



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 03 OF 2018

ASHFORD KAUGI MBIUKI.....1ST PLAINTIFF

BRIDGET GEORGE MBIUKI alias BRIDGET IGOJI GEORGE...2ND PLAINTIFF

GILBERT KINYUA MBIUKI.....3RD PLAINTIFF

WILFRED KAARIA MBIUKI.....4TH PLAINTIFF

FRANKLIN MUGAMBI MBIUKI.....5TH PLAINTIFF

VERSUS

JULIUS MUNGATHIA.....1ST DEFENDANT

GEORGE WAMAE MWANIKI.....2ND DEFENDANT

JUDGMENT

1. This suit was brought to court by way of Originating Summons. The summons read as follows:

ORIGINATING SUMMONS

(Section 38 of the Limitation of Actions Act and Order 37 of the Civil Procedure Rules).

LET JULIUS MUNGATHIA and GEORGE WAMAE MWANIKI of Tharaka Nithi County within 15 days of service of this summons which is issued on the application of Ashford Kaugi Mbiuki, Bridget George Mbiuki, Gilbert Kinyua Mbiuki, Wilfred Kaaria Mbiuki and Franklin Mugambi Mbiuki who claim to have become entitled to land parcel No. Kiara/E. Magutuni/2048 by adverse possession for the determination of the following questions;

1. Whether the plaintiffs have acquired title to land parcel No. Kiara/E. Magutuni/2048 by adverse possession?
2. Ought the 2nd defendant's title to land parcel No. Kiara/E. Magutuni/20148 be cancelled?
3. Should title to land parcel No. Kiara/E. Magutuni/2048 be registered in the names of the plaintiffs of (sic) any of them?
4. Should the executive officer of this court be authorized and empowered to sign the necessary documents for transfer of land parcel No. Kiara/E. Magutuni/20148 to the plaintiffs or any of them?
5. What is the order as to costs?

DATED AT MERU THIS 16TH DAY OF AUGUST, 2013

GATARI RINGERA & COMPANY

ADVOCATES FOR THE PLAINTIFF

2. PW1, Ashford Kaugi Mbiuki, asked the court to adopt his witness statements dated **16th August, and 26th April, 2017** as his evidence in

this suit. He, however, told the court that the latter witness statement dated **26th April, 2017** takes precedence over the one dated **16th August, 2013**. The statement dated 26th April, 2017 reads as follows:

STATEMENT OF ASHFORD KAUGI MBIUKI

I am one of the plaintiffs herein. The parcel of land was previously registered in the names of the 1st defendant.

The 1st defendant has never lived on the suit land. He lives in Mikinduri. He was born and has lived in Mikinduri.

Our father bought the suit land from the defendant in 1992 and he took possession immediately. Our father was cultivating the parcel of land from the time he bought it.

He obtained the land while he was still living in Tigania. The 1st defendant has never cultivated the land neither did he fence it. He never did any developments on the suit land.

Our mother Bridget Mbiuki has been cultivating the parcel of land. She has been doing subsistence farming on the land. She has planted bananas stems, mango trees, muringa, and avocado. There is no building on site.

The defendant has cut trees, 41 trees.

.....

ASHFORD KAUGI MBIUKI

DATED AT MERU THIS 26TH DAY OF APRIL, 2017

3. During cross-examination, PW1 told the court that his family entered the land in 1992 but it had no structures on the land. He also told the court that although the original number of the suit land was 680, he did not know its new number. He also told the court that he had no evidence to prove his family's cultivation of the suit land. He told the court that he had cautioned the land but then withdrew Chuka Case No. 34 of 2014. He also told the court that there was another case at the tribunal, without giving details. He told the court that he could not remember if or if not there had been another suit, Chuka SPM No. 16 of 2011 filed by the plaintiffs against the defendants touching on the said subject matter. Later on, he denied filing that case at all. A minute later, he confirmed that there was such case. He said that he did not know what had happened to the case and said that their advocate could have withdrawn the case. A minute later he changed his narrative and said the case had been withdrawn by consent and that the plaintiff's paid Kshs.35,000/= as costs.

4. PW1 told the court that he was aware that the 2nd defendant had a title. He denied that his family had prevented the 2nd defendant from fencing the suit land. He also denied knowledge that the 2nd defendant's fence had been pulled down. He also said that he had not prevented the 2nd defendant from entering the suit land.

5. During cross-examination he said that he only came to know the 1st defendant in 1992 when he went to the suit land to sell it. He also told the court that the 2nd defendant had gone to the suit land in 1992 and that he cut trees. He told the court that he informed the chief and the OCS. He did not say what action they took. He, however, concluded by saying that the 2nd defendant was chased away by neighbours.

6. PW2, Bridget George Mbiuki, asked the court to adopt her witness statement dated 26th April, 2017 as her evidence in this suit. The statement reads as follows:

STATEMENT OF BRIDGET GEORGE MBIUKI alias BRIDGET IGOJI GEORGE

The suit land was registered in the name of the 1st defendant. My husband bought the parcel of land in 1992. We immediately began cultivating the land from 1992 to date.

I have been in continuous cultivation of the parcel since then. Over the years I have planted maize, beans and peas. I have also planted avocado trees, nappier grass, banana stems, mango trees and muringa trees. There is no building on site.

My husband fenced the parcel of land in 2011. The defendant has cut trees and we reported the incident at Magutuni police station.

We have been in open continuous and uninterrupted occupation and cultivation of the suit land.

.....

BRIDGET GEORGE MBIUKI ALIAS BRIGDET IGOJI GEORGE

DATED AT MERU THIS 26TH DAY OF APRIL, 2017

7. PW2, testified that Julius Mungathia, the 1st defendant and George Wawae Mwaniki, the 2nd defendant had never lived on the suit land. During cross examination she told the court that she and her children had five houses on the suit land. She also said that she had cows in the suit land. Her evidence in this respect is in veritable contradistinction from PW1's evidence that the family had not put up any structures on the suit land. PW2 also told the court that she had no photographic evidence to show that she and her family lived on the suit land.

8. PW3, Gilbert Kinyua Mbiuki, told the court that the 2nd plaintiff was his brother, the 2nd plaintiff was his mother, the 4th and 5th plaintiffs were also his brothers and that he was the 3rd plaintiff. He said that the evidence of his mother (PW2) and that of his brother (PW1) reflected his position in this suit.

9. PW3 asked the court to adopt his witness statement dated 26th April, 2017 as his evidence in this suit. The statement reads as follows:

STATEMENT OF GILBERT KINYUA MBIUKI

I am one of the plaintiff's herein. I and my family have been in occupation of the suit land since 1992.

Our father bought the suit land from the defendant in 1992 and he took possession immediately. We have been in occupation since then. We have been in open, exclusive and continuous possession of the parcel of land for more than 12 years.

We have developed the parcel of land. We have planted indigenous trees, avocado and muringa trees. We farm and keep cattle on the suit land.

The first defendant sold the parcel of land to the 2nd defendant and the 2nd defendant is trying to gain entry to the suit land.

.....

GILBERT KINYUAMBIUKI

DATED AT MERU THIS 26TH DAY OF APRIL, 2017

10. PW3 told the court that his family got the land from Julius Mungathia, the 1st defendant, who had sold the land to his father. He told the court that the 1st defendant lives at Mikinduri and the 2nd defendant stays in Tanzania, although in 2010 he lived at Chogoria. He told the court that the plaintiffs wanted the land to be registered in their names because they had lived on it for over 12 years.

11. During, cross-examination PW3 told the court that the family had no house on the suit land. The court notes that PW2, his mother, had testified that her family had 5 houses on the suit land. He admitted that he could not produce an agreement showing that the 1st defendant had sold land to his father. Asked why, if the land had indeed been sold to his father by the 1st defendant, why then was it that the 1st defendant had gone to tell his mother that the suit land had been sold to the 2nd defendant, he was evasive and eventually said that he did not have an answer. He also admitted that he had no evidence that his family cultivated the suit land. During re-examination, PW3 told the court that his family's land shared a boundary with the suit land.

12. DW1, Justus Mungathia asked the court to adopt his witness statement dated 26th April, 2017 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT

I, JOHN MUNGATHIA OF C/O P. O. Box 2387-60200 Meru wish to state as follows:

That I am the 1st defendant herein in this matter and the plaintiff are children and wife of my cousin.

That he 2nd defendant is the wife of my cousin one George Mbiuki. That I and my brother were born in the family of M'Aruburuki.

That the suit land was initially owned by our grandfather who had two sons, my father and the father to George Mbiuki.

That upon demise of my grandfather my father migrated from Magutuni Meru South to Tigania Meru North sometimes in 1950's.

That we left the family of his brother in Meru South Magutuni and that of George Mbiuki who had not married the 2nd plaintiff then.

That my cousin George Mbiuki looked for me in 1996 so that he could give me our share of the land which was an ancestral land and he caused sub-division and subsequent transfer to the same.

That I got registered as the owner of the land Kiera/E. Magutuni/2048 on 29th October, 1996 with my cousin George Mbiuki taking the other portion.

That upon transfer of the parcel of land the family of my cousin was still in occupation and use of the land, therefore notified them

that I have sold the land to the 2nd defendant and sometimes on 10th December, 2010, I entered to the sale of land agreement with George Wamae Mwaniki for the sale of the suit land.

That I obtained land control board consent, and we carried out transfer where I transferred the same to the 2nd defendant for value as a purchaser.

That the 1st – 5th plaintiff's had sued me in the Chuka Civil Case No. 16 of 2011 and withdrew the matter with cost. Same was awarded to me at certificate of cost at Kshs.35,725 and a decree issued on seeking a claim for land that they now have cunningly filed another claim before the court seeking adverse possession.

That the claim by the plaintiff against me is of no cause of action thus the same ought to be dismissed.

That is all I wish to state.

.....

JOHN MUNGATHIA

DATED AT MERU 26TH THIS DAY OF APRIL, 2017

13. During cross-examination, DW1's evidence as averred in his witness statement was not controverted. He told the court that after he sold the suit land to George Wamae Mwaniki, DW2, he informed the plaintiffs but they did not allow DW2, to put up a house on his land. Earlier on, DW1 had produced as an exhibit an agreement dated 10th December, 2010 that formed the basis for his transferring the suit land to DW2.

14. I note that in the pleadings DW1 is variously referred to as John Mungathia, Justus Mungathia and Julius Mungathia. As the parties have not raised any issues regarding this matter, the court will assume that all these names refer to DW1. The agreement between DW1 and DW2 dated 10th December, 2010 refers to DW1 as Johana M'Cokera Muramba alias Justus Mungathia. Nothing more will be said about the multiplicity of names by which DW1 is called.

15. DW2, George Wamae Mwaniki, the 2nd defendant, asked the court to adopt his witness statement dated 26th April, 2017 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT

I, GEORGE WAMAE MWANIKI C/O P. O. BOX 2387-60200 Meru wish to state as follows:

1. That sometimes on 10th December, 2010 I entered into sale of land agreement with the 1st defendant who was the registered owner then.
2. That I carried out official search of the suit land Kiera/E.Magutuni/2018 which revealed that the 1st defendant was the registered owner of the parcel of land.
3. That the terms of agreement was that the transfer was to be effected upon successful clearance of the payment of the consideration of Kshs.700,000/=.
4. That the 1st defendant obtained Land Control Board Consent for purposes of transfer and we prepared the transfer forms and the land was successfully transferred in my name and a certificate of title issued on 28th December, 2010.
5. That the 1st defendant had informed me that the 1st to 3rd defendants who were children of his cousin Bridget George Mbiuki were in occupation of the suit land but illegally, therefore the agreement was the 1st defendant was to give a vacant possession on or before 31st March, 2011.
6. That I tried to fence and clear land so that I could develop the same that (sic) the plaintiff violently ejected me out of the suit land and they have been cutting down trees.
7. That the claim by the plaintiff is that they don't have good cause of action hence ought to be dismissed with costs.
8. That is all I wish to state.

GEORGE WAMAE MWANIKI.....

DATED AT MERU 26TH THIS DAY OF APRIL, 2017

16. DW2 told the court that he works in the medical sector and he presently works in Dar-es-Salaam, Tanzania.

17. The propriety of the evidence of DW2 was not impeached during cross-examination.

18. DW3, Dunstan Munene Murithi, told the court, that he was a businessman at Chogoria. He asked the court to adopt his witness statement dated 26th April, 2017 as his evidence in this suit. The statement reads as follows:

WITNESS STATEMENT

I, DUNSTAN MUNENE MURITHI OF C/O P. O. BOX 2387-60200 MERU wish to state as follows:

That I am a witness to the sale of land agreement made between the 1st defendant and 2nd defendant over a sale of land agreement in respect of Land Registration No. KIERA/E.MAGUTUNI/2048 whereas upon search the owner of the land then was the vendor one Julius Mungathia.

The agreement was drawn and attested by the firm of I. C. MUGO & CO. ADVOCATES over the sale of land, therefore upon taking possession of the sale of land (sic) the plaintiffs were violent and hostile towards us as we tried to cultivate and harvest the trees which they violently refused.

That is all I wish to state.

Sworn by the said Dunstan Munene Murithi at Meru this 26th of April, 2017

19. During cross-examination by the plaintiff's advocate, DW2 told the court that the suit land was not being occupied or cultivated when DW2 bought it. He added that when he and DW2 were fencing it, no one was using the land.

20. I find that the consistency of DW3's evidence when juxtaposed with his witness statement upheld the integrity of his evidence.

21. The parties filed written submissions.

22. The plaintiffs' written submissions are reproduced herebelow in exactly the form they were filed in court. No clerical or other mistakes, if there are any, have been corrected. No alterations whatsoever have been made to them.

The submissions state as follows:

PLAINTIFF'S SUBMISSIONS

ON PLEADINGS

Before you my lord is an action brought by the plaintiffs by way of an Originating Summons dated 16.8.2013 seeking a determination of five questions to wit:-

1. Whether the plaintiffs have acquired title to land parcel No. Kiare/E. Magutuni/2048 by adverse possession?
2. Ought the 2nd defendant's title to land parcel No. Kiare/E. Magutuni/2048 be cancelled?
3. Should title to land parcel No. Kiare/E.Magutuni/2048 be registered in the names of the plaintiff of any of them?
4. Should the executive officer of this court be authorized and empowered to sign the necessary documents for transfer of land parcel No. Kiare/E. Magutuni/2048 to the plaintiffs or any of them?
5. What is the order as to costs?

ON THE EVIDENCE TENDERED AND THE LAW APPLICABLE

Your lordship the plaintiffs' evidence brought out the following salient issues in the determination of this suit;

- That the plaintiff' father had bought parcel No. Kiare/E. Magutuni/2048 from the 1st defendant in 1992 and the plaintiff took possession by way of cultivation of the suit land.
- That the plaintiffs have been cultivating the land since that time to date.
- That the 1st defendant does not live on the land but at Mikinduri – Meru County. The land is in Tharaka Nithi County.
- That the 2nd defendant has never taken possession of the land since he purchased the same from the 1st defendant in 2010.

- That the plaintiff's home is adjacent to the land and they cultivate it.
- That the 2nd defendant having acquired registration of the same on 28.12.2010 has not to this day dispossessed the plaintiff s and lives in Tanzania.
- The plaintiffs claim my lord is that of adverse possession. It is their case that since 1992 when they began to cultivate the land and grow food crops and trees, their occupation has been continuous and uninterrupted since 1992 to date a period running to 26 years now.

SECTION 38(1) OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA provide as follows:

“where a person claims to have become entitled by adverse possession on to land registered under any of the acts cited in section 37 or land comprised in a lease registered under any of those acts, we 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 he proprietor of the land”.

The plaintiffs are properly before you.

They have demonstrated that they are in occupation of the land and for a continuous period of 26 years. In order to succeed in a claim for adverse possession the plaintiffs must demonstrate that they have been in occupation of the land for a period running to 12 years. This the plaintiff have done.

My lord, it does not matter whether the title changed hands what is important is that the plaintiffs' occupation was not interrupted. The Court of Appeal No. 73 of 2015 case of **GRACE KAMENE M'BECERE – VERSUS – JOYCE RIGIRI W/O DAVID MBOGORI & another** is instructive on this point where the court found the appellant to be in adverse possession despite changes of ownership. It does not disturb the running of time. (copy annexed).

The defendants stated that they do not live on the land. One lives at Meru County and the other in Tanzania. The 2nd defendant who is the registered owner did not cloth his title with possession, having failed to do that he therefore holds the title in trust for the plaintiffs.

In **GRACE KAMENE Supra** it was held;

“Time which has begun to run under this act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owned takes legal proceedings or makes an effective entry into the land.....that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry or sue for the recovery of land”.

Similarly, in the case of **KIMANI RUCHINE – VERSU – SWIFT RUTHERFORD & CO. LTD (1980) eKLR** court held that to succeed in a claim of adverse possession:

“The plaintiffs have to prove that they have used this land which they claim, as of right; nec vi, nec clam, nec precario.....so the plaintiffs must show that the company had the knowledge (or means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration”. (copy enclosed)

CONCLUSION

My lord, cause the transfer of the land to the plaintiffs and in default the Deputy Registrar of this court to so execute all the transfer documents in favour of the plaintiffs, we so pray. We ask for costs.

DATED AT MERU THIS 28TH DAY OF OCTOBER, 2018

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For; M/S MUIA MWANZIA & CO.

ADVOCATES: FOR THE PLAINTIFFS

23. The plaintiffs' advocate proffered the following legal authorities:

- a) Grace Kamene M'Berece (Appellant) AND Joyce Rigiri & Another (Respondents) – Court of Appeal No. 73 of 2015 at Nyeri – In this case the court overturned the decision of the High Court that had denied the appellant ownership of land through the doctrine of adverse possession. It is a good authority that where adverse possession is proved, the claimant should be registered owner of the suit land.

b) Daniel Kimani Ruchine & Others (plaintiffs) versus Swift, Rutherford Co. Ltd & Another (Defendant) – Nairobi High Court Civil Case No. 1401 of 1971 [1977] eKLR. This case is a good authority for the principle that adverse possession must be proved by way of cogent evidence.

24. The defendants' written submissions are reproduced herebelow in exactly the form they were filed in court. No clerical or other mistakes, if there are any, have been corrected. No alterations whatsoever have been made to them.

The submissions state as follows:

DEFENDANT'S WRITTEN SUBMISSIONS

Your Lordship, the plaintiff in this case filed a case of adverse possession against the defendant's parcel of land No. The defendant on the other hand has opposed the claim and indeed filed a replying affidavit to that effect. The defendant denied that the plaintiffs were in possession and occupation of the land, infact they wondered why their father though alive was not a party to this case as a plaintiff as well.

The 2nd defendant adopted his statement as his evidence in court. He testified that the 1st defendant sold the said land in question to him, they drew an agreement for sale of contract and he proceeded to fence the whole of the land with poles and barbed wire. That during the fencing exercise there was no one in the land and it was not cultivated or developed. The 2nd defendant was indeed shocked to find out that the plaintiffs had sworn affidavits saying that they had extensively developed the land, whereas the same has never been inhabited by any party.

In deed the court record shall bear witness as the plaintiff's witnesses contradicted their testimony on occupation and development. The PW2 testified how she had extensively developed the land by building four houses on the land and had kept cattle and other animals. On the contrary, PW3, testified that the mother, PW2, had not built any house on the land. PW3 further told the court that the defendants went to see the mother when DW1 was selling land to DW2.

The plaintiffs did not show any evidence of the occupation of land, whether by calling any independent witness as their occupation was highly contested. DW1 testified that he had been given this land by the plaintiff's father who was still alive but who was not a party to this suit. He wondered why PW2 did not oppose the sale of the land when he took DW2 to her to confirm that no one was living or utilizing the land and that the same belonged to the plaintiff.

The plaintiff further claimed that their father had bought land from DW1 but did not produce any evidence to support their claim neither did they bring their father to court to support this claim.

The plaintiffs later destroyed the poles and barbed wire after DW2 fenced and have since illegally taken possession of the land.

Prior to the filing of this case, the plaintiffs had filed Chuka PMCC No. 16 of 2011, same parties and the same subject matter. This smatter was raising the issue that the plaintiffs' father had bought land from DW1. Later on this matter was withdrawn by the plaintiffs and soon thereafter they filed this case.

It is without any doubt your lordship that the plaintiffs are merely forum shopping for orders and they have no cause of action against the defendants. They have also not proved their case on a balance of probabilities as their evidence was contradictory both in examination in chief and during cross examination.

On the other hand DW1 clearly told court that the land was previously inhabited by the plaintiffs until when their father called him for his share of the land as the same was family land. DW1 testified that the plaintiffs gave him vacant possession of the Land once their father gave him the land. They removed all their things from the land and up to when DW2 was buying it was uninhabited by nobody. When DW2 fenced that is when the plaintiffs grew interest in the land. Clearly, the plaintiffs claim is misplaced, there is no evidence no record to show that they have been in occupation of the land for a period of 12 years as provided by law.

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 essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor 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 eh 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 Action 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 n 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 afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes 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”.

Sections 37 and 38 of the Limitation of Actions Act stipulates 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 provide 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 n a lease registered under any of those Acts, 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.”

The question that begs is has the plaintiffs proved on a balance of probabilities that hey indeed complied with the above stated law. The plaintiffs contradictory testimony before court affirms that they did not have any evidence that indeed they live on the suit property or that they has been inoccupation and exclusive possession.

Your Lordship, clearly the plaintiffs are litigants who are out to abuse the court process in order to deprive the defendants their hard earned property. There is no evidence of adverse possession and their claim is not supported by any evidence to warrant the orders sought and we urge this court to dismiss this suit with costs to the defendants.

DATED AT MERU THIS 30TH THIS DAY OF OCTOBER, 2018

FOR: CHARLES KARIUKI 7 KIOME ASSOCIATES

ADVOCATES FOR THE DEFENDANTS

25. I have considered the pleadings, oral evidence and the submissions proffered by the parties to buttress their veritably diametrically incongruent assertions. I have also considered the legal authorities proffered by the plaintiff which are good authorities in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. Regarding submissions, I opine that they cannot introduce new evidence. Such new evidence must be rejected by courts. Courts must rely on cogent evidence contained in apposite pleadings whose veracity is upheld by the consistency and integrity of the oral evidence proffered by the parties and their witnesses.

26. I frame the issues for determination in this suit as:

a) Have the plaintiffs upon consideration of the totality of the evidence adduced by the parties proved on a balance of probabilities that they are entitled to be declared owners of the suit land through the doctrine of adverse possession and hence entitled to be registered as proprietors of the suit land in lieu of the 2nd defendant?

b) Who will pay costs?

27. In determining if adverse possession exists the court must establish the following things:

(1) Existence of the ingredients which eventually concretize determination that adverse possession exists. These include open occupation without interruption by the registered owner and without his consent.

(2) A point in time from which the period of occupation for twelve years, which is the period necessary for adverse possession to accrue, can start to be counted.

28. In determining if or if not declaration of the existence of adverse possession is tenable, cogent evidence must be proffered by the claimant or claimants. As a declaration that a claimant is entitled to adverse possession has the consequence that the registered owner of the suit land is deprived of his property, the integrity of the claimant’s evidence must be unimpeachable. The claimant must tell the court the truth. Where a claimant is not truthful, a court cannot find that such a claimant is entitled to be declared owner of the suit land through the doctrine of adverse possession.

29. In their affidavit in support of this originating summons, which affidavit was sworn by Ashford Kaugi Mbiuki, the plaintiffs aver that the suit land was sold to their deceased father by Julius Mungathia, the 1st defendant in 1992. It is, however, pellucid that the 1st defendant became the registered owner of the suit land on 29th October, 1996. Ipso facto, the 1st defendant could not have sold the land to the 1st plaintiff’s father 4 years before he became its proprietor. On a balance of probabilities, I find the plaintiffs’ claim improbable.

30. Their mother, PW2, told the court that her family had five houses on the suit land. This claim was debunked by the evidence of her sons PW1 and PW3 who said that they only cultivated the land. This makes it difficult for this court to establish the veracity of any other claims the plaintiffs make.

31. The evidence of DW1, DW2 and DW3 was in all material respects congruent with the assertions they made in their witness statements. The 1st defendant's claim that this was ancestral land is not controverted. It is his evidence that his grandfather had two sons, his father and the father of George Mbiuki, the husband of the 2nd plaintiff and the father of the other plaintiffs. He avers that his cousin George Mbiuki, looked for him in 1996 and told him that he wanted to give him his share of the family's common ancestral land. He caused the land to be sub-divided and transferred the suit land to him. His cousin, George Mbiuki, retained the other portion which is occupied by the plaintiffs.

32. In his averment in the witness statement, he states that upon the demise of his grandfather, his father migrated from Magutuni, Meru South to Tigania, Meru North in the 1950s. This explains why the 1st, 3rd, 4th and 5th plaintiffs' father had to look for him to give him his share of the ancestral land.

33. It is not controverted that the plaintiffs had sued the 1st defendant in Chuka Civil Case No. 16 of 2011. The plaintiffs withdrew the case and were condemned to pay costs in the sum of Kshs.35,725/=. This case concerned the same subject matter. It is quite clear that the existence of this suit had interrupted the period within which adverse possession would accrue, even if the other ingredients were in existence, which I do not say they existed. This suit was filed in October, 2013, 2 years after closure of Chuka Civil Case NO. 11 of 2011. By whatever stretch of imagination, the 12 years period required for adverse possession to accrue had not been satisfied.

34. Mere longevity of alleged occupation is not enough to prove adverse possession. Even if this period exceeds fifty years, it cannot suffice if the said occupation was with the consent of the landowner. From 1996 when the father of the 1st, 3rd, 4th, 5th plaintiffs and the husband of the 2nd defendant gave the 1st defendant his share of ancestral land, the plaintiffs, if they were utilizing the suit land, which fact they failed to prove, were using it with the consent of the 1st defendant. Such period cannot count in computing the period necessary for adverse possession.

35. From 18th December, 2010, when the 2nd defendant became the registered owner of the suit land, the plaintiffs filed this case on 17th October, 2013. This was slightly less than three years after the 2nd defendant became registered owner of the suit land. Obviously, adverse possession cannot accrue against him.

36. It is clear to this court that the plaintiffs seek to reclaim ancestral land which was rightfully given to the 2nd defendant by his cousin, the husband of the 2nd plaintiff and the father of the other plaintiffs. I find that they are being veritably greedy in trying to use this case to exclusively retain ancestral land to the exclusion of one of the beneficiaries, the 1st defendant.

37. I find that the plaintiffs are not entitled to be declared owners of land parcel No. KIARE/E.MAGUTUNI/2048 through the doctrine of adverse possession.

38. I enter judgment for the defendants against the plaintiffs in the following terms:

- a) This suit is hereby dismissed.
- b) Costs shall follow the event and are awarded to the defendants.

39. Orders accordingly.

Delivered in open Court at Chuka this **19th day of December, 2018** in the presence of :

CA: Ndegwa

Miss Njenga present for the Plaintiff

Defendants and their advocate – Absent

P.M. NJORGE

JUDGE