



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 228 OF 2017

EMMY KAARI KABURU.....PLAINTIFF

VERSUS

PATRICK KAMUNDI ERASTO.....DEFENDANT

JUDGMENT

1. The applicant/plaintiff seeks a declaration that she is entitled to ownership of 12 feet by 150 feet of part of Land Parcel No. **MUTHAMBI/IGARUMATHI/791** through the doctrine of adverse possession.
2. During hearing, PW1 the plaintiff/applicant (hereinafter referred to as “The Plaintiff”), asked the court to adopt her witness statements dated **10th April, 2017 and 9th February, 2018** as her evidence in this suit. Having perused the two statements, I find that the statement dated **9th February, 2018** subsumes the issues raised in the statement dated **10th April, 2017**. The statement is pasted in the form it was filed without any alterations whatsoever. The dated **9th February, 2018** reads as follows:

FURTHER APPLICANT’S STATEMENT PURSUANT TO LEAVE OF COURT GRANTED ON 1ST FEBRUARY 2018

1. Your lordship this is the applicant’s further statement following the leave of court granted to the parties to this suit on 1st February 2018. With this further statement I wish to explain and expound the questions posed in my originating summons dated 10th April 2017 and my supporting affidavit sworn and dated 10th April 2017.

2. My lord a brief background information leading to this suit will greatly help the court to understand why I have brought this suit. Firstly I am the wife to the late DONALD MUGO ERASTO. I have obtained already letters of administration ad litem in respect of his estate. I have attached a copy of the grant on the affidavit in support of my originating summons. This gives me the locus standi to articulate rights, liabilities and interest of the late DONALD MUGO ERASTO.

3. The late DONALD MUGO ERASTO had four brothers. One was PATRICK KAMUNDI ERASTO the respondent herein. The other brothers of my late husband were ANOLD NJAGI KIAMBATI and the late ELIPHAS NDIGA and EUGINIO NJUE. The four had five sisters and EUGINIO NJUE who are not involved in this suit. The late DONALD MUGO, PATRICK KAMUNDI ERASTO and ANOLD NJAGI KIAMBATI and their five sisters were born of one ERASTO MUCHARA KIAMBATI. The said ERASTO MUCHARA KIAMBATI predeceased DONALD MUGO my husband.

4. Upon the demise of ERASTO MUCHARA KIAMBATI his sons spearheaded by the respondent decided to file a succession cause in respect of their late father’s estate. As of the time of death of ERASTO MUCHARA KIAMBATI he had one property namely LR; MUTHAMBI/IGAMURATHI/43. The land was adjacent to Thuci-Chuka-Nkubu-Meru road. The position of the land attracted many private developers. One of these private developers was known as DOMISIANO KABURU NJERU. With an intention of investing around where LR; MUTHAMBI/IGAMURATHI/43 was situated he approached the three sons of ERASTO MUCHARA KIAMBATI that is my husband the late DONALD MUGO ERASTO, ANOLD NJAGI KIAMBATI and the respondent PATRICK KAMUNDI ERASTO. The three agreed with the private developer DOMISIANO KABURU NJERU that they would include him in the succession cause and they would sell to him jointly and severally a portion measuring 72 feet by 150 feet. The agreement between my late husband, PATRICK KAMUNDI and ANOLD NJAGI KIAMBATI on one part and DOMISIANO KABURU NJERU on the other part was reduced into writing. Refer to annexure marked E.M.K.3 annexed to the supporting affidavit. The agreement was entered into on 27th November 1998. Of importance to note is the contribution each one made to make up for the 72 feet by 150 feet that they were all jointly and severally selling to DOMISIANO KABURU NJERU. The contributions were as follows;

- (i) PATRICK KAMUNDI ERASTO was to contribute 12 feet by 150 feet
- (ii) The late DONALD MUGO ERASTO was to contribute 19 feet by 150 feet
- (iii) ANOLD NJAGI KIAMBATI was to contribute 41 feet by 150 feet

Their contributions therefore added to 72 feet by 150 feet the portion that they were to sell jointly to DOMISIANO KABURU NJERU.

5. Pursuant to the specific performance of the agreement dated 27th November 1998 between ANOLD NJAGI KIAMBATI, DONALD MUGO ERASTO and PATRICK KAMUNDI ERASTO on one part and DOMISIANO KABURU NJERU on the other part the said DOMISIANO KABURU NJERU paid the consideration thereof as follows;

(i) Ksh 120,000 paid and received by PATRICK KAMUNDI ERASTO

(ii) Ksh 641,666 paid and received by ANOLD NJAGI KIAMBATI which money was in payment of the land and the developments therein.

(iii) Ksh 158,333 paid and received by the late DONALD MUGO ERASTO

Note that these transactions of drawing the agreement and payments were carried out by and in the presence of M/S D.J MBAYA & CO ADVOCATES OF P.O BOX 2224 MERU. Up to the filing of this suit none of the parties privy to this agreement ever complained that there was forgery. Apparently the agreement was executed and signed during day light and in presence of an advocate. Denying of the existence and the signing of the agreement aforesaid is mere denial and a bid to avoid liability and responsibility.

6. Your lordship the respondent by the time they entered into the agreement aforesaid without informing others (after all he was the one who was involved and engaged in the succession process) caused the title deed to his portion LR; MUTHAMBI/IGAMURATHI/791 to be generated. He did not disclose to others that he had a title to his portion. The respondent did not disclose this fact to the others. He was therefore behaving in a fraudulent and dishonest manner. It seems that right from the start the respondent was out to enrich himself unfairly.

7. As pointed out supra the late ERASTO MUCHARA KIAMBATI was the registered proprietor of LR; MUTHAMBI/IGAMURATHI/43. A portion of the said land was excised out as it was compulsorily acquired by government to create room for construction of Thuci-Nkubu road. Many people became interested in buying plots for private developing. The children of the registered proprietor one ERASTO MUCHARA KIAMBATI the then registered proprietor of LR; MUTHAMBI/IGAMURATHI/43 were to live to this new development and in particular commercial opportunity. The siblings of the respondent apportioned themselves portions measuring 72 feet by 200 feet out of LR; MUTHAMBI/IGAMURATHI/43. As regards the late ELIPHAS NDIGA he got a bigger portion. The portions were excised by a surveyor however before the generation of the titles for the said portions (save for the portion belonging to the respondent) the late DONALD MUGO ERASTO, ANOLD NJAGI KIAMBATI and the respondent agreed to contribute their respective portions for the purpose of selling to one DOMICIANO KABURU NJERU. The late DONALD MUGO contributed 19 feet by 150 feet, ANOLD NJAGI KIAMBATI contributed 41 feet by 150 feet while the respondent contributed 12 feet by 150 feet. DOMICIANO KABURU was interested in buying a portion measuring 72 feet by 150 feet and this is exactly what the three of them contributed from their respective shares. It was agreed that the contributions by the three of them was to be registered under the name of ANOLD NJAGI KIAMBATI whereupon he would then sell it as it were directly to DOMICIANO KABURU NJERU.

8. Stealthily and secretly the respondent had his title deed processed. When the respondent had his title processed it was not put into account that he had sold 12 feet by 150 feet portion. He ought to have generated a title for 60 feet by 200 feet. His title now reads 72 feet by 200 feet.

9. On the ground the respondent caused his land LR; MUTHAMBI/IGAMURATHI/791 to be fenced so that a portion measuring 12 feet by 150 feet was left out and the portion measuring 60 feet by 200 feet was fully fenced. The respondent concentrated his developments on the portion measuring 60 feet by 200 feet. This portion measuring 12 feet by 150 feet was to go to DONALD MUGO'S portion of LR; MUTHAMBI/IGAMURATHI/796. DONALD MUGO'S land now is less by 12 feet by 150 feet the portion that the respondent sold and received money for but was never excised from his land parcel LR;MUTHAMBI/IGAMURATHI/791. On the ground I continued to occupy and use 12 feet by 150 feet portion from 1998. The respondent on the other hand confined himself to the remaining 60 feet by 200 feet portion out of his parcel of land LR; MUTHAMBI/IGAMURATHI/791.

10. Upon the demise of DONALD MUGO ERASTO on 15th April 2015 the respondent started encroaching in the portion that I was occupying and which was measuring 12 feet by 200 feet. This was on 27th August 2015. He relocated the boundary to encompass 12 feet by 150 feet portion. I reported the matter to the local chief. The chief wrote a letter addressed to the registrar of land Meru south/Maara Sub Counties for assistance. See item number 5 on the list of documents. The registrar advised me to get counsel from an advocate and I was counseled accordingly.

11. In the meantime on or around 27th November 1998 the late DONALD MUGO, the respondent PATRICK KAMUNDI ERASTO and ANOLD NJAGI KIAMBATI had entered into a sale of land agreement with DOMICIANO KABURU NJERU to perfect and effect the sale of 72 feet by 150 feet portion comprising of LR; MUTHAMBI/IGAMURATHI/789. According to the agreement ANOLD NJAGI contributed 41 feet by 150 feet portion, the late DONALD MUGO contributed 19 feet by 150 feet and the respondent contributed 12 feet by 150 feet portion. According to the agreement the parties to the agreement (vendors) received and acknowledged ksh 158,333 for DONALD MUGO, ksh 641,666 for ANOLD NJAGI which was inclusive of a developed house on his portion plus his contribution of 41 feet by 150 feet portion (ksh 300,000 for the house and ksh 341,666 for 41 feet by 150 feet portion) and ksh 120,000 for the respondent PATRICK KAMUNDI ERASTO. We realized that after August 2015 when the respondent started encroaching on the portion measuring 12 feet by 200 feet I and ANOLD NJAGI KIAMBATI got surprised. I bought the official search of the respondent and it was at this point in time that I realized the respondent's parcel of land LR; MUTHAMBI/IGAMURATHI/791 was measuring 0.175 Ha which was equal to 72 feet by 200 feet. I also found out that the

respondent had indeed taken the title deed of his land even before the time the agreement was entered into that is on 27th November 1998.

The respondent did not disclose this.

12. In the meantime the late DONALD MUGO and I his wife continued to occupy and make use of 12 feet by 200 feet portion uninterrupted not even by the respondent. This was with effect from 1998. In the meanwhile DONALD MUGO died on 15th April 2015 and I continued to occupy and use the 12 feet by 200 feet portion uninterrupted. I have been in occupation of the said portion for a period in excess of 19 years. The respondent has never notified or demanded that I do move out of the 12 feet by 200 feet portion part of LR; MUTHAMBI/IGAMURATHI/791 for all this while. The respondent has never instituted any eviction proceedings against me save for a letter from an advocate which demanded that I should not renovate my commercial building. This was in August 2015. The respondent has always been aware of the adverse nature of occupation and use of 12 feet by 200 feet portion out of LR; MUTHAMBI/IGAMURATHI/791 by me.

13. I have developed the said 12 feet by 200 feet portion without the respondent raising a finger. I have commercial premises (shop) on the portion. I have also three rental rooms on the portion and I use the rental rooms as my residence. Equally I had 10 banana plants on the portion. I was also cultivating subsistence crops on the portion. My occupation and use of 12 feet by 200 feet portion is in excess of 12 years uninterrupted. In fact I have been in occupation of this land since 1998 a period in excess of 19 years uninterrupted.

14. As recently as 2015 the respondent cut down, damaged my banana plants, the respondent also fenced off part of 12 feet by 200 feet portion which I have been in occupation for all this period.

15. I am advised that my stay on 12 feet by 200 feet portion out of LR; MUTHAMBI/IGAMURATHI/791 adversely to the registration and ownership of the respondent has given rise to proprietary interest to me over the said portion. The respondent's title to the 12 feet by 200 feet portion has been extinguished by operation of law. The respondent cannot claim the portion to belong to him anymore. The estate of DONALD MUGO ERASTO is entitled to be given and registered with the said portion. The respondent should be ordered by the court to execute all the necessary documents to effect the transfer and registration of 12 feet by 200 feet portion out of LR; MUTHAMBI/IGAMURATHI/791 to the estate of DONALD MUGO ERASTO and in default the deputy registrar be authorized to execute all the necessary documents to effect the said transaction. The respondent should also be ordered to pay the costs of this suit. Despite me serving the respondent with demand and notice of intention to sue the respondent did not make any amends. The only action the respondent took was to reply to the demand notice and denied culpability. For these reasons I would be entitled to the costs of the suit.

16. That in my originating summons I have posed 19 questions that the court should consider in delivering a fair judgment in this case. I shall now try to justify the said questions.

(i) The first question raised in the originating summons is whether the applicant is the widow of one DONALD MUGO ERASTO and holder of letters of administration ad litem of the said DONALD MUGO ERASTO? The answer to this question is in the affirmative. In the list of documents letters of administration ad litem is listed as number one. This legal document gives me the locus standi to commence this suit.

(ii) Whether the respondent is the registered proprietor of LR; MUTHAMBI/IGAMURATHI/791 measuring 72 feet by 150 feet or thereabout? The answer is in the affirmative. At paragraph 3 of the supporting affidavit I have annexed a copy of register which clearly show that the respondent is the registered proprietor of LR; MUTHAMBI/IGAMURATHI/791. On the list of documents the copy of register and/or green card is listed as item number three.

(iii) Whether the respondent, ANOLD NJAGI KAMBATI and DONALD MUGO ERASTO entered into a sale of land agreement dated 27th November 1998 with one DOMICIANO KABURU NJERU whereby the respondent was to sell 12 feet by 150 feet out of LR; MUTHAMBI/IGAMURATHI/791, DONALD MUGO ERASTO was to sell 19 feet by 150 feet out of his interest in LR; MUTHAMBI/IGAMURATHI/43 and ANORD NJAGI KIAMBATI was to contribute 41 feet by 150 feet out of his interest on LR; MUTHAMBI/IGAMURATHI/43 which was registered in the name and style of ERASTO MUCARA KIAMBATI?

The answer to this question is also in the affirmative. The agreement was drawn in the firm of D.J MBAYA & CO ADVOCATES. Payments were also paid in presence of D.J MBAYA & CO ADVOCATES. The agreement was a legally binding one. I am not aware that there is any forgery as far as this agreement is concerned. In the supporting affidavit the agreement is annexed as E.M.K.3 WHILE on the list of documents by me the agreement is listed as item number 4. By denying the existence of this agreement the respondent is trying to enrich himself unfairly.

(iv) The other question is whether the agreement between the respondent, ANOLD NJAGI KAMBATI and DONALD MUGO ERASTO and one DOMICIANO KABURU NJERU of 27th November 1998 was to the effect that DOMICIANO KABURU NJERU was to buy the parcel of land known as LR; MUTHAMBI/IGAMURATHI/789 registered in the name and style of ANOLD NJAGI KIAMBATI? The agreement of 27th November 1998 between DONALD MUGO ERASTO, ANOLD NJAGI and PATRCK KAMUNDI ERASTO on one

part and DOMISIANO KABURU on the other side was clear that DOMISIANO KABURU NJERU was to buy 72 feet by 150 feet portion from parcel number LR; MUTHAMBI/IGAMURATHI/789 registered in the name of ANOLD NJAGI KIAMBATI. It was an arrangement between DONALD MUGO ERASTO, ANOLD NJAGI and PATRCK KAMUNDI ERASTO that the entitlement of ANOLD NJAGI and DONALD MUGO from land parcel LR; MUTHAMBI/IGAMURATHI/43 was first to be registered in the name of ANOLD NJAGI KIAMBATI who would then transfer 72 feet by 150 feet to the buyer DOMISIANO KABURU NJERU. This meant that 72 feet by 150 feet meant for DOMISIANO KABURU NJERU was to be excised from LR; MUTHAMBI/IGAMURATHI/789 then the balance thereof plus a portion 12 feet by 150 feet contributed by the respondent was to be excised from the respondent's portion LR;MUTHAMBI/IGAMURATHI/791. However fraudulently the respondent entered into the aforesaid agreement very well knowing that he had caused his title to LR; MUTHAMBI/IGAMURATHI/791 generated. The portion measuring 12 feet by 150 feet sold by the respondent could now be excised by first going to the land control board and getting a consent. He remained mute over this issue and presented himself as though his portion had no title. To disguise the matter he even excised 12 feet by 150 feet portion and the applicant upon implementation of the agreement occupied the portion and started developing it. The respondent fenced his remaining portion of 60 feet by 150 feet and concentrated on improving and developing the same without disrupting me on the 12 feet by 150 feet portion. For all this time I believed DONALD MUGO'S portion covered LR; MUTHAMBI/IGAMURATHI/796 included 12 feet by 150 feet portion the respondent purported to excise from his land parcel LR; MUTHAMBI/IGAMURATHI/791. From 1998 to date I have been in occupation and in use of 12 feet by 150 feet portion out of the respondent's parcel LR; MUTHAMBI/IGAMURATHI/791 uninterrupted.

(v) The other question is whether in the said agreement between the respondent, ANOLD NJAGI KAMABATI and DORNALD MUGO ERASTO and one DOMICIANO KABURU NJERU the respondent acknowledged ksh 120,000 in payment of 12 feet by 150 feet and whether DONALD MUGO ERASTO was paid ksh 158,333 as consideration for 19 feet by 150 feet while ANOLD NJAGI KIAMBATI received ksh 641,666 for his contribution of 41 feet by 150 feet? The answer to this question is in the affirmative. The agreement of 27th November 1998 is clear to this issue. The agreement was drawn by a firm of advocates M/S D.J MBAYA & CO ADVOCATES P.O BOX 2224 MERU. All the parties privy to the agreement executed it including the respondent. Who sold what and who bought what is clearly indicated in the agreement. What each of the vendors got from DOMISIANO KABURU NJERU and for what portion of land is clearly stated in the agreement. The agreement in question has never been challenged there before. It is only now that the respondent says that the agreement is a forgery. The respondent has the onus to show that the agreement is a forgery. He who alleges must prove. On my part I have no reasons or doubts as to the authenticity of the agreement. The proprietor of D.J MBAYA & CO ADVOCATES and the purchaser DOMISIANO KABURU NJERU can vouch to the authenticity of the agreement.

(vi) The next question is whether the respondent was dishonest and fraudulent when executing the agreement dated 27th November 1998 by concealing that he had already acquired title deed of LR; MUTHAMBI/IGAMURATHI/791 and which land included 12 feet by 150 feet that the respondent was purporting to dispose? Looking at the copy of register of LR; MUTHAMBI/IGAMURATHI/791 the registered proprietor hereof is the respondent herein. The respondent was registered with this land on 10th November 1998. This was exactly 17 days before the respondent, DONALD MUGO and ANOLD NJAGI entered into a sale of land agreement with DOMISIANO KABURU NJERU. It means therefore that the respondent concealed material facts relevant to the agreement. He had already gotten his title to LR; MUTHAMBI/IGAMURATHI/791 that he presented to ANOLD NJAGI, DONALD MUGO and DOMISIANO KABURU yet the land was not registered yet. He presented to them that he was capable of giving 12 feet by 150 feet out of his portion LR; MUTHAMBI/IGAMURATHI/791. To conceal his fraud and dishonesty he divided his land LR; MUTHAMBI/IGAMURATHI/791 into two by excising the 12 feet by 150 feet (the portion he was selling) and fenced off the remaining portion of 60 feet by 200 feet. When I moved into the portion of 12 feet by 150 feet back in 1998 the respondent did not resist or oppose. I went on to develop the portion by constructing a commercial plot and three rear rooms that I use as my residence. From 1998 I have been in occupation and in use of the said portion uninterrupted. The respondent started demanding the portion around 2015 when my husband DONALD MUGO died. The respondent cannot claim the portion from me after expiry of 12 years and above for this will be in contravention of section 7 of the law of limitation of actions act 22 laws of Kenya.

(vii) The next question posed is whether the respondent has ever excised 12 feet by 150 feet out of his land LR; MUTHAMBI/IGAMURATHI/791? On or around 1998 and in implementation of the agreement of 27th November 1998 the respondent using a surveyor excised 12 feet by 150 feet portion out of his portion LR; MUTHAMBI/IGAMURATHI/791. For all this while the respondent seemed to be contented with my occupation of 12 feet by 150 feet portion which was meant to go to the estate of DONALD MUGO after sharing the portion that remained after selling 72 feet by 150 feet to DOMISIANO KABURU NJERU. After the implementation of the agreement on the ground ANOLD NJAGI was pushed by DOMISIANO KABURU and in turn ANOLD NJAGI pushed me into the respondent's portion of 12 feet by 150 feet that the respondent had sold to DOMISIANO KABURU NJERU. The respondent cannot have his cake and eat it. He sold his

land and he was paid for it. He cannot now claim the land he sold and paid for at my expense. After sharing LR; MUTHAMBI/IGAMURATHI/789 with ANOLD NJAGI equally my portion is less by 12 feet by 150 feet which the respondent refuses to give up despite being paid for it.

(viii) The next question is whether for all this time the respondent has been occupying, using and developing only 60 feet by 200 feet out of LR; MUTHAMBI/IGAMURATHI/791? There is no doubt and it is common knowledge and it is evident on the ground that the respondent has only been occupying and making use of 60 feet by 200 feet out of his land parcel LR; MUTHAMBI/IGAMURATHI/791. For one he sold 12 feet by 150 feet to DOMISIANO KABURU NJERU. Secondly in specific performance of the agreement he subdivided his land though informally into two portions one measuring 12 feet by 150 feet and the other 60 feet by 200 feet. I moved into the portion measuring 12 feet by 150 feet as early as 1998 while the respondent concentrated on the portion measuring 60 feet by 200 feet. I developed 12 feet by 150 feet by constructing a commercial building and residential rooms. That from 1998 the respondent has never questioned my occupation and use of 12 feet by 150 feet out of LR; MUTHAMBI/IGAMURATHI/791. The first time the respondent has questioned my being on the 12 feet by 150 feet portion came in 2015 (17 years after the demise of my husband DONALD MUGO) when he wrote a demand letter dated 31st August 2015. In the defendant's list of documents the letter is listed as item number 5. I am advised that a demand notice cannot defeat an overriding interest arising out of adverse possession. By the time the respondent wrote the said letter the overriding interest in my favor had crystallized. In response to my letter dated 28th February 2017 the respondent admitted being in occupation of my 12 feet by 150 feet portion through his reply dated 15th March 2017 when the respondent demanded through his counsel, "Do advise your client to vacate the portion she is squatting on before we get orders to evict her at her own risks as to costs and any other disbursements arising therefrom". This is a clear admission on the part of the respondent that as of 2015 I was still in occupation of 12 feet by 150 feet out of the respondents LR; MUTHAMBI/IGAMURATHI/791.

(ix) Whether the applicant has been in occupation and use of 12 feet by 150 feet out of the respondent's parcel of land LR; MUTHAMBI/IGAMURATHI/791 with effect from on or around 1998? The answer to this question is in the affirmative. On the portion of the land under reference I have a commercial building to wit a shop which is operational. I have three 10 by 10 feet rear rooms that I and my family occupy and use as residence. I also have 10 mature banana plants on the portion. Immediately after the agreement of 27th November 1998 my late husband, our children and I moved to this portion. From that time onwards to date I am in occupation of the portion uninterrupted. The respondent is not and has not said that I entered in the land on 31st August 2015 when he wrote to me demanding that I vacate.

(x) Whether the respondent was aware that the applicant was in actual possession of approximately 12 feet by 150 feet a portion of LR; MUTHAMBI/IGAMURATHI/791? Strictly speaking the answer to this question is in the affirmative. The respondent excised off 12 feet by 150 feet from his land parcel LR; MUTHAMBI/IGAMURATHI/791 back in 1998 whereupon I started developing it. The respondent further fenced 60 feet by 200 feet out of LR; MUTHAMBI/IGAMURATHI/791. He then concentrated in the development of the 60 feet by 200 feet. He was aware that I had occupied the 12 feet by 150 feet. He saw me construct a commercial building to wit a shop with mortar and stone. He also saw me construct the three 10 by 10 feet rear rooms. He saw me on daily basis occupying the said rooms as residence with my family. He also saw me on daily basis operating the shop standing on the suit land. He cannot claim that he was not aware of my being on the said portion for all this time.

(xi) Whether the applicant has obtained an overriding interest over LR; MUTHAMBI/IGAMURATHI/791 by virtue of occupation of 12 feet by 150 feet out of LR; MUTHAMBI/IGAMURATHI/791 for a period of 12 years uninterrupted? I have stated earlier that I have been in occupation of 12 feet by 150 feet out of the respondent's LR; MUTHAMBI/IGAMURATHI/791 for a period now of 20 years since 1998. Section 7 of the limitation of actions act creates the doctrine of adverse possession. Section 28 creates overriding interests which need not be noted in the register. Given the number of years that I have been in the suit land I have acquired the suit land under the doctrine of adverse possession. The respondent attempt to take from me the portion is now untenable in law. A demand letter in itself cannot defeat an overriding interest like the one I am enjoying in the suit land.

(xii) Whether the applicant is entitled to be registered as the absolute proprietor of 12 feet by 150 feet comprised in LR; MUTHAMBI/IGAMURATHI/791? By reason of the matters I have stated herein above I am entitled to be registered with 12 feet by 150 feet portion out of the respondent's parcel of land LR; MUTHAMBI/IGAMURATHI/791. Should the respondent refuse to transfer 12 feet by 150 feet portion contained in LR; MUTHAMBI/IGAMURATHI/791 the court should order and direct the deputy registrar to execute all the necessary documents to effect the transfer of 12 feet by 150 feet from LR; MUTHAMBI/IGAMURATHI/791 from the respondent to me and/or to the estate of the late DONALD MUGO ERASTO.

7. Cost follows the event. I should be paid the cost of this suit. The respondent is not only in breach of a legally binding agreement but also in breach of the law by denying me what is legally mine.

DATED AT CHUKA THIS 9TH DAY OF FEBRUARY, 2018

.....
EMMY KAARI

3. In her evidence she told the court that she was claiming a portion of land 12 feet in width and 150 feet in length from the defendant's land parcel **MUTHAMBI/IGAMURATHI/791**. She referred the court to an agreement where she claimed that the defendant and his two brothers sold land to one DOMISIANO KABURU NJERU. Her case is that after the sale she discovered that the defendant had taken a portion of land measuring 12 feet by 150 feet from her late husband's portion of land.

4. This court notes that nowhere in the apposite agreement is it indicated that the defendant was selling any land. It is only indicated that he was one of the witnesses, along with six others including the vendors and the purchaser of the subject land Domisiano Kaburu Njeru. It is also noted that the agreement refers to parcel No. MUTHAMBI/IGAMURATHI/789. The defendant's land is

parcel No. MUTHAMBI/IGAMURATHI/791. It is noted that in his pleadings the defendant is categorical that the signature purported to be his in the agreement is a forgery.

5. PW1 denied that she only came back to the suit land after her husband died after she had left in 2003 and that she only returned to attend his burial. Regarding when the defendant got his title, she told the court that she did not know when it was issued. She told the court that the defendant had moved his boundary to the land she was claiming on 27th August, 2015 whereas her husband died on 15th April, 2015. She however, was categorical that she had no evidence that the defendant had moved his boundary into her land. During re-examination by her advocate, she told the court that the defendant's parcel of land should have been 60 feet in width and 200 feet in length instead of 72 feet in width and 200 feet in length. She gave two conflicting dates concerned since when she was in occupation of the suit land. Firstly, she said that she was in occupation since 1992 and then changed her narrative to say that she was in occupation since 1991. It is, however, noted that during cross-examination she had at one point admitted that her husband, the late Donald Mugo Erasto, may have moved to the suit land with the permission of the defendant.

6. PW2, Arnold Njagi Kiambati, asked the court to adopt his statement dated **10th April, 2017** as his evidence in this suit. The statement is pasted in the exact form it was filed in court without any alterations whatsoever. The statement reads as follows:

APPLICANT'S	WITNESS	STATEMENT
--------------------	----------------	------------------

1. My name is ANOLD NJAGI KIAMBATI. I come from Marima in Muthambi location of Maara Sub County and I am business man.
2. I know the respondent. He is my brother. I know the applicant, she is my sister-in-law having been married to my late brother one DONALD MUGO ERASTO. The respondent and I were born of ERASTO MUCARA KIAMBATI. Other siblings of the respondent and I are the late ELIPHAS NDIGA ERASTO, STELLA MUIYA KIAMBATI, JULIET ITHIMA, ROLINE MUTHONI and EUGENIO NJUE ERASTO.
3. I know land parcel LR; MUTHAMBI/IGAMURATHI/43 as it was then. The original registered proprietor of the said parcel of land is ERASTO MUCARA KIAMBATI my father. A portion of the said land was excised out as it was compulsorily acquired by the government to create room for the construction of Thuchi-Nkubu road. After the construction of the said road a big portion of LR; MUTHAMBI/IGAMURATHI/43 was left going along the Thuchi-Nkubu road. The side of LR; MUTHAMBI/IGAMURATHI/43 which became adjacent to the newly tarmacked road became all over a sudden commercially viable. Many people became interested in buying plots for private developing.
4. The children of the registered proprietor one ERASTO MUCARA KIAMBATI the then registered proprietor of LR; MUTHAMBI/IGAMURATHI/43 were live to this new development and in particular commercial opportunity. The siblings of the respondent apportioned themselves portions measuring 72 feet by 200 feet out of LR; MUTHAMBI/IGAMURATHI/43. As regards the late ELIPHAS NDIGA he got a bigger portion. The portions were excised by a surveyor however before the generation of the titles for the said portions (save for the portion belonging to the respondent) DONALD MUGO ERASTO, I and the respondent agreed to contribute our respective portions for the purpose of selling to one DOMICIANO KABURU NJERU. DONALD MUGO contributed 19 feet by 150 feet, I contributed 41 feet by 150 feet while the respondent contributed 12 feet by 150 feet. DOMICIANO KABURU was interested in buying a portion measuring 72 feet by 150 feet and this is exactly what the three of us contributed from our respective portions of land. It was agreed that the contributions by the three of us was to be registered under my name whereupon I would then sell it as it were to DOMICIANO KABURU NJERU.
5. Stealthily and secretly the respondent had his title deed processed. When the respondent had his title processed it was not put into account that he had sold 12 feet by 150 feet portion. He ought to have generated a title for 60 feet by 200 feet. His title now reads 72 feet by 200 feet.
6. On the ground the respondent caused his land LR; MUTHAMBI/IGAMURATHI/791 to be fenced so that a portion measuring 12 feet by 150 feet was left out and the portion measuring 60 feet by 200 feet was fully fenced. The respondent concentrated his developments on the portion measuring 60 feet by 200 feet. This portion measuring 12 feet by 150 feet was to go to DONALD MUGO'S portion of LR; MUTHAMBI/IGAMURATHI/796. DONALD MUGO'S land now is less by 12 feet by 150 feet the portion that the respondent sold and received money for but was never excised from his land parcel LR; MUTHAMBI/IGAMURATHI/791. On the ground the applicant continued to occupy and use 12 feet by 150 feet portion from 1998. The respondent on the other hand confined himself to the remaining 60 feet by 200 feet portion out of his parcel of land LR; MUTHAMBI/IGAMURATHI/791.
7. Upon the demise of DONALD MUGO ERASTO on 15th April 2015 the respondent started encroaching in the portion that the applicant was occupying and which was measuring 12 feet by 200 feet. This was on 27th August 2015. I am aware that the applicant reported the matter to the local chief. What transpired in the local chief's office and thereafter I don't know.
8. In the meantime on or around 27th November 1998 the late DONALD MUGO, the respondent PATRICK KAMUNDI ERASTO and I entered into a sale of land agreement with DOMICIANO KABURU NJERU to perfect and effect the sale of 72 feet by 150 feet portion comprising of LR; MUTHAMBI/IGAMURATHI/789. According to the agreement I contributed 41 feet by 150 feet portion, the late DONALD MUGO contributed 19 feet by 150 feet and the respondent contributed 12 feet by 150 feet portion. According to the agreement the parties to the agreement (vendors) received and acknowledged ksh 158,333 for DONALD MUGO, I received and acknowledged ksh 641,666 which was inclusive of a developed house on my portion plus my contribution of 41 feet by 150 feet portion (ksh 300,000 for the house and ksh 341,666 for 41 feet by 150 feet portion) and ksh 120,000 for the respondent. After August 2015 when the respondent started encroaching on the portion measuring 12 feet by 200 feet I and the applicant got surprised. The applicant bought the official search of the respondent and it was at this point in time that we realized the respondent's parcel of land LR; MUTHAMBI/IGAMURATHI/791 was measuring 0.175 Ha which was equal to 72 feet by 200 feet. We also found out that the respondent had indeed taken the title deed of his land even before the time we entered into the agreement on 27th November 1998. The respondent did not disclose this.
9. In the meantime the late DONALD MUGO and the applicant his wife continued to occupy and make use of 12 feet by 200 feet portion

uninterrupted not even by the respondent. This was with effect from 1998. In the meanwhile DONALD MUGO died on 15th April 2015 and the applicant continued to occupy and use the 12 feet by 200 feet portion uninterrupted. The applicant has been in occupation of the said portion for a period in excess of 19 years.

10. The applicant has developed the said 12 feet by 200 feet portion without the respondent raising a finger. The applicant has commercial premises (shop) on the portion. The applicant has also three rental rooms on the portion and she uses the rental rooms as her residence. Equally she had 10 banana plants on the portion. She was also cultivating subsistence crops on the portion. Her occupation and use of 12 feet by 200 feet portion is in excess of 12 years uninterrupted. In fact she has been in occupation of this land since 1998 a period in excess of 19 years uninterrupted.

11. As recently as 2015 the respondent cut down, damaged the applicant's banana plants, the respondent also fenced off part of 12 feet by 200 feet portion which the applicant has been in occupation for all this period.

12. That is all I wish to state

ANOLD NJAGI KIAMBATI.....

DATED AT CHUKA THIS 10TH DAY OF APRIL, 2017

7. In his evidence, PW2 told the court that his land parcel MUTHAMBI/IGAMURATHI/795 bordered parcel Numbers 791 and 796. He told the court that parcel no. 796 belonged to the late Donald Mugo, the plaintiff's deceased husband, whereas parcel No. 791 belonged to the defendant, his other brother. Some moments later he changed his narrative and said that his land parcel no. 795 did not touch (border) parcel No. 791 which he said belonged to the defendant.

8. At this point, the court recorded this inconsistency in PW2's evidence.

9. PW2 went only to tell the court that he, PW1's husband and the defendant had agreed to sell land to one Domisiano. He testified that each of the parties' portions of land measured 72 feet by 200 feet. They were each one of them to contribute portions which would form the land they were selling to the said Domisiano. He said that he himself contributed a portion of land measuring 41 feet by 150 feet. He told the court that each of the three brothers would remain with portions which were equal in size.

10. PW2 was generally evasive during cross-examination. At one point advocate M/S Kithaka sought the court's assistance to direct PW2 to answer the questions he was being asked during cross-examination. Even after he was directed by the court to answer the advocate's questions, he told the advocate "I did not come here to discuss anything other than parcel No. 791."

11. PW2 told the court that the agreement through which the plaintiff was buttressing her claim was dated 27th November, 1998. Reluctantly, he admitted that the defendant's title was issued on 10th November, 1998, two weeks before the apposite agreement was signed.

12. I found PW2's evidence generally garbled.

13. DW1, Patrick Kamundi Erasto, asked the court to adopt his witness statements dated 26th April, 2017 and 5th March, 2018 as his evidence in this suit. The statement dated 26th April, 2017 reads as follows:

STATEMENT OF THE RESPONDENT PATRICK KAMUNID ERASTO (In exactly the way it was filed)

I am the above mentioned adult of sound mind. I come from Marima area. The defendants are my sister in law and brother respectively. I am the registered owner of land parcel No. Muthambi/Igamurathi/791. My sister in law's now deceased husband is the registered owner of land parcel No. Muthambi/Igamurathi/796 while the 2nd defendant is the registered owner of land parcel No. Muthambi/Igamurathi/795.

The 1st defendant has encroached on my land by taking a portion measuring 10x12 ft whereupon she has put up a shop. We have had several talks before the area chief, before the district officer but she 1st defendant has refused to remove her illegal structure.

On 4.3.2017 I got a surveyor to check for me the boundaries between the three pieces of land and he confirmed that indeed the 1st defendant has encroached on my land and the 2nd defendant has encroached on the 1st defendant's land by taking a portion measuring 10 x 80 ft. This is the reason the 1st defendant has been saying that I have taken her land.

These pieces of land Muthambi/Igamurathi/43 which was subdivided between his 4 sons and a balance was left for our now deceased mother.

Our other brother Njagi and Mugo who is deceased agreed to sell and share the proceeds of one portion, and share their remaining one portion between themselves. They sub-divided No. Muthambi/Igamurathi/790 into two portions with Mugo getting Muthambi/Igamurathi/796 and Njagi Muthambi/Igamurathi/795. I have no issue with this since it is their land they sold but now the 1st

defendant has encroached on my land.

I pray that the court do order an official survey of the three portions to establish the correct boundary and evict the 1st defendant from my land. I am also praying for costs of this suit.

DATED AT MERU THIS 26TH DAY OF APRIL, 2017

PATRICK KAMUNDI ERASTO

14. It is noted that DW1 wrongly calls the plaintiff the 1st defendant and PW2 the 2nd defendant. The court cannot understand why he made this mistake as the statement indicates that it was filed by the firm of MWANGI G & Co, Advocates.

15. DW1's statement dated 5th March, 2018 reads as follows:

FURTHER STATEMENT BY THE RESPONDENT PURSUANT TO LEAVE GRANTED ON 1ST FEBRUARY, 2018 (In exactly the way it was filed)

Further to my statement dated 26th April, 2017, I wish to respond as follows to the further statement dated 9th February, 2018 filed in this court by the applicant.

Parcel No. Muthambi/Igamurathi/791 borders the one for my brother Donald Mugo Erasto, who is deceased and that of Eliphias Ndiga. Donald lands parcel borders the one for Anold Njagi Kiambati as shown in the mutation form dated 9th December, 1998.

I am a stranger to the agreement dated 27th November, 1998. I do not know when or where the said agreement was signed as I was not involved. I have never received any money from Domisiano Kaburu Njeru as alleged. The signature on that document is not mine.

I remember that when we subdivided or father's land parcel Muthambi/Igamurathi/43 each one of us got a portion measuring 72 by 200 ft. by the time we got the titles to these portions, I was already in occupation of a portion that was later registered in my names together with my wife Lucy Kaimuri Kamundi. I remember I started occupying this land in 1984 when the Chuka-Meru road was being tarmacked. At that time I only fenced off my whole portion.

The applicant started cohabiting with my brother Donald Mugo in or around 1999. By this time I had built a row of rental houses on my portion of land and Donald Mugo my brother was doing odd jobs for me e.g delivery of meat to local secondary schools where I had tenders.

It is during this time that the applicant comes into my brother's live.

Sometimes when the rooms I had built did not have customers Donald would occupy them but mostly he lived with me and my wife in my house. Later Donald informed us that he wanted to marry the applicant. So when they announced that they intended to get married and being the elder brother for Donald I decided to allow them occupy one of my rooms at the back.

The applicant comes from Tharaka tribe and we come from Muthambi and we have a traditional taboo where we are not supposed to get married to each other. Most of our family members including our first cousin Nyaga Mukiga declined to participate in dowry processes for the applicant due to this traditional taboo between Tharaka and Muthambi people.

As soon as this lady came into our family bad things began to happen to my brother. He started getting crazy and behaving in a funny way. When he became crazy he became hostile to the applicant and chased her away with a panga.

When the applicant ran away from my brother my wife and I began to take care of my brother but my wife died in 2002. I was then forced to take care of my brother. I was also taking care of my mother who was then ailing.

Before my mother died in 2014 she called me and advised me to take good care of my brother Donald and not to allow our other brothers Anold and Eliphias to take advantage of my sick brother because they had began to sell Donald's land. My mother also said that I should not allow the applicant to take possession of Donald's land because she would sell it and leave his children without land.

My mother also advised me that when I start to subdivide the rest of the family land I should remember not to place Donald's portion near Anold's portion because Anold would try to steal Donald's portion. She informed me that she had heard rumours that Anold had already began to see off Donald's land parcel No. Muthambi/Igamurathi/796.

Almost a year after the death of my mother, our brother Donald also died in 2015. That is when the applicant returned to disturb us. She started by trying to occupy my portion of land by building a commercial shop on the portion near my brother's land. When I learnt of this I decided to take immediate legal action and my lawyer wrote to her to ask her to stop encroaching on my land.

I want to state clearly that the applicant has not stayed in my land for the last 19 years as she claims because she ran away almost six years after her marriage to my brother and returned to our home only in 2015. When I went to my lawyer to chase her away from my portion of land, she decided to file this case against me.

Dated this 5th day of March, 2018

PATRICK KAMUNDI ERASTO

16. In cross examination, DW1 by and large gave evidence consistent with his witness statements. I only note that he was categorical that the plaintiff/applicant, had left her home for 10 to 12 years after his brother Donald Mugo, deceased, developed a mental weakness and only returned to bury her after her husband, his brother Donald Mugo died in 2015. He was categorical that he was taking care of his deceased brother before he died.

17. DW2, Senan Gatwiri Burini, asked the court to adopt her witness statement dated 26th June, 2018 as her evidence in this suit. The statement reads as follows:

DEFENDANT'S WITNESS STATEMENT

My name is Senan Gatwiri Burini. I come from Mitheru location Kaunju village and aged 39 years. The respondent is my husband and he is the elder brother to Donald who is the late husband to the plaintiff. I was married in the year 2002 and I found my husband in his plot at Marima. Kamundi had a brother known as Donald who was staying at Kamundi's premises at the back side of the plot and he had butchery at the front side of the same Kamundi's plot when I got married there. The brother to Kamundi had a wife who ran away from him in the year 2003 after the husband was affected mentally and one of the children's health problem in the same year which the plaintiff said it was family problems. The wife came back in 2015 when the husband died whereby she had come for the burial. After the burial of the husband, the plaintiff, 2 brothers and 3 sisters to Kamundi started destructing the front side of the plot owned by Kamundi and the plaintiff started living in Kamundi's mother house since the mother had passed away and of which the mother's house was built by Kamundi.

DATED THIS 26TH DAY OF JUNE, 2018.

SENAN GATWIRI BURINI

18. During cross examination, DW2 stuck to the averments contained in her witness statement. She was categorical that the husband of the applicant/plaintiff, Donald Mugo, her husband's deceased brother had developed a mental illness and that the applicant/plaintiff ran away in the year 2003 and only came back to bury her husband, Donald Mugo, in 2015. She also told the court that when the plaintiff/applicant had run away from her home in 2002, she had only one child but when she returned in 2015 she had another child.

19. DW3, Elias Rucheni Njiru, asked the court to adopt his witness statement dated 26th June, 2018 as his evidence in this suit. His witness statement reads as follows:

DEFENDANT'S WITNESS STATEMENT (In exactly the way it was filed)

My names are Elias Rucheni Njiru: I come from Marima Town and I work in the farm of Kamunde which is located at Mitheru town. Once in a while I am called to the place where Kamundi has a bar to do odd jobs around and I am well versed with his life and that of his immediate family.

Kamundi is a business man with a plot at Marima Town. He has other brothers including Donald who was married to the plaintiff. Donald was the younger brother of Kamundi and used to stay with Kamundi at his business premises. He used to sell meat outside the building and he also used to sleep at the backrooms built by Kamundi around his plot. When Donald met and married the plaintiff, he was living at the back room of Kamundi plot. Kamundi treated the two as his own children but when they got their first child Donald became sick. He got mental sickness and his wife ran away from him. This is because Donald had become hostile and violent. Kamundi and his wife began to take care of Donald during his sickness. At the same time he was also taking care of his aged mother for whom he had built a house within his plot. When his mother died Kamundi brought tenants to occupy his mother's house and he continued taking care of Donald at his own house. Donald died in 2015 and his wife the plaintiff came home to attend the burial. After the burial, the brother called Anold came and chased away the tenants from the house that Kamundi built for his mother and that is how the plaintiff entered the house and began to live there. She later began to build her own houses and these houses touched the land that belonged to Kamundi. Kamundi told her to stop building on his land. After this I heard from Kamundi that Donald's wife had taken him to court. Due to my lengthy stay with this family I know a lot of things about them. I know that each brother has a plot at Marima market and that Anold sold his plot to a tycoon in town called Domiciano. Anold then built his house in Donald's plot and he still lives in Donald's side of plot.

DATED THIS 26TH DAY OF JUNE, 2018

.....

ELIAS RUCHENI NJIRU

20. During cross-examination, DW3's evidence was consistent with the contents of his witness statement.

21. The parties filed written submissions.

22. The Plaintiff's/Applicant's submissions are reproduced herebelow in exactly the way they were filed. No alternations have been made whatsoever and any mistakes, if there are any, are the responsibility of the plaintiff's advocate. It is stated as follows:

PLAINTIFF'S FINAL SUBMISSIONS

1. Your lordship the plaintiff by way of originating summons dated 10th April 2017 sought for the following orders; that she be registered with a portion measuring 12 feet by 150 feet out of the defendant's land parcel LR; MUTHAMBI/IGAMURATHI/791. Her claim is based on the doctrine of adverse possession.

2. The plaintiff is the widow of the late DONALD MUGO ERASTO a younger brother to the defendant. The plaintiff therefore claims not only on her behalf but also on behalf of the estate of the late DONALD MUGO. The plaintiff is a holder of letters of administration Ad Litem in respect of the estate of the late DONALD MUGO. We invite the court to look at exhibit number 1 in the list of the plaintiff's documents.

3. In support of her case the plaintiff posed several questions for the court's consideration. These questions are enumerated on the face of the originating summons dated 10th April 2017. Some of the most important questions in the O.S include whether the defendant is the registered proprietor of LR; MUTHAMBI/IGAMURATHI/791, whether the plaintiff has been in occupation continuously and exclusively of a portion measuring 12 feet by 150 feet out of the defendant's land parcel LR; MUTHAMBI/IGAMURATHI/791 and finally whether the plaintiff should therefore be registered with 12 feet by 150 feet portion out of the defendant's land parcel LR; MUTHAMBI/IGAMURATHI/791? We shall be revisiting these issues one after the other shortly.

4. Further the plaintiff has listed and produced a list of documents in support of her claim. To show that she is a wife to the late DONALD MUGO she has produced form P & A 47 letters of administration Ad Litem. She has also produced a copy of register of LR; MUTHAMBI/IGAMURATHI/791. To show where LR; MUTHAMBI/IGAMURATHI/791 originated from the plaintiff has produced a copy of register of LR; MUTHAMBI/IGAMURATHI/43 which originally belonged to the father in law of the plaintiff and the father of the defendant, the late DONALD MUGO and one ANORD NJAGI KIAMBATI. To demonstrate on what basis she claims she has been in occupation of the defendant's land the plaintiff has exhibited and produced an agreement dated 27th November 1998 duly executed by ANOLD NJAGI, the late DONALD MUGO and the defendant and witnessed by an advocate of the High Court of Kenya one D.J MBAYA & CO ADVOCATES among other witnesses. The agreement is dated 27th November 1998. The plaintiff has also produced a photograph showing a permanent shop which rest on the portion measuring 12 feet by 150 feet claimed by the plaintiff. Finally to demonstrate to the court that as late as 27th August 2015 the defendant has been dispossessed of the claimed portion by the plaintiff, the plaintiff produced a chief's letter dated 27th August 2015 which was to the effect that the defendant had recently relocated a boundary from where it has existed. The summary of the plaintiff's case is that after her husband DONALD MUGO, the defendant and ANOLD NJAGI another brother in law entered into a sale of land agreement afore said she and her husband the late DONALD MUGO remained in occupation un interrupted and exclusively on a portion measuring 12 feet by 150 feet out of the defendant's land parcel LR; MUTHAMBI/IGAMURATHI/791 until DONALD MUGO died in 2015. The plaintiff still lives in the contested portion since 1998.

5. On the other hand the defendant's case is that the plaintiff has never been continuously and exclusively on the suit land. The defendant however admits that his counsel wrote a demand notice to the plaintiff dated 31st August 2015 whereby the defendant was demanding that the plaintiff do vacate the suit land. The demand notice is a confirmation that the plaintiff was on the disputed land as of 31st August 2015. There is no evidence that she has ever moved out of the suit land. Her exclusive and continuous use of the suit land can be demonstrated by the fact that the defendant has never gone to court at any time to seek for eviction of the plaintiff. The plaintiff has been adversely occupying 12 feet by 150 feet portion out of the defendant's land parcel LR; MUTHAMBI/IGAMURATHI/791. She still continues to use the suit land adversely and exclusively. How and why she occupied 12 feet by 150 feet a portion of LR; MUTHAMBI/IGAMURATHI/791 is explained by the agreement dated 27th November 1998 between the defendant, the late DONALD MUGO (husband to the plaintiff) and ANORD NJAGI KIAMBATI on one part and DOMISIANO KABURU NJAGI on the other part.

6. There are several emerging issues in the pleadings of both the plaintiff and the defendant and their evidence in chief and cross examination thereof that are in support of the plaintiff's case. We shall attempt to analyze a few of these issues.

(A) THE AGREEMENT DATED 27TH NOVEMBER 1998

(i) Your lordship we appreciate that in a case of a claim by way of originating summons by a vendor or a purchaser any issue affecting the existence or validity of the agreement in issue cannot be raised in an originating summons. We invite the court to look at order 37 Rule 3 Civil Procedure Rules. It means therefore neither the plaintiff nor the defendant can challenge the validity or existence of the agreement under these summons. The agreement forms only a basis of how, why and in what circumstances the vendor occupied the suit land.

(ii) The agreement between one DOMISIANO KABURU NJERU as a purchaser on one part and the defendant, the late DONALD MUGO and ANOLD NJAGI KIAMBATI forms the basis as to how, why and when and in what circumstances upon which the plaintiff entered into the suit land. The defendant is estopped from challenging the existence or validity of the agreement. The plaintiff is not out to enforce the aforesaid agreement. Her claim is based on adverse possession and not specific performance of the agreement. The agreement is signed by the parties and witnessed by an advocate of the high court of Kenya. The agreement is clear that each of the brothers contributed a certain portion of their entitlement to create 72 feet by 150 feet portion which was jointly sold to DOMISIANO KABURU NJERU. ANOLD NJAGI contributed 41 feet by 150 feet, the late DONALD MUGO contributed 19 feet by 150 feet while the defendant contributed 12 feet by 150 feet. ANOLD NJAGI, DONALD MUGO and the defendant received Ksh 641,660, Ksh 158,330 and Ksh 120,000 respectively as consideration for the portion they sold. It means the defendant has been fraudulent and dishonest even at the time of making the agreement. He contributed 12 feet by 150 feet for the sale to DOMISIANO KABURU but he very well knew that he had already gotten a title deed of his portion LR; MUTHAMBI/IGAMURATHI/791. He concealed this fact to this fact to ANORD NJAGI and DONALD MUGO. He got the title on 10th November 1998 and he continued to enter into an agreement for sale of a portion on 27th November 1998. He knew for sure he did not have the portion to give while

the agreement was that the contributions were to be combined into LR; MUTHAMBI/IGAMURATHI/789 which was to be transferred as one portion to the buyer. The defendant kept quiet and DONALD MUGO and the plaintiff entered into 12 feet by 150 feet portion immediately after the agreement was drawn and executed. To create space for DOMISIANO KABURU, DOMISIANO KABURU pushed ANORD NJAGI who in turn pushed DONALD MUGO and DONALD MUGO pushed the defendant by a portion measuring 12 feet by 150 feet. This was in 1998. This status remained up to 2015 when DONALD MUGO died. Now the defendant attempted to throw out the plaintiff. By this time the plaintiff had acquired the portion by way of adverse possession. The plaintiff is not trying to enforce the agreement which would mean that the agreement is time barred but in her O.S the agreement is only a basis to show how, when and in what circumstances the purchaser entered into the disputed land.

(iii) The defendant cannot have his cake and eat it. He contributed 12 feet by 150 feet towards the sale of 72 feet by 150 feet portion to DOMISIANO KABURU NJERU. He was paid and indeed he acknowledged Ksh 120,000 at the time of execution of the agreement aforesaid. His land as we stand LR; MUTHAMBI/IGAMURATHI/791 measures 0.175 Ha which is approximately 72 feet by 150 feet. It is for this reason that we submit that the plaintiff on the balance of probability upon concluding the agreement entered in the disputed portion and the two have been there for a period in excess of twelve years. As regards DONALD MUGO he lived on this land for approximately 17 years (1998 to 2015). As regards the plaintiff she has been on this land since 1998 to date a period in excess of about 20 years now. The plaintiff's allegations were supported by PW2 who is a brother in law to the plaintiff and a brother to the defendant.

(B) PHOTOGRAPH OF A PERMANENT BUILDING BUILT BY THE PLAINTIFF ON THE SUIT LAND Exhibit number 5 is a photograph of a shop with an inscription DEMKA which stands for DONALD EMMY KAARI. By the time the photograph was taken there was a business being ran in the name and style of KENDA'S ANIMAL FEEDS. The business person was a tenant of the plaintiff. The shop seemed to be an old establishment unlike the defendant's allegations that the plaintiff only carried out renovations in 2015. The renovations could not have been carried out and at the same time the same be rented. The shop in itself shows that it was not recently built or renovated. In the meantime the plaintiff was and is still living on the rear part of the shop. There is no evidence on record that at any time the defendant resisted by going to court for the plaintiff's dispossessing him of the use and enjoyment of the suit land. The defendant was very much aware that the plaintiff was in occupation of the suit land since 1998. We therefore submit that the plaintiff has proved on the balance of probability her overriding interest over the defendant's land parcel LR; MUTHAMBI/IGAMURATHI/791.

We invite the court to look at the photographs particularly the rear rooms that the plaintiff and her children occupy to date and satisfy itself that these are old buildings unlike the defendant's allegations that the defendant was only trying to encroach on the suit land on or around 2015.

(C) CHIEF'S LETTER DATED 27TH AUGUST 2015 Seemingly the plaintiff and the defendant were living peacefully until around 2015 when DONALD MUGO died. The defendant then took advantage of the plaintiff because she was a woman, vulnerable and defenseless. When DONALD MUGO was alive the defendant did not complain that both DONALD MUGO and the plaintiff were occupying a portion of 12 feet by 150 feet a portion of LR; MUTHAMBI/IGAMURATHI/791. The defendant therefore took advantage of the death of the late DONALD MUGO to perpetuate his fraudulent transaction. It is worth noting that the plaintiff complained to the local chief on or around 27th August 2015 that the defendant had relocated the boundary. This confirms the plaintiff's allegations that the defendant had fenced his 60 feet by 150 feet portion out of his land leaving 12 feet by 150 feet in occupation of the plaintiff and her husband DONALD MUGO. It was after the death of DONALD MUGO in 2015 that the defendant now tried to take back the 1st feet by 15 feet by relocating the boundary. The chief cannot be said to be partisan or compromised. His letter confirms that as of August 2015 the plaintiff was still in occupation and in use of 12 feet by 150 feet out of LR; MUTHAMBI/IGAMURATHI/791.

(D) DEMAND LETTER BY COUNSEL FOR THE DEFENDANT DATED 31ST AUGUST 2015 ADDRESSED TO THE PLAINTIFF Defendant's exhibit number 5 is a demand notice addressed to the plaintiff by counsel for the defendant. The letter is dated 31st August 2015. First a letter to an adverse party is not enough to interrupt exclusive and continuous use of land being claimed under adverse possession. The manner in which the letter is framed seems to be a cover up because as of this time the plaintiff had shown her intentions to go to court to claim the portion she has been occupying since 1998. The letter is framed in such a manner that the plaintiff is shown to be attempting to encroach by constructing permanent houses. The existing houses were permanent and they have been there since 1998. The letter threatens that the defendant will go to court after expiry of seven days and this never came to pass. This letter is only a confirmation that the plaintiff was still in occupation of the suit land as of 31st August 2015 and the same was drawn and served after the plaintiff complained to the local chief and the defendant served with the chief's letter dated 27th August 2015. The demand notice was an afterthought on the part of the defendant.

7. Your lordship the defendant has not challenged fully the plaintiff's assertions. The defendant's allegations that the plaintiff was away to her home and she only came back in 2015 have been denied by the plaintiff. In any event the estate of DONALD MUGO for which she represents had acquired 12 feet 150 feet out of LR; MUTHAMBI/IGAMURATHI/791 by the time DONALD MUGO died in 2015. DONALD MUGO was in occupation of the portion since 1998 a period of approximately 17 years. There is no evidence to show that ANORD NJAGI had reasons to cheat over the agreement and the plaintiff's occupation of the suit land. There can be no settling of scores between the defendant and PW2 when there is an agreement with clear provisions.

8. Seemingly the defendant and his witnesses are totally against the plaintiff. They all talked of the plaintiff's clan CHANGU not marriageable to the defendant's clan although this is not true. In fact one of the defendant's sister is married to CHANGU clan. The defendant and his witnesses are confined to a cocoon of traditional taboos and beliefs which are neither applicable nor relevant to this case.

9. There is an allegation by the defendant that PW2 stole land from DONALD MUGO and this is why PW2 agreed to give evidence. This is far from the truth. PW2 had their own arrangement with DONALD MUGO whereby DONALD MUGO gave PW2 his land for valuable consideration. There is no evidence showing that PW2 stole anything from DONALD MUGO. The agreement is clear. It was signed by ANOLD NJAGI, DONALD MUGO and PATRICK KAMUNDI (the defendant) before an advocate of the high court of Kenya. The defendant's I.D card appeared on the agreement and there can be no explanation as to where the advocate got the I.D card's number and the name other than the defendant appeared before the advocate whereupon he signed the agreement. The defendant did not call D.J MBAYA ADVOCATE to confirm or disprove that he signed the said agreement. Nothing was easier for the defendant to dismiss the agreement than inviting or summoning D.J MBAYA ADVOCATE to give evidence pertaining the agreement. The defendant did not even complain after realizing that his signature had been "forged" as he alleges.

The agreement bears the official stamp of D.J MBAYA ADVOCATE and the court should take it as valid. As pointed out earlier the effect of existence or validity of an agreement for sale of land in a claim based on adverse possession is never an issue.

10. Your lordship the plaintiff urges this court to rely on her pleadings to wit the O.S dated 10th April 2017, its supporting affidavit sworn and dated 10th April 2017 and the annexures thereto in support of her claim. The plaintiff also urges the court to look at the plaintiff's statement and the supplementary statement and also look at her oral evidence before court.

11. The authorities cited by the defendant in support of their defence are good and relevant cases to matters on O.S. They are however not applicable to the instant O.S. IN HIGH COURT OF KENYA AT NYERI E & L CASE NO 86 OF 2011 VERGINIA WANJIKU VERSUS DAVID MWANGI JOTHAM JUSTICE A OMBWAYO has set out requisite factors that must be established when proving a claim under adverse possession. The same are relevant to this case. The plaintiff has however proved all of them. IN E & L COURT AT MURANG'A E.L.C NO 45 OF 2017 LAWRENCE MUIRURI VERSUS CHARLES MWENGA JUSTICE J G KEMEI made a finding and held that the applicant was entitled to 4.00 acres out of the defendant's land parcel for having occupied and made use the defendant's land for a period in excess of 12 years continuously and exclusively and uninterrupted. We will be taking the former case as part of our authorities.

12. Your lordship we invite the court also to be guided by the following cases pertaining to adverse possession. The authorities are all court of appeal cases and they include;

(i) COURT OF APPEAL AT NAIROBI IN CIVIL APPEAL NO 24 OF 1979 GITHU VERSUS NDETE

(ii) COURT OF APPEAL AT NAIROBI IN CIVIL APPEAL NO 73 OF 1982 PUBLIC TRUSTEE VERUS WANDURU

(iii) COURT OF APPEAL AT NAIROBI IN CIVIL APPAL NO 35 OF 2002 KASUVE VERSUS MWAANI INVESTMENTS

(iv) HIGH COURT OF KENYA AT NYERI E.L.C CASE NO 86 OF 2011 VERGINIA WANJIKU VERSUS DAVID MWANGI JOTHAM

13. In conclusion your lordship we urge the court to make a finding and hold that the plaintiff has proved her case on the balance of probability. She has been in occupation of the suit land since 1998 to date. It is only in 2015 when the defendant tried to dislodge the plaintiff from the suit land by relocating the boundary from where it has been since 1990's. The plaintiff has a permanent shop and permanent residence on the suit land that were constructed on the suit land by her late husband. When, how and in what circumstances the plaintiff entered the suit land is demonstrated by the agreement dated 27th November 1998. We pray that the court do allow the O.S and the prayers sought by the plaintiff with costs.

14. We rest our submissions and pray.
DATED AT CHUKA THIS.....30TH ...DAY OF.....AUGUST, .2018

23. The defendant/respondent's written submissions are reproduced herebelow without any alteration whatsoever and if there are any mistakes, they are the responsibility of the defendant's advocate. It is stated as follows:

DEFENDANTS SUBMISSIONS

PLEADINGS AND EVIDENCE

MY Lord, these are the humble submissions on behalf of the Defendant herein. It is our submissions that the Plaintiff did not prove that she has acquired overriding rights over a portion measuring 12ft by 150ft out of land parcel number Muthambi/Igambamurathi/791 which is currently registered in the names of the Defendants.

PLEADINGS AND EVIDENCE

My Lord the Plaintiff claimed her claim through Originating Summons dated 10TH APRIL 2017 supported by her affidavit of same date. She also filed her witness statements, list of documents which were duly served on the Defendant. On his part the Defendant filed his replying Affidavit on 26TH APRIL 2017 and later his witness statements and list of documents as directed by the Honorable Court. When the case was listed for hearing the Plaintiff called two witnesses while the Defendant called four witnesses.

CASE FOR PLAINTIFF

The Plaintiff was PW1 and she testified on 15 March 2018. She informed the court that she was married to Donald MugoErasto who is a younger brother of the Defendant and that upon her marriage she joined the said Donald at some back rooms belonging to the Defendant and that she lived there since 1998.

According to her testimony before the court she said that the three brothers (Donald, Anold and the Defendant) entered into a sale of land agreement whereby each agreed to cede a portion measuring 19ft by 150ft; 41ft by 150ft and 12ft by 150 ft respectively out of the portions that they had received after the family land was subdivided.

She then went on to show that the portions so hived out of the said family land would be sold to one Domisiano KaburuNjeru and each brother would cede the equivalent to the next brother in a kind of domino effect with Anold Njagi Kiambati taking a portion out of his immediate neighbor Donald her husband; and then Donald her husband taking a portion out of the Defendants portion in order to achieve the purpose of the agreement.

She therefore claims that due to this agreement the Defendant's own land being land parcel number Muthambi/Igamurathi/791 should be reduced the equivalent of 12ft by 150ft so that he should only own 60ft by 200ft instead of what he currently owns which is 72ft by 200ft.

PW2 is the brother of the Defendant and brother in law to Donald the husband of the Plaintiff.

He told the court his land parcel is Muthambi/Igamurathi/795 and that it borders Donald's land.

At first he claimed that his land touches the land of the defendant but upon being pressed by court he said it does not.

He recounted the content of a sale agreement signed between the three brothers and one Domisiano Kaburu Njeru in which all three brothers agreed to contribute various portions of their land to the sale for a consideration. That he personally contributed 41ft by 150ft towards the achievement of the deal and that this was before the title deeds were issued.

He also said that the portion that was later registered under the names of Donald the husband to the Plaintiff was less due to the agreement and that he got surprised to learn that the portion that was registered in the names of the Defendant remained unchanged and unaffected even after the agreement signed between them and the buyer.

He says that according to the arrangement that they had each of the other two brothers (Donald and the Defendant) would cede a portion of their land to him so that his own land would then go to the purchaser Domisiano. However he was very surprised to find that the Defendants title remained intact and there was no reduction by 12ft by 150ft as envisioned. He then claimed that Donald Mugo who is now dead was utilizing a portion measuring by 12ft by 150ft before his death.

Analysis of the Plaintiff's Evidence

From the evidence adduced by the Plaintiff's my Lord, it is very easy to observe that there was no independent evidence adduced to authenticate the claim that the three brothers including the Defendant entered into a sale agreement in 1998 through which they jointly agreed to sell portions of their land to the buyer Domisiano. The said Domisiano was never called to give evidence

Secondly, My Lord concerning this agreement and the testimony of the two Plaintiff witnesses, we submit that there is nothing adduced to show that the Plaintiff was living on the portion being claimed in adverse possession for a period of 12years. The Plaintiff only said that she had lived at the place without giving specifics to prove her allegations taking into consideration that the Defendants land parcel number 791 measures 0.175Ha.

Thirdly my Lord PW2 was evasive and economical with the truth. According to him the said agreement was signed before the titles were issued to the three brothers; however the Defendant adduced evidence to show that his title was issued on 10th November 1998 whereas the sale agreement was entered into on 27th November 1998.

Lastly My Lord, the claim by the Plaintiff is not a claim for adverse possession but an attempt to force specific performance of a fake agreement that the Defendant denies having entered into. The claim for adverse possession is only a smoke screen and should be rejected by

the Honorable Court.

I invite the Court to look at the whole evidence adduced by the Plaintiff's witnesses PW1 and PW2. Both are annoyed with the Defendant because he continues to hold his 72ft by 200ft and not what they thought he should be holding that is 60ft by 200ft. This realization prompted the Plaintiff to file this suit and to make false claims over the portion that is measuring 12ft by 150ft from the Defendants land.

When he was asked why he never laid an claim concerning this agreement when the brother Donald was living PW2 answered that he was not aware that the Defendant's land was measuring 72ft by 200ft until when the Plaintiff carried out a search and this fact was discovered.

This clearly illustrates that the Plaintiff's claim is not genuine; it is misadvised and is meant to settle scores between PW2 and his brother the Defendant. The Plaintiff is a marionette that is being controlled by PW2 for his own personal whims.

PW2 stated in court that the portion that was eventually transferred to Donald was less than what he had contributed; he however fails to disclose that he is the one who is encroaching on Donald's portion due to Donald's mental sickness and the absence of the Plaintiff when she ran away from home.

All these ambiguities reveal that PW2 has a hidden agenda and that agenda is to cause friction between the Plaintiff and the Defendant so that the Plaintiff does not claim back from him the land that he stole from her sick husband. This is a self-serving interest and his testimony should be taken for what it is; an attempt to save his neck by helping the Plaintiff to file a false claim against the Defendant.

The Defense has clearly demonstrated throughout the case that PW2 is the force behind the Plaintiff's claim; he is the instigator of this suit. We pray to the Honorable Court to take into consideration all the surrounding circumstances; including the fact that PW1 admitted that he is the one occupying part of Donald's land and that he wants the land of the Defendant to be reduced in size. The agreement that he is basing his testimony on is clearly a forgery and it is for this reason that he was very aversive and uncomfortable when testifying before the court.

Evidence was also adduced to show that he the one who encroached on the land of Donald with whom he is bordering and that he is trying to evade blame by the Plaintiff by supporting her to harass the Defendant instead.

CASE FOR DEFENSE

My Lord, the Defendants case is that the Plaintiff has never occupied the portion she is claiming for a period of more than W12 years as claimed.

According to him, when she got married to his younger brother Donald in 1999, he gave them a room at his business premises to live in. The room was not at the portion that is being claimed by the Plaintiff.

When the Plaintiff returned to bury her husband Donald in 2015, she was installed at the house where her mother in law used to live. No evidence was ever adduced to show that the back rooms and the house she entered in 201 are within the portion measuring 12ft by 150ft that she is claiming in this suit

The Defense witnesses including DW1, DW2, DW3, and DW4 clearly told this Honorable Court that the Plaintiff was married by Donald in 1999 and that she left the homestead in 2003 after Donald turned violent due to mental sickness.

She then stayed away until the death of Donald in 2015 when she returned to bury him. It is at this time that PW2 and other family members who were not called to testify chased away tenants from the house that the Defendant had built for his mother. They then installed the Plaintiff in that house and it from there that she launched the grand plan to steal the Defendant's land using the excuse of an agreement that never was.

Not only did she take over her mother in laws former house, but she then began to encroach on other portions of land belonging to the Defendant prompting him to raise an alarm including reporting the matter to the local authorities and his lawyer. Before the Defendant could file a suit to claim back the land that the Plaintiff had encroached on, the Plaintiff filed this suit against the Defendant.

My Lord this is a case of cunning connivance between the Plaintiff and P W2 with the target being the Defendant who was kind enough to support the Plaintiff and her husband during their times of need. This is a conspiracy that has fallen flat on the face of the two connivers because as can be seen from our legal analysis below the Plaintiff has failed to proof that she has acquired overriding rights against the suit land.

LEGAL ANALYSIS

My Lord, we submit that the Plaintiff failed to demonstrate that she had acquired adverse possession of the suit premises. These are well enumerated in the case of **Virginia Gitau** (High Court in Nyeri, ELC Civil case no 86 of 2011 Virginia Wanjiku Mwangi vs David Mwangi Jotham Kamau

1. Open and notorious use of the property
2. Continuous use of the property
3. Exclusive use of the property

4. Actual possession of the property

5. Non permissive, hostile or adverse use of the property.

The Plaintiff failed to show that she held the portion claimed continuously for the entire limitation period; and due to this her claim fails to meet the legal threshold.

On the other hand the Defendant clearly demonstrated to this court that the Plaintiff only lived on his land for seven broken years. The first time was when she got married to Donald in 1999 to the time she walked out on Donald upon his getting sick. That is only less than 5 years give or take a few months. The second period is when she returned to attend the burial of Donald in 2015 to the time that she filed this suit in 2017. Therefore it is clear that her claim does not meet the threshold enumerated in Virginia Gitau case above.

We also wish to submit the following case law for consideration in support of our above submissions.

In **Sarah NyamburaKungu-vs- David Njuguna, Civil Appeal No. 20 of 1988** as reported in the case of **Lawrence MuiruriNjugunavs Charles MwengaMulwa (ELC NO 45 OF 2017 at ELC Court Murang'a** it was held that "Adverse possession only arises in case of continuous uninterrupted occupation of the land for over 12 years."

The Plaintiff in this instant suit was in occupation of different portions of the Defendants land for an estimated 7 years or less. This is less than the 12 years stipulated period under the Limitation of Actions Act.

And it should not be lost to the Honorable Court that during the first five years she occupied a different portion of land than what is being claimed in this suit. During that period, which lies between the day she married Donald and the day she walked out of her marriage (1999 to 2003); she lived at the backrooms of the Defendants business premises.

Later after walking away from the marriage and staying away from the suit premises between 2003 and 2015, she returned and began encroaching on the portion that she is now claiming. This gives her only two (2) years on that portion. Two years clearly falls short of the statutory period under the Limitation of Action's Act, being the law under which this Originating Summons is brought.

We humbly submit that the Plaintiff has no colour of right to claim adverse possession of any part of land parcel number Muthambi/Igamurathi/791.

We pray that this suit be dismissed with costs and that the Plaintiff be ordered to vacate the Defendants land.

DATED AT MERU THIS.....DAY OF.....2018

.....

MWANGI E G & CO

ADVOCATES FOR THE DEFENDANT

24. The plaintiff proffered the following cases in support of her position:-

1. Court of Appeal at Nairobi, Civil Appeal No. 24 of 1979 – Githu versus Ndete.
2. Court of Appela at Nairobi, Civil Appeal No. 73 of 1982 – Public Trustee Versus Wanduru.
3. Court of Appeal at Nairobi, Civil Appeal No. 35 of 2002 – Kasuve Verus Mwaani Investiments Limited & 4 Others.
4. High Court of Kenya at Nyeri ELC Case No. 86 of 2011 – Virginia Wanjiku versus David Mwangi Jotham.

25. In Githu versus Ndete (op.cit), the court, among other things, decided that the mere change of ownership of land which is occupied by another person under adverse position does not interrupt such person's adverse possession. It also held that a title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title. These two principles are good law and precedent. But the existence of these principles need to be proved. As already shown in the narration of the plaintiff's evidence, I find that the existence of these principles has not been proved.

26. The case of Public Trustee Versus Wanduru (op.cit), among other things, held that the appellant's cause of action arose not from the agreement of sale but from the claim of adverse position under the Limitation of Actions Act and also that the appellant had acquired an indefeasible title to the land by being in a continuous, uninterrupted and exclusive adverse possession of it for twelve years. It also held that the respondent's title to the suit land was subject to the second appellant's overriding interest over the land under the Registered Land Act. I find that the evidence proffered by the plaintiff/applicant and her one witness is not sufficient for this court to apply the principles enunciated by this case in her favour. First the agreement said to have been entered into between the plaintiff's/applicant's husband and his brother Arnold Njagi Kiambati, does not indicate that the defendant was selling land to the purchaser. Indeed, the defendant demonstrated that he had obtained title to the suit land before this agreement was signed. On a balance of probability, I am inclined to accept that his signature as a witness to that agreement was a forgery. Although, perhaps the plaintiff sought to show that adverse possession started running around the

time this agreement was signed, the plaintiff /applicant in her evidence did not demonstrate that this was the position. The registration of the suit land in the defendant's name, although it could not interrupt adverse possession in proper circumstances, was not in any way impeached by the evidence proffered by the plaintiff/applicant.

27. Secondly, the plaintiff applicant did not proffer evidence to support acquisition of part of the defendants land under the Limitation of Actions Act.

28. The case of Kasuve versus Mwaani Investment Ltd and 4 others (op.cit), among other things, held that in order to be entitled to land by adverse position, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuation of possession by the owner on his own possession. In this case the evidence proffered by the plaintiff/applicant and her one witness does not satisfy the court that the plaintiff/applicant has satisfied any of the principles enunciated by this case to entitle her to ownership of land by way of adverse possession.

29. The case of Virginia Wanjiku Mwangi Versus David Mwangi Jothan Kamau held that the plaintiff had satisfied the court that she was entitled to ownership of the suit land by way of adverse possession. Adverse possession must be proved. In this case the plaintiff/applicant has not done so.

30. The defendant/respondent has proffered the following cases in support of his assertions:

(i) Virginia Wanjiku Mwangi Versus David Mwangi Jotham Kamau – [2013] Eklr

(ii) Lawrence Muiruri Njuguna Versus Charles Mwenga Mutwa [2017] eKLR.

31. I note that the case of Virginia Wanjiku Mwangi has also been proffered by the plaintiff/applicant. Both this case and the case of Lawrence Muiruri Njuguna (op.cit) are good authorities that adverse possession requires to be proved by way of evidence. Where there is proof, the claim of adverse possession succeeds. Where there is no evidence, the claim fails.

32. I find that the only issue for determination in this suit is if or if not, upon consideration of all the evidence tendered by the parties in this suit, the plaintiff is entitled to a declaration that she be declared proprietor of a portion of land measuring 12 feet by 150 feet from the defendant's/respondents land parcel No. Muthambi/Igamurathi/791 by way of adverse possession.

33. I have considered the pleadings, the oral evidence, the authorities and the submissions proffered by the parties to buttress their diametrically incongruent assertions. I have already dealt with the authorities.

34. Having carefully considered the respective submissions proffered by the parties, I find that the plaintiff/applicant seeks to use her submissions to give new evidence. However, a court of law is always guided by the evidence tendered by the parties. PW1, as I have already noted, was generally evasive during cross examination and so was PW2. This court tends to agree with the defendant's evidence that for many years, since her husband became mentally unstable around the year 2003, the plaintiff/applicant did not live on the suit land and only returned during her husband's burial in 2015. I also find that during the period she had stayed in the suit land, she and her deceased husband had been living thereon with the consent of the defendant/respondent. The length of stay with the consent of the landowner, even when it is more than twelve years or even fifty years or more cannot count in determination of entitlement to ownership of land by adverse possession.

35. I do find that the defendant/respondent and his witnesses gave credible evidence. I have already, in an earlier part of this judgment, so stated. I also find the submissions proffered by the defendants/applicant's advocate relevant in their exposition of the issues apposite to this suit.

36. I do find that the plaintiff/applicant is not entitled to ownership by way of adverse possession to a portion of land parcel No. Muthambi/Igamurathi/791. Having so found, I do not find it necessary to answer any other questions posed in the Originating Summons.

37. In the circumstances, this suit is hereby dismissed.

38. The parties are close relatives. To promote harmony in their family, I exercise my judicial discretion and refuse to award costs.

39. It is so ordered.

Delivered in open Court at Chuka this 27th day of November, 2018 in the presence of:

CA: Ndegwa

Manases Kariuki h/b Miss Kithaka for the defendant

Emmy Kaari Kabure – Applicant - absent

P. M NJOROGE,

JUDGE