



Olesopia alias Simon Sopia & another (Suing as legal administrators of the Estate of Kamur Ole Tierikat (Deceased) v Letiepoon alias Tiepon Olekitui (Enviromental and Land Originating Summons 35 of 2021) [2024] KEELC 4483 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4483 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 35 OF 2021

EM WASHE, J

JUNE 3, 2024

FORMERLY NAROK ELC CASE NO.45 OF 2019(O.S)

IN THE MATTER OF: LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

-AND-

IN THE MATTER OF: L.R.NO. TRANSMARA/SHARTUKA/97

-AND-

IN THE MATTER OF: A CLAIM OF ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF LIMITATION OF ACTIONS ACT.

BETWEEN

OLENAPOE OWITI OLESOPIA ALIAS SIMON SOPIA & SOPIA JACKSON
RANKALO (Suing as legal administrators of the estate of
KAMUR OLE TIERIKAT (DECEASED) PLAINTIFF

AND

LEKATOI OLE LETIEPOON ALIAS TIEPON OLEKITUI DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of an Originating Summons dated 25.07.2019 (hereinafter referred to as “the Present OS”) seeking for the following Orders against the Defendant; -
 - a. Declaration that the Defendant’s right to recover a portion measuring 10 acres out of LR.NO.Transmara / Shartuka/97 is barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya and his title thereto extinguished on the grounds that the Plaintiff’s herein



have openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period of 27 years.

- b. There be an Order that the Plaintiffs be registered as the proprietor of the portion of 10 acres out of LR.NO.TRANSMARA/SHARUKA/97 in place of the Defendant herein who currently holds title to the suit property.
 - c. There be an Order restraining the Defendant either by himself, agents, servants and/or employees from interfering with the Plaintiffs' peaceful possession and occupation of the said portion measuring 10 acres of the suit property, that is, LR.NO.Transmara / Shartuka/97 in any manner whatsoever and/or howsoever.
 - d. The Deputy Registrar and/or Executive Officer of the Honourable ELC be directed and/or ordered to execute the Transfer Instruments and all attendant documents to facilitate the transfer and registration of a portion measuring 10 acres out of LR.NO.Transmara / Shartuka/97 in favour of the Plaintiffs in the event of default by the Defendant to execute the necessary Transfer Instruments.
 - e. Costs of this Originating Summons be borne by the Defendant.
 - f. Such further and/or other orders be made as the Court may deem fit and expedient in the circumstances of this case.
2. The facts in support of the present OS can be summarised as follows; -
- a. The Plaintiffs herein are the legal Administrators of the Estate of one KAMUR OLE TIERIKAT.
 - b. On or about 10.08.1992, the deceased KAMUR OLE TIERIKAT entered into an Agreement For Sale to purchase a portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97 from the Defendant.
 - c. The Plaintiffs state that the total consideration for the 10 acres purchased by Kumar Ole Tierikat from the Defendant was KShs 15,000/- in cash and 30 herds of cattle.
 - d. The deceased Kumar Ole Tierikat confirms to have paid the KShs 15,000/- and 27 herds of cattle leaving a balance of 3 herds of cattle as the final instalment.
 - e. Thereafter, the deceased Kumar Ole Tierikat, his third wife and her family including the Plaintiffs moved into the portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97.
 - f. During the time of the transaction between the deceased Kumar Ole Tierikat and the Defendant, the Adjudication of SHARTUKA GROUP RANCH had not been finalised and individual plot numbers issued to the members.
 - g. Nevertheless, the Defendant's property was later assigned PLOT.NO.97.
 - h. Later on, the father to the Plaintiffs known as Kumar Ole Tierikat passed away in the year 2006 while he was in occupation of the 10 acres within LR.NO.Transmara / Shartuka/97 but was buried in the homestead of the 1st wife in OLALUI ADJUDICATION SECTION.
 - i. At the time of the demise of Kumar Ole Tierikat, the Defendant herein had not executed and/or transferred the portion of 10 acres to his name.



- j. Nevertheless, the family of the late Kumar Ole Tierikat continued to occupy and use their portion of 10 acres within LR.NO.Transmara / Shartuka/97 even after the demise of their father.
 - k. However, in the year 2018, the Defendants and his sons unlawfully entered into the portion of 10 acres within LR.NO.Transmara / Shartuka/97 belonging to the Plaintiffs and fenced it off thereby depriving them of their legitimate and rightful use of the said portion.
 - l. The Plaintiffs plead that the Defendant's actions of fencing of the Plaintiffs' portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97 is unlawful and/or illegitimate as the same belongs to the estate of Kumar Ole Tierikat by virtue of their occupation which accumulatively is 27 years.
 - m. The Plaintiffs further state that their occupation on the said property having been for a period of 27 years, the Defendant's ownership over the portion measuring 10 acres on the property known as LR.NO.Transmara / Shartuka/97 is now extinguished by operation of law and the same should be declared the property of the Plaintiffs.
 - n. In conclusion thereof, the Plaintiffs prayer is that this Court declares the portion measuring 10 acres within the property known as LR.NO.Transmara / Shartuka/97 to be property of the deceased Kumar Ole Tierikat by virtue of adverse possession.
 - o. Similarly, the Plaintiffs pray for costs of the present OS as well.
3. The present OS was duly served on the Defendant herein who responded to the same by filing Statement of Defence & Counter- Claim dated 10.07.2023.
4. The Defendant opposed the present OS in the Statement of Defence by stating the following facts; -
- a. The Defendant admitted that he is the registered owner of the property known as LR.NO.Transmara / Shartuka/97 measuring approximately 20.64 Hectares with the Register of the said property being opened on 14.08.1998 and a Certificate of Title issued in his name on 14.07.2000.
 - b. The Defendants view therefore was that he did not have any proprietary rights and/or interest on the property known as LR.NO.Transmara / Shartuka/97 before 14.07.2000 capable to being disposed off to the late Kumar Ole Tierikat as alleged in the present OS.
 - c. The Defendant proceeded to vehemently deny the existence of any Agreement For Sale of 10 acres within the property known as LR.NO.Transmara / Shartuka/97 in the year 1992 with the late Kumar Ole Tierikat.
 - d. In the alternative and without prejudice to the above, the Defendant pleaded that even if the purported Agreement For Sale existed, then the date of computing the time for adverse possession can not start running until the said Agreement For Sale was repudiated by the parties therein or the last payment had been received by the Vendor.
 - e. In other words, any occupation and/or use of the 10 acres within the property known as LR.NO.Transmara / Shartuka/97 by the deceased Kumar Ole Tierikat was based on a consent and/or license by the Defendant.
 - f. In essence, the Defendant pleaded that a claim under the Law of Limitation, Cap 22 had not risen and is therefore inapplicable.



- g. In addition to the above Statement of Defence, the Defendant filed a Counter-Claim against the Plaintiffs herein on the following facts; -
- i) The Defendant is the registered owner of the property known as LR.NO.Transmara / Shartuka/97.
 - ii) The Defendant herein is entitled to exclusive use and quite occupation of the said property known as LR.NO.Transmara / Shartuka/97 as provided for under the Kenyan Constitution, 2010.
 - iii) Consequently, the Plaintiff's occupation and/or use of the 10 acres within the property known as LR.NO.Transmara / Shartuka/97 is unlawful and deprives the Defendant of his rightful use and occupation of the said property as envisaged by law.
- h. In conclusion therefore, the Defendant sought for the following Orders against the Plaintiffs herein; -
- i) An order of eviction do issue against the Defendant in the Counter-Claim herein evicting him, his family members, agents, servants and/or associates from the property known as LR.NO.Transmara / Shartuka/97.
 - ii) A permanent injunction do issue to restrain the Defendant in the Counter-Claim, his family members, servants and/or agents from trespassing into the property known as LR.NO.Transmara / Shartuka/97 with the intention of erecting illegal structures thereon or tilling any portion of it for his benefit.
 - iii) Costs of the Counter-claim and interest thereon be awarded to the Plaintiff.
5. The Plaintiffs on being served with the Statement of Defence and Counter-Claim responded by filing a Reply to Defence and Defence to Counter-Claim dated 08.12.2023.
6. In the Reply to the Statement of Defence, the Plaintiffs reiterated the contents of the present OS and emphasized the following facts; -
- a. The Plaintiffs stated that the Defendant's ownership of the property known as LR.NO.Transmara / Shartuka/97 began way before the actual registration of his name in the year 2000.
 - b. According to the Plaintiffs, the Defendant had beneficial rights by the year 1992 capable of being alienated through the Agreement For Sale with the deceased KAMUR OLE TIERIKAT and therefore the said Agreement For Sale was lawful and legitimate.
 - c. The Plaintiffs further pleaded that based on the Agreement Fors Sale entered into 1992, the deceased KAMUR OLE TIERIKAT proceeded to occupy the said 10 acres portion and has continuously and openly done so for a period of over 27 years and therefore the Plaintiff's ownership rights on the said portion measuring 10 acres has been extinguished by the provisions of the *Limitation of Actions Act*, Cap 22.
7. In defence to the Counter-Claim filed by the Defendant, the Plaintiffs again reiterated the contains of the present OS.
8. The Plaintiff's further opposed the Counter-Claim on the following grounds; -



- a. The Plaintiffs insisted that the family of the late Kumar Ole Tierikat had been in occupation and use of the portion measuring 10 acres within the property known as LR.NO.Transmara / Shartuka/97 for over a period of 27 years.
 - b. The Plaintiffs further pleaded that the said period of 27 years on the property known as LR.NO.Transmara / Shartuka/97 had been open, peaceful and/or uninterrupted by the Defendants.
 - c. Consequently therefore, any proprietary rights by the Defendant herein over the portion measuring 10 acres within the said property known as LR.NO.Transmara / Shartuka/97 has been extinguished by operation of the Limitation of Actions Act, Cap 22.
 - d. In essence, the prayers sought by the Defendant in the Counter-Claim were not merited and should be dismissed with costs.
9. On filing of the Reply to Defence and Defence to the Counter-Claim dated 08.12.2023, the pleadings in this suit were closed and the matter was listed for hearing.

PLAINTIFF'S CASE.

10. The first Plaintiff's witness was the 2nd Plaintiff who was marked as PW 1.
11. The 2nd Plaintiff introduced himself as a resident of ORONGAI Sub-Location within Shartuka Location.
12. The 2nd Plaintiff informed the Court that he was one of the Legal Administrators of the estate of Kumar Ole Tierikat.
13. The 2nd Plaintiff admitted being familiar with the Defendant herein.
14. In support of the present OS, the 2nd Plaintiff confirmed filing a witness statement dated 25.07.2019 which he adopted the same as his evidence in chief.
15. Thereafter, the 2nd Plaintiff also produced the following documents as exhibits of the present OS; -
 - Plaintiff Exhibit 1- Copy of Certificate of Death of KAMUR OLE TIERIKAT dated 23.09.2015.
 - Plaintiff Exhibit 2- Copy of a Grant of Letters Ad Litem in favour of the 1st and 2nd Plaintiffs herein dated 29.01.2019.
 - Plaintiff Exhibit 3- Copy of the Agreement For Sale dated 10.08.1992 between the deceased KAMUR OLE TIERIKAT and the Defendant.
 - Plaintiff Exhibit 4- Copy of the Green Card to the property known as LR.NO.Transmara / Shartuka/97.
 - Plaintiff Exhibit 5- Copy of the Title deed to the property known as LR.NO.Transmara / Shartuka/97.
 - Plaintiff Exhibit 6- Copy of the Extract of the Minutes of the Meeting dated 19.10.2018, 23.11.2018 and 07.12.2018.
 - Plaintiff Exhibit 7- copy of a bundle of photographs of the Plaintiff's developments.
 - Plaintiff Exhibit 8- Copy of a letter dated 22.01.2019 from the Area Chief.



Plaintiff Exhibit 9- A bundle of photographs taken on the 05.07.2019 showing the demolitions of the Plaintiffs structures.

Plaintiff Exhibit 10- Copy of the letter dated 12.07.2019 from the Area Chief.

Plaintiff Exhibit 11- Copy of the proceeding in KILGORIS PMCC ELC CASE NO. 5 OF 2019.

Plaintiff Exhibit 12- Copy of the Defence in KILGORIS ELC CASE NO.5 OF 2019.

16. The 2nd Plaintiff after production of the above listed exhibits reiterated the fact that the late Kumar Ole Tierikat's occupation of the 10 acres within LR.NO. Transmara / Shartuka/97 started way back in the year 1992.
17. The 2nd Plaintiff stated that the portion of 10 acres within LR.NO.Transmara / Shartuka/97 was to be transferred to the late Kumar Ole Tierikat but unfortunately, he passed away before the same would be done.
18. However, despite the Defendant failing to transfer the said 10 acres portion to the late Kumar Ole Tierikat and/or his estate, the Plaintiffs herein who are part of the family have been occupying and using the same for the last 27 years.
19. The 2nd Plaintiff informed the Court that his father Kumar Ole Tierikat passed away in the year 2006 and at this time, they were already in possession and use of the said portion of 10 acres.
20. It was only in the year 2018 that the Defendant and/or his sons encroached into the Plaintiffs portion and started threatening to evict them.
21. Further to that, the Defendants actually entered into the Plaintiff's portion and demolished the structures that were on the ground and fenced of the said portion measuring 10 acres which had been in use of the Plaintiffs.
22. The dispute was reported to the Area Chief who tried to resolve the same by calling for barazas but there was no resolution.
23. According to the 2nd Plaintiff, the Defendant's position was that he wanted to refund the purchase price paid by the late Kumar Ole Tierikat but the Plaintiffs refunded this offer.
24. When the discussions before the Area Chief could not resolve the matter, the Defendant proceeded to file an case before the Senior Principal Magistrates Court at Kilgoris seeking to evict the Plaintiffs.
25. On the other hand, the Plaintiffs filed this suit for adverse possession in this Court.
26. The Plaintiffs therefore denied the allegations that they were forcefully taking the Defendant's land.
27. The Plaintiff confirmed that they did not invade and build on the Defendant's land as alleged.
28. In conclusion of his evidence in Chief, the 2nd Plaintiff sought for the Court's assistance to get their land back.
29. On cross-examination, the 2nd Plaintiff informed the Court that he was about 41 years.
30. Consequently, the 2nd Plaintiff admitted that he was not present when the Agreement For Sale dated 1992 was prepared and executed.
31. The 2nd Plaintiff confirmed that the Agreement For Sale executed in the year 1992 was for a portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97.



32. However, neither the 1st Plaintiff nor the 2nd Plaintiff was present during the preparation and execution of the said Agreement For Sale.
33. Nevertheless, the 2nd Plaintiff stated that the Agreement For Sale executed in the year 1992 was valid and therefore the estate of Kumar Ole Tierikat was entitled to the 10 acres within the property known as LR.NO.Transmara / Shartuka/97.
34. On being referred to Plaintiff Exhibit 6, the 2nd Plaintiff confirmed that all the people who are listed in the Minutes attended the meetings.
35. The 2nd Plaintiff informed the Court that the Minutes and the Lists of Attendees was taken by the Area Chief.
36. However, the Minutes and List of Attendees was not signed because people refused to sign on the same.
37. As regards the PLAINTIFFS' EXHIBIT 6 (c), the Minutes show a resolution that the portion should not be returned and it was signed by the Area Chief.
38. The 2nd Plaintiff testified that in the year 2018, the Defendant herein encroached into the portion of 10 acres belonging to the late Kumar Ole Tierikat and destroyed trees as well as fenced a portion of the said area measuring 10 acres.
39. This acts by the Defendant were reported to the Police who visited the scene and took photographs.
40. The 2nd Plaintiff referred to the Plaintiff Exhibit 10 to prove the destruction done by the Defendant.
41. The 2nd Plaintiff admitted that he was aware the Defendant had filed another case before the Lower Court against the Estate of Kumar Ole Tierikat.
42. The 2nd Plaintiff confirmed that the late Kumar Ole Tierikat had been buried in OLALUI but the mother was buried on the portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97.
43. According to the 2nd Plaintiff, the deceased Kumar Ole Tierikat had paid the full purchase price of the 10 acres portion within the property known as LR.NO.Transmara / Shartuka/97.
44. The 2nd Plaintiff concluded his cross-examination by informing the Court that both Plaintiffs were living on the portion of 10 acres purchased within the property known as LR.NO.Transmara / Shartuka/97.
45. On re-examination, the 2nd Plaintiff identified the parties to the Agreement For Sale executed in the year 1992 to be the deceased father Kumar Ole Tierikat and the Defendant herein.
46. The 2nd Plaintiff insisted that the meetings contained in the Minutes produced as Plaintiff Exhibit 6 actually took place.
47. The 2nd Plaintiff confirmed that the Minutes and Resolutions of the meetings which happened in the year 2018 and 2019 were recorded by the Area Chief.
48. The 2nd Plaintiff concluded his re-examination by stating that the people on the 10 acres portion within the property known as LR.NO.Transmara / Shartuka/97 were the Plaintiffs only although the mother had also been buried on the same portion.
49. At the end of this re-examination, the 2nd Plaintiff was discharged from the witness box.
50. The Plaintiff's second witness was LEBOI OLE MUNGE who was marked as PW 2.



51. PW 2 introduced himself as a retired Chief of OLORONGAI LOCATION.
52. PW 2 admitted being familiar with the Plaintiffs herein as well as the late Kumar Ole Tierikat.
53. PW 2 informed the Court that the Plaintiffs had been living in the same area since the year 1989.
54. PW 2 also confirmed to be aware of the dispute been the Plaintiffs and the Defendants.
55. To begin with, PW 2 pointed out that the dispute relates to the property known as LR.NO.Transmara / Shartuka/97.
56. PW 2 testified that both the Plaintiffs and the Defendant live on the same property known as LR.NO.Transmara / Shartuka/97.
57. According to PW 2, the Plaintiff had been in occupation of a portion measuring 10 acres within the property known as LR.NO.Transmara / Shartuka/97 for the last 27 years.
58. However, the Defendant complained in the year 2018 that the Plaintiffs had encroached into his property known as LR.NO.Transmara / Shartuka/97.
59. This disagreement then necessitated various meetings in the year 2018 at the offices of PW 2.
60. PW 2 confirmed that all the persons who were recorded in the List of Attendees were present and he is the one the stamped the minutes thereof.
61. PW 2 clarified that the reason the Attendees did not sign the List was because he was the convenor and person who was recording everything.
62. According to PW 2, the Defendant admitted selling a portion of 10 acres to the late Kumar Ole Tierikat but now wanted to refund the purchase price to the Plaintiffs.
63. However, the Elders therein refused the Defendant's proposal and declared that the portion of 10 acres rightfully belonged to the estate of Kumar Ole Tierikat and the Plaintiffs herein.
64. This resolution by the elders was passed on the 07.12.2018.
65. Nevertheless, dispute the Elders resolution of 07.12.2018, the Defendant proceeded to encroach into the Plaintiffs portion and cut down trees and grass.
66. These acts are what made the Plaintiffs to make a report to the Area Chief and the letter produced as Plaintiff Exhibit 10 was written.
67. PW 2 confirmed that both the Plaintiff Exhibit 8 & 10 were written by him as the area chief.
68. On cross-examination, PW 2 was referred to the Plaintiff Exhibit 10 to which he stated was a letter to confirm that the Defendant had destroyed the Plaintiffs trees.
69. PW 2 informed the Court that he went to the ground together the Forest officer and verified the destruction that was undertaken by the Defendant on the Plaintiffs portion.
70. On referring to the Plaintiff Exhibit 6(a), PW 2 stated that the Minutes we done by the Assistant Chief and he only attended as an Observer.
71. PW 2 affirmed that all the persons who attended had Identification Cards but were not requested to sign the Attendants list.
72. PW 2 confirmed that he was the one that prepared the Plaintiff Exhibit 8.



73. PW 2 further confirmed that he was one of the witnesses in the Agreement For Sale done in the year 1992.
74. PW 2 testified that the property known as LR.NO.Transmara / Shartuka/97 was about 600 meters from his property although they do not share a boundary.
75. PW 2 informed the Court that the deceased Kumar Ole Tierikat had many wives and that is the reason he purchased this portion of 10 acres to settle one of the wives.
76. PW 2 concluded his cross-examination by stating that the full purchase price for the portion of 10 acres was settled by the deceased Kumar Ole Tierikat to the Defendant.
77. On re-examination, PW 2 confirmed that he visited the ground and verified that actually a number of trees had been destroyed by the Defendant.
78. PW 2 insisted that he was present in all the meetings that took place in the year 2018 relating to the dispute at hand.
79. PW 2 concluded his re-examination by reiterating that the deceased Kumar Ole Tierikat had actually purchased the 10 acres within LR.NO.Transmara / Shartuka/97 from the Defendant.
80. At the end of this re-examination, PW 2 was discharged from the witness box and the Plaintiffs closed their case thereof.

DEFENCE CASE.

81. The first Defence witness was the Defendant himself and was marked as DW1.
82. The Defendant introduced himself as a resident of ORONKAI within Shartuka Location.
83. The Defendant began his testimony by indicating that he is the registered owner of the property known as LR.NO.Transmara / Shartuka/97.
84. The Defendant denied knowledge of the late Kumar Ole Tierikat but admitted that he was familiar with the 1st Plaintiff herein only.
85. The Defendant denied the allegation that he sold any portion 10 acres to any of the Plaintiffs herein.
86. In reference to the Plaintiff Exhibit 3, the Defendant denied knowledge of the entire Agreement For Sale and specifically the consideration provided therein for the 10 acres portion.
87. The Defendant further denied ever receiving either the full and/or part payment of the Purchase Price from the late Kumar Ole Tierikat and/or the Plaintiffs before the Court.
88. The Defendant then produced the Copy of Title Deed of the property known as LR.NO.Transmara / Shartuka/97 as DEFENCE EXHIBIT 1.
89. The Defendant also informed the Court that he had prepared and signed a witness statement dated 10.07.2023 of which he wished to adopt as his evidence in chief.
90. The Defendant clarified that in the year 1992 when the Agreement For Sale was executed, he was not yet a registered owner of the property known as LR.NO.Transmara / Shartuka/97 as Adjudication was still on going.
91. The Defendant then denied knowledge of any other case before any Court of law as alleged by the Plaintiffs.



92. As regards the meetings contained in the Plaintiff Exhibit 6, the Defendant admitted that indeed the meetings took place but denied that there was any resolution to the dispute arrived at.
93. According to the Defendant, the meetings were to discuss the issue of the Plaintiffs handing vacate possession but they refused.
94. The Defendant's position in the meetings was that he had not sold any portion of land to the late Kumar Ole Tierikat and or the Plaintiffs.
95. The Defendant however admitted that the Plaintiffs still occupy a small portion of the property known as LR.NO.Transmara / Shartuka/97.
96. Consequently therefore, the Defendant sought the Court to dismiss the Plaintiff suit with costs.
97. On cross-examination, the Defendant confirmed that the Plaintiffs occupy a portion on the edge of the property known as LR.NO.Transmara / Shartuka/97.
98. The Defendant could not however recollect the actual number of years that the Plaintiffs had been in occupation of the said portion but insisted that it was not so long ago.
99. The Defendant admitted that there were various meeting held at the area Chief's office but he did not agree with the fact that he sold any land to the late Kumar Ole Tierikat and or the Plaintiffs herein.
100. Referring to the Plaintiff Exhibit 3, the Defendant confirmed that the person known as NAISAKU OLE TIPOU was his wife and is at home.
101. The Defendant on the other hand denied being familiar with KURET OLE TAKOI and LEKAKEN OLE TONKAI.
102. The Defendant disputed the allegation that his wife was one of the witnesses to the Agreement For Sale executed in the year 1992.
103. The Defendant in concluding his cross-examination stated that he did not have any witness who was present when he allowed the late Kumar Ole Tierikat to occupy a portion of the property known as LR.NO.Transmara / Shartuka/97.
104. On re-examination, the Defendant reiterated that he had never signed the Agreement For Sale executed in the year 1992.
105. Lastly, the Defendant denied that the wife was ever a witness to the said Agreement For Sale.
106. At the end of this re-examination, the Defendant was discharged from the witness box and the Defence closed its case.
107. The parties thereafter were directed to file and exchange their submissions and in compliance, the Plaintiffs filed their submissions on the 05.03.2024 while the Defendant similarly filed his on the same date 05.03.2024.
108. The Court has carefully perused the pleadings filed by the parties, the testimonies of the parties and witnesses, the exhibits produced and the final submissions.
109. The issues for determination can now be outlined as follows; -

Issue No. 1- Is The Plaintiff Herein Entitled To A Prayer Of Adverse Possession For A Portion Of 10 Acres Within The Property Known As Lr.no.transmara / Shartuka/97 From The Defendant?



Issue No. 2- Is The Defendant Entitled To An Order Of Eviction Against The Plaintiffs In Relation To The 10 Acres Within The Property Known As Lr.no.transmara / Shartuka/97 From The Plaintiffs?

Issue No.3- Are The Plaintiffs Entitled To The Prayers Sought In The Present Os?

Issue No. 4- Is The Defendant Entitled To The Prayers Sought In The Counter-claim Filed Against The Plaintiffs?

Issue No.5- Who Bears The Costs Of The Present Os & The Counter-claim?

110. Having outlined the issues for determination hereinabove, the same will now be discussed hereinbelow in the same order.

Issue No. 1- Is The Plaintiff Herein Entitled To A Prayer Of Adverse Possession For A Portion Of 10 Acres Within The Property Known As Lr.no.transmara / Shartuka/97 From The Defendant?

111. The first issue for determination in the present OS is whether or not the Plaintiffs have proved a claim of adverse possession against the Defendant for a portion of 10 acres within the property know as LR.NO.Transmara / Shartuka/97.

112. A look at the title of the present O.S, it is clear that the Plaintiffs are seeking to invoke the provisions of Section 38 of the *Limitation of Actions Act*, Cap 22 as well as Section 37 Rule 7 & 14 of the Civil Procedure Rules, 2010.

113. The principles that guide our Courts in the determination of issues appertaining Adverse possession have long been settled.

114. The leading authority on disputes about adverse possession is the case of MTANA LEWA-VERSUS-KAHINDI NGALA MWAGANDI (2015) eKLR, which outlined the ingredients of adverse possession as follows;-

“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.”

115. The principles provided hereinabove were further expounded in the case of Civil Application No.110 Of 2016 Between Richard Wefwafwa Songoi-versus- Ben Munyifwa Songoi (2020) eKLR , where the Court of Appeal pronounced identified 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.

116. Lastly, in the case In the case of Tabitha Waitherero Kimani-versus- Joshua Nganga (2017) eKLR, the mandatory requirements of adverse possession were reconfirmed as follows;-



- “(A) Open And Notorious Use Of The Property. For this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
- (B) Continuous Use Of The Property – The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor’s time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (C) Exclusive Use Of The Property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner’s property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
- (D) Actual Possession Of The Property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

117. Based on the above ingredients, this Court will proceed to evaluate the Plaintiffs claim of adverse possession against the Defendant herein.

Ingredient 1- On What Date Did The Plaintiffs Came Into Possession?

118. The first ingredient to be evaluated is the possible date upon which the claimant took possession of the portion being claimed.
119. The Plaintiffs herein have pleaded that they are the Administrators of the late Kumar Ole Tierikat who moved to into the property known as LR.NO.Transmara / Shartuka/97 way back in the year 1992.
120. The Plaintiffs testified that the entry of the late Kumar Ole Tierikat was during the Adjudication of SHARTUKA GROUP RANCH which exercise resulted to the Defendant being allocated PLOT.NO.97 within SHARTUKA ADJUDICATION SECTION and ultimately the title known as LR.NO.Transmara / Shartuka/97.
121. According to the Plaintiffs, the entry of the late Kumar Ole Tierikat on the Defendant’s PLOT.NO.97 within NKARARO ADJUDICATION SECTION and now LR.NO.Transmara / Shartuka/97 was based an Agreement For Sale dated 10.08.1992 which was produced as Plaintiff Exhibit 3.
122. According to the Plaintiff Exhibit 3, the late Kumar Ole Tierikat was purchasing a portion of 10 acres from the Defendant’s property known as PLOT.NO.97 within SHARTUKA GROUP RANCH now titled as LR.NO.Transmara / Shartuka/97.



123. The Plaintiffs state that upon execution of the Agreement For Sale produced as PLAINTIFFS EXHIBIT 3, the late Kumar Ole Tierikat moved into the property now known as LR.NO.Transmara / Shartuka/97 and began occupation and use of the same.
124. In essence therefore, the Plaintiffs herein submitted that the date of their occupation began in the year 1992 with the entry of the late Kumar Ole Tierikat pursuant to the Agreement For Sale with the Defendant for the portion of 10 acres on the property known as LR.NO.Transmara / Shartuka/97.
125. The Defendant on other hand does not deny the occupation of the Plaintiffs on a portion of the property known as LR.NO.Transmara / Shartuka/97.
126. The Defendant stated in his cross-examination by the Plaintiff's Counsel that the 1st Plaintiff is the one that had trespassed into one corner of his property known as LR.NO.Transmara / Shartuka/97 and unlawfully occupied the same.
127. The Defendant however could not remember or give an approximate date upon which the 1st Plaintiff entered and/or took possession of the portion measuring 10 acres within the property known as LR.NO.Transmara / Shartuka/97.
128. Similarly, the Defendant denied ever entering into any Agreement For Sale dated 10.08.1992 with the late Kumar Ole Tierikat for a portion of 10 acres within PLOT.NO.97 in SHARTUKA GROUP RANCH now titled as LR.NO.Transmara / Shartuka/97.
129. In essence, the Defendant disputes the late Kumar Ole Tierikat's entry into the property known as LR.NO.Transmara / Shartuka/97 in the year 1992 or anytime during his life on earth.
130. In the alternative, the Defendant pleaded that if indeed there was an entry by the late Kumar Ole Tierikat, computation of time should commence from the date of when the title deed was issued on the 14.07.2000.
131. According to the Defendant's pleadings in the Statement of Defence, the Defendant did not have any proprietary rights and/or ownership of the property known as LR.NO.Transmara / Shartuka/97 until the date its register was opened and his name entered into the said Green Card which was in the year 1998.
132. Consequently, if any Agreement For Sale was executed between the late Kumar Ole Tierikat and the Defendant, then time for computing the period of 12 years can only start once the property known as LR.NO.Transmara / Shartuka/97 was registered in his name.
133. To collaborate the Plaintiffs testimony, the 2nd Plaintiff called one witness known as LEBOI OLE MUNGE who was marked as PW 2.
134. PW 2 introduced himself as a retired chief of OLORONGAI LOCATION which is the area within which SHARTUKA GROUP RANCH is located.
135. PW 2 informed the Court that his residence was about 600 meters away from the property known as LR.NO.Transmara / Shartuka/97 and therefore, he viewed both the Plaintiffs and the Defendants as his neighbours.
136. PW 2 further testified that the late Kumar Ole Tierikat entered into the property known as LR.NO.Transmara / Shartuka/97 way back over 27 years ago and had been staying there with his third wife before his demise.



137. Thereafter, the Estate of the late Kumar Ole Tierikat continued with their occupation and use of the portion measuring 10 acres until the year 2018 when the Defendant invaded the Plaintiff's portion, destroyed various trees and structures and fenced a portion of it.
138. However, despite the Defendant's invasion of the Plaintiff's portion measuring 10 acres and fencing a part of it, the Plaintiffs are still in occupation of the remaining part of the original portion of 10 acres within LR.NO.Transmara / Shartuka/97.
139. The question now is what would be the possible date upon which the late Kumar Ole Tierikat entered into the property known as LR.NO.TRANSMARA/SHARUKA/97.
140. The Plaintiffs position is that the late Kumar Ole Tierikat took possession on the execution of the Agreement For Sale dated 10.08.1992 which is produced as Plaintiff Exhibit 3.
141. Although the Defendant has disputed this Agreement For Sale dated 10.08.1992, he did not specify the reason why this Agreement For Sale is not legitimate.
142. The Plaintiffs who alleged the existence of the Agreement For Sale dated 10.08.1992 complied with the provisions of Section 107 of the Evidence Act, Cap 80 by producing the said Agreement as Plaintiff Exhibit 3.
143. It therefore goes without saying that if the Defendant disputed this Agreement For Sale dated 10.08.1992 and produced as Plaintiff Exhibit 3, the burden of proof to confirm that it was not genuine shifted to him.
144. The Defendant was required to undertake proactive steps to challenge the validity of the Agreement for Sale dated 10.08.1992 through either obtaining a document examiner's report and/or at the very least call one NAISWAKU ELE TIEPOON who is the wife and still alive to collaborate his evidence.
145. The inaction by the Defendant did not in any way assist his case as both his pleadings and his testimony remained a mere denial.
146. Even if this Court is to be pursued that the date of taking possession should be computed from the time the Defendant was registered as the owner of the property known as LR.NO.Transmara / Shartuka/97, the date of taking possession can only move to the year 1998 which is the date the Green Card was opened and the name of the Defendant registered as the owner of the said property.
147. In conclusion therefore, this Court hereby decides that the late Kumar Ole Tierikat took possession of the portion measuring 10 acres on the property known as PLOT.NO.97 within SHARTUKA GROUP RANCH now titled as LR.NO.Transmara / Shartuka/97 in the year 1992.

Ingredient No. 2- What Was The Nature Of The Possession?

148. The second ingredient in a claim of adverse possession is the nature of possession.
149. This ingredient requires that the possession of the claimant must be one that is open and notorious to the land owner and the general public to the extent that it is contrary to the use and occupation of the land owner.
150. The Courts have similarly held that the possession must entail not only occupation of the land being claimed but such land must be used by the Claimant.
151. In other words, the Claimant must demonstrate occupation and/or possession and use of the said property at the same time.



152. In the present OS, the Plaintiffs pleaded and further testified that they have been in occupation and use of their portion measuring 10 acres within the property known as LR.NO.Transmara / Shartuka/97 since the year 1992.
153. In support of this testimony, the 2nd Plaintiff produced Photographs of the developments on their portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97 as Plaintiff Exhibit 7.
154. In the Plaintiff Exhibit No.7, the Plaintiffs confirmed the existence of a House, the growing of maize and trees as well as various animals within the said portion occupied by the Plaintiffs.
155. The Defendant in his Statement of Defence denied the developments contained in the Plaintiff Exhibit No. 7 by alleging that the same were from a different property and not the portion occupied by the Plaintiffs on LR.NO.Transmara / Shartuka/97.
156. However, at the hearing of the matter, the Defendant did not give any evidence and/or testimony to demonstrate that the said developments were actually in a different property from the property known as LR.NO.Transmara / Shartuka/97.
157. PW 2 on the other hand who is a neighbour and former area Chief collaborated the evidence of the 2nd Plaintiff by confirming that the late KAMUR OLE TIERIKAT had indeed taken possession and was in actual use of the portion measuring 10 acres within LR.NO.Transmara / Shartuka/97 as demonstrated in the Plaintiff Exhibit 7.
158. To add to the above testimony by the PW 2, there was also a letter dated 12.07.2019 which was produced as Plaintiff Exhibit 9.
159. In the Plaintiff Exhibit 9, the Area chief writes to confirm that the Defendant herein had actually entered into the portion occupied and/or under the use of the Plaintiffs and destroyed a number of trees which belonged to the estate of the late KAMUR OLE TIERIKAT.
160. In essence therefore, looking at the totality of the evidence presented by the Plaintiffs herein, this Court is satisfied that the late KAMUR OLE TIERIKAT and or his estate including the Plaintiffs herein possessed and/or occupied the portion of 10 acres on LR.NO. Transmara / Shartuka/97 in an open and notorious manner as required under this ingredient.

Ingredient No.3- Whether The Fact Of The Possession Was Known By The Other Party.

161. The third ingredient to evaluation is whether or not the land owner was aware of the claimant's possession and/or occupation of the disputed property.
162. In this ingredient, the Claimant is required to demonstrate that the land owner was aware of the Claimant's possession and use of the dispute property.
163. In the present OS, the Plaintiff pleaded and testified that the Defendant herein was well aware of the late KAMUR OLE TIERIKAT from the year 1992 when the Agreement for Sale was executed.
164. Consequently therefore, the Defendant has been fully aware of the late KAMUR OLE TIERIKAT'S possession and that of his estate thereafter.
165. On the other hand, the Defendant denied knowledge of the late KAMUR OLE TIERIKAT'S possession and/or occupation as well as that of his estate.



166. However, the Defendant has pleaded in the alternative that if such an occupation and/or possession by the late KAMUR OLE TIERIKAT happened, then it was on the basis a licence issued pursuant to the Agreement For Sale executed in the year 1992.
167. Consequently therefore, the late KAMUR OLE TIERIKAT and or his estate cannot make a claim of adverse possession unless the said Agreement For Sale executed in 1992 is terminated by the Parties.
168. Unfortunately, the Defendant did not testify about the alternative defence of issuing a licence to the late KAMUR OLE TIERIKAT as pleaded in his Defence.
169. Be as it may, PW 2 testified that both the Estate of KAMUR OLE TIERIKAT and the Defendant are on the same property known as LR.NO.Transmara / Shartuka/97 since the early 1990.
170. The Plaintiff Exhibit 3 which this Court has found to be a valid document demonstrates the Defendant's knowledge of the late KAMUR OLE TIERIKAT interest on a portion of the property known as LR.NO.Transmara / Shartuka/97.
171. The Plaintiff Exhibit 7 & 9 have also shown the developments undertaken on the portion measuring 10 acres on the property known as LR.NO.Transmara / Shartuka/97 which is the same property that the Defendant also resides on.
172. All this evidence clearly point to the fact that the Defendant was well aware of the late KAMUR OLE TIERIKAT'S possession and occupation of the 10 acres within the property known as LR.NO.Transmara / Shartuka/97.
173. However, the Defendant has raised an alternative defence to the effect that the occupation and/or possession of the late KAMUR OLE TIERIKAT was based on a licence pursuant to the Agreement For Sale dated 1992.
174. According to the Defendant's pleadings, the late Kumar Ole Tierikat'S occupation and/or possession can only become adverse once the Agreement For Sale dated 1992 was determined or repudiated.
175. An issue therefore arises as to whether the late Kumar Ole Tierikat'S occupation of the 10-acre portion within LR.NO.Transmara / Shartuka/97 was based on a license or not.
176. The guiding document in answering this issue will be the Agreement For Sale produced as Plaintiff Exhibit 3.
177. A careful perusal of the PLAINTIFFS' EXHIBIT 3 confirms the agreed consideration for the 10 acres portion purchased by the late Kumar Ole Tierikat from the Defendant on PLOT.NO.97 within SHARTUKA GROUP RANCH now titled as LR.NO.Transmara / Shartuka/97.
178. However, the same Agreement For Sale indicates that the late Kumar Ole Tierikat did not clear the full purchase price of the 10 Acres and had been left with a balance of 3 herds of cows.
179. In essence therefore, according to the Agreement For Sale executed in 1992, the late Kumar Ole Tierikat could only be given a license to occupy and use the 10 acres on the Defendant's property known as PLOT.NO.97 within SHARTUKA GROUP RANCH pending the payment of the balance.
180. Although the 2nd Plaintiff and PW 2 testified that the Purchase Price of the Agreement For Sale executed in 1992 was fully settled, none of them gave the date and/or manner in which the said balance was settled.



181. In the absence of any evidence on the date and/or manner in which the balance of 3 herds of cattle was paid to the Defendant, then this Court is not able to make a determination that the full purchase price under the Agreement For Sale executed in 1992 was fully settled.

182. In the case of Wambugu-versus- Njuguna (1983) KLR 173, the Court of Appeal stated as follows;-

“ 8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

183. In another case of Simon Nganga Njoroge-versus- Daniel Kinyua Mwangi (2015) eKLR, the Honourable Court re-emphasized on the principle outlined in the case of WANMBUGU-VERSUS-NJUGUNA as follows;-

“ Having found the plaintiff’s testimony concerning the said sale agreements more believable, and taking note of the principle espoused in Wambugu -vs- Njuguna (supra) to the effect that where a claimant pleads the right to land under an agreement and in the alternative, seeks an order based on subsequent adverse possession, (Like the plaintiff herein has done) the rule is : the claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price and that the claimant will succeed under adverse possession upon occupation for at least 12 years after such payment . I find and hold that, in the circumstances of this case, the plaintiff possession of the suit property became adverse from 6th June, 1994”.

184. Based on the guidance of the above authorities which this Court duly associates itself with, the finding of this ingredient is that the late KAMUR OLE TIERIKAT’S possession and/or occupation of the 10 acres on the Defendant’s property was on the basis of a License emanating from the Agreement for Sale and which cannot be adverse against the Defendant’s ownership.

Ingredient No. 4- For How Long Has The Possession Continued

185. The forth ingredient is to evaluate the period upon which the Claimant has been in occupation of the disputed property.

186. However, in view of the determination that the late KAMUR OLE TIERIKAT’S occupation was based on a license from the Defendant, then the period of his occupation adverse to the Defendant’s ownership can not run until the last instalment is confirmed to be paid and/or the Agreement For Sale is terminated all together.

Ingredient No.5- That The Possession Was Open & Undisturbed For 12 Years.

187. The last ingredient is usually to confirm if the period of occupation and/or possession by the Claimant amounts to the requisite 12 years as provided in the Limitation of Actions, Cap 22.

188. However, again this Court will not be able to discuss this ingredient as the occupation and/or possession of the late KAMUR OLE TIERIKAT and or his estate including the Plaintiffs herein was based on a license emanating from the Agreement For Sale executed in 1992.



Issue No.3- Are The Plaintiffs Entitled To The Prayers Sought In The Present Os?

189. In answer to this issue, this Honourable Court is of the considered finding that the prayers sought in the present OS are not merited and can not be granted as prayed.

Issue No. 4- Is The Defendant Entitled To The Prayers Sought In The Counter-claim Filed Against The Plaintiffs?

190. The Defendant has filed a Counter-Claim dated 10.07.2023 of which he seeks for an eviction order against the Plaintiffs herein from the property known as LR.NO.Transmara / Shartuka/97 and thereafter a permanent injunction against their occupation and use of the portion measuring 10 acres thereon.

191. The Defendant's pleadings state that the entire property known as LR.NO.Transmara / Shartuka/97 belongs to the Defendant and therefore Article 40 of the Kenyan Constitution, 2010 deems it as a private property which should be for the exclusive use of the registered owner.

192. The Defendant further pleads that the Plaintiffs occupation on the portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97 is illegal, unlawful and therefore the Plaintiffs should be forthwith evicted.

193. The Plaintiffs on the other hand have denied the Defendant's allegations in toto and reiterated the facts pleaded in the present OS.

194. The first issue of determination is whether or not the Defendant is entitled to an order of eviction as sought.

195. To begin with, this Court has earlier made a determination that the Agreement For Sale executed in the year 1992 is a valid and binding document between the late KAMUR OLE TIERIKAT and the Defendant.

196. A close perusal of the Agreement For Sale dated 10.08.1992 shows that the same did not provide on when the remaining balance of the purchase price would be settled.

197. Further to that, the Agreement For Sale dated 10.08.1992 did not also provide for the completion period and/or the manner in which parties can terminate the same.

198. As such, this Honourable Court can not terminate and/or order issue an eviction order against the Plaintiffs over the said portion of 10 acres within LR.NO.Transmara / Shartuka/97 when the said Agreement For Sale is still valid and operational between the Estate of the Late KAMUR OLE TIERIKAT and the Defendant herein.

199. The Estate of the late a KAMUR OLE TIERIKAT and by extension the Plaintiffs herein have a lawful and legitimate interest for the portion of 10 acres within the property known as LR.NO.Transmara / Shartuka/97 unless and until either the parties terminate the Agreement For Sale dated 10.08.1992 and/or a Competent Court of Law declares the same to be terminated thereof.

200. However, in the meantime, the Plaintiffs are entitled to the use and occupation of the 10 acres within the property known as LR.NO.Transmara / Shartuka/97 pending the completion of the terms contained in the Agreement For Sale dated 10.08.1992 or a proper termination of the said Agreement For Sale dated 10.08.1992 either by the parties or a court of law of competent jurisdiction.



Issue No.5- Who Bears The Costs Of The Present Os & The Counter-claim?

- 201. The last issue is who should bear the costs of the present OS and the Counter-Claim.
- 202. It is a settled principle that costs usually follow the outcome.
- 203. In this present OS, the Plaintiffs did not succeed in prosecuting their claim against the Defendant.
- 204. Similarly, the Defendant was not successful in prosecuting their Counter-Claim against the Plaintiffs herein.
- 205. Consequently therefore, it is only reasonable that each party should bear its own costs as both parties ought be condemned to pay costs.

Conclusion

- 206. In conclusion therefore, this Court hereby makes the following Orders in determination of the present OS and the Counter-Claim herein;-
 - A. The Originating Summons Dated 25.07.2019 Be And Is Hereby Dismissed.
 - B. The Counter-claim Dated 10.07.2023 Is Dismissed As Well.
 - C. The Estate Of The Late Kamur Ole Tierikat And By Extension The Plaintiffs Herein Are Entitled & Are Therefore Granted Quite Possession And/or Occupation Of 10 Acres Within The Property Known As Lr.no.transmara / Shartuka/97 Pending Either The Completion Of The Terms In The Agreement For Sale Dated 10.08.1992 Or A Lawful Termination Of The Same By Either The Parties And/or A Court Of Competent Jurisdiction.
 - D. The Defendant Be And Is Hereby Directed To Observe Peace & And Compliance Of The Order No. C Hereinabove And To Desist From Either Destroying, Cutting, Burning, Demolishing And/or Interfering With The Plaintiffs Occupation And/or Possession Of The 10 Acres Provided In The Agreement For Sale Dated 10.08.1992 Until The Said Agreement Is Either Completed And/or Lawfully Terminated By The Parties And/or A Court Of Competent Jurisdiction.
 - E. Each Party Will Bear Its Own Costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON DAY OF 3RD OF JUNE 2024.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Ngeno

Advocates For The Plaintiffs: Ms. Ochwal

Advocates For The Defendant: Mr. Bigogo

