



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A
ELC NO. 503 OF 2017 (OS)

MARY NJIIRI MURUGA.....1ST PLAINTIFF

ISSAC NDIRANGU NJIIRI.....2ND PLAINTIFF

JESSEY KAMAU NJIIRI (substituted for

ELIZAPHAN NJIIRI TOBO MURUGA -deceased).....3RD PLAINTIFF

VS

GRACE NJERI MUGANE.....1ST DEFENDANT

ANDREW GACHINGIRI NGAHU.....2ND DEFENDANT

JUDGMENT

Introduction and Pleadings

1. On the 14/7/2004 the original Plaintiffs in this suit to wit; Elizaphan Njiiri Tobo Muruga and Erastus Muruga Njiiri filed suit against the Defendants by way of Originating Summons and sought the following orders;

- a. That the Plaintiffs are entitled to be registered as proprietors of all that piece/parcel of land known as Land Title LOC2/KINYONA /544 under Section 38 of the Limitation of Actions Act Cap 22 on the ground that since October 1971 the Plaintiffs have been openly peacefully and as of right in possession and occupation of the above mentioned piece of land that is to say for a period of over 12 years immediately preceding presentation of this Originating Summons in Court.
- b. That the Defendants title to the said piece of land is extinguished under Section 17 of the Limitations of Actions Act.
- c. That the Plaintiff be registered as the proprietors of all that piece of land known as LOC2/KINYONA/544 under Section 38 of the Limitations of Actions Act in place of Defendants.
- d. That the costs of this suit be provided for which application is supported by the affidavits of Elizaphan Njiiri Tobo Muruga and Erastus Muruga Njiiri hereto annexed and upon such further or other grounds as may be adduced at the hearing thereof.

2. The Originating Summons are supported by the supporting affidavit of the Applicants in which Erastus Muruga Njiiri deponed that he purchased the suit land from Kariuki Njiiri, his step brother in October 1971 at a price of Kshs 10,000/-. By the time Kariuki Njiiri died in 9/8/1975 he had paid Kshs 5900/-. The balance of Kshs 4100/- was paid to the legal administrator of his estate, the Public Trustee on the 29/5/1986.

3. That they filed a case in HCCC No 320 of 2003 (OS) against Wambui Kariuki, Wairimu Kariuki, Njiiri Kariuki and Kari Kariuki, the then owners of the suit land but on carrying out searches on the suit land discovered that the Defendants are the registered owners of the suit land as shown on the official search dated 2/7/2004.

4. The Applicants further filed a Notice of Motion on 13/7/2004 seeking to restrain the Defendants from claiming interfering wasting or damaging alienating or disposing of the suit land pending the hearing and determination of the suit on the ground that the Defendants had entered onto the land uprooted the tea bushes and threatened to subdivided the suit land causing the Applicants irreparable harm. This application was allowed on the 14/7/2004.

5. On the 1/10/2004, The Hon Justice Lenaola (as he then was) in dismissing a Preliminary Objection by the Defendants invoked Section 6 of the Civil Procedure Act and stayed this suit until HCCC No 320 of 2003 (OS) is either withdrawn or determined. This suit was withdrawn on the 21/10/2004 by orders of the Court issued on the 5/3/2010.

6. In resisting the Originating Summons the 2nd Defendant deponed in his supplementary affidavit dated the 31/3/06 that they purchased the suit land from the registered owner Peter Njiiri Maina on the 23/4/2004 and took over vacant possession. He stated that the value of the tea bushes was included in the purchase. That they are innocent purchasers and have obtained a good title. They contended that at the time of purchase the land was vacant.

7. The Defendants contend that the suit land belonged to Maina Njiiri who gave it to his step brother Kariuki Njiiri to use it to secure loans with the intention of reverting it back to the original owner. To that extent they contend that the occupation was with consent of the original owner. That the Plaintiffs were never in adverse possession of the suit land.

8. It is their case that Kariuki Njiiri died before discharging the charge and his estate was succeeded by his wife who held the suit land in trust for his children. That the family of Kariuki wrote to the Public Trustee and informed it that the suit land belonged to Maina Njiiri. Vide the orders of the Land Dispute Tribunal the suit land reverted to Maina Njiiri who directed that it be registered in the name of his son Peter Maina Njiiri. That the Plaintiffs have never occupied the suit land.

The evidence of the parties.

9. The Plaintiff led evidence and called one witness. Jesse Kamau Njiiri – PW1 who informed the Court that he lives in Londiani in Kericho County. He testified that his father purchased the suit land from Kariuki Njiiri and produced sale agreements in support. That the said Njiiri died before the completion of the purchase. Upon his demise his father paid the administrator of the estate of the late Kariuki, the Public Trustee the balance of the purchase price in 1986.

10. He stated that his family occupied the suit land since 1971 till 2004, planted tea and trees, when they were evicted. That his father Elizaphan Muruga employed one Josephat Kamau to oversee the farming activities in the suit land. That it is the area chief that directed them to vacate the suit land. He confirmed that they vacated and filed suit in the same year.

11. In cross examination he stated that he was born in 1983 and only came to know about the suit land in 1992. That though they lived in Londiani he and his father used to visit the suit land with his father where they picked tea and grazed cows. That their father kept 10 cows and 7 sheep

12. He however informed the Court that he learnt from his father that the panel of elders awarded the suit land to Peter Maina Njiiri in SPMCC No 18 of 2007. He was not aware if the said award had been set aside, appealed or vacated.

13. He informed the Court that though he knew that the said Peter Maina sold the suit land to the Defendants, he did not sue the said Peter Maina but sued the Defendants because they are the current registered owners of the suit land and are in occupation.

14. Further he stated that though the suit land was awarded to his father in the Succ Cause HCCC No. 530 of 1993 following the death of Kariuki Njiiri wife, Jane Wangari Njiiri, the land was not transferred to him. He refuted claims that his father was given the suit land by Maina Njiiri for purposes of securing a loan facility.

15. PW2 – Isaac Ndirangu Njiiri testified and relied on his witness statement dated the 11/4/19 as his evidence in chief. He stated that Maina Njiiri and Erastus Muruga were brothers. He reiterated the evidence of PW1 that they occupied the suit land from 1971 to 2004 when they were evicted. That his father planted tea, trees and kept livestock on the land.

16. He produced a list of documents marked PEX No 1-23 detailing how the land came into possession of his late father Elizaphan.

17. While under cross examination by Mr Mwangi Ben, the Counsel for the Defendants, he stated that he was born in 1969 in Londiani but lived on the land between 1992-1993. He recalled the economic activities on the land were tea picking livestock rearing and planting of trees. That the 1st Plaintiff is his mother while the 3rd Defendant is his younger brother. His father was Elizaphan Njiiri Muruga. That he is claiming land on behalf of his father who was never registered as owner despite having had occupation and possession from 1971 to 2004. He learnt about the suit land from his father. He informed the Court that he did not sue the estate of Kariuki Njiiri that sold the suit land to his father. That it is Peter Njiiri that sold the suit land to the Defendants in 2004.

18. He informed the Court that it is his father that paid the deposit of Kshs 5900/- to Kariuki Njiiri and the balance of Kshs 4100/- to the Public Trustee. That whilst they were harvesting trees on the land in 2004, the area chief ordered them to vacate the suit land ostensibly through a Court order which they did and filed the current suit. The Chief informed them that the land had been sold to the Defendants.

19. DW1- Andrew Gachingiri Ngahu testified and relied on his witness statement dated the 24/10/18 as his evidence in chief. That the original land belonged to Maina Njiiri deceased but transferred it to Kariuki Njiiri. Upon the death of Kariuki Njiiri, his estate was sued by Maina Njiiri to recover the suit land in Land Dispute Tribunal No 18 of 2003 where the elders determined that the land belonged to Maina Njiiri. Consequently, the land was registered in the name of his son, Peter Maina on his instructions.

20. That they carried due diligence before purchasing the suit land. He stated that he and the 1st Defendant purchased the suit land from Peter Maina on 24/4/2004 measuring 6 acres. He produced an agreement for sale dated the 23/4/2004. That he obtained Land Control Board consent in respect to the transfer. He stated that the 1st Defendant lives on 4.6 acres of the suit land while he cultivates tea on his portion of 1.5 acres.

21. He testified that they are bonafide purchasers of the suit land and urged the Court to dismiss the suit.

22. DW2 – Grace Njeri Mugane testified and reiterated the evidence as given by DW1. She relied on the witness statement signed jointly with DW1. She maintained that she did not know the Plaintiffs nor Kariuki Njiiri. That she transacted with Peter Maina.

23. DW3 – Peter Njiiri Maina testified and stated that his father namely Maina Njiiri, the original owner of the suit land measuring 2.43 ha gave his title to Kariuki Njiiri to secure a loan and return it thereafter. That in 2003 Maina Njiiri sued Michael Kariu Njiiri, the administrator of the estate of Mrs Jane Wangari Kariuki Njiiri for recovery of the suit land in the LDT No 18 of 2003. That the said Michael Kariu Njiiri admitted before the elders that the suit land belonged to Maina Njiiri. That consequently, Peter Maina Njiiri, the son of Maina Njiiri was awarded the suit land in LDT No 18 of 2003 which award was adopted by the Court in SPMCC No 18 of 2003. Further he stated that on the 23/4/2004 he sold the suit land to the Defendants having followed all the legal processes as required by law. That the Defendants have been in possession of the suit land since 2004. He informed the Court that hitherto his father was in possession of the suit land since 1963 where he harvested trees growing on the suit land. He stated that the Plaintiffs have never occupied the suit land as they live in Londiani, Kericho County. He maintained that he was not aware if there was tea growing on the suit land.

The written submissions

24. The Plaintiffs submitted that they are entitled to the suit land having been in possession and occupation from 1971 openly and peacefully for a period in excess of 12 years. That once title has accrued and vested to a party, it matters not how many times the title changes hands. As long as the initial title was extinguished then the subsequent owners will be holding the title in trust for the adverse possessor.

25. The Plaintiffs submitted that their father Elizaphan Njiiri Muruga and Erastus Muruga Njiiri pleaded that they purchased the suit land from Kariuki Njiiri in 1971 after which they were put in possession. That Elizaphan took possession and planted tea and obtained a license No. 05073 from Kenya Tea Development Authority dated the 8/3/1994. That this is evidence that there was indeed 5000 tea bushes on the suit land and the licence was in respect to the tea bushes planted before 1994. The Plaintiffs submitted that this evidence establishes that they were in occupation of the suit land from 1971 to 8/3/1994 which is 20 years. That during the said period the occupation was open uninterrupted and peaceful to entitle the Plaintiffs to be licensed to plant tea. That DW3 lied to the Court when he testified that there was no tea on the suit land.

26. In their submissions the Plaintiffs stated that they proved that there was a sale agreement between Kariuki Njiiri and Elizaphan Muruga Njiiri as shown by the copy of the agreement, the acknowledgement of the purchase price which was witnessed inter alia by witnesses amongst them Jane Wangari Kariuki, the wife of Kariuki Njiiri.

27. That the balance of the purchase price was paid in 1986 and therefore even if this date was to be taken in calculating the start of time running, 12 years would be 1998.

28. They submitted that the suit No HCCC No 320 of 2003 was withdrawn and therefore this suit does not run foul of Section 6 of the Civil Procedure Act.

29. The Plaintiffs relied on the cases of;

a. Winsley Barasa Vs Immaculate Awino Obongo CA 115 of 2015 where the Court held that once adverse possession comes into operation, the title is extinguished and the adverse possession continues to exist against the title as an overriding interest which need not be registered. They attach to the land. That the title in the name of the Defendants is subject to the overriding interests in favour of the Plaintiffs.

b. Chevron (K) Limited Vs Harrison Charo Wa Shuto CA No 17 of 2016. The Court held that at the expiration of 12 years the proprietors title will be extinguished by operation of law and Section 38 of the Limitation of Actions Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land.

30. The Defendants submitted that the Plaintiffs have filed multiplicity of suits to wit; Nairobi HCCC No 320 of 2003 – Elizaphan Njiiri Tobo Muruga & Erastus Muruga Njiiri Vs Wambui Kariuki, Wairimu Kariuki Njiiri Kariuki and Kari Kariuki; Nairobi HCCC No 764 of 2004 – Elizaphan Njiiri Tobo Muruga Muruga and Erastus Muruga Njiiri Vs Grace Njeri Mugane & Andrew Gachingiri Ngahu.

31. The Defendants submitted that Elizaphan Njiiri Tobo Muruga died on the 15/5/2014 and urged the Court to determine whether the application to substitute the Plaintiffs was granted. That in the event that it was not granted then the Plaintiff's suit would come to a naught on grounds of locus standi to bring suit on behalf of the estate of the said Elizaphan Njiiri Tobo Muruga, deceased .

32. In their submissions the Defendants contended that the 2nd and 3rd Defendants gave insufficient incredible and hearsay evidence because they were not present during the alleged sale and occupation of the suit land by the said Elizaphan.

33. That the Plaintiffs witnesses admitted that their father lived all his life in Londiani where he died. The tea delivery slips relied on by the Plaintiffs did not disclose that it was in respect to the suit land. Further that the agreement did not disclose who prepared it least of all who signed it between the Elizaphan and his father Erastus Muruga. In any event they contend that the suit land the alleged subject of agreement was not disclosed. The land is described as 10 acres at Kimuya. According to the title on record the suit land measures 2.43 ha or 6.1 acres and not 10 acres.

34. In their submissions the Defendants faulted the witnesses for not being clear as to whether they were claiming on behalf of the estate of Erastus Muruga or Elizaphan.

35. In further submissions the Defendants stated that Kariuki Njiiri held the suit land in trust for Maina Njiiri who had allowed him to use the land as collateral for a loan hence the registration of the title in Kariuki's name. That Kariuki had no right to sell the land. DW3 testified that the family of Kariuki agreed to return the suit land to Maina Njiiri and the recovery of the said land was subject of the Land Dispute Tribunal in 18 of 2003 which decreed that the suit land be registered in the name of Peter Maina Njiiri on the instructions of his father, Maina Njiiri who was alive then. DW3 stated that the suit land was in the possession of his father and at no time did the Plaintiffs and their father occupy or cultivate on the suit land. DW3 stated that the Plaintiffs are his neighbours in Londiani where they live and their father was buried.

36. The Defendants submitted that they have been in possession of the suit land since 2004 cultivated and developed it.

37. As to whether the Plaintiffs have a sustainable claim before the Court, the Defendants contended that the 1st Plaintiff is the widow of Elizaphan and the 2nd and 3rd Defendants are his sons. It was their view that since the 1st Plaintiff did not testify on account of alleged senility/illness and no substitution was made in her place, her case claim was not prosecuted. Secondly that the 2nd and 3rd Plaintiffs were born in 1969 and 1983 and hence cannot pursue a claim on their own behalf as an independent claim based on adverse possession. In addition, they have no capacity to sue on behalf of their father because they failed to exhibit the necessary capacity as legal representatives. In any event they have not enjoined the family of Kariuki Njiiri or even Peter Maina, the previous owners of the suit land.

38. As to whether the Plaintiffs have proved that they are entitled to adverse possession, it was the submission of the Defendants that no cogent evidence was adduced at the trial such as evidence tendered by neighbours or developments plans to show that their father occupied the suit land.

39. That whatever claim the Plaintiff's father might have had was extinguished by the orders of the Court in SPMCC No 18 of 2003 which decision was not appealed and that the change of ownership to Peter Njiiri Maina who sold the land to the Defendants became effective. That no time has begun running against the Defendants in favour of the Plaintiffs. The Defendants acquired title in 2004 and subsequently the suit was filed within the same year.

40. Are the Defendants bonafide purchasers of the land? The Defendants submitted that they purchased the suit land for value after following due diligence and deserve the protection of the law. The Plaintiffs are relying on possession which was not adverse to the true owners of the land. The adverse nature of the possession must be proved as a fact. The Defendants stated that the acreage of the suit land is not disclosed. The identification of land in possession of an adverse possessor is an integral part of proving adverse possession.

41. The Defendants have relied on a number of authorities which I have read and considered;

a. Murang'a E.L.C Case No. 510 of 2017(o>S) Kiguru Ngugi –Vs- Michael Mungai.

b. Kimitei Arap Tonui –Vs- Grace Chebet Tonui (2019) eKLR

c. Elvis Kosgey & Another –Vs- Gilbert Kosgey & 2 Others (2016) eKLR.

d. Wilson Kazungu Katan & 101 Others –Vs- Salim Abdalla Bakshwein & Another (2015).

e. Benedictor Etabale Masaba –Vs- Edwin N. Opanga & 2 Others (2018) eKLR.

f. M'Mbaoni M'thaara –Vs- James Mbaka (2017) eKLR.

g. William Tadeus –Vs- Swaleh Jined Bawazir (2019) eKLR.

h. Samuel D. Omwenga Angwenyi –Vs- National Land Commission & 2 Others (2019) eKLR.

42. Before I delve into the issues set out for determination, I would like to make certain observations which have a general bearing on the suit.

43. The sale agreement dated the 23/4/2004 was inclusive the tea bushes on the land. The purchasers were to take possession of the suit land upon execution of the agreement of sale. The title was registered on the 9/6/2004. The 1st Defendant purchased 4.6 acres while the 2nd Defendant took the balance of 1.5 acres.

44. On the 6/7/2004 a caution was registered by Elizaphan Njiiri Muruga claiming purchasers interest. This was after the suit land had been transferred to the Defendants.

45. On the 6/9/2011 Elizaphan Njiiri Muruga deponed in a further supporting affidavit sworn by himself on his own behalf and that of Erastus Muruga. He deponed that Kariuki Njiiri put him in possession in 1971 after paying the deposit where he has since remained openly uninterrupted planting tea bushes and trees and subsistence crops. That he paid the balance of KShs 4100 to the public trustee, the administrator of the estate of Kariuki Njiiri on the 29/5/86. That though the Public Trustee failed to transfer the lands to him he remained in occupation and possession.

46. There is a tea plantation license in the name of Elizaphan Muruga dated the 8/3/1994. It refers to 5000 tea bushes planted before 1974 on the suit land.

47. Land Dispute Tribunal Proceedings dated the 24/2/2003 between Peter Maina Njiiri and Michael Kariu Njiiri, the son of Kariuki Njiiri and Legal Administrator of the estate of his late mother Jane Wangari Njiiri.

48. According to the 2nd Defendant, Kariuki Njiiri was given land by his brother Maina Njiiri for purposes of charging the same to secure loan facilities. The said Kariuki did not charge the suit and instead he sold it to his step Brother Muruga in 1974 at the consideration of Kshs 10,000/- where he received a deposit of Kshs 5900. As fate would have it he died in 1975 before concluding the sale but after putting Muruga in possession in October 1971. He paid the balance of the purchase price to the Public Trustee. According to the confirmation of grant of administration dated 23/8/1993 the said land was distributed to Muruga in whole.

49. I Have perused the copy of the green card on record and note that on the encumbrance section, the following charges were registered on the title;

- a. 27/8/1964 - charge to Agricultural Finance Corporation to secure Kshs 18,600/0
- b. 10/11/1971- charge to secure the sum of 35,000/- Kenya Commercial Bank & Barclays Bank
- c. 17/6/75- discharge of charge No 1 above.

50. The Court was unable to sight the charge documents in respect to the above securities but according to the proprietorship section the charges were registered during the period when Kariuki Njiiri was the registered owner. It is clear and probable that Kariuki used the suit land to secure loans.

51. In respect to the transfer of the land from Maina Njiiri to Kariuki, the green card disclosed the consideration as a gift.

52. On the 22/9/1974 the land was registered in the name of Karanja Kamau ID/FH 636624 consideration being disclosed as Kshs 2000/- and a land certificate issued on the 18/2/1974.

53. On the 25/6/1974, entry No 2 the land becomes registered in the name of Kariuki N Njiiri.

54. Entry No 5 dated 15/1/1981 the suit land becomes registered in the name of Stephen Mirara Muhoro at the consideration of Kshs 58,000/-.

55. Entry No 7 on the title is curious. I say so because the title became registered in the name of Kariuki Njiiri on the 19/7/1982 when he died on the 9/8/1975. The identification card ID No ID /FH 636624 disclosed in entry No 2 as belonging to Karanja Kamau.

56. On the other hand Maina Njiiri the original owner of the land pursued the land from the family of Kariuki Njiiri in Land Dispute Tribunal 18 of 2003. According to the record, Michael Kariu Njiiri informed the Land Dispute Tribunal that his family including his mother had agreed to transfer the land to Peter Maina Njiiri on instructions from Maina Njiiri on condition that they are refunded Kshs 145,000/- being expenses incurred in the case. He stated that the land was given to their father by Maina Njiiri for purposes of securing a loan.

57. On the 17/3/2003 the Court in LDT No 18 of 2003 adopted the award of the Land Dispute Tribunal in the following terms/orders;

“It is by consent ordered as follows

- a. That the judgement is hereby entered in terms of the award of Kigumo Land Disputes Tribunal.
- b. That the caution filed against the land parcel No LOC2/KINYONA/544 be and is hereby removed
- c. That the suit premises LOC 2/KINYONA/544 be registered in the name of Peter Njiiri Maina
- d. Costs in the cause.”

The suit land was registered in the name of Peter Maina on the 8/3/2004 in pursuance of the said orders.

58. The tribunal made some observations which have a bearing on the suit; firstly, that the land was not settled but had mature tea on one part and mature wattle trees on the remainder. This observation concurs with the evidence of Muruga that he had planted tea and trees on the land. See letter dated the 7/4/2004 written to Kenya Tea Development Authority The eviction was in March 2004. The Defendants started supplying tea to Ikumbi Tea Factory thereafter.

59. Jane Wangari Kariuki Njiiri died on the 19/3/93 and Michael Kariu Kariuki aka Michael Njiiri Kariuki was appointed legal representative of her estate. She left a will dated 26/2/1993 wherein under para 16 she stated as follows;

“ I devise and bequeath and declare that land title No LOC2/KINYONA/544 at Kimuya having been sold by my late husband to Erastus Muruga who paid the balance of the purchase price to the Public Trustee shall take the whole parcel of land bearing all the costs and incidental thereto himself alone.”

60. Pursuant to the said will a certificate of confirmation of grant, in SUCC Cause No 536 of 1993 and dated the 23/8/1993, the suit land was awarded to the said Erastus Muruga as a whole.

61. The import of the will is that it confirms that the suit land was sold to Muruga by the late Kariuki in which the late wife was a witness.

62. There is no evidence that the said confirmation of grant was ever appealed, set aside or vacated.

Analysis and determination

63. The issues for determination are;

- a. Whether this suit is subject to the jurisdiction of the court;
- b. Whether the Plaintiffs have capacity to file suit;
- c. Whether the Plaintiffs have established title to the suit land by way of adverse possession;
- d. Whether the Defendants are bona fide purchasers of the suit land;
- e. Who pays the costs of the suit.

64. Is the suit subject to the jurisdiction of the court? The Defendants have invited the Court to determine the issue. They have accused the Plaintiffs of filing multiple cases and argue that this suit is unmaintainable in the circumstances. The Plaintiffs submitted that there are no pending suits save for this one. My perusal of the record reveals that the HCCC No 320 of 2003 was withdrawn vide the orders of the Court dated 21/10/2004. HCCC No 764 of 2004 refers to the current suit which was filed initially in Nairobi and later transferred to Nyeri under ELC 683/14 and currently ELC 503 OF 2017.

65. It is the finding of the Court that the suit is not subject to the jurisdiction of the court.

66. The original Originating Summons was filed by Elizaphan Njiiri Tobo Muruga and Erastus Muruga Njiiri who were son and father respectively.

67. It is not in dispute that the suit land was registered in the name of Maina Njiiri on the 2/7/1962 and on the 25/6/1964 it was conveyed to Kariuki K Njiiri consideration being a gift.

68. Between the period of 27/8/1964 to 17/6/1975 Kariuki Njiiri obtained various loan facilities from Agricultural Finance Corporation and Kenya Commercial Bank which facilities were discharged in 1975. DW3 contended that Kariuki held the title in trust on behalf of Maina Njiiri because he had been given to secure a loan and return the title to Maina Njiiri. The Plaintiffs on the other hand dispute this. It is the view of the Court that this is not borne out of evidence. It is on record that the land was transferred to Kariuki as a gift. As to whether there was a resulting trust, no evidence was led in support.

69. The original Plaintiffs and the current Plaintiffs are related. Erastus Muruga Njiiri and Elizaphan were father and son respectively. It is not in dispute that Kariuki Njiiri and Maina Njiiri are brothers. Erastus Njiiri Muruga was their step brother. They were sons of Senior Chief Karanja Wa Njiiri.

70. Erastus Muruga Njiiri died at age 95 years on 30/8/2012 as per the death certificate on record dated the 10/10/12. Upon his death his son Elizaphan Muruga Njiiri was substituted on his behalf as per the letters of grant of administration issued on the 21/2/2013.

71. On the 15/5/2014 Elizaphan Njiiri Tobo Muruga died aged 76 years and vide succ cause No 691 of 2014, Mary Njiiri Muruga, Issac Ndirangu Njiiri and Jesse Kamau Njiiri were appointed Legal Administrators for the purposes of substitution of the deceased in the suit on the 14/10/2014.

72. Their substitution in place of Elizaphan Njiiri Tobo Muruga was allowed by the Court vide its orders issued on the 14/11/2014.

73. The Defendants have contended that the 2nd and 3rd Plaintiffs' cannot sustain the suit because they were toddlers when the alleged possession and occupation by their father in 1971. That any independent claim by the Plaintiffs is doomed to fail. That the Plaintiffs have not accumulated any period of adverse possession to qualify as adverse possessors.

74. The question as to whether adverse possession survived the death of Erastus and Elizaphan is one that should be addressed. It is on record that the estate of Erastus was succeeded by Elizaphan. It is also on record that the occupant of the suit land was Elizaphan from 1971 to 2004 when he was evicted. It is also on record that Erastus together with Elizaphan acquired the suit land through purchase and gave it to Elizaphan to occupy. It is not disputed that the claim of adverse possession was filed by both Erastus and Elizaphan in 2004 immediately following his eviction from the suit land. Upon the death of Erastus in 2012, Elizaphan maintained and sustained the suit until his death in 2014 upon which the current Plaintiffs, who are the legal representatives of his estate succeeded him.

75. When faced with a similar question as to whether adverse possession survives a deceased, the Court of Appeal in **Peter Mbiru Michuki Vs Samuel Mugo Michuki (2014) ECLR** said;

“ Order 24 rule 1 of the Civil Procedure Rules provides that the death of a Plaintiff shall not cause the suit to abate if the cause of action survives or continues. The issue is whether the claim for adverse possession survives the death of the Plaintiff. Section 16 of the Limitation of Actions Act provides that actions for the recovery of land an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. The effect of this provision is that when the letters of administration was granted for the estate of the Plaintiff in this case, the administration of the estate dates back to the date of the death.”

76. Section 16 of the Limitations of Actions Act states as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.” (emphasis is mine).

77. It is not disputed that the original Plaintiffs died after filing this suit and therefore their claim survived them. It is my view that a claim of adverse possession survived the original Plaintiffs who are now represented by the current Plaintiffs. See Order 24 Rule 2 of the Civil Procedure Rules.

78. It is the view of the Court that the Plaintiffs going by the above precedent and the law are within their rights to pursue the claim of adverse on behalf of their fathers estate.

79. I will now turn to the 3rd issue which is whether the Plaintiffs have proved title by adverse possession.

80. The concept of adverse possession has its origin in the English common law and developed at a time when title to land was rooted in the physical sustained possession or occupation of the land. This practice became law in England when the Limitations Act of 1623 was passed. The Act barred the owner holding the legal or paper title from recovering possession of the subject land after a certain (arbitrary) period of time. The limitation period is therefore the basis of a claim in adverse possession.

81. Adverse possession as a legal concept draws its principles from the historical importance of physical and factual possession of land, over documentary proof that, while conferring legal title does not directly imply that the owner will act on it. Thus the doctrine is a combination of common law (nature of possession) and statute (duration of possession).

82. The essence of adverse possession under the Limitation of Actions Act, Cap 22 Laws of Kenya, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land.

83. Under Section 28 of the Land Registration Act, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.

84. The Land Registration Act Cap 300 (now repealed) contained the same provisions under Section 30 (g).

85. Section 7 of the Limitation of Actions Act cap 22 states that;

“Actions to recover land may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

86. Section 38 of the Limitation of Actions Act, Cap 22;

“Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

87. It is now settled and trite that for adverse possession to mature into title to land the following conditions must be fulfilled:

- a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- c. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.

e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

f. Possession must be without the permission of the owner.

88. In the case of **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

‘...The Plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, Nec Clam, Nec Precario* (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.

89. The Plaintiffs through PW1 and PW2 have led evidence that the suit land was sold to Elizaphan and Erastus on 18/10/1971. PW2 produced copies of agreement of sale dated on even date between Erastus and Kariuki Njiiri. The purchase price was Kshs 10,000/- and the land was at Kimuya. The agreement is witnessed by E Muracia Njiiri (brother of Kariuki Njiiri) and Mrs Jane Wangari Njiiri. An acknowledgement dated the 10/4/1974 shows that Kshs 5900/- was paid leaving a balance of Kshs 4100/-. The land was subsequently given to Elizaphan to occupy.

90. The Defendants have argued that the land reference number is not disclosed in the agreement and further that the suit land cannot be the one being sold because it measures 6.1 acres on the title while the agreement described 10 acres. PW1 stated in evidence that the suit land was situate in Kimuya. The Court has no doubt that the land being referred to in the agreement of sale aforesaid is the suit land. It is in evidence that Kariuki died in 1975 before completing the sale and the purchasers paid the balance of Kshs 4100/- to the administrator of the estate of Kariuki, the Public Trustee. Refer to the letters adduced in evidence by PW2 dated the 17/6/77, 23/5/86 and 4/9/87. The Public Trustee acknowledged the receipt of Kshs 4100/- on the 29/5/1986. Erastus indicated in his letter that he had paid the balance to Kariuki before but he could not get the receipt which forced him to pay again to the Public Trustee in 1986. Jane Wangari Kariuki, the wife of Kariuki Njiiri in her will recognized the agreement of sale and bequeath the suit land to Erastus on account of sale by Kariuki and that the said Erastus paid the purchase price to the Public Trustee. This is further supported by the confirmed grant in the estate of Mrs Kariuki issued on 23/8/1993 wherein the suit land is awarded to Erastus in whole. It is to be noted that she witnessed the said agreement in 1971.

91. It is the holding of the Court that indeed there was a sale of the suit land and Erastus and Elizaphan entered the suit land by way of purchase. The Defendants argument that there was no sale is incorrect in view of overwhelming evidence to the contrary.

92. Was there possession and occupation by the Plaintiffs? PW1 and PW2 testified that Kariuki Njiiri put the said vendors in possession whereupon they commenced tea and tree planting and livestock farming and that they both had occasion to work on the land with their father Elizaphan at different times. PW2 adduced evidence that his father was licensed to plant tea by Kenya Tea Development Authority vide license No 05073 dated the 8/3/1994. The parcel of land disclosed in the licence is LOC2/KINYONA/544 in respect to 5000 existing tea bushes established in or before 1974. In addition the Court was shown two Kenya Tea Development Authority verification certificates in the name of Elizaphan dated the 2/11/94 and 9/2/94. It is also on record that when the Land Tribunal Dispute elders visited the suit land in 2003 they observed that there was mature tea and wattle trees on the suit land. This supports the evidence that the Plaintiff's father planted tea and trees on the suit land.

93. The Defendants have led evidence that neither the father nor the Plaintiffs occupied the suit land nor planted tea. DW3 stated in evidence that there was no tea on the suit land. The agreement of sale dated the 23/4/2004 between DW3 and the Defendants disclosed under para 4 that the sale price is inclusive of the tea bushes therein. I find the evidence of DW3 misleading in the face of this disclosure.

94. In the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances.”

95. PW1 and PW2 stated that they and their father lived in Londiani in Kericho but their father had a worker on the suit land who worked the land. There are tea delivery notes showing that the green tea was delivered under grower Number 0012 which was registered in the name of Elizaphan. This is supported by payment advice slips adduced in evidence by PW2. See letter dated the 7/4/2004 where the said Elizaphan raised a complaint to Kenya Tea Development Authority after he was evicted. He was seeking intervention of Kenya Tea Development Authority in view of the fertilizer loan that he had taken and was to be repaid using the tea proceeds, which tea was then taken over by the Defendants.

96. It is the conclusion of the Court that the said Elizaphan was in occupation and possession of the suit land carrying out farming of tea trees and livestock rearing. That occupation and possession has been satisfactorily proved.

97. The next issue is whether this occupation was adverse to the rights of the real owner. It is to be noted that the suit land was registered in the name of Kariuki Njiiri. The Plaintiffs have led evidence that Elizaphan was in uninterrupted possession and occupation of the suit land from 1971 to 2004 when he was removed by DW3 and the Defendants through the area chief. That Kariuki Njiiri had knowledge of the Plaintiff's father's occupation of the land. His possession was notorious and open. His entry was pursuant to a purchasers right. The land was in exclusive control of Elizaphan by himself and his worker Josephat Kamau who tended the tea and trees. The fact of growing tea trees and rearing livestock denoted animus possidendi that is to say utilizing the land as of right (color of right) and in inconsistent/conflict with the rights of the true owner.

98. In the case of **Public Trustee – v- Wanduru, (1984) KLR 314** at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property

because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

99. In the case at hand, the purchase price was partly paid in 1971 and possession given to the Elizaphan. The balance was paid in 1986. Time therefore started running in 1986 and 12 years later in 1998 adverse possession had crystalized and vested in Elizaphan.

100. The estate of Kariuki Njiiri or any other person holding title held the said title in trust for Elizaphan.

101. It is the view of the Court that title to the land accrued and vested to Elizaphan in 1998 . For the duration of 12 years and thereafter the registered owner was dispossessed of the land. The title held by Kariuki Njiiri was extinguished in 1998 and his estate remained a bare trustee for Elizaphan.

102. Was there any interruption? Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when the adverse possessor relinquishes possession in the hands of the registered owner. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. See **Githu V. Ndeete** [1984] KLR 776. Running of time will not be interrupted by sending a notice or letter from the true owner to the claimant. The Court of Appeal in **Githu vs Ndeete 1984 K.L.R 776** stated that;

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession”

103. It is on record and adduced in evidence that DW3 sued the administrator of the estate of Mrs Jane Wangari Kariuki in 2003 at the LDT No 18 of 2003. It is the finding of the Court that since adversity in the land had vested in Elizaphan in 1998, this suit did not interrupt or in any way affect the rights of the adverse possessor. In any event DW3 received land pursuant to the award and decree in LDT /SPMCC No 18 of 2003 that was encumbered with an overriding interest. He therefore held the suit land in trust for Elizaphan and any interest he purported to transfer to the Defendants had in its DNA adversity stamped on it.

104. Having heard and observed the demeanor of the witnesses of the Plaintiff I find their evidence to be cogent honest and truthful and I am inclined to believe them. Their evidence was also corroborated by documents produced by both parties which I have analyzed in detail.

105. In any event, It is also to be noted that the decision of the Land Dispute Tribunal was a nullity as it acted ultravires its mandate set out in Section 3 of the Land Dispute Tribunal Act which gave the jurisdiction to the Land Disputes Tribunals in all cases of Civil nature involving disputes to:-

- a) The division of or the determination of boundaries to land, including land held in common.
- b) A claim to occupy or work land.
- c) Trespass to land.

106. The Plaintiffs led evidence that they were evicted from the suit land in 2004 and filed the suit shortly thereafter. It is the view of the Court that by the time the Plaintiffs were being removed, adverse possession had vested way back in 1998.

107. It is therefore the finding of this Court that the Plaintiffs have established title by adverse possession.

108. It is noteworthy that this land was bequeath to Erastus Muruga in the confirmation of grant in the estate of Mrs Jane Wangari Kariuki in 1993. However the administrator of the estate took an unlawful detour and consented before the Land Dispute Tribunal to hand over the suit lands to DW3 instead of the beneficiary as disclosed in the confirmation of grant aforesaid. That said, it is clear that adverse possession had vested way back in 1998 and the estate held the land in trust for the Plaintiffs father. Constructive and implied trust had been created and continued to be present in the title in favour of the Plaintiffs.

109. Are the Defendants bonafide purchasers of the suit land? Prescriptive rights or in other words the rights arising out of adverse possession are overriding interests that need not be noted on the title but affect registered land. They are interests that attach on the land and run with the land. In the case of in **Mweu v. Kiu Ranching & Farming Co-operative Society Ltd.** [1985] KLR 430:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

110. Having held that adverse possession vested in the name of Elizaphan in 1998, it then follows that the title received by the Defendants was encumbered by an overriding interest in the name of prescriptive rights or adverse possession. As earlier stated overriding interests need not be noted on the title as they are attached and run on the land.

111. In the case of In the case of **Katende v Haridar & Company Ltd [2008] 2 EA 173**, the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchase as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud; and
- g. he was not party to the fraud.”

112. Further in the case of **Samuel Kamere Vs Land Registrar (2015) EKLK** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he said valuable consideration for the purchase of the suit property.” (emphasis is mine).

113. The Defendants led evidence that they purchased the suit land from DW3 and paid valuable consideration for the same after carrying out due diligence which included carrying out a search of the suit land to determine the registered owner. That may be so, however, it is to be noted that part of the sale included tea bushes on the suit land. The Defendants have not stated whether they inquired who the owner of the tea bushes on the land was. This would have been obtained from Kenya Tea Development Authority. They would have also inquired from the seller to give them a licence to show that he was licensed to grow the tea thereon. In any event DW3 in his evidence informed the Court that there was no tea on the land.

114. In addition, the fact of the eviction of the Plaintiff’s father from the suit land should have signaled to the Defendants that they were purchasing land in the possession of another person and that would have put them on guard to inquire further into the nature of the occupation of the Plaintiffs. Certainly, they failed to do so to their peril.

115. It is the finding of the Court that the Defendants acquired land that was already encumbered with trust and equity cannot treat them as bonafides. Their remedy lies elsewhere which is to pursue a refund of the purchase price from the vendor namely DW3.

116. The Defendants have faulted the Plaintiffs for not enjoining the estate of Kariuki Njiiri or DW3. The Plaintiffs have the liberty to sue whomever they think will give them relief. They have sued the Defendants who are now the registered holders of the suit land title that is encumbered with the right of prescription.

117. Final orders and disposition of the Court;

- a. That the Plaintiffs are entitled to be registered as proprietors of all that piece/parcel of land known as Land Title LOC2/KINYONA /544 under section 38 of the Limitation of Actions Act Cap 22 on the ground that since October 1971 the Plaintiffs have been openly peacefully and as of right in possession and occupation of the above mentioned piece of land that is to say for a period of over 12 years immediately preceding presentation of this originating summons in Court.
- b. That the Defendants title to the said piece of land is extinguished under section 17 of the Limitations of Actions Act.
- c. That the Plaintiffs be registered as the proprietors of all that piece of land known as land LOC2/KINYONA/544 under section 38 of the Limitations of Actions Act in place of Defendants.

118. The Plaintiffs shall have the costs of the suit.

119. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 26TH DAY OF NOVEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Muturi Njoroge HB for Kimwere for the 1st – 3rd Plaintiffs

Mwangi Ben for the 1st and 2nd Defendants

Ms Irene and Ms Njeri, Court Assistant