



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 248 OF 2009

MUSA MUSYIMI1ST PLAINTIFF

ERASTUS MUIA MUSYIMI.....2ND PLAINTIFF

MUTIE MUSYIMI3RD PLAINTIFF

MBULA MUSYIMI4TH PLAINTIFF

VERSUS

MARTIN MATI MULINGE JOSHUA MUEKE MULINGE

(sued in their capacity as legal Representative of the Estate of

MULEWA MULINGE (deceased)DEFENDANTS

JUDGMENT

Introduction:

1. On 13th August, 2009, the Plaintiffs herein commenced this suit by way of an Originating Summons of the same date.
2. In the Originating Summons, the Plaintiffs raised the following issues for determination:
 - a. *Have the Plaintiffs jointly and severally been in actual possession and occupation of the suit land for a period in excess of twelve (12) years?*
 - b. *Has there been absence of possession by the true owner of her heirs, personal representatives and assigns through abandonment?*
 - c. *Do the Plaintiffs have any other right to be in occupation and control of the suit land other than their entry and occupation?*
 - d. *Have the Plaintiffs openly and without the consent of the Defendants cultivated the suit land, built houses therein or otherwise done any other acts which are inconsistent with the enjoyment by the Defendants of land for purposes for which they intended to use it?*
 - e. *Do the Defendants live on the suit land or do they reside elsewhere?*
 - f. *Has there been any interruption to the Plaintiffs' occupancy of the suit premises throughout the aforesaid statutory period?*
 - g. *Is the nature of the property such that, in the light of the foregoing questions, adverse possession would result?*
 - h. *Has the interest of the Defendants been extinguished?*

- i. ***Should declaratory orders to the effect that the Plaintiffs are entitled, by way of adverse possession, to all that land known as Title No. Muputi/Kiima-Kimwe/526 issue?***
- j. ***Can any other orders in the interest of justice be issued herein?***

3. The 2nd Plaintiff swore an Affidavit in support of the Application in which he deponed that parcel of land known as Muputi/Kiima-Kimwe/526 (*the suit property*) is registered in the name of Mulewa Mulinge; that the said Mulewa Mulinge is now deceased and that the Plaintiffs are related to the Defendants by virtue of the fact that their father, Mulinge Mueke, the husband of the registered proprietor of the suit land, and their father, the late Musyimi Mueke, were blood brothers.

4. According to the 2nd Plaintiff, the suit property was once owned by their great-grandfather, Kimenye, and that upon his demise, the same was passed by inheritance to his son, Mueke wa Kimenye, who in turn bequeathed it to his wife Tabitha Wandia Mueke.

5. The 2nd Plaintiff deponed that sometimes in the year 1977, Mulewa Mulinge deceitfully obtained registration in her name of what was until then a family land; that since 1978 to date, the Plaintiff's have been in occupation of the suit land and that they have built permanent houses on the land.

6. The 2nd Plaintiff further deponed that the Defendants do not live on the land; that the former registered owner of the suit admitted that the Plaintiffs have been in occupation of the land and they are entitled to the suit property by virtue of adverse possession.

7. In reply, the 2nd Defendant deponed that him, together with the 1st Defendant, are the legal representatives of their late mother Mulewa Mulinge; that the Plaintiffs, who are his cousins, are the children of the late Philes Mutio Musyimi and that in the year 1994, the Plaintiffs' mother trespassed into the deceased's parcel of land.

8. The 2nd Defendant deponed that in 1998, their mother, Mulewa Mulinge, filed in this court HCCC. No. 181 of 1998 against the Plaintiffs' mother; that the Defendant filed a defence and counter-claim and that the court dismissed the Plaintiffs' mothers' claim for title to the suit land.

9. The 2nd Defendant denied that the Plaintiffs have occupied the suit property as alleged in the Originating Summons; that the Plaintiffs have all along lived on parcel of land number Muputi/Kiima-Kimwe/ 669 which is an ancestral land and that their mother never gave up occupation and possession of the suit land.

10. The 2nd Defendant finally deponed that the Plaintiffs have, upon the death of their mother, purported to occupy the illegal structures which were supposed to be demolished and their late mother evicted.

11. The matter proceeded for hearing by way of *viva voce* evidence.

The Plaintiffs' case:

12. The 3rd Plaintiff, PW1, informed the court that the 1st and 2nd Plaintiffs are his brothers; that the 4th Plaintiff is his sister who died in the year 2011 and that the Defendants are his cousins.

13. PW1 informed the court that he lives on the suit property which was owned by his great-grandfather, Kimenye Mati.

14. It was the evidence of PW1 that his great-grandfather, Kimenye Mati, had seven (7) wives; that one of the wives, who was his great-grandmother, was known as Mbula; that Mbula had one son by the name of Mueke who was his grandfather and that the two sons of Mueke from his wife Wandia were Musyimi Mueke, his father and Mulinge Mueke, the Defendants' father.

15. PW1 informed the court that his father had one wife, Philes Mutio Musyimi while the Defendants'

father had two wives, Mbenya Mulinge and the Defendants' mother Mulewa Mulinge.

16. According to PW1, he was born on the suit property in 1964; that his brother Musa Musyimi, was born on the suit land between 1947-48 while his other brother, Erustus Musyimi was born on the suit land in 1949.

17. It was the evidence of PW1 that the land parcel number Muputi/Kiima-Kimwe/526 was inherited by his grandfather, Mueke, from his great-grandfather, Kimenye Mueke; that the families of Musyimi and Mulinge lived on the land and that each family had its own portion.

18. The evidence of PW1 was that their father died in 1964; that the adjudication of the land in the area commenced in 1975 and that the family's land was left in the hands of the Defendants' father, Mulinge Mueke.

19. PW1 informed the court that during the adjudication process, his uncle, Mulinge Mueke had the whole land registered in favour of his two wives leaving out the family of his brother, Musyimi, notwithstanding the fact that the family of Musyimi was already living on the land.

20. PW1 stated that the family land measured approximately five (5) acres; that the said five (5) acres was divided into four (4) portions and that one of the plot (526) is the suit property.

21. It was the evidence of PW1 that his eldest brother (*the 1st Plaintiff*) has been on the suit property since 1948; that his other brother has been on the land since 1949 while himself has been on the land since 1964 and his late sister (*the 4th Plaintiff*) since 1969.

22. PW1 testified that they have lived on the suit land since they were born and that the suit property, together with plot numbers 527, 528 and 518 belong to the Mueke family.

23. According to PW1, it was only after the death of their mother in the year 2008 that the Defendants claimed that the suit property was registered in their mother's name; that when they filed Machakos CMCC No. 646 of 2008, the court observed that they had lived on the land for many years and that they were not parties to the previous suit that was in the High court.

24. It was the evidence of PW1 that their late mother is still in the morgue up to date because of this suit and that when the 4th Plaintiff died, they buried her on the suit property.

25. In cross-examination, PW1 stated that the suit land was registered in favour of the Defendants' mother in 1977 and that he was not aware of the case that was in the High Court involving her late mother and the Defendants' late mother.

26. PW1 denied that he was aware that the suit property was bequeathed to the Defendants' mother by their grandmother, Wandia, as a gift for taking care of her.

27. PW1 stated that plot number 669 is owned by four (4) people who represent one of the houses of their great-grandfather, the house of Mbula who was their great-grandmother. The registered owners of plot number 669 being Nganda Kimenye, Kitonyi Mueke, Mutungi Kimenye and Mulinge Mueke.

28. PW1 informed the court that by the time the register for plot no. 669 was opened in 1977, his father had already died and that his father was buried on plot number 669, and so was his great-grandfather and grandfather.

29. In cross-examination, PW1 admitted that his elder brother, Musa Musyimi, has settled on plot number 669; that his other brother, Mutinda Musyimi is also settled on plot number 669 and that their family also have an interest in plot number 669.

30. It was the evidence of PW1 that his sister, who was 40 years old, died at 2.00 a.m and she was buried

in the morning of the same day on the suit property.

31. PW1 informed the court that they did not inform the Defendants about the death of their sister because the Defendants had prevented them from burying their mother on the suit land.

32. The Plaintiffs' cousin, who is also a step-sister of the Defendants, PW2, informed the court that her mother was known as Mbenya, who was the 1st wife of Mulinge Mueke.

33. It was the evidence of PW2 that the Plaintiffs were born and brought up on plot number 526; that the Plaintiffs' and the Defendants' grandmother sub-divided her land and gave it to her two sons – Musyimi and Mulinge and that they have been occupying their respective portions of plot number 526.

34. In cross-examination, PW2 stated that Wandia was not buried on the suit land; that Musa Musyimi does not live on the suit land but lives on the ancestral land which is plot 669 and that the Plaintiff's other brother, Mutinda Musyimi, also lives on plot number 669.

35. According to PW2, the 2nd and the 3rd Plaintiffs have been living on the land for many years although she could not remember exactly when they moved on the land.

36. The Assistant Chief of Katoloni sub-location, PW3, informed the court that he has known the Plaintiffs and the Defendants since the 1970's; that the Plaintiffs' mother comes from his clan and that he came to learn about the dispute in the year 2008 when the Plaintiffs' mother died.

37. According to PW3, the two families of Musyimi and Mulinge have been living on their respective portions of land which abutt each other; that the Plaintiffs' family lives on Plot No. 526 while the Defendants' family owns portions numbers 527, 528 and 518.

38. In cross-examination, PW3 stated that he was employed in several institutions outside Machakos between 1989 until the year 2002; that he was engaged in businesses in Oloitoktok until the year 2004 and that he was thereafter employed as an Assistant Chief.

39. According to PW3, he was not aware how the families of Musyimi and Mulinge shared their properties; that some of the Plaintiffs live on plot number 669; that plot number 669 is the ancestral land for the Musyimi and Mulinge's families and that he was approached by the two families to open up an access road on the suit property which he opened up.

40. PW4 informed the court that the Defendant's father was his cousin; that he knows the two families very well and that the families of the Plaintiffs have always lived on plot number 526.

41. According to PW4, the Defendants' family lives on plot number 527 and 518 and that the three parcels of land were initially owned by their great-grandfather.

42. It was the evidence of PW4 that Wandia, one of the wives of Mueke Kimenye, had two sons, Mulinge Mueke and Musyimi Mueke and that Mulinge Mueke was the elder son.

43. It was the evidence of PW4 that during the adjudication process in the year 1970-77, the Plaintiff's mother was living on Plot No. 526 and that when the family of Kimenye Mati met, they decided that Plot No. 526 belongs to the Plaintiffs' mother. According to PW4, the family met when they discovered that parcel of land number 526 was registered in the name of the Defendants' mother.

44. In cross-examination, PW4 stated that he gave evidence in Machakos HCCC No. 181 of 1998.

45. The former Assistant Chief of Kiima-Kimwe informed the court that the families of Musyimi and Mulinge have always co-existed peacefully on plot number 526; that Mueke and his grandfather were brothers and that he was not aware of the evidence that was tendered in Machakos HCCC No. 181 of 1998.

The Defence case:

46. The 2nd Defendant, DW1, stated that he lives in Katoloni, Kiima- Kimwe and in Likuyu; that the Plaintiffs are his cousins and that Wandia Mueke (*deceased*) is their grandmother.

47. It was the evidence of DW1 that his late mother, Mulewa Mulinge, died in the year 2004 and that the suit property is registered in the name of his late mother.

48. According to DW1, his late mother was registered as the proprietor of the suit land on 25th May, 1977 and a Title Deed was issued in her favour in the year 1979.

49. DW1 informed the court, that her mother sued the Plaintiffs' mother when she forcefully occupied the suit land; that Machakos HCCC No. 181 of 1998 was heard and determined in favour of her late mother and that the Plaintiffs' mother was ordered by the court to vacate the suit property.

50. It was the evidence of DW1 that when the Plaintiffs' mother died, the Plaintiffs were permanently enjoined from burying their mother on the suit property by the lower court; that at the time of their mother's death, the Plaintiffs were living on their ancestral land which is Plot No. 669 and that the Plaintiffs have never lived on the suit property as alleged.

51. According to DW1, their great-grandfather, Kimenye, had five wives; that the sons/grandsons of the 3rd, 4th and 5th wives of Kimenye were registered as the owners of Plot No. 669 and that plot is the one that belonged to the three wives of Kimenye.

52. According to DW1, the Plaintiffs are entitled to a share of the ancestral land being Plot No. 669 measuring 9 Ha; that they have always lived on the said land and that the 2nd, 3rd and 4th Plaintiffs only moved on the suit land after the death of their mother in the year 2008.

53. DW1 informed the court that the 4th Plaintiff used to live with her mother and that when she died, she was hurriedly buried on the suit land.

54. In cross-examination, DW1 stated that initially, plot number 526 belonged to Kimenye; that the said plot was bequeathed to his mother by his grandmother Wandia as a gift and that her mother was given another plot being plot number 528 by his grandfather.

55. It was the evidence of DW1 that when her mother died, she was living with him in Mikuyu because she was ailing.

56. DW1 informed the court that his father was buried on plot number 527 which belonged to his first wife while the Plaintiffs' father was buried on plot number 669.

57. DW1 denied that the Plaintiffs' mother moved on plot number 526 in 1969.

58. In re-examination, DW1 stated that although her mother lived on plot 518, she used to cultivate plot 526; that her mother purchased plot number 518 and that the two plots abutt each other.

59. The brother of DW1, DW2, reiterated the evidence of DW1 which I have summarized above.

Submissions:

60. The Plaintiffs' advocate submitted that the evidence of PW1 shows that by the time the suit land was adjudicated between 1975 and 1977, both the Musyimi and Mulinge families were residing, cultivating and grazing the land belonging to Kimenye Mueke being parcels number 526, 527, 528 and 518.

61. Counsel submitted that it was only after the death of the Plaintiffs' mother that they discovered that

the suit property was registered in favour of the Defendants' mother and that the learned magistrate made a finding in CMCC No. 646 of 2008 that the Plaintiffs reside on the suit land.

62. Counsel submitted that the Defendants did not call any independent witness to rebutt the evidence that the Plaintiffs have lived on plot number 526 for all their lives; that there is uncontroverted evidence that the Plaintiffs have lived on the suit property for more than twelve (12) years and that the Plaintiffs have proved that they qualify to be the owners of the suit property by adverse possession.

63. The Defendants' advocate submitted that the Plaintiffs' mother trespassed on the suit property in 1994; that the Defendants' mother sued the Plaintiffs' mother and that the High Court decided the suit in favour of the Defendants' mother.

64. Counsel submitted that the Plaintiffs have not proved that they are entitled to the land by adverse possession.

65. The Defendants' counsel relied on several authorities which I have considered.

Analysis and findings

66. The Plaintiffs have sued the Defendants by way of an Originating Summons seeking for a declaratory order that they are entitled to land known as Muputi/Kiima-Kimwe/526 (*the suit property*) by way of adverse possession.

67. The Plaintiffs and the Defendants are cousins by virtue of the fact that the Plaintiffs' father, the late Musyimi Mueke, was the brother of the Defendants' father, the late Mulinge Mueke.

68. The late Mulinge Mueke and Musyimi Mueke were the sons of Wandia Mueke, who was the first wife of Mueke. The Plaintiffs' and the Defendants' grandfather, Mueke, was the son of Mbula, who was one of the seven (7) wives of the Patriarch, Kimenye Mati. In a nutshell, Kimenye Mati was the great-grandfather of the Plaintiffs and the Defendants.

69. The Plaintiffs' case is that the suit property was one of the properties that was owned by their great-grandfather, Kimenye Mati, who died around 1927.

70. According to the evidence of the 3rd Plaintiff, PW1, by the time the adjudication process commenced around 1975, his father, Musyimi Mueke, had died and left his elder brother, Mulinge Mueke, in charge of their grandfather's land.

71. It was the evidence of PW1 that his father, Musyimi Mueke, together with his mother, the late Philes Mutio Musyimi, lived on plot number 526 (*the suit land*) and that he was born on the land in 1964.

72. PW1 informed the court that his elder brother, Musa Musyimi (*the 1st Plaintiff*) was also born on the suit property between 1947-1948 and so was his other brother Erastus Muia Musyimi (*the 2nd Plaintiff*) who was born in 1949.

73. The evidence of PW1 was that the Defendants' father, Mulinge Mueke, had parcels of land numbers 526, 527, 528 and 518 registered in favour of his two wives during the adjudication process despite the fact that both the families of Mulinge and Musyimi were residing, cultivating and grazing on plot No. 526.

74. When their mother, Philes Mutio Musyimi, died on 15th June, 2008, PW1 informed the court that they were served with an order of the court barring the burial of their mother on plot 526; that that is when he became aware of the fact that plot number 526 was registered in favour of the Defendants' mother and that when Machakos CMCC No. 646 of 2008 was heard, the magistrate advised them to pursue the current suit.

75. In cross-examination, PW1 stated that plot number Muputi/Kiima-Kimwe/669 is also their ancestral land; that his eldest brother, Musa Musyimi and Mulinge Musyimi leave on plot number 669 and that when their father died in 1964, he was buried on plot number 669.

76. PW1 denied that he was aware of Machakos HCCC No. 181 of 1998 which was a suit that was filed by the Defendants' late mother in which she sued the Plaintiffs' mother.

77. The evidence of PW2, the Defendants' step sister, was similar to that of PW1.

78. The evidence of the Plaintiffs' and the Defendants' uncle, PW4, was that before adjudication, each wife of Mr. Musyimi and Mr. Mulinge settled on the portions that had been allocated to them by their mother-in-law, Wandia, which was Plot No. 526, and that it was not until the year 2008 when Philes Mutio died that a dispute in respect to plot number 526 arose.

79. According to PW4, during the adjudication process, it is Philes, the Plaintiffs' mother, who was on Plot No. 526.

80. PW4 informed the court that as the Chairman of Kimenye's family, he had a meeting with elders who decided that the late Mulewa Mulinge irregularly procured the registration of the suit land in her name and left out Philes Mutio Musyimi.

81. According to DW1, his father and the Plaintiffs' father inherited plot number 669 from the late Kimenye Mati; that plot number 526 is registered in the name of their late mother, Mulewa Mulinge and that when their mother sued the Plaintiffs' mother over the suit property in HCCC No. 181 of 1998, the court decided the matter in favour of their mother.

82. According to DW1, some of the Plaintiffs moved on the suit property after the death of their mother whom the court had ordered to be evicted and that the Plaintiffs have never occupied the suit property as alleged.

83. Adverse possession has been defined as the non permissive physical control over land, coupled with the intention of doing so, by a stranger having actual occupation solely for his own behalf, in opposition to, and to the exclusion of the true owner for a period of more than twelve (12) years.

84. The plea of adverse possession is always based on facts which must be asserted, pleaded and proved. ***(See Ithongo v. Thindiu (1981) KLR 197).***

85. The factual proof requires the Applicant to show on what date he took possession of the land, the nature of his possession or possessory acts, how long the possession went on and whether his possession was open and undisturbed for the statutory period. All these are questions of fact which must be pleaded and proved.

86. In the Affidavit in support of the Originating Summons, the 2nd Plaintiff deponed that *"at all times since 1978 and todate, I and the other Plaintiffs have been in occupation of the suit premises and have used the suit land to the exclusion of all others, Mulewa Mulinge and the Defendant inclusive."*

87. The 1st and 2nd Plaintiffs did not testify in this matter notwithstanding the fact that it is the 2nd Plaintiff who swore the Affidavit in support of the suit.

88. As I have stated above, the 3rd Plaintiff, PW1, informed the court that the 1st Plaintiff has been on the suit land since he was born in 1948 while the 2nd Plaintiff has been on the same land since he was born in 1949.

89. The assertion by PW1 that the two Plaintiffs have been on the land since 1948 and 1949 respectively contradicts the disposition of the 2nd Plaintiff, who never testified in this matter, that the Plaintiffs have

been on the land since 1978 to date.

90. In cross-examination, the 3rd Plaintiff (PW1) informed the court that the 1st Plaintiff has settled on plot number 669, which, according to PW1, is also their ancestral land. Other than the 1st Plaintiff, PW1 informed the court that his other brother, Mutinda Musyimi, has also settled on Plot No. 669.

91. The 3rd Plaintiff (PW1) did not inform the court the circumstances under which the 1st Plaintiff and Mutinda Musyimi moved from plot number 526 to plot number 669 if at all they were born and lived on Plot No. 526.

92. PW1 did not also elaborate on when the two brothers moved to plot number 669 from Plot No. 526 to enable the court compute time for the purpose of ascertaining if the doctrine of adverse possession is available to them.

93. Indeed, the people who would have been in a better position to inform the court if they were born on the suit property in the year 1948 and 1949 respectively, and for how long they lived on the suit land before they moved to Plot No. 669, would have been the 1st and 2nd Plaintiffs.

94. I say so because the 3rd Plaintiff, who stated that he was born in 1964, almost the same time his father died, cannot purport to know how the family of Mulinge was allocated the suit land by the late Wandia in 1979 better than the 1st and 2nd Plaintiffs, or his late mother.

95. The failure by the 1st and 2nd Plaintiffs to testify in this matter and the admission by all the witnesses who testified on behalf of the Plaintiffs that the 1st Plaintiff and his other brother, Mutinda Musyimi, are living on their ancestral land number 669 shows that the Plaintiffs' case that they have been living on the suit property exclusively, continuously and peacefully for more than twelve (12) years is not true.

96. In addition to my observations above, the 3rd Plaintiff and his witnesses confirmed that their late father, Musyimi Mueke, was buried on plot number 669 when he died.

97. Considering that the Plaintiffs' father had only one wife, Philes Mutio, he could not have been buried on plot number 669 if indeed the Plaintiffs had settled on plot number 526 with their mother in 1949 as claimed by PW1. The Plaintiffs' father could only have been buried on plot number 669 in 1964 because that is where he had settled with his only wife and children.

98. PW1 informed the court that he was not aware that his mother had been sued by the Defendants' mother in Machakos HCCC No. 181 of 1998. According to the 3rd Plaintiff, he only became aware of the suit between the two ladies when her mother died in the year 2008.

99. I have perused the Plaint, the Defence and the Judgment in Machakos HCCC No. 181 of 1998.

100. In the Plaint, the Defendants' mother alleged that in 1994, the Plaintiffs' mother invaded Plot No. 526 which was registered in her name; that the Plaintiffs' mother had moved from plot number 669 where she had settled with her family and that the Plaintiffs' mother proceeded to put up temporary structures on the suit land.

101. In the suit, the Defendants' mother sought for an order of eviction.

102. In the Defence and counter-claim that was filed by Philes Mutio Musyimi, the Plaintiffs' mother, she averred that the Defendants' mother had Plot No. 526 fraudulently registered in her name; that she has been in continuous uninterrupted use and possession of the plot since 1965 and that the Defendants' mother's title has been extinguished upon expiry of twelve (12) years.

103. After hearing the matter, Mwera J (*as he was then*) allowed the claim by the Defendants' mother and

dismissed the Plaintiffs' mother's counter-claim. While dismissing the Plaintiffs' mother's counter-claim, the judge held as follows:-

“The court similarly did not find the Defendants’ evidence as worth establishing her claim. She alleged fraud and did not establish any. Not even her own claim of adverse possession.”

104. The court therefore found that the Plaintiffs' late mother did not establish her claim of adverse possession over Plot No. 526. The court proceeded to order for her eviction from plot No. 526. Unfortunately, she died in the year 2008 before the said eviction could be effected.

105. Considering that the suit against the Plaintiffs' mother was for eviction, it is strange that she could not have informed her grown up children if indeed they were living with her on the suit property.

106. The only reason why the 3rd Plaintiff was not aware of the suit, and why the suit was not significant to him at that particular time was because he was not living on the land. If the Plaintiffs were living on the land by the time the decision in HCCC No. 181 of 1998 was made, I doubt that their claim would have been any different from their mother's claim, considering that their evidence in this matter was that they moved on the suit property with their mother, or that they were born on the suit land.

107. In addition to the above, if the Plaintiffs' claim is that they are entitled to the suit property through inheritance, then the High Court has since decreed that the suit land belongs to the Defendant's mother. The Plaintiffs cannot therefore claim the suit property as of right.

108. Although PW4, who claims to be the chairperson of the Kimenye family, informed the court that it is the Plaintiffs' family which is entitled to the land, and that it is the Plaintiffs' mother who was on the land during the adjudication, he did not tell the court why the family waited until this suit was filed to deliberate on the issue.

109. In any event, PW4 also testified in HCCC No. 181 of 1998. The court disregarded his evidence.

110. From the foregoing, I arrive at the conclusion that the precise period of the Plaintiffs' alleged adverse possession has not been proved by clear and unequivocal evidence. To the contrary, the evidence before the court shows that the Plaintiffs have always lived on plot number 669 which is their ancestral land. They only moved on the suit land in the year 2008 after the demise of their mother.

111. If they had moved on the land in the year 1994 when the Defendants' mother alleged that their mother had moved on the land, then they would have been sued alongside their mother in HCCC No. 181 of 1998 considering that they were all adults, or at least they would have applied to be joined in the suit.

112. However, they were neither sued nor enjoined in the suit because they were not living on the land in the first place.

113. For those reasons, I find that the Plaintiffs have not proved their claim on a balance of probabilities. Consequently, I dismiss the Originating Summons dated 13th August, 2009 with costs.

114. Finally, I hope that the soul of the late Philes Mutio Musyimi, whose body has been lying in the morgue since the year 2008, will rest in peace next to where her late husband, Musyimi Mueke, was interred.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE