



REPUBLIC OF KENYA



KENYA LAW
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**Murket v Onguti & 2 others (Environment & Land Case 6 of 2021)
[2022] KEELC 14509 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 6 OF 2021
EM WASHE, J
NOVEMBER 1, 2022**

BETWEEN

SAITOTI OLE MURKET PLAINTIFF

AND

ONDORO ONGUTI 1ST RESPONDENT

JUSTUS OGARI NYARERU 2ND RESPONDENT

JOSEPH MASTER ONTOMWA 3RD RESPONDENT

JUDGMENT

1. The Plaintiff herein filed an Originating Summons dated August 27, 2021 (hereinafter referred to as “the Originating Summons”) against the Respondents seeking for the following Orders;-
 - i. That a permanent injunction be granted to restrain the Defendants by themselves, their servants and/or agents or employees or anyone claiming under them from entering, encroaching on, obstructing, trespassing, charging, selling, alienating or in any other way whatsoever from interfering with the Plaintiff’s quite enjoyment of Land Reference Number Transmara/moyoi/210 or any portion thereof.
 - ii. That the Defendants title to the parcel of land Reference Number Transmara/moyoi/210 measuring approximately 0.91 Hectares be deemed to have been extinguished through adverse possession of the Plaintiff and/or that the Plaintiff be declared and registered as the proprietor of the parcel of land Reference Number Transmara/moyoi/210 and/or that the Defendants does hold the Land Reference Transmara/moyoi/210 subject to the interest of the Plaintiff.
 - iii. That the Defendant do transfer the said parcel of land known Transmara/moyoi/210 to the Plaintiff which the Deputy Registrar of this Honourable Court do execute the transfer forms of the said parcel of land to the Plaintiff.



- iv. Costs of this suit be borne by the Defendants.
2. The prayers have been supported by the grounds contained in the body of the Originating Summons and the supporting Affidavit sworn on August 27, 2021.
3. The Supporting Affidavit sworn on the August 27, 2021 has also placed before the Court various documents as annexures namely (i) a copy of the Official Search of the property known as Transmara/moyoi/210 (hereinafter referred to as “the suit property”) dated August 3, 2021 (ii) a picture of the portion occupied by the Plaintiff (iii) a picture of the house constructed by the Plaintiff (iv) a picture of a cow shed and cultivated land by the Plaintiff.
4. The Plaintiff further filed a List of Witnesses dated 27th of August 2021 for the witnesses to be called at the hearing.
5. The Originating Summons and the other supporting documents were then served on the Defendants who appointed a Counsel to represent them.
6. On the 26th of October 2021, the Respondents filed a Joint Replying Affidavit sworn on the October 23, 2021 opposing the Originating Summons herein.
7. The Joint Replying Affidavit placed before the Court various documents in form of annexures which included (i) a copy of Authority to swear by the 1st and 2nd Defendants (ii) a copy of the Title deed of the suit property (iii) a copy of an Agreement for Sale between Richard Chania Ondoro, Justus Ogari Nyareru & Joseph Master Ontomwa & Olakuyia Soitat Siteti dated April 26, 2021 (iv) a copy of the official search of the suit property dated August 3, 2021.
8. The Plaintiff upon receipt of the Joint Replying Affidavit filed a Further Affidavit on the 25th of November 2021 in response.
9. The hearing of the Originating Summons thereafter began on the May 5, 2022.

Plaintiff’s Case.

10. The Plaintiff in the matter testified as the 1st witness.
11. The witness informed the Court that he resides in Ngorika.
12. The witness testified that he was in Court because some people had visited the suit property with a view of selling the same yet it is the place he resides.
13. The witness identified the property in dispute as Transmara/moyoi/210.
14. The witness stated that he was not aware the suit property was owned by someone else.
15. The only time the witness became aware of this situation was when strangers wanted to evict him from the suit property.
16. In an effort to establish the ownership status of the suit property, the witness visited the offices of the Land Registrar Transmara West and upon conducting an official search, he was informed that the suit property belonged to the Defendants herein. (Plaintiff produced a copy of the Official search dated August 3, 2021 as Plaintiff Exhibit 1)
17. The witness informed the Court that he had been in occupation of the suit property since the year 2004 which is 18 years ago.



18. During all this period of time, there was no person who protested his occupation and/or took any steps to evict him from the suit property.
19. To proof occupation of the suit property, the witness indicated that there was a house built and occupied by his family, a cattle pen and an area cultivated with various crops.
20. The witness produced Four (4) pictures as confirmation of the developments mentioned hereinabove. (The four (4) pictures produced as Plaintiff's Exhibits 2 (a) (b) (c) and (d))
21. The witness testified that the main reason he had filed this Originating Summons was to have the title deed issued to the Defendants cancelled and issued afresh in his name as the lawful owner of the suit property.
22. On Cross-examination, the witness reiterated that he was the one in occupation of the suit property and that is the reason he filed this proceeding.
23. According to the witness, his entry on the suit property was without the consent of the Defendants and open to everyone.
24. The witness stated that he did not see any illegality with the way he entered and/or occupied the suit property.
25. The witness further reconfirmed that he entered the suit property in the year 2004 and has been occupation since then.
26. The witness testified that he was born in the year 1984 and had been staying with his parents in Eukiwanja within Lolgorian Location before relocating to the suit property in the year 2004.
27. The witness explained that the reason he left his father's homestead was because the herd of cattle he owned had become big and required more space.
28. As a result of this increase of cattle, the witness decided to move away from the father's home and entered into the suit property where he lives up to now.
29. According to the witness, he was not aware that the suit property was owned by the Defendants and there was no permission granted to him for such an occupation.
30. The witness stated that the suit property was vacate and there was no one who was occupying the same.
31. The witness confirmed that he only came to know that the suit property belonged to the Defendants in the year 2021 when he conducted an official search.
32. The witness informed the Court that the father's property and the suit property were far apart.
33. According to the witness, he had not made any efforts to procure title to the suit property because he believed the land did not belong to anyone.
34. Nevertheless, the witness informed the Court that he claims the suit property because he has been in occupation of the same since 2004 with his family.
35. The witness indicated that if the Court directed him to vacate the suit property, he would do so in accordance to the Court's directions.
36. The witness confirmed that he did not know the Defendants in this suit but had sued them after he discovered that the suit property was registered in their names.



37. The witness stated that he did not have powers to stop the registered owners of the suit property from selling the same.
38. The witness admitted being familiar with the purchaser of the suit property and informed the Court that the Transfer of the Title to the suit property was in process.
39. In reference to the Plaintiff's Exhibit 2 (a) (b) (c) and (d), the witness confirmed that none of the pictures captured any member of his family or any person living within the suit property.
40. In Re-examination, the witness informed the Court that he knew the Purchaser way before the purported purchase of the suit property.
41. The witness then reiterated that he had never seen the 3rd Defendant before these proceedings.
42. The witness testified that there was a house, a church, a cattle pen and cultivated land containing maize which were on the suit property.
43. The witness indicated that the suit property is approximately Forty-Five (45) Acres of which he has occupied approximately Twenty-Five (25) Acres and the balance is just idle with grass and natural trees.
44. The Plaintiff 2nd Witness was one Olemiris Leshan.
45. The witness informed the Court that he knew the Plaintiff as they had grown up together as friends since their childhood.
46. The witness stated that the Plaintiff herein had started living in the suit property way back in 2004 and had built a house, cattle pen and planted various crops as well as trees.
47. According to the witness, he was not aware of anyone who owned the suit property and/or occupied the same.
48. The witness denied knowledge of the 3rd Defendant as the owner of the suit property.
49. In cross-examination, the witness stated his intention was to testify about the suit property.
50. According to the witness, the suit property belonged to the Plaintiff.
51. Nevertheless, the witness admitted that he had never seen any title documents in the name of the Plaintiff.
52. The reason why the witness believed the suit property belonged to the Plaintiff is because he is the one in occupation.
53. The witness reiterated that the Plaintiff entered the suit property in the year 2004.
54. The witness confirmed that the Plaintiff did not enter the suit property through a purchase or a Lease.
55. The witness further confirmed that the Plaintiff was not given the suit property by his father or through adjudication by the Government of Kenya.
56. The witness testified that it was not legal to just enter into another person's land and occupy the same according to the law of the land.
57. However, the witness stated that within their culture, anyone has a right to enter and occupy any parcel of land that is vacate and/or not in use.
58. The witness further stated that if he came across any vacate land within his area, he would not hesitate to enter and occupy the same for his benefit.



59. In reference to the Plaintiff's Exhibit 2 (a) (b) (c) and (d), the witness admitted that all the pictures did not capture the Plaintiff and/or any family member.
60. The witness indicated that initially, the Plaintiff resided on the suit property with his brother but the brother moved out.
61. The witness could however not remember the name of the Plaintiff's brother.
62. In Re-examination, the witness agreed that the pictures cannot tell where the homestead is located.
63. The witness further stated that he could not remember when the Plaintiff got married.
64. The witness also could not remember when the Plaintiff's first born was delivered.
65. The witness could also not remember any activities that the Plaintiff did in terms of occupation in the year 2002.
66. The Plaintiff's last witness was one Nkore Ole Masanka.
67. The witness informed the court that he knew the Plaintiff since childhood and were agemates.
68. According to this witness, the Plaintiff entered and started living on the suit property in the year 2004.
69. The witness testified that he did not know the owner of the suit property or ever seen such a person including the Defendants herein.
70. Similarly, the witness indicated that he was not aware of any person who was claiming the suit property.
71. In cross-examination, the witness indicated that he did not know the full particulars of the suit property.
72. According to the witness, the description known to him was Plot 210 which is what the Plaintiff had told him.
73. The witness confirmed that the Plaintiff had never shown him any title document to the suit property.
74. The witness testified that he knows and believes that the suit property belongs to the Plaintiff because he occupies it by farming and residing therein.
75. The witness stated that the suit property does not belong to the Plaintiff's father.
76. The witness further stated that he does not have any recollection whether or not the said suit property was allocated to the Plaintiff by the Government through allocation.
77. However, the witness confirmed that he helped the Plaintiff to construct a mabati house on the suit property.
78. The witness confirmed the Plaintiff's statement that he saw a vacate parcel of land and he simply moved in and occupied the same.
79. In Re-examination, the witness confirmed that the Plot No 210 he referred earlier was within Moyoi adjudication Section.
80. The Plaintiff after this witness closed his case against the Defendants.



Defence Case

81. The Defendants commenced their Defence with the evidence of Joseph Master Ontomwawho is the 3rd Defendant in this suit.
82. The witness informed the Court that he hails from Kisii County and is a retired teacher.
83. The witness testified that he does not know the Plaintiff and had only come to see him in Court at the time of giving evidence in this suit.
84. According to the witness, he is the lawful owner of the suit property together with other co-owners. (Title Deed dated July 3, 2021 of Transmara/myoi/210 produced as Defence Exhibit 1).
85. The witness further presented a copy of an Official Search Certificate for the suit property dated August 3, 2021 (Copy of official Search dated July 3, 2021 produced as Defence Exhibit 2).
86. According to the witness, the Defendants acquired their ownership in the year 1983 before adjudication of Moyoi area.
87. Thereafter, Moyoi area was declared an Adjudication Section, demarcated and sub-divided into various plots and titles issued from the year 1998.
88. The witness confirmed that upon acquisition of their ownership rights, they occupied the suit property until the year 2022 when they Defendants discovered the Plaintiff's presence.
89. The witness stated that the Plaintiff's presence on the suit property was discovered in the year 2021 when the Defendants took the purchaser known as Olakuyia Soitat Sitetifor a visit and/or inspection of the physical ground.
90. On this material day, the witness together with the other Defendants and the purchaser were brutally attacked by the Plaintiff and other members of public using crude weapons and their vehicle extensively damaged.
91. This incidence was then reported at Lolgorian Police Station and recorded in the Station's Occurrence Book. (An extract of the Occurrence Book of Lolgorian Police Station is marked for production as Defence Exhibit 3)
92. The witness testified that the Plaintiff had no legal right to trespass into and occupy the suit property without the Defendants permission.
93. The witness stated that there was no sale transaction between the Plaintiff and the Defendants to confer any ownership rights on the Plaintiff.
94. The witness informed the Court that there was no law in Kenya that allowed a stranger to enter any vacate land and start occupying it without the consent of the owner.
95. The witness confirmed that the suit property was sold to one Olakuyia Soitat Sitetipursuant to an Agreement For Sale dated April 26, 2021. (The Agreement For Sale is produced as Defence Exhibit 4)
96. The witness also presented the Registered Index Map dated 18/11/2021 defining the boundaries of the suit property. (Copy of the Registered Index Map dated November 18, 2021 produced as Defence Exhibit 5.)



97. The witness then produced pictures of the extensively damaged motor vehicle which was caused by the Plaintiff. (Copies of the pictures showing damage of the Defendant's motor vehicle produced as Defence Exhibit 6)
98. The witness informed the Court that the Local Assistant Chief of Magena Sub-Location within which the suit property is located has written a letter dated November 19, 2021 confirming the true owners. (Letter dated November 19, 2021 from the Assistant Chief Magena Sub-Location is produced as Defence Exhibit 7)
99. In conclusion therefore, the witness indicated that the suit property belongs to the Defendants and the Plaintiff has no legal right to enter and/or occupy the suit property.
100. In Cross-examination, the witness confirmed that he is one of the owners of the suit property.
101. The witness told the Court that the Defendants were issued with a Title Deed in the year 1998.
102. The witness indicated that upon acquisition of the suit property, a temporary house was built but the same was demolished by the Plaintiff.
103. The witness stated that the demolition of the temporary house in the suit property is one of the reasons the Defendants want to sell the suit property.
104. The witness testified that although he did not see the Plaintiff demolish the original temporary house, he strongly believes that it's the Plaintiff because another house was illegally built by the Plaintiff.
105. The witness confirmed that the attack on the Defendants and purchaser happened on the same day the Report was presented to the police in Lolgorian Police Station.
106. On the material day of being attacked at the suit property, the Defendants could not enter the property because of the hostility.
107. The witness stated that the suit property had been used for farming and cattle rearing by the Defendants until the year 2021 when they came to discover the Plaintiff's presence.
108. On discovery of this illegal entry, the Defendants informed the Assistant Chief wrote a letter confirming their ownership.
109. It is at this point that the Plaintiff filed this suit.
110. The witness confirmed that there is an existing criminal case against the Plaintiff but could not remember the case number thereof.
111. The witness informed the Court that he had not taken any steps to evict the Plaintiff because ownership of the suit property is now an issue in this suit.
112. The witness stated that he does not know the number of the Occurrence Book but the Motor Vehicle which was damaged was taken photographs and the same have been presented in Court.
113. The witness testified that the intention of selling the suit property was because they would no longer feel safe after the incidence of attack by the Plaintiff.
114. In Re-examination, the witness confirmed that the suit property belongs to the Defendants.
115. The witness indicated that the Defendants did not have any right to enter and occupy the suit property.
116. The witness indicated that the Plaintiff started trespassing on the suit property in the year 2010.



117. Nevertheless, the witness confirmed that he was attacked in the year 2021 when he reported the incidence at Lolgorian Police Station.
118. The witness lastly stated that he came to Court to testify about the suit property and not the motor vehicle that was damaged.
119. The Defence Second Witness was one Christopher Ben Oseko Akuma.
120. This witness informed the Court that he stays in Mashangwa location.
121. The witness stated that he personally knows the Defendants herein.
122. The witness indicated to the Court that he is the registered owner of the property known as Transmara/moyoi/394 which neighbours the suit property.
123. The witness confirmed that the suit property belongs to the Defendants herein.
124. The witness denied the allegation that the Plaintiff has been on the suit property since 2004 or anytime amounting to 12 years.
125. The witness informed the Court that the Plaintiff might have entered and/or stated occupation of the suit property in the year 2021 or 2022.
126. The witness stated that he purchased his property in the year 1990 and has been in occupation of the same since then.
127. The witness objected to the Plaintiff's demand that he owns the suit property because the Defendants have not been in occupation of the suit property.
128. In Cross-examination, the witness reiterated that the Defendants were his neighbours.
129. The witness insisted that the Defendants have been his neighbours since the year 1990 when he acquired his property.
130. All this time, the Defendants have been staying and using the suit property upto date.
131. The witness confirmed that in the year 2021, the Defendants were attacked during a visit to the suit property.
132. The witness further stated that the temporary house which was built by the Defendants on the suit property was similarly destroyed.
133. The witness indicated that the Defendants have been farming and keeping cattle on the suit property.
134. The witness informed the Court that he was not familiar with the purchaser of the suit property if indeed it had been sold.
135. The witness further stated that he could not confirm if the Plaintiff occupies the suit property because the Defendants have been cultivating on the same.
136. In Re-examination, the witness reinstated that the suit property belongs to the Defendants.
137. The witness further denied that the Plaintiff had occupied the suit property for a period of 12 years.
138. The Third Defence Witness was Neke Siteko Mopei.
139. The witness informed the Court that he hails from Moyoi Location and was a businessman.
140. The witness confirmed knowing the Defendants in this suit.



141. The witness also confirmed being familiar with the suit property.
142. The witness indicated that the suit property belongs to the Defendants herein.
143. The witness admitted to know the Plaintiff as well.
144. The witness told the Court that the Plaintiff had not occupied the suit property for a period of 12 years.
145. According to the witness, the Plaintiff's occupation on the suit property could be about 4 to 5 years only.
146. Consequently, in the witness's view, the Plaintiff was not entitled to any rights on the suit property.
147. The witness stated that he is familiar with the physical location of the suit property.
148. The witness further informed the Court that he is aware of where the Plaintiff originally stayed.
149. The witness told the Court that the Plaintiff comes from Kiwanja Village which is about 5 to 6 kilometres away from the suit property.
150. According to the witness, the Plaintiff lives alone on the suit property and has no family member with him.
151. The witness indicated that the Plaintiff has never purchased the suit property and the same is not a family asset.
152. The witness was of the opinion that the Plaintiff's actions were geared to simply grabbing someone's private property based on tribal issues.
153. The witness further stated that the suit property is within an area occupied by the Massai but the Defendants were Kisii.
154. The witness therefore said it was not proper and lawful for someone to just enter into another person's land just because he does not live there.
155. The witness informed the court that he was aware the 3rd Defendant was attacked by the Plaintiff and it was reported at Lolgorian Police Station as well as the Deputy County Commissioner's office.
156. The witness stated that he was aware the Defendants herein had sold off the suit property to one Olakuyia Soitat Siteti and the Plaintiff had not objected to the same.
157. Consequently, the witness reiterated that the Plaintiff had no ownership rights over the suit property.
158. In Cross-examination, the witness indicated that he stays in Lolgorian and has known the Defendants from 2019- 2020.
159. The witness stated that he was familiar with the suit property and the ownership as confirmed by the official search.
160. The witness testified that the Defendants used to occupy the suit property but due to tribal clashes, they relocated from the suit property.
161. These tribal clashes occurred about 8 to 10 years ago.
162. Since then, the witness admitted that the Defendants have not been occupying the suit property permanently.



163. It is due to the Defendants absence on the suit property that the Plaintiff entered and began occupying the same which was about 4 to 5 years ago.
164. The witness stated that it's the Plaintiff who threatened the Defendants and it was reported to Lolgorian Police Station.
165. The witness lastly stated that at the time of the Agreement of Sale being done, the Plaintiff was already in the suit property.
166. In Re-examination, the witness indicated that the Defendants herein disclosed the presence of the Plaintiff on the suit property to the purchaser.
167. Nevertheless, in the witness's opinion, the Plaintiff does not have any legal authority or rights to be on the suit property.
168. The Fourth Defence Witness was Olakuyia Soitati Siteti.
169. He indicated that he hails from Moyoi Location and his occupation was farming.
170. The witness confirmed knowledge of both the Plaintiff and the Defendants.
171. The witness also informed the Court that he is familiar with the suit property which he is aware belongs to the Defendants.
172. The witness stated that the Plaintiff started staying on the suit property about 1 year ago.
173. The witness indicated that the Plaintiff had not purchased the suit property, or acquired the same through adjudication or inheritance from his father.
174. The witness further indicated that the Plaintiff stays alone and has no other family members living on the suit property.
175. The witness confirmed to the Court that he purchased the suit property on the 26th of April 2021 and the Plaintiff never objected to the said transaction.
176. The witness informed the Court that at the time of purchasing the suit property, he was aware the Plaintiff presence although the occupation has not been for 12 years.
177. In cross-examination, the witness stated that he was introduced to the Defendants through a mutual friend.
178. The mutual friend informed the witness that the Defendants were disposing off the suit property which is not far away from where he resides.
179. At the time of discussion between the mutual friend and the witness, the Defendants were unknown to him as they were staying in Kisii.
180. The witness indicated that prior to purchasing the suit property, he undertook a search of the suit property and confirmed that it did not have any encumbrances.
181. According to the witness, at the time of purchasing the suit property, there was no one in occupation on the ground including the Plaintiff herein.
182. The witness further testified that the time he came across the Plaintiff was when they visited the suit property with the Defendants and were attacked thereafter.



183. Consequently, the witness admitted that he could not say exactly when the witness entered and/or occupied the suit property.
184. The witness stated that at the time of writing the Agreement for Sale, he was not aware of the Plaintiff's presence on the suit property.
185. The witness therefore disputed that he was informed of the Plaintiff's presence on the suit property prior to executing the Agreement for Sale.
186. The witness confirmed that there was no encumbrance on the title of the suit property placed by the Plaintiff.
187. The witness testified that he is one in occupation of the suit property and is not aware if the Plaintiff occupies any portion of the same suit property.
188. The witness stated that he knows the Plaintiff who has not occupied the suit property for more than 12 years.
189. In Re-examination, the witness reiterated that the Plaintiff had not occupied the suit property for a period of 12 years and above.
190. The Fifth Defence Witness is Chief Inspector Meshack Mwangangi.
191. The witness introduced himself as the Officer in Charge of Lolgorian Police Station.
192. He informed the Court that he was in Court to present the Occurrence Book of Lolgorian Police Station.
193. The witness referred to the entry number 14/16/12/2020 reported by one Samson Ochiri who is the Chief Executive Officer of Social Empowerment which was a Community Based Organisation.
194. The entry on the occurrence Book indicated that Samson Ochiri in the company of the 3rd Defendant while visiting a parcel of land which they had sold were attacked by a group of people whom they could not identify.
195. The Occurrence Book further indicated that the unknown persons were dressed in Masai attire.
196. As a result of this attack by these unknown persons, their motor vehicle registration number KAS 030 B Mitsubishi Double Cab was smashed on the windscreen and the occupants suffered multiple injuries.
197. Upon reporting the incidence, the victims never returned pursue the complaint.
198. According to the Occurrence Book, the parcel of land to be purchased belonged to the 3rd Defendant.
199. In Cross-examination, the witness informed the Court that the incidence of attack occurred on the December 16, 2020 at 1500 hrs.
200. According to the Occurrence Book, the incidence was not reported by Olakuyia Soitat Siteti.
201. Similarly, the Occurrence Book shows that the incidence did not occur on April 2021.
202. According to the witness, the investigations emanating from this report were still under investigations because arrests had not been made so far.
203. The witness in his opinion stated that he was not sure that the Plaintiff is the one who attacked the 3rd Defendant according to the Occurrence Book.
204. The witness confirmed that he did not visit the Crime scene.



205. Similarly, the witness confirmed that the verification of the ownership to the motor vehicle has not been complete.
206. According to Occurrence Book, the alleged offence was malicious damage and assault.
207. After this witness, the Defence also closed its case.
208. Parties were then given directions to prepare, file and exchange submissions which directions were compiled hence this judgement.

Analysis & Determination.

209. The Court upon looking at the pleadings, the evidence adduced in Court and the submissions by the parties, the main issue for determination is whether or not the Plaintiff has satisfied the ingredients of adverse possession.
210. The Plaintiff herein has invoked Order 37 Rule 7 of the *Civil Procedure Rules*, Section 38 of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*, No 3 of 2012.
211. Order 37 Rule 7 of the *Civil Procedure Rules* provides that a claim of Adverse possession should be made by way of an originating Summons supported by an affidavit to which an extract of the title to the land in question is annexed.
212. Section 38 of the *Limitation of Actions Act*, Cap 22 on the other hand provides that where a person claims to have become entitled by way of adverse possession, then such a claimant is entitled to apply to this Court for an order that he be registered as the proprietor of the land.
213. Section 28(h) of the *Land Registration Act*, No 3 of 2012 further provides for rights acquired or in the process of being acquired by virtue of written law relating to the limitation of actions or by prescription.
214. The legal framework around claims of adverse possession has been discussed in various legal determinations.
215. In the celebrated case of *Mtana Lewa-versus- Kabindi Ngala Mwagandi*(2015) eKLR, the ingredients of adverse possession were highlighted 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.”
216. These above-mentioned ingredients of adverse possession were further discussed and simplified by the Court of Appeal sitting at Kisumu in Civil Application No 110 of 2016 *Richard Wefwafwa Songoi-versus- Ben Munyifwa Songoi*(2020) eKLR which held that for a person to establish a claim of adverse possession, the following broad principles must be satisfied; -
 - 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.
217. In this case, the Court shall apply the evidence adduced at the trial to determine the above ingredients of adverse possession claimed by the Plaintiff in the originating Summons.

A. On what date did the plaintiff came into possession of the suit property?

218. Looking at the testimony of the Plaintiff herein, the year of coming into possession of the suit property has been provided as 2004.
219. The Plaintiff's two witnesses who are childhood friends have also testified that possession and occupation of the suit property commenced in the year 2004.
220. The Plaintiff has placed before the Court coloured pictures of the developments including temporary house with mabati roofing, wooden cattle pen and some cultivated portion of land with trees at the background as Plaintiff's exhibit 2 (a) (b) (c) and (d).
221. The Plaintiff's Witness No. 2 informed the Court that the Plaintiff was residing with his brother who thereafter vacated the suit property.
222. On cross-examination, the witness could not remember the name of the Plaintiff's brother.
223. The Plaintiff's 2nd Witness could not remember when the Plaintiff got married or got his first-born child.
224. Further to this, the Plaintiff's 2nd witness could not give the Court dates of anything that the Plaintiff constructed and/or developed on the suit property.
225. The Plaintiff's 3rd witness only stated that the Plaintiff has been in occupation since the year 2004.
226. On cross-examination, the Plaintiff's 3rd witness admitted that he does not know the actual registration number of the suit property but was informed by the Plaintiff that where he occupied was Plot No 210.
227. The Defendants on the other hand have disputed the allegation that the Plaintiff has been in occupation of the suit property from the year 2004.
228. The Defence 1st witness who is also the 3rd Defendant testified that the Defendants have been in occupation of the suit property doing farming and other activities since 1983 when they acquired proprietorship rights and obtained their title to the same in the year 1998.
229. The Defence 1st witness informed the Court that there was a temporary house built on the suit property which he suspects was demolished by the Plaintiff although he did not witness the same.
230. However, the Defence 1st witness admitted that the suit property is currently not occupied having relocated back to Kisii sometime ago although that did not mean that he relinquished his occupation thereof.
231. The Defence 1st witness stated that he only came to know about the Plaintiff's entry and/or occupation of the suit property in the year 2021 when they visited the ground with the new purchaser known as Olakuya Saitat Siteti and were chased away by unknown persons with Maasai attire.
232. The Defence 1st witness visited the offices of the local administration and was given a letter on the November 19, 2021 confirming the ownership of the suit property in the name of the Defendants.
233. The Defence 2nd Witness who is a neighbour to the Defendants on the ground also testified and confirmed the ownership and occupation of the Defendants.



234. The Defence 2nd Witness in his testimony informed the Court that the Defendants vacated the suit property about 8 or 10 years ago when there was tribal clashes between the Maasai community and other communities.
235. Due to this hostility, the 3rd Defendant relocated to Kisii County and did not have a permanent occupation of the suit property.
236. The Defence 2nd Witness stated that the Plaintiff's entry and occupation on the suit property was facilitated by tribal hostilities which forced members of other communities which were not Maasai to be denied entry, use and/or occupation of their properties.
237. The Defence 3rd Witness also challenged the Plaintiff's claim that he has been in occupation of the suit property since 2004.
238. The Defence 3rd witness stated that he inspected the suit property right before purchasing the same and did not find the Plaintiff on the ground.
239. The Defence 3rd witness testimony was that he came to learn about the Plaintiff's entry and occupation on the suit property when he visited the ground with the 3rd Defendant in the year 2021.
240. The Defence 3rd witness further testified that he has taken up possession of the suit property and if the Plaintiff is within it, then such entry and occupation must have happened less than 2 years ago.
241. Section 7 of the *Limitation of Actions Act*, Cap 22 provides as follows; -
- “An action may not be brought by any person to recover land after the end of Twelve (12) years from the date in which the right of action accrued to him or, if its first accrued to some person through whom he claims, to that person.”
242. Clearly therefore, for a Claimant in adverse possession to succeed in a claim of adverse possession, he or she must provide a date and/or event that is ascertainable by the Court in computing time under Section 7 of the *Limitation of Actions Act*, Cap 22.
243. Under Section 107 (1) and (2) of the *Evidence Act*, Cap 80, the law provides as follows; -
- “(1) whoever desires any court to give judgement as to any legal rights or liabilities dependent on the existence of facts which she/he asserts must prove that those facts exist.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
244. In this particular case, the burden of proving that possession took place in the year 2004 rests with the Plaintiff.
245. The photographs produced as Plaintiff's Exhibits 2 (a) (b) (c) and (d) as evidence of occupation or possession do not provide any information as to when they were taken, which land reference the structures contained therein were developed or any relationship with the suit property herein.
246. Unfortunately, the Plaintiff did not find it necessary to call any person in the community like a village elder or member of the local administration of truly verify the act of entry and/or occupation on the suit property.



247. The 2 witnesses that Plaintiff called did not add any value because they did not know basic information like when their own friend was married, or bore his first child and/or built the temporary house purported to be on the suit property.
248. The Plaintiff's witnesses' evidence was very shallow without any collaboration of the facts alleged by the Plaintiff.
249. In conclusion therefore, the Court has not found any evidence placed before the Court by the Plaintiff to confirm that indeed the entry and/or occupation of the suit property occurred in the year 2004 as alleged.

B. What was the nature of his possession?

250. The second limb to be analysed is what nature of possession the Plaintiff enjoys.
251. According to the evidence of the Plaintiff as well as the 2 witnesses thereof, the possession was open and without force.
252. The evidence adduced by all the Plaintiff's witnesses is that the Plaintiff found a vacate parcel of land and moved in.
253. The entry and/or occupation of the suit property was by way of building a temporary house, wooden cattle pen and cultivating a portion of the suit property.
254. The Plaintiff's evidence confirmed that the entry and/or occupation was not based on any Agreement for Sale, adjudication and/or inheritance from the Plaintiff's father.
255. The Defendant's witnesses have also admitted that indeed, there is no Agreement For Sale, adjudication and/or inheritance from the Plaintiff's family that can give rise to any legal ownership of the suit property.
256. Although the date of entry by the Plaintiff into the suit property cannot be satisfactorily ascertained, the existence of some form of development has been confirmed by all the witnesses in this suit.
257. The Court therefore finds that the nature of entry and/or possession by the Plaintiff was open and/or without secrecy as required by law.

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

258. On this aspect, the Plaintiff as well as the witnesses testified that the entry was simply done because the suit property was vacant.
259. The Plaintiff's testimony was that at the time of entry, he did not know who the suit property belonged to and/or its title number.
260. The Plaintiff's 2nd witness confirmed the Plaintiff's evidence that it was a normal occurrence for any person to enter into any vacant property and develop the same without any form of ownership.
261. The Plaintiff during his evidence in chief further testified that he did not know the 3rd Defendant and/or any of the other Defendants prior to the institution of this suit.
262. The 3rd Defendant and on behalf of the other Defendants denied also being familiar with the Plaintiff herein.
263. According to the evidence adduced at the hearing, both the Plaintiff and the Defendants did not know one another prior to at least the year 2020.



264. In other words, it is clear from the Plaintiff's evidence that the entry and/or possession of the suit property was without the knowledge of the Defendants until the year 2021 when the 3rd Defendant visited the ground in the presence of the purchaser Olakuya Soitat Siteti.
265. In the case of *Kimani Ruchire-versus-swift Rutherford& Co Limited* (1980) KLR, 10, the Judge held as follows; -
- “So, the Plaintiff must show that the Company had knowledge (or means of knowing actual or constructive) of the possession or occupation.”
266. On this aspect, the Court is of the considered view that the Plaintiff has not provided any substantively proof that the Defendants had knowledge of his possession and/or occupation prior to the year 2021 at the very least and therefore has not satisfied this ingredient.

D. For how long his possession has continued?

267. As regards this aspect, the Court is guided by the finding Aspect A.
268. The Court made a finding hereinabove that the Plaintiff had not placed any evidence to proof that the entry and possession of the suit property occurred in the year 2004.
269. Nevertheless, thereafter in aspect 2, the Court made a finding that indeed the Plaintiff has developed some structures like the temporary house, the wooden cattle pen and the portion of cultivated land.
270. According to the evidence of the Defence 2nd witness, the developments done by the Plaintiff cannot have occurred before the tribal clashes that occurred about 8 to 10 years ago which necessitated the Defendants to vacate the suit property.
271. The Defence 3rd witness went further to indicate that at the time he first visited the suit property in 2020 prior to the execution of the Agreement For Sale in the year 2021, he did not find the Plaintiff on the ground and/or notice any developments therein.
272. According to the Defence 3rd Witness, if any developments were done by the Plaintiff, then such developments were done after the year 2020 and not earlier.
273. Considering all these contracting facts and the failure by the Plaintiff to provide sufficient evidence on the date upon entry and occupation, then any computation of the period relating to the Plaintiff's occupation would be speculative and without reasonable basis.
274. In the Court's considered view, the Plaintiff has failed to establish the necessary date or event to proof entry and/or possession and activate the computation of time as required in this aspect of adverse possession.

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

275. The last aspect in a claim of adverse possession is a confirmation that such an occupation and/or possession has occurred openly for a period of 12 years from the time of entry.
276. While in Aspect No 2, the Court has held that the Plaintiff's occupation is open and without secrecy, the Court in Aspect No 1, 3 & 4 has also made findings that the period of Twelve (12) years are required in Section 7 of the *Limitation of Actions Act*, Cap 22 cannot be ascertained from the evidence produced in Court.



277. The Plaintiff has failed to provide any prove to confirm the entry and occupation of the suit property in the year 2004 as alleged in the Originating Summons.
278. Consequently therefore, the Court's considered view is that again the Plaintiff has failed to prove that his possession on the suit property has been open and undisturbed for the requisite 12 years.
279. In conclusion therefore, the Court makes the following Orders as appertains the Originating Summons dated August 27, 2021;-
- i. The Originating Summons dated August 27, 2021 be and is hereby dismissed.
 - ii. The Plaintiff herein shall bear the costs of this suit.
 - iii. The Plaintiff be and is hereby ordered to demolish, bring down, remove, vacate and/or yield vacant possession of any portion of land in his occupation, or through agents, servants, employees and/or any other person claiming any ownership and/or occupational rights on the suit property known as Transmara/moyoi/210 within the Next Sixty (60) Days from the date of this judgement.
 - iv. The Plaintiff's himself, its servants, employees, agents and/or any other person claiming any ownership and/or occupational rights thereof be and are hereby restrained and/or prohibited by way of a permanent injunction from claiming, entering, encroaching, obstructing, trespassing, occupying and/or in whatsoever manner interfering with the quiet occupation and/or possession the suit property known as Transmara/moyoi/210.
 - v. In the event the Plaintiff failed to comply with Order No 2 hereinabove within the prescribed time, an Order of eviction shall automatically issue upon lapse of the sixty (60) days period provided therein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 1ST NOVEMBER 2022.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno / Ms. Mempe

Advocate for the applicant: Ms. Wekesa

Advocate for the respondent: Ms. Mireri H/b Ochwangi

