



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 115 OF 2017

FORMERLY MERU ELC CASE NO 100 OF 2009

MARTIN MUGAMBI.....1ST PLAINTIFF

AGNES MWIMBI.....2ND PLAINTIFF

VERSUS

NJERU NYAGA ALIAS NDURURU NYAGA.....DEFENDANT

JUDGMENT

1. This suit was brought to court by way of Originating Summons dated 13th July, 2009 which states:

ORIGINATING SUMMONS

LET NJERU NYAGA alias NDURURU NYAGA of South District of Eastern Province within 15 days after service of this summons upon him enter appearance to this summons which is issued on application of MARTIN MUGAMBI and AGNES MWIMBI who claims to be entitled to 2 acres out of the suit land reference KARINGANI/NDAGANI/294 by adverse possession and prescription of time, for the determination of the following questions:-

1. Whether the plaintiffs have been in quiet and continuous uninterrupted and exclusive possession of 2 acres of KARINGANI/NDAGANI/294 for a period of over 12 years.
2. If the answer to No.1 above is positive, whether the said possession is adverse.
3. Whether the plaintiffs are entitled to declaration of the 2 Acres and whether the court should so declare.
4. What is the order as to costs.

2. PW1, Martin Mugambi, the plaintiff asked the court to adopt his witness statement dated 7th April, 2014 as his evidence in this suit. His witness statement states as follows:

THE 1ST PLAINTIFF'S STATEMENT

I MARTIN MUGAMBI of C/O P. O. Box 2387-60200, Meru being an adult of sound mind states as follows:-

That I am the 1st plaintiff in this matter and thus conversant with all the matters herein.

Land parcel No. 294 was originally owned by Nkoroi Nciankuga who was the husband to Joyce Ciamwonge Nkoroi. The said Nkoroi Nciankunga died before the demarcation process and the land was left in the hands of Joyce Ciomwange Nkoroi.

When Nkoroi Nciankuya passed on he left behind.

The 2nd wife gave birth to Nyaga Nkoroi who is the father to Njeru Nyaga alias Ndururu Nyaga. That when the demarcation process began the land which was occupied by Joyce Ciomwanje Nkoroi and Veronica Weveti who was the wife of Nyaga Nkoroi and the mother of Agnes Mwimbi (The 2nd plaintiff).

The 2nd wife of Nkoroi Nyaga namely Meli Kanini gave birth to Njeru Nyaga alias Ndururu Nyaga. (The defendant). The demarcated land was originally registered in the names of Nyaga Nkoroi and the land was later transferred to Njeru Nyaga alias Ndururu Nyaga.

Agnes Mwimbi (The 2nd plaintiff) together with her mother Veronica Weveti were occupying the land parcel in question since time in (sic) memorial.

That I was living with my grandmother Joyce Ciomwange Nkoroi from 1970's and grew up in the said land and I was shown a piece of land by my grandmother where I settled and developed.

That to date I continue to occupy the said land and also Agnes Mwimbi occupies a portion of the land. That I have occupied and developed the parcel that was left to me by my grandmother until the defendant started subdividing the parcel of land No. KARINGANI/NDAGANI/4204 – 4208.

That my grandmother and the 2nd plaintiff had filed HCCC No. 127 of 1996 (OS) against the defendant but the same was dismissed for want of prosecution and was never heard on merit. That after the suit was dismissed I and the 2nd plaintiff filed the current suit claiming 3 acres and 2 acres respectively of L.R. No. KARINGANI/NDAGANI/4204 – 4208). That I have occupied the said land for over 20 years uninterrupted and as such I am the owner of the said 3 acres which I have occupied exclusively.

Njeru Nyaga alias Ndururu Nyaga has never occupied this land as he lives in Embu where his land is situated.

I pray that court do find that I have had exclusive occupation of the said land for over 20 years and thus I be declared the owner of 3 acres of KARINGANI/NDAGANI/294.

That is all I wish to state.

Sworn by the said Martin Mugambi at Meru this 7th day of June, 2014

3. During cross examination by advocate Joe Kathungu, for the defendant, PW1 told the court that one Thungu Tatua was his father and was also one of his witnesses in this case. He went on to say that his father had other land other than the suit land. He went on to say that he had lived on the suit land with his grandmother and went on to say that when she died in 2004 she was buried in his father's land. He went on to say that the original 2nd plaintiff also used to live on the original parcel No. Karingani/Ndagani/294. He, however, went on to say that when she died, she was buried in her husband's land at Maua.

4. During cross examination, PW1 kept on contradicting himself. For example, he denied knowledge of one Alfred Mugambi Njue who lived on part of the original parcel of land. He said that he did not see him in court. However, challenged by the defendant's advocate, he changed his mind and said that he now remembered him. He even proffered that he was his neighbour. The court noted that he was demurring when answering questions and noted that he did not appear truthful.

5. PW1, during cross-examination, told the court that his grandmother's house on the original suit land had collapsed and that he had built another one to replace the collapsed one. He went on to say that three families lived on the suit land, to wit, the families of: (a) Alfred Mugambi (b) Albert Gitauru and (c) his family. He also said that there were 7 houses on the suit land three belonging to him and four belonging to the other families. And yet he had initially said that he did not know Alfred Mugambi.

6. PW1 told the court that he was born on the suit land. However this evidence is not contained in his witness statement. During cross-examination PW1 told the court that he did not live with his father because all along he had lived with his mother and his grandfather. This suggests that his father did not live with his wife, PW1's mother.

7. PW1's propensity to change his evidence and to contradict himself pellucidly came out when during further cross-examination he told the court that he was claiming his inheritance and that he did not live on the suit land, as he had earlier claimed but lived at Chuka where he was a casual worker who carried goods for market people at a fee. He also admitted that he did not have a house on the suit land. He also could not explain why he and the 2nd plaintiff were now claiming 5 acres whereas in their plaint they were veritably pellucid that they were claiming 2 acres out of land parcel No. KARINGANI/NDAGANI/294. PW1 also told the court that his grandmother and his mother had been allowed by the defendant to cultivate part of his land but claimed that he was entitled to the land because he and his grandmother and mother had been in occupation for over 12 years.

8. PW2, the 2nd plaintiff, told the court that he joined this suit as a substitute to his deceased mother, Agnes Mwimbi, the original 2nd defendant. He asked the court to adopt his witness statement dated 21st October, 2017 as his evidence in this suit. The witness statement states as follows:

WITNESS STATEMENT

I, **ALEXANDER NYAGA ALIAS ALEXANDER NJUE MARETE** do wish to state as follows:

That I am the son to one Agnes Mwimbi.

I entered the said parcel No. 294 before 1963 with my mother Agnes Mwimbi. We lived there with Nyaga Nkoroi with his wife Veronica

Weveti together with great grandmother Joyce Ciomwonge Nkoroi and the family.

Later Nyaga Nkoroi passed on in the year 29th August, 1985. We were left with the other family members including Ciondeke (daughter to Joyce). Veronica also passed on later.

Even after Veronica's demise we went on to enjoy continuous uninterrupted occupation until 1996 where and when Njeru Nyaga alias Ndururu started threatening us to vacate the suit property that he wanted to develop the suit land.

On or about 17th December, 2012, Njeru Nyaga went ahead to sub-divide the suit property KARINGANI/NDAGANI/294.

Further, on or about 27th December, 2012 Njeru Nyaga brought a surveyor to the suit property and put up beacons on the land. It is after all this that my mother Agnes Mwimbi brought the matter to court.

It is after my mother passed on that I took up the mantle to follow up the case which was already in court.

It is all my averments that Njeru Nyaga has never developed the suit property in any way.

That is all I wish to state.

Alexander Nyaga alias Alexander Nyaga Marete

Dated at Meru 21 this day of October, 2017

9. During cross-examination by the defendant's advocate, PW2, told the court that he had lived in the suit land with his mother. He, incredulously, went on to say that his mother had lived on the suit land for over 40 years and that after that she got married and left the suit land. He testified that she died in 2015 and was buried in her husband's land at Maua. He told the court that he stayed on part of parcel No. 294 with his wife and children. He seemed not to know the number of houses PW1 had on the suit land. He also kept on referring to some notes before he answered questions put to him during cross examination. He could not satisfactorily explain why in the Originating Summons he and PW1 were claiming 2 acres whereas they were now claiming 5 acres. He laconically stated that when PW1 and his mother, the original 2nd plaintiff, claimed 2 acres in the Originating Summons, they may have been wrong.

10. During further cross examination, he told the court that the defendant was his maternal uncle. He admitted that his own father had his land where his mother was buried. He also told the court that another suit filed by the 1st plaintiff and his mother, the original 2nd plaintiff had been dismissed for lack of prosecution on 2nd July, 2009. This was MERU HCCC No. 60 of 2006. Asked why he was claiming land from his maternal uncle and not from his father, he said that he was claiming the land because his maternal grandfather had lived on the suit land.

11. Although at one time during cross-examination he had intimated that he and his family lived at Chuka, during re-examination he told the court that he and his family lived on the suit land. He also told the court, also during re-examination, that his mother got married in 1968, moved out of the suit land and then returned in 1999. That makes it a hiatus of 33 years. The inconsistencies pervading PW2's evidence makes this court unable to know when he is telling the truth and when he is lying. This puts into question the veracity and the integrity of his evidence.

12. PW3, Mpungu Tatua told the court that Martin Mugambi the 1st plaintiff was his son. He asked the court to adopt his witness statement dated 7th June, 2014 as his evidence in this suit. The statement states as follows:

THE WITNESS STATEMENT

I MPUNGU TATUA OF C/O P. O. BOX 2387-60200, Meru being an adult of sound mind states as follows:

That Joyce Nciamwonge was married to Nkoroi Ciankuga and had 3 children of whom two died and one was left Ndionisia Ciandeke.

Later on Nkoroi Ciankuga passed on leaving Joyce Ciamwonge Nkoroi.

Joyce Ciamwaye Nkoroi continued to occupy land parcel Karingani/Ndagani/294 before independence and was detained for 6 years and after detention came back and continued to occupy the land.

Later after independence the land was gathered and after demarcation the land was registered in the names of Nyaga Nkoroi because women could not be registered as owners of land due to customs and traditions.

That Nyaga Nkoroi later on came from Embu and started living with Joyce Ciamwanye and Veronica Weveti who was his wife.

Later he went back to Embu to stay with his son Njeru Nyaga alias Ndururu Nyaga and after his demise was buried at Embu in the land owned by Njeru Nyaga alias Ndururu Nyaga.

That I was also living in this land before I went to alternative parcel of land. That both Martin Mugambi and Agnes Mwimbi have lived on

this land since time immemorial.

That Agnes Mwimbi is sister to Njeru Nyaga alias Ndururu Nyaga (defendant).

That Martin Mugambi (1st plaintiff) was staying with her grandmother Joyce Ciamwonge Nkoroi taking care of her and she left behind her share of land to the 1st plaintiff who has lived on the said parcel for over 20 years.

That it was about 1996 when Njeru Nyaga started to subdivide land parcel No. KARINGANI/NDAGANI/294 telling them to leave the land.

That Joyce Ciamwonge ad Agnes Mwimbi sued the defendant claiming their respective shares of land.

That the plaintiff has developed his land with trees, houses and cultivation of other subsistence crops.

That I know that the plaintiffs have been in occupation of the said land for over 30 years.

That is all I wish to state.

MPUNGU TATUA

AT MERU THIS 7TH DAY OF JUNE, 2014

13. During cross-examination by the defendant's advocate PW3 told the court that the 1st plaintiff, his son, was claiming part of the suit land because he had lived on the land with his grandmother. Surprisingly, although he said that he was the child of the brother of the defendant, PW3 testified that he only came to know the defendant in 1996. Regarding why he was not claiming the suit land himself, he said that he could not do so because he was not sired by Nkoroi Wa Ciamboga but was the son of Nkoroi wa Ciamboga's brother. I found this line of argument interesting because the 1st plaintiff, his son was claiming land he himself said he could not claim.

14. Also in cross-examination he was asked to explain his testimony that the 1st and 2nd plaintiffs were brothers. He told the court that the father of the 2nd plaintiff was one Patrick Muiruri. This court found PW3's evidence rather convoluted and garbled. Despite PW1 having testified that his grandmother's house had collapsed, pw3 told the court that PW1 lived in that house. Rather curiously, PW3 told the court that he was not supposed to give PW1, his son, land and insisted that he should get his grandmother's land.

15. DW1, Njeru Nyaga alias Ndururu Nyaga, the defendant told the court that he wants this suit heard and determined before he died as he was an old man. He feared that the plaintiffs wanted to delay the determination of the case until he died so that they could cause trouble to his children. He said: "I am waiting for this case to end then I die". DW1 asked the court to adopt his witness statement dated 19.10.2017 as his evidence in this suit. The witness statement states:

DEFENDANT'S STATEMENT

My name is Ndururu Nyaga. I come from Kibugu location in Embu County. Joyce Ciamwonge Nkoroi was wife to my grandfather who died before land demarcation. She was also grandmother to the 1st plaintiff herein.

I allowed the said Joyce Ciamwonge Nkoroi to use a part of my land measuring 1 acre. I did this out of love, compassion and goodwill. She later died in the year 2004 and was buried in her son's land. The said son, Germano Mukuru is a father to the 1st plaintiff herein.

Prior to her death, the 1st plaintiff would visit her occasionally though he never lived there. However, upon her death, he began to cultivate the portion where I had allowed his grandmother to utilize during her lifetime. He only cultivates there but still lives in Chuka town together with his family.

The 2nd plaintiff on the other hand is my step sister. She is married to one Njue Marete and they live on his land in Nyambene. She has never at any one time cultivated on my land. I have however given permission to her son Alexander Nyaga to cultivate on a portion of approximately 0.5 acre of my land.

In the year 2006, the plaintiffs herein filed Meru HCCC No. 60 of 2006 seeking a portion of 2 acres from my parcel of land. The honourable court dismissed the matter with costs on 2nd July, 2009 for want of prosecution. I pray that this matter should similarly be dismissed with costs to me.

That is all.

DATED AT EMBU THIS 19TH DAY OF OCTOBER, 2017.

SIGNED.....

NDURURU NYAGA

16. During cross examination by the plaintiff's advocate, DW1 testified that he had allowed the 1st plaintiff's grandmother to cultivate about half an acre of his land. He told the court that the original 2nd plaintiff never cultivated or occupied any part of his land. He testified that he had allowed her son, Alexander Nyaga to cultivate approximately half an acre of his and. He stressed that he had asked and obtained his permission to do so. He stressed that he only cultivated the land and never lived there. He stressed that in Meru HCCC 60 of 2009 he had said that PW2 used about 1 acre but that was an approximation. He told the court that he had never given the plaintiffs notice to vacate his land as he did not have to do so because they had occupied the suit land with his permission. He told the court that they were relatives. He was categorical, however, that since they had abused his generosity and taken him before court, he would evict them once this suit was completed.

17. During cross-examination, he was insistent that the plaintiffs did not live on the land, only cultivated thereon and then went to their houses elsewhere.

18. I opine that DW1 came out as a truthful witness and his evidence was not impeached in any material manner.

19. DW2, Alfred Mugambi Njue, asked the court to adopt his witness statement dated 13th October, 2017 as his evidence in this suit. The statement states:

DEFENDANT'S WITNESS STATEMENT

My name is Alfred Mugambi Njue.

I come from Rukiundu sub-location in Tharaka-Nithi County.

The defendant herein is my uncle.

He allowed me and my mother to settle in the suit land in the early 1960s.

I have lived there since then to date.

Martin Mugambi has never lived in the suit land.

In the year 2004 he started cultivating a portion of less than an acre out of the suit land being the portion that was being cultivated by his grandmother Joyce Ciamwonge. His grandmother died in the month of May, 2004 and he started cultivating that portion soon after her death. He has been cultivating the portion by cultivating subsistence crops.

Agnes Mwimbi has never cultivated or taken possession of any portion of suit land.

Alexander Nyaga cultivates a portion of the land measuring about 0.5 acre portion out of the suit land. He however lives in his fathers' land at Kirege. His father is called Patrick Njue Marete.

That is all.

Dated at Embu this 13th day of October, 2017.

Signed by

ALFRED MUGAMBI NJUE

20. The statement corroborates DW1's evidence that he and the plaintiff's moved into the suit land with the defendant's permission. It is also unequivocal that Agnes Mwimbi, the original 2nd plaintiff had never cultivated or taken possession of any portion of the suit land but her son Alexander Nyaga had been allowed to cultivate part of it. The statement is pellucid that the 2nd plaintiff lives at Kirege in his father's land. The statement is also unequivocal that though the 1st plaintiff cultivates a portion of the suit land, he never lives on the suit land, where he himself, DW2, lives.

21. I opined that DW2's evidence was not in any material manner impeached during cross-examination.

22. I find it necessary to point out that after the close of their case, the plaintiffs filed an application seeking to amend their Originating Summons to indicate they were claiming 5 and not 2 acres. This application is dated 19th March, 2018. As this suit was filed on 13th July, 2009, this application was filed over 9 years after the suit came to court. This court dismissed this application.

23. After they gave their oral evidence, the parties filed written submissions. It is hereby clarified that a court of law relies on the evidence tendered by the parties orally and in their pleadings. Written submissions cannot be used by the parties to proffer new evidence. Any such evidence is not taken into account by courts of law.

24. The plaintiffs' written submissions take the following form:

APPLICANTS' WRITTEN SUBMISSIONS

Your Lordship the plaintiffs/applicants have herein brought an application via originating summons dated 13th July, 2009 claiming adverse possession of 2 acres of land on parcel number Karingani/Ndagani/294 against the ownership rights of the defendants.

In their evidence they relied on their affidavits and witness statements filed in court. They claim that they utilized 3 acres of land by the 1st applicant and 2 acres of land by the 2nd plaintiff.

During cross examination of the defendant, he confirmed that indeed the land was his and that the plaintiffs use the land, whereas they do not pay any money for the same. He also confirmed that they use and utilize the land with his knowledge. It was further his evidence that they utilize only half an acre. The defendant further confirmed that the 1st applicant's grandmother one Ciamwonge used one acre out of the entire parcel which the plaintiff took over and continued to utilize. He further testified that the 2nd plaintiff also utilizes one acre of land but upon further cross examination changed his testimony to half an acre of land. Further his replying affidavit of 21st October, 2010 in response to the application claiming adverse possession, categorically stated both the plaintiffs occupied one acre of land each. Therefore from his own testimony, there is no doubt whatsoever that the plaintiffs are in open, continuous, user and occupation of one acre each of the subject suit land. What is in contention is the acreage each of them occupies.

LAW APPLICABLE

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action especially prerequisites being that the possession of the adverse possessors is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

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

The Limitation of Actions Act makes further provision for adverse possession at section 13 that:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

Section 37 and 38 of the Limitation of Actions stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a high court order vesting the land in him.

Section 37 provides that:-

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

It is our humble submissions that the bill of rights are to be applied so as to develop the law where there is a gap in giving effect to a right or fundamental freedoms per Article 20(3) (b). These rights are however not absolute, but subject to limitations in so far as such limitations are reasonable and justifiable taking into account the factors set out in Article 24 including the nature, importance, purpose and extent of the right vis a vis the limitations as well as prejudice to the rights and freedoms of others.

Your lordship, the Constitution further dictates in Article 24 (2) that any statute limiting a right or fundamental freedom should be clear about the right or freedom being curtailed and specifically express such intention as well as the nature and extent of the limitation for it to be valid. For the avoidance of doubt, the framers of the Constitution included a list of rights and freedoms which may not be limited notwithstanding any provisions of the Constitution. These absolute rights are set out in Article 25. It is instructive that the right to property is not one of them. This then leaves the protection of the right to property within the precincts of allowable limitations by the statute.

Every person in Kenya has the Constitutional protection of the right to property under Article 40. This entitles every person to the right to acquire and own property in any manner prescribed by law. The doctrine of adverse possession in effect allows a party to acquire land in accordance with the law.

In conclusion thus, we urge this honourable court to find they have proved their case and judgment be found in their favour.

We so pray.

Dated at Meru this 28th day of June, 2018

FOR: CHARLES KARIUKI & KIOME ASSOCIATES

ADVOCATES FOR THE PLAINTIFF/APPLICANT

25. The defendant's submissions take the following form:

DEFENDANT'S SUBMISSIONS

Your Lordship,

The Plaintiffs filed this suit against the Defendant vide Originating Summons dated 13th July 2009 claiming adverse possession of 2 acres of land out of parcel of land number KARINGANI/NDAGANI/294.

The Originating summons is supported by the Affidavits of MARTIN MUGAMBI and AGNES MWIMBI both sworn on 13th July, 2009.

In his Affidavit, MARTIN MUGAMBI the 1st Plaintiff contends that he went to the suit land in the year 1974 to live with his grandmother one JOYCE CIAMWONGE. That they were occupying 2 acres which he continued to utilize after the said JOYCE CIAMWONGE passed on in the year 2004. He further contends that he has extensively developed the 2 acres and that he lives there with his wife and 3 children.

AGNES MWIMBI contended that she entered the suit land before the year 1963. That she took possession with her mother one VERONICA WEVETI NYAGA who later died and left her in occupation of 2 acres. It was further her contention that she still occupied 2 acres with her son ALEXANDER NYAGA and that she had extensively developed the 2 acres.

Your Lordship, On 14th February, 2015 during the pendency of this suit the said AGNES MWIMBI passed on. She was substituted by her above mentioned son i.e ALEXANDER NYAGA as the 2nd Plaintiff.

Upon being served with the Originating Summons, the Defendant responded vide a Replying Affidavit sworn on 21st October, 2009. He contended that he had allowed JOYCE CIAMWONGE to use part of his land measuring 1 acre for her livelihood. This he did out of love, compassion and goodwill. That when the said JOYCE CIAMWONGE died, she was buried in a different parcel of land belonging to her son, the 1st Plaintiff's father. That during her lifetime MARTIN MUGAMBI, the 1st Plaintiff would occasionally visit her but he never lived there. He further contended that after JOYCE CIAMWONGE died, her grandson the 1st Plaintiff began to cultivate the portion that she had been in occupation of though he lived in Chuka town with his family away from the suitland.

With regard to the original 2nd Plaintiff AGNES MWIMBI, it was the Defendant's contention that she never lived or cultivated any part of the suitland. That it was her son ALEXANDER NYAGA who cultivates 1 acre with the Defendant's license and/or permission.

When the matter came up for hearing, parties agreed to adopt their respective written statements and documents as evidence in support of their cases.

Your Lordship, from the evidence on record, it is not in dispute that the Defendant is the registered proprietor of parcel of land number KARINGANI/NDAGANI/249. The issue in dispute and which this Honourable Court is called upon to determine is whether the Plaintiffs herein have made out a case warranting the granting of orders of adverse possession sought. Justice B.N Olao in the case **Wangari Waithanje & 2 Others vs Thathi Fracis Muruarua [2017]eKLR** held that in a claim for adverse possession, the law is that the Plaintiffs have to prove the following:-

- 1. That they have been in continuous and uninterrupted occupation and possession of land in dispute for 12 years or more having dispossessed the original owner thereof.***
- 2. That such possession has been open, notorious and with the knowledge of the registered owner.***
- 3. That such occupation is without the permission of the owner.***
- 4. That the Plaintiffs have asserted a hostile title to the registered owner of the property.***

We submit that they have failed to prove and or establish those requirements.

Your Lordship, in determining whether the Plaintiffs have been in continuous and uninterrupted occupation of the Suitland for more than 12 years, it is imperative that the Court establishes when time began to run against the registered owner if at all. We submit that time could only have begun to run on 5th July, 1976 when the suitland was registered in the name of the Defendant. However, it would appear that neither of

the Plaintiffs were in occupation of any part of the suitland at that time.

In the course of cross examination by counsel for the Defendant, the 1st Plaintiff, MARTIN MUGAMBI claimed that he was born on the suitland. In his Affidavit sworn on 13th July, 2009 in support of the Originating Summons, he states at paragraph 2 that he went to the suitland in 1974. In his statement dated 7th June, 2014 he states that he was living with his grandmother from 1970's and grew up on the suitland. These contradictions portray a dishonest litigant who is not being candid with the Court and we urge the Court to disbelieve his evidence. Indeed the Honourable Court will note that this is the same witness who in the course of his testimony claimed he did not know ALFRED MUGAMBI NJUE who cultivates on the suitland but later claimed that the said Alfred was his neighbour and that he had only forgotten him. We therefore urge the Court to believe the testimony of the Defendant which was also corroborated by DW2 ALFRED MUGAMBI NJUE that the 1st Plaintiff only entered the suitland in the year 2004 when his grandmother JOYCE CIAMWONGE died. This therefore means that he could not have occupied the land for the requisite period of 12 years by the time this suit was being filed in the year 2009.

With regard to the original 2nd Plaintiff, it was the testimony of her son ALEXANDER NYAGA that she left when she got married. He stated during re-examination that she got married in the year 1968. Your Lordship, time cannot be said to have started running against the Defendant before the year 1976 when he became the registered proprietor of the suitland. Even assuming she had lived there since before 1963 as she claimed (though it is denied) those years cannot be computed in a claim for adverse possession because at that time she would not have been occupying the land with the intention to dispossess the owner but merely by virtue of her consanguinity and relationship with the owner. Further your Lordship, though her son claimed that she later came back to the land in 1999, it is our submission that this would only serve to prove that her occupation if any was **interrupted** and **not continuous**. Even after she died, she was buried on her husband's land where she used to live.

The Honourable Court will note that MPUNGU TATUA who was the Plaintiffs' witness 3 also confirmed that when AGNES MWIMBI, the original 2nd Plaintiff got married, she went to live on her husband's land. It has already been established that this was in 1968 and we submit that any occupation of the land before the registration of the Defendant in the year 1974 is irrelevant to prove adverse possession.

It is further our submission that there was no adverse possession since the Plaintiffs were on the suitland with the consent, permission and/or license of the Defendant. Indeed the Defendant confirmed this was the position during his testimony. A licensee cannot have time running in their favour to assert a claim for adverse possession. Justice B.N Olao quoted with approval the case of **MWINGI HAMISI ALI VS ATTORNEY GENERAL & ANOTHER** it was held,

“Adverse possession does not apply where possession is by consent and in a Court of law, sympathy takes a second stand as the Court is governed by statutes.

We submit that the burden is on the person claiming to be entitled to the land by adverse possession to prove not just the period but also that his possession was without the permission of the owner. In this case, the Plaintiffs have failed to discharge that duty. In fact from their Affidavits attached to their “Amended Originating Summons” which Affidavits were sworn on 19th March, 2018 the same date as that in their supporting Affidavits for the Notice of Motion dated 19th March, 2018; both Plaintiffs admit at paragraphs 6 and 8 respectively that their occupation was **with full consent** of the Defendant.

Your Lordship, we submit that the Defendant was never dispossessed of his land. It was his testimony that none of the Plaintiffs live on the land, that they cultivate and go home, it is therefore quite apparent that the Plaintiffs did not prove that the Defendant ever lost his rights to the 2 acres of the suitland by being dispossessed to entitle them to these 2 acres by way of adverse possession.

In conclusion, we urge the Honourable Court to find that the Plaintiffs have failed to establish **open, peaceful, exclusive and uninterrupted possession** of 2 acres of the suitland for a period of more than 12 years. The suit should therefore be dismissed with costs to the Defendant.

That is all.

DATED AT EMBU THISDAY OF..... 2018

.....

JOE KATHUNGU & CO.

ADVOCATES FOR THE DEFENDANT

26. In terms of the requirements of Order 21 Rule 4 of the Civil Procedure Rules, I frame the issue for determination as if or if not, upon consideration of the totality of the evidence proffered by the parties, the plaintiffs are entitled to be registered as proprietors of two acres of land out of Land Parcel No. KARINGANI/NDAGANI/294 through the doctrine of adverse possession. The plaintiffs claim that they had been in quiet, continuous and uninterrupted occupation of the land they claim for a period exceeding 12 years. The defendant maintains that the plaintiffs and those through whom they stake a claim of ownership through the doctrine of adverse possession occupied the portions of land they are claiming with his permission and therefore the plaintiffs cannot be declared proprietors of the land through the doctrine of adverse possession.

27. I have carefully considered the parties' pleadings, the oral evidence they have tendered and the submissions they have filed to buttress their diametrically incongruent assertions.

28. I do find that the plaintiffs oral evidence as tendered by PW1, PW2 and PW3 is riddled with a litany of contradictions. PW1 admits that Meru HCCC No. 127 of 1996 (OS) filed by his grandmother and the original 2nd plaintiff, the present 2nd plaintiff's mother, was dismissed for want of prosecution. He does not explain why the plaintiffs in that case never applied to court for the said dismissal to be reviewed. The court is unable to know if they did so and if their application was dismissed or not.

29. PW2 claims that he is staking his claim to the suit land because his mother had occupied and cultivated the land for over 40 years. Then incredulously he stated in his oral evidence that during those 40 years she left the land to be married. He says that she left to get married in 1968 and only returned in 1999. That was a hiatus of 33 years which, even if his mother had in the first place not occupied the suit land with the consent of the defendant, constituted a veritable interruption. I agree with the evidence of DW1 and DW2 that PW2's mother Agnes Mwimbi, had never cultivated or occupied the suit land. I find the evidence of DW1 and DW2 that both PW1 and PW2, the plaintiffs, had been allowed to cultivate portions of the suit land by the defendant.

30. The narration of the facts and the casting of the evidence proffered by PW1, PW2 and PW3 are well set out in the apposite paragraphs in the earlier part of this judgment and the many inconsistencies contained in that evidence have been flagged out. There is no need to repeat them.

31. On three separate occasions, the plaintiffs have claimed 3 different acreages of land. In Meru HCCC No. 6 of 2006, they were claiming 3 acres. In this suit, in their Originating Summons dated 13th July, 2009, they are claiming 2 acres. Yet in their application dated 19th March, 2018, nine years after this suit was filed, they sought to claim five acres. This application was dismissed by this court on 21st May, 2018. I opine that the plaintiffs have engaged themselves on a veritable fishing expedition.

32. Ownership by adverse possession, if successful, deprives the original owner of the suit land. It must be proved. Mere allegations cannot suffice. Occupation for whatever period of time, even for 50 years or even longer, does not suffice to entitle claimants to ownership of the apposite land when the claimants and those they may be claiming through entered the suit land with the consent and permission of the owner of the land.

33. I unequivocally find that the plaintiffs and the deceased persons through whom they purport to stake their claims over the suit land have cultivated or occupied the suit land through the permission of the defendant. In other words, they have all along been the licensees of the defendant.

34. The defendant proffered the case of Wangare Waithanje and 2 others versus Thathi Francis Muruariva – Embu ELC Case No. 244 of 2014 (OS) as an authority for their assertion that adverse possession must be proved through cogent evidence. In that case, the plaintiffs proved their case. In this case, they have not.

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

(a) Question 1 – The plaintiffs may have been cultivating and thus occupying the portions of land for over 12 years but this has been with the permission of the defendant. A licensee's occupation for whatever period of time cannot be a basis for a claim of ownership of land through the doctrine of adverse possession.

(b) The plaintiffs possession of the portions of land they claim is not adverse to the defendant.

(c) The plaintiffs are not entitled to a declaration that they own the portions of land they claim.

(d) Costs shall be paid to the defendant by the plaintiffs.

36. In the circumstances, this suit is dismissed.

37. Costs shall follow the event and as already stated are awarded to the defendant.

38. It is so ordered.

Delivered in open Court at Chuka this 14th day of November, 2018 in the presence of :

CA: Ndegwa

Mark Muriithi h/b Kathungu for defendant

Martin Mugambi – 1st plaintiff - present

P.M. NJOROGE

JUDGE