



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO. 301 OF 2017**

**FORMERLY MERU ELC. 217 OF 2013**

**JULIET CIONJOKA MUTEGI.....PLAINTIFF**

**VERSUS**

**HILDAH KARIMI NJERU.....DEFENDANT**

**JUDGMENT**

1. This suit was brought to court by way of Originating Summons dated **21<sup>st</sup> August, 2013**, which states:

**ORIGINATING SUMMONS**

**Under section 38 of the limitation of actions act cap 22 order 37 Rule 7 of the Civil Procedure rules sections 1A, 1B, 3A of the Civil Procedure Act and all enabling provisions of the law.**

Let Hilda Karimi Njeru of P. O. Box 524 Chuka the respondent herein within fifteen (15) days of service of this summons inclusive of the day such service enter appearance to this summons which is issued on the application of Juliet Cionjoka Mutegei of C/O of P. O. Box 2846 Meru who claims to have become entitled to LR Mwimbi/Murugi/504 measuring approximately 6.012 Ha by adverse possession and for determination of the following issues.

1. Whether the plaintiff/applicant has been in open, continuous and exclusive possession of LR Mwimbi/Murugi/504 for 12 years and more.
2. Whether the plaintiff/applicant has become entitled to LR Mwimbi/Murugi/504.
3. Whether the plaintiff/applicant should now be registered the owner of LR Mwimbi/Murugi/504.
4. Whether the plaintiff has been on the suit land without the defendant's permission.
5. Whether the deputy registrar/executive officer of this court should be empowered to sign all the necessary documents to facilitate transfer of the land to the plaintiff/applicant in the event of the respondent declining to so sign.
6. Whether the defendant should be condemned to pay costs of this suit.

**AND ISSUANCE OF THE ORDERS THAT:**

- i) An order of injunction restraining the defendant by herself, her agents, assigns or anybody acting at her behest from alienating, disposing and/or charging LR Mwimbi/Murugi/504 and or in anyway interfere with the applicant's use and occupation of LR Mwimbi/Murugi/504 pending the hearing ad determination of this application inter-parties.
- ii) The plaintiff/applicant has become entitled to LR Mwimbi/Murugi/504 by adverse possession.
- iii) That the plaintiff/applicant be registered the owner of LR Mwimbi/Murugi/504.
- iv) The defendant be ordered to pay costs of the suit.

**WHICH APPLICATION** is based on the following grounds inter-alia and the supporting affidavit of the applicant and the annexures thereto.

- a) The plaintiff has been in exclusive, open and uninterrupted occupation of LR Mwimbi/Murugi/504 for 43 years.
- b) The plaintiff/applicant was married on the suit land and has raised her family of (3) three on the suit land.
- c) That the applicant has been for the 43 years on the suit land without the permission of the respondent.
- d) The plaintiff/applicant's husband is buried on the suit land.
- e) The applicant and her family have extensively developed the suit land by inter-alia planting tea bushes on 12 acres of the suit land, build permanent residential homes etc.
- f) The applicant and her family know no other land they can call home.
- g) The respondent through fraud had herself registered as the owner.
- h) The respondent is threatening the applicant and members of her family of eviction.
- i) The respondent's only interest is to sell the suit land.
- j) The applicant and her family will be rendered not only landless but destitute.

**DATED AT MERU THIS 5<sup>TH</sup> DAY OF AUGUST, 2013**

.....

**FOR: MOKUA OBIRIA & ASS**

**ADVOCATES FOR THE APPLICANT**

2. The summons was supported by the applicant's affidavit sworn on **5<sup>th</sup> August, 2013**, which states:

**I, JULIET CIONJOKA MUTEGI** an adult female of sound mind of C/O P. O. Box 2846 Meru do make oath and state as follows:

- 1. That I am the applicant conversant with what is herein contained therefore competent to swear and make this affidavit.
- 2. That the defendant Hilda Karimi Njeru is a close family relative being sister to my late husband.
- 3. That I was married to Francis Mutegi Kanampiu – deceased in 1970.
- 4. That upon marriage we set up our home on LR Mwimbi/Murugi/504 measuring approximately 14 acres whereupon I have remained to date.
- 5. That I gave birth to three children who are now adults on LR Mwimbi/Murugi/504
- 6. That my children are:
  - a) Joan Wanja Born 1975
  - b) John Mwenda Born 1980
  - c) Peter Nyag Born 1981
- 7. That my sons are both married and have settled on the suit land.
- 8. That when my late husband died we buried him on the suit land.
- 9. That all my married life my family and myself have never known any other land as our home.
- 10. That LR Mwimbi/Murugi/504 is and has been family land.
- 11. That LR Mwimbi/Murugi/504 was first registered in the names of Timothy Riungu – deceased as the elder son in the family.

12. That when the said Timothy Riungu died it would appear a succession case was filed in Nairobi being H.C. Succession case No. 369/1981 where the children of Robert Riungu were entered as the owners.
13. That the said succession cause was filed and prosecuted clandestinely.
14. That when the said Timothy Riungu died he was buried elsewhere not on the suit land.
15. That from the record the defendant had herself registered as owner by way of gift, from who no one can tell. (annexed is a copy of green card marked JCM 1).
16. That the defendant/respondent is a sly and crafty woman who through fraud and or dubious means had herself registered as the owner.
17. That I do remember when my late husband was ailing the respondent conned us into giving her money to facilitate the suit land being registered in my husband's name but it would appear she used the money to her own benefit.
18. The respondent is married with her own properties elsewhere and has nothing on the suit land.
19. That I have extremely developed the suit land by planting tea bushes on a whole 12 acres, setting up a zero grazing unit for 12 cows, planted 5,000 coffee trees besides planting 3,000 eucalyptus trees and other fruit trees.
20. That on the suit land also stands a tea buying centre that caters for more than 50 tea farmers which at present the respondent has closed to the prejudice of the farmers.
21. That my being on the suit land has been open, uninterrupted, notorious and without the permission of the respondent for more than 12 years thereby entitling me to be registered the owner of the land.
22. That the respondent's only interest is to sell the suit land and make quick bucks irrespective of the well being of myself and family.
23. That on a number of occasions the respondent has brought prospective buyers who she has shown all round, and I am apprehensive I will lose all my life long investments.
24. That unless the respondent is barred from selling and/or disposing the suit land I stand to suffer irreparable loss and this suit will be rendered nugatory.
25. That the respondent shall suffer no loss or prejudice if status quo is maintained pending the hearing and determination of this suit.
26. That all that is deponed to herein above is the truth.

**DATED AT MERU THIS 5<sup>TH</sup> DAY OF AUGUST, 2013**

3. The Respondent responded to the application through her affidavit sworn on **26<sup>th</sup> August, 2016**, which states:

**REPLYING AFFIDAVIT**

I, HILDAH KARIMI NJERU of P. O. Box 524 Chuka do hereby make oath and state as follows:-

1. That I am the respondent herein competent to swear this affidavit.
2. That I am surprised that the applicant has obtained orders of injunction against me without disclosing to this Hon. Court material particulars.
3. These material particulars are that on 30.7.2013 the applicant sued me before this same Hon. Court vide HC Environment & Land Case No. 54/2012 which case is still pending before this Hon. Court.
4. That at the time the applicant herein filed the said plaint, she together with her children filed a Notice of Motion seeking orders of injunction and inhibition orders against me.
5. That this application was argued comprehensively and finally dismissed.
6. That the applicant did not appeal against the dismissal order but instead filed a similar application dated 8.2.2013 which is still pending and the applicant has not taken any steps to prosecute the same, instead she has filed another suit camouflaged to appear as if it is a new cause of action.
7. That this suit is therefore not only res judicata but also sub-judice.

8. That I will request the court to have the entire file in HC Environment & Land Case No. 54/2012 brought before this court for perusal.
9. That the applicant is therefore abusing the due process of this court and I pray this court not to countenance such blatant misuse of the court.
10. That in HC Environment & Land Case NO. 54/2012 the applicant's claim is based on trust where she says that land parcel No. Mwimbi/Murugi/504 is family land and that I am registered over the same to hold the same in trust for the family.
11. That in that case the applicant does not disclose which family I am supposed to hold the said land in trust for.
12. That this is the same land she has now sued me a second time claiming that she has lived on the same for four decades and that she is therefore entitled to the same on adverse possession.
13. That it is telling that one of the applicant's witnesses says that the land should be shared between my two now deceased brother and myself, while the applicant says she is entitled to the whole land.
14. That as I had stated in HC Environment & Land case NO. 54/2012 land parcel No. Mwimbi/Murugi/504 belonged to my now deceased brother, one Timothy Riungu and a succession was done in respect of his estate and the land registered in the names of his children (annexed and marked "HKN 1" are a bundle of documents to prove the same).
15. That the two children of the deceased Timothy later transferred the land to me through a power of attorney.
16. That I am registered over the same to preserve their interests over the said estate. (annexed and marked 'HKN 2 a & b' is the power of attorney and a letter from one the children).
17. That the applicant has taken advantage of the absence of these two children who work overseas to enter the land and utilize the same.
18. That the applicant being aware of these facts built a home on the suit land at her own risks.
19. That the tea and coffee bushes were planted by our late mother at the instructions and financing of Timothy Riungu to enable her eke a living during her lifetime and it is these crops the applicant is purporting to have planted.
20. That I could not object to the applicant's husband being buried on the land as I did not get instructions to the said effect from the children of my late brother Timothy Riungu.
21. That I am not selling the land as I cannot sell that which does not belong to me and the applicant should tender evidence.
22. That I am in possession of part of the land and the applicant cannot use an application to evict me.
23. That the fictitious tea farmers are not part of the two suits filed by the applicants and I have not been sued by anybody else apart from the applicant.
24. That it is abusive for the applicant to call a woman of my age and standing in society as sly, crafty and fraudulent merely to prop her otherwise non-existent claim.
25. That I have never asked the applicant's late husband for money with any promise to transfer this land to him as the same is for the children of my other late brother.
26. That as I have earlier stated the applicant and her family are entitled to land parcel No. Mwimbi/Murugi/468 a fact the applicant would wish buried and to which she has never denied.
27. That it is the applicant who traverse the portion they occupy carrying pangas and threatening me with death, since they know that they have no right over this land.
28. That I have no need to be violent.
29. That the applicant only entered this land after the death of my mother since my late mother had refused them to interfere with the estate of Timothy.
30. That the applicant therefore has no claim over this land and has occupied the same at her own risk and as a tenant at will.
31. That I therefore pray that this application be dismissed and the entire suit be struck out with costs.
32. That what is deponed to herein above is true to the best of my knowledge, belief and understanding.
4. Upon filing this suit, the applicant filed an application dated **5<sup>th</sup> August, 2018** which sought the following orders:

- a) That the application herein because of its nature be certified urgent and the same be heard on priority basis.
- b) That the honourable court be pleased to issue a temporary order of injunction restraining the defendant by herself, her servants, agents, assigns and or anybody acting at her behest from alienating, selling, charging and or in anyway interfering with the applicant's peaceful use and occupation of LR Mwimbi/Murugi/504 pending the inter-parties hearing of this suit.
- c) That for the interests of justice the Hon Court be pleased to issue an order of status quo pending the hearing and determination of this suit.
- d) That costs of this application be provided for.

5. The application had the following grounds:

- i) The plaintiff/applicant has all her life lived on the suit land.
- ii) That the applicant's occupation of LR Mwimbi/Murugi/504 has been open uninterrupted and without the permission of the respondent.
- iii) That the respondent is sister in law to the applicant who through fraud and craftiness had herself registered as owner of the suit land.
- iv) That the respondent/applicant has never lived and or worked on the suit land.
- v) That respondent/defendant has extensively developed the suit land.
- vi) That the applicant and her family has no other land.
- vii) The respondent/defendant has on a number of occasions brought prospective buyers to the suit land wanting to sell it off.
- viii) The applicant has a prima facie with chances of success.
- ix) The plaintiff/applicant stands to suffer irreparable loss in the event the respondent is left to dispose of the land.
- x) That in the event the respondent alienates the suit land the suit herein will be rendered nugatory.
- xi) That no prejudice will be occasioned the respondent.

6. On an interim basis pending interpartes hearing this application was allowed on 8<sup>th</sup> August, 2013 and the parties were directed to come to court on 5<sup>th</sup> September, 2013 for interpartes hearing. On 23<sup>rd</sup> August, 2013 shortly before the application could be heard interpartes, the applicant, Juliet Cionjoka Mutegi, wrote a letter to the Deputy Registrar of this court alleging unpalatable accusations against the judicial officer handling this matter. Upon investigation, the applicant withdrew her allegation but nevertheless the DCIO made a recommendation that she be charged with a criminal offence. This matter was handled in this court's ruling dated 14<sup>th</sup> January, 2015 which is reproduced in full herebelow.

### **RULING**

This application is dated **5<sup>th</sup> August, 2013** and seeks orders:

- a) That the application herein because of its nature be certified urgent and the same be heard on priority basis.
- b) That the honourable court be pleased to issue a temporary order of injunction restraining the defendant by herself, her servants, agents assigns ad or anybody acting at her behest from alienating, selling, charging and or in any way interfering with the applicant's peaceful use and occupation of LR MWIMBI/MURUGI/504 pending the interpartes hearing of this application.
- c) That for the interest of justice the honourable court be pleased to issue an order of status quo pending the hearing and determination of this suit.
- d) That costs of this application be provided for.

On 8.8.2013 the application was certified urgent. Interim injunctive orders were also issued against the respondent. However, before the matter could be heard interpartes on 5.9.2013, the applicant wrote an unpalatable letter insinuating unethical actions on the part of the judicial officer handling this case and the respondent. In the applicant's letter she also sought for the transfer of her suit to either Embu or Nyeri. The court ordered the District Criminal Investigations Officer to investigate the allegations.

On 26.9.2013, the advocates for the plaintiff and the respondent addressed the court. It transpired that the applicant had filed another case against the defendant. This was HCC No. 54 of 2012. In that case she had sought orders similar to the ones she was seeking in this suit. She had obtained an order of injunction exparte. After the application was heard interpartes, it was dismissed and the exparte orders were vacated.

After getting interim orders, exparte, in this matter without disclosing this to the court, the applicant felt that her mischief would be

discovered. This is why she wrote her letter dated 23<sup>rd</sup> August, 2013 which in addition to traducing the court and the respondent also sought the transfer of this suit to Embu or Nyeri. In doing so the applicant was forum shopping.

Having been denied similar orders by this court in another suit, I find that the prayers sought by the applicant are not merited. Regarding the recommendation by the DCIO, Meru Central, that the applicant be charged with the criminal offence of undermining authority at a judicial proceeding contrary to section 121(10 (d) of the Penal Code, I note that the applicant has disowned the contents of her letter. I also note that she has personally apologized to the court. I decline to give any directions in this matter but I do not wish to stop the DCIO from charging the applicant with any offence or offences she may have committed, if he so wishes.

Having considered all apposite matters raised herein I make the following orders:

The applicant's application dated 5<sup>th</sup> August, 2013 is dismissed.

1. Costs are awarded to the respondent.
2. The unorthodox prayer for this suit to be transferred to Embu or Nyeri is denied.

It is so ordered.

Delivered in open Court at Meru this **14<sup>th</sup> day of January, 2015** in the presence of:

CC: Daniel/Lilian

Mokua for the plaintiff

Kimabi h/b Miss E.G. Mwangi for defendant

**P. M. NJOROGE,**

**JUDGE.**

7. It is pellucid that the applicant upon being given interim orders, discovered that during the interpartes hearing scheduled to take place on 5<sup>th</sup> September, 2013, it would be brought to this court's attention that an application seeking similar orders had been dismissed in HCCC No. 52 of 2012 where the applicant was the plaintiff and the respondent was the defendant. In other words, the applicant had filed, concurrently, two separate suits in which the subject matter was the same. Clearly the applicant had come to court with muddied hands.

8. PW1, Juliet Cionjoka Mutegi, asked the court to adopt her witness statement dated 13<sup>th</sup> April, 2018 as her evidence in this suit. The statement states as follows:

**STATEMENT – JULIET CIONJOKA MUTEGI**

I am Juliet Cionjoka Mutegi, the applicant herein.

I am married with children.

Initially, my deceased husband, his sister (the defendant) and their entire family used to live on land parcel No. Mwimbi/Murugi/422 whereon they were born and brought up by their parents Charity Ibrahim (my deceased mother-in-law) and the late Kanampiu (my father-in-law).

In the year 1965, my husband Francis Mutegi (deceased) moved onto land parcel No. Mwimbi/Murugi/504 which land was their family land.

The said Mutegi (deceased) built his home thereon and started developing the said land extensively by inter-alia planting trees, rearing livestock, planting tea bushes, coffee trees, banana trees and cultivating among other developments.

None of his (my husband) brothers or sisters ever moved to live and or work onto the said land.

I got married to the said Mutegi in the year 1970 while he was still living on and developing land parcel No. 504 the suit land.

None of his relatives uses, lives and/or cultivates thereon up to date.

During the time of registration the said land was registered in the name Timothy Riungu (deceased) him being the eldest son in Kanampiu's family to hold it in trust for the family.

The defendant neither lives nor cultivates the suit land (parcel No. Mwimbi/Murugi/504).

The said children live in Europe. They have never stepped onto the suit land neither do they know where it is. They are all adults and indeed disinterested in the suit land since they know its family land and it belongs to the plaintiff only that it was registered in their deceased father's name during the first registration.

However the defendant wrongfully, fraudulently, illegally unlawfully and/or in blatant breach of trust caused the said land to be transferred/registered in her name.

We have immense development thereon including permanent houses, permanent cattle shed, tea bushes, coffee trees, various mature trees and other livestock amongst other developments.

I pray for relief as stated in the plaint.

That all I can state.

### **ABOUT THE LAND**

This land is family /ancestral land. At the time of registration my husband Francis Mutegi was in school. My mother in law initiated the registration of the land in the name of Timothy Riungu.

The father to my husband was called Ibrahim Kanampiu. He died in the year 1943.

Kanampiu's mother had been divorced, she left with her children.

During the time of demarcation my husband Mutegi was advised by his maternal uncles to go to his father's clan for land.

The clan identified land for him.

That on getting to the land there was already someone in occupation who had extensively developed it. This was Shadrack Mutegi Mbitira.

The said Shadrack offered to purchase an alternative land which came to be registered as Mwimbi/Murugi/504. During demarcation my husband's elder brother Timothy Riungu was this time living in Scotland – he had gone to Scotland in the forties.

My husband's family comprises of the following:

- i. Timothy Riungu – deceased
- ii. Hilda Karimi
- iii. Francis Mutegi Kanampiu – deceased
- iv. John Gitari
- v. Betty Murungi – deceased

Timothy Riungu died in 1978 and was buried on another land.

At no time did Timothy Riungu use and or live on the land all his lifetime he knew and recognized the suit land to belong to Mutegi (my husband).

When my husband died in 2011 I called Hilda Karimi in the presence of elders to give directions as to where to bury him as the land was in her names. Hilda openly declared that the land belonged to Mutegi so we should proceed to bury my late husband.

### **HOW THE LAND WAS REGISTERED IN THE NAME OF HILDA KARIMI**

While my husband was alive, Hilda approached and indicated that she wanted to have the land changed from the name of Timothy Riungu – deceased to Francis Mutegi. He indicated that there was no need to file succession as she knew a land registrar who would facilitate the changes.

He asked that we give him Kshs.100,000/= for that purpose.

I took a loan of Kshs.50,000/= from KWFT and sold one of my cow to get the Kshs.100,000/= which money we gave to Hilda Karimi.

This was in April, 2009. She took long to deliver the title as promised. In December, 2009 I went to the defendant's home. She asked me to wait for another two weeks.

After two weeks she asked for a family meeting.

In attendance

- John Gitari
- Francis Mutegi
- Hilda Karimi
- And my two children John Mwenda and Peter Njagi

At the meeting she took out a title deed and gave it to my husband who handed it to me. On perusing the title I realized that the title was in her names.

The meeting almost degenerated into violence. On further deliberations, she asked to be given Kshs.500,000/= for renovation of her house in order for her to retransfer the land to Francis Mutegi.

The title was given to John Gitari for safe keeping.

Upon the demise of my husband I wanted to know the fate of the title to the suit land.

John Gitari was in Scotland. I called him and he told me to wait until December, 2011 when he would be back home.

On 8<sup>th</sup> December, 2011 I went to the home of John Gitari, he had also invited the defendant. In this meeting the defendant indicated that she was willing to retransfer the land but to do this she asked for Kshs.60,000/=

It took about 7 months to raise Kshs.60,000/=. I took a loan of Kshs.80,000/= out of which I took 60,000/= to Hilda Karimi.

She took the money and asked me to accompany her to Chuka Police Station to report loss of title and to be issued with abstract.

From the police we proceeded to the Chuka Land's Office where she indicated that she wanted to transfer the land to me. The green card could not be traced. We were asked to come the next day. This remained the case for seven consecutive days.

In July, 2012 and after waiting for the title without success I went to see my brother in law John Gitari. Hilda was also called in this meeting. She stubbornly said that she was not ready to transfer the land and or surrender the title.

My brother in law on hearing this threw up his arms.

After about 1 month while at home someone unknown drove up to my home and told me that he had been told that the land was up for sale and he was interested.

This alarmed (sic) that was when I moved to court.

**HILDA KARIMI**

She is my sister in law. She is married and her home is in Chuka.

She had never at any time lived on the suit land.

No other person has ever used the suit land except myself and my family.

No other person has been buried on the land except my late husband.

I have planted tea leaves upon 10 acres

I have coffee on 1 acre.

The rest of the land is used for homestead and food crops.

The defendant is only registered as a trustee. I pray that the registration be cancelled and I be awarded the land.

**SIGNED**

.....

**JULIET CIONJOKA NJERU**

9. PW2, Shadrack Mutegi Mbitira, asked the court to adopt his witness statement dated **12<sup>th</sup> April, 2018** as his defence in this suit. The statement reads as follows:

**SHADRACK MUTEGI MBITIRA**

I am the above named person resident of Mugichu village Mutindwa location.

I am 81 years old, married with children.

I know the plaintiff herein, she is wife to Francis Mutegi who is deceased.

I have known her for more than 50 years.

Her late husband was an age mate.

I do remember during demarcation of land which was around 1963 one Kuura Joseph who was uncle to Francis Mutegi sold to me a parcel of land measuring about 9 Acres.

When Francis Mutegi became of age he sought to be shown their family land from his uncles.

He sued his uncle Joseph Kura before the elders. The elders determined that the land that had been sold to me belonged to Francis Mutegi's family.

By then I had extensively developed the land I asked Francis Mutegi to look for an alternative land so that I can buy for him.

I gave them money about Kshs.6,500/=. This was in 1964. They used the money to purchase the land where they are living. This money I gave to Charity Ibrahim – mother to Francis Mutegi and Joshua Mugwika her brother.

This time Francis Mutegi was away in school.

That is all.

**SIGNED.....**

**SHADRACK MUTEGI MBITIRA**

10. PW3, Joan Wanja Mutegi, asked the court to adopt her witness statement filed on 12<sup>th</sup> April, 2018 as her evidence in this suit. The statement states:

**STATEMENT – JOAN WANJA MUTEGI**

I am Joan Wanja Mutegi.

The applicant herein is my mother.

The defendant is my paternal aunt.

We were born and brought up on the land parcel No. Mwimbi/Murugi/504.

I am now 28 years old.

The said land is our only home. The said land is family land.

The defendant does not live thereon. Nobody else lives on that land apart from us, the family of the applicant. During land registration, our said land was registered in the name of our eldest paternal uncle, Timothy Riungu – deceased.

The family of our uncle (Timothy Riungu – deceased) lives in Scotland Europe where all his children are born and brought up. Timothy Riungu died in the year 1978.

However, the defendant wrongfully, fraudulently, illegally and/or in breach of trust caused the said land to be registered under her name thereby dispossessing us of our said land.

We have developed the said land extensively, by among others building a permanent cattle shed, planting trees, tea bushes, coffee trees constructing a permanent cattle shed, planting banana trees, planting other trees including gravellia and Eucalyptus trees among others.

Should the said land be taken from us we shall be rendered homeless.

That is all I have to state.

Signed by.....

**JOAN WANJA MUTEGI.**

11. PW3, Joan Wanja Mutegi, PW4, John Mwenda Mutegi and PW5, Peter Njagi Mutegi are siblings. Their statements aver that they were born and brought up in the suit land and that the respondent, their paternal aunt, had wrongfully, fraudulently, illegally and/or in breach of trust caused the suit land to be registered in her name. I find that it is not necessary to reproduce the witness statements of PW4 and PW5 as what they state therein is what PW3 has stated.

12. PW2, Bernard Nyaga, asked the court to adopt his witness statement filed on **12<sup>th</sup> April, 2018** as his evidence in this suit. The statement states as follows:

**STATEMENT – BERNARD NYAGA**

I am the above named person resident of Mpuri village.

I know the parties in this dispute

I am aged about 60 years old.

I come from the same village with the plaintiff.

I have known the plaintiff's family for more than 40 years.

The plaintiff's husband was called Francis Mutegi – he is deceased.

I used to be an employee of the plaintiff.

I remember in the early seventies I assisted the plaintiff plant tea bushes on their land.

The plaintiff has planted tea bushes on about 10 acres. This was done between 1972 – 1973.

That all my life I have not seen any other person on the suit land. It has only been the plaintiff and her family.

The plaintiff has three children, a daughter and two sons.

The defendant is sister in law to the plaintiff who got married in the 50's. She has her home elsewhere. She has never lived on the suit land.

The land to the best of my knowledge belongs to the plaintiff and her family.

That is all.

Signed.....

**BERNARD NYAGA**

13. DW1, Hilda Karimi Njeru, the Respondent, asked the court to adopt her witness statement dated 17<sup>th</sup> May, 2018 as her evidence in this suit. The statement states as follows:

**STATEMENT OF HILDA KARIMI NJERU**

I am the above named defendant. I come from Kirigi village in Igamba Ngombe location of Tharaka Nithi County. I am a retired civil servant and currently eking a living as a farmer. I am the registered owner of parcel no. Mwimbi/Murugi/504.

This land was transferred to me in 2009 by the children of Timothy Riungu's who are the rightful heirs and beneficiaries of his estate. I was issued with the title deed in 2009. After being issued with the title deed I instructed my lawyer to advise the applicant who was living on a portion of the said land to vacate so that I could carry out the instructions that I had been given by my brother's children.

**BACKGROUND INFORMATION**

Both my parents are currently deceased

My father was called Ibrahim Kanampiu and he died in the 1940s while my mother was called Charity Muiya Ibrahim and she died in 1992. They had five children, including myself, my three brothers and one sister Timothy Riungu, Francis Mutegi and John Gitari Riungu and Beth Murugi respectively.

We were all born and brought up on land parcel No. Mwimbi/Murugi/422 which belonged to our parents. The family also had another parcel No. Mwimbi/Murugi/468 which is currently registered in the names of the applicant's husband Francis Mutegi who is our brother.

The land under dispute is parcel no. Mwimbi/Murugi/504 and is estimated to be 6.012 Ha. It is not family land but my brother Timothy Riungu land. This land was bought by my mother and she gave it to Timothy Riungu because he had not received any portion of the family land since parcel No. Mwimbi/Murugi/422 had been given to John Gitari Riungu while parcel Mwimbi/Murugi/468 was given to Francis Mutegi.

At the time this land was registered in the names of Timothy Riungu he was living with his family in Scotland. My mother planted the coffee and tea bushes for Timothy until when he returned to Kenya in 1968 upon which he personally took over the management of the land from my mother. When he came back to Kenya he found that our brother Francis Mutegi had built a structure on his farm and he tried to get him to leave but he refused. My mother also tried to advice (sic) Francis Mutegi to leave Timothy's land but he refused and continued to occupy a small portion.

So far a long time my two brothers were utilizing this land but Francis was only occupying a small portion because Timothy had planted coffee and tea and other crops on the larger portion. My mother was overseeing the farming on Timothy's portion on his behalf. Because my brother was very busy at Kenyatta National Hospital.

Because of his busy schedule my brother Timothy authorized his lawyer to manage this land and other properties on his behalf. I remember at one time my mother who did not understand the role of my brother's lawyer in the management of this land and she placed a caution on the same to prevent the land from being taken over by my brothers lawyer. However this caution was later removed after the death of my brother to pave way for the succession cause that bequeathed the land to my nieces and rightful heirs.

It is not true that I stole land parcel No. Mwimbi/Murugi/504 from the applicants family as she alleges. Land parcel No. Mwimbi/Murugi/504 belongs to my brother Timothy and his children. When my brother died, he bequeathed this land and other properties to his two children Michael Nyaga Riungu and Beth Kangai Riungu through a written will. The will was executed by his appointed trustee Peter David Belford Walker who filed a probate and administration cause no. HCC 369 of 1981 in Nairobi. It is through this succession case that the children of my brother got registered as proprietors of the said land. There has never been any challenge filed in that succession case by the applicants or those claiming under her.

In 2009, my nephew and niece gave me a power of attorney to manage the land for them because they were still living in Scotland. Later they transferred the land to me through the correct legal procedure including signing the transfer forms in my favour. I was then issued with the land certificate and I am now the registered owner of this land which belongs to the children of Timothy. I am not holding this land in trust for the applicant or her children. The applicant and her family have their own land being parcel No. Mwimbi/Murugi/468 and they are currently cultivating and living there.

The applicants have tried all means to steal this land from me. Apart from this suit the applicants had filed another land case being case No. ELC 54 of 2014 (which later became ELC No. 168 of 2017 in Chuka). This case has been dismissed and the applicants are now trying to circumvent the law by filing multiple suits on the same subject matter. I am praying for the court to dismiss this suit and to condemn them to pay me costs. They should also be ordered to vacate this land and to return to their land that is still registered in their names.

**DATED AT EMBU THIS 17<sup>TH</sup> DAY OF MAY, 2018**

**HILDA KARIMI NJERU**

14. DW2, Eustace Karuri Mbugori, asked the court to adopt his witness statement dated **17<sup>th</sup> May, 2018** as his evidence in this suit. The statement states as follows:

**STATEMENT OF EUSTACE KARURI MBOGORI AS A WITNESS**

I am married to the sister of defendant's husband one John. We grew up together with defendant and went to the school together. We are neighbors. The father of defendant died before demarcation. I was born in 1932 and the father died in 1944. I knew when he died because I was 12 years old. Demarcation in our area commenced around 1962. Before demarcation the mother of defendant bought a piece of land in a place called Mpuri. She bought from a person called Timathu.

The uncle of defendant called Joshua Mugwika Ndiira also bought a portion from the same Timathu.

This is the land that was eventually registered in the name of Timothy. Timothy is the eldest son of Charity (defendant's mother). It was a first registration to Timothy Riungu. He was registered to hold the same absolutely. He planted coffee and had a coffee number in his name. Since Timothy was away in England, he authorized the mother to be getting the money for his upkeep. From England he came to Nairobi as he was working at Kenyatta National Hospital. But he would visit his land when he was free. When he got unwell he got a trustee from his properties, one David Walker. He said his property to go to his two children Kangai and Michael, in the event of his death. The children are still alive. The trustee filed a succession and had the land in his name. He even used to take loans with it. The children followed this land and it was registered in their names.

The children gave the defendant power of attorney to deal with the father's estate. The defendant would always tell and consult me on these things. The land was eventually transferred into defendant's name.

The defendant was given the power of attorney to take care of the estate of her brother. The children are away, one in USA and the other in England.

The mother of the defendant had gathered two other parcels which are family land. These are Nos. 468 and 422. The plaintiff's husband chose No. 468 as it was in town. The other son Gitari was given 422. That is all I wish to state.

**DATED AT EMBU THIS 17<sup>TH</sup> DAY OF MAY, 2018**

.....

**EUSTACE KARURI MBOGORI**

15. DW3, Dorothy Mukwanyaga, asked the court to adopt his witness statement dated **17<sup>th</sup> May, 2018** as his evidence in this suit. He statement states as follows:

**STATEMENT BY DOROTHY MUKWANYAGA NJERU**

I am the above named person. I live in Chuka. The defendant is my mother. I am her first born. I know the background to this land since it is my uncle Timothy's land. When my uncle died the land was transferred to his children. His children are Beth Kangai Riungu and Michael Nyaga Riungu. They are my cousins. I have had the privilege of seeing several letters and post cards written to my mother by Beth concerning her wishes for the land that was left to them by my uncle Timothy. In these letters Beth asked my mother to have the land transferred into her names and to take care of it. Beth also advised my mum to discuss the matter with her father's attorney Mr.Walker so that he could facilitate the transfer of land parcel No. Mwimbi/Murugi/504 into my mother's name. I can say that this land belonged to my uncle Timothy and when he died he left it to his children and it is these children who transferred the land to my mother.

That is all I wish to say.

**DATED AT EMBU THIS 17<sup>TH</sup> DAY OF MAY, 2018**

.....

**DOROTHY MUKWANYAGA NJERU**

16. DW4, John Gitonga Nkabuni, asked the court to adopt his witness statement dated **17<sup>th</sup> May, 2018**, as his evidence in this suit. The statement reads as follows:

**STATEMENT OF JOHN GITONGA NKABUNI AS A WITNESS**

We belong to the same clan as the litigants here. I am the secretary of the entire clan. I came to know about the suit land when the defendant told the clan that she had been given the land by the children of Riungu. I knew Timothy Riungu. This is in the year 2009. I know that the other sons of defendant's father have their own lands.

I know where they are.

That's all I know.

**DATED AT EMBU HIS 17<sup>TH</sup> DAY OF MAY, 2018**

.....

**JOHN GITONA NKABUNI**

17. The parties filed written submissions.

18. The plaintiff/applicant's written submissions which are in exactly the form they were filed read as follows:

**SUBMISSIONS ON BEHALF OF THE PLAINTIFF.**

Your Lordship, the suit property herein is **LR MWIMBI/MURUGI/504** measuring approximately **6.012Ha**. The respondent **HILDAH KARIMI NJERU** is a sister-in-law to the plaintiff.

In an OS filed in court on **6/8/2013** and dated **5/8/2013** the plaintiff raises the following issues:

- (a) Whether the plaintiff/applicant has been in open, continuous and exclusive possession of **LR Mwimbi/Murugi/504** for 12 years and more.
- (b) Whether the plaintiff/Applicant has become entitled to **LR MWIMBI/MURUGI/504**.
- (c) Whether the plaintiff/applicant should now be registered the owner of **LR MWIMBI/MURUGI/504**.
- (d) Whether the plaintiff has been on the suit land without the defendant's permission.
- (e) Whether the deputy registrar/executive officer of this court should be empowered to sign all the necessary documents to facilitate transfer of the land to the plaintiff/applicant in the event of the respondent declining to so sign.
- (f) Whether the defendant should be condemned to pay costs of this suit.

The plaintiff seeks a declaration that by virtue of adverse possession she has become entitled to be registered owner of **LR MWIMBI/MURUGI/504**.

The plaintiff pleads that she has been in exclusive use and occupation of the suit land for more than 43 years that she has all her married life lived on the suit land, actually she was married and settled on the land. That her family and herself have extensively developed the suit land by inter-alia planting tea bushes over an area covering 12 Acres and erecting permanent residences. That the plaintiff and her family know of no other land they can call home. That they stand to be rendered destitute if they lose this land.

The plaintiff's case is adumbrated in the supporting affidavit annexed to the originating summons.

The defendant in response to the OS did not file any defence.

The plaintiff filed a list of witness statement, which were adopted as evidence. The statements are quite detailed; we need not recapitulate the same here.

Your Lordship in the absence of any statement of defence on record, the defendants testimony together with that of her witnesses whatever their worth lack anchorage.

Your Lordship the plaintiff's claim herein purely is of adverse possession.

Your Lordship in **CA No. 22/2013** in the court of Appeal at Nyeri, the court cited with approval **Knetter J** in the case of **KIMAMI RUCHIRE –VS- SWIFT RUTHERFORDS & CO. LTD.**

*“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, no secrecy, no persuasion). So the plaintiff must show that the company has knowledge or the means of knowing actual or constructive) of the possession or occupation, the possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.*

Your Lordship it is our humble submission that the plaintiff has proved her claim for adverse possession and therefore pray that orders do issue that she be registered the owner of **LR MWIMBI/MURUGI/504**.

We seek to rely upon the following authorities;

**(i) In the court of Appeal at Mombasa Civil Appeal No. 46/2015**

MISTRY VAJI –vs- JAVENDRA RAICHARD & 2 OTHERS

**(ii) In the court of Appeal at Nairobi C.A NO. 95/2014**

RUTH WANGARI KANYAGI –VS- JOSEPHINE MUTHONI.

**(iii) In the High court of Kenya at Meru HCCC 283/1990**

GABRIEL MBUI –VS- MUKINDIA MARANYA

DATED at Meru this.....6<sup>th</sup> .....day of.....September,.....2018

.....

FOR: MOKUA OBIRIA& ASS.

**ADVOCATES FOR THE PLAINTIFF**

19. The Respondent/Defendants written submissions which are in exactly the form they were filed read as follows:

**SUBMISSIONS ON BEHALF OF DEFENDANT**

MY LORD the Plaintiff initiated this suit by way of the Originating Summons dated 5<sup>th</sup> August 2013. The suit is in respect of her claim that she has acquired through the principle of adverse possession, land parcel number MWIMBI/MURUGI/504 that is currently registered in the names of the Defendant. Together with the Plaintiff the Plaintiff also filed a deaith of other documents and a Notice of Motion through which she asked for temporary orders of injunction against the Defendant.

She brought the application under section 38 of the Limitation of Actions Act, Order 37 Rule 7 of the CPC and sections 1A, 1B and 3A of the Civil Procedure Act.

The defendant filed a replying affidavit on 26 August 2013 and the matter proceeded to full hearing with both sides adducing evidence to support their case.

In that replying affidavit the Defendant raised a preliminary point of law in which she flagged the fact that the Plaintiff had actually filed another suit against her and that the said suit concerned the same issue and that suit was still pending for determination. It is our prayers that My Lord allows us to submit on this issue because it has the potential to terminate these proceedings in favor of the Defendant. We therefore wish that Your Lordship will consider the following issues for determination on behalf of the Defendant.

**ISSUES FOR DETERMINATION ON BEHALF OF THE DEFENDANT**

- 1. Whether the Defendant filed a defense in this suit?**
- 2. Whether this matter is *sub-judice* and an abuse of the court process.**
- 3. Whether the court should strike out and dismiss this suit**
- 4. Whether the Plaintiff is entitled to claim the whole of land parcel number 504 or just the portion that she is currently occupying.**
- 5. Who bears the cost of this suit**

- 1. Whether the Defendant filed a defense in this suit?**

On 26 August 2013, upon being seized of the suit the Defendant filed a replying affidavit in which she denied the claim. The reply is dated 26 August 2012.

My Lord we submit that an Originating Summons is in the nature of an application and it is a common practice for defendants to file a replying affidavit when served with the OS in a suit such as this one. We pray that the court takes a judicial notice of this fact; that defendants in cases initiated by originating summons may choose to file a defense or to file a replying affidavit and both methods are acceptable to court.

**See the case of L.K.K V J.K (2012) eKLR** where the court noted that the Respondent had filed a replying an affidavit denying the plaintiff's claim. Our legal terrain is undulated with instances when litigants chose to file replying affidavits to respond to claims for adverse possession against their land.

We therefore submit that the Defendants filed a defense in this matter and that that defense is on record in the form of the Replying Affidavit of 26 August 2013.

- 2. Whether this matter is *sub-judice* and an abuse of the court process.**

We submit that yes, this suit is subjudice under section 6 of the Civil Procedure Act.

The section provides as follows:

‘No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.’

Suit number 168 of 2017 was filed on 27<sup>th</sup> July 2012 by the Plaintiff in this case and her three children. It was filed against the Defendant and they were claiming for the following orders

- a. A declaration that LR No Mwimbi/Murugi/504 is the Property of the Plaintiff's and that the Defendant is holding L.RMwimbi/Murugi/504 in trust for the Plaintiffs.
- b. An order of cancellation of the Defendants name from the Register of LR no MWIMBI/MURUGI/504 and register the names of the Plaintiff's thereof
- c. An order of permanent injunction and inhibition to restrain the Defendant by himself, her agents/servants from interfering with LR No Mwimbi/Murugi/504
- d. Costs and interests and any further or better relief this Honorable Court may deem fit to grant.

On 27<sup>th</sup> July 2012 the Plaintiff and her co plaintiffs in Suit 168 of 2012 filed an application for temporary injunction against the Defendant but that application was dismissed on 6<sup>th</sup> of February 2013 for lack of merit. It is the dismissal of this application that prompted the Plaintiff, by herself and without the Plaintiff's in the prior suit to file the instant suit.

This instant suit my Lord is asking for the following prayers

- a. An order of Injunction restraining the Defendant by herself, her agents, assigns or anybody acting at her behest from alienating, disposing and or charging LRMwimbi/Murugi/504 and or in any way interfere with the applicants use and occupation of LRMwimbi/Murugi/504 pending the hearing and determination of this application interparties.
- b. The Plaintiff/Applicant has become entitled to LRMwimbi/Murugi/504 by adverse possession.
- c. That the Plaintiff/Applicant be registered as owner of LR MWIMBI/MURUGI/504
- d. The Defendant be ordered to pay the costs of this suit.

My Lord the substantive issues being claimed in both suits are the same.

We submit that the Plaintiff, instead of appealing against the ruling issued on 6<sup>th</sup> February 2013 in suit number 168 of 2012 decided to file this suit and while doing so, she concealed the fact of the existence of that prior suit to this court in order to serve her own interests.

We also submit that the Plaintiff has not filed a verifying affidavit with the pleadings in this suit as is required under Order 4 (1) (f) of the Civil Procedure Rules. My Lord this failure is not an innocent mistake or oversight but was an intention omission aimed at hiding the fact that there was another suit between the parties and that it was sub judice to file this instant suit.

The logical explanation for this is that she was trying to circumvent justice by hiding material information from this court. The material information she was hiding being the existence of CHUKA ELC CASE NO. No 168 of 2017 whose existence would have jeopardized the hearing and determination of this suit.

Her decision to keep this crucial information from the Court has been very prejudicial to the Defendant who is a woman of advanced age being aged 82 years. She has been forced to spend a lot of money in legal fees, travel expenses etc in order to defend herself in the two cases that have been running simultaneously.

We submit that this is an injustice of the highest order my Lord; especially when the law provides the relief of staying one suit until the other suit is heard and finalized. Why did the Plaintiff not disclose this crucial information to the Court?

Our guess is that the Plaintiff was keeping this information concerning suit number 168 of 2017 hidden from this court so that she can kill two birds with the same stone; by using two suits to acquire land parcel no Mwimbi/Murugi/504.

My Lord the Plaintiff and three others filed a previous suit which is ChukaELC Case no 168 of 2017 before the Plaintiff filed this instant suit. That previous suit was filed on 27<sup>th</sup> July 2012 and before it could be heard and disposed; the Plaintiff filed this suit on 6<sup>th</sup> August 2013. She did not bother to have the previous suit stayed and neither did she bother to pursue that previous suit to its logical conclusion because on 23 November 2017 the suit got dismissed for want of prosecution under order 17 rule 2 (1) of the Civil Procedure Rules.

It is our submission that this suit should be struck off and dismissed for being sub-judice.

The issue of the instant suit being sub judice was pleaded in paragraph 1 to 13 of the Replying Affidavit. The filing of this suit, while suit number 168 of 2017 was still pending hearing and determination; and before the Plaintiff could have it stayed is in violation of the overriding objective of the Civil Procedure Act which requires under Section 1B that there be an efficient use of the available judicial and administrative resources.

**In THIBA MIN. HYDRO CO. LTD VS JOSPHAT KARUNDWIGA (2013) eKLR** Judge B. N. O. la'o stayed a subsequent suit pending the hearing and final determination of the subsequent suit. In the instant circumstances the Plaintiff hide some crucial information from this court; and that information includes the fact that there was another suit pending before the court involving her and the Defendant and that in that suit the subject matter was the same which is a claim of ownership for land parcel number 504 which is currently registered in the names of the Defendant. The Plaintiff's claims in both suit is that she has acquired overriding interest in the suit land with the slight difference that

in the first suit (168 of 2017) she lays her claim under the customary trust while in the instant suit she lays her claim under the doctrine of adverse possession. We submit that the Defendants plea of sub-judice was properly invoked and due to that this suit should be struck out with costs to the Plaintiff.

### **3. Whether the court should strike out and dismiss this suit**

The other reason why this suit ought to be struck out is that it is an abuse of the court process and a waste of judicial time and resources.

The Plaintiff my Lord has filed two suits, concerning the same subject matter and claiming similar relief. In both suits she claims overriding interest over land parcel number Mwimbi/Murugi/504 with her claim in Chuka Suit number 168 of 2017 being anchored on the

principle the overriding principle of trust. In the instant suit my Lord she claims under the Principle of adverse possession; thus confusing the court while taking the courts precious time and resources to no avail. My Lord Suit number 168 of 2017 was dismissed in November 2017 for want of prosecution. The Plaintiff filed that suit and did not bother to pursue it to its logical conclusion neither did she deem it expeditious to stay its proceedings pending the hearing and determination of this instant suit.

My Lord it is our humble submissions that section 6 of the CPC is couched in a mandatory term to the effect that 'no court shall proceed with....'

Proceeding with this suit, while the other suit is still on the cards is prejudicial to the Defendant my Lord. My Lord a perusal of the court file for suit number 168 of 2017 will reveal that the same was dismissed on 23 November 2017 for want of prosecution. This was before any stay had been granted in the matter. The dismissal was made under section 17 Rule 2.

The particular section provides as follows My Lord

'In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

My Lord it has been held that a dismissal under Order 17 Rule 2 of the CP Rules is not fatal and if a party is so willing; it can apply to have the suit revived.

Why do we mention this fact my Lord? This plaintiff has filed two similar cases in court my Lord. She has chosen to pursue one while abandoning the other without any justification although it takes priority over the instant suit. If this Honorable Court decides against the Plaintiff in this suit she has the option, under the operation of the above section to revive the dismissed suit and this will defeat the overriding objection of Section 1A and 1B of the Civil Procedure Act and in particular section 1A (a) which provides that 'The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act'

It is our further submission that the Plaintiff did not comply with the provisions of Order 4 Rule (2) (f) which provide that every plaint shall be accompanied by 'an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.'

The failure of the Plaintiff to make this statutory disclosure was meant to hood wink the court into believing that there is no other suit pending before any other court; between the same parties and on the same subject matter. We invoke the provisions of Section 1A and 1B and beseech this Honorable Court to strike out the instant suit under order 2 Rule 15 (d) of the Civil Procedure Rules.

We wish to rely on the case of **KIVANGA ESTATES LIMITED VS NATIONAL BANK OF KENYA LIMITED (2017) eKLR** in which Honorable Asike-Makhandia observed that the act of abandoning suits before determination while filing fresh ones is itself an abuse of the court process sufficient under order 2 Rule 15 (1) (b) and (d) to justify striking out.

That particular order provides that the a plea to strike out can be made any stage of the proceedings and it is our humble submission at this stage that the suit be struck out because the Plaintiff intentionally misled the court by failing to reveal the existence of suit number 168 of 2017 at ELC Court in Chuka. She abandoned that until it was dismissed for want of prosecution. The present suit is therefore brought in bad faith; with the intention of oppressing the Defendant who is a senior citizen and we pray that the court takes this into consideration.

By virtual of section 3A of the Civil Procedure Act, My Lord the court has wide discretionary powers that should be exercised in favour of the Defendant who is an innocent party. She has been forced to defend two simultaneous cases due to the failure of the Plaintiff to disclose material facts to this court.

We have raised this preliminary objection at this stage of the proceedings because we have joined the case late and we were not aware that suit number 168 of 2017 had not been stayed pending the hearing of this suit my Lord. In any case the law is clear that a suit that has been proved to be an abuse of the court process can be struck out at any stage of the proceedings.

A final word on the issue of suit number 168 of 2017 My Lord the dismissal was effected under section 17 (2) of the CPR.

### **4. Whether the Plaintiff is entitled to claim the whole of land parcel number 504 or just the portion that she is currently occupying**

My Lord it is not true that the Plaintiff has acquired adverse possession of the whole land parcel number Mwimbi/Murugi/504. The parcel

measures approximately 6.012Ha which is estimated to be 14 acres. There is a road running across it so that one part of the suit land is on one side of the road while the other is on one side of the road. My Lord the Plaintiff currently occupies a portion that measures only 4 acres. She failed to prove that she controls the whole 14 acres since she did not table any evidence to show the income she is deriving from it for comparative purposes.

My Lord the law is very clear that the party that alleges must prove. The Plaintiff could not prove that indeed she is in adverse possession of the suit land.

Finally my Lord we submit that the Plaintiff is not a destitute; her family has other land that was bequeathed on them by the family. We pray for this suit to be struck out with costs to the Defendant.

We humbly submit.

DATED AT EMBU this.....day of.....2018

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**NJIRU KITHAKA & CO**

**ADVOCATES FOR THE PLAINTIFF**

20. In his submissions the plaintiff's advocate told the court that he relied on the following authorities to buttress his assertions:-

- a) MISTRY VAIJI VERSUS JAVENDRA RAICHARD & 2 OTHERS, Appeal No. 46 of 2015, Court of Appeal at Mombasa.
- b) RUTH WANGARI KANYAGI VERSUS JOSEPHINE MUTHONI, Civil Appeal No. 95 of 2014, Court of Appeal at Nairobi.
- c) GABRIEL NJUI VERSUS MUKINDIA MARANYA, Meru HCCC 283 of 1990.

21. The applicant's advocate did not attach the case of Gabriel Mbui versus Mukindia Maranya (op.cit). I will not say any more about it. The case of Mistry Valji versus Javendra Raichard and two others (op.cit) is good authority that adverse possession must be proved through cogent evidence and does not accrue by mere occupation and use. The case of Ruth Wangari Kanyagia (op.cit) is also a good authority that adverse possession must be proved. It is also a good authority that where a claimant sought orders of adverse possession when he or she had entered the suit land with the consent and permission of land owners, adverse possession cannot accrue. I will take into account the principles enunciated by these two cases when making my determination of the apposite issues in this case.

22. The defendant's advocate proffered the following authorities to buttress his assertions:

- a) L. K. K. (applicant versus J. K. (respondent) [2012] eKLR
- b) Ndungu Mugoya & 473 others versus Stephen Wangombe & 9 Others [2005] eKLR
- c) Kivanga Estates Limited (Appellant) versus National Bank of Kenya Limited (Respondent) – Nairobi Court of Appeal No. 217 of 215 [2017] eKLR.

23. I find the case of L.K. K. versus J. K (op cit) relevant for the proposition that an Originating Summons can be opposed through a replying affidavit. In this suit, the replying affidavit not only opposed the Originating Summons but also prayed that it be dismissed. I find that this Originating Summons has been properly opposed and canvassed.

24. The case of Ndungu Mugoya & 473 others versus Stephen Wangombe & 9 Others, op cit, is a good authority, inter alia, that where the court thinks that a matter before it evinces characteristics of abuse of the court's process, the concerned court may exercise its discretion to strike out the impugned suit. It is also a good authority that such a suit could be struck out where the litigant failed to aver that there was another suit concerning the same matters and parties pending in the court system. It is pellucid that in this matter the plaintiff refused to disclose to the court that she had filed HCCC No. 168 of 2017 on 27<sup>th</sup> July, 2012 where she and her three children were plaintiffs and the Respondent/Defendant was the defendant. It is also not controverted that the plaintiff/applicant had not filed a verifying affidavit. Indeed, I find that order 4 rule 2 of the Civil Procedure Rules is couched in mandatory terms and reads as follows:

**ORDER 4 RULE 1(2)**

***“The plaint shall be accompanied by an affidavit verifying the correctness of the averments contained in rule (1) (1) (f) above.***

**ORDER 4 RULE 1(f)**

***Order 4 rule 1 (f) requires “an averment that there is no other suit pending and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint”.***

25. The case of Kivanga Estates Limited versus National Bank of Kenya (op cit) is a classic authority for the proposition that where a suit is res judicata another, it is a gross abuse of the court's process and merits dismissal. In the interest of justice, I will embrace the spirit of the constitution and lean towards delivering substantial justice.

26. I find that the primary issue for determination in this matter is if or if not the applicant/plaintiff is entitled to be declared proprietor by way of adverse possession of Land Parcel No. MWIMBI/MURUGI/504.

27. From my consideration of the totality of the evidence proffered by the parties, I find that when the plaintiff and her husband started their occupation, they did so with the permission of the original registered owner of the suit land and with the acquiescence of the mother of the plaintiff's/applicant's husband. I also find that this land was not ancestral husband. If it were, all the siblings of the plaintiff's/applicant's late husband would now be staking a claim upon the land. However, it is only the applicant who is laying such a claim.

28. I also find that the suit land properly belonged to its original registered owner Timothy Riungu (deceased), the eldest brother of the applicant's/plaintiff's husband, Francis Mutegi, (deceased). Having so found, I find that the plaintiff/applicant did not proffer an iota of evidence, that the process employed in having the land registered in the name of the respondent/defendant by the children of the original registered owner was fraudulent, irregular, wrongful or in any way illegal.

29. That the suit land is properly registered in the name of the respondent/defendant was attested to by the conduct of the applicant/plaintiff. By filing a claim for adverse possession against the respondent/defendant, by dint of that conduct, the applicant/plaintiff unequivocally admits that the suit land belongs to the respondent/applicant. Otherwise time necessary to run so that adverse possession accrues would remain static because adverse possession cannot run against a non-owner. The upshot of this finding is that, it is upon the applicant/plaintiff to prove by way of cogent evidence that she is entitled to ownership of the suit land by way of adverse possession.

30. As I have found that the plaintiff and her deceased husband entered the suit land with the permission of the deceased original registered owner, I wish to point out that the longerity of occupation does not count for anything as long as the original entry was with the consent and acquiescence of the said owner. It does not count even when the occupation is for 100 years. Occupation per se is not enough. Other important factors have to be taken into account.

31. Some of the issues canvassed by the parties do not fall in the realm of adverse possession considerations. Issues such as what share of the family land the various siblings had received and if or if not the respondent/defendant had been registered as owner of the suit land fraudulently are, with due respect, out of the province of adverse possession. They should have been canvassed in an ordinary plaint or other apposite pleadings.

32. I find that this court has the discretion of dismissing this suit on account that the applicant/plaintiff had refused to disclose to court that she had earlier on filed another case in which a preliminary application had been dismissed which application was seeking similar orders which she later on sought in this suit. The said suit had indeed consequently been dismissed on account of non-prosecution.

33. The defendant asks the court to dismiss this suit as being res-judicata Chuka ELC Case No. 167 of 2017. It is indeed true that this suit which sought orders similar to the orders the applicant/plaintiff is now seeking was dismissed. This court would be entitled to declare this suit res-judicata Chuka ELC Case No. 167 of 2017. This court, however, notes that this suit was dismissed for lack of prosecution. In the interest of justice and to embrace the spirit of Article 159 of the Constitution of Kenya, and without declaring the issue of res-judicata a procedural technicality, I am inclined to consider the totality of facts and circumstances surrounding this case and to deliver substantial justice.

34. It is not controverted that the applicant/plaintiff has lived on part of the suit land since 1970. It is also not controverted that the suit land was transferred to the defendant by the children of her deceased brother, Timothy Riungu, the original registered owner of the land, who live outside Kenya. She says that she is registered as a trustee for those children. It is not controverted that the applicant/plaintiff has her house on one side of the suit land which is separated from the other portion by a road. It is also not controverted that the plaintiff and her family has lived thereon for a long time. I am inclined to find that the applicant/plaintiff has been on a portion of the suit land without the respondent's/defendant's or any other persons consent from the time Timothy Riungu, the original owner of the suit land died in 1978. The court deems this date to be the cut off point when the original consent ceased to apply. The plaintiff/applicant has, however, on a balance of probabilities only proved that she deserves to be declared owner of a portion of the suit land where her homestead stands and which is the smaller portion of the suit land AND which portion is separated from the other portion of the suit land by a road of access. It is declared that the other portion of land, which is the bigger portion, and is separated by a road of access from the portion where this court has declared the applicant/plaintiff as owner through the doctrine of adverse possession, is the property of Hilda Karimi Njeru, the respondent/defendant.

35. Judgment is entered for the Applicant/Plaintiff and for the Respondent/Defendant as follows:

a) The Applicant/Plaintiff is entitled to be registered as proprietor of the portion of the suit land, which is the smaller portion of the suit land, on which her homestead is situated and it is clarified that this portion of land is separated from the remaining parcel of land by a road of access.

b) The Respondent/Defendant is to remain the registered owner of the parcel of land, which is the bigger portion, separated by a road of access from the portion this court has declared belongs to the Applicant/Plaintiff by way of adverse possession.

c) The Deputy Registrar of this court is directed to execute all documents necessary for the implementation of the orders contained herein.

d) Parties are at liberty to move the apposite government surveyor or any other qualified surveyor, at their cost, to establish the exact areas of their portions of land.

e) The Land Registrar is ordered to issue two separate titles to the parties once survey and other registration processes are completed.

36. The parties are close relatives. To promote harmony in the family, no costs are awarded to any of them.

37. Orders accordingly.

**Delivered in open court at Chuka this 28<sup>th</sup> day of November, 2018 n the presence of :**

CA: Ndegwa

Juliet Cionjoka Mutegi – plaintiff

Hildah Karimi Njeru

**P.M. NJOROGE,**

**JUDGE.**