



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 99 OF 2017

FORMERLY MERU HCC NO. 73 OF 2006

EMILIO MARANGU M'NDIIRI.....PLAINTIFF

VERSUS

ANJERO MUNENE MARINDI.....1ST DEFENDANT

LAWRENCE ANTONY KINYUA.....2ND DEFENDANT

FAITH N KINGA KABUCHA.....3RD DEFENDANT

ERICK GITONGA MBAKA.....4TH DEFENDANT

EVANGLINE MAKENA MITAMBO.....5TH DEFENDANT

JUDGMENT

1. This suit was filed as Meru HCCC No. 73 of 2006 (OS). It became ELC No. 99 of 2017 when the file was transferred to Chuka from Meru. A further amended Originating Summons was filed on 27th September, 2017. It reads as follows:

LET, ANJERO MUNENE MARINDI, LAWRENCE ANTONY KINYUA, and FAITH N KINGA KABUCHA, ERICK GITONGA MBAKA and EVANGELINE MAKENA MITAMBO of Magundu village, Karimba sub location, Mitheru Location, Meru South District within fifteen (15) days after service of this summons which is issued in the application of EMILIO MARANGU M'NDIRI who claims to have become entitled to the whole of land parcel No. Muthambi/Upper-Karimba/1279 and all parcels of land excised and/or emanating therefrom by operation of the Limitation of Actions Act, Cap, 22 Laws of Kenya and under the doctrine of adverse possession for the determination of the following questions:-

1. Whether the plaintiff has been in open continuous and exclusive possession of the whole of land parcel No. Muthambi/Upper-Karimba/1279 which has now been subdivided into L.R. Numbers Muthambi/Upper Karimba/1598, 1599, 1600 and 1601 and of which parcel No. 1600 has been subdivided further into land parcel numbers Muthambi/Upper Karimba/2028, 2019 and 2030 for over 12 years.

1a) Whether the 1st defendant had become a statutory trustee in favor of the plaintiff prior to the sub-division of the former L.R. Muthambi/Upper Karimba/1279 into 4 parcels and the subsequent transfer of 2 resultant parcels thereof to the 2nd and 3rd defendants and the further sub division of parcel No. 1600 by 2nd defendant to give rise to land parcel numbers Muthambi/Upper-Karimba/2028, 2019 and 2030 and transfer of 2 of these new parcels to the 4th and 5th defendants.

1b) Whether in his capacity as a statutory trustee, the 1st defendant had the legal capacity to deal with the suit land against the interest of the plaintiff without his consent.

1c) whether the plaintiff had acquired title to the former L.R. Muthambi/Upper Karimba/1279 and by extension to the resultant land parcel numbers Muthambi/Upper Karimba/1598, 1599, 1600 and 1601, 2018, 2019 and 2030 by operation of law under the doctrine of adverse possession.

2. Whether the plaintiff should be registered as the legal owner of the resultant land parcel numbers Muthambi/Upper Karimba/1598, 1599, 1600 and 1601, 2018, 2019 and 2030 in the place of the defendants in lieu of the original L.R. No. Muthambi/Upper Karimba/1279.

3. Whether the defendants should be ordered to transfer the resultant land parcel numbers L. R. No. Muthambi/Upper-Karimba/1598, 1599, 1600 and 1601, 2018, 2019 and 2030 in lieu of the original L.R. No. Muthambi/Upper Karimba/1279 to the plaintiff and in default the Executive Officer of this honourable Court should be empowered to sign all the requisite documents to effect transfer of the resultant parcels in lieu of L.R. No. Muthambi/Upper Karimba/1279 to the plaintiff and the said production of the original title deeds for these resultant parcels should be dispensed with for purposes of perfecting the said transfers.

3a) Whether any further orders should be issued for refund of consideration, if any, between the defendants inter se.

4. Whether the defendants should be ordered to pay the costs of this suit jointly and severally to the plaintiff.

AMENDED AT MERU THIS 13TH DAY OF MARCH, 2007

FURTHER AMENDED at MERU this 27th day of SEPTEMBER, 2017

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MWENDA MWARANIA, AKWALU & CO.

ADVOCATES FOR THE PLAINTIFF

2. The further amended Originating Summons was supported by the plaintiff's affidavit sworn on 27th September, 2017 which states as follows:

I, EMILIO MARANGU M'NDIIRI OF P. O. Box 220 Chuka do hereby make oath and state as follows:-

1. That I am the plaintiff herein.
2. That until 11.8.2006 the then L.R. No. Muthambi/Upper Karimba/1279 was registered in the name of the 1st defendant. (Annexed and marked 'EMM 1' is a copy of a certified copy of the register).
3. That on the said 11.8.2006 the 1st defendant in an attempt to defeat my interest in the land subdivided it into 4 parcels being L. R. No.s Muthambi/Upper Karimba/1598, 1599, 1600 and 1601 as evident from annexure 'EM 1' above.
4. That on 18.8.2006 I filed the current suit and the 1st defendant, who was then the sole defendant, was served with the original summons among the other documents on 11.9.2006 as evident from the annexed copy of affidavit of service sworn and filed on 17.10.2006 a copy of which is annexed hereto and marked 'EMM2'
5. That immediately after being served the 1st defendant hastily transferred L.R. No. Muthambi/Upper Karimba/1598 to the 3rd defendant and number L.R. No. Muthambi/Upper Karimba/1600 to the 2nd defendant on 14.9.2006 with him being left with land parcel numbers L.R. No. Muthambi/Upper Karimba/1599 and 1601. (Annexed hereto and marked 'EMM 3a', 'b', 'c', and 'd' are copies of the registers in respect of L.R. No. Muthambi/Upper Karimba/1598, 1599, 1600 and 1601 respectively).
6. That subsequently on 2.2.2017 the 2nd defendant further subdivided the suit parcel No. 1600 into 3 parcels being L. R. No. Muthambi/Upper Karimba/2028, 2029 and 2013 of which he transferred parcel No. 2028 to the 4th defendant and No.2019 to the 5th defendant with him retaining parcel No. 2030. (Annexed and marked 'EMM 4a', 'b' and 'd' are copies of the register in respect of parcel No. 1600 and official searches in respect of the said parcel numbers 2018, 2019 and 2013 respectively).
7. That I have been in open, continuous and exclusive possession of the suit land since my birth long before the registration of the parent parcel of land L.R. No. Muthambi/Upper Karimba/1279.
8. That I have been in open, continuous and exclusive possession of the said land for over 12 years now since its registration until now and I have extensively developed the parent parcel of land.
9. That my possession of the parent parcel of land has been adverse to the title of the registered proprietors as I have not been paying any rent therefor.
10. That I have become entitled to be registered as the legal proprietor of the parent parcel of land by adverse possession and I urge this honourable court to order that I be registered as the legal proprietor of the resultant titles.
11. That I further urge the honourable court to empower its Executive Officer to sign all relevant documents to effect the registration of the suit lands in my name, in the event that the defendants refuse to sign.
12. That the facts stated hereinabove are true to the best of my knowledge, information and belief.

3. In this affidavit, the plaintiff did not disclose that the impugned subdivision of the original suit land, that is L. R. NO.

MUTHAMBI/UPPER-KARIMBA/1279 was done after Hon Lady Justice Kasango, J, had on 9th July, 2009 dismissed an application for inhibitory and injunctive orders filed by the plaintiff and ordered as follows:

- a) That the Chamber Summons dated 2.8.2006 is struck out for being an abuse of the court process with costs thereof being awarded to all the defendants.
- b) The Chamber Summons dated 15th January, 2009 is dismissed with costs to all the defendants.
- c) That the interim orders issued on 19th January, 2009 by this court in this matter are hereby vacated.

4. It is noted that the inhibition placed against the original suit land L.R. No. MUTHAMBI/U-KARIMBA/1279 on 28th May, 1992 vide Meru HCCC No. 134 of 1992 was lifted on 12th July, 2016. It is pellucid that when the subdivisions were done, there were no legal procedural impediments.

5. In the interest of justice and in order to expedite hearing and determination of this suit, on 28th September, 2017 this court issued inhibition orders to be registered against L.R Nos. Muthambi/Upper-Karimba/1598, 1599, 1601, 2028, 2029 and 2030. This was to forestall the possibility of complications which would arise if parts of the original suit land were further sub divided.

6. Justice J. Anyara Emukure in his ruling in Meru HCCC 134 of 1992, condemned, the plaintiffs wife and son to pay costs for withdrawing the suit without proffering any reasons for so doing and thus unnecessarily burdening the plaintiff with the rigours of defending himself for 17 years at that time. Assuming that there were no other disputes involving the plaintiff and those claiming under him and the 2nd defendant, from 1992 to 2018, matters concerning the original suit land have been in the hallowed precincts of the judicial pipeline for twenty six years. Litigation must at one point in time come to an end. As the old adage proclaims, 'Justice delayed is justice denied'. Indeed Article 159 of the Constitution at paragraph 2 (d) has an unequivocal edict that; 'Justice shall not be delayed". I opine that justice has been delayed for too long a period in this matter.

7. The defendants who are plaintiffs in their counter-claim dated 4th August, 2018 pray for dismissal of this suit and for judgment against the plaintiff, who is the defendant in the counter-claim for:

- a) A declaration that the plaintiffs in counter-claim are the lawful proprietors of their respective parcels of land and an Order for eviction do issue against the defendant in the counter-claim EMILIO MARANGU M'NDIIRI from the resultant parcels of land to wit UPPER-KARIMBA/2028, 2029, 1600, 1601, 1598, 1599 & 1278.
- b) Costs of this suit be borne by the defendant in counter-claim.

8. PW1, the plaintiff, Emilio Marangu M'Ndiiri, asked the court to adopt his witness statement dated 22nd February, 2018 as his evidence in chief in this suit. The statement reads as follows:

PLAINTIFF'S STATEMENT

Further to the evidence I give in court on 31.1.2018, I wish to add to my evidence-in-chief as follows:-

After I replied to the demand notice by the 3rd defendant dated 27.7.2009 (P.Exh.6A) he kept quiet but when I was hospitalized for amputation he took a portion of the land I was using leaving me with the other.

Subsequently, the 3rd defendant sub-divided his parcel No. 1600 into 3 portions being numbers Muthambi/Upper-Karimba/2028, 2029 and 2030 whereby he transferred parcel No. 2028 to the 4th defendant and 2029 to the 5th defendant while he was left with parcel No. 2030. The Originating Summons herein was amended further to include these new owners. I will produce as exhibits the green card for parcel No. 1600 and search certificates for 2028, 2029 and 2030.

When this case started, I was using the whole of the original parcel No. 1279 measuring 1.276 Hectares (3.153 acres). At that time the 3rd defendant was not a party hereto. The only party was the original 1st defendant (now deceased) and represented by Erasto Njeru Munene, his son and legal representative. Both the 3rd defendant and the 2nd defendant were introduced herein vide the first amended Original Summons dated 13.3.2007 after the original 1st defendant sub divided the original parcel No. 1279 into parcel Nos. 1598, 1599, 1600 and 1601 whereby he transferred 1598 to the 2nd defendant and it is still intact and 1600 to the above mentioned 3rd defendant I have already produced the green card (sic) a search certificate for 1279 as P.Exh. 1A and 1B and also green card for 1600 was indicated herein as intended to be produced.

I will also produce search certificates for 1598 in the name of the 2nd defendant and 1599 and 1601 in the name of the late original 1st defendant as exhibits.

The original 1st defendant was served with the summons herein on 11.9.2006 and 3 days later, he transferred the said parcel Nos.1598 and 1600 to the 2nd and 3rd defendants respectively.

The original parcel No. 455 was first registered in the name of the late original 1st defendant on 24.9.90 by which time I was still in occupation of the land which originally was my ancestral land and I started using the portion of it that I am claiming in 1967 and which the

late original 1st defendant curved out of the main land and it was given parcel No. 1279. By the time of registration of the original parcel No. 455 I was in occupation. From the said date of registration, 12 years lapsed on 24.9.2002.

After that date of 24.9.2002 the original 1st defendant was by operation of law converted to a trustee with me as a beneficiary of the land I was occupying. As such he could not evict me. He has never attempted to evict me. Even the other defendants have never filed any suit to evict me to date; which would be time barred any way.

I pray that all the issues in the further amended Originating Summons dated 27.9.2017 be reserved in my favour.

That is all.

.....

EMILIO MARANGU M'NDIIRI

DATED AT MERU THIS 22ND DAY OF FEBRUARY, 2018

9. In his oral evidence, the plaintiff admitted that he had given the original 1st defendant, the present 1st defendant's father Land Parcel No. 465 after he had failed to repay a loan he had obtained from National Wide Finance Limited with the 1st defendant's land as collateral. He testified that the original parcel No. Muthambi/Upper-Karimba was subdivided into two portions to make parcel Nos. Muthambi/Upper-Karimba/1278 and 1279. He told the court that parcel No. 1278 measured 5 acres and was sold to the 3rd defendant. Parcel No. 1279 measured 3.15 acres.

10. PW1 told the court that parcel 1279 was subdivided secretly when he was in hospital. PW1, when giving his oral evidence on 31st January, 2018 he told the court that he continues to use the suit land but only a small portion of it. Regarding Meru HCCC No. 134 of 1992, PW2 was rather hesitant in accepting that he knew about it. He later on grudgingly admitted that it was brought against the original 1st defendant and himself by his wife and son. Later on he changed his story and admitted that "he and another person" were defendants. By and large, a conspectus of his evidence was that the defendants illegally and fraudulently had portions of the suit land transferred to them. He was, however, economical with the truth when he said that the parties in Meru HCCC No. 134 of 1992 had withdrawn the suit by consent of the parties. There is nothing that can be further from the truth. The plaintiffs therein autonomously withdrew the suit without offering any reasons and were condemned by the court to pay costs. At the tail end of his cross-examination PW1 admitted that he occupied less than ¼ acre of land, part of parcel 1601 which is now parcel 2028 registered in the name of Eric Mbaka.

11. PW1 produced the following exhibits:

- a) A copy of the Green Card for Parcel No. Muthambi/Upper –Karimba, 1279 the said land.
- b) A copy of the Green Card for parcel No. Muthambi/Upper-Karimba/455 whose subdivision spawned parcel No. Upper-Karimba/1279, the suit land.
- c) Search certificate for parcel Nos. Muthambi/Upper-Karimba/1278 and 1279.
- d) Two notices to vacate the suit land issued to the plaintiff and replies thereto.
- e) A copy of the green card for parcel no. Muthambi/Upper-Karimba/1600.
- f) Search certificate for parcel Nos. 1598, 1599, 1600, 1601, 2028, 2029 and 2030.

12. DW1, Erasto Njeru Munene, asked the court to adopt his witness statement dated 6th November, 2017 as his evidence in this suit. The statement reads as follows:

STATEMENT OF ERASTO NJERU MUNENE

I have substituted the 1st defendant.

I am in occupation of parcels No. Muthambi/Upper –Karimba/1599 & 1601.

These parcels are a result of subdivision of parcel No. Muthambi/Upper-Karimba/1279 which had been subdivided into 4 portions; Parcel No. Muthambi/Upper-Karimba/1598-1601.

My father got parcel No. Muthambi/Upper-Karimba/1279 from a sub division of the initial parcel No. Muthambi/Upper-Karimba/455.

He got parcel No. Muthambi/Upper-Karimba/455 from Emilio Marangu who gave him as compensation.

My father owned parcel Muthambi/Chamunga/6.

He gave the plaintiff the same to service loan.

They did an agreement with a rider that in case he was unable to pay the loan he would transfer his land parcel No. Muthambi/Upper-Karimba/455 the titles were not ready.

He was unable to pay the loan and chose to go as per the agreement ie transfer parcel No. Muthambi/Upper-Karimba/455 to my father.

Emilio Marangu occupies a small portion less than ¼ of 1600.

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ERASTO NJERU MUNENE

DATED AT MERU THJIS 6TH DAY OF NOVEMBER, 2017

13. During cross-examination, DW1 by and large stuck to his witness statement. He also asked the court to rely on his exhibits as contained in his list of documents dated 6th November, 2017. They are:-

1. Court order dated 12.7.2006
2. Ruling of court dated 25.7.2008
3. Green card over parcel No. Muthambi Upper-Karimba/1279
4. Green card over parcel No. Muthambi Upper-Karimba/1598
5. Green card over parcel No. Muthambi Upper-Karimba/1599
6. Green card over parcel No. Muthambi Upper-Karimba/1600
7. Green card over parcel No. Muthambi Upper-Karimba/1601
8. Agreement dated 22.3.1983
9. Court order dated 21.8.2009
10. Limited grant issued on 16.2.2015
11. Letter dated 18.7.91 to Nation Wide Finance Co. Ltd by the plaintiff
12. Letter dated 24.9.1986 by Nation Wide Finance Co. Ltd
13. Letter showing transfer dated 20.8.1987 by the land officer
14. Letter dated 3.8.1987
15. Letter dated 21.9.1986
16. Search certificate dated 3.5.2017 over parcel No. Muthambi Upper-Karimba/2028
17. Search certificate dated 3.5.2017 over parcel No. Muthambi Upper-Karimba/2029

14. DW2, Lawrence Anthony Kinyua, asked the court to adopt his witness statement dated **6th November, 2017** as his evidence in this suit. He also asked the court to use his replying affidavit dated **6th November, 2017**, which was a response to the amended Originating Summons as his further evidence in this suit. He asked the court to correct an error in his replying affidavit which gave the area of parcel No. Muthambi/Upper-Karimba/1600 as ¼ acres. He clarified that its size was 1 ¼ acres. He told the court that he occupies parcel Nos. Muthambi/Upper-Karimba/1599, 1600 and 1601. He told the court that the plaintiff occupies less than ¼ acre of parcel No. Muthambi/Upper-Karimba/1600.

15. DW2, during cross-examination, told the court that he was registered owner of the suit land when the inhibition inhibiting the suit land had been removed. He said that even though the suit was still in this court, there was no legal impediment to the land he had bought being transferred to him.

16. DW2's witness statement reads as follows:

STATEMENT OF LAWRENCE ANTONY KINYUA

The initial parcel of land was parcel No. Muthambi/Upper-Karimba/1279 belonging to Anjero Munene.

It was subdivision of parcel No. Muthambi/Upper-Karimba/455 which gave birth to 1279.

Parcel No. Muthambi/Upper-Karimba/455 belonged to Anjero Munene

I bought parcel No. Muthambi/Upper-Karimba 1600 from Anjero Munene. It is ¼ Acres.

I am in occupation of parcel No. Muthambi/Upper-Karimba/1600 and also cultivate 1601 belonging to Anjero Munene.

Faith Nkinga cultivates parcel No. Muthambi/Upper-Karimba/1598 to this day.

Emilio Marangu occupies my land No. Muthambi/Upper-Karimba/1600. He occupied about ¼ of my area.

Anjero Munene died in 2010. His son Eraso Njeru Munene is taking over these (sic) brief.

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LAWRENCE ANTONY KINYUA

DATED AT MERU THIS 6TH DAY OF NOVEMBER, 2017

17. DW 3, Faith Nkinga Kabucha, asked the court to adopt her statement dated **6th November, 2017** as her evidence in this suit. She also asked the court to consider her replying affidavit dated **6th November, 2017** as her answer to the amended Originating Summons. Her witness statement states as follows:

STATEMENT OF FAITH NKINGA KABUCHA

I have known Anjero Munene Marindi (the deceased) for a long time.

I have known him from childhood.

We are related – my father and the deceased were cousins.

I supported the deceased throughout the Civil Case Meru HCCC No. 134 of 1992.

I did that by financing him.

He decided to give me a piece of his land after the dispute was determined.

So that he subdivided parcel No. 1279 into 4 pieces.

I got 1598 and cultivated it to this day.

I took possession of the parcel in August, 2006, to date.

I cultivate exclusively. The plaintiff has not occupied my area.

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FAITH NKINGA KABUCHA

DATED AT MERU THIS 6TH DAY OF NOVEMBER, 2017

18. At the close of DW3’s oral evidence, Mr. Mwanzia, the defendant’s advocate, told the court that he and Mr. Mwarania, the Plaintiff’s counsel had agreed that the Replying Affidavit of Eric Gitonga Mbaka (4th defendant) and that one of Evangeline Makena Mitambo (5th defendant) both sworn on 6th November, 2017 be adopted as their evidence-in-chief in this suit. Mr. Mwarania confirmed this position. He also told the court that he had waived his right to cross-examine the two witnesses.

19. The parties’ advocates filed written submissions. The submissions are in the exact format they were filed by the parties’ advocates. No alterations whatsoever have been made.

20. The plaintiff's written submissions read as follows:

PLAINTIFF'S SUBMISSIONS

Your Lordship,

This a claim of the then land parcel No. Muthambi/Upper Karimba/1279 measuring 1.276 Hectares the equivalent of 3.15 Acres under the doctrine of adverse possession.

From the green card of the initial suit land (P.Exh.1A), the land came about as a result of sub-division of the original L. R. No. Muthambi/Upper Karrimba/455. The green card of the said No. 455 (P.Exh.2) confirms that fact.

From the evidence, it is clear that No. 455 originally belonged to the plaintiff but during the Adjudication process, he transferred the same to the original late 1st defendant, one Angelo Munene Marindi (deceased), so that in exchange the plaintiff would use the deceased's L. R. No. Muthambi/Chamunga/6 which already had a Title Deed as a collateral to secure a Bank loan. The understanding was that in the event that the plaintiff failed to repay the loan, he would forever forfeit his No. 455 to the deceased to replace his No. Chamunga/6.

All this while, the plaintiff was in possession, occupation and user of the whole of the said 455 measuring 3.30 Hectares the equivalent of 8.15 Acres.

Subsequently, the said L. R. No. 455 was registered on 26/9/1990 and a Title Deed issued on 16/11/90, as per entry Nos. 1 and 2 in the proprietorship section of the green card (P.Exh.2). According to the plaintiff and the 3rd defendant, Faith Nkinga Kabucha, the plaintiff and the deceased agreed to excise a portion measuring 5.0 Acres from No. 455 and sell it to the 3rd defendant who would in turn clear the Bank loan and have the title to the deceased's L. R. No. Chamunga/6 discharged and this they did. The portion sold to the 3rd defendant was parcel No. Muthambi/Upper Karimba/1278 measuring 2.024 Hectares the equivalent of 5.00 Acres (see P.Exh. 3A) thereby leaving the balance of 3.15 Acres comprised in parcel No. 1279 which is the original suit land herein.

Your Lordship, since the original transfer of 455 to the deceased was conditional and was to be re-transferred to the plaintiff upon full payment of the Bank loan and discharge of the deceased's L. R. No. Chamunga/6, the balance of 3.15 Acres comprised in parcel No. Muthambi/Upper Karimba/1279 was to be re-transferred to the plaintiff upon repayment of the Bank loan by the 3rd defendant upon being given 5.00 Acres from the original.

As it were, the plaintiff continued occupying the suit land measuring 3.15 Acres but no official transfer was done. Though the plaintiff was in occupation of the whole land prior to its registration and sub-division only to release parcel No. 1278 upon sub-division, we will limit our submissions to the period after the first registration date which was 24/9/90. Your Lordship, sub-division of the original parcel No. 455 did not interfere with the plaintiff's possession of the balance of 3.15 Acres comprised in No. 1279. As such on 24/9/2002, 12 years elapsed and by virtue of **section 37(a)** of the Limitation of Actions Act, Cap. 22 the registered owner automatically became a Trustee of the suit land with the plaintiff as the beneficiary.

As such any action by the registered owner against the interest of the beneficiary after 24/9/02 was unlawfully, null, void and of no legal effect. The registered owner could not pass to any other person any better title than he had. Therefore, by the time he came to sub-divide the land and transfer 2 portions therefrom to the 2nd and 3rd defendants in September, 2006, the deceased 1st defendant had no proprietary interest in the land capable of being transferred or otherwise dealt with against the interest of the plaintiff as *c'est qui trust*.

Your Lordship, interests acquired or in the process of being acquired in the nature of adverse possession are overriding affecting registered land though not noted in the register by dint of **section 30(f)** of the then Registered Land Act, Cap. 300 (now repealed) and the current **section 28(h)** of the current Land Registration Act, 2012. As such, neither the sub-division of the original parcel No. 455 of parcel No. 1279

affected the plaintiff's interest in the 3.15 Acres comprised in the then parcel No. 1279 and the period of limitation against the registered proprietor elapsed on 24/9/2002 as earlier submitted.

As from 25/9/2002, the registered owner who was the late 1st defendant (now deceased) became a trustee for the plaintiff. Any sub-divisions and/or transfers of the land thereafter were unlawful and fraudulent. All the other defendants (2nd – 5th) all bought parcels of land excised from the original 1279 while this case was actually going on. The 2nd and 3rd defendant had their respective parcel numbers 1600 and 1598 transferred to them on 14/9/06 while this suit was filed on 18/8/06 and the deceased 1st defendant served on 11/9/06 as per the affidavit of service sworn and filed on 17/10/06 which is also annexed to the affidavit in support of the further amended originating summons sworn and filed on 27/9/17 as "**EMM 2**". The 4th and 5th defendants got registered as owners of their parcel numbers 2028 and 2029 being excised from 1600 on 26/4/17 and 24/2/17 respectively.

Your Lordship, all the transfers were fraudulent by the registered owners against the plaintiff who is the beneficiary of the constructive statutory trust created under the said section 37(a) of the Limitation of Actions Act, Cap. 22 and whose interest in the land overrides any other interest under the said **section 28(h)** of the Land Registration Act, 2012.

Your Lordship, the issue now is whether the 2nd - 5th defendants title to land which was acquired unlawfully and contrary to the said **sections 37 (a)** of Cap 22 and **sections 30 (f)** of the repealed Cap. 300 or **section 28 (h)** of the current Land Registration Act, 2012 can be afforded the constitutional protection of their perceived right to property. The answer to this issue is found at **Article 40(6)** of the Constitution which clearly stipulates that:-

“The rights **(to property)** under this Article do not extend to any property that has been found to have been **unlawfully** acquired.”

(emphasis ours)

As such Your Lordship, upon your finding that the deceased 1st defendant’s absolute title to the land ceased on 24/9/02 and thereafter he held the land parcel No. 1279 in trust for the plaintiff under **section 37 (a)** of Cap. 22, we urge you to proceed to find that the plaintiff is entitled to the 3.15 Acres comprised in the original parcel No. 1279 and was so entitled from 25/9/02 and proceed to declare all the subsequent subdivisions and transfers of all the resultant parcels unlawful.

That being the case we urge Your Lordship to resolve all the 8 issues raised in the further amended Originating Summons dated 27/9/17 and filed in court on the same day in favour of the plaintiff and on issue No. 3a) we urge You to order that each of the 4 purchasers do pursue the persons who sold the respective parcels of land to them for refund of any paid up consideration.

Finally, once the principal claim succeeds the counterclaim for eviction of the defendant should fail and we urge Your Lordship to dismiss the same with costs as it is time-barred in any event.

There has been an insinuation by the defendants that the filing of **Meru HCCC No. 134 of 1992** interrupted the running of time for purposes of adverse possession. Nothing could be further from the truth my Lord. The only suit which can stop the running of time is by the registered owner for eviction and not suits against him. This was the unanimous holding of the Court of Appeal in **Nyeri CA No. 98 of 1998** between **Gerishon Muindi Baruthi –vs- Willys Gatinku Mukobwa & Robert Njogu**.

(Copy attached)

We so humbly submit and pray Your Lordship.

DATED at MERU this day of 2018

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For. MWENDA MWARANIA, AKWALU & CO.

ADVOCATES FOR THE PLAINTIFF

21. The plaintiff’s advocate proffered the case of Gerishon Muindi Buruthi (appellant) AND Willys Gatinku Mukobwa & Another (Respondents) to buttress his assertion that the plaintiff is entitled to be declared owner of the suit land by virtue of the doctrine of adverse possession. This is a good authority in its facts and circumstances. No one case is congruent in its facts and circumstances to another to a degree of mathematical certitude. In that case, the court found as a fact that the appellant’s possession of the relevant portions of the parcels of the suit lands was clearly by way of an open assertion of a hostile title. In this case, I do find that the plaintiff had occupied the suit land with the consent of the original 1st defendant following the plaintiff’s inability to pay a bank loan which had been taken by the plaintiff using the original defendant’s land as security.

22. I do take issue with the appellant’s submission that” **“There has been an insinuation by the defendants that the filing of Meru HCCC No. 134 of 1992 interrupted the running of time for purposes of adverse possession. Nothing could be further from the truth my lord. The only suit which can stop the running of time is by the registered owner for eviction and not suits against him. This was the unanimous holding of the Court of Appeal in Nyeri CA NO. 98 of 1998 between Gerishon Muindi Baruthi versus (sic) Willys Gatinku Mukobwa & Robert Njogu.”** Having carefully gone through this judgment I did not find anywhere a unanimous holding to the effect asserted by the plaintiff’s advocate.

23. The defendants’ written submissions read as follows:

DEFENDANT’S SUBMISSIONS ON PLEADINGS

Your lordship, all the defendants oppose the Further Amended Originating Summons dated 27.9.2017 as brought by the plaintiff.

In their opposition, they have singularly filed replying affidavits all dated 6.11.2017.

Further to that my lord, they have put a counter-claim which they seek orders of eviction of the plaintiff from the resultant subdivision of the main land being UPPER-KARIMBA 2028, 2029, 1600, 1601, 1598, 1599 & 1278.

The defendants relied on the statements dated 6.11.2017 & further on their testimonies in court.

ON THE EVIDENCE TENDERED AND THE LAW APPLICABLE

My lord, I do not want to reiterate the testimony of the defendants. The plaintiff also testified and from his testimony in cross-examination the following salient facts were clear;

- 1) **THAT** the plaintiff resides and occupies a small portion which is less than a quarter.
- 2) **THAT** the Original Parcel of land being MUTHAMBI/UPPER-KARIMBA/455 was 1st registered on 24.9.1990.
- 3) **THAT** soon thereafter a suit was filed in the High Court at Meru being suit No. 134 of 1992 by the wife of the plaintiff and his son against the deceased defendant herein who was substituted by the 1st defendant. The plaintiff's wife was litigating under the same title.
- 4) **THAT** the defendants are in possession of the suit land herein and have left the plaintiff in occupation of less than a quarter acres comprising parcel No. MUTHAMBI/UPPER-KARIMBA/1600.
- 5) **THAT** there was a Criminal case in PRINCIPAL MAGISTRATE COURT AT CHUKA NO. 1188 of 2007 where the 3rd defendant Faith Kabucha pressed charges of forcible detainer causing the plaintiffs' wife and daughter to be arrested and evicted from the suit land which the 3rd defendants occupies to this day being parcel No. MUTHAMBI/UPPER-KARIMBA/1598.
- 6) **THAT** over the years the plaintiff has not been in peaceful and notorious occupation of the parcels of land the subject of this suit.
- 7) **THAT** the suit land was transferred as a result of an inhibition order which was lifted by the court freeing the land to dealing by the 1st defendant deceased when the suit No. HCCC 134 of 1992 was dismissed in 2007.

ON THE LAW

My lord, the doctrine of Adverse possession has qualifications. A party must meet certain conditions by way of evidence to enable the court find in his/her favour.

In a nutshell the party claiming adverse possession must demonstrate the following;

- a) **THAT** he has been in continuous occupation of the land.
- b) **THAT** the occupation must be peaceful.
- c) **THAT** his occupation must be more than 12 years continuously.
- d) **THAT** the title must be registered in another persons name.

My lord, has the plaintiff met this requirements? My answer, is in the negative.

(i) Time

My lord, time is of essence in a claim for adverse possession. Time can be stopped from running when Civil Proceedings are taken. In this case the plaintiffs own family filed suit No. HCCC 134 of 1992 only 2 years after the title was registered. Time stopped running in favour of the plaintiff as the parties suing where litigating under the same title.

In the case of **GRACE KAMENE M'BECERE –VERSUS- JOYCE RIGIRI W/O DAVID MBOGORI & ANOTHER** the court held that;

“time is stopped when there are legal proceedings against the Adverse possession.”(copy attached)

(ii) Assertion of Right& Occupation

It is not in dispute that the original defendant now deceased asserted his right by way of entering into his land. This is found in the testimony of his son the 2nd defendant when he stated *“when the deceased was alive they cultivated with Lawrence Kinyua presently, it is Lawrence Kinyua Antony the 3rd defendant cultivating and occupying the plaintiff has remained with less than ¼.”*

Further upon cross-examination by the plaintiff counsel the witness stated that it is his father who occupied the land before subdivision. To buttress the position in my land, in the Ruling in CIVIL CASE NO. 134 OF 1992 defence exhibit No. 2 the learned Judge captures the possession on the ground then and states as at page 3 thereof 1st paragraph,

“On 12.11.99 a consent order was recorded before Kuloba J. allowing the 2nd defendant to continue occupying and cultivating the area where his house presently cultivated.”

The 2nd defendant was the deceased one AnjeloMuneneMarindi the father to the 1st defendant.

In essence therefore, it is clear that the defendant was also in his occupation of his land and therefore has asserted his right to ownership and occupation.

(iii) Peaceful & continuous

My lord, from the facts of this case it is a truism that the plaintiffs occupation was not peaceful and continuous. The fact that he now occupies less than ¼ of an acre and the Criminal case against his family members and the Civil case betrays the fact his occupation was peaceful, quite and continuous.

In the case of **KIMANI RUCHINE –VERSUS- SWIFT RUTHERFORD & CO. LTD [1980] eKLR** the court stated that;

“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 attached)

Nothing can be further from the truth. The plaintiff occupation was interrupted and broken by the defendant’s assertion as his right pushing him to occupy less than a ¼ of which we asks for eviction thereof.

CONCLUSION

My lord the plaintiff’s claim must fail. That being the case the counter-claim for eviction must take the day. He must be evicted from the remainder of the suitland.

We ask for costs.

DATED AT MERU THIS.....12TH DAY OF...NOVEMBER,....2018.

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FOR:-MUIA MWANZIA & CO.

ADVOCATES FOR THE DEFENDANTS

24. The defendant’s advocate proffered the case of ***Grace Kamene M’Becere versus Joyce Rigiri w/o David Mbogori and Another, [Nairobi HCCC 1401 of 1971 [1977] eKLR*** to support his assertion that “time is stopped when there are legal proceedings against the adverse possessor”. He also proffered the case of ***Kimani Ruchine versus Swift Rutherford & Co. Ltd, [Nairobi Civil Appeal No. 73 of 2015*** in support of his assertion that: “possession must be continuous, it must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent reconsideration”. I opine that the principles enunciated by these two authorities are good authorities in their facts and circumstances. However, no one case is congruent to another in facts and circumstances to a degree of mathematical certitude. I will apply the principles enunciated by these cases to my consideration and determination of this suit.

25. I frame the principal issue for determination as if or if not the plaintiff has satisfied this court on a balance of probabilities that he is entitled to be declared as having obtained ownership though adverse possession of Land Parcel No. Muthambi/Upper-Karimba/1279 and by extension the resultant, through subdivisions, Land Parcel No’s Muthambi/Upper-Karimba/1598, 1599, 1600, 1601, 2028, 2019 and 2030. The answer to this principal issue will have answered all the questions as framed in the Originating Summons.

26. This suit was filed on **18th August, 2006**, although the Originating Summons is dated **2nd August, 2006**. Over the years the suit has been handled by the following Judges: Lenaola J (as he then was and now a Judge of the Supreme Court of Kenya, Lady Justice R. N. Sitati, J, Ouko, J (now the President of the Court of Appeal), Lady Justice M. Kasago, J, and Judge P. M. Njoroge J (this Judge). From **9th July, 2009** when a ruling was read by Lady Justice Kasango, J, no action was taken until **26th May, 2015**, although the suit was to, be heard on **18th May, 2010**, when the defendants advocate obtained a date for directions to be taken on **14th November, 2015**. This was a hiatus of about 6 years. This was an in excusable and inordinate delay in the prosecution of this case. Indeed, I opine that the suit was a veritably apposite candidate for dismissal under the provisions of order 17 of the Civil Procedure Rules.

27. Because of the delay in the hearing and determination of this suit, the original suit land has been subdivided into many portions. As a result, other defendants have been brought into the loop and instead of just dealing with Parcel No. L. R. Muthambi/Upper-Karimba/1279 we are dealing with its subdivisions which are L.R. Nos. Muthambi/Upper-Karimba/1598, 1599, 1600, 1601, 2028, 2029 and 2030 as enumerated in the further amended Originating Summons.

28. At the outset, I wish to point out that after the inhibitions placed upon parcel Nos. Muthambi/Upper-Karimba/1278 and 1279 were removed by the Hon. 1. Lenaola (J, as he then was) in Meru HCCC No. 134 of 1992 and the apposite order was signed by the Deputy Registrar on **12th July, 2006**, there was no inhibition standing in the way of the various subdivisions and transfers to the respondents. An attempt to reintroduce inhibitions in this suit against parcel Nos. Muthambi/Upper-Karimba, 1598, 1599, 1600 and 1601, which were subdivisions of parcel No. Muthambi/Upper-Karimba/1279 through the plaintiff’s application dated **2nd August, 2006** was dismissed by the Hon. Lady Justice M. Kasango on **9th July, 2009**. In dismissing the application the Learned Lady Judge was unequivocal that the application was struck out for being an abuse of the court process.

29. The plaintiff argues that because the original defendant became registered as owner of L.R. Muthambi/Upper-Karimba 455 on **24th**

September, 1990, he became entitled to ownership through the doctrine of adverse possession on **24th September, 2012**. This has been vehemently denied by the defendants who have argued that he only occupied about one quarter of an acre out of the suit Land. They say that his occupation of that portion of land has all along been opposed and they have provided evidence that at one time his wife and daughter had been convicted of forcible entry contrary to section 90 of the penal code in Chuka PM's Court Criminal Case No.1188 of 2007. Although the plaintiff claimed that this conviction was set aside by the High Court, he never tendered evidence to prove his claim. I, however, opine that the setting aside of such a conviction does not remove the fact that his occupation was challenged by the defendants.

30. The defendants submit that even assuming that the plaintiff could claim that he had obtained ownership of the suit lands by way of adverse possession, Lady Justice Mary Kasango in her ruling on **9th July, 2009** was categorical:

i) THAT the Chamber Summons dated **2.8.2006** is struck out for being an abuse of the court process with costs thereof being awarded to all the defendants.

ii) The Chamber Summons dated **15th January, 2009** is dismissed with costs to all the defendants.

iii) That the interim orders issued on **19th January, 2009** by this court in this matter are hereby vacated.

This ruling removed any impediments concerning the 1st defendant's use of his land.

31. It is my finding that there was nothing unprocedural as appertains to subdivisions and transfers of the suit lands to the defendants. But this suit is dealing with the issue of adverse possession.

32. Many of the issues canvassed by the parties concern ownership of the original suit land and subdivisions thereof. I opine that these are issues which should have been better canvassed in an ordinary suit brought to court by way of plaint. Adverse possession is concerned with if or if not the claimant has satisfied all the requirements necessary for him to be declared owner of the claimed land through adverse possession.

33. It is not controverted that the suit land was a subdivision of the Original Parcel No. Muthambi/Upper-Karimba/1279. This parcel itself emanated from a subdivision of parcel No. Muthambi/Upper-Karimba/455 into parcel Nos. Muthambi/Upper-Karimba/1278 and 1279. This parcel had devolved to the original 1st defendant, Anjeru Munene Marindi, after the plaintiff obtained a loan with the 1st defendant's land as security and had failed to repay it. He claims that they had an understanding with the then 1st defendant and the 3rd defendant that she would buy 5 acres out of parcel No. 405, settle the loan and then the plaintiff would be given the remainder of the land which he is claiming in this suit. He never gave any evidence regarding that understanding. In any case such evidence would have been more relevant in a case filed by way of an ordinary plaint rather than in a case filed by way of Originating summons seeking ownership through the doctrine of adverse possession.

34. I find that the running of time for adverse possession to accrue, was interrupted by the filing of Meru HCCC by the plaintiff's wife and his son against the deceased original defendant and himself. The plaintiff opposes this argument and says that time would only stop if it was the original 1st defendant who had sued the plaintiff for eviction. I do not agree. As long as the plaintiff and the original defendant were in court, there is no way the original 1st defendant would have filed a suit for eviction against the plaintiff. I find that the plaintiff's assertion in this area lacks merit.

35. Upon careful analysis of oral evidence, the pleadings and the submissions proffered by the parties to buttress their diametrically incongruent positions, I find that from the word go, the plaintiff had occupied the suit land with the consent of the original 1st defendant, Angelo Munene Marindi. I also find that time for counting the period necessary for adverse possession to accrue had been stopped by the plaintiff's participation or in any other way being involved in Meru HCCC No.139 of 1992 where he was the 1st defendant and the original defendant was the 2nd defendant. The upshot of these findings is that the plaintiff's claim against the 1st defendant lacks merit and is hereby dismissed.

36. I find that the plaintiff's claim for ownership of land under the doctrine of adverse possession against the 2nd, 3rd, 4th and 5th defendants lacks merit. It is hereby dismissed.

37. I uphold the defendants' claim.

38. Judgment is therefore entered for the defendants ERASTO NJERU MUNENE, LAWRENCE ANTONY KINYUA, FAITH N KINGA KABUCHA, ERIC GITONGA M BAKA AND EVANGELINE MAKENA MITAMBO against the plaintiff EMILIO MARANGU M'NDIIRI (defendant in the counter-claim) in the following terms:

a) The suit filed by EMILIO MARANGU M'NDIIRI, the plaintiff in the main suit is hereby dismissed.

b) It is hereby declared that the plaintiffs in the counter-claim ERASTO NJERU MUNENE, LAWRENCE ANTONY KINYUA, FAITH N KINGA KABUCHA, ERIC GITONGA M BAKA and EVANGELINE MAKENA MITAMBO are the lawful proprietors of their respective parcels of land and an order of eviction is hereby issued against the defendant in the counter-claim EMILIO MARANGU M'NDIIRI from parcels of Land Numbers UPPER-KARIMBA/2028, 2029, 1600, 1601, 1598, 1599 & 1278.

c) Costs in the main suit and in the counter-claim shall follow the event and are awarded to ERASTO NJERU MUNENE, LAWRENCE ANTONY KINYUA, ERIC GITONGA M BAKA AND EVANGELINE MAKENA MITAMBO (defendants in the

main suit and plaintiffs in the counter-claim against EMILIO MARANGU M'NDIRI (the plaintiff in the main suit and the defendant in the counter-claim).

d) The inhibitory orders issued by this court on **28th September, 2017** against the suit lands are hereby vacated.

39. Orders to be implemented accordingly.

Delivered in open court at Chuka this **13th day of December, 2018** in the presence of:

CA: Ndegwa

Akwalu for the plaintiff

Lawrence Antony Kinyua – 2nd defendant

Faith Nkinga Kabucha – 3rd defendant

Evangeline Mkena – 5th defendant

Other defendants absent

P.M. NJOROGE

JUDGE