REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 14 OF 2018 (OS)

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

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

AND IN THE MATTER OF SECTION 38 OF THE LAW OF LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS F KENYA AND

IN THE MATTER OF AN APPLICATION BY JULIA MUGURE THAT THE COURT DO MAKE A DECLARATION THAT HE IS ENTITLED TO 1.00 ACRE OF LR: MAGUMONI/MUKUUNI/303 UNDER THE DOCTRINE OF ADVERSE POSSESSION AND

IN THE MATTER OF AN APPLICATION BY JULIA MUGURE THAT SHE BE REGISTERED WITH 1.00 ACRE OUT OF LR:MAGUMONI/MUKUUNI/303 WHICH HE HAS ACQUIRED UNDER THE DOCTRINE OF ADVERSE POSSESSION

JULIA MUGURE (suing as the administratix

of the estate of the late Wilfred Njagi Kiragu deceased).....APPLICANT

VERSUS

BENJAMIN COLLINS MATI.....1ST RESPONDENT

GERRAD NYANGI WILSON.....2ND RESPONDENT

JUDGMENT

1. This application was brought to court by way of Originating Summons filed on **15th November, 2018**. The summons states as follows:

ORIGINATING SUMMONS UNDER ORDER 37 RULE 7 CIVIL PROCEDURE RULES

Let Benjamin Collins Mati and Gerrard Nyangi Wilson of P.O. Box Magumoni within 15 days after service of these summons upon them enter appearance to these summons of Julia Mugure the applicant herein who claims to be and have been in actual possession of 1.00 acre out of LR: Magumoni/Mukuuni/303 for a period in excess of 12 years and have (sic) an overriding interest for determination of the following questions;

1. Whether the applicant is the administratix of the estate of Wilfred Njagi Kiragu and therefore having locus standi to institute this suit?

2. Whether the 1st respondent is the registered proprietor of LR; Magumoni/Mukuuni/303?

3. Whether the 2nd Respondent has a judgment in his favour giving him 10 acres out of LR: Magumoni/Mukuuni/303?

4. Whether on 14th January 1992 Wilfred Njagi Kiragu (deceased) entered into a sale of land agreement with the 1st respondent whereby the 1st respondent sold and Wilfred Njagi Kiragu bought 1.00 acre out of LR: Magumoni/Mukuuni/303?

5. Whether on or around 1992 Wilfred Njagi Kiragu entered into LR; Magumoni/Mukuuni/303 and started developing and improving the said 1.00 acre out of LR: Magumoni/Mukuuni/303?

6. Whether Wilfred Njagi Kiragu has been in actual possession and occupation of 1.00 acre out of LR; Magumoni/Mukuuni/303 from 1992 to 2004 while the applicant has been in actual possession and occupation from 1992 to date exclusively and without any interruption for a period in excess of twelve years?

7. Whether the applicant has occupied, possessed and made use of 1.00 acre out of LR; Magumoni/Mukuuni/303 to the exclusion of any other person including the 1st and 2nd respondents for a period in excess of twelve years?

8. Whether the applicant has improvements and developments in LR; Magumoni/Mukuuni/303 which include;

i. Napier grass

ii. Gravellier trees

iii. Eucalyptus trees

iv. Assorted indigenous trees

9. Whether the applicant has acquired 1.00 acre out of LR; Magumoni/Mukuuni/303 by way of adverse possession and whether the applicant should be registered with the said 1.00 acre out of LR; Magumoni/Mukuuni/303?

10. Whether the applicant has an overriding interest over LR; Magumoni/Mukuuni/303 under the doctrine of adverse possession capable of being protected by the law by virtue of section 28 of the registration of land act?

11. Whether the 2nd respondent when executing orders of the court in Chuka CMCC No. 185 of 2018 should be estopped from touching the 1.00 acre out of LR; Magumoni/Mukuuni/303 which is in occupation, use and cultivation by the applicant.

REASONS WHEREFORE the applicant prays for the following orders:

a. That the 1st respondent be ordered to transfer 1.00 acre out of LR; Magumoni/Mukuuni/303 and in default the Deputy Registrar be authorized to execute all the requisite documents to facilitate the transfer of 1.00 acre out of LR; Magumoni/Mukuuni/303 from the 1st respondent to the applicant.

b. An order restraining the 2nd respondent from alienating in any manner 1.00 acre out of LR; Magumoni/Mukuuni/303 occupied and in use by the applicant when executing the court orders in Chuka CMCC No. 185 of 2018.

c. Costs of this suit.

These summons are supported by the annexed affidavit of Julia Mugure and other reasons and grounds and evidence to be offered at the time of hearing and the annexed certified copy of register of land parcel LR; Magumoni/Mukuuni/303

Dated at Chuka this 14th day of November, 2018

2. The application is supported by the affidavit of **Julia Mugure**, the applicant sworn on **14th November, 2018** which states as follows:

SUPPORTING AFFIDAVIT

I Julia Mugure of P. O. Box 6, Magumoni in the Republic of Kenya make oath and state as follows:-

1. That I am the applicant herein well versed with the particulars of this case and hence competent to make this oath.

2. That I am the administratix of the estate of Wilfred Njagi Kiragu and I am a holder of letters of administration (grant) to that effect (annexed and marked J. M. 1 is the letters of administration)

3. That the 1st respondent is the registered proprietor of LR; Magumoni/Mukuuni/303 as it appears on the copy of register of LR; Magumoni/Mukuuni/303 (annexed and marked J.M.1 is the copy of register of LR; Magumoni/Mukuuni/303)

4. That the 2nd respondent has a judgment in his favour giving him 10 acres out of LR; Magumoni/Mukuuni/303 (annexed and marked J.M.2 is the order issued on 11th September, 2018 in Chuka CMCC No. 185 of 2018)

5. That on 14th January, 1992 Wilfred Njagi Kiragu who is my husband entered into a sale of land agreement with the 1st respondent whereby the 1st respondent sold and my husband bought one acre out of LR; Magumoni/Mukuuni/303 (annexed and marked J.M.3 is the sale of land agreement)

6. That my husband passed on in 2004 and I and the rest of his family went on cultivating one acre out of LR; Magumoni/Mukuuni/303.

7. That on or around 1992 immediately after executing the agreement deposed in number 6 herein above I and my husband entered into LR; Magumoni/Mukuuni/303 and started developing and improving the said one acre out of LR; Magumoni/Mukuuni/303.

8. That I and my husband have been in actual possession and occupation of 1.00 acre out of LR; Magumoni/Mukuuni/303 exclusively and without any interruption for a period in excess of twelve years.

9. That my occupation of 1.00 acre out of LR; Magumoni/Mukuuni/303 was open and exclusive with no interference or disruption from any person let alone the respondents.

10. That I have occupied, possessed and made use of 1.00 acre out of LR; Magumoni/Mukuuni/303 to the exclusion of any other person including the 1st and 2nd respondents for a period in excess of twelve years.

11. That the 1st respondent has never even given me a notice to vacate from 1.00 acre out of LR; Magumoni/Mukuuni/303 despite that the 1st applicant knew that I was in occupation and making use of LR; Magumoni/Mukuuni/303.

12. That I have improvements and developments in LR; Magumoni/Mukuuni/303 which include;

i. Nappier grass

ii. Gravellier trees

iii. Eucalyptus trees

iv. Assorted indigenous trees

13. That I cultivate subsistence crops on the said 1.00 acre out of LR; Magumoni/Mukuuni/303 to date.

14. That I am advised by my counsel on record which advocate I verily believe to be true that I have acquired 1.00 acre out of LR; Magumoni/Mukuuni/303 by way of adverse possession and I should be registered with the said 1.00 acre out of LR; Magumoni/Mukuuni/303.

15. That I have an overriding interest over LR; Magumoni/Mukuuni/303 under the doctrine of adverse possession capable of being protected by law by virtue of section 28 of the registration of land act.

16. That the 2nd respondent when executing orders of the court in Chuka CMCC No. 185 of 2018 should be estopped from touching the 1.00 acre out of LR; Magumoni/Mukuuni/303 which is in occupation, use and cultivation by me.

17. That there is enough land out of LR; Magumoni/Mukuuni/303 whereby the 2nd respondent can excise his 10 acres without touching 1.00 acre that I have been in occupation since 1992.

18. That it is only fair and just that the court do declare that I am entitled to 1.00 acre out of LR; Magumoni/Mukuuni/303 by operation of law under the doctrine of adverse possession.

19. That the 1st respondent should be ordered to transfer 1.00 acre out of LR; Magumoni/Mukuuni/303 to me and in default the deputy registrar be directed to sign all the requisite documents to facilitate the transfer of the said 1.00 acre to me by the respondent out of LR; Magumoni/Mukuuni/303.

20. That all which is deponed herein is true to the best of my knowledge, belief and information.

Sworn at Chuka by the said Julia Mugure this 14th day of November, 2018

3. On **21st March, 2019**, the 1st Respondent, Benjamin Collins Mati, filed a replying affidavit which states:

REPLYING AFFIDAVIT

I, BENJAMIN COLLINS MATI ID NO. 1868945 and of P. O. Box 39-60403 Magumoni within the Republic of Kenya do hereby make oath and state as follows;

1. That I am a male adult of sound mind, the 1st Respondent herein, hence competent to swear this affidavit.

2. That I have read, explained to and understood the contents of the applicant's Originating Summons dated 16th October, 2018 and the supporting affidavit together with the annextures thereto and I wish to respond as follows;

3. That I am the registered proprietor of LR NO. Magumoni/Mukuuni/303 measuring approximately 7.294 Ha.

4. That in the year 1992, I sold to the late Wilfred Njangi Kiragu (deceased) one (1) acre piece of land which was to be excised from the property LR No. Magumoni/Mukuuni/303.

5. That the applicant was to personally pay for and/or facilitate the sub division charges and all other charges for processing of the title into his name.

6. That I have been ready and willing to have the said piece of land transferred to the applicant but the same was not possible due to the caution that had been registered against the suit property by the 2nd respondent.

7. That I did not sell the subject piece of land to the 2nd respondent and I am not party to or privy to any judgment or order that gave him ownership of ten (10) acres of the suit property LR. No. Magumoni/Mukuuni/303.

8. That the applicant is the *bona fide* owner of the one (1) acre piece of land to be excised from the suit property LR No. Magumoni/Mukuuni/303 by virtue of his purchaser rights.

9. That what is deponed to herein is true to the best of my knowledge, information and belief.

4. The **2nd Respondent's** replying affidavit was filed on **24th December, 2018**. It states as follows:-

REPLYING AFFIDAVIT

I, GERRARD NYANGI WILSON of ID NO. 0254756 and a resident of Kirinyaga County within the Republic of Kenya do hereby make oath and state as follows:-

1. That I am the 2nd Respondent herein hence competent to swear this affidavit.

2. That I have read the Originating Summons by the applicant dated 14th November, 2018 and the contents thereof and wish to respond as hereunder;

3. That the said application is riddled with falsehoods and concealment of material facts.

4. That it is not true that the applicant is in occupation of the suit property as he alleges.

5. That I am the one in occupation of the 10 acres out of the suit land.

6. That my land is land parcel No. Magumoni/Mukuuni/3625 and not land parcel No. Magumoni/Mukuuni/303 as per said Originating Summons.

7. That there is no such land as Magumoni/Mukuuni/303 since the same was subdivided through the court order which was given on 11th September, 2018 attached herein marked "GNW".

8. That in execution of court order the land was divided into Magumoni/Mukuuni/3625 and Magumoni/Mukuuni/3626 and therefore the land parcel No. Magumoni/Mukuuni/303 being quoted by the applicant is non-existent.

9. That the plaintiff's land is Magumoni/Mukuuni/3626 and not land parcel No. Magumoni/Mukuuni/3625.

10. That I am content that the applicant herein has not satisfied the ingredients of adverse possession to warrant the order being sought in the Originating Summons.

11. That I have personally been in my said parcel of land No. Magumoni/Mukuuni/3626 measuring 10 acres since the year 1987 and no one including the plaintiff encroached and/or settled on my said portion.

12. That the plaintiff is not being candid with the truth whereby the correct position he had purchased land from the 1st defendant but took too long to pursue the same despite knowing very well I was pursing my portion of 10 acres from land parcel No. Magumoni/Mukuuni/303.

13. That I would request this honourable court to visit the suit property to confirm applicant doesn't stay on the land parcel no. Magumoni/Mukuuni/3625.

14. That I pray this honourable court to dismiss the suit herein with costs since there is no cause of action disclosed.

15. That if the orders sought herein are granted I will be highly prejudiced as I am the owner of the suit land Magumoni/Mukuuni/3625 and I may therefore suffer irreparable damage.

16. That I bought the suit land free from any encumbrances and/or claim.

17. That whatever is deponed to herein is true to the best of my knowledge, information and belief.

5. PW1, **Julia Mugure**, asked the court to adopt her witness statement dated **14th November, 2018** as her evidence in this suit. She stated that the witness statement had explained everything she had to say in this case. The witness statement, which has been reproduced herein without any correction, change or erasure, reads as follows:

APPLICANT'S STATEMENT

My name is Julia Mugure. I come from Mukuuni sub location Mukuuni location of Meru South Sub County and I am a teacher by profession.

I am the administratix of the estate of Wilfred Njagi Kiragu. I am a holder of letters of administration (grant) in respect of the estate of Wilfred Njagi Kiragu. The letters of administration gives me the locus standi to institute this suit. I know the 1st respondent. He is a resident of Nairobi in Nairobi county but he is the registered proprietor of LR; Magumoni/Mukuuni/303. He rarely comes at home. Most of the times he is in Nairobi city.

I remember in 1992 to be exact on 14th January, 2018 my husband and the 1st respondent entered into a sale of land agreement. By operation of the agreement my husband was to buy and the 1st respondent was to sell one acre out of the 1st respondent's land parcel LR; Magumoni/Mukuuni/303. The agreement was reduced into writing. My husband paid the full consideration to the 1st respondent which was Kshs.25,000/=

The 1st respondent did not honour his part of bargain. After signing the agreement and taking the consideration the 1st respondent went to slumber land. He showed no other interest in the agreement. On our part we entered into the sale land immediately upon the execution of the agreement. We started cultivating the land. We cultivated both perennial and subsistence crops. As regards perennial crops we have planted nappier grass, gravellier trees, eucalyptus trees and many assorted indigenous trees. From 1992 we have been in occupation and use of one acre that the 1st respondent sold to my husband save that my husband died in 2004 whereupon I continued occupying and making use of one acre purchased by my husband from the 1st respondent.

The occupation by the applicant of one acre out of LR; Magumoni/Mukuuni/303 was open and without authority from the 1st respondent. The applicant dispossessed the 1st respondent right from 1992.the 1st respondent has never told the applicant to move out of the land. The 1st respondent has never even written a letter to the applicant. It can be safely said that the applicant's occupation and use of one acre out of LR; Magumoni//Mukuuni/303 has been peaceful, open and uninterrupted by anybody let alone the registered proprietor.

From 1992 to date is a period in excess of 12 years. By operation of section 7 of the limitation of actions act the 1st respondent cannot claim the one acre from the applicant for he is statute barred. Indeed the 1st respondent's title to one the applicant has been in occupation an in use since 1992 has extinguished by operation of law.

I am aware of Chuka CMCC No. 185 of 2018. The 2nd respondent is the plaintiff in that case while the 1st respondent is the defendant. The 2nd respondent has a judgment in his favour. Under the said suit the 2nd respondent was given 10 acres out of LR; Magumoni/Mukuuni/303. The 2nd respondent can execute the judgment at any time.in fact the 2nd respondent has an order authorizing even with the dispensation of the title deed of LR; Magumoni/Mukuuni/303 when registering the new titles. The 2nd respondent may call the surveyor any time.

The applicant is of the considered view that the 2nd respondent should excise his 10 acres from the other portion of LR; Magumoni/Mukuuni/303. He should not touch on one acre that I have an overriding interest on and which I have acquired through adverse possession. LR; Magumon/Mukuuni/303 is big enough to give the 2nd respondent what he claims from the 1st respondent without touching on the one acre that I have been in occupation and in use todate and which I claim from the 1st respondent.

That is all I wish to state

Dated at chuka this 14th day of November, 2018

……..

JULIA MUGURE

6. PW1, produced her exhibits. These are:

1. Letters of Administration in respect of the Estate of Wilfred Njagi Kiragu.

2. Copy of Register (Green Card of LR: Magumoni/Mukuuni/303.

3. Order in favour of the 2nd Respondent issued by Court on 11th September, 2018 in Chuka CMCC No. 185 of 2018.

4. Sale of Land Agreement between the Applicant's husband (Wilfred Njagi Kiragu) and the 1st Respondent dated 14th January, 1992.

5. Photographs showing developments on one acre out of LR; Magumoni/Mukuuni/303 by the applicant

7. PW1 told the court that she knew the 2nd Respondent as her husband and the 2nd Respondent had bought land from the 1st Respondent. She told the court that she and the 2nd Respondent were in occupation of different portions of LR; Magumoni/Mukuuni/303.

8. PW1 told the court that she was claiming ownership of her one acre of land, by way of adverse possession, from the 1st Respondent. She told the court that she did not want the 2nd Respondent to use the guise of implementing a court order to interfere with her land. She went on to tell the court that the 2nd Respondent's land had been properly demarcated after he bought it from the 1st Respondent.

9. In his words DW1, the 1st Respondent, told the court that PW1 had been ***"eloquent enough"*** and for that reason he did not wish to cross-examine her. PW1 had earlier on been cross-examined by the 2nd Respondent's advocate.

10. On 8th July, 2019, by consent, the parties agreed to adopt the 1st and 2nd Respondents' defences in ELC 12 of 2018 (OS). The contents and gists of those defences are, mutatis mutandis, reproduced in this judgment.

11. DW1 asked the court to deem his replying affidavit (op.cit) as his witness statement.

12. DW2's witness statement in ELC 12 OF 2018 (OS) states as follows:

2ND RESPONDENT'S STATEMENT

I Gerald Nyangi Wilson of P. O. Box 496 Embu state that I am the 2nd Defendant herein.

That I bought 10 acres out of land parcel No. Magumoni/Mukuuni/303 from the 1st defendant in the year 1987.

That I paid the entire purchase price to the 1st respondent through his then advocate's office, D.O. Rachier Advocates.

That part of payment of Kshs.30,020/= I paid him through the chief wherein he had requested me to give the money to his mother since he was serving a sentence at Athi river.

That I occupied the 10 acres immediately upon execution of the agreement.

That I asked him we do a subdivision so that he can give me title to my land but he refused.

That I sued him in Meru Law courts civil suit NO. 692 of 1995 whereby I won the case and he was ordered to transfer to me the 10 acres of land.

That I continued staying on my 10 acres of land waiting for the 1st respondent to sign transfer forms to me.

That in the year 2017 I went to high court Meru with a purpose of filing an application to order the 1st respondent to transfer for me my 10 acres and/or have the court dispense with the title of and parcel No. Magumoni/Mukuuni/303 and I was told the file of Civil Suit No. 692 of 1995 was missing and the court opened a skeleton file.

That the judge presiding ordered that the file be transferred to Chuka High Court since the suit land was within the jurisdiction of this honourable court.

That upon the file being transferred, the 1st respondent never appeared in court and the court ordered that I be given my 10 acres.

That the transfer forms were signed by the court's executive officer and the land was subdivided.

That upon subdivision, land parcel No. Magumoni/Mukuuni/303 was dispensed with and the new numbers are Magumoni/Mukuuni/3625 and 3626.

That before I could get my title the applicants herein put a caution on the land and sued me on the instant suit.

That I have lived on the suit land since 1987 and there is no way the applicants herein could claim adverse possession thereon since land parcel No. Magumoni/Mukuuni/303 has already had a case since the year 1995.

That I registered a caution on land parcel NO. Magumoni/Mukuuni/303 in the year 1991 which I withdrew in the year 2018.

That the suit herein is misconceived and the applicants are supposed to sue the 1st respondent and not me.

That is all I wish to state.

Signed

Gerald Nyangi Wilson

Dated at Embu this 5th day of April, 2019

13. The exhibits produced in ELC 12 of 2018 (OS) were deemed exhibits in this suit.

14. The parties filed written submissions.

15. The applicant's written submissions are pasted herebelow in exactly the way they were framed without any erasure whatsoever including spelling and any other mistakes:

PLAINTIFF FINAL SUBMISSIONS.

1. Your lordship this is a suit that has been commenced by way of originating summons. That the suit is against two defendants. By an originating summons dated 12th November 2018 the applicant herein after the (plaintiff) has moved the court for the following orders;

(a) That the 1st respondent be ordered to transfer 1.00 acre to the plaintiff out of LR.MAGUMONI/MUKUUNI/303 and in default the deputy registrar be authorized to execute all the requisites documents to facilitate the transfer of 1.00 acre out of LR.MAGUMONI/MUKUUNI/303 from the 1st respondent to the applicant.

(b) An order restraining the 2nd respondent from alienating in any manner 1.00 acre out of LR.MAGUMONI/MUKUUNI/303 occupied and in use by the applicant when executing the court orders in CHUKA C.M.C.C. NO.185 OF 2018

(c) Cost of the suit

2. In support of the originating summons ,the plaintiff filed and served a supporting affidavit sworn by the plaintiff and dated 12th November 2018. In principle the plaintiff has deposed in the aforesaid affidavit that LR.MAGUMONI/MUKUUNI/303 as it was then, was registered in the name of the 1st defendant . that by an agreement dated 14TH JANUARY 1992, the 1st defendant agreed to sell and the late husband of the plaintiff one WILFRED NJAGI KIRAGU agreed to buy 1.00 acre out of the 1st defendant main land LR.MAGUMONI/MUKUUNI/303 (AS IT WAS then) . that LR.MAGUMONI/MUKUUNI/303 , measures 18.01 acres. the consideration for the sale was ksh.26 ,000 which was payable upon execution of the agreement.

That the plaintiff contends that her late husband entered into the suit land in 1992 and he has extensively developed the portion he bought. The plaintiff contends that she has been in occupation of land continuously exclusively and without any interruption from the 1st defendant for a period in excess of 12 years. No one has ever disposed the plaintiff from occupation and use of 1.00 acre out of LR.MAGUMONI/MUKUUNI/303 as it was then since 14TH January 1992 to date. The plaintiff hold the view that she has acquired an overriding interest in the nature of adverse possession over 1.00 acre out of LR.MAGUMONI/MUKUUNI/303 as it was then.

In the supporting affidavit the plaintiff acknowledges that ,the 2nd defendant has a court order see exhibit number 2 in which the 2nd defendant was awarded 10 .00 acres out of the then LR.MAGUMONI/MUKUUNI/303. The bond of contention between the plaintiff and the 2nd defendant is that when the 2nd defendant was trying to implement the court order , he carried out the excise in such a manner that he touched the plaintiff land that she has been in occupation since 14th January 1992. The plaintiff contends that LR.MAGUMONI/MUKUUNI/303 measures 18.01acres and the 2nd defendant should not encroach into the plaintiff portion measuring 1.00 acre. the plaintiff contends that the suit land is enough for her and the 2nd defendant without necessarily having to touch on the plaintiff portion. The plaintiff seek for an order that the 1st defendant be directed to transfer 1.00 acre to her and in default the deputy registrar be authorized to sigh all requisite document to facilitate the transfer . as regards the 2nd defendant the plaintiff deposes that the land is enough for the 2nd defendant and the plaintiff, consequently the 2nd defendant should not interfere with the plaintiff portion which portion now legally belong to the plaintiff by operation of doctrine of adverse possession.

3. In further support of the plaintiff claim (OS) ,she filed and served several document s. These document include ;

(i) Copy of register (green card) LR.MAGUMONI/MUKUUNI/303

(ii) Order in favor of the 2nd respondent issued by court on 11th September 2018 in CHUKA C.M.C.C. NO.185 OF 2018

(iii) Sale of land agreement between the applicant and the 1st respondent dated 14th January 1992

(iv) Photographs showing developments on 1.00 acre out of LR.MAGUMONI/MUKUUNI/303.

4. By a close look of the document attached, it is clear that the plaintiff and the 1st defendant indeed entered into a sale of land agreement on 14th January 1992. Whereby the plaintiff was to buy and the 1st defendant was to sell 1.00 acre out of LR.MAGUMONI/MUKUUNI/303.

The photographs shows the development that the plaintiff has made on her 1.00 acre bought from the 1st defendant . the copy of green card (exhibit no.1) clearly shows that as of 14th January 1992 when the plaintiff purchased 1.00 acres from the 1st defendant, the 1st defendant was the registered proprietor. we shall visit this issues later in these submission . suffice it to say at this juncture that the 1st defendant does not deny the plaintiffs allegation both in her pleading and her replying affidavit dated 19th march 2019.

5. The defendant have reacted differently to the plaintiff claim under the instant OS . we shall first engage and interrogate the 1st defendant reaction. As pointed out supra, the 1st defendant does not in principle deny or oppose the plaintiff claim. His defence is that had the 2nd defendant not cautioned the land LR.MAGUMONI/MUKUUNI/303, the 1st defendant would have transferred 1.00 acres out of the 1st defendant land parcel LR.MAGUMONI/MUKUUNI/303 to the plaintiff. Todate he is not opposed to the plaintiff getting her 1.00 acres out of what was then LR.MAGUMONI/MUKUUNI/303.

The 1st defendant in his answer to the plaintiff allegation in the OS, supporting affidavit and the exhibits , filed and served a replying affidavit sworn and dated 19th march 2019 and defence papers dated 16th April 2019. The 1st defendant has also attached several documents to what he refers to as defence papers. These documents include ;

i. Title deed of LR.MAGUMONI/MUKUUNI/303

ii. Sale of land agreement dated 8th August 1995

iii. Official search of LR.MAGUMONI/MUKUUNI/303.

The 1st defendant does not attempt to contradict or context that the plaintiff in 1992 entered the suit land and started developing it . the 1st defendant does not deny that the plaintiff has been in occupation of the suit land without any interruption for a period in excess of 12 years. Simply put the 1st defendant does not oppose the plaintiff claim. The only divergence that has come out in his defence papers ‘’is the interpretation of what adverse possession his as far as the 1st defendant is concern there is no adverse possession and he would wish that the transaction between him and the plaintiff be treated as sale of land agreement between him and the plaintiff through the principle of willing buyer willing seller. All he is not aware of is that after six years the agreement dated 14th January 1992 could not be enforced, but under order 37 CPR the agreement can be used as a basis to show that the plaintiff is on the land. However the plaintiff claim is based on the doctrine of adverse possession and not the agreement.

6. Your lordship we submit that the 2nd defendant is opposed to the plaintiff claim , although from the pleadings and evidence the plaintiff is not claiming any land from the 2nd defendant. the 2nd defendant in opposition to the plaintiff claim, has filed and served upon the plaintiff the following;

(a) 2nd respondent statement dated 5th April 2019

(b) Replying affidavit sworn and dated 21st December 2018

(c) List of document dated 5th April 2019.

The 2nd defendant has also attached all the documents enlisted in his list of documents.

It is the 2nd defendant contention that the plaintiff has not acquired an overriding interest in the nature of adverse possession , granted that they has been a case in court namely 185 of 2018 formally Meru law court number 692 0f 1995. The 2nd defendant is economical with the truth because he does not point out the suit was between him and the 1st defendant. The plaintiff was not a party to that suit. The claim of adverse possession is against the 1st defendant and not the 2nd defendant . we therefore submit that the 2nd defendant pleading as regards the issue of adverse possession are clearly out of place.

Looking closely at the 2nd defendant pleadings, he is not telling the truth in full. It is true that he bought 10.00 acres from the 1st defendant , but only 10.00 acres and they were demarcated ,but allegedly he could not pay the full consideration. The demarcation was carried out back in 1987. The 2nd defendant therefore has been reasonably and logically occupied 10.00 acres which has a clear boundary . this assassion is supported by the 2nd defendant statement dated 5th April 2019 where he avers that he is in occupation of 10.00 acres since 1987 when he entered sale of land agreement with the 1st respondent .it was after the 2nd defendant got the court order exhibit no.6, that now he extended the 10.00 acres to more than 10.00 acres with total disregard to those who are occupying the other portion out of MAGUMONI/MUKUUNI/303 and in particular the plaintiff. THIS EXCISE WAS CARRIED OUT when this suit was in progress and it affected the portion of 1.00 acre occupied by the plaintiff and this is why the plaintiff sued the 2nd defendant. the plaintiff claim against the 2nd defendant is to the extent that when the 2nd defendant will be implementing the court order that he get 10.00 acres out of LR.MAGUMONI/MUKUUNI/303 the 2nd defendant should not alienate the portion measuring 1.00 acre out MAGUMONI/MUKUUNI/303 , which the plaintiff has been in occupation since 1992. The plaintiff contends that the total area of the suit land measures 18.01 acres and the 2nd defendant can get his 10.00 acres (which in any way he has been in occupation since 1987) without alienating 1.00 acre that the plaintiff has been in occupation since 1992.

We do recognize that the 2nd defendant has a court order dated 29th august 2018. By the said order the 2nd defendant is entitled to 10.00acres out of the original MAGUMONI/MUKUUNI/303. The 2nd defendant 10.00acres need not be in one piece, particularly noting that other

purchasers bought land from the 1st defendant and they have been in occupation of the so purchased portion from 1990's and in particular for the plaintiff since 14th January 1992. As contended the 2nd defendant 10.00 acres are intact in one piece which he has been occupying since 1987. The 2nd defendant only want to increase his 10.00 acre at the expense of the plaintiff, without caring about the plaintiff and all those others who purchased land from the 1st defendant.

The 2nd defendant knew when seeking for the court order that there were others who had purchased land from the 1st defendant and they were in occupation . the 2nd defendant ought to have informed the court and the plaintiff that the plaintiff would be affected by the order being sought by the 2nd defendant so that the plaintiff could put her objection to her land being alienated by the 2nd defendant. the issue of alienation anyway should not arise for the suit land measures 18.01acres and the 2nd defendant can get is 10.00 acres. As pointed out supra the 2nd defendant has been in occupation of 10.00 acres from 1987 and this is supported by the 2nd defendant statement dated 5th April 2019. The 2nd defendant his telling the truth when he says in his statement that he has been in occupation of 10.00 acres since 1987 and when he carried out his survey works in 2018 he was out to increase his 10.00 acres , that he has been in occupation since 1987.

He subdivided or caused to be subdivided MAGUMONI/MUKUUNI/303, when this suit was in progress and he only got registered with LR.MAGUMONI/MUKUUNI/3625 a subdivision of MAGUMONI/MUKUUNI/303 on 28th November 2018. We submit that the 2nd defendant action was meant to defeat justice in this case.

7. Your lordship in a humble view, the issues for determination in this case include but are not limited to the following .

(i) Whether the plaintiff has acquired an overriding interest in the nature of adverse possession over 1.00 acre out of LR.MAGUMONI/MUKUUNI/303 as it was then and if the answer is in the affirmative whether the court should order and direct that the plaintiff be registered with 1.00 acre out of the then MAGUMONI/MUKUUNI/303.

(ii) Whether in execution of the court order dated 29th August 2018 in CHUKA CMCC NO.185 OF 2018, the defendant should carry on the excise in manner that it does not alienate The plaintiff 1.00 acre out of MAGUMONI/MUKUUNI/303 as it was then.

(iii) Whether the honorable court should order and direct that the area of original LR.MAGUMONI/MUKUUNI/303 be established by the district surveyor to confirm,

(a) The actual size and or the area of the suit land.

(b) The size and area of the portion that the defendant was occupying before he carried out the 2nd survey works in 2018,

(c) how the land is occupied and utilized by various persons.

(iv) Whether land parcels MAGUMONI/MUKUUNI/3625 AND LR.MAGUMONI/MUKUUNI/3626 should be reconstituted into the original LR.MAGUMONI/MUKUUNI/303 to facilitate the implementation of the orders that may be issued by this court.

(v) Whether the 2nd defendant can get his 10.00 acres as per the court order and still leave enough land for other purchasers including the plaintiff to get their entitlement.

(vi) Who should pay the cost of this suit?

8. The first issue for determination my lord is whether the plaintiff has acquired 1.00 acre out of LR.MAGUMONI/MUKUUNI/303 as it was then. The answer to this question is in the affirmative , there is no dispute that the plaintiff purchased from the 1st defendant 1.00 acre out of MAGUMONI/MUKUUNI/303 back in 14th January 1992. The 1st defendant in his pleading and in his evidence has not disputed that there was such sale. The 1st defendant also has not disputed that the plaintiff has been in occupation and in use of 1.00 acre to the exclusion of everybody else including the 1st defendant the registered proprietor of MAGUMONI/MUKUUNI/303 as it was then . the occupation was open and peaceful. In fact it is the 2nd defendant who came to disturb the status quo in 2018 by carrying out survey works that affected the plaintiff 1.00 acre.

The doctrine of adverse possession has been the something matter in many high court cases and so by this court (ELC). The judicial decisions are therefore in plenty. We shall site only two for the purpose of this case which is COURT OF APPEAL AT NAIROBI , CIVIL APPEAL NO.73 OF 1982-PUBLIC TRUSTEES VERSUS WANDURU, the court held inter alia;

1. '**the appellant's cause of action arose not from the agreement of sale but from the claim of adverse possession under the limitation of actions act (cap 22)'.**

2. …….

3. 'The appellant had acquired an indefeasible title to the land by being in a continues, uninterrupted and exclusive adverse possession of it for twelve years.'

4. 'The period of twelve years began to run the day the appellant and her husband took possession of the land as that was the day when the respondent possession was discontinued, and not on the last day by which an application for the consent of the land control board was required to have been made under the land control act as that act did not apply to the

appellant's claim'.

5. 'The respondents title to the suit land was subject to the second appellant's overriding interest over the land under the registered land act 9cap 300) section 30 (f).'

That we urge the court to be bound by this authority granted that it a court of appeal judgment and deliver a judgment in favor of the plaintiff.

9. After the end of 12 years continuously without interruption by the plaintiff on 1.00 acres out of MAGUMONI/MUKUUNI/303 . the title to the portion so occupied by the plaintiff was extinguished . the portion no longer belong to the 1st defendant. the plaintiff and right to come to this court and pray that the portion so occupied for period in excess of 12 years continuously and openly and without any interruption be registered in her name. the 2nd defendant survey works carried out in 2018 could not defeat , the plaintiff's claim over 1.00 acre which the plaintiff had now acquired by way of adverse possession the plaintiff has indefensible title to 1.00 acre so occupied for a period in excess of 12 years , see above attached authorities. It has been held in many judicial decision that a subdivision and change of title to land that has been acquired by way of adverse possession cannot defeat the overriding interest of the adverse possessor. When the 2nd defendant carried out survey works in 2018 to extend what he had occupied before he did not defeat the plaintiff adverse possession over 1.00 acre. the plaintiff was in occupation since 1992. In fact has submitted supra, the portion measuring 1.00 acre was no longer the property of 1st defendant from whom the 2nd defendant was trying to get to increase to his 10.00 acres already in occupation. the 2nd defendant ought to have looked for part of MAGUMONI/MUKUUUNI/303 other than the portion measuring 1.00 acre which had been acquired by way of adverse possession by the plaintiff. By so submitting we are guiding by the following authority .'COURT OF APPEAL AT NAIROBI CIVIL APPEAL N0.24 OF 1979 –GITHU VERSUS NDEETE, where it was held inter lia;

1. 'The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession'.

2. 'Where the person in possession has already began and is in the course of acquiring rights under section 7 of the limitation of Action Act (cap22) and by virtue of section (30) f of the registered land act (cap 300), those rights are overriding interest to which the new registered purchaser's title will be subject'.

3. ……..

4. 'A title by adverse possession can be acquired under the limitation of actions act to a part of parcel of land which the owner holds title.'

This authority clearly shows that the 2nd defendant submission of LR MAGUMONI/MUKUUNI/303 did not affect the 1.00 acre that the plaintiff have been in occupation since 1992 , we urge the court to make such a findings. In light of our submission in this paragraph we contend that the plaintiff should be registered with 1.00 acre out LR.MAGUMONI/MUKUUNI/303

10. Should the 2nd defendant in execution of a court order dated 29th august 2018 in CHUKA CMCC NO185 of 2018 in his favor alienate 1.00 acres out of MAGUMONI/MUKUUNI/303 that the plaintiff has occupied since 14th January 1992 ? the answer to this question in our humble view is in the negative. The aforesaid court order is to be executed against the 1st defendant viz a viz land parcel MAGUMONI/MUKUUNI/303 . as pointed supra the portion measuring 1.00 acre out of MAGUMONI/MUKUUNI/303 no longer belonged to the 1st defendant by operation of law. The defendant title to 1.00 acre became extinguished 2004 upon expirely of 12 continues un interrupted occupation by the plaintiff see CIVIL APPEAL NO.24 OF 1979 –GITHU VERSUS NDEETE . The 2nd defendant therefore cannot purport to execute the court order in his favor by alienating 1.00 acre that the plaintiff was in occupation for a period in excess of 12 years. The portion of 1.00 acre may be in the name of the 1st defendant but in law the 1st defendant title to this portion was extinguished on or around 2004. The 2nd defendant therefore cannot purport to alienate this portion of land measuring 1.00 acre which the plaintiff has been in occupation for a period in excess of 12 years. The 2nd defendant should get other portion from MAGUMONI/MUKUUNI/303 as it was then to satisfy the court order.

11. Your lordship there is dispute between the litigants at what the actual size of LR.MAGUMONI/MUKUUNI/303 as it was then is. The plaintiff and the 1st defendant are of the stand that the land is 18.01 acres. the 2nd defendant on the other hand avers that the land is less than 18.01acre. we submit that the 2nd defendant stand is driven by is want to get the plaintiff land and those other purchasers that bought land from the 1st defendant to add to his 10.00 acres which he is already in occupation. the plaintiffs contention is that the land is enough for the 2nd defendant to get his 10.00 acres as per the court order and leave enough land for the purchasers to get what is rightfully their's.

The court will do justice if it orders that they be another survey works on what was then MAGUMONI/MUKUUNI/303 by the district surveyor who should be accompanied by the parties to this suit. We strongly feel that if the district surveyor measures the suit land , he will confirm that it measures 18.01 acres and not less. your lordship a surveyor in 1992 had established this fact . the dispute has only arisen after the 2nd defendant single handily , without participation of all the affected person, purported to resurvey the land in 2018. We dare submit your lordship that the survey carried out in 2018 there was collusion and connivance between the surveyor and the 2nd defendant. this is a very strong and good reason. Why this court should order that LR.MAGUMONI/MUKUUNI/303 be surveyed with a view to establishing the actual size and or area of the land.

(a) The actual size and or the area of the suit land.

(b) The size and area of the portion that the defendant was occupying before he carried out the 2nd survey works in 2018,

(c) how the land is occupied and utilized by various persons.

If the court orders a resurvey , it will make an informed judgment . in the 2nd defendant statement at paragraph 1 the 2nd defendant avers that he has been in occupation of 10.00 acres from 1987 when he purchased 10.00 acres from the 1st defendant . if that be the case they must be a clear demarcation by way of beacon (mature trees) separating the 10.00 acres from the rest of the land. That being the case the 2nd defendant did not have to call the surveyor in 2018, his 10.00 acre are separate from the rest of the land , his survey in 2018 as tended to alienate the plaintiff land and that of other purchasers. This extension definitely posses more question than answers. To clear this grey area the court should order and direct that the land be resurveyed by the district surveyor who should then report back to the court by filing a report. That on the second page line 4 of the 2nd defendant statement dated 5th April 2019 , the 2nd defendant avers that he has been in occupation of 10.00 acres since 1987. The question then is ,why should he increase his 10,00acres in 2018 so that the increase affect the plaintiff portion and other ,portions purchased by various purchasers from the 1st defendant. the survey works carried out by the 2nd defendant single handedly in 2018 can only be described as fraudulent and dishonesty. A repeat of survey of the suit land will do justice to both the plaintiff the 1st and 2nd defendant . we pray for orders for resurvey of the suit land LR.MAGUMONI/MUKUUNI/303 as it was then. Your lordship we pray that this court do reconsider to order the reconstitution of MAGUMONI/MUKUUNI/3625 AND 3626 subdivision of LR.MAGUMONI/MUKUUNI/303 into their original parcel of land. By so ordering this court will pave way for the orders that this court may make so that the plaintiff get her 1.00 acre out of what was then MAGUMONI/MUKUUNI/303. Of interest to note is that LR.MAGUMONI/MUKUUNI/3625 measures 4.05 hectares which is more than 10.00 acres curtsey of 2nd defendant exhibits No.8(official search).

12. Who should pay the cost of this suit? Cost follows the events , curtsey of section 27 CPA .of course we are minded that the issue of cost is discretionary, we however submit that the plaintiff is entitled to cost of this suit.

13. In conclusion your lordship , we submit that the plaintiff has proofed her case on the balance of probability. she has demonstrated that she has acquired an overriding interest in the nature of adverse possession over 1.00 acre out of the 1st defendant land parcel MAGUMONI/MUKUUNI/303 as it was then. she has been in occupation of this portion of 1.00 acre quietly peacefully and continuously and without interruption for a period in excess of 12 years. she should therefore be registered with 1.00 acre. the plaintiff has equally demonstrated that the 2nd defendant should not alienate the plaintiff portion measuring 1.00 acre when executing the court order in his favor. We are submitting that the land is enough for everybody who has an interest over LR.MAGUMONI/MUKUUNI/303. The 2nd defendant is only being selfish by wanting more than 10.00 acres that he has been occupying since 1987, curtsey of the 2nd defendant statement dated 5th April 2019. We pray for the prayers sought in the OS dated 12th November 2018.

14. Your lordship we rest our submission and pray.

DATED AT CHUKA this 16th day of July, 2019

15. The 1st respondent's written submissions are pasted herebelow in exactly the way they were framed without any erasure whatsoever including spelling and any other mistakes.

SUBMISSION:

BENJAMIN COLLINS MATE

1ST RESPONDENT

LR NO. MAGUMONI/MUKUUNI/303

(1) IN GOOD FAITH

I sold portions of my land to all the Applicants in Good faith allowing them to occupy and settle in their portions without any hindrances.

Problems only arose after the 2nd Respondent wrongfully cautioned the Land **(Doc-5B), (Doc -5C).**

Initially I had sub-divided the land as follows:

(a) Robert Moffat Njoka……Applicant 11……2.00 Acres….Doc – 4D

(b) Justin Mutegi Kithira……1.00 Acre……Doc – 4E

(c) Njeru Phillip Njoka……..Applicant 12……..…2.01 Acres…..Doc – 4F

(d) Alexander Nyaga……..Applicant 13……1.00 Acre……Doc – 4G

(e) Julia Mugure……Applicant 14……1.00 Acre……Doc – 4H

(f) Bundi Kiragu……Applicant 10……....1.00 Acre……Doc – 4I

(g) Eustace Kent Nkonge…….2.00 Acres

(h) Gerald Nyangi Wilson……2nd Respondent……...7.00 Acres

(i) Me - Benjamin Collins Mate …….1st Respondent…….1.00 Acre

Total…….....…18.01 Acres

Officially, the Acreage of MAGUMONI/MUKUUNI/303 is 18.02 Acres **(Doc -1)** and as can be seen from the above figures we fitted comfortably in the Land.

(2) BREACH OF CONTRACT BY THE 2ND RESPONDENT

The main aim of the Agreement for Sale of the Land **(Doc-3)** was to save the Land from being Auctioned.

This was the Sole Responsibility of the 2nd Respondent, but he failed and if it wasn't for the quick action of Robert Moffat Njoka – Applicant 11 - of clearing the Balance of the Loan with the Bank, the Land would have been Auctioned **(Doc-4C),** since the 2nd Respondent had abandoned his Responsibility.

As a Breacher, the 2nd Respondent cannot claim any portion of the Land, but since I am a kind person, I can forgive him and award him a certain portion of the Land.

(3) PAYMENTS MADE BY THE 2ND RESPONDENT.

(a) The 2nd Respondent showed me a copy of a letter where in September 1987, he paid a total of Kshs 166,000 via Hamilton, Harrison & Mathew and Oraro & Rachier Advocates.

The Bank received only Kshs 100,395 **(Doc-5A**) and it wasn't my fault that the full amount was not remitted to the Bank.

(b) The 2nd Respondent showed me copy of a letter where in November 1993 he paid Kshs 30,000 to my late Mother Zipporah.

There was nothing left for him to pay in 1993 since the Breached Contract **(Doc-3)** had expired on 31-10-1987, the Bank Loan cleared by one of the Applicants - Robert Moffat Njoka 11, the Land sub-divided and the 2nd Respondent settled in his portion of the Land.

Infact the 2nd Respondent was informed of the same by my Lawyer – Mukira Mbaya & Co. Advocates when he returned his cheque for Kshs 31,880 as per my Lawyer's letter dated 16-03-1992 **(Doc-11)** since there was nothing left for him to pay.

I couldn't have refused the 2nd Respondent's cheque and then later tell him to go and pay the same amount to my late Mother Zipporah.

That is unbelievable!

I never authorized my late Mother Zipporah to accept payments on my behalf, and if I did, let the 2 nd Respondent prove it but I can swear I never received that amount.

My late Mother Zipporah was not my Agent and there's nowhere in the Agreement **(Doc-3)** where she was allowed to accept payments.

Just because Zipporah is my Mother doesn't mean she's me and I am her.

Legally we are two separate entities each answerable to their own deeds.

(4) CORRECT ACREAGE OF MAGUMONI/MUKUUNI/303

Officially, the Acreage of MAGUMONI/MUKUUNI/303 is 7.294 Hectares (18.02 acres) **(Doc-1)** but different surveyors have surveyed the Land and found it to be between 16.50 Acres and 17.00 acres and not 18.02 Acres.

(5) MY PROPOSAL

Having taken all things into account, it would be okay if the Honourable Court can settle this matter once and for all by reverting to the old boundaries and authorizing the Land to be sub-divided as follows:-

(a) Robert Moffat Njoka……Applicant 11……2.00 Acres…..Doc – 4D

(b) Justin Mutegi Kithira……1.00 Acre……Doc – 4E

(c) Njeru Phillip Njoka……..Applicant 12……..…2.01 Acres…..Doc – 4F

(d) Alexander Nyaga…….Applicant 13……1.00 Acre……Doc – 4G

(e) Julia Mugure……Applicant 14……1.00 Acre……Doc – 4H

(f) Bundi Kiragu……Applicant 10……....1.00 Acre……Doc – 4I

(g) Eustace Kent Nkonge…….2.00 Acres

(h) Gerald Nyangi Wilson……2nd Respondent……...5.00 Acres

(i) Me - Benjamin Collins Mate …….1st Respondent…….1.50 Acres

Total…….....……..…..16.51 Acres

That way, every party will feel satisfied.

The 2nd Respondent cannot get more since he Breached the Contract **(Doc- 3)**

(6) CIVIL SUIT NO. 692 AT MERU LAW COURTS

TRANSFERRED TO CIVIL SUIT NO. 185 AT CHUKA LAW COURTS

I am the Plaintiff in the above mentioned Civil Suit **(Doc -7A) (Doc-7B)** and the 2nd Respondent is the Defendant.

I've always been available, and as the Sole Registered Owner of the Land, I'd like to know why the Transactions and Rulings were made without my presence.

As can be seen from my letter dated 14th June 1991 to the 2nd Respondent **(Doc-13),** he knew my Nairobi Home because he even once visited me there.

Mr Paton Kimathi's Affidavit dated 7th August 2018 **(Doc-14),** is a complete fabrication meant to mislead the Court.

All the information contained therein is false.

In July 2018 I was based in Nairobi and I have never operated a Bar at Mukuuni Market.

I do not even know the Lady called Judy Mr Kimathi is talking about.

Can the Court summon Mr Kimathi to come and testify how he claims to have met me in the Green Bar because it is false?

(7) ANSWERS TO YOUR QUESTIONS.

Thanks for asking me some Personal Questions and here are my Answers:-

(a) Q: Do you understand English

A: I believe I fully understand English but Old Age is catching up with me and my Hearing is very poor.

(b) Q: Are you married?

A: Yes, I am married with children but my wife died young.

Her maiden name was Lily Njeri Njoroge

(c) Q: Do you have any other piece of Land?

A: No and my children really blame me for selling their Land as they really do not understand what happened.

Right now I am being accommodated by my Brother.

(d) Q: Are you a Barman?

A: No. I do not drink or smoke and I don't think a Bar Business would be the right one for

me and so I have never been a Barman.

Strangely, you are the 3rd person to ask me the same question.

The other two were congratulating me for opening and running a Bar in Mukuuni with my wife Ciamati.

I don't know where they got that information from because it's false and as mentioned, my late wife's name was Lily Njeri Njoroge and not Ciamati.

I know I sometimes give you a hard time but I am sorry and I ask you to forgive me.

Dated at Chuka this 18th day of July, 2019.

16. The 2nd Respondent's written submissions are pasted herebelow in exactly the way they were framed without any erasure whatsoever including spelling and any other mistakes.

2ND RESPONDENT'S WRITTEN SUBMISSIONS

May it please your Lordship,

The 2nd Respondent submits as follows in opposition to the Applicant's claim: -

A. INTRODUCTION

1. The Applicant instituted the suit herein against the Respondents through Originating summons dated November 14th, 2018and filed in Court on the 15th day of November 2018. The Applicant prays that:

a) The 1st Respondent be Ordered to transfer 1.00 acres out of LR MAGUMONI/MUKUUNI/303 and in default the Deputy Registrar be authorized to execute all the requisite documents to facilitate the transfer of 1.00 acres out of MAGUMONI/MUKUUNI/303 from the 1st Respondent to the Applicant.

b) An Order restraining the 2nd Respondent from alienating in any manner 1.00 acres out of LR MAGUMONI/MUKUUNI/303 occupied and in use by the Applicant when executing the Court Orders in Chuka CMCC No. 185 of 2018.

c) Costs of the suit.

2. The Application is supported by the Affidavit of **JULIA MUGURE** of an even date. It was accompanied by issues for determination of an even date, a case summary of an even date, a list of documents and witnesses of an even date and a statement by **JULIA MUGURE**.

3. The 1st Respondent filed a Replying Affidavit dated March 19, 2019 on March 21, 2019 and a statement titled Defence papers dated April 16, 2019 on April 18, 2019. The statement had annexed to it a bundle of documents marked Doc 1 to doc 7.

4. The 2nd Respondent filed a Replying Affidavit dated December 21, 2019 on December 24, 2019 in opposition to the Applicant's claim herein. He also filed a Statement dated April 5, 2019 on April 8, 2019 and a list and bundle of documents dated April 5, 2019 on April 8, 2019.

B. ISSUES FOR DETERMINATION

5. The matter proceeded for hearing vide viva voce evidence on July 8th, 2019 and on the same day, the defense given in ELC case no. 12 of 2018(OS) was by a consent recorded in open court and signed by all parties on July 8th, 2019 adopted by all parties to apply in this case. From the pleadings and the evidence of the parties, we humbly submit that the following issues fall for determination:

a) Whether the Applicant has identified the land in possession;

b) Whether the applicant has been in non-permissive or non-consensual possession of the suit property;

c) Whether the Applicant's possession was notorious, open, exclusive and uninterrupted;

d) Whether the Applicant is entitled to a restraining Order as against the 2nd Respondent.

C. RESOLUTION OF ISSUES

a. Whether the Applicant has identified the land in possession.

6. **Order 37 Rule 7 (1) and (2)** of the **Civil Procedure Rules, 2010** provide as follows:

> *"(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.*
>
> *(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed."*

7. The aforesaid provisions of the law are couched in mandatory terms. The Court of Appeal in **Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 others [2004] eKLR** noted as follows as concerns the aforesaid requirement:

> *"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, rule 3 D (2) of order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons. In this case, the appellant did not annex the certified extracts of land title LR Nos 1756 and 1757 before the sub-division or even after the sub-division. What he annexed were copies of certificates of titles for the sub-divisions LR Nos 1757/5; 1757/6 and 1756/7 all issued on 4th October, 1996. He did not annex any document of title relating to LR No 1756/8. Mr George Matata Ndolo deposes in paragraph 25 of the affidavit sworn on 29th March, 2001 that the suit properties are already charged to banks and that the rights of the banks have been registered against the titles.*
>
> *The burden was on the appellant to produce the certified extracts of title in respect of the suit properties. In the absence of the extracts of title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted. Moreover, the appellant did not prove the location of the distinct portion of the land he is claiming or its acreage. He does not say whether the portion he is claiming was comprised in the original title LR No 1756 or LR No 1757. He does not further say whether the portion of the land he is claiming is comprised in now LR No 1757/5, 1757/6, 1756/7 or 1756/ 8. Evidently, two original titles LR Nos 1756 and 1757 comprising of Mwani Ranch and even the four sub-divisions are expansive and it is difficult to locate the portion claimed by the appellant. There is no evidence that the alleged fourty acres were surveyed, demarcated and excised from the expansive ranch. In paragraph 4 of the supporting affidavit the appellant deposes that he and other people have been in possession of the fourty and twenty acres thereby implying that he is not in exclusive possession of the land he claims.*
>
> *In the circumstances, there was no concrete evidence that appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres."*(Emphasis supplied) **(See page 5 and 6 of the 2nd Respondent's Bundle of Authorities)**

8. In this case, the Applicant did not annex and/or produce a certified extract of the title to the suit property. In addition, the Applicant did not prove the distinct location of the portion of the suit property he is claiming. No maps and/or plans were provided to the Court to establish the exact location of the portion claimed by the Applicant.

9. Furthermore, the Applicant herein during cross-examination by the 2nd Respondent's counsel on July 8th, 2019, stated that she knows that the suit property does not exist anymore. She also admitted that the suit property MAGUMONI/MUKUUNI/303 was now MAGUMONI/MUKUUNI 3525 AND MAGUMONI MUKUUNI 3526, but she did not know the specific portion (between 3525 and 3526) under which the 1.00 acre of land she was claiming fell under.

10. In view of the forgoing, we humbly submit that the Applicant has not identified the portion of land she is claiming and as such has not satisfied the evidential burden on him to succeed on a claim for adverse possession.

b. Whether the applicant has been in non-permissive or non-consensual possession of the suit property

11. The Applicant stated that she together with her deceased husband had entered into the suit property through an agreement of sale and therefore with the permission of the 1st Respondent. It was admitted in evidence by the Applicant, which evidence the 1st Respondent supported to be true, that the Applicant's deceased husband and the 1st Respondent entered into a sale agreement on 14th January June, 1992. He paid the purchase price and was granted possession. He acknowledged that the only reason why the title had not been issued in his favour is because the 2nd Respondent had put a caution over the suit property.

12. In **Christopher Kioi& another vs. Winnie Mukolwe & 4 others [2018] eKLR** the Court of Appeal held that:

> *"But even if it were accepted that Kioi took possession of the suit property pursuant to the alleged agreement for sale, that in itself would negate a claim based on adverse possession because the possession would have been with the consent of Kituri. As this Court stated in Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001:*
>
> *"It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance of an agreement of sale or lease or otherwise."*
>
> *The appellants however submitted, on the authority of the judgment of this Court in Wambugu v. Njuguna (supra) that Kioi's possession of the suit property became adverse after payment of the last installment. We have however found that the appellants did not adduce any cogent evidence of payment of such last installment, or any other for that matter. In Wambugu v. Njuguna (supra), this Court held that a purchaser of land under a contract of sale who is in possession of land with the permission of the*

vendor can only lay claim to the land after the period of validity of the contract, unless and until the contract has been repudiated, in which case adverse possession starts from the date of termination of the contract. (See also Samuel Miki Waweru v. Jane Njeri Richu, supra). In the absence of any evidence regarding the period of validity of the alleged sale between Kioi and Kituri, and assuming that Kioi had taken possession of the suit property on the basis of the agreement for sale, the time for adverse possession would have started to run only in 2005 when the 1st respondents, as the administrators of Kituri, repudiated the contract by entering into another agreement for sale with the 2nd respondent. That would not satisfy the statutory period for adverse possession.(Emphasis supplied) **(See page 13 and 14 of the 2nd Respondent's Bundle of Authorities)**

13. This position was buttressed in **Gabriel Mbui vs.Mukindia Maranya [1993] eKLR** where it was noted as follows:

"*(3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, ie without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called "adverse". Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner's will accompanied the occupier's possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession, to emphasize that "hostility" is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (Cobb v Lane [1952] 1 All E R 1199; Denning, MR, in Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd [1974] 3 All ER 575 at p 580; Chanan Singh, J, Jandu v Kirpal and another (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1[1976] Kenya L R 253, at pp 257, 258)"*(Emphasis supplied) **(See page 22 and 23of the 2nd Respondent's Bundle of Authorities)**

14. From the foregoing, it is clear that where one takes possession of land lawfully and with the consent of the registered proprietor, one cannot claim adverse possession. To succeed in a claim for adverse possession, the claimant must be one who is in the position of a trespasser, that is, the legal owner is entitled to evict the claimant from the land for the claimant has no claim over the same. Where a party has entered disputed land with the consent of the owner, he cannot be a trespasser and therefore cannot claim adverse possession.

15. In this case, the Applicant's deceased husband, together with the Applicant entered into the suit property with the consent of the 1st Respondent as a purchaser. This much has been admitted by the Applicant and the 1st Respondent. At no point was it stated that he stopped claiming under the sale agreement and began being a trespasser. As such, the Applicant herein has not been in non-permissive or non-consensual possession of the suit property. The following passage from **Gabriel Mbui vs. Mukindia Maranya [1993] eKLR** lends credence to this position:

"*Statements of the rule on adverse possession arising from failed land sale contracts have created an uncertainty in the law pertaining to land. Normally, a person claiming adverse possession is allowed in possession as a purchaser pending completion of the purchase price, or if he has already paid in full, then pending compliance with the requisite statutory formalities; and he is allowed to stay there because he is a purchaser, and not a mere trespasser. The vendor decides by accident or design to allow matters to drift on without taking steps to evict the purchaser from the land after the contract fails on account of non-completion, late performance, or non-compliance with legal requirements, relying on the belief that the purchaser will get out on his own, or on the hope that it will all turn out right in the end. Both the vendor and the purchaser may be ignorant of the legal consequences. The purchaser believes he is in possession as a purchaser, and wishes to remain there and found his title on contract. When things come to a head, the purchaser says in retrospect, that although he looked and acted like a purchaser in possession, but the vendor did not evict him, and although he did not say he no longer relied on the contract and did not repudiate it, and the vendor was still entitled to look on him as a purchaser and he did not realize it and it might not have suited the purchaser for the vendor to regard him otherwise than as purchaser, the purchaser was in fact a person in adverse possession, quietly picking up the years which are necessary to elapse to bar the owner's title. The obvious rule against this unconscionable approach of the purchaser should naturally be, that the purchaser having been able to go in and stay under the contract, cannot be allowed to repudiate the contract with the hindsight of a fool and claim adverse possession. If, however, at any time, the purchaser made it clear that he was no longer bound by the contract, or that despite the contract becoming null and void he is retaining possession under some other colour of right independently or the land sale contract, then different considerations would apply. For it is only upon making that fact clear, that the vendor can take action against him. Accordingly, the rule should be, that where it is only the fact that a squatter is in possession as a purchaser under a contract which has become in operative, null and void, or unperformed by him, and which has enabled him to claim title by adverse possession, the position is that although the full period required by the statute has elapsed, the squatter's possession remains consensual and does not found a claim of being in adverse possession. This proposition is in accord with what Hancox JA (as he then was), said in asisto Wambugu v Kamau Njuguna [1982-88] 1 K A R, 117 at p 222, namely:*

> *"The respondents never repudiated the 1958 agreement, but adopted it by remaining in and cultivating the land, until the appellant made it clear that he was no longer going to allow the respondent to stay there ….the respondent, cannot now be heard to say that this occupation was not under the agreement, but was adverse to the registered owner if the necessary period had elapsed"*.
>
> *The vendor is at liberty to allow a purchaser to stay on the land, expecting the purchaser to complete payment, or to apply for extension of the time within which the consent of the Land Control Board may be sought and obtained or otherwise to comply with the law; and the vendor is entitled to extend the time for putting things right, including fulfillment of legal requirements; and until the purchaser evinces a clear intention not to rely on the contract but on adverse possession, time does not run. If such repudiation is not shown, the purchaser remains in occupation with the permission of the vendor even if the contract becomes null and void by operation of law. That is the law to be gleaned from the combined three speeches of the Court of Appeal in Wambugu v Njuguna [1982-88] 1 KAR 117, Kneller and Hancox, JJ A, and Chesoni, Ag JA. Contrary holdings rendered in unguarded and flabby terminology do not appeal to close reasoning and are not founded on justice, but on arbitrary spar of the moment deception. To claim title by virtue of purchase, and then to turn round and claim it by adverse possession is to set up mutually self-destructive contradictions and a confusion of though. As was aptly put by Chanan Singh, J, in Jandu v Kirpal and another [1975] E A 225 at 233, "Previously title was claimed by virtue of purchase: now, it is by adverse possession. These contradictions do exist"* (Emphasis supplied) **(See page 30 and 31of the 2nd Respondent's Bundle of Authorities)**

16. In addition to the foregoing, it was claimed that consent from Land Control Board was obtained. However, no evidence of the same was submitted. As such the claim for adverse possession must fail for the same is a violation of **sections 6 and 22** of the **Land Control Act**. We rely on the following passage from **Gabriel Mbui vs. Mukindia Maranya [1993] eKLR** for this proposition:

> *"In the instant case the plaintiff conceded that the sale agreement did not receive the consent of the relevant Land Control Board, and that the agreement, therefore became null and void. It is also conceded and stated that despite the fact that the agreement became null and void, the plaintiff remained in possession of the land which had been sold under the agreement. The plaintiff does not say under what colour of right he continued in possession. It was a matter of evidence for him to prove the aspect. If he remained there as a purchaser, he was violating the provisions of section 22 of the Land Control Act; and the Court cannot aid him to benefit from his own wrong to break the law. Nor can circuity and metamorphosis erase the crime that taints his possession. He does not have to be successfully prosecuted to show that he is contravening section 22, given the admission by the plaintiff that the transaction required the consent of the Land Control Board, that the consent was neither sought nor obtained at all that the transaction became null and void, that despite all that, he remained in possession which he had taken in furtherance of the land sale agreement, and that in furtherance thereof he continued to pay the agreed purchase price stipulated in the agreement."*(Emphasis supplied) **(See page 42 of the 2nd Respondent's bundle of authorities).**

c. Whether the Applicant's possession was notorious, open, exclusive and uninterrupted;

17. For a claimant to succeed in a claim for adverse possession, it must be shown that his possession was notorious, open and exclusive. Just because the Applicant was in possession of the subject land does not mean that the same was notorious, open, exclusive and uninterrupted. There must be control the property to the exclusion of others and without interruption. The issue must be proved by straightforward and stringent evidence. We rely on the cases of **Christopher Kioi& another vs. Winnie Mukolwe & 4 others [2018] eKLR** and **Gabriel Mbui vs. Mukindia Maranya [1993] eKLR** for this proposition. **(See pages14, 26 and 28 of the 2nd Respondent's bundle of authorities)**

18. We humbly submit that the Applicant has not established that she was in notorious, open and exclusive possession of the suit property. Other than evidence of being in possession of the suit property, which is not enough to discharge this burden, the applicant tendered no evidence to this end.

19. In addition, the Applicant's possession was not uninterrupted. The 1st Respondent filed Chuka CMCC No. 185 of 2018 (Formerly Meru CMCC 692 of 1995) in the year 1995 as proprietor of the suit property to enforce his rights thereto. The Applicant acknowledged having heard of the said suit.

20. In addition, the 2nd Respondent filed a caution against the suit property in 1991 and the same remained in place until 2018.

d. Whether the Applicant is entitled to a restraining Order as against the 2nd Respondent.

21. It is not in dispute that the 2nd Respondent obtained Orders in Chuka CMCC No. 185 of 2018 (Formerly Meru CMCC 692 of 1995) directing that the conveyance to the 2nd Respondent of ten (10) acres of the suit property be affected by the Court. (See 2nd Respondent's Exhibit 6.)

22. Subsequently, the Orders were executed as Transfer forms were executed on September 21, 2019. (See 2nd Respondent's Exhibit 7). As things stand, the suit property is no-longer in existence. Two new titles were issued being MAGUMONI/MUKUUNI/3625 and MAGUMONI/MUKUUNI/3636. (See 2nd Respondent's Exhibit 8).

23. Therefore, an Order restraining the 2nd Respondent from alienating in any manner 1.00 acres out of LR MAGUMONI/MUKUUNI/303 occupied and in use by the Applicant when executing the Court Orders in Chuka CMCC No. 185 of 2018 is an exercise in futility as the same is overtaken by events. The 2nd Respondent has already subdivided the suit property and alienated his ten (10) acres from thereon. He cannot be restrained from doing that which has already been done.

24. In addition to the forgoing, the 2nd Respondent acquired the title to MAGUMONI/MUKUUNI/3625 after following due procedure. The title was issued pursuant to a Court Order issued in Chuka CMCC No. 185 of 2018. Any party aggrieve by the decision ought to Appeal the same or file an application for Review of the same. Any party affected and/or aggrieved by the execution of the said Orders ought to follow the procedure prescribed under **Order 22** of the **Civil Procedure Rules**.

25. In asking this Court to issue an Order restraining the 2nd Respondent from alienating in any manner 1.00 acres out of LR MAGUMONI/MUKUUNI/303 occupied and in use by the Applicant when executing the Court Orders in Chuka CMCC No. 185 of 2018 is equivalent to asking this Court to seat on appeal, review and/or hear objection proceeding emanating from execution of the Orders in Chuka CMCC No. 185 of 2018.

26. It is worth noting that when the Applicant was asked during cross examination by the 2nd Respondent's counsel if she was appealing against the decision and orders issued in Chuka CMCC No. 185 of 2018, she said she was not appealing.

27. We urge the Court to decline the invitation to struggle the baby sired in Chuka CMCC No. 185 of 2018 and direct any parties aggrieved by the said Orders to address its grievances as prescribed by law.

D. CONCLUSION

It is discernible from the foregoing that the Applicant has not proved his case on a balance of probabilities hence the Applicant's claim herein must fail.

We so humbly pray.

DATED AT NAIROBI THIS 29th DAY OF July, 2019

18. The following paragraphs are, mutatis mutandis, taken from the judgment in ELC 12 OF 2018 (OS) as all the applicants' cases and the defence cases in ELC 10, 11, 12, 13 and 14 have common threads running through them. This is, firstly, that the applicants and the 2nd Respondent bought land from the 1st Respondent. Secondly, all the applicants were claiming land by way of adverse possession from the 1st Respondent. Thirdly, all the applicants were claiming overriding interests over the original suit land which the 2nd Respondent had subdivided allegedly through a court order.

19. On **23rd September, 2019**, Advocate Kimanzi, holding brief for M/S Ambani, the 2nd respondent's advocate, told the court that the 1st respondent, Benjamin Collins Mati, had through his submissions introduced new evidence through his annextures 11 and 14. He argued that new evidence could not be introduced through written submissions and asked the court to expunge the offending annextures. The court agreed and ordered that those annextures be expunged. The court delivered a ruling to that effect and ordered that this ruling be filed in Chuka ELC Numbers 10, 11, 13 and 14 (ALL OS) and those annextures also filed in those cases, be expunged.

20. I frame the issues for determination to be:

a) Has the applicant proved entitlement to the suit land through the doctrine of adverse possession?

b) Who will bear costs attendant to this suit?

21. The applicant and the 2nd respondent proffered legal (case law) authorities to buttress their assertions. I find it veritably superfluous to regurgitate the principles enunciated by those authorities. This is because these principles are contained in written submissions filed by the parties and which have been fully reproduced in an earlier part of this judgment. The 1st Respondent did not proffer any case law authorities. The authorities proffered by the parties are good law in their facts and circumstances. I have taken them into account when arriving at my determination in this case. However, I do opine that no two cases are congruent to a degree of mathematical certitude in their facts and circumstances.

22. A conspectus of the Applicant's case is that her husband purchased one acre out of LR. Magumoni/Mukuuni/303 from the applicant and was put into possession thereof and has developed the land and has been living thereon for a period exceeding the threshold necessary for a declaration of ownership by way of adverse possession to accrue. She says that the 1st Respondent could not transfer the land to her because the 2nd Respondent had placed a caution over L.R. Magumoni/Mukuuni/303 part of which he had purchased. She seeks a declaration that she is owner of the suit land by virtue of the doctrine of adverse possession. She says that the 2nd Respondent threatens her occupation of his land when purporting to execute a judgment in Chuka CMCC No. 185 of 2018.

23. DW1, the 1st Respondent, agrees that he sold land to the applicant and has all along been willing to transfer it to the Applicant. He explains that he has been unable to do so because the 2nd respondent had placed a caution over the suit land. He laconically states that the apposite blame should be ascribed to the 2nd respondent. DW1 in his pleadings seeks to introduce new parties and issues and also asks the court to grant orders not tenable in this suit. I decline to allow new issues, parties and new prayers as sought by DW1.

24. DW1 told the court that his original agreement with DW2, the 2nd respondent, was for sale of 10 acres, DW2 failed to fulfil their contractual agreements, and as a result, he gave him 7 acres. He denied knowledge of the proceedings and judgment in Chuka CMCC No. 185 of 2018 whose execution spawned this suit and also Chuka ELC 10, 11, 13 AND 14 OF 2018 (ALL OS). Without saying who advised him, he claimed that the decree in Chuka CMCC No. 185 of 2018 was irregular because there was no judgment upon which the impugned decree could be predicated. He also told the court that he had been advised, without saying who advised him, that the orders and the decree

which spawned this suit could not be implemented because, by the 2nd Respondent's admission, judgment had been delivered in 1995, if at all it was delivered. He invited the court to peruse the file for Chuka CMCC No. 185 of 2018 and find that the orders and decree in that case were irregular and should be set aside.

25. I do note that this is not an appeal from the judgment in Chuka CMCC No. 185 of 2018. However, issues of law can be raised at any stage in the proceedings. A court of law cannot close its eyes and be blind when issues of law which can cause injustice are raised by a litigant, and more so when that litigant is a lay person who is not represented by an advocate and who says that he cannot afford services of legal counsel. I find that the issues raised by the 1st respondent bring out weighty issues of law. For this reason, I perused the file for Chuka CMCC No. 185 of 2018. A perusal of the proceedings in this suit has also been necessitated by the 2nd question in the Applicant's Originating Summons which states: ***"2. Whether the 2nd Respondent has a judgment in his favour giving him 10 acres out of LR; Magumoni/Mukuuni/303".***

26. The proceedings in the skeleton file have a copy of pages of the register which are by and large illegible. The descriptive portion of the 2nd page has descriptive parts rendered non-existent and the page where the 2nd Respondent's name appears is illegible. In his letter dated **24th April, 2018**, addressed to the Chief Magistrate, Meru, he requested for the judgment apposite to Meru CMCC 692 of 1995 and went on to say that since the file had been missing, he sought to be allowed to construct a skeleton file so that he could obtain apposite orders. He made no indication regarding when a judgment was delivered in that case and did not produce a copy of the alleged judgment or even his plaint.

27. It is noted in the reconstructed file that on **9th June, 2003**, the 2nd Respondent had requested for judgment and his request was received by the Meru Registry on **23rd September, 2003**. The request was in the following form:

> **REQUEST FOR JUDGMENT**
>
> The defendant requests for judgment against the plaintiff on the counter-claim, the plaintiff having failed to file reply to the counter-claim.
>
> This request is for interlocutory judgment on prayer (a) of the counter-claim and costs.
>
> **Dated at Embu this 9th June, 2003**
>
> **NJAGE & Co. Advocates for the defendant**

28. There is no clear evidence that an interlocutory judgment was entered. This court is not able to know what prayer (a) was. There is no evidence that formal proof proceedings took place and that a judgment was delivered. Except for the claim in his Notice of Motion dated **2nd May, 2018**, there is no evidence for his claim that he had been awarded 10 acres. I, therefore, find that there was no basis for the lower court granting orders in terms of the prayers in the Notice of Motion Application dated **2nd May, 2018**. In any case, an award based on an interlocutory judgment is tenable only where the apposite claim is for pecuniary damages or for detention of goods. Interlocutory Judgments cannot be used to award land to a litigant.

29. If the alleged Judgment was entered in **1995, 23 years** had elapsed when the orders in Chuka CMCC 185 of 2018 were issued. As there is also an indication that the alleged impugned Judgment was entered or delivered in **2003, 15 years had elapsed** by the time orders in **CMCC 185 of 2018** were issued. By dint of the **Limitation of Actions Act**, such a Judgment cannot be implemented.

30. A conspectus of the case postulated by the 2nd Respondent (DW2) is that, he bought 10 acres from the 1st Respondent but the 1st Respondent only gave him 7 instead of 10 acres. He says that he went to court and obtained a judgment to the effect that he was entitled to 10 acres out of Land Parcel No. Magumoni/Mukuuni/303. He goes on to state that he executed that judgment as a result of which the original land was subdivided to spawn land parcel Nos. Magumoni/Mukuuni/3625 and 3626. He avers that he has been on land parcel No. 3626 measuring 10 acres since 1987 and that no one including the Applicant had encroached or settled upon it. He is obviously being economical with the truth as he only obtained 10 acres after the orders he obtained in Chuka CMCC 185 OF 2018. He argues that the applicant's claim for adverse possession against him has no merit. In his replying affidavit, DW2 at one place says his land is parcel No. Magumoni/Mukuuni/3626 and at another place says that his land is Magumoni/Mukuuni/3625.

31. The applicant, though he gave garbled oral evidence regarding the occupation of part of land parcel No. Magumoni/Mukuuni/303, eventually agreed that he and the applicants in ELC 10, 11, 12, 13 and 14 (ALL OS) shared parts of this land.

32. From the Applicant's pleadings, it is clear that the 2nd Respondent had been sued in this case because if the Applicant succeeded in this case, he would be negatively affected. This is because the applicant would then be found to have obtained an indefeasible title to the claimed land by having been in continuous, uninterrupted and exclusive adverse possession of it for twelve years. And I add: ***"For a period exceeding 12 years which is the threshold for ownership by way of the doctrine of adverse possession to accrue***". This would be the position even if the land in question had changed registered ownership. The new owner's title would be subject to the applicant's overriding interest. This is an inconvertible principle unequivocally elaborated by the ***Court of Appeal in Civil Appeal No. 73 of 1982 Public Trustee versus Wanduru (op cit)***. It was also pellucidly enunciated by the same court in Githu versus Ndeete – Civil Appeal No. 24 of 1979 [1984] Klr 776.

33. Upon perusal of the file apposite to Chuka CMCC 185 of 2015, I note that the proceedings show that on **29th April, 2018**, at Meru, Gerrald Nyangi Wilson, the 2nd Respondent herein, was allowed to reconstruct a skeleton file. On **7th May, 2018**, an order was issued by Hon. M. K. N. N. Maroro (P.M) that the file be placed before the Judge for transferring orders to Chuka Court which would have

jurisdiction. On **17th July, 2019**, the 2nd Respondent was at the Chuka Registry where his application was fixed for hearing on **2nd May, 2018** or on **29th May, 2018**. On **29th May, 2018**, the matter was heard in Chuka CM's court and the 2nd Respondent was granted the orders he sought in his application dated **2nd May,2018** which orders spawned this dispute.

34. It is pellucid that Meru CMCC No. 692 of 1995 which became Chuka CMCC 185 of 2018 was never properly heard because the lower court sought to issue orders in a matter where the alleged judgment was entered or delivered over 12 years after issue. The court, therefore, lacked jurisdiction to hear and determine a matter irregularly, illegally and improperly placed before it. It could be that the presiding officer in the court innocently proceeded to deal with the matter. Any decision arising thereof is **void ab initio** and merits setting aside. I note that at paragraph 27 of their submissions on behalf of the 2nd Respondent, his advocates have stated that: ***"We urge the Court to decline the invitation to struggle (sic) the baby sired in Chuka CMCC No. 185 of 2018 and direct any parties aggrieved by the said Orders to address its (sic) grievances as prescribed by law."*** Perhaps they mean by way of appeal. This argument is hereby debunked as there was no valid decision to be appealed against. I opine that there never was any womb that would have carried the alleged pregnancy to full term.

35. I have considered the pleadings, the authorities, the oral evidence and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties.

36. In the earlier part of this judgment I have clearly expressed myself regarding the various issues raised in this matter. I, however, find it necessary to unequivocally pronounce myself regarding one overarching issue. This concerns implementation and execution of a judgment upon expiry of the period stipulated by the Limitation of Actions Act.

37. I need not reinvent the wheel. The ***Court of Appeal in Civil Appeal No. 124 of 2003 at Nyeri – M'Ikiara M'Rinkanya & Sebastian Nyamu (Appellants) AND Gilbert Kabeere M'Mbijiwe*** (Respondent), pronounced itself as follows:

> ***"…it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher v Donovan, which we consider as still good law in this country, and the previous decisions of this court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of "action" in section 4 (4) of the Act would be inconsistent with the law of adverse possession."***

This position has been restated in many other cases. The execution of the alleged Judgment in Chuka CMCC 185 of 2015, is, therefore, irregular, unlawful and void ab initio. It should be set aside and any orders emanating from such execution should be voided.

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

> **1.The 1st** Respondent was registered as proprietor of L.R.Magumoni/Mukuuni/303 before it was subdivided into LR: Magumoni/Mukuuni/3625 and 3626 in 2018.
>
> **2.The 2nd** Respondent has no valid judgment in his favour giving 10 acres out of LR: Magumoni/Mukuuni/303 for the following reasons:
>
> **a) No** judgment was produced in Chuka CMCC 185 of 2018 to support its alleged delivery and to enable the court to issue the orders it granted.
>
> **b) The** alleged judgment was wrongly predicated upon an interlocutory Judgment which can only be used to grant pecuniary damages or detention of goods but cannot award land to a litigant.
>
> **c)** The execution of the alleged judgment took place outside the limitation period of 12 years since it was allegedly entered or delivered.
>
> **3.The** applicant had on 8th August, 1995 entered into an agreement where the 1st Respondent sold to him one acre of land.
>
> **4.The** applicant on or around 1995 entered into L.R Magumoni/Mukuuni/303 and has improved and developed the one acre he continues to occupy.
>
> **5. The** applicant has been and still is in occupation of one acre out of LR: Magumoni/Mukuuni/303 exclusively and without any interruption for a period in excess of twelve years**.**
>
> **6. The** applicant has been in occupation of her part LR: Magumoni/Mukuuni/303 to the exclusion of any other person including the 1st and 2nd Respondents for a period in excess of twelve years.
>
> **7. The** applicant has improvements and developments on LR: Magumoni/Mukuuni/303.
>
> **8. The** applicant has acquired one acre out of LR: Magumoni/Mukuuni/303 by way of adverse possession and should be registered as proprietor of the said one acre which he has incontrovertibly identified.

9. The applicant has an overriding interest over one acres out of LR: Magumoni/Mukuuni/303 under the doctrine of adverse possession which overriding interest is protected by law by virtue of Section 28 of the Land Registration Act.

10. The 2nd respondent when executing orders of court in Chuka CMCC No. 185 of 2018 should be estopped from interfering with the one acre of LR: Magumoni/Mukuuni/303 which the applicant has been in occupation of, use and cultivation. In any case, this court has found the said orders invalid and void ab initio and, therefore, incapable of being implemented.

39. The issues which arose during the hearing of this case are ***quintessentially*** veritably ***sui generis***. They demonstrate how the judicial process can cleverly be contrived to occasion injustice. In this case, the 2nd respondent claims that he obtained a judgment between 1995 and 2003. He is economical with the truth. He does not say exactly when the impugned judgment was delivered. He does not explain why it took him between 13 years and 23 years to seek the implementation of the judgment. He did not enclose a copy of the alleged judgment in his application which spawned the orders that were issued in Chuka CMCC 185 of 2018 (Formerly Meru CMCC 692 of 1995). The 1st Respondent claims that he was not aware of the proceedings at Chuka in CMCC 185 of 2018. By the time he became aware of the proceedings, the 2nd respondent had obtained a decree and executed it. At this time the 30 days prescribed for filing of an appeal by Section 79B of the Civil Procedure Act had expired. To make matters worse, the proceedings were conducted in utter disregard of the law. Firstly, the alleged judgment was predicted upon an interlocutory judgment which can only be used to award pecuniary damages and not land. Secondly, the alleged judgment was being executed outside the time allowed by the Limitation of Actions Act.

40. As said in an earlier part of this judgment, a court of law cannot close its eyes to injustice especially where the injustice is perpetrated through a flawed judicial process in which the lower court pellucidly lacked jurisdiction. I take welcome succour from the Supreme Court of Kenya in Samuel Kamau Macharia & Another versus Kenya Commercial Bank & 2 others - Supreme Court Application No. 2 of 2011 where it opined as follows:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction the Court cannot entertain any proceedings…"***

41. Justice Nyarangi (JA) in the celebrated case of "***The MV Lilians S" [1989] KLR 1*** when dealing with the issue of jurisdiction opined as follows:

> ***"…Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction."***

42. I unequivocally find that the lower Court in CMCC 185 of 2018 lacked requisite jurisdiction. I opine that the injustice perpetrated by orders issued in this suit should be arrested and thwarted. Thanks to the foresight of this country's Constitution, as per Article 159 (d) of the Constitution, justice should be administered without undue regard to procedural technicalities. Just because the 1st respondent could not appeal orders issued in Chuka CMCC 185 of 2018 because he learnt about the proceedings after the time stipulated for an appeal had expired, the injustice allowed by this case cannot be allowed to thrive. Also just because the applicant in this case was not a party to Chuka CMCC 185 of 2018, this court cannot allow an injustice to be foisted upon him. I unequivocally opine that this is one case where Article 159 (d) of the Constitution should be invoked.

43. Upon considering all apposite issues, I make the following findings:

(i) The applicant has clearly identified the land he claims ownership thereof through the doctrine of adverse possession. He has an overriding interest over any title or titles emanating out of the change of ownership of the suit land.

(ii) Orders granted in Chuka CMCC 185 of 2018 emanated from an Interlocutory Judgment. Awards arising out of Interlocutory Judgments can only grant pecuniary damages. They cannot award land. This renders orders issued in Chuka CMCC 185 of 2018 ***void ab initio.***

(iii) Execution in Chuka CMCC 185 of 2018 having arisen out of orders issued by a court which irregularly and without jurisdiction handled the matter is declared void ab initio and all orders issued in that suit are hereby set aside and, ipso facto, vacated forthwith.

(iv) Execution in Chuka CMCC 185 of 2018 having been effected over 12 years after the alleged judgment was delivered is hereby declared null and void and any decisions or actions arising therefrom including subdivision of LR. No. Magumoni/Mukuuni/303 is hereby declared null and void and the Land Registrar, Chuka, will be directed to cancel registers in respect of LR Numbers Magumoni/Mukuuni/3625 and Magumoni/Mukuuni/3626 AND to forthwith reinstate the register for the original LR. Number Magumoni/Mukuuni/303.

(v) The 2nd Respondent acquired a veneer of ownership of the suit land, though irregularly and illegally, **only in 2018**. Adverse possession cannot accrue against him though the applicant has an overriding interest over the original parcel of land and any subdivisions arising therefrom. For this reason, I am persuaded not to condemn him to pay any costs.

(vi) Adverse possession accrues from the time the 1st Respondent could not transfer the suit land to the Applicant because the 2nd Respondent had placed a caution over the suit land on 7th June, 1991, which period exceeds 12 years. Having truthfully explained

that he had all along been willing to transfer the suit land to the applicant, I am inclined not to condemn the 1st Respondent to pay costs. It is veritably pellucid that the applicant was occupying the suit land openly and without the consent of the 1st Respondent.

(vii) For avoidance of doubt, the threshold for a declaration of ownership of the claimed land by the applicant starts running from the time he discovered that the land could not be transferred to him because the 2nd Respondent had placed a caution over the suit land.

(viii) Justice veritably eschews, frowns upon and detests unjust enrichment. For this reason, the 1st respondent should not be allowed to use the above findings to lay claim upon the 7 acres he has admitted that the 2nd Respondent has been in occupation of after he sold land to him. In any case, parties are bound by their pleadings. Though rather unorthodoxically and in obeisance to the command contained in Article 159 of the Constitution, I find it appropriate that Justice should be administered without undue regard to procedural technicalities. Although not through the doctrine of adverse possession BUT in the greater interest of Justice, I find that the 2nd Respondent is entitled to the 7 acres of land out of land parcel No. Magumoni/Mukuuni/303 which he has been in occupation of. The 1st Respondent will be ordered to transfer that land to the 2nd Respondent. This decision is made without prejudice to any other legal recourse the 1st and 2nd Respondents may want to explore.

44. I issue Judgment in the following terms:

(i)**The** applicant is declared owner by way of adverse possession of one acre out of LR. Magumoni/Mukuuni/303.

(ii)**The** Land Registrar, Chuka, is ordered to cancel the registers for LR. Numbers Magumoni/Mukuuni/3625 and Magumoni/Mukuuni/3626 and to forthwith reinstate the register for LR. Magumoni/Mukuuni/303.

(iii)**The** 1st respondent is ordered to transfer one acre out of L.R. Magumoni/Mukuuni/303 to the applicant and in default the Deputy Registrar of this court is directed to execute all documents necessary for this order to be implemented. Costs apposite to this transfer shall be borne by the applicant.

(iv)**The** 1st Respondent is ordered to transfer to the 2nd Respondent the 7 acres of land the 2nd Respondent has been occupying on part of Land Parcel No. Magumoni/Mukuuni/303. It is clarified that this transfer should not interfere with the applicant's land. In default, the Deputy Registrar of this court is directed to execute all documents necessary for implementation of this order. Costs for this transfer will be borne by the 2nd Respondent.

(v) It is ordered that any inhibition or restriction registered against the original suit land or its subdivisions be removed forthwith to facilitate the implementation of this judgment.

(vi) No costs are awarded in this suit and, as a result, parties will bear their own costs

45. Orders accordingly.

Delivered in open Court at Chuka this **15th day of October, 2019** in the presence of:

CA: Ndegwa

Kaminza h/b Ambani for the 2nd Respondent

Julia Mugure – Applicant

Benjamin Collins Mati – 1st Respondent

P. M. NJOROGE,

JUDGE.