



**Oltimpan v Nairenke (Environment & Land Case 12 of 2021)  
[2022] KEELC 12693 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12693 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE 12 OF 2021  
EM WASHE, J  
SEPTEMBER 26, 2022  
IN THE MATTER OF: LIMITATION OF ACTIONS ACT, CAP  
22 LAWS OF KENYA  
AND  
IN THE MATTER OF A CLAIM OF ADVERSE POSSESSION  
PURSUANT TO SECTION 38 OF THE LIMITATION OF  
ACTIONS ACT, CAP 22 LAWS OF KENYA**

**BETWEEN**

**DAVID OLTIMPAN MEISASHI ..... PLAINTIFF**

**AND**

**FRANCIS OLE NAIRENKE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein filed an Originating Summons dated 7<sup>th</sup> October 2019 (hereinafter referred to as “the Originating Summons”) seeking for the following Orders; -
  - i. A Declaration that the Defendant’s right to recover a portion measuring 3 Acres of L.R.NO. TRANSMARA/ENAENYIENY/441, is barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya, and his title over a portion in occupation/use of the Plaintiff thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation/use and possession of the aforesaid portion of 3 acres for a period exceeding 12 years.
  - ii. That there be an order that the land registrar (Transmara Sub-County) do register the Plaintiff as the proprietor of the portion measuring 3 acres of L.R.NO.TRANSMARA/



ENAENYIENY/441, in place of the Defendant and/or the register thereof be rectified to reflect the Plaintiff's ownership of the aforesaid 3 acres under his use and current continued occupation.

- iii. That the Defendant herein be ordered to execute all the requisite papers necessary to have the Plaintiff be registered as owner of the portion of L.R.NO. TRANSMARA/ENAENYIENY/441 measuring 3 Acres, decreed by the court, in default, the Deputy Registrar and/or court execute officer be at liberty to execute all such necessary documents to give effect to the judgement and/or decree of the Court.
  - iv. That this Honourable Court be pleased to issue permanent order of injunction against the Defendant, his agents, servants and/or employees from whatsoever manner, interfering with the plaintiff's occupation and/or use over a portion of land otherwise known as L.R.NO. TRANSMARA/ENAENYIENY/441 measuring 3 acres under the Plaintiff's occupation.
  - v. Costs of this Originating Summons be borne by the Defendant.
  - vi. Such further and/or other orders be made as the Court may deem fit and expedient, in the circumstances of this case.
2. The Orders are supported by the grounds outlined in the body of the Originating Summons and the Affidavit of the Plaintiff sworn on the 7<sup>th</sup> of October 2019.
  3. The Plaintiff's Affidavit dated 7<sup>th</sup> October 2019 also placed before the Court the following documents as annexures (i) Sale of Land Agreement dated 22/07/2002 (hereinafter referred to as "the Agreement for Sale"), (ii) Copy of an Official Search of the property known as TRANSMARA/ENAENYIENY/441 dated 17<sup>th</sup> September 2019, (iii) 19 photographs of the developments, crops and trees on the property known as TRANSMARA/ENAENYIENY/441, (iv) copy of the Application For Consent of Land Control Board dated 12/11/2008.
  4. The Plaintiff filed a List of Documents dated 7<sup>th</sup> September 2019 and outlined (i) DAVID OLTIMPAN MEISASHI (ii) DANIEL LENKUME (iii) TALALA KERIAKO (iv) TEEYIAH OLE LENKUME (v) THE DISTRICT LAND REGISTRAR together with the Statements thereof.
  5. The Originating Summons was served on the Defendant who filed a Replying Affidavit dated 22<sup>nd</sup> October 2019 (hereinafter referred to as "the Replying Affidavit").
  6. The Replying Affidavit was executed by affixing the Left Thumb Print of the Defendant.
  7. The Defendant indicated that the Plaintiff had misguide the facts of the matter to mislead the Court into granting adverse possession relating to TRANSMARA/ENAENYIENY/441 (hereinafter referred to as "the suit property").
  8. The Defendant pleaded that the suit property belonged to him having obtained the Title Deed on the 16<sup>th</sup> of June 2009.
  9. The Defendant further pleaded that prior to issuance of the Title Deed on the 16<sup>th</sup> of June 2009, he was not in a position to dispose of the suit property.
  10. The Defendant indicated in the Replying Affidavit that he could not prepare and/or apply for any Consent before the Land Control Board because he did not have any title deed and therefore, the copies of the Agreement For Sale as well as the Application for Consent presented by the Plaintiff were forgery.



11. In reply to the claim of adverse possession, the Defendant pleaded that the Plaintiff herein was a brother in law who requested to be given some portion of the suit property to temporarily reside due to tribal clashes that had occurred between the Kisii and the Maasai communities.
12. The Defendant indicated that the Plaintiff's occupation was never to be permanent as it had been agreed that once the tribal clashes would cease, the Plaintiff would relocate back to his property.
13. In conclusion therefore, the Defendant pleaded that the Plaintiff's claim was misconceived, in bad faith and should be dismissed.
14. The Defendant then placed before the Court the following annexures(i) Copy of the Title Deed for the property known as TRANSMARA/ENAENYIENY/441 dated 16<sup>th</sup> June 2009 (ii) a copy of an official Search of the property dated 23.09.2019.
15. The hearing of the suit commenced on the 11/02/2021.
16. The Plaintiff's 1<sup>st</sup> witness was DAVID OLTIMPANI MEISASHI who is also the Plaintiff herein.
17. The witness indicated that he is a resident of Shankoi Location within Transmara Sub-County.
18. The witness testified that he purchased three(3) acres on suit property by virtue of Agreement for Sale.
19. After full payment of the purchase price, the Plaintiff took possession, built two houses thereof, planted trees and even fenced the portion he had acquired.
20. Nevertheless, the Defendant became elusive and failed to turn up for the Land Control Board approval.
21. However, the Plaintiff has continued to occupy and/or use the portion of three (3) acres on the suit property upto date.
22. The Plaintiff produced the following documents as his exhibits;-  
Plaintiff Exhibit 1-Land Sale Agreement dated 22/7/2002.  
Plaintiff Exhibit 2-Copy of Application For Official Search.  
Plaintiff Exhibit 3-Copy of Application for the Land Control Board Consent.  
Plaintiff Exhibit 4-Bundle of photographs.  
Plaintiff Exhibit 5- Copy of the Certificate Green Card for TRANSMARA/ENAENYIENY/441.
23. The Plaintiff indicated that he has been in occupation of the suit property since the year 1999 and therefore it is not true that the Defendant acquired the suit property in the year 2009.
24. The Plaintiff made reference to the Green Card which provided that the Defendant was registered as the owner on the 30/8/1999.
25. Similarly, the Plaintiff testified that his entry into the suit property was not due to tribal clashes as claimed by the Defendant.
26. In concluding his evidence in chief, the Plaintiff requested the court to grant his prayer for adverse possession for the three (3) acres that he had purchased.
27. In addition to the above, the Plaintiff prayed for costs as well.
28. In cross-examination, the Plaintiff indicated that he purchased the suit property measuring 3 Acres and an Agreement For Sale was indeed executed before witnesses who are the elders.



29. The Plaintiff reiterated that the Agreement for Sale produced as Plaintiff Exhibit 1 was relating to the suit property although the same did not specifically indicate the suit property.
30. The Plaintiff similarly testified that an Application for the Land Control board Consent was prepared jointly.
31. However, the Application for the Land Control Board Consent did not indicate the name of the Plaintiff as the beneficiary and/or buyer.
32. The Plaintiff admitted not having any Transfer Forms executed by the Defendant to support the application for the Land Control Board Consent.
33. Nevertheless, the Plaintiff insisted that he had paid a consideration for the purchase by cash and witnesses to the Agreement for Sale would come and testify.
34. In re-examination, the Plaintiff indicated that both the Agreement for Sale and the Application for the Land Control Board consent were prepared together and executed at the same time.
35. The Plaintiff's 2<sup>nd</sup> Witness was one TALALA KERIAKO.
36. The witness confirmed writing and executing a witness statement dated 7/10/2019 which he adopted as his evidence in chief.
37. The witness confirmed being familiar with both parties herein.
38. The witness further indicated that he was a witness of the Agreement for Sale between the parties.
39. The witness testified that a sum of KShs 150,000/- was paid by the Plaintiff as purchase price.
40. On cross-examination, the witness indicated that he was just called to witness the Agreement for Sale.
41. According to his knowledge, the property on sale was Parcel No. 441 within Enaenyeny Group Ranch.
42. However, the witness informed the court that he did not peruse the Agreement for Sale to confirm if the property number had been indicated therein.
43. The witness also denied knowledge of whether the Transfer documents had been prepared or not.
44. The Plaintiff's 3<sup>rd</sup> witness was DANIEL LENKOME.
45. The witness confirmed preparing and filing the witness statement dated 7/10/2019 and adopted the same as his evidence in chief.
46. The witness indicated that he was a witness in Agreement for Sale.
47. The witness confirmed that the Agreement for Sale was in writing and he was one of the witnesses therein.
48. The witness also confirmed that the purchase price was duly paid by the Plaintiff.
49. In cross-examination, the witness reiterated that the Agreement for Sale was in relation to land in Enaenyeny Group Ranch.
50. The Plaintiff 4<sup>th</sup> witness was OLE LENKUME.
51. The witness indicated that he resides in Shankoe Location.
52. The witness adopted his witness statement as his evidence in chief.



53. The witness further testified that he was called by the Plaintiff to be a witness to an Agreement for Sale which he wanted to pay the purchase price.
54. The witness witnessed the Agreement For Sale by signing on the same.
55. In cross-examination, the witness indicated that the land was within Shankoe but in Enaenyeny Group Ranch.
56. After the testimony of the Plaintiff's 4<sup>th</sup> witness, the Plaintiff closed his case.
57. The Defence hearing commenced on the 30/09/2021.
58. The Defendant herein was the 1<sup>st</sup> witness.
59. The Defendant informed the court that he is resident of Enanyeny owning the suit property.
60. The suit property measures approximately Three (3) acres.
61. The Defendant acknowledged the Plaintiff being his brother in law.
62. The Defendant testified that the Plaintiff occupation was not from the year 2002 but the year 2009.
63. The Defendant indicated to the Court that in the year 2009, there were tribal clashes between the Kisii and Maasai communities.
64. As a result of these tribal clashes, the Plaintiff was affected by being displaced and therefore approached the Defendant to grant him temporary space to occupy until the tribal clashes had ceased.
65. The understanding between the Plaintiff and the Defendant was that once peace had prevailed, the Plaintiff would vacate the Defendant's property and relocate back to his property.
66. The Defendant informed the court that the area which was given to the Plaintiff to occupy was only half an acre and not the either suit property.
67. Nevertheless, when peace was restored between the Kisii and the Maasai Communities, the Plaintiff refused to vacate the portion he was occupying and instead now produced the purported Agreement for Sale before the Court.
68. The Defendant despited the Agreement for Sale indicating that it refers to a property in Shankoe and not the suit property.
69. In addition to the above, the Agreement for Sale did not contain the Identification Number of the purported seller and the signature thereof was not the Defendant's.
70. The Defendant reiterated that the suit property was only three (3) acres and not more.
71. The Defendant stated that for one to transfer his property, a transfer form would be required together with a Land Control Board Consent.
72. Similarly, there would be no need of a Land Control Board Consent to sub-divide the suit property yet the Plaintiff was purchasing the entire 3 acres.
73. In conclusion therefore, the Defendant indicated that both Agreement for Sale and the Application For the Land Control Board were forgeries.
74. The Defendant prayer was that the Plaintiff's claim be dismissed.
75. In cross-examination, the Defendant indicated that he comes from Shankoe within Enanyeny.



76. The Defendant confirmed that his location was known as shankoe.
77. The Defendant testified that he acquired the suit property in the year 2009.
78. The Defendant also testified that the Plaintiff entered the suit property in the year 2009.
79. However, the Defendant admitted to not having any documentary evidence in regards to the tribal clashes of the year 2009.
80. The Defendant reiterated that the mutual agreement was that the Plaintiff would temporary occupy the portion and vacate once peace had prevailed between the Kisii and Maasai communities.
81. The minutes of these meeting were not written down or signed by the parties herein.
82. When calm returned between the Kisii and Massai communities, the Plaintiff relocated his family back to their original home but remained on the suit property.
83. As appertains the Agreement for Sale, the Defendant indicated that he only came to learn about it in Court and does not know anything about it.
84. The Defendant also further denied knowledge of the Application For Land Control Board Consent and further stated that the signature on the said Application was not his signature.
85. The Defendant relied on the Certificate of Official Search which indicated that he was registered as the owner of the suit property on the 30/08/1999 although the Title Deed was issued on the 16/06/2009.
86. Consequently therefore, the Defendant indicated that although he was the registered owner of the property in the year 2002, he did not have any title deed of the suit property.
87. As appertains the trees shown in the pictures produced by the Plaintiff, the Defendant admitted the same to have been planted by the Plaintiff for purposes of providing a shade.
88. In concluding the cross-examination, the Defendant indicated that he does not know how to read or write and therefore signs his documents by affixing a finger print on the same and not a signature as shown in the Agreement for Sale and the Application for the Land Control Board Consent.
89. In re-examination, the Defendant indicated that the Trees in the picture usually grow very fast.
90. In the Defendant's opinion, the Trees in the picture were planted in the year 2010.
91. The Defendant indicated that when one is selling a property, the description should be in accordance to the particulars in the title deed and not the location of the property.
92. As appertains the meeting allowing the Plaintiff to occupy a portion of the suit property, the Defendant confirmed that they discussed as a family and no minutes were written down or signed.
93. Consequently, the Defendant only came to know about the Agreement for Sale and the Application For Land Control Board Consent in these proceedings.
94. The Defendant indicated that the signatures of both the Agreement for Sale and the Application For Land Control Board Consent were not his and were actually differing in both documents.
95. The Defendant denied receiving any purchase price of Kenya Shillings One Hundred and Fifty Thousand (KShs 150,000/-) from the Plaintiff for the sale of the suit property.
96. The Defence Second Witness was one MOSES LEMANSHON NAIRENKE.
97. The witness indicated that he resides in Enanyieny.



98. The witness testified that he knows the Plaintiff who was his brother in law.
99. The witness informed the Court that the Defendant was his cousin.
100. The witness testified that the suit property was owned by the Defendant.
101. The witness denied the allegation that the Plaintiff sold the suit property to the Plaintiff.
102. The witness also denied the allegations that the Plaintiff entered the land in the year 2002.
103. According to the witness, the Plaintiff gained access into the suit property in the year 2009 as a family member.
104. The witness indicated that the Plaintiff had been allowed into the suit property by the Defendant due to the tribal clashes between the Kisii and Maasai communities.
105. After being permitted to temporarily occupy a portion of the suit property by the Defendant, the Plaintiff constructed two houses, did a bit of farming and planted some trees.
106. When calm was restored three (3) years later between the Maasai and Kisii communities, the Plaintiff requested for time to construct new structures on his property.
107. Once the new structures were complete, the Plaintiff relocated his family only and he remained on the suit property.
108. Nevertheless, the Plaintiff has only been in the suit property for the last Ten (10) years.
109. In concluding his evidence in chief, the witness indicated that the Defendant was the legal owner of the suit property and has never sold the same to anyone else.
110. In cross-examination, the witness informed the Court that the Plaintiff has a different property known as TRANSMARA/ENANYIENY/661 which is registered in his name.
111. The witness indicated that he resides on the property known as TRANSMARA/ENANYIENY/393.
112. The witness testified that his property is not far from when the Plaintiff's property is located.
113. The witness also stated that the Defendant always discusses and/or consults him on various issues especially relating to land.
114. The witness insisted that he had come to court to give evidence of how the Plaintiff had refused to vacate the suit property.
115. According to the witness, the tribal clashes between the Maasai and the Kisii lasted for 3 years.
116. However, the witness confirmed that there were no minutes of the meeting with allowed the Plaintiff to occupy a portion of the suit property.
117. In Re-examination, the witness confirmed that the Plaintiff has his own property known as TRANSMARA/ENANYIENY/661 where his children are currently staying.
118. The witness stated that although the Defendant does not involve him in everything he does, when it comes to issues of property, the two would always consult.
119. The Defence Third witness was SAMUEL RINGA OLE SAMAYO.
120. The witness introduced himself as a village elder in Enanyieny area.
121. The witness indicated that he is a neighbour to both the Plaintiff and the Defendant.



122. The witness testified that both the Plaintiff and the Defendant live on the suit property.
123. However, the suit property belongs to the Defendant and has a title deed to it.
124. The relationship between the parties is that of in laws.
125. The witness indicated that the Plaintiff approached the Defendant in the year 2009 for a temporary place to stay due to the tribal clashes between the Maasai and the Kisii communities.
126. The Defendant accepted the Plaintiff's request and was given a portion to reside on until the tribal clashes stopped.
127. The witness informed the court that after three (3) years, the tribal clashes ceased but the Plaintiff refused to vacate the suit property alleging that he had purchased the same.
128. As a village elder, the witness denied knowledge of any transaction of sale between the parties herein.
129. The witness also informed the Court that in an effort to amicably settle the dispute, a meeting was convened by the village elders and the Plaintiff expressed his acceptance to vacate the suit property.
130. However thereafter, the Plaintiff only relocated his family members but remained on the suit property until date.
131. In conclusion therefore, the witness indicated that they do not believe the suit property was sold by the Defendant.
132. Similarly, the witness indicated that the Plaintiff entered the suit property in the year 2009 and not 2002.
133. On cross-examination, the witness reiterated that indeed there were tribal clashes between the Maasai and Kisii communities which lasted for about 3 years.
134. The witness also confirmed that there was a meeting between the parties herein convened by the village elders which resolution was that the Plaintiff to vacate the suit property.
135. The witness indicated that there were no written and signed minutes of the said meeting but he was fully aware of the resolutions that were made in the meeting.
136. The witness further testified that it is pursuant to the said resolution in the meeting with the elders that the Plaintiff relocated his family from the suit property.
137. The witness stated that he resides on TRANSMARA/ENAENYIENY/438 which is located only one plot away from the suit property.
138. The witness stated that the distance between the suit property and his property was about 300 metres.
139. The witness further testified that as a practice within the area, if a member of the public was selling his property, the village elders and the wife of the seller must be informed and be present during the transaction.
140. As appertains the Plaintiff's occupation on the suit property, the Defendant informed the witness of the same as his close friend and confidant.
141. In conclusion therefore, the witness confirmed that the Defendant was the first occupant of the suit property and the registered owner of the same.
142. On completion of this witness's testimony, the Defence closed its case.



143. The Court directed the parties to file their written submissions which directions were complied with by the Plaintiff's filing their submissions on the 07/02/2022 and the Defendants filing theirs on the 22/02/2022.
144. The Court has gone through the pleadings, the oral testimonies of the parties as well as the witnesses, the documentary evidence by both parties and finally the submissions of the parties carefully.
145. The Issues before the Court can be summarised as follows; -
- i. IS THE LAND SALE AGREEMENT DATED 22/07/2002 VALID & BINDING ON THE PARTIES HEREIN?
  - ii. IN THE EVENT THE SALE OF LAND AGREEMENT IS NOT VALID, WHEN DOES TIME START RUNNING FOR A CLAIM OF ADVERSE POSSESSION.
  - iii. HAS THE PLAINTIFF SATISFIED THE INGREDIENTS OF ADVERSE POSSESSION AS TO WARRANT THE ORDERS SOUGHT?
  - iv. WHO BEARS THE COSTS OF THE SUIT?
- ISSUE.NO.1- IS THE LAND SALE AGREEMENT DATED 22/07/2002 VALID & BINDING ON THE PARTIES HEREIN?
146. The basis of the Plaintiff's claim is the Agreement for Sale with the Defendant.
147. The Agreement for Sale takes the form of a Letter from the Plaintiff to the Defendant.
148. The property indicated to be on sale is Plot.No. 441 in Shankoe Location Shankoe Sub-Location measuring approximately Three (3) Acres.
149. The consideration is Kenya Shillings One Hundred and Fifty Thousand (KShs 150,000/-) which was paid in full on the day of execution.
150. Both the buyer and the seller have executed the Agreement for Sale.
151. However, on the seller's place of signature, there is both a signature and a finger print affixed on the same.
152. The Agreement for Sale is then witnessed by four (4) witnesses who have all signed and affixed their identification cards numbers.
153. The Plaintiff has also produced an Application to the Land Control Board dated 12/11/2008 relating to the suit property.
154. During the hearing, the Plaintiff called three witnesses namely TALALA KERIAKO, DANIEL LENKOM and TEEYIA OLE LENKUME.
155. Indeed, all these persons names appear on the Agreement for Sale.
156. The Defendant on the other hand has denied ever executing both the Agreement for Sale and the Application to the Land Control Board dated 12/11/2008.
157. The Defendant testified that as at the year 2002, suit property did not have any Title Deed to enable him sell the property away.
158. Similarly, in the year 2008, the Defendant had still not acquired the relevant title to the suit property to be able to comply with the documents required by the Land Control board in processing a Consent.



159. The Defendant also called two witnesses namely MOSES LEMASHON NAIRENKE who is a cousin and SAMUEL RINGA OLE SAMAYO who is a village Elder and an immediate neighbour to the suit property.
160. The Defendant's witness testified that no such Agreement for Sale was ever entered in relation to the suit property.
161. The Defendant's witnesses' evidence was that the Plaintiff was simply allowed to use a portion of the suit property as a brother in law because of tribal clashes which had occurred in the year 2009.
162. The Defence witnesses indicated that the Plaintiff was a brother in law to the Defendant and his occupation was based on a family understanding.
163. The Court has carefully perused the Agreement for Sale and noted the following; -
- a. The property indicated to being sold off is described as PLOT.441 WITHIN SHAKOE LOCATION OF SHANKOE SUB-LOCATION.
  - b. On the part of the Seller's execution, THERE IS BOTH A SIGNATURE & A FINGER PRINT IMPRESSION.
  - c. On the aspect of the witnesses, THERE WAS NO CLEAR DISTINCTION BETWEEN THE SELLER'S WITNESSES AND THE PURCHASER'S WITNESSES.
164. Making reference to Section 3(3) of the Law of Contract , the Act reads as follows; -
- “No suit shall be brought upon a Contract for disposition of an interest in land unless;-
- a. The Contract upon which the suit is founded;-
    - i. Is in writing
    - ii. Is signed by all the parties thereto; and
  - b. The signature of each party has been attested by a witness who is present when the contract was signed by the party; provided that this sub-section shall not apply to a contract in the cause of public auction within the meaning of the [Auctioneers Act](#) (Cap 526), nor shall anything in it affect the creation of a resulting, implied and constructed trust.”
165. Looking at the Plaintiff's Exhibit 5 which is the Green Card to the suit property, the Court takes note that the Ministry of Land & Physical Planning had allocated a proper number which is TRANSMARA/ENAENYIENY/441 as early as 17/4/1996 when the same was owned by ENAENYIENY GROUP RANCH.
166. The suit property was then transferred to the Defendant on the 30.08.1999.
167. The Court is therefore at a loss in how the parties to the of Agreement for Sale would fail to describe the suit property if indeed this was a genuine transaction.
168. The description of the property given as Plot.No.441 within Shankoe Location Shankoe Sub-Location is vague and inconsistent with the description of the suit property which was already existing at the time of the preparation and execution of the Agreement for Sale.
169. As regards the execution of the Agreement for Sale, the Defendant raised an issue with the execution.



170. The Defendant pointed out that he does not know how to make a signature and usually affixes finger print if required to do so.
171. On the Agreement for Sale, the part of the Seller has both a signature and a finger print.
172. The form for the Application of the Land Control Board dated 12/11/2008, there is a signature on the part of the Defendant.
173. Referring to the Replying Affidavit by the Defendant dated 22<sup>nd</sup> of October 2019, the same has been executed by affixing of a finger print.
174. Similarly, a second Replying Affidavit by the Defendant dated 13<sup>th</sup> January 2020 was also executed by affixing of a finger print.
175. Unfortunately, during the hearing of this matter, this issue of signature was discussed casually.
176. The Plaintiff failed to ask or verify from the Defendant whether or not the finger print mark on the Agreement for Sale belonged to him or not yet it was a critical issue in terms of the validity of the Agreement for Sale.
177. The witnesses who were called by the Plaintiff did not explain the manner that the parties executed the said Agreement for Sale and/or whether the execution was done in their presence as required by the Law of Contract.
178. During the filing of the pleadings in this suit, the Plaintiff did not also raise an issue in the manner the Defendant was executing the pleadings which was different from the signature which had been used in the Agreement for Sale.
179. Consequently therefore, Court upon considering all these inconsistencies, it is of the view that the signature and/or marks appearing both the Agreement for Sale and the Application to the Land Control Board dated 12/11/2008 did not belong to the Defendant in this matter.
180. The last aspect in this issue is in regards to the witnesses of the Agreement for Sale.
181. The Agreement for Sale indicates that four persons witnessed the transaction.
182. However, looking at the provisions of Section 3(3) of the Law of Contracts, the presences of the witnesses is meant to witness the execution and/or appending of the signature and/or finger prints.
183. In this Agreement for Sale, the witnesses are not described to be present during execution of the same.
184. During the hearing, the witnesses whose names are on the Agreement for Sale all gave evidence that they had been called by the Plaintiff.
185. Both the Plaintiff and the witnesses who testified did not give a name or names of the Defendant's witness(es) at the time of execution of the Agreement for Sale.
186. In other words, there is no proof that the purported signature and/or finger print that appears on the part of the Seller who is the Defendant was witnessed by anyone in the Agreement for Sale.
187. In view of all these anomalies, the Court is of the considered opinion that the Agreement for Sale does not comply with the mandatory provisions of the [Law of Contract Act](#) as required and is therefore not binding on the parties herein.



**ISSUE NO. 2- IN THE EVENT THE SALE OF LAND AGREEMENT IS NOT VALID, WHEN DOES TIME START RUNNING FOR A CLAIM OF ADVERSE POSSESSION?**

188. The Court having made a finding on the legality and/or validity of the Agreement for Sale, it is therefore necessary to look at the aspect of the when time began running in terms of Section 7 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya.
189. Section 7 of the [Limitation of Actions Act](#), Cap 22, Laws of Kenya provides as follows; -
- “An action may not be brought by any person to recover land after the end of twelve (12) 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.”
190. In addition to Section 7 hereinabove, Section 13 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya further provides as follows;-
- “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 of this act 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”
191. At the hearing of this matter, the Defendant testified that the Plaintiff approached the Defendant who is the brother in law with a request to temporary occupy a portion of the suit property.
192. The reason for the request was because the Plaintiff had been affected by tribal clashes between the Maasai and Kisii communities and his properties burnt down.
193. The Defendant was therefore to temporarily stay on a portion of the suit property until calm returned was and then he would relocate back.
194. This evidence by the Defendant was fully collaborated by the Defendant’s witnesses who was a cousin and the village elder who is also a neighbour to the Defendant.
195. All the three Defence witnesses stated without any contradiction that the Plaintiff started occupying a portion of the suit property in the year 2009.
196. The Plaintiff on the other hand indicated that his occupation was from the year 2002 when they entered into the Agreement for Sale.
197. The Plaintiff’s witnesses also indicated that the Plaintiff took possession of the suit property upon payment of the consideration thereof.
198. However, in view of the fact that the purported Agreement for Sale has been found not binding on the parties, the Court is of the considered view that occupation and use of a portion of the suit property commenced in the year 2009.
199. The Defendant herein has admitted in his testimony and similarly, the two witnesses have confirmed that the Plaintiff was allowed to use a portion of the suit property being the brother in law to the Defendant.



200. The pictures produced by the Plaintiff without a doubt show developments, crops and trees that have been planted by the Plaintiff signifying his presence on the suit property.
201. Consequently, the court is of the considered view that time for purposes of computing the claim for adverse possession began in the year 2009.

**C. ISSUE NO.3- HAS THE PLAINTIFF SATISFIED THE INGREDIENTS OF ADVERSE POSSESSION AS TO WARRANT THE ORDERS SOUGHT?**

202. This being a claim of adverse possession, the Kenyan Courts have indeed established a number of principles that should be proved in a claim of adverse possession.
203. In the celebrated case of MTANA LEWA-VERSUS- KAHINDI NGALA MWAGANDI (2015) eKLR, the Court reiterated these principles in the following manner; -

“For one to succeed in a claim of adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin maxim nec vi,nec cla,nec precario.”

204. In the case of KENYA TEA DEVELOPMENT AUTHORITY-VERSUS- JACKSON GACHUHI (2006) eKLR the Court also held as follows;-
  - a. There must be an adverse act (by the applicant) and nothing that would lead the owner (Respondent) to suppose that his rights remain intact.
  - b. The assertion of possession must be open, peaceful and as of right.
  - c. The party claiming to hold adversely must go to prove that his possession was in denial of the other’s title, and that he excluded that other from enjoyment of the property.
  - d. The registered owner must have knowledge of his ouster by the adverse possessor.
205. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Muniyifwa Songoi [2020] eKLR opined that a person claiming adverse possession must establish the following
  - (a) On what date he came into possession.
  - (b) What was the nature of his possession?
  - (c) Whether the fact of his possession was known to the other party.
  - (d) For how long his possession has continued and
  - (e) That the possession was open and undisturbed for the requisite 12 years.
206. With the guidance of the above authorities, the Court will also evaluate if indeed the Plaintiff has satisfied the above requirements.
207. On the issue of when the Plaintiff took possession, the court has already pronounced itself on the same with the year 2009 being the time when the Plaintiff took possession and/or occupation of a portion of the suit property.



208. Looking at the nature of his occupation and/or possession, the evidence by the Defendant and the two witnesses indicate that the Plaintiff was given a portion of the suit property for temporary use.
209. The evidence of the Defendant and the 1<sup>st</sup> Defence witness clearly describe the relationship with the Plaintiff as of brothers in law.
210. The Defendant and the two Defence witness's testimony is that the Plaintiff was allowed to use a portion of the suit property temporarily due to the tribal clashes of 2009 which had resulted to his property being built down.
211. The Plaintiff's occupation on the suit property was temporary in nature and the Defendant as well as the witnesses therefore have indicated that the Plaintiff's family has since relocated back to their home.
212. It is only the Defendant who is still resident on the disputed portion which he developed and has refused to vacate.
213. The Court evaluating the above facts is of the view that the Plaintiff's entry, occupation and/or possession is one based on a license.
214. It is the Defendant who authorised the Plaintiff's entry for a temporary time and upon the tribal clashes being contained which indeed happened, the Plaintiff was to vacate the portion he occupied on the suit property and relocate back to his rightful property.
215. In other words, one of the key requirements in adverse possession which is nec precario translating to "but without permission of the land owner" fails at this point.
216. The effect of this ingredient of adverse possession was discussed in the Case of WAWERU-VERSUS-RICHU, COURT OF APPEAL NO.122 OF 2001 eKLR where the Court held as follows; -
- "it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner"
217. In another case of WANJE -VERSUS- SAIKWA CIVIL APPEAL NO. 72 OF 1982 (1984) KLR, the Court made the following observations; -
- "A person who occupies another person's land with that other person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of his land and the possession is not illegal. Again, there is no adverse possession when land is occupied under a license until the license has been determined".
218. The Court further observed the following on page 293; -
- "The Appellants have been cultivating the land and reside on the land and those activities, constitute adverse possession. However, the cultivation and the residence was with express permissive possession and did not become adverse during the time the Appellants were allowed to occupy the land."
219. The last authority to make reference on this issue is HCCC NO. 2826 OF 2007 BETWEEN MBIRA-VERSUS GACHUHI where the Court made the following finding; -
- "It has always been the law that permissive or consensual occupation is not adverse possession. The possession must be adverse. Adverse possession is occupation inconsistent with the Title of the true owner; inconsistent with and in denial of the right of the true owner of the



premises. If one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse.”

220. The Court having gone through the authorities above and the evidence placed before this Court, it is the Court’s considered view that the Plaintiff has failed to satisfy the mandatory ingredients of adverse possession in this matter.

#### **IV. ISSUE.NO. 4- WHO BEARS THE COSTS OF THE SUIT?**

221. The Court having made a finding that the Plaintiff has not satisfied the mandatory ingredients of a claim for adverse possession against the Defendant, the costs of the suit shall be borne by the Plaintiff.

222. In conclusion therefore, the Court makes the following Orders in determination of the Originating summons dated 7<sup>th</sup> October 2019; -

A. The Originating Summons dated 7<sup>th</sup> October 2019 be and is hereby dismissed.

B. The Plaintiff be and is hereby directed to demolish, remove, vacate, yield possession of the portion in occupation and/or use in the next Ninety (90) days from the date of this judgement.

C. In the event of non-compliance with Order No. B hereinabove, an Order of eviction shall automatically issue.

D. The Plaintiff, his agents, employees and/or any other person deriving an interest from him be and is hereby permanently prohibited by way or injunction from entering, using, occupying, planting, building and/or in whatsoever way and manner interfering with the quite occupation and/or possession of the suit property

E. Costs of the suit be borne by the Plaintiff.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 26<sup>th</sup> SEPTEMBER 2022.**

**EMMANUEL.M.WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

COURT ASSISTANT: Ngeno/Elisha

ADVOCATES FOR THE APPLICANT: O. M Otieno (N/A)

ADVOCATES FOR THE DEFENDANT: Mireri

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