup> to 3<sup>rd</sup> defendants have a good defence against the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs**

156. Your Lordship, in (iii) hereinabove, we have demonstrated and submitted that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs did not prove their case against the 1<sup>st</sup> to 4<sup>th</sup> defendants. We have also demonstrated in (i) that the disputed land was **1 acre** and not **1½ acres** of land and that the said **1 acre** was bought by **EUSTACE MARANGU**. We have also demonstrated and submitted with material evidence in (ii) that **EUSTACE MARANGU** was of age when he bought the said **1 acre** of land. We have also demonstrated in (iv) that it is the 4<sup>th</sup> plaintiff who is entailed to the said **1 acre** of land.

157. In a nutshell, we submit that the 1<sup>st</sup> to 4<sup>th</sup> defendants indeed tendered a good defence against the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' claim and urge the Court to find so and allow the 1<sup>st</sup> and 4<sup>th</sup> defendants' replying affidavits to the Originating Summons and the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' claim.

158. The only issue we would want to bring to the attention of the Court is that the 4<sup>th</sup> defendant who gave evidence in Court as **DW3** clearly stated in his statement and evidence that he bought the **½ acre** of land from the 1<sup>st</sup> to 3<sup>rd</sup> defendants.

159. His evidence in Court is clear and straight forward. It was not shaken during the cross-examination by both the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' Advocates and the 4<sup>th</sup> plaintiff's Advocates.

160. The 4<sup>th</sup> defendant also produced his documents as his exhibits which were also not disputed.

f) **The 1<sup>st</sup> to 4<sup>th</sup> defendants' comments in respect of the report of the Scene visit by Court Administrator on 30/08/2018 in LAND PARCEL NO. MAGUMONI / THUITA / 494.**

161. Your Lordship, we cannot conclude our submissions herein without making a few comments of the Court Administrator's Report on the scene visit on **30<sup>th</sup> August 2018**.

162. First your Lordship, we want to state that it is true that the *locus in quo* was visited on **30/08/2018**.

163. During the said visit, the parties and their Advocates were present.

164. The unsworn statements were made by the parties and as the Court can note from the said report, the said statements were more or less what the parties stated in Court when this matter was heard.

165. The only difference is that the said statements were not tested through cross-examination as was done in Court.

166. When this case was subsequently heard, evidence given by the parties in this case and their witnesses were put to test through cross-examination and we do not need to repeat what we have already submitted.

167. However, we want to bring to the attention of the Court that the 1<sup>st</sup> defendant's statement was incorrectly recorded because he stated that **EUSTACE MARANGU** bought **1 acre** and not **0.50 acres**.

168. The 1<sup>st</sup> defendant was all along consistent in his replying affidavit to the amended originating summons sworn on **27/06/2017** and filed in court on **13/07/2017**, his statement dated **27/06/2017** and filed in Court **13/07/2017** and his evidence which he tendered in this Court in regard to the size of the land bought by **EUSTACE MARANGU**.

169. Other issues raised in the scene visit report came out clearly during the time of hearing hereof particularly the house of the 3<sup>rd</sup> plaintiff which was slightly affected when the boundary was straightened.

170. On the allegations that some trees were cut down from the disputed portion of land, the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs did not prove such allegations during the hearing hereof.

171. On the issue of the cowshed being constructed recently, it is clear from the 4<sup>th</sup> defendant's statement dated **27/06/2017** and filed in Court on **13/07/2017** and his list of documents, particularly the sale agreement **D EXH. 3** and his replying affidavit to the originating summons sworn on **27/06/2017** and filed in Court on **13/07/2017** that the 4<sup>th</sup> defendant took possession of **½ acre** of land and has extensively developed it

172. The finding by the Court Administrator that a piece of land sold to the 4<sup>th</sup> defendant has encroached the 3<sup>rd</sup> plaintiff's home is not true and / or supported by any evidence because it came out clearly at the time of hearing hereof that a small part of the mud house belonging to the 3<sup>rd</sup> plaintiff got affected when the boundary was being straightened.

173. On the issue of the 3<sup>rd</sup> plaintiff's toilet being cut off and taken by the 4<sup>th</sup> defendant, it was clear during the time of hearing hereof that the said toilet belong to the 1<sup>st</sup> defendant and was taken over by the 4<sup>th</sup> defendant when he bought ½ acre of **LAND PARCEL NO. MAGUMONI / THUITA / 494**.

174. Finally, it is also to be noted that there was no finding by the Court Administrator that there existed any other boundary separating the ½ acre of land belonging to the 4<sup>th</sup> defendant and 1 acre belonging to **EUSTACE MARANGU**.

175. The boundary made up of trees that was alleged by the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs to have existed beyond the current fence separately the **1 acre** of land and ½ acre of land was never noted by the Court Administrator because it never existed.

**g) What appropriate orders should the Court give in this case?**

176. Your Lordship, we have analysed both the plaintiffs and the defendants' cases hereinabove. We have also addressed issues for determination and made a few comments on the Court Administrator's scene visit report.

177. From our submissions hereinabove, and taking into account the evidence tendered in court, we pray to the Court to dismiss the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs' case with costs to the defendants.

178. As regard the 4<sup>th</sup> plaintiff's case, we urge the Court to allow find that she is the one entitled to the said 1 acre.

179. We also urge the Court to find that the 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs are mere licensees of the 4<sup>th</sup> plaintiff in the said 1 acre.

We so humbly pray.

**DATED AT MERU THIS 3<sup>RD</sup> DAY OF DECEMBER, 2018**

**NYAMU NYAGA & CO. ADVOCATES**

**ADVOCATES FOR THE 1<sup>ST</sup>, 2<sup>ND</sup> 3<sup>RD</sup> & 4<sup>TH</sup> DEFENDANTS**

16. I have considered the pleadings, the oral evidence and the submissions proffered by the parties in support of their assertions. I have also considered the case of Wambugu versus Njuguna, Civil Appeal No. 10 of 1982, Court of Appeal at Nairobi, proffered by the defendants to buttress their assertion that adverse possession cannot accrue in favor of a licensee.

17. I find the only issues to be determined are:

(a) Are the plaintiffs entitled to be declared owners of part of the suit land measuring 1 ½ acres by way of adverse possession?

(b) Is the 4<sup>th</sup> plaintiff entitled to be exclusively declared owner of part of the suit land measuring 1 acre by way of adverse possession?

18. All the plaintiffs have proved that they have been in occupation of the suit land for a period exceeding the threshold for entitlement to be declared owners of part of the suit land through the doctrine of adverse possession.

19. The 1<sup>st</sup> to 3<sup>rd</sup> plaintiffs have not proved that one Agnes Kanyua Riara, deceased, the person through whom they claim the suit land bought 1 ½ acres and not 1 acre from Ephantus Njoka, deceased. On a balance of probabilities, I find that Agnes Kanyua Riara (deceased) only bought 1 acre.

20. The 4<sup>th</sup> plaintiff has not proved that it is her deceased husband, (Eustace Marangu) who bought the suit land.

21. I find that the scene report filed by this court's Executive Officer is rather nebulous in that it does not touch on the acreage of the portion occupied by all the plaintiffs. It is, however, helpful in that it confirms occupation of the suit land by all the plaintiffs for a long period of time.

22. I issue the following orders:

a) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' claim that they be declared owners of 1 ½ acres out of Land Parcel No. Magumoni/Thuita/494 by way of adverse possession is hereby dismissed.

b) The 4<sup>th</sup> plaintiff's prayer that she be exclusively declared owner of 1 acre out of Land Parcel No. Magumoni/Thuita/494 is hereby dismissed.

c) I find that the 1<sup>st</sup> to 4<sup>th</sup> plaintiffs are entitled jointly to ownership of 1 acre out of Land Parcel No. Magumoni/Thuita/494 in equal shares and their present occupation should determine the portions of land which they are entitled to.

d) Costs shall follow the event and are awarded to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

**Delivered in open Court at Chuka this 22<sup>nd</sup> day of May, 2019 in the presence of:**

CA: Ndegwa

Kijaru absent for 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> plaintiffs

Dennis Muthomi h/b Nyamu Nyaga for defendants

Dennis Muthomi h/b I.C.Mugo for the 4<sup>th</sup> plaintiff

**P. M. NJORGE,**

**JUDGE.**