



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 140 OF 2017

FORMERLY MERU HCCC. 33 OF 2011 (OS)

JASON GITARI NJOKA.....APPLICANT

VERSUS

FRANCIS GACICI IRUBIA.....1ST RESPONDENT

EILEEN KAGENDO MBAKA.....2ND RESPONDENT

TIMOTHY MURIUKI MUTEGLI.....3RD RESPONDENT

FREDRICK MBAKA M'ABORES.....4TH RESPONDENT

ERNEST MURITHI GICACI.....5TH RESPONDENT

JUDGMENT

1. This suit was brought to court by way of Originating Summons which upon an amendment dated **17th May, 2017** reads as follows:

LET EILEEN KAGENDO MBAKA, TIMOTHY MURIUKI MUTEGLI, FREDRICK MBAKA M'ABORES AND ERNEST MURITHI GACICI OF Post Office Box 38 Chuka within 15 days after service of this summons upon them enter appearance to this summons of Jason Gitari Njoka the applicant herein who claim to be and has been in actual possession of 7 acres now contained in LR: Magumoni/Rubate/714 which was part of LR; Magumoni/Rubate/568 and which was part of LR: Magumoni/Rubate/38 for a period in excess of 12 years and has an overriding interest for determination of the following questions:

1. Whether the 1st respondent was the original registered proprietor of all that parcel of land known as LR: Magumoni/Rubate/38 measuring 18 acres or thereabout.
2. Whether the 1st respondent subdivided what was then LR: Magumoni/Rubate/38 into two portions LR: Magumoni/Rubate/567 and 568 and sold and transferred the same to Mutegei Jamlick Julius Ngai and Elizaphan M'Ngatuni Mwebia.
3. Whether the 1st respondent caused subdivision of LR: Magumoni/Rubate/568 into LR: Magumoni/Rubate/713 and 714 and transferred LR: Magumoni/Rubate/713 to Albert Murithi Njeru and the 1st respondent was left with the balance that is LR: Magumoni/Rubate/714.
4. Whether the 1st respondent caused subdivision of LR: Magumoni/Rubate/714 into LR: Magumoni/Rubate/757, 758, 759 and 760 and transferred the same parcels to Eileen Kagendo Mbaka, Timothy Muriuki Mutegei, Fredrick Mbaka M'Abores and Ernest Murithi Gacici while the 1st respondent caused subdivision of LR: Magumoni/Rubate/761.
- 4.(a) Whether** the 1st respondent caused subdivision of LR: Magumoni/Rubate/714 into LR: Magumoni/Rubate/757, 758, 759, 760 and 761 and transferred the same parcels to Eileen Kagendo Mbaka, Timothy Muriuki Mutegei, Fredrick Mbaka M'Abores and Ernest Murithi Gacici while the 1st respondent retained LR: Magumoni/Rubate/761.
5. Whether in the year 2008 Munene Francis Gacici sold LR: Magumoni/Rubate/759 to the 4th respondent.

6. Whether the applicant was in occupation since 1974 of what is contained in LR; Magumoni/Rubate/757, 758, 759 and 760 which were part of LR; Magumoni/Rubate/714 and which were part of LR; Magumoni/Rubate/568 and which was part of LR; Magumoni/Rubate/38 which was then in the name and style of the 1st respondent.

6.(a) Whether the applicant was in occupation since 1974 of what is contained in LR; Magumoni/Rubate/757, 758, 759, 760 and 761 which were part of LR; Magumoni/Rubate/38 which was then in the name and style of the 1st respondent.

7. Whether the 1st respondent was aware that the applicant was in actual possession of approximately 7 acres now comprised in LR; Magumoni/Rubate/757, 758, 759 and 760 to the 2nd, 3rd, 4th and 5th respondents respectively.

7.(a) Whether the 1st respondent was aware that the applicant was in actual possession of approximately 12.75 acres now comprised in LR; Magumoni/Rubate/757, 758, 759, 760 and 761 to the 2nd, 3rd, 4th and 5th respondents respectively.

8. Whether the 2nd, 3rd, 4th and 5th respondents had the full knowledge that the applicant was in actual possession and occupation of the respective parcels of land when they purchased the same from the 1st respondent.

9. Whether the 1st respondent was holding 7 acres out of what was then LR; Magumoni/Rubate/714 in trust for the applicant who had occupied and possessed 7 acres thereof for a period in excess of 12 years uninterrupted.

9.(a) Whether the 1st respondent was holding 12.75 acres out of what was then LR; Magumoni/Rubate/714 in trust for the applicant who had occupied and possessed 12.75 acres thereof for a period in excess of 12 years uninterrupted.

10. Whether by operation of law 7 acres occupied by the applicant for a period in excess of 12 years were no longer the property of the 1st respondent.

10.(a) Whether by operation of law approximately 12 acres occupied by the applicant for a period in excess of 12 years were no longer the property of the 1st respondent.

11. Whether the 1st respondent had any good title to pass to the 2nd, 3rd, 4th and 5th respondents by operation of law that is by adverse possession.

12. Whether the 2nd, 3rd, 4th and 5th respondents are now bent to evict the applicant from 7 acres comprised in LR; Magumoni/Rubate/757, 758, 759 and 760.

12 (a) Whether the 2nd, 3rd, 4th and 5th respondents are now bent to evict the applicant from approximately 12.75 acres comprised in LR; Magumoni/Rubate/757, 758, 759, 760 and 761.

13. Whether the applicant has obtained an overriding interest over LR; Magumoni/Rubate/757, 758, 759 and 760 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38.

14. Whether the applicant is entitled to be registered as the absolute proprietor of 7 acres comprised in LR; Magumoni/Rubate/757, 758, 759 and 760 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38.

14(a) Whether the applicant is entitled to be registered as the absolute proprietor of approximately 12.75 acres comprised in LR; Magumoni/Rubate/757, 758, 759, 760 and 761 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38.

15. Whether the 2nd, 3rd, 4th and 5th respondents should be ordered to execute all the necessary documents to effect the transfer including necessary application for consent and transfer of approximately 7 acres contained in LR; Magumoni/Rubate/757, 758, 759 and 760 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38 registered in the name and style of the 2nd, 3rd, 4th and 5th respondents respectively.

15(a) Whether the 2nd, 3rd, 4th and 5th respondents should be ordered to execute all the necessary documents to effect the transfer including necessary application for consent and transfer of approximately 12.75 acres contained in LR; Magumoni/Rubate/757, 758, 759, 760 and 761 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38 registered in the name and style of the 2nd, 3rd, 4th and 5th respondents respectively.

16. Whether the 2nd, 3rd, 4th and 5th respondents are now threatening to evict the applicant from approximately 7 acres contained in LR; Magumoni/Rubate/757, 758, 759 and 760 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38.

16(a) Whether the 2nd, 3rd, 4th and 5th respondents are now threatening to evict the applicant from approximately 12.75 acres contained in LR; Magumoni/Rubate/757, 758, 759, 760 and 761 part of LR; Magumoni/Rubate/714 part of LR; Magumoni/Rubate/568 part of LR; Magumoni/Rubate/38

17. Whether the applicant is entitled to the cost of the suit.

DATED AT CHUKA THIS 7TH DAY OF MARCH, 2011

AMENDED AT CHUKA THIS 17TH DAY OF MAY, 2017

2. PW1, Jason Gitari Njoka, the applicant asked the court to adopt his witness statement dated **7th March, 2011** as his evidence in this suit. The statement states:

STATEMENT UNDER ORDER 3 RULE 2 OF THE CIVIL PROCEDURE RULES 2010

That I am the plaintiff /applicant in the instant suit.

That I know what was then LR: MAGUMONI/RUBATE 38. The original proprietor of LR: MAGUMONI/RUBATE/38 is the 1st respondent herein (Francis Gacici Irubia).

To my knowledge and information the 1st respondent was holding the said land in trust of his benefit and that of my father Njoka M'Ithara M'Iruba. Even when the 1st respondent was registered with this land he knew my father's interest in the whole land.

The 1st respondent was registered with what was then LR: Magumoni/Rubate/38. By this time my father Njoka Ithara Irubia was an army man. The 1st respondent took advantage and he was registered with the land. The land therefore is ancestral land and it included my father's interest.

That in 1974 my father told me to go into what was then LR: Magumoni/Rubate/38 and occupy, possess and cultivate half of the said land and leave the balance thereof to my father. In the year 1974 I started by cultivating the land for 2 years. I cultivated what I believed was half. In 1975 I planted gravelia trees, avocado trees, miringa trees. I also planted mirama and miraba trees. In 1975 I also planted guava trees.

In 1976 I established my residence on the said area by constructing a small residential house. By then I was not married.

At present I have 3 residential houses some built in 1977. In 1976 I constructed a cow shed. For all this while the 1st respondent was aware that I have moved and occupied half of what was then LR: Magumoni/Rubate/38. That by the time I moved into the land my father Njoka Ithara Irubia and his brother Francis Gacici Irubia the 1st respondent herein had no case between them over this land. My father always believed that he was the registered owner of the said land.

That the 1st respondent did nothing to object to my being in occupation of what was then LR; Magumoni/Rubate/38 or any part thereof.

That among the development and improvement on the said land was residential houses, cowshed, over 5,000 gravelia trees, orange trees, olive trees, mango trees, coffee trees, banana plants, macadamia trees, miraa trees, yams etc.

I stayed on this land quietly with no disturbances of whatever kind. The 1st respondent was all the time aware of my presence on the suit land.

In 1995 my father wanted to sell portion of LR; Magumoni/Rubate/38 (which he had all along believed to be his) to cater for school fees. This was in 1995.

My father realized that LR; Magumoni/Rubate/38 was indeed registered in the name and style of Francis Gacici the 1st respondent herein.

That the 1st respondent has his own parcel of land at Gitumbi which is part of the ancestral land. the 1st defendant has never lived on LR; Magumoni/Rubate/38 nor cultivated the same.

In 1995 the 1st respondent subdivided LR; Magumoni/Rubate/38 into two parcels of land LR; Magumoni/Rubate/567 and 568. The 1st respondent then sold and transferred LR; Magumoni/Rubate/567 to Elizaphan M. Ngatuni and Jamlick Ngai Mutegi.

That LR; Magumoni/Rubate/567 that was sold was measuring two acres.

The two acres was on the other half of LR; Magumoni/Rubate/38 which was meant for father after I occupied the other half. The two acres did not touch the portion that I was occupying.

Later the 1st respondent subdivided LR; Magumoni/Rubate/568 into two portions LR; Magumoni/Rubate/713 and 714. The 1st respondent then sold LR; Magumoni/Rubate 713 to Albert Murithi Njeru.

That the 1st respondent then retained LR; Magumon/Rubate/714. In the year 2000 the 1st respondent had LR; Magumoni/Rubate/714 closed for subdivision. The new titles were LR; Magumoni/Rubate/757, 758, 759, 760 and 761. The 1st respondent retained LR; Magumoni/Rubate/761 while transferring LR; Magumoni/Rubate/757, 758, 759 and 760 to 2nd, 3rd, Munene Francis Gacici and 5th respondents respectively.

The portion of Land covered LR; Magumoni/Rubate/757, 758, 759 and 760 is approximately 7 acres and it covers every inch of what was then LR; Magumoni/Rubate/38 which was in my occupation and possession since 1974. To my knowledge and information Munene Francis Gacici sold and transferred LR; Magumoni/Rubate/759 to the 4th respondent in the year 2008.

For all this while I was occupying and cultivating LR; Magumoni/Rubate/757, 758, 759 and 760 even as the 2nd, 3rd, 4th and 5th respondents were acquiring their respective parcels of land. On the other hand the 1st respondent knew I was in occupation in the land he was transferring to the 2nd, 3rd, 5th respondents and Munene Francis Gacici.

That my stay in LR; Magumoni/Rubate/38 has been uninterrupted for a period in excess of 12 years. The area I have been occupying was determined as 7 acres. After the 1st respondent sub divided the same and transferred the resultant parcel to the 2nd, 3rd, 5th respondents and to his son Munene Francis Gacici who later sold his portion to the 4th respondent.

I am entitled to the land that I have been occupying by operation of law (adverse possession).

DATED AT CHUKA THIS 7TH DAY OF MARCH, 2011

SIGNED.....

JASON GITARI NJOKA

3. PW1 asked the court to use his exhibits in his list of documents dated **9th August, 2017** as evidence in this suit. The documents were marked as his exhibits numbers **1 to 10**.

4. Interestingly, during cross-examination, PW1 told the court that he did not know the number of the original land only saying that it was given to him by his father who he said was an AP Officer in Somalia. He told the court that his father had another piece of land where he was born. He said that he moved into the suit land in **1976**. He also told the court that he was born in **1956**. Should he be telling the court the truth, he claims to have moved into the suit land when he was only **18 years old**.

5. PW1 went on to say that he did not know the area of the original suit land. He told the court that when his father came back from Somalia, he found that the adjudication process had ended and complained to the adjudication committee which awarded the suit land to him. He, however, testified that his father's leave ended and he asked his brother Francis Gacici to hold the land in trust for him. At this point, I only wish to point out that after completion of the adjudication process, one cannot complain to the adjudication committee.

6. PW1 testified that when his father wanted to sell 2 acres out of his land in 1995, he discovered that the land was registered in the name of the 1st respondent. Asked what action his father took upon this discovery, PW1 told the court that his father went to clan elders who told the 1st respondent to give the land back to his father. PW1 admitted that he had no evidence such as the minutes of the elders meeting to prove his assertion. Asked, if it was ancestral land, why his grandfather's other descendants, were not claiming the land, he refused to answer that question. Followed further, he told the court that he did not know the land which was given to the 1st respondent only saying that it was far. He was, however, insistent that land parcel No. Magumoni/Rubate/38 belonged to his father. Once again, during cross-examination PW1 told the court that he did not know the numbers of the land he was claiming.

7. Asked if or if not he had been prosecuted and jailed for matters concerning the suit land, he initially refused to give a response and this fact was noted by the court. He then said that he was jailed for 4 months but added that that had nothing to do with the 1st respondents land.

8. During cross-examination, PW1 denied that he knew of Chuka PMCC NO. 64 of 2005. He categorically said that Ernest Muriithi, the 5th respondent, had never taken him to court. He denied that there was no eviction order in that case.

9. It is difficult to know when PW1 is telling the truth or when he is lying. During re-examination by his advocate, Mr. I. C. Mugo, he underwent an immediate epiphany and remembered that Chuka PCMM 64 of 2005 indeed existed. He, however, added that the case is still pending. There is nothing further from truth in this assertion as in Chuka PMCC No. 64 of 2007, judgment was given in favour of Ernest Muriithi Gacici (Plaintiff) against Jason Gitari Ithare (defendant) and vide a decree signed by Hon. P. M. Mutua, Resident Magistrate on 2nd July, 2006, it was decreed as follows:

a) THAT the Defendant do vacate the Plaintiff's Land within 14 days failure to which he be vacated.

b) Costs and interest of this suit.

10. Consequently a Warrant to the Bailiff to give possession of land to Ernest Muriithi Gacici was issued by Hon. P. M. Mutua, RM, on 9th August, 2006. The applicant was indeed evicted and somehow returned to the suit land.

11. PW2, George Mutegi Akasha asked the court to adopt his witness statement dated 7th March, 2012 as his evidence in this suit. Although the statement is dated 7th March, 2012, it was filed on 7th September, 2017. It states:

WITNESS STATEMENT UNDER ORDER 3 RULE 2 OF THE CIVIL PROCEDURE RULES 2010

My names are George Mutegi Nahason alias Muti. My postal address is 3 Magumoni. I am a retired teacher/ a peasant farmer.

I know the plaintiff he is younger than me. I have known him since he was a child. I know Francis Gacici. We belonged to the same clan Nkui/Igakuya.

I know land parcel LR Magumon/Rubate/38 as it was then. Land parcel LR Magumoni/Rubate/38 was walked the boundaries by M'IBURI M'Mwara.M'Iburi M'Mwara was my neighbour. M'Iburi was the son to M'Ithera Njoka. M'Ithera Njoka was the father to Jason Gitari. During adjudication and demarcation of Rubate adjudication section, Njoka M'Itara who was an administration police was then working in North Eastern Province. This is why he requested M'Iburi to walk the boundary of his land.

After what was then Magumoni/Rubate/38 was walked the boundary by M'Iburi M'Mwara objections were raised by M'Ruthiri M'Rinjeu and the land was confirmed to be that of Njoka M'Ithara. After the objection was over Njoka M'Ithara went back at work by then at Isiolo. He then requested Francis Gacici to go for demarcation fees at Isiolo so that he could pay the same to adjudication office. He was to pay all the fees that belonged to the family. Francis Gacici had just finished school he could not raise the cost of four parcels of land. After all this, everybody around the area was left knowing that land parcel LR Magumoni/Rubate/38 belonged to Njoka M'Ithara. Through proxy, Njoka M'Ithara cultivated this parcel of land because he was still at work.

To date Francis Gacici has never cultivated or made use or occupied land parcel LR Magumoni/Rubate/38.

That in 1998 Njoka M'Ithara was desirous to sell a portion of LR. Magumoni/Rubate/38 which land he had been cultivating since demarcation and which land he believed and trusted to be his. That Njoka M'Ithara was desirous to sell two acres. The prospective buyers were the late Mutegi Jamlick Julius Ngai and Elizaphan M'Ngatuni Mwebio. The two purchasers paid the purchase money to Njoka M'Ithera. The buyers looked for a survey or surveyor to have the two acres exercised from the main land. it was at this point that the surveyor and everybody else concerned discovered that land parcel LR Magumoni/Rubate/38 was registered in the name of Francis and meetings were convened several times to discuss how and why Francis Gacici was registered with his brother's parcel of land LR Magumoni/Rubate/38. In the last clan meeting Francis Gacici agreed to return land parcel LR Magumoni/Rubate/38 to Njoka M'Ithara in 2004. Unfortunately Njoka M'Itara died in 2008 before Francis Gacici had transferred LR Magumoni/Rubate/38 to Njoka M'Ithara. However, despite Francis Gacici not being the person who had sold two acres out of and parcel LR Magumoni/Rubat/38, he surrendered the title and the two purchasers a forenamed and their two acres exercised and transferred. The two purchasers were given LR Magumoni/Rubate/567 while Francis Gacici remained registered with the balance LR Magumoni/Rubate/568. Francis Gacici kept on promising that he would transfer LR Magumoni/Rubate/568 to Njoka M'Ithara. In the year 2008 Njoka M'Ithara died before Francis Gacici had transferred the land to the said Njoka M'Ithara. Later, Francis Gacici sub divided LR: Magumoni/Rubate/568 into the parcels namely LR Magumoni/Rubate/713 and LR Magumoni/Rubate/714. Francis Gacici then transferred LR Magumoni/Rubate/713 to Albert Murithi Njeru. Francis Gacici was left registered with LR Magumoni/Ruate714. Later, Albert Murithi Njeru sold LR Magumoni/Rubate/713 to Mercy Mbuba Ntwiga.

I am of knowledge and information that LR Magumoni/Rubate/714 squarely covered the portion that Jason Gitari Njoka had all his developments. Francis Gacici later sub divided LR Magumoni/Rubate/714 into five portions of and namely; LR Magumoni/Rubate/757, 758, 759, 760 and 761 and transferred parcel 757 to Irene Kagendo Mbaka 758 to Timothy Muriuki Mutugi, LR Magumoni/Rubate/759 to Fredrick Mbaka M'Bore LR. Magumoni/Rubate/760 to Ernest Murithi Gacici while Francis Gacici retaining the balance LR Magumoni/Rubate/561. I repeat that land parcels LR Magumoni/Rubate/757 to 761 covers Jason Gitari's homestead and the portion he had been cultivating all this while.

I am aware that Jason Gitari Njoka entered the suit lands when they were under the original land parcel LR Magumoni/Rubate/38. This was in 1974 Jason Gitari was the eldest son of Njoka M'Ithara's 2nd wife. It was Njoka M'Ithara who told Jason Gitari to enter and settle in what was then LR Magumoni/Rubate/38. For all this while Njoka M'Ithara knew the land to be his. From that time Jason Gitari has been on this land without any interference. Neither Francis Gacici nor his or the respondents have ever settled on this land nor cultivated the same.

From the time Jason Gitari entered this land he has made tremendous developments on the land. many gravellier trees (ready for harvesting) Muringa trees, Miraa, Miuus, coffee trees, banana plantations, olive trees, macadamia trees, avocado trees, yam plants many mango trees and many assorted indigenous trees, a homestead cowshed and goat pen etc.

Jason Gitari is married with children. All his children were born while Jason was living and cultivating the suit lands. The first born is about 29 years.

That for all this while I have never heard any person write a letter let alone Francis Gacici demanding that Jason Gitari should leave the suit lands. His stay on the suit lands for this period of about 38 years, Francis Gacici has never disrupted the quiet occupation and use of those portions covered by LR Magumoni/Rubate/757, 758, 759, 761 and LR. Magumoni/Rubate/713. The period Jason Gitari has stayed in this land is in excess of 30 years.

I and many others including Jason Gitari came to know that land parcel LR Magumoni/Rubate/714 had been sub divided into five parcels when Ernest Murithi Gacici through his counsel AG Riungu, opposed the burial of Jason Gitari's grandchild on what I Jason Gitari and many others believed to be LR Magumoni/Rubate/714. The child was buried in what is now LR Magumoni/Rubate/760. The sub divisions were done secretly. The boundaries have never been beacons physically on the ground. If the suit lands were ever

demarcated then this was done when Jason Gitari was in remand and none of his family members or the clan knew about this.

That is all I wish to state.

DATED AT CHUKA THIS 7TH DAY OF MARCH, 2012

SIGNED.....

GEORGE MUTEGI NAHASON ALIAS MUTI.

12. PW2's evidence was in material respects in variance with PW1's evidence. For example, he told the court that PW1 had moved into the suit land in the 1960's with his father when he was a child. PW1's evidence was that his father told him to move into the suit land in 1974. In his statement, he is categorical that P1's father discovered that the land was registered in the 1st respondent's father's name in 1998. PW1 in his statement and in his oral evidence says that this discovery was made in 1995. He could not satisfactorily explain why PW1 was claiming land from the 1st respondent when his own father had land. He was unable to satisfactorily answer many of the questions put to him by the defendants. Towards the end of PW2's evidence, it was brought to the court's attention that PW3, Lydia Ciamuiru Njoka had sat in court throughout the period PW2 gave his evidence. PW3, was, nevertheless, allowed to give her evidence.

13. PW3, Lydia Ciamuiru Njoka asked the court to adopt her witness statement dated 7th March, 2011 as her evidence in this suit. The statement reads as follows:-

STATEMENT UNDER ORDER 3 RULE 2 OF THE CIVIL PROCEDURE RULES 2010

I am Lydia Ciamuiru Njoka.

I come from Karii village, Rubate sub location, Rubate Location in Meru South District in Tharaka Nithi County of P. O. Box 38 Ikuu – Chuka.

I wish to state as follows,

I know the applicant Jason Gitari Njoka. He is my step son having been born of my co-wife Jesca Ciambaka. I also know the 1st respondent Francis Gacici. He is a brother to my husband.

I know the land that the applicant live (sic). All the time I have always known that the land the applicant lives belongs to his father Njoka M'Ithara. I don't know the number of the land the plaintiff/applicant lives. All I know is that the land belonged to my husband, the father of the applicant. I knew the land belongs to my husband right from the demarcation and adjudication.

It is within my knowledge and information that it is Njoka M'Ithara who walked round the boundaries of the land that the applicant lives. I did not know how this land turned out to be that of the 1st respondent.

I came to know that the land parcel LR; Magumoni/Rubate/38 was not in the name of my husband Njoka M'Ithara when the said Njoka M'Ithara attempted to sell the said land to Elizaphan Iguna and Ngai Ciakathumbi. My husband Njoka was paid money by the two but conducting a search on what was then LR. Magumoni/Rubate/38 he discovered that the land was in the name and style of the 1st respondent. That Njoka filed a suit before the clan (Nkui na igakwaiya) he complained that Francis Gacici had taken his land. The 1st respondent accepted to return the land to Njoka. However he changed his mind and gave 2 acres to Ngai and Iguna who had bought land from Njoka. The clan had ordered that the 1st respondent do return the whole of LR Magumoni/Rubate/38.

Sometimes later the 1st respondent subdivided the land the remaining balance and gave it to Mbaka Kiama but he registered with his daughter Eileen Kagendo Mbaka the 2nd respondent, to Lydia Kagendo but he registered it with her son Timothy Murithi Mutegi the 3rd respondent, to Munene Francis who sold it to Mbaka Bore the 4th respondent and the other to Ernest Murithi Gacici (his son) the 5th respondent.

I know his leaving (sic) on this was immediately after he was circumcised. The time the applicant started living on this land he was a young man of age 19 years to 20 years. He was not married.

It is within my knowledge and information that Jason Gitari the applicant was shown where to cultivate on LR Magumoni/Rubate/38 by his father Njoka. By this time Njoka believed that this land belonged to him. The applicant was directed by his father to utilize half of his land. Njoka was to use the remaining part and this was the part that he sold to Ngai and Iguna believing land to be his. As for me I was using the one half that was meant for Njoka. I planted mango trees, avocado trees etc. Iguna and Ngai were sold the portion that I was cultivating.

I know for certain that Jason did not enter his land under the authority of the 1st respondent Francis the registered proprietor of LR Magumoni/Rubat/38 as it was then. All the while the 1st respondent was aware that Jason the applicant was in occupation of LR Magumoni/Rubate/38 as it was then. I am not aware of anytime that he 1st respondent has ever taken Jason to court to have him evicted from what was then LR Magumoni/Rubate/38.

For all this while Jason has extensively developed half of what was then LR Magumoni/Rubate/38. He has therein over 4,000 gravelia trees, mango trees, avocado trees, orange trees, guava trees, olive trees, coffee trees, banana plants, paw paw trees, miraa trees macadamia trees, blue gum trees, and jacarandas trees.

The applicant married while in the suit land and he has children. Some of the children are mature and married with grand children. He has residential houses and goats and cow shed on the suit land.

I came to realize that the land Jason the applicant was occupying had been sold when I saw new persons cultivating the land Jason was cultivating.

It (sic) my statement that these (sic) new persons come into this land Jason the applicant had stayed in this land for a period in excess of 12 year. That those who bought the land have not yet entered into possession. Jason still possess (sic) and occupies half of what was then LR Magumoni/Rubate/38.

DATED AT CHUKA THIS 7TH DAY OF MARCH, 2011

SIGNED.....

LYDIA CIAMUIRU NJOKA

14. PW3, during cross-examination, told the court that the original suit land parcel No. Magumoni/Rubate was originally registered in the name of Ithaara Irubia as the 1st registered owner. Obviously, this is not true. Uncontroverted evidence provided by PW1 himself shows that the original suit land was registered in the name of Francis Gacici on **6th February, 1967**. He was the 1st registered owner.

15. PW3 told the court that she did not know where the parcels of land PW1 was claiming were situated. She was unequivocal that she had never visited those parcels of land. She told the court that she did not know the respondents. The court notes that in her witness statement PW3 avers that: "I came to realize that the land Jason the applicant was occupying had been sold when I saw new persons cultivating the land Jason was cultivating". And yet in her oral evidence, she was categorical that she had never visited the land PW1 was claiming from the respondents.

16. At one point PW3 became rude and evasive. At one time in time to a question regarding whether she was the one who had given the facts contained in her statement by advocate Muchiri, the 2nd respondent's advocate, she retorted: "I am not the one who takes cases to court. I should not be asked such questions." The court recorded this repulsive conduct. Her answer to most of the questions put to her, even by PW1's advocate, in re-examination was that she did not know the matters concerned.

17. DW1, Francis Gacici Irubia asked the court to adopt his witness statement filed on **4th May, 2011** as his evidence in this suit. The statement reads as follows:

FRANCIS GACICI IRUBIA'S STATEMENT

I am Francis Gacici the 1st respondent herein. I come from Rubate location Kanthiiri location and I am a farmer. I know the applicant herein. He is the son of my brother (Njoka M'Ithara). The 2nd, 3rd and 4th respondents are my neighbours. The 5th is my son. My father was known as M'Irubia M'Imwara. He had 3 children Alice Ciakirimo, Njoka M'Ithara the applicant father who was the eldest and myself.

My father had 3 parcels of land one at Karii, the other at Gitumbi and the other at Nkwego the suit land herein. That the suit land (Nkwego) was initially 50 acres and was sub divided into two portions by the father of the applicant on or about 1966. That I was given 18 acres and my brother was left with 32 acres. After subdivision we both registered the lands in our own names and I registered the land under my name on or about the year 1995. The same being land parcel No. Magumoni/Rubate/38 and my brothers land was registered as land parcel No. LR Magumoni/Rubate/38 and my brothers land was registered as land parcel No. LR Magumoni/Rubate/272. After registration we began cultivating the shamba as one family until 1998 when I suggested to my brother that we subdivide our individual parcel and subdivide them to our children who were already grownups.

That my brother refused claiming that the whole 50 acres belonged to him. He reported the matter to the clan for resolution (Nkui Igakuya) clan. The clan resolved that I and my brother should divide our portions amongst our children. But earlier on in the year 1994 my brother had approached me and requested that I give him 2 acres so that he could sell and take his children to school which I accepted and gave him the 2 acres. That in the same year I sub divided my land amongst my children and gave each 1.17 ha excluding Eric and Benjamin. I transferred LR Magumoni/Rubate/760 to Earnest. LR Magumoni/Rubate/758 to Joselyne Muthoni and LR Magumoni/Ruate/759 to Geoffrey Munene Gacici. I sold 2 acres to Irene Kagendo Mbaka, 2 acres to Albert Muriithi and retained the balance.

My brother also sub divided his portions and the applicant was given LR No. Magumoni/Rubate/1114 measuring 1.215 ha which he sold to Mercy Muthoni in the year 2010 and bought Karingani/Gitarene/1049. The said Jason (applicant) was also given another land in Karii which he sold. It is not true that the applicant was in occupation of the suit land since 1975 but he began occupying the same in 1998. That he utilized the portion of my son parcel LR No. Magumon/Rubate/760 and not seven acres as he alleges.

That the said seven acres are being utilized by all respondents since 2000 and it is not true as he avers that he has been using the same for 12 uninterrupted years. The applicant has been trespassing on the land of the respondents since the year 2000 causing

damage to their crops and there are several cases in Chuka court against him.

That all the respondents have developed their parcels by cultivating and the applicant has never challenged their occupation until the year 2011 when he filed this suit. That the applicant does not own any land in the suit land and he should be moved out of the suit land.

That's all!

SIGNED.....

FRANCIS GACICI

18. DW1 told the court that he was the 1st registered owner of the original suit land parcel No. Magumoni/Rubate/38. He said that the 5th respondent, Ernest Muriithi Gacici was his son. He said that he had given or sold parcel No. 757 to Eileen Kagendo, parcel No. 758 to his daughter Joselyn who gave it to Timothy Muriuki, the 3rd defendant, parcel No. 759 to his son Geoffrey Munene who sold it to Fredrick Mbaka (4th Respondent) and parcel no. 760 he gave to his first born child, Ernest Muriithi Gacici, the 5th respondent. He said that the applicant, Jason Gitari Njoka, had given the respondents a lot of trouble and has been chasing them out of the suit land using among other things pangas and arrows.

19. During cross-examination DW1 told the court that Jason Gitari Njoka, the applicant was his nephew. He denied that parcel No. Magumoni/Rubate/38 was gathered by a person called Ibuuri. He said that he did not know such a name. he was unequivocal that he conducted the gathering. He denied the intimation that Njoka, the applicant's father had given him money to have the land registered in his name and that instead he had the land registered in his name. The court notes that this insinuation was not contained anywhere in the evidence of PW1, PW2, PW3 and in their witness statements.

20. DW1 told the court that he subdivided the original parcel No. Magumoni/Rubate/38 into parcels Nos. Magumoni/Rubate/567 and 567. He was categorical that the subdivision was not done through the pressure of the applicant. He went on to tell the court that he gave parcel No. 567 to one Albert Njeru, who has not been enjoined in this suit.

21. DW1, denied that PW1, the applicant, entered the suit land when he was a child. He said that he was already married when he invaded the land. He was categorical that he found the trees he himself had planted on the land. He also explained that he had no part in his being jailed. He explained that he had cut trees belonging to Eileen Kagendo, the 1st respondent, who was the complainant.

22. I opine that, upon my analysis of the evidence proffered by DW1, his cross-examination did not in any material manner impeach the integrity of his evidence.

23. DW2, Fredrick Mbaka M'Abores, told the court that he had authority to give evidence on behalf of the 5th defendant Ernest Muriithi Gacici. He asked the court to adopt his witness statement as his evidence in this suit. The witness statement reads as follows:

FREDERICK MBAKA M'ABORES

I am Fredrick Mbaka the 4th respondent in this case. I come from Rubate location Kanthiri sub location, I am a farmer. I know Jason Gitari the applicant herein. I am the registered owner of land parcel No. Magumoni/Rubate/759 measuring 1.17 Ha. I was registered as the owner in year 2008. I bought the land from Geoffrey Munene in the year 2008 who is the son of Francis Gacici the 1st respondent herein. The said Geoffrey Munene inherited the land from his father Francis Gacici in the year 2000.

That my land neighbours' that of Irene Kagendo the 2nd respondent and Earnest Muriithi the 5th respondent and Timothy Muriuki Mutegi the 3rd respondent. Utilized (sic) the land for one year from the year 2008 upto January, 2010 when the applicant herein Jason Gitari started interfering with my possession by way of cutting my trees split timbers and sold them. I reported to Chera police station. He was arrested and charged with the offence of cutting down trees contrary to section 334(1) of the penal code in criminal case no. 181 of 2020 and the case is still pending in court. Again in the year 2010 in the month of July the said Jason did cut down my fence of which I reported and he was arrested and charged with malicious damage to property. The suit is still pending.

I stopped utilizing the said land in the year 2010 when he became violent and I have been cultivating the said land. I had planted some maize, beans, bananas and I was also maintaining the coffee bushes in the land before the said interference from the applicant herein. The applicant utilizes a very small portion of Earnest Gacici Muriithi and is not in occupation of seven 7 acres as he alleges.

That's all!

Signed.....

FREDRICK MBAKA

24. DW2, asked the court to also adopt his replying affidavit dated 3rd May, 2011, as also his evidence in this suit. He was categorical that the applicant had never occupied his portion of the suit land, parcel No. Magumoni/Rubate/749. He testified that the applicant had made attempts to invade his portion of the suit land and had at one time destroyed his barbed wire fence by cutting it. As a result he was prosecuted in Chuka Criminal Case No. 93 of 2010. He produced the proceedings in the Criminal suit as an exhibit. A Civil Suit was filed by the 5th

defendant in Chuka PM's court No. 64 of 2005. As a result, judgment was entered for the 5th defendant and he was evicted from parcel No. Magumoni/Rubate/760. He produced the order that evicted him as an exhibit. DW2, also produced as an exhibit proceedings concerning Chuka Criminal Case No. 1096 of 2011 where Florence Jarson Mukwanjeru and his wife Joice Muthoni Gitari had been charged with the offence of unlawfully assaulting Frederick Mbaka Maboresh thereby occasioning him actual bodily harm. Both of them were convicted and after mitigation were granted one year's probationary sentence.

25. During cross-examination DW2 told the court that he bought land parcel No. Magumoni/Rubate/759 in 2008. He said that he bought it from Geoffrey Munene Gacici, the son of the 1st respondent. He said that parcel 759 was a subdivision of 759. He told the court that he did not undertake due diligence concerning when Munene obtained his title. I opine that even if he had undertaken due diligence, the land was registered in the name of Munene and had not been cautioned and had not got inhibitory orders placed against it.

26. DW2 told the court that he knew the applicant for 30 years. He said that when he bought his land the applicant was living in his father's land behind the Presbyterian Teachers College. He was categorical that the applicant had not moved into the suit land when he bought his portion of the land.

27. DW2, admitted that there was a scene visit by the court. However, he explained that at that time the applicant had burned vegetation in the suit land and destroyed fences to conceal boundaries. He added that the applicant had been jailed for this criminal conduct.

28. I opine that having considered the totality of the evidence proffered by DW2, even after cross-examination, the veracity of his evidence was not impeached in any material manner.

29. DW3, Eileen Kagendo Mbaka, asked the court to adopt her witness statement dated 4th May, 2011 as her evidence in this suit. She also asked the court to also deem her replying affidavit sworn on 3rd May, 2011 as her evidence. Her witness statement reads as follows:

IRENE KAGENDO MBAKA'S STATEMENT

I am Irene Kagendo Mbaka the 2nd respondent in this case. I come from Magumoni division Thuita sub location. Am a business lady at Nairobi. Jason the applicant herein is a stranger to me.

I know the 1st respondent herein Francis Gacici who sold 2 acres of land to me through my father Jason Mbaka. Same being LR Magumoni/Rubate/757. I obtained the title in year 2000. I have been utilizing the land through planting crops and trees such as bananas, Avocado trees, graevilleas. In year 2007 Jason Gitari Njoka the applicant in this case went and set fire on my land burning the entire vegetation and my crops. I reported the matter at Chuka police station. He was charged with malicious damage of property, and trespass the same being criminal case no. 988/07. He was found guilty and sentenced to 2 years.

My land boarders (sic) that of Timothy Muriuki the 3rd respondent in this case, Fredrick Mbaka the 4th respondent herein. That I have been in possession of the said land from 2000 to-date uninterrupted.

That is all!

SIGNED BY.....

IRENE KAGENDO

30. DW3 told the court that the 1st respondent and his father knew each other and that it is through her father that she bought her portion of the suit land. She said that she conducted due diligence and all necessary processes were followed. She testified that at one time, the applicant set her land on fire and as a result he was charged with the offences of setting fire on trees and shrubs, trespass on private property and malicious damage to property. She testified that he was convicted and jailed. She produced proceedings in Chuka PM's Criminal Case No. 988 of 2007 as an exhibit. The court notes that he was sentenced to pay a fine of 30,000/= and in default to serve a 9 months imprisonment. For trespass, he was sentenced to pay a fine of 3,000/= and in default serve a 2 months imprisonment. For malicious damage to property he was sentenced to pay a fine of 10,000/= and in default to serve a prison sentence of 3 months.

31. During cross-examination DW3 was clear that his deceased father handled all issues concerning the land including cultivation. She also told the court that the criminal case against the applicant was handled by her father who gave evidence as the complainant. She told the court that before buying her portion of the suit land, she visited it and there was no homestead or occupation by the applicant.

32. She told the court that it was her workers, and not herself, who were subjected to violence by the applicant.

33. The parties wrote written submissions to support their assertions. The submissions are pasted in exactly the manner they have been filed by the litigants' advocates. Therefore, any clerical, grammatical or other mistakes, repetitions, any inconsistencies and/or shortcomings are the responsibility of the advocates who represent the litigants.

34. The applicant's written submissions state as follows:

APPLICANT'S FINAL WRITTEN SUBMISSIONS

1. Your lordship these are the applicant's final submissions. The applicant seeks for a declaration that he has an overriding interest in

the nature of adverse possession over land parcels LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761. The applicant seeks orders of this court to the effect that he be registered with the said parcels of land. We will demonstrate to the court that by the time the 1st respondent disposed the aforesaid parcels of land the title to the said parcels of land had been extinguished by operation of law and therefore he could not pass good title to any person let alone the current proprietors.

2. That parcels LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761 have a long history which started during the adjudication of Rubate Adjudication section as it was then. According to the applicant and his witnesses one NDURU IBURI walked the boundaries of what was then 38 Rubate Adjudication section and which was later registered as LR; MAGUMONI/RUBATE/38. The applicant's father one M'ITHARA NJOKA was then recorded with the then 38 Rubate Adjudication section during the adjudication process. Since M'ITHARA NJOKA the father of the applicant was working in what was then North Eastern province he left the 1st respondent who is his brother to finalize the registration. The applicant's father even gave the 1st defendant adjudication fees. According to the applicant the 1st respondent then caused LR; MAGUMONI/RUBATE/38 to be registered in his name. That by the time the applicant's father retired and came back home on permanent basis he knew and believed that LR; MAGUMONI/RUBATE/38 was his.

3. That M'ITHARA NJOKA the father of the applicant was surprised when he wanted to sell two acres to ELIZAPHAN IGUNA and JASPER NGAI. Upon conducting a search he found out that the land was registered with the 1st respondent. Several clan meetings were held to try and sought out the dispute between M'ITHARA NJOKA and the 1st respondent. First, the 1st respondent agreed that M'ITHARA NJOKA would sell the two acres and the 1st respondent was to execute all the requisite documents to effect the transfer. Secondly the clan NKUI NA IGAKUIYA resolved that the 1st respondent should transfer the remaining part of LR; MAGUMONI/RUBATE/38 to M'ITHARA NJOKA the applicant's father. The dispute continued for the 1st respondent did not accomplish the mission. After LR; MAGUMONI/RUBATE/38 was subdivided to pave way for the sale of two acres by M'ITHARA NJOKA LR; MAGUMONI/RUBATE/567 and LR; MAGUMONI/RUBATE/568 were the resultant parcels. That LR; MAGUMONI/RUBATE/567 was then transferred to ELIZAPHAN IGUNA and JASPER NGAI the purchasers. At a later date and in total defiance of the clan decision the 1st respondent subdivided LR; MAGUMONI/RUBATE/568 into LR; MAGUMONI/RUBATE/713 and LR; MAGUMONI/RUBATE/714. The 1st respondent then sold LR; MAGUMONI/RUBATE/713 to MERCY MUTHONI MBUBA. In the meantime on or around 2000 the 1st respondent subdivided LR; MAGUMONI/RUBATE/714 into LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761. This was carried out on paper alone while the applicant was in prison. The 1st respondent then transferred LR; MAGUMONI/RUBATE/757 to EILEEN KAGENDO MBAKA the 2nd respondent on or around 11th September 2000, LR; MAGUMONI/RUBATE/758 to TIMOTHY MURIUKI MUTEGI, LR; MAGUMONI/RUBATE/759 to GEOFFREY MUNENE a son of the 1st respondent who then transferred the same to FREDRICK MBAKA M'ABORES the 4th respondent, LR; MAGUMONI/RUBATE/760 to ERNEST MURITHI GACICI a son of the 1st respondent and the 1st respondent retained LR; MAGUMONI/RUBATE/761. Of interest to note your lordship is that the subdivisions and transfer of LR; MAGUMONI/RUBATE/714 was done on paper only. There are no boundary marks or beacons on the ground. The subdivisions and transfers were carried out while the applicant was in prison and incarcerated in prison for cutting down and harvesting trees he has been harvesting from time immemorial. The applicant became even further worried when the 5th respondent in 2005 filed a civil suit against the applicant. After getting interlocutory orders without serving the applicant the 5th respondent was given orders of eviction against the applicant. Quickly the applicant through his counsel intervened and the eviction orders were vacated and the suit reinstated for hearing. However the said suit NO 64 OF 2005 was stayed pending the hearing and determination of the instant O.S. Let the respondents not cheat this court that the applicant was ever evicted from the suit lands. There was only an unlawful attempt to evict the applicant without a proper hearing and following the correct procedure and in total affront of principles of natural justice.

4. Then what followed were attempts by the respondents to cause the arrest of the applicant but the applicant resisted all in bid to protect his occupation of the suit lands his homestead and his family.

5. The respondents' case is that they are the registered proprietors of LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761 variously and respectively. They are the registered proprietors and the applicant is only a trespasser. That the applicant has not been in occupation of the suit lands for a period of 12 years uninterrupted. According to the 1st respondent the applicant only moved into the suit lands in the year 2000. Looking at DW2's evidence the 4th respondent told this court that on or around 1970's the applicant moved from his father's land which is situated near Rubate teachers college to some other place. The 4th respondent only went short of telling the court that after moving from his father's land the applicant equally moved to the contested lands on or around 1974. The applicant's allegations marry very well with the 4th respondent's allegations that indeed the applicant moved from the land near the college in 1970's.

6. Your lordship it is worth noting that the respondents did not put in a counter claim. They did not seek for eviction of the applicant from the parcels of land they are registered with. The respondents only testified that the applicant has not acquired an overriding interest in the nature of adverse possession. That it means therefore that the respondents not having put in a counter claim they cannot bring a suit against the applicant to have him evicted from any of the suit lands. If the respondents had a claim against the applicant they should have put it in form of a counter claim. It is the applicant's case that he has been in occupation of LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761 from 1974 after moving from his father's land next to Rubate College as pointed out by DW2 the 4th respondent. He has a homestead. By the time he entered the parcels of land before they were subdivided he was only a young man. He got married while there and he has sired as many as nine children. Some daughters are married and the applicant is a grandfather.

7. Your lordship in our considered view the issues for determination include but are not limited to the following;

(i) Whether the applicant has an overriding interest in the nature of adverse possession on land parcels LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761 subdivisions of LR; MAGUMONI/RUBATE/714 a subdivision of LR;

MAGUMONI/RUBATE/568 a subdivision of LR; MAGUMONI/RUBATE/38 originally registered under the 1st respondent?

(ii) Whether change of ownership or title of land that has been acquired under adverse possession can defeat the adverse possession?

(iii) Whether the applicant dispossessed the 1st respondent of LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761 when the said still formed part of LR; MAGUMONI/RUBATE/714 and whether the 1st respondent ever regained possession of LR; MAGUMONI/RUBATE/757, 758, 759, 760 and 761 and whether the applicant applied the doctrine of self help to retain possession of the suit lands?

(iv) Who should pay the cost of the suit?

8. Your lordship in 1974 the applicant on instructions of his father M'ITHARA NJOKA a brother to the 1st respondent moved into what was then LR; MAGUMONI/RUBATE/38, occupied and started making use of about 15 acres or thereabout of what was then LR; MAGUMONI/RUBATE/38. The rest of the land was being utilized by the applicant's mother and step mother PW3. The 1st respondent subdivided LR; MAGUMONI/RUBATE/38 into LR; MAGUMONI/RUBATE/567 and 568 and M'ITHARA NJOKA sold LR; MAGUMONI/RUBATE/567. The 1st respondent then subdivided LR; MAGUMONI/RUBATE/568 into LR; MAGUMONI/RUBATE/713 and 714 and sold LR; MAGUMONI/RUBATE/713 to MERCY MUTHONI MBUBA. For all this while the applicant remained in the portion that came to be delineated as LR; MAGUMONI/RUBATE/714. The 1st respondent was careful enough not to touch this portion. Even by the time the 1st respondent subdivided LR; MAGUMONI/RUBATE/714 on or around 2000 the applicant was on the land for a period of about 26 years that is with effect from 1974. The 1st respondent was aware that the applicant was on the suit lands even as he went on to subdivide the land.

It is the applicant's evidence that he started to develop the suit lands even before they were excised from LR; MAGUMONI/RUBATE/714. He had various trees both fruit trees and gravellier trees. The applicant has a homestead where he has nurtured his nine children with children of over eighteen years and married. Both the applicant and his family know no other place as home. The applicant is still on this land as we talk. In addition to the homestead the applicant has chicken pen, goat pen and cowshed. A son of the applicant has a house on this land and he is 21 years old as we talk. The applicant planted trees which are now mature and therefore more than twelve years old.

In the 1st respondent's statement in compliance to order 11 received in court on 4th May 2011 the 1st respondent stated that the applicant entered into the suit lands in 1998. In cross examination he told the court that the applicant entered into the suit lands in 1974. Contradiction is the art of cheating. The 1st respondent was economical with the truth in particular when he stated that he does not know whether or not PW2 was a committee member of the land adjudication. That by the time the applicant filed this suit in 2011 he had already finished 12 good years on the suit lands. He was cultivating the whole of LR; MAGUMONI/RUBATE/714 before it was subdivided into the suit lands. Even after the suit lands were excised from LR; MAGUMONI/RUBATE/714 the applicant continued to make use of them all. He still uses these pieces of land to date.

Your lordship DW2 FREDRICK MBAKA ABORE was interesting. He told the court that the applicant before moving into the suit lands was living and residing on his father's land which is beside Rubate teachers college. On cross examination he was clear that the applicant moved from that land in 1970s. Although DW2 does not say where the applicant moved to this evidence clearly supports the applicant's evidence that he moved into the suit lands in 1974. This kind of evidence coming from the respondent is instructive that the applicant is telling the truth when he tells the court that he moved into the suit lands in 1974. To date this is a period in excess of 37 years.

The 1st respondent was clear that he did not give authority to the applicant to be on the suit lands. According to the 1st respondent he unlawfully entered into the parcels of land. The 1st respondent knew that the applicant was on the land. He did not take any initiative to remove the applicant into the suit lands even by writing a demand notice. He did not move to court to have the applicant evicted. This is a clear case of adverse possession and particularly noting that even in this suit the respondents did not file a counter claim. Your lordship by so submitting we are guided by the following cases.

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

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

(iii) COURT OF APPEAL AT BUSIA CIVIL APPEAL NO 6 OF 2000 WASUI VERSUS MUSUMBA

Of importance to note of the authorities is that mere change of ownership does not defeat overriding interest in the nature of adverse possession. See **GITHU VERSUS NDETE** above.

9. The second question posed by these proceedings is whether transfer of ownership over land which there is an overriding interest in the nature of adverse possession can defeat such an overriding interest as is in this case. The answer to this question is in the negative. Mere change of ownership does not defeat an overriding interest in the nature of adverse possession. The 1st respondent subdivided LR; MAGUMONI/RUBATE/714 and disposed it to various persons including the 2nd respondent, 3rd respondent and the 5th respondent. He retained LR; MAGUMONI/RUBATE/761. As regards LR; MAGUMONI/RUBATE/759 it was transferred to the 4th respondent. We submit that these changes of ownership did not affect the applicant's overriding interest over the suit lands who was in occupation and in use exclusively and uninterrupted from 1974 a period in excess of about 37 years. Your lordship in so submitting we are guided by the following court of appeal authorities; (see authorities cited at paragraph 8 herein above)

10. The doctrine of adverse possession means that the applicant should have for a period of not less than 12 years exclusively and without any interruption have occupied and made use of such land in a manner adverse to the rights of the registered owner. The respondents attempted to dislodge the applicant from the suit lands after they acquired the same from the 1st respondent. We have already pointed out that subsequent ownership of LR; MAGUMONI/RUBATE/714 and transfers thereof were inconsequential granted the long period the applicant had occupied the suit lands before they were excised from LR; MAGUMONI/RUBATE/714. The applicant was arrested and charged even for trespass on private land. This was done by the father of the 2nd respondent. Using the titles they had acquired secretly and on the land that was not subdivided on the ground the respondents variously had the applicant arrested and charged for either assault, trespass or cutting down trees he had planted. To date no beacons are on the ground and the land remains whole as the applicant has been using for subsistence crops and other benefits. The respondents and in particular the 1st respondent has never retaken back the suit lands from the applicant. The applicant was bound to apply self help to stop the new purchasers, 2nd, 3rd, 4th and 5th respondents from ejecting him from the land. He was there with his family and he had no other place to move to. He was there from 1974 when he was a young boy. He is still there and he is a grandfather. All criminal cases that DW2 talked about were geared towards removing the applicant from the suit lands. He however went to court, came back and defended his occupation of the sit lands since 1974. All the respondents have in vain tried to remove the applicant from the suit land. He is still entrenched on the suit land.

11. Who should pay the cost of this suit? Your lordship costs follow the event courtesy of section 27 of the civil procedure act. The applicant has been forced to come to court t champion and articulate his rights. The respondents jointly and severally should be condemned to pay the cost of this suit.

12. We rest our submissions and pray.

DATED AT CHUKA THIS 5TH DAY OF NOVEMBER, .2018

35. The second respondent's written submissions read as follows 2nd respondent's submissions

2ND RESPONDENT'S SUBMISSIONS

1. BACKGROUND:

Your Lordship, the Applicant instituted this suit by way of an Originating Summons dated 7th March 2011. The Respondents filed their respective Replying Affidavits in opposition to the originating summons on 4th May 2011. More particularly the 2nd Respondent filed her replying affidavit in opposition to the originating summons on 4th May 2011 and a further affidavit on 29th October 2018.

With particular reference to the 2nd Respondent, the Applicant's claim is that he has been in possession of property title number Magumoni/Rubate/757 registered in the 2nd Respondent's name since 1974 and thus claims adverse possession over the said property.

The 2nd Respondent denies the same and insists that she is the bonafide owner of the property in dispute having purchased the same for value from the 1st Respondent in 2000, after conducting the necessary due diligence and that at the point of purchase and transfer there was no adverse claim raised by the Applicant. Further, the 2nd Respondent contends that the Applicant only took possession of her property for a short stint in the year 2007, and thefater the Applicant was evicted and prosecuted in court in Chuka Criminal Case No. 988 of 2007 wherein he was convicted of trespass on private land, malicious damage to property and setting fire to trees and shrubs.

2. ISSUES FOR DETERMINATION

Your Lordship, with particular reference to the 2nd Respondent, the only issue for determination in our humble opinion is whether the Applicant has made out a case to meet the threshold to successfully sustain a claim of adverse possession over the 2nd Respondent's land Title Number Magumoni/Rubate/757.

3. TESTIMONY

The Applicant called three witnesses in support of his case, himself, a Mr. George Mutugi Nahashon and Lydia Ciamwiru Njoka.

PW1 adopted his statement dated 7th March 2011, as his evidence in chief in this matter. He testified that he went to the 1st Respondent's land in 1974. The gist of his evidence is that his father was the owner of Magumoni/Rubate/ 38 that was subdivided to produce the new titles which are in issue in this manner. He claims that the 1st Respondent subdivided the land through fraudulent means and thereafter sold and apportioned the property to the Respondents herein.

Gaps and inconsistencies in PW1'S testimony

i. He admitted that he never got a title document over the property that was bequeathed to him by his father which he claims validly belongs to him.

ii. He claims that his father was an AP in Somalia and thus the reason why when the adjudication was done over the property he

missed out and was disenfranchised by his brother, the 1st Respondent. It is quite odd that his father a Kenyan National would have been an administrative police officer in a foreign country Somalia. Further he claimed that despite his father having been an Administration Police officer he never knew how to read or write. This comes out as a lie. It is foolhardy for a foreign government to employ a foreign national in their police service further one who does not even know how to read and write.

iii. He testified about the elders having ruled in his father's favour against the 1st Respondent when there was a dispute between him and his brother to bolster the case that the property claimed is ancestral, that he inherited from his father, but there was no corroboration whatsoever of the same.

iv. He further did admit to having been jailed over trespassing and maliciously damaging the 2nd Respondent's property, which he claimed to have always been in possession of over the years.

v. He further admitted during cross-examination that he did not actually know the title number of the parcel of land that he is claiming.

PW2 as well adopted his witness statement. The bulk of his testimony was not cogent and was hearsay. Highlights of PW2's testimony

i. He claimed not to know that in the year 200 that the 1st Respondent had sold property Magumoni/Rubate/757 to the 2nd respondent.

ii. His evidence was primarily hearsay. He referred to an alleged decision of the clan that was not in favour of the 1st Respondent's ownership of the properties in issue in order to bolster the Applicant's case, however he was not present at the said proceedings nor did he provide any documentary proof of the same.

iii. He did admit that he knew that the Applicant had been jailed in relation to his violent occupation of the Respondents land

PW3 adopted her testimony which had been filed in court. It was worthy to note that the said adopted witness statement had not been signed by PW3. It did become apparent during cross examination of PW3 by the Respondents' counsel that her testimony in court was in variance with her unsigned witness statement. It is plausible that the reason for this is that she is not the one who originated the preparation of the written statement filed in court.

Inconsistencies and gaps in PW3's statement.

i. In her statement filed in court she claimed that she knew the Respondents in the matter yet while under cross examination she maintained she did not know them then later flip flopped on the issue when she said she only knew the 1st Respondent. This brings into issue the integrity of the witness and her testimony in court.

ii. She admitted to not knowing the land in question as per the title numbers yet in her statements she referred to them.

iii. It was apparent that she actually did not know which particular parcels of land were in issue with respect to this suit. More particularly with respect to the 2nd Respondent's property Title Number Magumoni/Rubate 757, she did not know where it is.

iv. She claimed to have had a close relationship with her step son, the Applicant, herein but despite knowing that he had been jailed she did not know the reason for the same. It appeared that she had been coached on what to say whilst giving her testimony or that she was out rightly lying to the court.

v. She admitted to not knowing how to read and write yet she could vouch as to the authenticity of the contents of her witness statements well as the day it was filed in court. It appears that the reason that she indeed did not sign the statement is because she doesn't know how to read or write and she did not actually participate in the making of the statement.

In totality, PW3's testimony did not come out as credible, it was shaky and vey inconsistent. The witnesses demeanour too left a lot to be desired. She was rude when being cross examined and would avoid answering questions put to her by the Respondents' counsel, which conduct the court too took note of. Further, given the fact that she admitted to not knowing the location of the parcels of land in issue more particularly land parcel Title Number Magumoni/Rubate/757, it is impossible for her to aid the Applicant in his case in proving he has been in possession of the land for the statutory period to sustain a claim of adverse possession over the property.

The Respondents called 3 witnesses, Francis Gacici, Fredrick Mbaka and Eileen Kagendo Mbaka, hereinafter referred to as DW1, DW2 and DW3 respectively.

PW1 adopted his witness statement. He did explain the manner in which he sub-divided his property and the manner in which he sold to the 2nd Respondent land parcel Title Number Magumoni/Rubate/757. He testified that prior to the sale of the said property to the 2nd Respondent, he was the one in occupation and use of the property and further that even thereafter it was in the use of the 2nd Respondent. He testified that around the year 2007, the Applicant violently trespassed on the same and burnt the vegetation thereon. He further testified that the Applicant was prosecuted, convicted and served time in jail for his unlawful trespass and malicious damage of property on the 2nd Respondent's land as well as for burning her vegetation. He further testified that the Respondents in this suit have not been having peaceful occupation and use of their parcels of land in dispute as the Applicant has time and again been using violence to evict them.

PW1 further testified that he did know the Applicant quite well since the Applicant's childhood days as he was the Applicant's paternal

uncle.

On cross examination, DW1 denied that the Applicant had ever been in possession of the parcels of land in issue since 1974. He maintained that the Applicant had been in occupation of just but a small portion of parcel Title Number Magumoni/Rubate/760 belonging to the 5th Respondent Ernest Gacici, his son since around the year 2000. He maintained that the parcels of land in issue had been cultivated way before the Applicant encroached on the 5th Respondent's property. He further maintained that at no point had any of the properties in dispute herein ever been registered in the name of the Applicant or his father and further that the sub-division process that culminated into the titles in issue herein was done transparently without any duress or fraud. He further testified that parcels of land Title Number Magumoni/Rubate/ 757 - 760 belonging to the Respondents herein which the Applicant is claiming ownership rights over by adverse possession were not in existence in 1974.

DW2 as well adopted his witness statement filed in court as his evidence in chief. He did explain the manner in which he came into ownership of his parcel of land in issue. He testified that the Applicant had a history of using violence in a bid to evict the Respondents from their property. He did produce as evidence to court judgments in which the Applicant had been found culpable of trespassing on the Respondents' property. He did further testify that the Applicant has personally meted out violence against him in a bid at evicting him from his property in issue. He further testified that the Applicant only utilizes a very small portion of the 5th Respondent's land approximating around 40 meters by 50 meters and is not in occupation of the entire 7 acres of land he claims owned by the Respondents in this matter which he claims.

During cross examination, DW2 maintained he did not know of plot 714. He further maintained that the Applicant never had a homestead on the property in dispute when he purchased his property. He further testified that he has known the Applicant for over 30 years. He further testified that it could not be true that the Applicant lived in the properties in issue since 1974 as having known the Applicant for over thirty years he does know that the Applicant lived in Rubate near the teacher's college from 1970s until the early 1990s. He further maintained that at the time of purchase of his property the Applicant was not cultivating upon it.

DW3, too adopted her statement filed in court on 4th May 201,1 as well as her replying affidavit filed on the same date and her further affidavit filed on 29th October 2018 as her evidence in chief. She testified that she acquired her property title number Magumoni/Rubate/757 in the year 2000. She testified that her late father Jasper Mwachani Mbaka and the 1st Respondent were good friends and it was through that relationship between the two that the 1st Respondent sold to her title number Magumoni/Rubate/757. She testified that prior to purchase of the property all due diligence was conducted to ensure that the title was clean and further that there was no third party with any adverse interests on the property. It was her testimony that the sale was subject to issuance of a land control board consent and that during the sitting of the land control board nobody including the Applicant raised any objection or claimed ownership of the same. She further testified that as she was resident in Nairobi where she earns her living, it was her father who maintained her property on her behalf

DW3 testified that she had cultivated upon her land and did have workers working there up until 2007 when the Applicant violently sought to occupy the property. It was at this point that DW3's father, the late Jasper Mwachani Mbaka, reported the matter to the police leading to the successful criminal prosecution of the Applicant herein on the following counts, trespass upon private land, malicious damage to property and setting fire to trees and shrubs in Chuka Criminal Case no. 988 of 2007. She did produce a copy of the judgment as an exhibit to this court.

She further testified that she had given her father a power of attorney to act on her behalf with respect to the property in issue and that is the reason that it was her father who was the complainant in the criminal case against the Applicant and that further her father was an active participant in this present suit and had even filed witness statement prior to his death.

4. ANALYSIS OF THE FACTS AND THE LAW

Your Lordship, ingredients of adverse possession were discussed by the Court of Appeal in **MTANA LEWA V KAHINDI NGALA MWAGANDI [2015] EKLR** where the court stated:

“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 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 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 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, 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 the 2nd Respondent's humble submission that this court be guided by the above legal principles and prerequisites of adverse possession as it renders a decision in this matter as to whether the Applicant has a claim over the 2nd Respondent's property Title Number Magumoni/Rubate/757 by adverse possession.

Your Lordship let us at this juncture interrogate the ingredients of adverse possession vis a vis the facts of this case.

i. Was the alleged possession of the Applicant over the 2nd Respondent's property for a continuous and uninterrupted period of 12 years?

Our answer to the above is no. The Applicant has claimed that he was in possession of the Respondents' land since 1974 however no proof has been adduced to prove the same. His witnesses that he called to support the case cannot vouch for his possession over the property. PW2's evidence was mostly hearsay and hence unreliable with no probative value. Further, PW3 admitted that she did not even know what parcel of land was in issue with respect to this case. To that end it is impossible for her to prove that the Applicant was in possession of the 2nd Respondent's property which she knows nothing about in terms of its location as well as title number.

In the evidence of DW1, who admitted to having good knowledge of the Applicant since his childhood did state that in the 1970s to the early 1990s, the Applicant did not either reside or have occupation over the land parcels in issue in this suit thus contradicting the Applicant's evidence that he had been on the land since 1974. Further DW1, testified that the only property in issue which the Applicant has been in occupation is a small portion of the 5th Respondent's which he occupied on or about the year 2000 thereabouts.

DW1, further testified that he is the one who sold land parcel Title Number Magumoni/Rubate/757 to the 2nd Respondent in the year 2000 and that at the time of the sale he had been the one in actual possession and use of the land to the exclusion of others, more particularly the Applicant. It was DW1, DW2 and DW3's testimony that the Applicant encroached on the 2nd Respondent's land on or around the year 2007 violently and he was jailed over the said illegal occupation of the 2nd Respondent's land. It is noteworthy that the applicant as well as PW2 and PW3 all conceded the Applicant's conviction over his trespass and malicious damage of property on the 2nd Respondent's land.

If we are to go by the testimony of the witnesses in court the Applicant clearly did not have occupation of the 2nd Respondent's land prior to 2007. For argument purposes alone, if we are to concede that he took over occupation in 2007 then as at the time of filing this suit in 2011, he had not met the threshold of 12 years.

In light of the above more particularly the shaky, disjointed and uncorroborated evidence of the Applicant and his witnesses that he had possession of the 2nd Respondent's land for 12 years as opposed to the well founded and corroborative evidence of the Respondents' witnesses' testimony, we humbly urge the court to find that the Applicant has failed to prove his continuous occupation of the 2nd Respondent's property for the statutory period of 12 years.

ii. Was the occupation of the 2nd Respondent's property Title Number Magumoni/Rubate 757 peaceful or by force?

Your Lordship, from the testimony and evidence laid out in court it is manifestly clear that the Applicant's occupation over the 2nd Respondent's property was through force and violence. DW1, DW2 and DW3 all testified as to the violent nature of the Applicant in seeking to evict the Respondents from their properties.

Indeed, judgments in several cases more particularly Chuka Criminal Case No. 988 of 2007, were tabled before court as evidence of the Applicant's forceful and violent occupation of the 2nd Respondent's property. In Chuka Criminal Case No. 988 of 2007, the Applicant was convicted of the following counts trespass upon private land, malicious damage to property and setting fire to trees and shrubs. From the counts upon which the Applicant was charged with and resultantly convicted it is manifestly clear that his occupation of the 2nd Respondent's land was not peaceful at all.

Further, the 2nd Respondent testified that since the violent occupation of the land by the Applicant that resulted in his prosecution and conviction she had ceased further occupation of the land due to fear of further violence from the Applicant. It is also worthy to note that DW2 also did testify that he has personally been physically accosted by the Applicant and did provide judgments from court evidencing the same.

Your Lordship, it is our humble submission that from the foregoing it is clear that the Applicant's occupation of the 2nd Respondent's property was not peaceful and thus the Applicant has failed to meet one of the prerequisites of adverse possession.

5. CONCLUSION

From the foregoing it is manifestly clear that the Applicant as at the time of filing the instant suit had not had possession of the 2nd Respondent's property for a continuous period of 12 years. It is further clear that there was no evidence to corroborate the Applicant's claim that he has been in possession of the said property since 1974 as he claimed. Indeed, his only attempt at occupation of the 2nd Respondent's property was orchestrated violently which led to his eviction from the property and his prosecution and conviction.

In light of the above, we humbly submit that the Applicant's claim of adverse possession on the 2nd Respondent's property is far-fetched, misconceived and misplaced. We humbly pray that this court does dismiss the same with costs.

We humbly submit.

Dated at Nairobi the 12th day of NOVEMBER, 2018

KIMANI & MUCHIRI

ADVOCATES FOR THE 2ND RESPONDENT

36. The 1st, 3rd, 4th and 5th respondents' written submissions read as follows:-

the 1st, 2nd, 4th and 5th respondents' final submissions

THE 1ST, 3RD, 4TH AND 5TH RESPONDENTS' FINAL SUBMISSIONS

My Lord,

The Plaintiff (Applicant) has applied before this court that he be registered as owner of land parcels **Magumoni/ Rubate/ 757, 758, 759, and 760** claiming that these parcels have fallen to him by adverse possession. He (Applicant) alleges that he has occupied those parcels for over 12 years, hence entitling him to ownership by adverse possession. The 1st, 2nd, 3rd, 4th and 5th Respondents have denied that the plaintiff has never occupied those parcels at all. To begin with it is apparent on the face of the record that those parcels **Magumoni/ Rubate/ 757,758,759 and 760**, were not in existence in **1974** when he alleges to have occupied them. The truth of the matter is that all these parcels came into being after they were transferred to their respective owners by **DW1 (Francis Gacici Irubia)** and other owners since the year **2000**. That D W 2 (Fredrick Mbaka Abores) got his Land **Magumoni/ Rubate/759** on **31/10/2010**, Ernest Murithi Gacici got his land **Magumoni/ Rubate/760** from his father in the year 2000, while Timothy Muriuki Mutegi bought his land **Magumoni/ Rubate/758** in the year **2007**.

It is therefore apparent from the word go, that **PW1 (Jason Nyaga Gitari)** is not telling the court the truth when he says he occupied **Magumoni/ Rubate/ 757,758,759 and 760** in **1974**.

PLAINTIFF'S CLAIM

The plaintiff's case taken briefly is that **Jason Gitari Njoka** alleges that he occupied those parcels since the year 1974, peacefully, uninterrupted, and with the knowledge of the defendants. **PW2 (George Mutegi Nahason)** says the suit land was occupied in 1974. He never told the court when parcels **Magumoni/ Rubate/ 757,758,759** and 760 were occupied by the Plaintiff (if at all) there was such occupation. The third witness **PW3 (Lydia Ciamuiru)** could not tell which portions of land were in dispute and she even ventured to say she does not know who were the actual defendants. It would appear that P W 2, and P W 3 were merely picked up to just fill up space to support a baseless claim.

DEFENDANT'S CASE

On the defence, **PW1 (Francis Gacici Irubia)** stated that the disputed parcels **Magumoni/ Rubate/ 757,758,759 and 760** emanated from him sub-diving his land No. **Magumoni/ Rubate/38** and selling it to the 2nd Respondent, 3rd and 4th Respondents buying from his children and the 5th Respondent, who is the son of the 1st Respondent getting parcel No. **Magumoni/ Rubate/760** as a gift from him (PW1). PW1 told the court (and this evidence) was not challenged that the plaintiff has never occupied land parcels **Magumoni/ Rubate/ 757,758,759** though the plaintiff has been attacking violently the owners of **Magumoni/ Rubate/ 757,758,759 and 760**. P W1 conceded that the only portion occupied by use of force is **Magumoni/ Rubate/ 760** which he estimates to be about ¼ of an acre in occupation. **DW2 (Fredrick Mbaka M'Abores)** who also spoke on behalf of the 3rd, and the 4th Respondents told the court that

the plaintiff has never occupied parcels **Magumoni/ Rubate/ 757,758, and 759** at all.

He DW2 conceded that a portion of **Magumoni/ Rubate/760(about ¼ of an acre)** is occupied violently by the plaintiff.

TOTALITY OF THE EVIDENCE

On the evidence, there is absolutely no evidence, that the plaintiff has ever occupied **Magumoni/ Rubate/ 757,758, and 759** at all. If one would pause to ask, on what date did the plaintiff enter parcel Numbers **Magumoni/ Rubate/ 757, 758, and 759**. There is no such evidence adduced on **Magumoni/ Rubate/ 760**, he has occupied about ¼ of an acre by use of brute force.

In 1974, these three parcels **Magumoni/ Rubate/ 758,759** and **760** never existed.

Magumoni/ Rubate/758 was registered in the year, 2000, and **Magumoni/ Rubate/759** was registered on **31/10/2008**, while **Magumoni/ Rubate/ 760** was registered on **17/10/2000**.

There is unchallenged evidence that **Jason Gitari Njoka (PW1)** has never occupied **Magumoni/ Rubate/ 758 and 759** save on one or two incidences when he went to cause violence on those portions of Land, arrested by Police and in some occasions convicted. On **Magumoni/ Rubate/ 760**, he has occupied about ¼ of an acre of land, by uses of violence and this can not qualify as adverse possession as the 4th Respondent has actively resisted this forcible invasion by taking the applicant to court in Chuka **PM 'S Court Civil case No. 64 of 2005** in which an eviction order was issued and the plaintiff has refused to let go of that portion.

It is therefore submitted other than a single forcible entry on **Magumoni/ Rubate/ 758, and 759**, when the plaintiff had gone to burn those parcels of land, the plaintiff has never entered into those portions of land. He entered, met resistance, and left. The plaintiff being the violent person he is sometimes sneaks into all these parcels **Magumoni/ Rubate/ 757, 758, and 759** burns the land and disappears.

With **Magumoni/ Rubate/760**, he occupies violently a corner of this land but there has been active resistance of the part o f the 5th Respondent **Ernest Murithi Gacici** who has sued the plaintiff in Chuka **P M'S Civil Suit No. 64 of 2005**, where a court decree was issued for the plaintiff to vacate that piece of land, but has to date by means of violence refused to vacate the ¼ of an acre put up a residential structure this; y Lord, is not adverse possession, but trespass, forcible detainer, nuisance, and sheer impunity.

This impunity has at times been visited on parcels **Magumoni/ Rubate/ 757,758, and 759** but only temporarily. There has not been any occupation on those four parcels.

THE BURDEN OF PROOF

He who alleges must prove a fact that is the law in **S. 107** of the evidence Act. The plaintiff has alleged adverse possession but he has totally failed to prove the same on any of the Four Parcels **Magumoni/ Rubate/ 757,758, 759, and 760**. For this failure to adduce evidence to prove adverse possession, within the meaning of **S. 7** of limitation of Actions Act, Cap 22 that is to say continuous un interrupted, and peaceful use of those parcels of land for period exceeding 12 years, then this action must fail. No such evidence of adverse possession has been led.

It appears with respect. The applicant dwelt with the history of the land Adjudication and forgot that he had to offer specific evidence in respect of each parcel of land in dispute to prove occupation for over 12 years, and that such occupation was devoid of violence. That such occupation was peaceful and uninterrupted.

On all those parcels **Magumoni/ Rubate/ 757,758, 759, and 760**, the plaintiff has failed to point out to this court when time began to run for each of the 4 parcels of land.

THE LAW

It would appear with profound respect, that the plaintiff mis apprehended the law of adverse possession when filing this claim. That the moment one uses violence to gain entry, or to sustain the illegal entry as in **Magumoni/ Rubate/760** adverse possession can not be pleaded. The maximum of the law on adverse possession has been "nec vi nec clam nec precario" which means without force, without secrecy, without permission. None of those ingredients in regard to adverse possession has been proved by the plaintiff. Instead, what has come out are a few violent incursions on the disputed land **Magumoni/Rubate/ 757,758, 759 and 760** which are unacceptable forms of brutality against the bonafide owners of those parcels and that cannot pass as adverse possession.

In other words, the plaintiff has totally failed to prove adverse possession and I invite the court to hold that the plaintiff has not discharged that burden of proof.

In conclusion, I do invite this court to be guided by a decision of this court, or its predecessor, in **NAIROBI CIVIL SUIT NO.1402 OF 1986: KIMEU VS. SYINA 1991 K L R 421** where Bosire J (as he then was) held that the onus of proof of adverse possession and its ingredients lie on the of Plaintiff. The learned Judge in that that suit dismissed the claim in that the burden of proof had not been discharged by the plaintiff.

CONCLUSSION

The plaintiff and his witnesses appeared not to know what case was before the court, and largely dwelt on irrelevancies. There was active resistance of the plaintiff whenever he attempted to disrupt the quiet possession of the owners. Such resistance includes Criminal Case Chuka Cr. 181/2010 and CR. 993/2010, by the 5th Respondent, and Chuka Civil Case No. 64/2005 by the 4th Respondent where an eviction order against the plaintiff was issued.

Instead of focusing on what constitutes adverse possession the plaintiff overlooked the fact that no amount of violence visited on bonafide owners of property can be translated to adverse possession. The plaintiff having failed to prove his case, I most humbly pray that Your Lordship dismisses the suit with costs.

DATED AT CHIKA THIS 5TH DAY OF NOVEMBER, 2018

P.M. MUTANI ADVOCATE

FOR THE 1ST, 3RD, 4TH and 5TH RESPONDENTS

37. The applicant proffered the following cases in support of his assertions.

- i) Githu versus Ndeete, CA, Nairobi, [1984] KLR 776
- ii) Public Trustee versus Wanduru, CA, Nairobi, [1984] KLR 314
- iii) Wasui versus Musuma, Busia High Court No. 6 of 2000 [2002] KLR 396

38. The 2nd respondent's advocate did not annex any authority to his submissions but cited the case of Mtana Lewa versus Kahindi Ngala Mwangandi [2015] eKLR. This is an eminently good authority for the principle that for adverse possession to accrue, all the elements prescribed by the applicable law must be satisfied. It is also a good authority for laying down ingredients concerning the process that triggers accrual of adverse possession. It states: ***"The process springs into action 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 and in extent to show that possession is adverse to the title owner. The doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act....."*** My careful consideration of these ingredients brings me to the conclusion that the applicant has not satisfied them. I will say no more about this case. However, I do not see the necessity to come back to this authority.

39. The 1st, 3rd, 4th and 5th respondents proffered the case of Kimeu versus Syina, Nairobi High Court, Civil Suit No. 1402 of 1986 [1991] KLR 421.

40. I find it necessary to say something about submissions. They are, no doubt, important tools for highlighting the respective cases in as far as the litigants are concerned. They also highlight salient principles in the legal authorities proffered by the parties. However, submissions cannot be misused by parties to introduce new evidence. Such introductions do not constitute evidence at all and must be ignored by courts. Decisions made by courts must be predicated upon the evidence proffered by parties, including in proper cases such as where oral evidence is tendered, subsection of such evidence to cross-examination to test its veracity and integrity.

41. I find that there are only two principal issues for determination in this matter:

- i) Upon consideration of the totality of the evidence proffered by the parties whether or not the applicant is entitled to be registered as the absolute proprietor of 7 acres comprised in L.R. Nos. Magumoni/Rubate/757, 758, 759, 760 and 761 part of L.R. Magumoni/Rubate/714 part of L.R. Magumoni/Rubate/568 part of L.R. Magumoni/Rubate/38.
- ii) Who will bear costs.

42. It is noted that in explicable, in his amended plaint dated 17th May, 2017, the applicant has escalated his claims to 12.75 acres from the original 7 acres.

43. Determination of the two issues as I have framed will subsume all the questions framed by the applicant in his Originating Summons.

44. PW1 and his witnesses PW2 and PW3 gave evidence which amounted to a veritable litany of contradictions and inconsistencies. The applicant gave evidence that he moved into the suit land upon his instructions of his father in 1974. PW2 and PW3 had filed witness statement seeking to support his claim. PW1 told the court that after his father had come from Somalia, perhaps he meant to say the Northern Frontier District, where he was an AP, he found that the Adjudication process had ended. He claimed that his father raised an objection with the Adjudication Committee and that he was awarded the land. He went on to say that since his father's leave had come to an end, he asked the 1st respondent, his brother, to deal with the land as his trustee. It is noted that the 1st Respondent was registered as 1st proprietor of the suit land on **6th February, 1967**.

45. PW2 in his statement says that the boundaries of the suit land were walked by M'Iburi M'Mwara on behalf of the applicant's father. The applicant is categorical that when his father came back from Somalia (perhaps he means NFD) he found that the adjudication process had ended. PW1 says that he discovered that the original suit land was registered in the name of the 1st respondent in 1995. PW2 is categorical

that the father of the applicant discovered this fact in 1998. Both, however, are congruent that he discovered this fact when he wanted to sell a portion of L.R. Magumoni/Rubate/38 to some buyer or buyers.

46. Whereas PW1 told the court that he had moved into the suit land alone in 1974, PW2 was categorical in his oral evidence that PW1 moved into the suit land when he was a child and that he moved into the land with his father. This is a veritably variant piece of evidence from the testimony of PW1.

47. PW3 was generally a hostile witness. She said that she was the stepmother of the applicant. She testified that the suit land was originally registered in the name of Ithaara Irubia. This was veritably false because according to PW1's exhibit No. 1, a copy of the apposite green card, the 1st registered proprietor was Francis Gacici, the 1st Respondent.

48. PW1 came out to be an untruthful witness. He denied that he was convicted of 3 criminal counts in Chuka PMCC No. 988 of 2007 after he had set fire to trees and shrubs, trespassed upon and caused malicious damage to property on the 2nd respondent's land. He indeed was fined a sum of Kshs.43,000/= and in default was to serve a cumulative 14 months imprisonment. He also denied that the 5th Respondent had filed a suit against him upon which he was evicted from the suit land in 2006.

49. PW3 constructively abandoned her witness statement. She told the court that she had never visited the suit land although she had indicated in her witness statement that she came to realize that the suit land was not registered in the name of the applicant's father when she "**saw new persons cultivating the land Jason was cultivating**". This was a material lie. Therefore, her evidence in her statement concerning the developments put up by the applicant was all contrived and constituted veritable lies. Generally, she evinced a very hostile demeanour and answered almost all questions put to her with a laconic "I do not know."

50. It is my finding that one cannot know when PW1 tells lies and when he tells the truth. I find that the probative value of his evidence and the evidence given by his witnesses, PW2 and PW3, is fatally flawed and full of inconsistencies.

51. I find the evidence of DW1, DW2 and DW3, the defence witnesses, credible.

52. I turn to the authorities proffered by the applicant and by the 1st, 3rd, 4th and 5th defendants.

53. The case of Githu versus Ndeete (supra) proffered by the applicant is a good authority that mere change of ownership does not defeat overriding interests in the nature of adverse possession. But that is where adverse possession has been proved. Adverse possession must be proved through cogent evidence. In this case the applicant's evidence does not support his claim for ownership of land by adverse possession. There is evidence that he entered the suit land by force. He was convicted of criminal offences. He was also evicted through a court order. And yet he somehow went back to the land. He seems to have rubbed off his violent nature upon his wife who was convicted in Chuka PM's Criminal Case No. 1096 of 2011 for unlawfully assaulting and occasioning actual bodily harm upon Frederick Mbaka M'Abores, the 4th Respondent.

54. The case of Public Trustee versus Wanduru (supra) is a good authority that where there is sufficient evidence, a claimant's claim had overriding interest over the apposite land under the Registered Land Act and, of course, by extension the present legal regime concerning land. In this case, the applicant has not proved his claim.

55. The third case proffered by the applicant is the case of Wasui versus Musumba (supra). This case is a good authority that adverse possession is tenable where there is sufficient evidence. Indeed the court found that the issue of an overriding interest was not a matter for adjudication in that originating summons as indeed the only relief that could be sought in an Originating summons of that nature was the registration of the applicant as proprietor of the suit land by virtue of adverse possession. The court declined to pronounce itself on the merits or otherwise of the claim based on overriding interest. The court also held that adverse possession cannot accrue when a claimant has occupied the suit land with the permission of the registered owner. With utmost respect, although this case is a good authority in its facts and circumstances, this case is not relevant to the facts and circumstances of this suit.

56. The 1st, 3rd, 4th and 5th Respondents have proffered the case of Kimeu versus Syina (supra). This case is a good authority for the principle that in a claim based on adverse possession, the applicant/plaintiff was duty bound to adduce, inter alia, evidence that he had been in possession of the suit land, that the occupation was exclusive, was adverse to the defendant's rights as owner and that his occupation had been continuous and uninterrupted or unchallenged for a period in excess of twelve years since the possession commenced. This authority is relevant to this case.

57. I find it necessary to tackle the issue of when time to accrue for adverse possession started running. Although the applicant claims to have entered the suit land in 1974 when he was 18 years old, his claim has been impeached by inconsistencies inherent in the evidence tendered on his behalf by PW2 and PW3. As I have already pointed out one finds it difficult to know when the applicant was lying or telling the truth. I am unable to find a point in time when time for accrual of adverse possession would have started running. PW2, in particular, was unequivocal that the applicant had moved into the suit land with his father in the 1960's. The applicant, himself, told the court that he occupied the suit land in 1974. Which is which? PW3 testified that she had never been near the suit land. This juxtaposed with her witness statement depicted her as a veritable liar because in her statement she had averred that she had seen the respondents cultivating the suit land. And more!

58. I have carefully considered the pleadings, the oral evidence and the submissions proffered by the parties in support of their veritably incongruent assertions. I have also considered the authorities they have annexed or cited. I find that the applicant has not proved that he is entitled to be registered owner, through the doctrine of adverse possession, of all the parcels of land he claims in his Originating Summons all of which through various subdivision emanated from the 1st Respondents Original Land Parcel No. Magumoni/Rubate/38.

59. The applicant is directed to vacate the suit land within three months after delivery of this judgment and should he fail to do so, his eviction is hereby ordered.

60. Costs shall follow the event and are awarded to all the defendants.

61. Orders accordingly.

Delivered in open Court at Chuka this 13th day of December, 2018

in the presence of:

CA: Ndegwa

Martin Muchiri for the 2nd Respondent

Mutani for 1st, 3rd, 4th and 5th Respondent

Dennis Muthomi h/b I.C. Mugo for the Applicant

P.M. NJORGE

JUDGE