



**Ikileng v Shihani (Environment and Land Case E009 of 2023)  
[2025] KEELC 6560 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6560 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND CASE E009 OF 2023**

**BN OLAO, J**

**SEPTEMBER 30, 2025**

**BETWEEN**

**ELISEYO OUMKULE IKILENG ..... PLAINTIFF**

**AND**

**MOSES ISUNDU SHIHANI ..... DEFENDANT**

**JUDGMENT**

1. Eliseyo Omukule Ikileng (the Plaintiff herein) first moved to this Court while acting in person and vide his Originating Summons dated 14<sup>th</sup> March 2023 in which he impleaded Augustine Akuni Juma and Moses Isindu Shihani as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. He sought judgment against the two Defendants that he had acquired by way of adverse possession the land parcel No South Teso/Amukura/2865 (the suit land) having been in open and notorious possession thereof for a period exceeding 12 years since 1995. The Originating Summons was subsequently amended on 19<sup>th</sup> March 2024 after he had instructed the firm of B. M. Ouma & Company Advocates to act for him. It is not necessary to rehash the pleadings in the Originating Summons dated 14<sup>th</sup> March 2023 save to add that the name of the 1<sup>st</sup> Defendant was deleted leaving only Moses Isindu Shihani who is therefore the Defendant or purposes of this judgment.
2. The Originating Summons was however accompanied by a verifying affidavit and supporting affidavit both dated 14<sup>th</sup> March 2023.
3. In the supporting affidavit, the Plaintiff deposed, inter alia, that the suit land was handed over to him in 1995 by his late father's brother whereupon he took possession and built his home where he has been living for a period of over 28 years as per the photographs which were however not attached though purportedly marked as EO1. That he has been in actual, open and uninterrupted possession and use of the suit land and therefore sought orders that the rights of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were extinguished upon the expiry of 12 years from the date upon which he came into possession of the suit land. He also sought orders that the Defendants be perpetually barred from taking and/or using the suit land



since he has been in possession thereof since 1995 upto the date for filing this suit. The Defendants should also be ordered to execute all the relevant documents to facilitate the transfer of the suit land in his name and in default, the Deputy Registrar of this Court should do so. Finally, the Defendants should meet the costs of the suit.

4. Annexed to this Originating Summons is a copy of the Green Card to the suit land showing that it was first registered in the name of the 1<sup>st</sup> Defendant on 13<sup>th</sup> January 2000 and thereafter on 23<sup>rd</sup> January 2023 it was transferred to the 2<sup>nd</sup> Defendant.
5. In response to that Originating Summons, the Defendants filed separate replying affidavits.
6. In his replying affidavit dated 20<sup>th</sup> December 2023 but filed on 19<sup>th</sup> December 2023 the 1<sup>st</sup> Defendant deposed, inter alia that he had sold his interest in the suit land to the 2<sup>nd</sup> Defendant. That he had previously had a dispute over the suit land with the Plaintiff in a Tribunal and therefore this suit is res judicata following the decision of the Land Dispute Tribunal which was adopted as a decision of the Court. It is therefore strange that the Plaintiff has filed this suit yet the Tribunal's award was in his favour. This suit should therefore be struck out.
7. In his replying affidavit dated 18<sup>th</sup> December 2023, the 2<sup>nd</sup> Defendant deposed, inter alia, that he is the registered proprietor of the suit land as per the annexed copy of title deed (annexture MIS-1) which he purchased from the 1<sup>st</sup> Defendant vide an agreement (annexture MIS-2). At the time of the said transaction which is 5<sup>th</sup> January 2023 as per the sale agreement, the 1<sup>st</sup> Defendant was in active occupation and use of the suit land. It is not therefore true that the Plaintiff has been in active occupation and use of the suit land on which the 1<sup>st</sup> Defendant had planted crops and which the 2<sup>nd</sup> Defendant continues to do. That there have been cases between the Plaintiff and the 1<sup>st</sup> Defendant over the use and occupation of the suit land and which have been arbitrated over by Land Disputes Tribunals as per annexures MIS-3 and MIS-4. That the said Tribunals ordered for the cancellation of the title to the suit land which decision was beyond their jurisdiction. However, the 1<sup>st</sup> Defendant continued to occupy the suit land from 2007 to 2023 when he sold it to the 2<sup>nd</sup> Defendant and complied with all relevant procedures. That he has remained on the suit land which is clearly demarcated and therefore, the Plaintiff has not met the threshold of the orders sought. His suit should be dismissed.
8. The 2<sup>nd</sup> Defendant annexed the following documents to his replying affidavit:
  1. Copy of title deed to the land parcel No South Teso/Amukura/2865.
  2. Copy of sale agreement dated 5<sup>th</sup> January 2023 between the 1<sup>st</sup> Defendant as vendor and the 2<sup>nd</sup> Defendant as purchaser for the land parcel No South Teso/Amukura/2865.
  3. Copy of the Proceedings of the Amukura Land Disputes Tribunal over the land parcel No South Teso/Amukura/2865 between the Plaintiff (as Applicant) and the 1<sup>st</sup> Defendant (as objector) and awarding it to the Plaintiff.
  4. Copy of the order issued in Busia Principal Magistrate Court in case No 72 of 2007 adopting the award of the Tribunal as a judgment of the Court.
  5. Copy of the application for consent signed by the Executive Officer of Busia Court for the transfer of the land parcel No South Teso/Amukura/2865 to the Plaintiff.
  6. Copy of letter of consent for the transfer of the land parcel No South Teso/Amukura/2865 to the Plaintiff.



7. Copy of transfer of land form in favour of the Plaintiff in respect of the land parcel No South Teso/Amukura/2865.

The 2<sup>nd</sup> Defendant also filed the statement of his witness Isaac Wafula Masinde but during the trial, this witness did not testify.

9. Having instructed counsel, and with the consent of the parties on 25<sup>th</sup> April 2024, the Plaintiff filed an amended Originating Summons dated 19<sup>th</sup> March 2024 in which Moses Isindu Shihani previously the 2<sup>nd</sup> Defendant (herein now the Defendant) remained as the only Defendant. By that amended Originating Summons, the Plaintiff citing the provisions of Sections 7 and 38 of the Limitation of Action Act sought a determination of the following questions against the Defendant with respect to the suit land:

1. Whether the Plaintiff has been in open and notorious possession of a portion of land measuring 0.23HA comprised in L.R No South Teso/Amukura/2865 since 1995 to date which is a period exceeding 12 years.
2. Whether the Defendant's title to a portion of L.R No South Teso/Amukura/2865 measuring 0.23HA has become extinguished upon expiry of 12 years from the time the Plaintiff went into possession of the said land.
3. Whether the Plaintiff has now acquired title to the said land by virtue of adverse possession.
4. Whether the registration of Moses Isindu Shihani as owner of L.R No South Teso/Amukura/2865 should be cancelled and the Plaintiff be registered as the owner of a portion thereof measuring 0.23HA.
5. Whether the Defendant, his agents, servants and/workers be restrained permanently by an injunction from interfering with the said parcel of land.
6. Who should pay the costs of this case.
7. That this Honourable Court do grant such and further orders as it may deem fit.

10. Arising out of the determination of those questions, the Plaintiff sought judgment against the Defendant in the following terms:

- a. The rights of Moses Isindu Shihani as the owner of L.R No South Teso/Amukura/2865 measuring 0.23HA got extinguished by adverse possession upon expiry of 12 years from the date the Plaintiff came into possession.
- b. That the Defendant be perpetually barred from using L.R No South Teso/Amukura/2865 measuring 0.23HA which has been in possession of the Plaintiff since 1995.
- c. That the Plaintiff be registered as the proprietor of a portion of land measuring 0.23HA comprised in L.R No South Teso/Amukura/2865.
- d. That the Defendant do execute all the relevant documents to facilitate the transfer of a portion of land measuring 0.23HA comprised in L.R No South Teso/Amukura/2865 into the name of the Plaintiff and that in default, the Deputy Registrar do execute on behalf of the Defendant.
- e. That the Defendant do pay the costs of the cause.



11. The amended Originating Summons is accompanied by the Plaintiff's statement and a verifying affidavit as well as statements of his two witnesses namely Boniface Anyiko Wedodo (PW2) and John Ojwang Emukule (DW3) both dated 19<sup>th</sup> March 2024.
12. In his statement Boniface Anyiko Wedodo (PW2) states that he has known the Plaintiff as his neighbor since the 1990's when he purchased the suit land where he has been living with his family. That the Plaintiff and his family have continued to utilize the suit land for growing food crops openly, peacefully, continuously and without interruption from anybody and all his friends, relatives and neighbours know that the suit land belongs to the Plaintiff.
13. On his part, John Ojwang Emukule (PW3) who is the son to the Plaintiff states that he has been staying on the suit land from the time he was born in 1986. That his family is the one utilizing the suit land where they have even buried their elders and which they consider to be their home and the Defendants has never interfered with their possession thereof for a period exceeding 12 years.
14. In addition to his supporting affidavit filed earlier, the Plaintiff also annexed to his amended Originating Summons a statement dated 22<sup>nd</sup> January 2024 in which he basically rehashed the contents of his supporting affidavit dated 14<sup>th</sup> March 2023. He stated that he has lived on the suit land since 1995 when it was handed over to his father one Akure Engwali Aremi. That he has been developing and cultivating the suit land and the Defendant obtained the title thereto without consulting him. He therefore complained to the Land Registrar Busia who confirmed that he is the one on the suit land and boundaries were established. The Land Registrar Busia therefore asked him to continue using the suit land until any suit is filed. Meanwhile, Augustine Akuni Juma who had been sued in this suit went missing after it was established that he had obtained the title deed to the suit land fraudulently.
15. The Plaintiff filed two lists of documents one dated 14<sup>th</sup> April 2023 and a further list of document dated 22<sup>nd</sup> January 2024.
16. The list of documents dated 14<sup>th</sup> April 2023 comprised the following:
  1. Copy of letter dated 11<sup>th</sup> August 1997 from the Assistant Chief Kwangamor sub-location addressed to the Registrar of Birth and Death Busia.
  2. Copy of letter from the Chief Kwangamor location dated 28<sup>th</sup> February 2002 and addressed to the District Officer Amukura.
  3. Copy of Notice to attend District Commissioner's, Office addressed to Augustine Akuni Juma and dated 20<sup>th</sup> September 2005.
  4. Copy of Proceedings and award of the Amukura Land Disputes Tribunal between the Plaintiff and Augustine Akuni Juma dated 9<sup>th</sup> September 2005 over the land parcel No South Teso/Amukura/2865.
  5. Copy of order dated 22<sup>nd</sup> September 2008 and issued in Busia Principal Magistrate's Court Case No 72 of 2007 adopting the award of the Amukura Land Disputes Tribunal with respect to the land parcel No South Teso/Amukura/2865.
  6. Copy of order dated 5<sup>th</sup> June 2008 and issued in Busia Principal Magistrate's Court Case No 72 of 2007 cancelling the title deed of Augustine Akuni Juma for the land parcel No South Teso/Amukura/2865 and awarding the same to the Plaintiff.



7. Copy of the application dated 16<sup>th</sup> June 2008 by the Plaintiff seeking for an order that the Executive Officer Busia Court signs the transfer documents for the land parcel No South Teso/Amukura/2865 to his name in place of Augustine Akuni Juma who had declined to do so.
8. Copy of transfer of land form for the land parcel No South Teso/Amukura/2865 in favour of the Plaintiff.

In a further list of documents dated 22<sup>nd</sup> February 2024, the Plaintiff filed the following documents:

1. Copy of Minutes of clan meeting held on 11<sup>th</sup> April 1996.
  2. Copy of letter dated 11<sup>th</sup> August 1997 from the Assistant Chief Kwangamor sub-location addressed to the Registrar of Births and Death Busia.
  3. Copy of letter dated 18<sup>th</sup> January 2000 from the Chief Kwangamor location addressed to the Land Registrar Busia.
  4. Copy of agreement between the Plaintiff and Augustine Akuni Juma dated 21<sup>st</sup> December 2002 by which the letter agreed to avail the original title deed to facilitate reconciliation between him and the Plaintiff.
  5. Copy of letter dated 3<sup>rd</sup> February 2023 from Assistant Chief Akobwait Sub-location addressed to the Plaintiff and others advising them that the District Surveyor would be on the land parcel No South Teso/Amukura/2865 on 4<sup>th</sup> February 2023 to confirm the boundary.
  6. Copy of Notice to register a restriction on the land parcel No South Teso/Amukura/2865 issued by the Land Registrar and addressed to Augustine Akuni Juma as proprietor and the Plaintiff as an Interested Party.
  7. Copy of letter dated 11<sup>th</sup> September 2023 from the Chief Kwangamor Location and addressed to the OCS Amukura Police Station under reference L.R No South Teso/Amukura/2865.
17. The trial commenced on 12<sup>th</sup> February 2025 and was concluded on the same day.
  18. The Plaintiff adopted as his testimony the contents of his supporting affidavit dated 14<sup>th</sup> March 2023 and also produced as his documentary evidence the documents filed vide his list of documents dated 14<sup>th</sup> April 2023. It is instructive to note that he did not adopt as his evidence his statement dated 22<sup>nd</sup> January 2024 nor produce his further documents as per the list also dated 22<sup>nd</sup> January 2024. He called as his witnesses Boniface Anyiko Wedodo (PW2) and John Ojwang Emukule (PW3) who also adopted as their testimony the contents of their statement already referred to above.
  19. The Defendant was the only witness who testified in support of his case. He too adopted as his testimony the contents of his replying affidavit dated 18<sup>th</sup> December 2023 and produced as his documentary evidence the documents annexed to the said replying affidavit.
  20. Submissions were thereafter filed both by Mr Ouma instructed by the firm of B. M. Ouma & Company Advocates for the Plaintiff and by Mr Okutta instructed by the firm of Ouma-Okutta & Associates Advocates for the Defendant.
  21. I have considered the evidence by the parties as well as the submissions by counsel.



22. Before I delve into the merits or otherwise of the Plaintiff's claim, I must first address some jurisdictional issues. It is settled law that an issue of jurisdiction, however raised, must be determined first because without jurisdiction, this Court must down it's tools – Owners of the Motor Vessel "lillian S" -V- Caltex Oil Kenya Ltd C.A. Civil Appeal No 50 of 1989 KECA 48 KLR [1989 KLR1].
23. In paragraphs 6 and 13 of his replying affidavit, the Defendant deposed that there has been previous litigation between the Plaintiff and Augustine Akunji Juma over the suit land and which was determined by the Amukura Land Disputes Tribunal hence rendering this case res judicata. Indeed, the award of the said Tribunal and the Court order adopting it as a judgment of the Court are among the documents produced as documentary evidence. In it's award, the Tribunal directed and ordered as follows:

“Order: the Applicant Eluseyo Omukule Ikileng awarded 0.23H. We further recommend that the Title Deed issued to the objector Augustine Akuni Juma be cancelled.”

Res judicata is provided for under Section 7 of the *Civil Procedure Act* as follows:

- 7: “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

In the case of Pop-in (kenya) Ltd & Others -V- Habib Bank A.G. Zurich 1990 KLR, the Court of Appeal held that the plea of res judicata does not only apply to points specifically pleaded by the parties and upon which the Court is actually required to form an opinion and pronounce judgment but to every point which property belongs to the subject under litigation. See also the case of Kenya Commercial Bank Ltd -V- Muiru Coffee Estate Ltd & Another 2016 where the Supreme Court rendered itself as follows:

“Res judicata is a doctrine of substantive law it's essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.

The doctrine of res judicata, in effect, allows a litigant only one bit at the cherry. It prevents a litigant or persons claiming under the same title, from returning to the Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process.”

It is clear from Section 7 of the *Civil Procedure Act* that before the doctrine of res judicata can be successfully invoked to defeat a suit, the party raising it must prove the following:



1. That the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.
2. The former suit must have been between the same parties or parties under whom they or any of them claim.
3. The parties must have litigated under the same title.
4. The Court which decided the former suit must have been competent to do so.
5. The former suit must have been heard and finally decided by that Court.

There is no doubt that the dispute involving the suit land was heard and determined by the Amukura Land Disputes Tribunal which rendered its award. However, that dispute was between the Plaintiff and Augustine Akuni Juma who was initially the 1<sup>st</sup> Defendant in the matter before his name was deleted in the amended Originating Summons. The Defendant was not a party in that suit and there is no evidence that he held the title thereto in common for himself with the Defendant herein as provided under explanation number 6 of Section 7 of the [Civil Procedure Act](#) which reads:

- 6: “Where persons litigate bona fide in respect of a public right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the person so litigating.”

Secondly the Amukura Land Disputes Tribunal which had determined the dispute between the Plaintiff and Augustine Akuni Juma and which proceeded to order for the cancellation of the title to the suit land held by the said Augustine Akuni Juma was not a competent Court as it had no jurisdiction to order for the cancellation of a title to land. Its jurisdiction was circumscribed under Section 3(1) of the



now repealed Land Disputes Tribunal Act to determination of boundaries, a claim to occupy land or trespass. Clearly, it was not the mandate of the said Tribunal to order for cancellation of any title to land. And since the Tribunal acted in excess of its jurisdiction, it was not a competent Court. Its award cannot qualify as res judicata because for the doctrine of res judicata to apply, the Court which heard and determined the previous suit must have been a competent Court as is clear from Section 7 of the *Civil Procedure Act* cited above. This suit is therefore not res judicata.

24. The other issue raised by the Defendant in his submissions at paragraph 18(1) is that this suit is incompetent as it is not accompanied by a supporting affidavit. That is not correct because when the Plaintiff filed his Originating Summons dated 14<sup>th</sup> March 2023, it was accompanied by a supporting affidavit of even date. And when he amended it on 19<sup>th</sup> March 2024, it was also accompanied by his statement dated 22<sup>nd</sup> January 2024. Nothing really turns on that objection.
25. It is also submitted by the Defendant in paragraph 18(2) of his submissions that the Plaintiff did not annex or provide a copy of the certificate of Official Search for the suit land. Again that is not correct because the Originating Summons filed on 15<sup>th</sup> March 2023 had annexed to it a copy of the Green Card to the suit land dated 3<sup>rd</sup> March 2023 and signed by the Land Registrar. The other issues raised in the Defendant's replying affidavit are not really jurisdictional matters. I shall determine them as I consider the merits or otherwise of the Plaintiff's claim.
26. The Plaintiff has anchored his claim on Section 38(1) of the *Limitation of Actions Act*. That Section provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

The doctrine of adverse possession has been discussed by the superior Court in many cases. In *Kasuve - V- Mwaani Investments Ltd & Others* 2004 I KLR [2004 KECA 161 KLR], it was held inter alia, that:

“Section 38(1) of the *Limitation of Actions Act* chapter 22 Laws of Kenya authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor. And in order to be entitled to the land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after disposing the owner or by the discontinuation of possession of possession on his own volition – *Wanje -V- Sakwa* (No 2) 1984 KLR 284. A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere



change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession – (see *Githu -V- Ndeete* 1984 KLR 776.”

27. In the Supreme Court of India case of *Karnataka Board of Wakf -V- Government of India & Others* 2004 10 SCC 779, the essentials of adverse possession were discussed as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*,” that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

See also *Kimani Ruchine -V- Swift Rutherford & Co Ltd* 1980 KLR 10 [1977 KEHC 30 KLR], [NBI High Court Civil Case No 1401 of 1971 where KNELLER J said:

“The Plaintiffs have to prove that they have used this land which they claim as of right; *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion). So the Plaintiffs must show that the Company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration; see *Wanyoike Gathure -V- Beverly* 1965 E.A 514, 518, 519, per MILES J.”

The Judge went on to add that:

“Possession can take different forms such as fencing or cultivation. It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because these are acts which are not inconsistent with the enjoyment of land by the person seemingly entitled to it. The resources or status of the claimants is not a factor in the correct approach to deciding what constitutes a sufficient degree of sole possession and user. The standard is an objective one and related to the nature and situation of the land. Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession, then it should be definite as to area and to time; see generally *West Bank Estates Ltd -V- Arthur* 1966 3 WLR 750.”

As to what amounts to adverse possession, Lindley Mr Put it as follows in the case of *Littledale -V- Liverpool* 1900 I CH 19:

“In order to acquire by the statute of Limitations a title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it...”

And in the case of *Leigh -V- Jack* 1897 5 EXD 264, Bramwel LJ referring to the statute of Limitations had this to say:

“Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. If this is the right way to approach the problem the question becomes; ‘Has



the claimant proved that the title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period? Rather than ‘Has the claimant proved that he (through himself or others on whose possession he can rely) has been in possession for the requisite number of years?’”

The above propositions were cited with approval by the Court of Appeal in the case of *Sisto Wambugu -V- Kamau Njuguna C.A. Civil Appeal No 10 of 1982 [1983 KECA 69 KLR]*. So essentially, the test is whether the title holder has been dispossessed of the land by the claimant. And as was further held in the case of *Mweu -V- Kiv Ranching & Farming Co-operative Society Ltd 1985 KLR 430*;

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

I shall be guided by the above precedents among others in determining the Plaintiff’s claim to the suit land by way of adverse possession.

28. The basis of the Plaintiff’s claim is that he has been living on the suit land since 1995 when it was handed over to him by his father’s brother. This is how he has deposed in paragraph 3, 4 and 5 of his supporting affidavit dated 14<sup>th</sup> March 2023 and whose contents he adopted as his testimony during the trial:

3: “That sometime in 1995 my father’s brother handed me the parcel of land L.R No South Teso/Amukura/2805 and handed the 1<sup>st</sup> Respondent his share which he later on sold.”

4: “That I immediately took open possession of my share and built my home thereon in the year 1995 and I have been living there todate, a period of over 28 years. Attached and marked E01-1 are photographs.” Emphasis mine.

5: “That I have been in open and uninterrupted possession and use of a parcel of land measuring 0.23HA comprising of L.R No South Teso/Amukura/2865”.

When the Plaintiff amended his Originating Summons on 19<sup>th</sup> March 2024, he set out in paragraph 1 thereof the following as one of the issues for this Court’s determination:

1: “Whether the Applicant has been in open and notorious possession of a portion of land measuring 0.23HA comprised in L.R No South Teso/Amukura/2865 since the year 1995 todate which is a period exceeding 12 years.”

And in his statement dated 22<sup>nd</sup> January 2024 filed together with the amended Originating Summons, he states thus in paragraph 1:

1: “I Eliseyo Omukule Ikileng residing in Akobwait sub-location of Teso South sub-County in Busia County is the Applicant in this suit and also the occupant who stays on parcel No L.R South Teso/Amukura/2865 since 1995 to-date. A period of almost 28 years.” Emphasis mine.

The Plaintiff’s witness Boniface Anyiko Wedodo (PW2) deposed as follows in paragraphs 2 and 3 of his statement dated 19<sup>th</sup> March 2024 and which he adopted as his evidence during the trial;

2: “That I know one Eliseo Emukule the Applicant herein as he is my neighbor.”



3: “That since the year 1990’s when the Applicant bought the suit parcel, the Applicant and his family have been staying in the suit land in absence of the Respondent herein.” Emphasis mine.

On his part, John Ojwangi Emukule (PW3) who is the Plaintiff’s son, stated as follows in paragraphs 2, 3 and 4 of his statement dated 19<sup>th</sup> March 2024 also in support of the Plaintiff’s case;

2: “That L.R No South Teso/Amukura/2865 is my ancestral land.”

3: “That I know Eliseo Emukule the Applicant herein as he is my father.”

4: “That since I was born in the year 1980, my family and I have been staying in the suit land in absence of the Respondent herein.” Emphasis mine.

It is clear from the above that the fulcrum of the Plaintiff’s case is that he and his family have been living on the suit land since 1980-1995.

29. In opposition to that claim, however, the Defendant filed a replying affidavit dated 18<sup>th</sup> December 2023 and in paragraphs 2, 3, 4 and 5 thereof, he deposed as follows:

2: “That I am the registered owner of title No South Teso/Amukura/2865 – see copy of title MIS-1.”

3: “That I bought the said parcel of land from the previous owner the 1<sup>st</sup> Respondent (see copy of agreement as MIS-2.”

4: “That prior to by (sic) purchasing the interest, the 1<sup>st</sup> Respondent was in active occupation and use of the portion bought and had planted crops on it an exercise which I intent (sic) and has since been doing on the ground.”

5: “That it is not true the Applicant has been in active occupation and use of same.”

Although the Plaintiff claims to have been living on the suit land since 1995 and in his supporting affidavit dated 14<sup>th</sup> March 2023 he purported to annex photographs of his home marked E01-1, no such photographs were annexed either in his Originating Summons dated 14<sup>th</sup> March 2023 nor in his amended Originating Summons dated 19<sup>th</sup> March 2024. And in his submissions at paragraph 18(3) counsel for the Defendant states as follows:

“The Applicant failed to exhibit a copy of survey report and or any photograph in proof of the portion he states he is in possession of out of the land parcel South Teso/Amukura/2865 since his pleadings disclose a claim of a portion by parcel No South Teso/Amukura/2865 and not the entire parcel. He is (sic) pleadings at variance a claim for apportion of the entire land and in some instances the whole parcel (parties are bound by their pleadings).”

On his part, counsel for the Plaintiff submitted in paragraph 6.1(c) of his submission thus:

(c) “That the Applicant has been in possession of the suit land since 1995 todate un-interrupted.”



The law is that he who alleges must prove. The Plaintiff having alleged that he and his family have been living on the suit land since 1995, the onus was on him to prove the same. Section 107 (1) of the Evidence Act provides that:

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Having asserted that he has “built my home thereon in the year 1995 and have been living there todate a period of over 28 years” (paragraph 4 of his affidavit dated 14<sup>th</sup> March 2023), and also that he is the Applicant in this suit “and also the occupant who stays on parcel No L.R South Teso/Amukura/2865 since 1995 todate”, (paragraph 1 of his statement dated 22<sup>nd</sup> January 2024), and the Defendant having denied that assertion, the least that the Plaintiff ought to have done was to avail photographs of the structure in which he and his family have been residing on the suit land since 1995. Surely they must have been living in some house of whatever kind and the fact that he did not avail any photographs of the home where he alleges to have lived on the suit land since 1995, taken together with the Defendant’s assertion that infact the Plaintiff lives on another parcel of land being parcel No South Teso/Amukura/2314, can only lead to the inevitable conclusion that indeed the Plaintiff has no home on the suit land. When the Defendant was cross-examined on 12<sup>th</sup> February 2025 by Mr Ouma counsel for the Plaintiff, he said:

“I know the Plaintiff since 2023. I know the land in dispute is not the suit land. I know the Plaintiff lives on parcel No South Teso/Amukura/2314”.

The Defendant’s case was that it is him who ploughs the suit land from the time he purchased it from Augustine Akuni Juma and having failed to discharge the burden bestowed upon him by the law that he has lived on the suit land since 1995, the Plaintiff’s claim cannot be sustained. As already stated in the case of Mweu -V- Kiu Ranching & Farming Co-operative Society Ltd (supra), “adverse possession is a fact to be observed upon the land”. There being no evidence to prove that the Plaintiff and his family have a home on the suit land since 1995 as pleaded, the Plaintiff’s claim to the suit land by way of adverse possession must collapse.

30. Secondly, even assuming that the Plaintiff was living on the suit land or in any other way occupying it since 1995 as he has alleged, any such occupation was not peaceful. There is evidence from the proceedings between him and the then proprietor of the suit land Augustine Akuni Juma at the Amukura Land Disputes Tribunal filed on 9<sup>th</sup> September 2005 that there was a dispute over the suit land some 10 years into the time when the Plaintiff alleges to have entered the suit land. That was before the expiry of the statutory 12 years period which would have entitled him to any orders that he had acquired the suit land by way of adverse possession. And although the said Tribunal purported to order that the title to the suit land held by the said Augustine Akuni Juma be cancelled, that was an order made without jurisdiction and therefore null and void. Most importantly, the suit in the Amukura Land Disputes Tribunal interrupted the Plaintiff’s occupation and possession of the suit land, if any.



31. The up-shot of all the above is that having considered all the evidence herein, this Court makes the following disposal orders.

1. The Plaintiff's suit is dismissed.
2. Costs to the Defendant.

**BOAZ N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER 2025**

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS  
30<sup>TH</sup> DAY OF SEPTEMBER 2025.**

Right of appeal.

**BOAZ N. OLAO**

**JUDGE**

**30<sup>TH</sup> SEPTEMBER 2025**

