



Siparo & another v Siparo & 2 others (Enviromental and Land Originating Summons E005 of 2024) [2025] KEELC 553 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELC 553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2024**

EM WASHE, J

FEBRUARY 5, 2025

**IN THE MATTER OF SECTION 7, 37 & 38 OF THE
LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

AND

**IN THE MATTER OF ORDER 37 RULE 7(1)
(2) & (3) OF THE CIVIL PROCEDURE RULES,2010**

AND

IN THE MATTER FOR AN ORDER THAT THE PLAINTIFFS HAVE ACQUIRED TITLE UNDER THE PROVISIONS OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA BY WAY OF ADVERSE POSSESSION AND SHOULD BE REGISTERED AS SUCH

BETWEEN

ROBERT OLE SIPARO 1ST PLAINTIFF

NAIBARTUNI CICILIA SIPARO 2ND PLAINTIFF

AND

MARY MAREN SIPARO 1ST DEFENDANT

PAUL TUMPES SIPARO 2ND DEFENDANT

PATRICK MATAYIAN SIPARO 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs herein have approached this Court by was of an Originating Summons dated 02.05.2024 (hereinafter as “the present O.S”) seeking the following Orders against the 1st to 3rd Defendants herein; -
 - a. That Robert Ole Siparo and Naibartuni Cicilia Siparo be registered as the proprietors of a portion of land measuring thirteen (13) acres to be hived off from the parcel



number Transmara/Enoo Saen/18 and Transmara/Enoo saen/421 in which they have been in occupation having acquired ownership and/or title thereto through adverse possession.

- b. That the title of the Defendants with respect to the said portion of land be declared as having been extinguished by operation of the law of adverse possession.
 - c. That the District Surveyor Transmara West be directed by this Court to visit the two parcels above and demarcate and/or curve the portion being occupied by the Plaintiffs, amend the map and allocate a new number to the portion.
 - d. That the Land Registrar Transmara West be directed by this Court to register the portion described in paragraph 3 hereinabove in the names of the Plaintiffs and issue them with a title deed.
 - e. That the Defendants be compelled by this Court to sign all the subdivision and transfer documents/forms effecting transfer of the portion to the Plaintiffs and failure to which the Executive Officer of the Court to sign all the sub-division and transfer forms.
 - f. That costs of this Originating Summons be provided for.
2. The facts in support are contained in the body of the present OS as well as the Supporting Affidavit sworn on the 02.05.2024 and can be summarised as follows; -
- a. The 1st and 2nd Defendants are the registered owners of the parcel of land known as LR. No. Transmara/Enoo saen/Enoo saen/18 while the 3rd Defendant is the registered owner of the property known as LR. No. Transmara/Enoo saen/Enoo saen/421.
 - b. The 1st Plaintiff and the 1st Defendants are first cousins based on the fact that their fathers are biological brothers.
 - c. The 1st Defendant was married to the Siparo family way back in 1977 and during this marriage, the 1st Plaintiff was adopted by the 1st Defendant as her child hence the name Siparo in his Kenyan Identification Card.
 - d. However, after the demise of the 1st Defendant's husband, the 1st Plaintiff was not allocated any portion on land during succession yet he was entitled to the 1st Child of the family.
 - e. Instead, the 1st Defendant in collusion with the 2nd and 3rd Defendants transferred and registered the properties known as LR. No. Transmara/Enoo saen/Enoo saen/18 & 421 in their names to the exclusion of the 1st and 2nd Plaintiffs herein.
 - f. Consequently, the 1st and 2nd Plaintiff were not allocated the portion of land they have been occupying since the year 1990 and now the 1st to 3rd Defendants are threatening to demolish and evict them from the said portion of land.
 - g. The 1st and 2nd Plaintiffs therefore are seeking for an order of adverse possession on the basis that they have been in occupation of their portion of land measuring 13 acres within the properties known as LR. No. Transmara/Enoo saen/Enoo saen/18 & 421 for over a period of 12 years as provided under Section 7 of the Limitation of Actions Act, Cap 22.
4. The present OS was duly served on the 1st to 3rd Defendants who responded through a Replying Affidavit sworn on the 07.06.2024 to which the present OS was opposed on the following grounds;
- a. The 1st Defendant admitted that the property known as LR. No. Transmara/Enoo saen/Enoo saen/18 was indeed registered in her name and that of the 2nd Defendant while the



property known as LR. No. Transmara/Enoosaen/Enoosaen/421 was registered in the name of the 3rd Defendant.

- b. The 1st Defendant averred that indeed the 1st Plaintiff hails from the same village where she comes from but denied any blood relationship save for the fact that the 1st Plaintiff was only an employee.
 - c. Based on the fact that the 1st Plaintiff was an employee of the 1st Defendant and her late husband, a decision was made that a house be built for him so that he can also accommodate his family and live a meaningful life.
 - d. In essence, the 1st and 2nd Plaintiff's occupation on the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 were by consent and/or with permission of the 1st to 3rd Defendant herein.
 - e. Further to the above, the 1st Defendant pleaded that if there were any legal rights to the 1st and 2nd Plaintiffs as children of the 1st Defendant and her late husband, then they should have registered such interests in the proceedings that were dealing with the succession proceedings of the 1st Defendant's late husband.
 - f. In conclusion, the 1st Defendant stated that the present OS was not merited and should be dismissed with costs.
5. After the filing of the Replying Affidavit dated 07.07.2024, the pleadings closed and the matter was certified ready for hearing.

Plaintiffs Case

6. The Plaintiff's case began on the 20.09.2024 with the evidence of the 1st Plaintiff who was marked as PW 1.
7. The 1st Plaintiff informed the Court that the 2nd Plaintiff was his wife while the 1st Defendant was his mother although not biological.
8. The 2nd and 3rd Defendants are children of the 1st Defendant although the 1st Plaintiff considered them as his brothers.
9. The 1st Plaintiff stated that the 1st Defendant was actually his cousin because their fathers were brothers.
10. Upon the 1st Defendant being married to the Siparo's family in 1977, the 1st Plaintiff moved with the 1st Defendant while he was only 8 years old.
11. Since then, the 1st Plaintiff lived with the 1st Defendant and her late husband thereby even adopting the name Siparo which is the family name.
12. The 1st Plaintiff testified that based on the fact that the 1st Defendant and her husband had adopted him, then according to Maasai culture, he was no longer counted in his old family and could not be allocated land in Narok where they came from.
13. During this period, the 1st Defendant and her late husband allocated a portion of land within the two properties namely LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 to the 1st Plaintiff which he has been using with his family up to date.
14. Similarly, during the 1st Plaintiff's marriage ceremony to the 2nd Plaintiff, the 1st Defendant and her late husband were the people that facilitated the entire process.



15. Nevertheless, after the demise of the 1st Defendant's husband, the 1st to 3rd Defendants through succession transferred the two properties known as LR. No. Transmara/Enoosaen/18 & 421 to their names to the exclusion of the 1st Plaintiff who was also entitled to a share of the deceased properties.
16. The 1st Plaintiff's prayer therefore was that he be allocated the portion he is in occupation of with the 2nd Plaintiff which is approximately 13 acres before the 1st to 3rd Defendants interfere with the said properties known as LR. No. Transmara/Enoosaen/18 & 421.
17. The 1st Plaintiff then produced the following exhibits in support of his testimony; -
 - PW 1 Exhibit 1- Copy of a Certificate of Official Search of the property known as LR. No. Transmara/Enoosaen/Enoosaen/18 dated 29.04.2024.
 - PW 1 Exhibit 2- Copy of a Certificate of Official Search of the property known as LR. No. Transmara/Enoosaen/Enoosaen/421 dated 30.04.2024.
 - PW 1 Exhibit 3- Bundle of photographs showing the homestead and developments within the 13 acres claimed by the 1st Plaintiff.
18. In closing up his evidence in chief, the Plaintiff requested this Court to grant him the 13 acres he occupies on the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 owned by the 1st to 3rd Defendants together with costs of this suit.
19. On cross-examination, the 1st Plaintiff was referred to exhibit PW 1 Exhibit 3 which he confirmed were the houses that he had built on the ground.
20. The 1st Plaintiff further stated that he was brought to the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 by the 1st Defendant and her late husband.
21. Similarly, the 1st Plaintiff informed the Court that it the late Siparo who allowed him to build and use the portion in which he occupies on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
22. According to the 1st Plaintiff, when the 1st Defendant and her husband took him away from his original home in Narok, he understood that he had been adopted by the two hence they became his parents.
23. In fact, it was the 1st Defendant and her late husband that assisted him to marry the 2nd Plaintiff and settle on their portion of land.
24. The 1st Plaintiff pointed out to the Court that the portion of 13 acres which he is occupying is located in the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 and is well demarcated.
25. The 1st Plaintiff stated that he was not aware of how the two properties known as LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 were transferred from the name of the late Siparo to the 1st to 3rd Defendants.
26. The 1st Plaintiff admitted that he did not either register his claim as a beneficiary or dependant of the late Siparo during the succession proceedings hence he was left out of the administration.
27. The 1st Plaintiff reiterated that he was given the portion of land he occupies by the 1st Defendant and her late husband within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
28. In conclusion, the 1st Plaintiff testified that he had filed this proceeding to object the manner in which the Estate of the Late Siparo was distributed by the 1st to 3rd Defendants herein.



29. On re-examination, the 1st Plaintiff confirmed that the houses on the pictures contained in PW 1 EXHIBIT 3 were his developments.
30. The 1st Plaintiff stated that during his marriage ceremony, the dowry was paid by the 1st Defendant and her deceased husband.
31. The 1st Plaintiff also reiterated that the 13 acres which he occupies were given to him by the late Siparo who was the 1st Defendant's husband.
32. The 1st Plaintiff averred that his National Identification Card bears the name Siparo which is a confirmation of his relationship with the 1st Defendant and her late husband.
33. The 1st Plaintiff indicated that he was not aware of the succession proceedings that administered the estate of the late Siparo.
34. The 1st Plaintiff was under the impression that the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 would be sub-divided amongst all the persons that were in occupation of them.
35. In concluding the re-examination, the 1st Plaintiff sought for this Court to grant the prayers sought in the present O.S.
36. The 1st Plaintiff was then discharged from the witness box after this re-examination.
37. The 2nd Plaintiffs' witness was one Paul Kabirondogia who was marked as PW 2.
38. PW 2 introduced himself a resident of Oldabashi Location within Enoosaen Area who was familiar with both the 1st and 2nd Plaintiffs as well as the 1st to 3rd Defendants.
39. PW 2 informed the Court that all the parties herein were his neighbours hence well versed with the facts of this case.
40. PW 2 began his testimony by adopting his witness statement dated 30.07.2024 as his evidence in chief.
41. PW 2 stated that the 1st Plaintiff came to Enoosaen in the year 1977 with the 1st Defendant and her husband.
42. Since 1977, the 1st Plaintiff has been staying with the 1st Defendant and her late husband as one family.
43. PW 2 confirmed that when the 1st Plaintiff wanted to get married, he was one of the persons that accompanied him together with the Late Siparo and the 1st Defendant.
44. After the 1st Plaintiff married, he was allocated land by the late Siparo so that he could build a home, cultivate and keep cattle and PW 2 was one of the witnesses.
45. PW 2 confirmed that indeed the houses on PW 1 Exhibit 3 belonged to the 1st Plaintiff and exist up to now.
46. PW 2 stated that the portion of land occupied by the 1st Plaintiff was given to him in the year 1990 and measured about 13 acres.
47. PW 2 averred that the 1st Plaintiff was not an employee of the Late Siparo and/or the 1st Defendant because according to him, the relationship between the 1st Plaintiff and the Late Siparo was one of a father and son.
48. PW 2 therefore sought this Court to grant the prayers in the present O.S as they were merited.



49. On cross-examination, PW 2 stated that he did not have any written evidence that the 1st Plaintiff had been leasing his portion of 13 acres.
50. PW 2 reiterated that the relationship between the 1st Plaintiff and the Late Siparo was not that of employee-employer but father and son.
51. On being referred to Paragraph 7 of the Supporting Affidavit to the present OS, PW 2 admitted that the 1st Plaintiff was indeed a herd's boy.
52. PW 2 insisted that due to this father and son relationship between the 1st Plaintiff and the Late Siparo, the 1st Plaintiff recorded the name Siparo as his surname on his national Identification Card.
53. PW 2 confirmed that there has been no dispute over occupation by the parties on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
54. It was only after the administration of the Estate of the Late Siparo that the 1st Plaintiff felt he had been left out as a beneficiary.
55. On re-examination, PW 2 was again referred to PW 1 Exhibit 3 wherein he indicated that the new homes had been demolished but the old houses were still on the ground.
56. PW 2 insisted that the 1st Plaintiff has a total of 13 acres which he leases a portion of it and then uses the remaining portion.
57. PW 2 therefore concluded his testimony by indicating that the present OS was merited and should be allowed.
58. The third plaintiffs' witness was Leparan ole Kosenin who was marked as PW 3.
59. PW 3 introduced himself as resident of Olchurai who is engaged in farming and keeping cattle.
60. PW 3 informed the Court that he had prepared and filed a witness statement dated 30.07.2024 to which he adopted the same as his evidence in chief.
61. On cross-examination, PW 3 stated that the 1st Plaintiff and the 1st Defendant were related.
62. PW 3 further stated that during the marriage ceremony of the 1st Plaintiff, it was the Late Siparo and the 1st Defendant that paid his dowry.
63. PW 3 reiterated that the 1st Plaintiff was given the portion of 13 acres by the Late Siparo and his occupation on the same was with the consent of the 1st Defendant and the Late Siparo.
64. PW 3 testified that the 1st Plaintiff is entitled to inherit the Late Siparo's estate as he was deemed one of the sons.
65. It was therefore unfortunate that the portion which the 1st Plaintiff occupies is not registered in his name but in the names of the 1st to 3rd Defendants.
66. PW 3 stated that he was not aware of how the two properties namely LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 were administered and transferred to the names of the 1st to 3rd Defendants.
67. On re-examination, PW 3 reiterated that all the parties herein were related.
68. PW 3 further confirmed that the 1st Plaintiff was allocated land on the two properties known as LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 although he has no title for his portion of land.



69. Consequently, PW 3 averred that the 1st Plaintiff should be recorded as the owner of the portion he occupies measuring approximately 13 acres.
70. At the end of this re-examination, PW 3 was discharged from the witness box and the Plaintiffs closed their case.

Defence Case

71. The first Defence witness was the 3rd Defendant Patrick Matayian Siparo who was marked as DW 1.
72. The 3rd Defendant introduced himself as a resident of Enosaen engaging in farming.
73. The 3rd Defendant stated that the 1st Defendant was his biological mother while the 2nd Defendant was his brother.
74. The 3rd Defendant confirmed to the Court that he was familiar with the 1st Plaintiff who was a worker brought by the 1st Defendant back in the year 1977 when he was about 10 years.
75. The 2nd Plaintiff on the other hand is the wife of the 1st Plaintiff.
76. According to the 3rd Defendant, the 1st Plaintiff was brought to the suit properties namely LR. No. Transmara/Enosaen/Enosaen/18 & 421 to take care of the family livestock and has never been lawfully adopted as a child of the Late Siparo and the 1st Defendant.
77. The 3rd Defendant then produced the following documents to confirm the 1st to 3rd Defendants ownership.

DW 1 Exhibit 1- Copy of an Official Search of the property known as LR. No. Transmara/Enosaen/Enosaen/18 dated 29.04.2024.

DW 1 Exhibit 2- Copy of an Official Search of the property known as LR. No. Transmara/Enosaen/Enosaen/421 dated 30.04.2024.
78. The 3rd Defendant testified that the 1st Plaintiff was allowed into the above properties known as LR. No. Transmara/Enosaen/Enosaen/18 & 421 with the consent of the Late Siparo and the 1st Defendant.
79. The 2nd Plaintiff was also allowed to occupy and use the two properties known as LR. No. Transmara/Enosaen/Enosaen/18 & 421 on the basis of the fact that she was the 1st Plaintiff's wife.
80. Consequently, both the 1st and 2nd Plaintiffs live on the two properties known as LR. No. Transmara/Enosaen/Enosaen/18 & 421 up to now with the consent and authority of the 1st to 3rd Defendants.
81. The 3rd Defendant denied that the 1st Plaintiff was allocated 13 acres by the late Siparo who was his father.
82. The 3rd Defendant informed the Court that the two properties were transferred to the names of the 1st to 3rd Defendants through administration of the Estate relating to the Late Siparo and title deeds issued in the year 2010.
83. On cross-examination, the 3rd Defendant admitted that he is familiar with the 1st and 2nd Plaintiffs herein.
84. The 3rd Defendant stated the he met the 1st Plaintiff way back in the year 1977 when he was hired as a worker by their father the Late Siparo and the 1st Defendant.



85. The 3rd Defendant nevertheless did not have any documentary evidence to confirm that the 1st Plaintiff had been employed by the Late Siparo and the 1st Defendant.
86. The 3rd Defendant further stated that the 1st Plaintiff was never paid in cash but in kind.
87. The 3rd Defendant informed the court that the 1st Plaintiff's need were catered by the Late Siparo and included clothing, shelter and even the dowry he paid to the 2nd Plaintiff's family.
88. The 3rd Defendant admitted that the 1st Plaintiff had been on the two properties known as LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 for over 20 years now.
89. The 3rd Defendant further admitted that the 1st Plaintiff had developed a homestead on the two portions of land namely LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 and also does cultivation on the said portion.
90. The 3rd Defendant stated that it was now 14 years since the titles of the two properties namely LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 were transferred to the names of the 1st to 3rd Defendants.
91. However, since the 1st to 3rd Defendants became the registered owners of the two properties known as LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421, they have never disrupted the 1st and 2nd Plaintiff's occupation as he still takes care of the two properties on behalf of the family.
92. It was the 3rd Defendant's testimony that it is the 1st and 2nd Plaintiffs that had filed the present suit after they were informed that the two properties were on sale.
93. As regards the name Siparo, the 3rd Defendant stated that it was a choice of the 1st Plaintiff to record the said name in his Kenyan Identification Card but it does not confirm any relationship with the Late Siparo who was his father.
94. On concluding the cross-examination, the 3rd Defendant stated that the present O.S is not merited as the 1st and 2nd Plaintiffs were in occupation of their portion of land with the consent of the 1st to 3rd Defendants.
95. On re-examination, the 3rd Defendant reiterated that the 1st and 2nd Plaintiffs entered and/or are in occupation of the portion measuring 13 acres on the two properties known as LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 with the consent of the 1st to 3rd Defendants.
96. The 3rd Defendant confirmed that the two properties namely LR. No. Transmara/Enoosaen/Ennoosaen/18 & 421 were registered in their names through administration of their late father's estate.
97. At the end of this re-examination, the 3rd Defendant was discharged from the witness box and the Defence closed its case.
98. The Court then directed that each party should file their final written submissions thereafter.
99. The 1st and 2nd Plaintiff's filed their submissions dated 18.11.2024 while the 1st to 3rd Defendants filed their submissions dated 08.11.2024.
100. The Court has gone through the present OS, the Replying Affidavit by the 1st to 3rd Defendants and the submissions herein and the issues for determination are as follows:-

Issue No. 1- Who are the registered owners of the properties known as LR. No. transmara/enoosaen/enoosaen/18 & 421?



Issue No. 2- Has the 1st & 2nd plaintiff's proved the ingredients of adverse possession against the 1st to 3rd Defendants properties known as known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421?

Issue No. 3- Is the 1st & 2nd plaintiff's entitled to the reliefs sought in the present os against the 1st to 3rd Defendants?

Issue No. 4- Who bears the costs of the present OS?

101. The Court having duly identified the above-mentioned issues for determination, the same will now be discussed below.

Issue No. 1- Who are the registered owners of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421?

102. The first issue for determination is to establish who are the registered owners of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.

103. This is because the 1st and 2nd Plaintiff's claim is for a portion of 13 acres within these two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.

104. According to the testimony of the 1st Plaintiff herein and the documents produced as PW 1 EXHIBIT 1 & 2 which are Certificates of official searches, the property known as LR. No. Transmara/Enoosaen/Enoosaen/18 is registered in the name of the 1st and 2nd Defendants while the property known as LR. No. Transmara/Enoosaen/Enoosaen/421 is registered in the name of the 3rd Defendant.

105. The provisions of Section 26 as read with Section 35 of the *Land Registration Act*, No. 3 of 2012 states that the person recognised as the owner of the parcel of land is the one appearing on the Title Deed and in the Certified copy of the Register which is the Green Card.

106. In this instance, the persons that appear on the Title Deed and Register of the property known as LR. No. Transmara/Enoosaen/Enoosaen/18 is the 1st and 2nd Defendant and this Court duly makes a finding that the two persons are the registered owners of the said property.

107. In addition to the above, the name that appears on the Title Deed and the Register of the property of the property known as LR. No. Transmara/Enoosaen/Enoosaen/421 is the name of the 3rd Defendant and this Court hereby makes a finding that the 3rd Defendant is the registered owner of the said property.

Issue No. 2- Has the 1st & 2nd Plaintiff's proved the ingredients of adverse possession against the 1st to 3rd Defendants Properties Known As Known As LR. No. Transmara/Enoosaen/Enoosaen/18 & 421?

108. The second issue for determination is whether or not the 1st and 2nd Plaintiffs have demonstrated and/or proved a claim of Adverse Possession against the 1st to 3rd Defendants properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.

109. To begin with, the 1st Plaintiff in his pleadings and testimony before this Court stated that he is in occupation and use of approximately 13 acres on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.



110. The 1st Plaintiff provided pictorial evidence which is PW 1 EXHIBIT 3 showing the houses and trees existing on the portion of 13 acres within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
111. Further to that, the 1st Plaintiff called two witnesses namely PW 2 and PW 3 that collaborated the fact of his occupation of the 13 acres within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
112. All the three Plaintiff's witnesses stated that the portion of 13 acres currently being claimed had been given to the 1st Plaintiff by the 1st Defendant's husband and his occupation there has been with the knowledge and consent of the Late Siparo and his entire family including the 1st to 3rd Defendants.
113. The only reason the 1st and 2nd Plaintiffs have now filed the present OS is because the estate of the Late Siparo including the 1st to 3rd Defendants did not include and/or recognise the 1st Plaintiff as one of the beneficiaries entitled to a portion of the estate belonging to the Late Siparo.
114. By virtue of this exclusion in the administration of the Late Siparo's estate, the 1st and 2nd Plaintiff's should be granted the 13 acres by virtue of their occupation of the two properties namely LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
115. The 1st to 3rd Defendants on their part did not contest the 1st and 2nd Plaintiffs occupation and use of the 13 acres on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
116. The 1st to 3rd Defendants through the testimony of the 3rd Defendant admitted that the 1st Plaintiff was an employee of the Late Siparo and the 1st Defendant.
117. The 1st to 3rd Defendants further stated that indeed the 1st Plaintiff was brought to the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 way back in 1977 and after he was married in 2010, the Late Siparo allowed him to use a portion of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 as his home place of farming.
118. In essence, the 1st to 3rd Defendants position is that the 1st and 2nd Plaintiffs occupation on the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was with the consent and authority of the Late Siparo and the 1st Defendant herein.
119. Further to that, the 1st to 3rd Defendants denied any blood and/or cultural family relationship between the 1st Plaintiff and the family of the late Siparo as alleged.
120. The 1st to 3rd Defendants testified that if indeed such a relationship existed, then the 1st Plaintiff should have raised the said issues during the succession proceedings that administered the estate of the late Siparo.
121. In essence, the 1st to 3rd Defendants opposed the claim of adverse possession by the 1st and 2nd Defendant as it does not meet the legal requirements that appertain to a claim of adverse possession.
122. To resolve this issue, this Court takes note that the present O.S has been brought through the provisions of Section 7 as read with Section 37 and 38 of the Limitation of Actions Act, Cap 22.



123. The provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides as follows:

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

124. The interpretation and the ingredients of what should be considered while determining a claim of Adverse possession under Section 7 of the *Limitation of Actions Act*, Cap 22 has been discussed in various judicial determinations.

125. In another case of *Mbira-versus- Gachuhi* (2002) 1 EALR 137, the Honourable made the following finding; -

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

126. In the case of *Mtana Lewa-versus- Kahindi Ngala Mwangandi* (2015) eKLR, the Honourable Court outlined the following ingredients to prove adverse possession; -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

127. The Court of Appeal in *Kisumu Civil Appeal No. 110 Of 2016 Between Richard Wefwafwa Songoi-versus- Ben Munyifwa Songoi* (2020) eKLR, the Court summarised the ingredients of Adverse Possession as follows; -

- (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.

128. Based on the above ingredients, the 1st and 2nd Plaintiffs claim of adverse possession will now be evaluated.

a. On what did he came into possession?

129. The first ingredient for the 1st and 2nd Plaintiffs to prove is the date when they took adverse possession of the portion of land they occupy within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 from the 1st to 3rd Defendants.



130. According to the evidence adduced by the 1st Plaintiff as well as the pleadings in the present OS, the 1st and 2nd Plaintiffs occupation and/or possession of the portion within LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 began was back in the year 1990 when the Late Siparo allocated and/or permitted to use the said portion of land to better their lives.
131. After the demise of the Late Siparo, the two properties namely LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 were vested to the 1st to 3rd Defendants through administration of the Estate and the permission and/or consent initially issued to the 1st and 2nd Plaintiffs continued to exist up to now.
132. In cases of adverse possession as is the present OS, the 1st and 2nd Plaintiffs are required to establish when they took possession and/or occupation of the portion of land within LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 in an adverse manner and contrary to the interests of the registered owners.
133. In the case of Gabriel Mbui-versus- Maranya (1993) eKLR, the Court described Adverse possession as follows; -
- “It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”
134. Based on the guidance of the above authority, it is clear that the 1st and 2nd Plaintiffs occupation on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 initially registered in the name of the Late Siparo and later registered in the names of the 1st to 3rd Defendants was not by a stranger and did not dispose the registered owners’ rights.
135. Instead, the 1st and 2nd Plaintiffs occupation and/or possession of the portion within the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was one with permission, consent and/or license of the initial registered owner the Late Siparo and subsequently thereafter, the 1st to 3rd Defendants.
136. In essence, this Court hereby makes a finding that the 1st and 2nd Plaintiffs never took possession of the portion they occupy within the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 in an adverse manner but with the consent and/or permission of the Late Siparo and subsequently thereafter with the consent and permission of the 1st to 3rd Defendants herein.

What was the nature of his possession?

137. The second ingredient that the 1st and 2nd Plaintiffs are required to prove is what was the nature of their possession on the portion of land within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
138. The 1st and 2nd Plaintiffs pleaded and testified that their occupation of the portion measuring 13 acres within the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 were open and notorious to all including the 1st to 3rd Defendants.
139. The 1st Plaintiff through the PW 1 EXHIBIT 3 provided some pictures that show the house he has developed and trees that he planted.



140. The Plaintiffs witnesses and in particular PW 2 who is an immediate neighbour confirmed that the houses and trees on in the Plaintiffs exhibit PW 1 EXHIBIT 3 actually exist on the ground.
141. The 1st to 3rd Defendants through their witness DW 1 did not dispute the fact that the Plaintiffs are in occupation and use of the portion of land measuring 13 acres on the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
142. In fact, the Defence witness accepted that the 1st and 2nd Plaintiffs after their marriage were allowed to build a family home and were also allocated some land to cultivate and keep some cattle.
143. The Defence witness further confirmed that even as the case was being heard, the Plaintiffs were still in occupation and use of their portion of land within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
144. Clearly, the Plaintiffs occupation on the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 is that is open to the general public including the 1st to 3rd Defendants hence can also be termed to be notorious in nature and not in secrecy.

c. Whether the fact of his possession was known to the other party.

145. The third ingredient that the Plaintiffs are required to prove is whether the owner of the land was aware of their possession and use.
146. The Plaintiffs in their pleadings have indicated that the late Siparo who was the husband to the 1st Defendant and father to the 2nd and 3rd Defendant was the one that allocated and/or allowed him to use the portion of 13 acres within the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
147. The Defendants as earlier stated confirmed that the 1st Plaintiff was an employee of the Late Siparo and the 1st Defendant hence based on this relationship, after the 1st Plaintiff's marriage to the 2nd Plaintiff, he was allocated a portion of land to develop a family home and do some agricultural activities by the Late Siparo.
148. There is no doubt and in fact it is a mutually agreed fact that the 1st to 3rd Defendants herein were aware of the Plaintiffs occupation on a portion of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 based on the permission granted by the Late Sipora and which occupation continued even after their registration as owners with their consent.
149. In essence, this Court hereby makes a finding that indeed the Plaintiffs occupation on a portion of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was well known to the 1st to 3rd Defendants after their registration in the year 2010 and was in fact with their permission.

D. For how long his possession has continued and

150. The fourth ingredient is the period in which the possession has occurred prior to the filing of the present O.S.
151. According to the finding in Ingredient 1, the Court made a finding that the 1st and 2nd Plaintiffs took possession and/or began occupying their portion of land around the year 1990 with the consent and/or permission of the Late Siparo and thereafter extended further from the year 2010 up to date with the consent and permission of the 1st to 3rd Defendants who became the registered owners of the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 in the year 2010.



152. The question then is whether time this Court can start calculating the period of the 1st and 2nd Plaintiff's occupation and/or possession from the year 2010 for purposes of establishing the length of the possession and/or occupation on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
153. According to the 1st and 2nd Plaintiffs, the period between the year 2010 when the 1st to 3rd Defendants were registered as owners of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 the time the present OS was filed is about 14 years which satisfies the requirements provided under Section 7 of the *Limitation of Actions Act*, Cap 22.
154. On the other hand, the 1st to 3rd Defendants position is that the period of calculating the 12 years period cannot commence where the occupation and/or possession is permitted and/or with the consent of the registered owner.
155. The Court having made a finding that the Plaintiffs occupation against the Defendants can only begin from 2010 when they became registered owners of the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421, this Court makes a finding that the Plaintiffs occupation has been about 14 years as at the time of filing the present O.S.
156. The provisions of Section 13 of the *Limitation of Actions Act*, Cap 22 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.”
157. The Court's interpretation of the above proviso is that time for purposes of seeking adverse possession under Section 7 of the *Limitation of Actions Act*, Cap 22 can only begin running once his occupation is adverse to the registered owners ownership.
158. The evidence tabled by both the 1st and 2nd Plaintiffs and the 1st to 3rd Defendants is that the 1st and 2nd Plaintiffs occupation was one that with the permission and consent of initially the Late Siparo and later the successors in title who were the 1st to 3rd Defendants.
159. To this effect, the 1st and 2nd Plaintiff occupation on the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was not adverse to the interests of the registered owners and therefore the time upon which the period of the adverse possession against the 1st to 3rd Defendants can not begin running until the occupation and/or possession is ascertained to be without consent and/or permission of the registered owners.
160. In conclusion, this Court hereby makes a finding that time upon which the 1st and 2nd Plaintiffs adverse occupation and possession can be calculated has not began running as they are in occupation and use of their portion of land within the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 with the consent and permission of the 1st to 3rd Defendants.

e. That the possession was open and undisturbed for the requisite 12 years.

161. The last ingredient is a confirmation whether the 1st and 2nd Plaintiffs adverse occupation and/or possession on the portion of land within LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 is one that is open and continuous for a period of 12 years.



162. According to the finding in Ingredient D hereinabove, this is clear that the 1st and 2nd Plaintiffs occupation and/or possession on the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 were with the consent and/or permission of the late Siparo and later the 1st to 3rd Defendants herein.
163. As a result of the permission and/or consent granted to the 1st and 2nd Plaintiffs by the Late Siparo and later the 1st to 3rd Defendants, the occupation and possession on the portion of land within LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 since the year 1990 was not adverse hence the period of 12 years did not start running even with the open occupation and/or possession that existed in favour of the 1st and 2nd Plaintiffs.
164. In other words, the 1st and 2nd Plaintiffs occupation and/or possession of the properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was open but not adverse to the interest of the Late Siparo and/or the 1st to 3rd Defendants.
165. This being the scenario, the period of 12 years which the 1st and 2nd Plaintiffs are expected prove as having held the land adversely to the interests of the Late Siparo and/or the 1st to 3rd Defendants has not been demonstrated.

Issue No. 3- Is the 1st & 2nd plaintiff's entitled to the reliefs sought in the present OS against the 1st to 3rd Defendants?

166. The third issue is whether based on the findings made hereinabove under Issue No. 2, the prayers in the present OS should be granted.
167. According to the findings contained in Issue No. 2, it is clear that the Plaintiffs are actually in occupation and possession of some portion of land within the 1st to 3rd Defendants properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421.
168. The 1st and 2nd Plaintiffs occupation and possession has been ongoing since the year 1990 when they were allocated land by the Late Siparo.
169. After the death of the Late Siparo, the 1st and 2nd Plaintiffs continued their occupation with the consent and permission from the 1st to 3rd Defendants who then had become the registered owners of the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 in the year 2010.
170. There is no doubt therefore that the 1st and 2nd Plaintiffs occupation and possession of the portion of land they occupy within the two properties known as LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was by the consent and/or permission of the 1st to 3rd Defendants who are the registered owners.
171. In the case of Samuel Kihamba-versus- Mary Mbaisi (kisumu Civil Appeal No. 27 of 2013) (2015) eKLR, the Court held as follows; -
- “strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy and without licence or permission of the land owner, with the intention to have the land. The must be an apparent dispossession of the land from the land owner.”
172. The finding of this Court is that the 1st and 2nd Plaintiffs herein are not entitled to the prayers sought in the present OS as their occupation and/or possession on the portion of land measuring 13 acres within the two properties namely LR. No. Transmara/Enoosaen/Enoosaen/18 & 421 was by consent and/or permission of the Late Siparo and thereafter the 1st to 3rd Defendants herein.



Issue No. 4- Who bears the costs of the present OS?

173. As to the issue of costs, it is a settled law costs follow the event.

174. In the present OS, the 1st and 2nd Plaintiffs have not succeeded in their claim and therefore will have no choice but to meet the costs of this litigation.

Conclusion

175. In conclusion, this Court hereby makes the following determination appertaining the Originating Summons dated 02.05.2024; -

A. The originating summons dated 02.05.2024 is not merited and therefore dismissed forthwith.

B. The 1st & 2nd plaintiffs shall meet the 1st to 3rd defendants litigation costs relating to the originating summons dated 02.05.2024.

DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC ON DAY THIS 5TH OF FEBRUARY 2025.

EMMANUEL.M. WASHE

JUDGE

In the presence of:

Court Assistant: Brian

Advocates for the Plaintiffs: Ms. Pion For Plaintiff

Advocates for the Defendants: Ms. Mireri for Defendant

