



REPUBLIC OF KENYA



**Naitipa v Megesh & another (Environment and Land Case Civil Suit
25 of 2021) [2022] KEELC 14937 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND CASE CIVIL SUIT 25 OF 2021
EM WASHE, J
NOVEMBER 22, 2022**

BETWEEN

JOSEPH OLOINYENYE NAITIPA PLAINTIFF

AND

JEREMIAH SAOLI OLE MEGESH 1ST DEFENDANT

JOSHUA KINYAMAL OLE SHANKIL 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein filed an Amended Originating Summons dated 28th May 2019 (hereinafter referred to as “the Amended O.S”)
2. The Amended O.S seeks for a number of prayers which are as follows; -
 1. A declaration that the Plaintiff is entitled to adverse possession to all that parcel of land known as TRANSMARA/MOITA/296 measuring approximately 10.98 Hectares.
 2. This Honourable Court be pleased to issue a vesting Order directing at the 2nd Defendant herein to transfer the suit land known as L.R. TRANSMARA/MOITA/296 into the names of the Plaintiff herein JOSEPH OLOINYENYE NAITIPA within 30 days of the date of this order failing which the Deputy Registrar of this Court is ordered to sign the transfer forms and all necessary documents of consent to facilitate the transfer to take place.
 3. Costs of these proceedings be borne by the Defendants.
3. The Amended O.S is supported by the Affidavit of the Plaintiff sworn on the 28th of May 2019.
4. In support of the Plaintiff’s case, a bundle of Documents dated 6th March 2020 contained various documents namely (i) Establishment of an Adjudication Section Notice dated 27th of May 1985 (ii) Establishment of an adjudication section letter setting out the boundaries of Masurura Area dated



- 14th June 1996 (iii) Copy of the Adjudication Map (iv) Certificate of a search of the Title No. TRANSMARA/MOITA/296 dated 30th October 2015 (v) Copy of the Adjudication overlap notice dated 25th March 1997 (vi) Copy of letter from the Land Adjudication and Settlement dated 27th January 1998 (vii) Letter from the District Land Registrar on resolving the Masurura/Moita boundary dispute dated 30th September 2004 (viii) Photos showing occupation and/or activities of the suit property.
5. The 1st Defendant opposed the Amended O.S by filing a Replying Affidavit sworn on the 16th of November 2015 (hereinafter referred to as “1st Defendant’s Replying Affidavit”)
 6. The 1st Defendant further filed a bundle of documents which included (i) A copy of the Declaration and demarcation process at Moita Adjudication Section dated 27th May 1985 (ii) copy of the Declaration and demarcation process at Masurura Adjudication Section dated 14th June 1996 (iii) a copy of the Registry Index Map for Moita Registration Section (Sheet No. 13) (iv) Copy of the Green Card in respect of L.R. NO. TRANSMARA/MOITA/296 (v) Copy of the Title Deed in respect of TRANSMARA/MOITA/296 (vi) Copy of the Certificate of Official Search in respect of L.R.NO. TRANSMARA/MOITA/296 (vii) Copy of the Certificate of Official Search in respect of L.R.No. TRANSMARA/MOITA/297.
 7. The 2nd Defendant similarly filed a Replying Affidavit sworn on the 22nd June 2019 (hereinafter referred to as “the 2nd Defendant’s Replying Affidavit”) in opposition of the Amended O.S.
 8. The 2nd Defendant’s Replying Affidavit attached two documents namely (i) a copy of the Certificate of Registration for L.R. TRANSMARA/MOITA/296 (ii) a portion of the Registry Index Map of Moita Adjudication Section.
 9. All the parties herein complied with the pre-trial procedures and the hearing of the Amended O.S began on 18/11/2020.

PLAINTIFF’S CASE

10. The hearing commenced with the testimony of the Plaintiff herein.
11. The Plaintiff began his testimony by indicating that he resides in Masurura Location.
12. The Plaintiff further stated that he had resided on the suit property since he was born and therefore was seeking adverse possession against the 1st Defendant.
13. The Plaintiff informed the Court that the 1st Defendant has never been in occupation and/or possession of the suit property at any one time.
14. The Plaintiff indicated that his occupation of the suit property was open, continuous and without authority for a period of over 51 years.
15. The Plaintiff testified that the various exhibits contained in the Bundle of documents dated 6th March 2020 and produced as Exhibits 1- 8 confirm his claim.
16. The Plaintiff in particular referred to Exhibit 3 which was the Adjudication Map which was proof that indeed the suit property existed on the ground.
17. The Plaintiff also referred the Court to the letter dated 30/09/2004 which was a Report containing various recommendations by the District Land Registrar, District Surveyor and District Land Adjudication & Settlement Officer on the dispute between Masurura Adjudication Section and Moita Adjudication Section.



18. The Plaintiff stated that one of the recommendations from the Report dated 30/09/2004 was that in the event someone's parcel was occupied by anyone else, then the owner was to seek eviction orders in a Court of law.
19. According to the Plaintiff, the 1st Defendant had never taken such steps against the Plaintiff.
20. The Plaintiff indicated that because he was the one on the ground, he filed this suit so that he could be declared the owner and issued with the legal title to the said suit property.
21. The Plaintiff relied on the photographs produced as Plaintiff Exhibit 8 to proof his occupation on the suit property.
22. As appertains the 2nd Defendant, the Plaintiff informed the Court that he was included in this suit as a result of an official search which showed that he was now the current registered owner.
23. The Plaintiff's prayer to the Court was a declaration that he was the lawful owner of the suit property and should therefore be issued with the necessary title deed.
24. In cross examination, the Plaintiff reiterated that he had been residing on the suit property since way back in 1959.
25. According to the Plaintiff, Moita Adjudication Section was declared in the year 1983 while Masurura Adjudication Section was declared an Adjudication Section in 1994 or 1996.
26. Consequently, the Plaintiff stated that Moita Adjudication Section had overlapped into Masurura Adjudication Section.
27. The Plaintiff informed the Court that he was not aware of any Court proceedings that challenged the boundary of Masurura Adjudication Section.
28. The Plaintiff confirmed that he was the registered owner of L.R TRANSMARA/MOITA/297 which was adjudicated at the same time with the suit property.
29. However, on the ground, the Plaintiff indicated that he resides on L.R.No. TRANSMARA/MOITA/296 which is the suit property herein.
30. The Plaintiff indicated that he did not know that he had been registered as the owner of L.R.NO. TRANSMARA/MOITA/297 until upon registration.
31. The Plaintiff testified that the developments on the suit property included 4 permanent houses and 1 semi-permanent house which were all captured in the Photographs produced as Plaintiff's Exhibit 8.
32. The Plaintiff stated that he became aware of the overlap between the two Adjudication Sections in 1994 when complaints by the beneficiaries were referred to the Adjudication Committees.
33. The Plaintiff further testified that the Adjudication Committee of Masurura Adjudication Section further raised a complaint through their letter dated March 1997 but the issues therein have never been resolved up to date.
34. In Re-examination, the Plaintiff stated the Government officials did not resolve any issues but simply made various recommendations through their Report dated 30/09/2014.
35. The Plaintiff after this Re-examination was discharged from the witness box.
36. The Plaintiff's 2nd witness was one MRS ELIZABETH NAITIPA.



37. The Plaintiff's 2nd witness introduced herself as the wife to the Plaintiff whom they had been together for 24 years.
38. The Plaintiff's 2nd witness informed the Court that she has resided on the suit property from the time she got married to the Plaintiff.
39. The Plaintiff's 2nd witness identified the neighbours to the suit property as Charles Sunkuli, Daniel Tumur and Leshanti Kalema.
40. The Plaintiff's 2nd witness denied knowledge of the 1st and 2nd Defendants on the ground and stated that she did not know where they resided.
41. In cross-examination, the Plaintiff's 2nd witness reiterated that she met the Plaintiff when he was already living on the suit property.
42. The Plaintiff's 2nd witness stated that the house they reside on is on L.R.NO. TRANSMARA/MOITA/297.
43. The Plaintiff's 2nd witness further stated that she did not know the location of the property registered in the Plaintiff's name.
44. In re-examination, the Plaintiff's 2nd witness testified that they occupy both L.R.NO. TRANSMARA/MOITA/296 and TRANSMARA/MOITA/297.
45. Upon completion of this re-examination, the Plaintiff's 2nd witness was discharged from the witness box.
46. The Plaintiff's 3rd witness was OLE SANTIYAO KALEMA.
47. The Plaintiff's 3rd witness stated that he resides in Masurura within Transmara but was familiar with the area known as Moita.
48. The Plaintiff's 3rd witness further informed the Court that he was a village elder giving support to the local Area Chief.
49. Consequently, to being a village elder, the Plaintiff's 3rd witness knew most of the residents in both Masurura and Moita for security and social reasons.
50. As appertains this suit, the Plaintiff's 3rd witness indicated that he knew the Plaintiff very well and resided on the suit property with his family.
51. The Plaintiff's 3rd witness further stated that he was the registered owner of L.R.No. TRANSMARA/MOITA/218.
52. The Plaintiff's 3rd witness informed the Court that the parcel occupied by the Plaintiff was in the same area as where he resides and they had been living with the Plaintiff for a long time.
53. The Plaintiff's 3rd witness admitted that there was a dispute on the boundary between Masurura Adjudication Section and Moita Adjudication Section.
54. Nevertheless, the Plaintiff's 3rd witness denied knowledge of the 1st and 2nd Defendants occupation on the suit property.
55. The Plaintiff's 3rd witness reiterated that his testimony was simply to confirm that the Plaintiff was the one in occupation of the suit property and his neighbour was OLE BOSHO and others.



56. In cross-examination, the Plaintiff's 3rd witness informed the Court that administratively, there is Masurura Location and Moita Location.
57. The Plaintiff's 3rd witness stated that he was a village elder of Moita area but the supervising chief was the one from Masurura Location.
58. The Plaintiff's 3rd witness testified that he was registered as the owner of his property in the year 1985.
59. The Plaintiff's 3rd witness informed the Court that the Plaintiff had a title but on the ground, he occupies the suit property.
60. The Plaintiff's 3rd witness stated that he was not aware if the Plaintiff owns L.R.NO. TRANSMARA/MOITA/297.
61. The Plaintiff's 3rd witness stated that on the ground, there was no boundary between the two properties occupied by the Plaintiff.
62. There was no re-examination and the Plaintiff's 3rd witness was discharged from the witness box.
63. The Plaintiff's Counsel thereafter indicated the closure of the Plaintiff's case.

FIRST DEFENDANT'S CASE

64. The Defence hearing began on 20/09/2017 with the testimony of the JEREMIAH SAOLI MBEESHI who was also the 1st Defendant.
65. The 1st Defendant introduced himself as a businessman doing business in Lolgorian town.
66. As appertains this suit, the 1st Defendant testified that he was the registered owner of the suit property.
67. The 1st Defendant informed the Court that he had acquired the suit property through an allocation within Moita Adjudication Section and thereafter issued a Title Deed.
68. The 1st Defendant's testimony was that the suit property was vacate during the demarcation and adjudication of Moita Adjudication Section.
69. The 1st Defendant indicated that upon being adjudicated and issued with a title to the suit property, he allowed one Mr.Ole Natingu to graze his cattle of the same.
70. The 1st Defendant admitted that he knew the Plaintiff in this suit who was a neighbour in Moita Adjudication Section.
71. The 1st Defendant stated that the demarcation of the suit property and that belonging to the Plaintiff was done on the same day in the presence of both of them.
72. Consequently thereof, both the Plaintiff and 1st Defendant are well aware of the boundary and ownership of both parcels namely L.R.NO. TRANSMARA/MOITA/279 and the suit property.
73. According to the 1st Defendant, both the Plaintiff and the himself only took possession after the demarcation of MOITA ADJUDICATION SECTION.
74. It was the 1st Defendants testimony that there were no structures and/or houses built on the suit property or any agricultural activities which were taking place on the land during demarcation.
75. The 1st Defendant therefore disputed that the Plaintiff built and/or occupied the suit property for more than 12 years as alleged.



76. The 1st Defendant adopted his Replying Affidavit dated 15/11/2015 as his evidence in chief.
77. The 1st Defendant was then Cross-examined by the Plaintiff's Counsel.
78. The 1st Defendant reiterated that he stays in Kirindon within Lolgorian town.
79. The 1st Defendant stated that the distance between Kirindon to Moita was about 17 Kilometers while the distance between Moita and Lolgorian was about 8 Kilometers.
80. The 1st Defendant informed the Court that he was allocated the suit property in the year 1997 although he never lived on the same.
81. The 1st Defendant stated that despite him not residing on the suit property, he did frequent visits.
82. The 1st Defendant denied that the Plaintiff lived on the suit property since his childhood.
83. The 1st Defendant however confirmed that the Plaintiff resides on the property L.R.No. TRANSMARA/MOITA/297 although he could not state the exact year he stated residing on the said property.
84. The 1st Defendant indicated that he did not have copies of his application for adjudication or an official search of the Plaintiff's property.
85. The 1st Defendant reiterated his objection to the Plaintiff's claim in totality.
86. In re-examination, the 1st Defendant stated that the Plaintiff resides on his own property and not on the suit property.
87. The 1st Defendant informed the Court that the suit property had in fact been sold to someone else.
88. After the joinder of the 2nd Defendant herein, the 1st Defendant was recalled for Cross-examination by Counsel for the 2nd Defendant on the 10/02/2022.
89. The 1st Defendant opened his further cross-examination by stating that he had already given evidence in the matter but could not remember the date of his testimony.
90. The 1st Defendant confirmed that the suit property belonged to him.
91. The 1st Defendant stated that during his time as the owner of the suit property, he grazed cattle on the same.
92. Upon disposing off the said suit property, he relocated to Kimintet where he currently resides.
93. The 1st Defendant admitted knowing one Mr. Ole Ngatuni but stated that he did not know the registered number of his property.
94. The 1st Defendant also admitted knowing the Plaintiff who was his neighbour.
95. The 1st Defendant informed the Court that he knew the 2nd Defendant who he had sold the suit property to.
96. The 1st Defendant could not however remember the date when the Agreement For Sale was executed although he recalled that it was in the year 2015.
97. The 1st Defendant indicated that the Agreement For Sale was prepared and executed before an Advocate.
98. Unfortunately, the 1st Defendant did not have the Agreement for Sale in Court.



99. The 1st Defendant stated that after completion of the Sale transaction, he had never gone back to the suit property and confirm who was in occupation thereof.
100. As appertains the ground visit during the Sale transaction, the 1st Defendant stated that he did not take the 2nd Defendant to the suit property.
101. The 1st Defendant informed the Court that the 2nd Defendant went to the suit property on his own because he knew the location and knew all about the same.
102. According to the 1st Defendant, he used to graze his cattle on the suit property before he sold the same to the 2nd Defendant.
103. Upon completion of the Sale transaction with the 2nd Defendant, the 1st Defendant removed his cattle on the suit property and handed over possession to the new owner.
104. The 1st Defendant did not however produce any evidence either by photographs or otherwise to confirm that he was in occupation of the suit property.
105. The 1st Defendant indicated that he did not call any witness to collaborate his evidence of occupation on the suit property before selling it to the 2nd Defendant.
106. However, the 1st Defendant insisted that he had been in occupation of the suit property and not the Plaintiff herein.
107. In re-examination, the 1st Defendant reiterated that he took possession of the suit property way back in 1980s and had been grazing on the same.
108. According to the 1st Defendant, the Plaintiff herein was only a neighbour by virtue of being the owner of the property L.R.NO. TRANSMARA/MOITA/297.
109. The 1st Defendant informed the Court that at the time of selling the suit property to the 2nd Defendant, the Plaintiff was not in occupation of the same.
110. According to the 1st Defendant's knowledge, upon the 2nd Defendant taking possession of the suit property, he began keeping cattle on the same.

SECOND DEFENDANT'S CASE

111. The 2nd Defendant introduced himself as a Narok County Government employee who resides in Kilgoris town.
112. The 2nd Defendant stated that he purchased the suit property from the 1st Defendant known as JEREMIAH SAOLI OLE MEGESH in the year 2016-2017.
113. Prior to purchasing the suit property, the 2nd Defendant undertook a search at the Lands Office and further obtained the necessary Registered Index Map.
114. Upon obtaining the relevant Registered Index Map, the 2nd Defendant visited the suit property with the 1st Defendant who pointed out the relevant beacons for boundary of the suit property.
115. The 2nd Defendant testified that at the time of the site visit, the entire suit property was vacant and only had bushes on it.
116. The 2nd Defendant having satisfied himself on the ownership and location of the suit property, an Agreement For Sale was executed between the 1st Defendant and the 2nd Defendant and a consideration paid.



117. The suit property was consequently transferred to the 2nd Defendant and a Certificate of Official Search to confirm his ownership was done on the 07/02/2018.
118. Unfortunately, before the 2nd Defendant would take possession, the Plaintiff herein commenced this suit claiming ownership of the suit property.
119. According to the 2nd Defendant, the Plaintiff was the registered owner of L.R.NO. TRANSMARA/MOITA/297 while the 2nd Defendant was the owner of L.R.NO. TRANSMARA/MOITA/296.
120. The 2nd Defendant informed the Court that he had done an official search on L.R.NO TRANSMARA/MOITA/297 and the Certificate of Official Search dated 05/03/2020 confirmed the same to belong to the Plaintiff herein.
121. The 2nd Defendant further informed the Court that the Plaintiff had other suits regarding properties known as TRANSMARA/MOITA/294 and 295.
122. The 2nd Defendant stated that the Plaintiff was not in actual occupation and/or possession of the suit property but simply grazed on the same because it was not fenced.
123. The 2nd Defendant testified that most people would graze on any land that is open.
124. The 2nd Defendant indicated that he purchased the suit property in 2017 and therefore has only been the registered owner for about 5 years.
125. The 2nd Defendant's request was that the Court dismisses the Plaintiff's suit with costs.
126. The 2nd Defendant's testimony was that he had taken a loan to purchase the suit property but had never taken possession thereof.
127. The 2nd Defendant then produced the Certificate of Official Search dated 07/02/2018 confirming that the suit property was in the name of the Defence 1st witness as DEFENCE EXHIBIT 1.
128. The 2nd Defendant also produced the Certificate of Official Search dated 05/03/2020 confirming that the property L.R.NO. TRANSMARA/MOITA/297 was registered in the name of the Plaintiff as DEFENCE EXHIBIT 2.
129. The 2nd Defendant indicated that L.R.NO. TRANSMARA/MOITA/297 and the suit property were next to each other and share a common boundary.
130. According to the 2nd Defendant, the boundary between L.R.NO. TRANSMARA/MOITA/297 and the suit property on the ground is intact and can be identified.
131. The 2nd Defendant produced the Registered Index Map contained in Sheet 31 which confirmed the boundaries of L.R.NO. TRANSMARA/MOITA/297 and the suit property to be common.
132. The Registered Index Map of Moita Adjudication Section contained in Sheet 31 was produced as DEFENCE EXHIBIT 3.
133. The 2nd Defendant stated that the Plaintiff has never been in occupation of the suit property.
134. The 2nd Defendant indicated it was only when he tried to fence the suit property that the Plaintiff started claiming ownership of the suit property and obtained an injunction for him not to develop the same.
135. In cross-examination, the 2nd Defendant stated that he was not related to the 1st Defendant.



136. The 2nd Defendant informed the Court that the 1st Defendant was not staying on the suit property at the time he purchased the same.
137. However, the 2nd Defendant stated that the 1st Defendant used to graze his cattle on the suit property.
138. According to the 2nd Defendant, the 1st Defendant resided in Loggorian although he could not precisely indicate the distances between Loggorian and the suit property was.
139. The 2nd Defendant confirmed an existence of an Agreement For Sale with the 1st Defendant.
140. The 2nd Defendant told the Court that he was not aware of any court case relating to the suit property before he purchased the same.
141. The 2nd Defendant testified that he was not aware that this suit had been filed in the year 2015.
142. The 2nd Defendant further testified that he was not aware that at the time of purchasing the suit property, the 1st Defendant had testified in this suit.
143. The 2nd Defendant reiterated that upon being registered as the owner of the suit property, he took possession and has been grazing his cattle on the same.
144. The 2nd Defendant admitted that he had not produced any pictures of the cattle within the suit property.
145. The 2nd Defendant indicated that the Plaintiff property L.R.NO. TRANSMARA/MOITA/297 was next to the suit property and if indeed he grazed his cattle on the suit property, then that was trespass.
146. According to the 2nd Defendant, the Plaintiff occupies the property known as L.R.NO. TRANSMARA/MOITA/297 and only purported to claim the suit property in the year 2020 when the 2nd Defendant tried to fence it.
147. The 2nd Defendant indicated that the stop Order was issued by the Court which directed that a Status Quo of the suit property be maintained until determination of this suit.
148. The 2nd Defendant reiterated that he purchased the suit property lawfully and did not in any way participate in a collusion to defeat justice.
149. In re-examination, the 2nd Defendant stated that no one challenged the Agreement For Sale on the suit property between the 1st Defendant and himself.
150. The 2nd Defendant confirmed that he undertook an official search over the suit property before entering into the Agreement For Sale and further visited the ground.
151. During the ground visit with the 1st Defendant, the 2nd Defendant stated that the suit property was vacant and there was no third party on it.
152. Similarly, there was no court order and/or caution on the records of the suit property at the time the 2nd Defendant transacted on the land.
153. Unfortunately, the 2nd Defendant was also not informed of this suit during the transaction period by the 1st Defendant.
154. The 2nd Defendant only came to be aware of this suit after he was joined and served with the Status Quo Order.



155. The 2nd Defendant stated that he was not surprised that the Plaintiff had other cases in Court with the neighbours claiming their properties as well.
156. The 2nd Defendant indicated that upon successfully purchasing the suit property, he took possession by clearing the bushes and did maize farming until he was brought to Court.
157. It was only in 2020 when the 2nd Defendant tried to fence the suit property that he was joined in this suit and an Order that status quo be maintained issued against him.
158. According to the 2nd Defendant, he purchased the suit property in the year 2015, took possession in the year 2016 and obtained the Title document in March 2017.
159. The process of obtaining the Title Documents in 2017 included obtaining the Land Control Board Consent which was granted in the year 2017.
160. In concluding his testimony, the 2nd Defendant reiterated that there was no person in occupation of the suit property in the year 2015.

ANALYSIS & DETERMINATION

161. Looking at the pleadings herein, the oral evidence adduced, the documents produced at the trial and the submissions of the parties herein, the issue before the Court is one of Adverse possession.
162. The main duty of the Court is to evaluate whether or not the Plaintiff herein has satisfied the ingredients of adverse possession to enable the Court grant the prayers sought in the Amended O.S.
163. The Plaintiff herein has invoked Order 37 Rules 1 and 7 of the Civil Procedure Rules 2010 and Section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya in the Amended O.S.
164. The provisions of Order 37 Rule 1 of the Civil Procedure Rules 2010 in the opinion of the Court does not assist the Plaintiff herein as the same deals with issues which are not part of this suit.
165. However, Order 37 Rule 7 of the Civil Procedure Rules 2010 provides that if any party is desirous of instituting a claim of Adverse possession, then such a claim should be brought to Court by way of an Originating Summons.
166. On the other hand, Section 38 of the *Limitation of Actions Act*, Cap 22 provides jurisdiction for this Court to hear and determine claims of adverse possession.
167. Similarly, Section 38 (2) of the *Limitation of Actions Act*, Cap 22 directs that if a claimant of adverse possession is successful before this Court, the determination shall be registered against the property's register and the registered owner's title shall be extinguished thereafter.
168. Various Courts in our jurisdiction have discussed the manner in which claims of adverse possession should be considered.
169. In the Case of MTANA LEWA-VERSUS- KAHINDI NGALA MWAGANDI (2015) eKLR, the ingredients of adverse possession were stated to be as follow; -

“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.”



170. The principles of adverse possession outlined hereinabove were against reiterated by the Court of Appeal in CIVIL APPLICATION NO.110 OF 2016 BETWEEN RICHARD WEFWAFWA SONGOI-VERSUS- BEN MUNYIFWA SONGOI (2020) eKLR where the Court stated that the following principles must be demonstrated successfully in a claim of adverse possession; -
- 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.
171. Based on the above principles, the Court will now endeavour to apply the facts and evidence presented to it and make the appropriate determinations.

A. ON WHAT DATE DID THE PLAINTIFF CAME INTO POSSESSION OF THE SUIT PROPERTY?

172. According to the testimony by the Plaintiff herein, he was born on the suit property way back 51 years ago.
173. The Plaintiff further testified that he was raised within the suit property and has known this area to be their ancestral home.
174. The Plaintiff indicated that he has since married while in occupation of the suit property and raised his family therein.
175. The Plaintiff's 2nd witness who is the wife of the Plaintiff collaborated the Plaintiff's evidence.
176. The Plaintiff's 2nd wife testified that at the time of getting married, the Plaintiff was already in occupation of the suit property which they have continued to occupy and use for the last 24 years of their marriage.
177. The Plaintiff's 3rd witness who is also the Village Elder further collaborated the Plaintiff's evidence by stating that he recognises the Plaintiff to be the person on the ground within the suit property.
178. The Plaintiff's 3rd witness denied the allegations that the 1st and 2nd Defendants were in occupation or possession of the suit property.
179. The Plaintiff's 3rd witness indicated that as a village elder, one of the key responsibilities is to know the people residing within his area of supervision for security and social functions.
180. Indeed, appertaining to the suit property, his testimony was that the same is occupied by the Plaintiff and not the 1st and/or 2nd Defendants herein.
181. The Plaintiff then produced photographs of the developments and/or agricultural activities connoting his occupation within the suit property as Plaintiff's Exhibit 8.
182. On the other hand, the 1st Defendant opposed the Plaintiff's allegation of entry and occupation on the suit property.
183. The 1st Defendant's testimony was to the effect that the Plaintiff herein migrated into the area during the Demarcation and adjudication of MOITA ADJUDICATION SECTION.



184. Prior to that, the Plaintiff resided somewhere else and was not born on the suit property.
185. The 1st Defendant in addition to the above stated that the Plaintiff was simply a beneficiary of MOITA ADJUDICATION SECTION having been allocated the neighbouring property known as L.R.NO. TRANSMARA/MOITA/297.
186. The 1st Defendant admitted that the Plaintiff was a neighbour on the suit property.
187. As appertains possession, the 1st Defendant informed the Court that he took possession after the demarcation and adjudication of the suit property by grazing cattle and granting one OLE NATINGU temporary use of the suit property before he sold the same to the 2nd Defendant.
188. The 2nd Defendant who is currently the registered owner testified before the Court and indicated that he was in occupation of the suit property.
189. The 2nd Defendant testified that he visited the suit property prior to purchasing the same and found the same to be vacant with bushes growing on the same.
190. Upon successfully purchasing the suit property in 2015 and obtaining the title deed in the year 2017, the 2nd Defendant has been grazing cattle on the said suit property thereby signifying his occupation and possession of the same.
191. The question that begs to be answered at this juncture is which could be the ascertainable date when the Plaintiff started occupation on the suit property.
192. Referring to the Plaintiff's Exhibit No. 4 which is a Copy of an Official Search of the suit property dated 30th October 2015, the 1st Defendant was officially registered as the owner in December 1997.
193. Consequently therefore, any entry of the suit property can only be deemed to have occurred from December 1997 when the 1st Defendant was dully recognised by the Government of Kenya as the legal and beneficial owner.

B. WHAT WAS THE NATURE OF HIS OCCUPATION & POSSESSION.

194. The Plaintiff in an effort to prove adverse possession must demonstrate that his/her occupation on the land was open, without secrecy and without force.
195. The Plaintiff during his testimony produced photographs of the developments within the suit property pronouncing is occupation as Plaintiff's Exhibit 8.
196. The Plaintiff's 3rd witnesses also collaborated the evidence of the Plaintiff by confirming that indeed there has been developments and open occupation of the suit property for a long period of time.
197. The Plaintiff's 3rd witness further testified that he had not met either the 1st or 2nd Defendants on the suit property and only recognised the Plaintiff as the occupant and beneficial owner of the suit property.
198. The 1st and 2nd Defendants in an effort to contest the occupation of the Plaintiff did not adduce any evidence of a dispute and/or call any witnesses including the said OLE NAIGUTA or the persons caring for the Cattle to challenge the Plaintiff's occupation.
199. This omission by the 1st and 2nd Defendant leaves the Court with only one conclusion that the said Defendants have not been in the occupation and/or possession of the suit property.
200. In essence therefore, it is clear in the Court's view that the Plaintiff's occupation on the suit property was open, without secrecy and without force.



C.WHETHER THE FACT OF HIS POSSESSION WAS KNOWN TO THE OTHER PARTY.

201. The Court having established that the Plaintiff's occupation was open, without secrecy and without force, the next question was whether or not the 1st and 2nd Defendants were aware of the same.
202. From the evidence of both the 1st and 2nd Defendants, both of them have admitted to have continuously and constantly visited the suit property during their ownership.
203. If indeed the 1st and 2nd Defendants conducted the numerous visits on the suit property as testified in Court, then how did they not realise that the Plaintiff was in occupation of their asset?
204. This answer was to be provided by the 1st and 2nd Defendant but unfortunately the same was not provided during the hearing.
205. Could there be a possibility that the 1st Defendant and subsequently the 2nd Defendant did know the physical location or boundary of the suit property which was neighbouring the Plaintiff's property?
206. The answer to this question was provided by the 1st Defendant in his testimony on the 20/09/2017.
207. The 1st Defendant admitted being shown the boundary of the suit property with that registered in the Plaintiff's name.
208. Its therefore clear that the 1st Defendant had knowledge of the boundaries to the suit property and any developments on the same by the Plaintiff cannot be said to have not been in his knowledge keeping in mind the various visits he undertook prior to selling it to the 2nd Defendant.
209. Similarly, the 2nd Defendant having purchased the suit property in the year 2017, when this suit was already in existence having been filed way back in 2015, he cannot also deny knowledge of the Plaintiff's claim of occupation relating to the suit property.
210. In conclusion therefore, the Court makes a finding that both the 1st and 2nd Defendants were aware of the Plaintiff's occupation of the suit property as required in this principle.

D FOR HOW LONG HIS POSSESSION HAS BEEN CONTINUED?

211. According to the evidence of the Plaintiff, his occupation on the suit property has been for the last 51 years.
212. According to the Plaintiff's 2nd witness, the occupation of the suit property has at least been for the last 24 years.
213. According to the Plaintiff's 3rd witness, the occupation of the suit property has been as long as he has been a resident of MOITA ADJUDICATION SECTION.
214. From the evidence by the Plaintiff's 3rd witness, he was also a beneficiary L.R NO. TRANSMARA/MOITA/218 within TRANSMARA/MOITA/218 which was declared in the year 1985.
215. The suit property was registered in the name of the 1st Defendant in December 1997.
216. According to the Court, there is no documentary evidence and/or witnesses called to prove any occupation of the suit property by the 1st Defendant since he acquired the Title Deed in December 1997.
217. Similarly, there is no documentary evidence and/or witnesses who were called to prove occupation of the suit property after the same was transferred to the 2nd Defendant in the year 2017.



218. This Court in its considered view is that the Plaintiff has been in occupation and/or possession of the suit property at least from the year 1997 when the same was registered in the name of the 1st Defendant.

E. THAT THE POSSESSION WAS OPEN AND UNDISTURBED FOR THE REQUISITE 12 YEARS.Z

219. Section 7 of the *Limitation of Actions Act*, Cap 22 reads as follows; -

“An action may not be brought by any person to recover land after the end of Twelve (12) years from the date in which the right of action accrued to him or, if its first accrued to some person through whom he claims, to that person.”

220. The Court having decided that the Plaintiff's occupation on the suit property commenced on or about December 1997, then accumulatively the Plaintiff has been on the suit property for 25 years which is above the prescribed period of 12 years.

221. The Court further makes a finding that said occupation of the suit property by the Plaintiff has not been interrupted and/or challenged in anyway by the 1st and/or 2nd Defendant as required in law.

CONCLUSION

222. In conclusion therefore, the Court makes the following Orders as appertains the Amended Originating Summons dated 28th May 2019; -

A.

A declaration be and is hereby made extinguishing the 1st and 2nd Defendant's ownership over the property known as TRANSMARA/MOITA/296 forthwith.

B.

A declaration that the Plaintiff herein JOSEPH OLOINYENYE NAITIPA by virtue of Adverse possession is the legal owner of the property known as TRANSMARA/MOITA/296.

C.

A Vesting Order be and is hereby issued directing the 2nd Defendant JOSHUA KINYAMAL OLE SHANKIL to transfer the property known as TRANSMARA/MOITA/296 into the names of the Plaintiff JOSEPH OLOINYENYE NAITIPA within Thirty (30) days from the date of this Order failure to which the Environment & Land Court Deputy Registrar Kilgoris Law Court is ordered to sign the Transfer Forms and all necessary documents to facilitate the Transfer accordingly.

D. Costs of the suit are awarded to the Plaintiff herein..

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 22ND NOVEMBER 2022.

EMMANUEL.M.WASHE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: NGENO



ADVOCATE FOR THE PLAINTIFF: BEGI (N/A)

ADVOCATE FOR THE DEFENDANT: MULISA

