



Omar (Suing as the Personal Representative of the Estate of Omar Marwa Adan) v Mwita & 2 others (Environmental and Land Originating Summons E008 of 2020) [2025] KEELC 6474 (KLR) (8 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6474 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2020
FO NYAGAKA, J
SEPTEMBER 8, 2025

BETWEEN

ADHAN OMAR (SUIING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF OMAR MARWA ADAN) PLAINTIFF

AND

JACOB GITINGORI MWITA 1ST DEFENDANT

BENEDICT MARWA MWITA 2ND DEFENDANT

AUGUSTINE PETER MWITA 3RD DEFENDANT

JUDGMENT

1. By way of an Amended Originating Summons dated 27th April 2022, the Plaintiff, Adhan Omar, who maintains this suit on behalf of the Estate of his deceased father, seeks determination of the following:
 - a. Whether the Applicant Plaintiff has resided, cultivated, planted trees on whole of land measuring 2.3 ha out of land parcel No. BUKIRA Buhirimonono 314 for over 12 years?
 - b. Whether the Applicant Plaintiff should be declared the owner of the said 2.3 ha out of land parcel No. Bukira Buihrimonono 314 to the exclusion of the Respondents Defendants?
 - c. Whether, this Honourable Court should direct the County Surveyor and Land Registrar Kuria to demarcate the said parcel and give him a number and register it in the name of the applicant?
 - d. Whether the Respondents defendants should pay the costs of this Originating Summons.
2. The Summons is premised on the grounds on the face of it and the averments in the affidavit in support thereof.



3. In the Affidavit, he stated that parcel no. Bukira Buihirimonono 341 (hereinafter referred to as the suit land) belonged to Noreri Chacha (deceased) who married Chacha Magori, a sibling to his mother. Other siblings included Augustine Mwita Magori. He deposed further that Augustine Mwita Magori was the father of Jacob Gitingori Mwita and Augustine Peter Mwita, the 3rd defendant. He added that at one point, Chacha Magori became quite elderly and left the management of the suit land to his youngest brother Augustine Mwita Magori. The younger sibling was also to take care of Noreri Chacha. Chacha Magori eventually passed on. Further, that the deceased left her home and with time, Augustine Mwita Magori then sold the land to one Nchagwa Sabai in order to raise money for dowry for his children. Augustine Mwita Magori then informed him of the sale of the suit land which information disturbed him since the land was the Noreri Chacha's (hereinafter referred to as 'the deceased') only asset.
4. He deposed that he wondered how and where the deceased would live in the event she returned to her home. Further, in order to avoid a possible family crisis, he bought the land from Nchagwa Sabai. It was 12 years to the date of suit from the time of purchase and he had been cultivating the land and planted trees on it for that period. Having purchased the land from Nchagwa Sabai, they agreed with Augustine Mwita Magori on two issues to wit;
 - i. That in event the deceased returned to her home, the deceased would take possession and ownership of the land.
 - ii. That in the event the deceased did not return to her home then he would take over the possession and ownership of the land.
5. That the deceased never returned to the land and as such he remained entitled to the suit land. He stated that he had the sale agreement and the family Minutes that authenticated the position in acquiring the land hereof. He reiterated that he has been in possession of the land for 12 years.

1st Defendants Replying Affidavit

6. The 1st Defendant filed a Replying Affidavit, sworn 24th March 2022. He deposed that he had consent to swear the Affidavit on behalf of the 2nd and 3rd Defendants attaching the same as "JGM-1". He deposed that the suit land is registered in the name of the deceased. He attached a copy of certificate of search and marked it as "JGM-2". Further, he averred that the Applicant had never enjoyed peaceful occupation and or possession of the suit land over twelve year period as alleged. Additionally, there had been several cases in different jurisdictions over the same parcel of land and involving the same parties. He listed them as Kuria West District, Land Disputes Tribunal Case File No.8 of 2010 in relation to which he attached the copy of proceedings he marked as "JGM-3"; Kehancha SRMC LTD. No. 10 of 2010 of which he attached the Decree and marking it as "JGM-4"; Kehancha SRM Succ. Case No. 22 of 2010 in relation to which he attached a copy of a Gazette Notice dated 9 7 2010 and marked it as "JGM-5"; Kisii H.C. Misc. Application No. 46 of 2011 of which he annexed and marked a copy of a court order dated 13th May 2011 as "JGM-6"; Migori H.C. Succ. Cause No.275 of 2015 of which he annexed and marked a copy of the judgment as "JGM-7"; and the instant matter, being Migori H.C. (sic) ELC E8 of 2020 (O.S).
7. He urged that the Originating Summons is incompetent and flew in the face of the law as no copy of title or green card had been attached as required by law. Further, that the Application as filed was legally incoherent as it did not disclose when time started running in favor of the Plaintiff. He deposed that there had been no legal agreement between the Plaintiff and any legally recognized proprietor of the land parcel LR. BUKIRA BUHIRIMONONO 341. Further, that in Migori High Court Succession Cause No. 275 of 2015 the court in its judgment ordered the Plaintiff herein to lodge a suit in court



to determine the validity of the sale over LR.NO. BUKIRA BUHIRIMONONO 341 between the Plaintiff, Omar Marwa Adan and Nchagwa Sabai. He swore further that the Plaintiff had not filed a case as directed by the Court, to confirm the validity of such agreement. Further, the instant case was not about the validity of the sale agreement but rather one for adverse possession. He stated that the Plaintiff was a joint Administrator in the estate of Noreri Chacha. It therefore made little sense claiming adverse possession against the said estate. Additionally, that the judgment in the Migori High Court Succession Cause No. 275 was very clear that what was to be determined by this court was the validity of the sale agreement alluded to by the Plaintiff, which had not been subjected to these proceedings. He urged that there was no demonstration by the Plaintiff that he occupied the 4.6 Ha of the suit land. He reiterated that he opposed the Originating Summons.

Hearing of the suit

8. PW1 was Adhan Omar who adopted his witness statement as his evidence in chief stated that he relied on the Amended Originating Summons dated 27th April 2022. His Statement was basically similar in content with the depositions in the supporting affidavit hence no need to rehash their contents here again. But he testified orally that they have lived on the land since 1985 and they had planted trees and various crops on it. However, in 2021, his father went to India for treatment and his cousins, the defendants, decided to take advantage of his absence and entered the suit land. That the defendants live on the parcels of land they inherited from their parents, that is, Bukira Buhirimonono 4054, 2846, 2847, 4953 and 5369. He prayed that he be granted the orders sought in the originating summons.
9. During cross examination, stated that the 1st defendant was his deceased father and that the defendants were cousins to his deceased father. He stated that he was there (present) when succession was done and that his father said he did not need to inherit from the estate. He said that he had purchased the suit land from Augustine Mwitwa. He produced a sale agreement. He added that the title he had was in the name of Noreri Chacha who did not sign the agreement. He further stated that in 2010 a dispute arose between his father and the 1st defendant. It was filed at Kehancha Land Disputes Tribunal. The Tribunal made a decision about it. The decision was that his father was to be compensated. The decision was appealed against at the Kisii High Court. It was set aside. He knew that he filed the suit late to challenge the validity of the sale agreement but he passed on before the hearing of the cases. He stated that they don't live on the suit land but they use it for farming. He admitted he had not filed a surveyors' report.
10. Learned counsel for the Defendant sought to cross examine the Plaintiff afresh in light of the new documents he filed upon leave being given. Leave was granted.
11. Upon the further cross examination, the witness stated that it was true that the case was initially of his late father. Additionally, the dispute began in 2011. When counsel for the Defendant put the contents of the Judgment in Kisii High Court Misc. Application No. 46 of 2011 to him, he stated that he knew the case, it was true that the decision of the Land Disputes Tribunal was set aside. Further, he was aware that the Tribunal decided that his father should not get the land but be refunded or paid some money. He was to be paid Kshs. 170,000 = as costs. Further, that his grandfather, Mwitwa Magori, owed dowry for the brother of Jacob called Yuvinalis. His grandfather had no cattle to pay dowry so he sold part of his land to Nchagua Sabai. When his father got the report, he went to his grandfather and inquired where Noreri, the wife of an uncle to his father called Chacha Magori, would live if the land was sold. His father decided to refund Sabai his money on understanding that if Noreri came back his father would let her have the land without claiming anything from her as she was his aunt, and if she did not return then my father would own the land. The Tribunal decided that his father had no right to the land but he could be paid some money by Jacob and Benedict (defendants). He stated that nowhere



- did his father say before the Tribunal that he was using the land or was on it. The defendants sought to quash the decision of the Tribunal before the High Court and they were successful.
12. He admitted further that after the High Court decision, his father and the defendants continued their dispute at the Succession Court in Kehancha. He stated that the Succession case was moved from Kehancha Magistrates' Court to Migori High Court to be finalized in Migori High Court Succession Case No. 275 of 2015. In the Cause, the judge decided that in accordance with Kuria custom, a male could inherit from his mother's side. The court in its judgment directed that his father could file a case regarding the validity of the sale agreement.
 13. He stated that his father filed suit but he could not recall where and which case it was. Further, that he thought his father filed a case concerning the sale agreement but he was not certain about it. Additionally, he inherited the documents that his father had in order to continue this case. When shown an agreement dated 3rd February 1985 he stated that it was the agreement the Succession Court advised his father to file suit over to verify its validity. He agreed that the agreement did not bear the land parcel number and the name of Noreri was not in it though the title deed was registered in her name. Also, Augustine Mwita was not registered as proprietor. He added that his father was then (or by the agreement) buying the land not from those who were registered as proprietors. He stated that it was true that his father and the defendants were in court from 2010 till the instant case was filed.
 14. He stated that he had not brought any surveyor's report to show that he was using the disputed land. Further, there was no report, even from a Chief, to show that his father was using the land.
 15. PW2 was Susana Motongori Rioba. She adopted her witness statement and testified orally that she knew the land parcel No. 341. Her father was in occupation of the same. Further, she had an uncle called Chacha Magori who lived in Arusha and who came back to live on the land. His father then subdivided some land to him. When he came back, he had a wife called Noreri. His uncle died and Mwita Magori inherited her as his wife. After some time, Mwita Magori sold the land belonging to Chacha. Noreri was displaced after her land was sold. She fled. Mwita had sold the land to Nchagwa Sabari who sold it to somebody called Omar. She stated that to date, it was Omar occupying the land and, all along, it was Omar in occupation of the land. Further, Omar lived on the land until he died. After his death Adan took over the land from his father.
 16. During cross examination, she stated that she did not know the land parcel number in dispute. Also, she did not know its exact acreage or who the registered proprietor of the land was. She stated that Omar bought the said land from Nchagwa Sabai. She was present during the sale. She did not append her signature to the sale agreement but Nchagwa Sabai was the owner of the land as he had bought from Mwita Magori. She stated that when the land was sold to Nchagwa, Noreri was alive. The witness could not tell whether Noreri signed the agreement. She stated that she was aware that there had been cases over the parcel of land but she did not know their particulars. Further, that Omar was the one living on the land until his death. He only used to farm on the land.
 17. The court put a question to the witness about her relation to the parties. She stated that the mother of the late Omar was her aunt by virtue of the fact that her father and the mother of Omar were brother and sister.
 18. PW3 was Julius Rioba Machugu who adopted his witness statement as evidence in chief. He testified that he lived about 20 meters from the disputed land. Further, that Mzee Omar had been living on the land parcel No. 341. After his death, his son, Adan Omar continued living on the land. He stated that he did not know how Omar came to start using the land. The people sued were also using the land. He knew Jacob Gitigori Mwita who was also using the land. He would enter forcefully and use the land.



19. During cross examination, he stated that the defendants had been living on the land and cultivating it. There was no house built on it as Mzee Omar never put up one. That the defendants had been using the land but he did not know for how long. He stated that the Plaintiff had never cultivated the land or made use of it in any way. He knew that Mzee Omar had cases with the defendants but that it was not true that the defendants succeeded in them.
20. PW4 was Seprina Mambe Wambura, a farmer from Isibania. She adopted her witness statement and testified that Mzee Omar had leased the land to her to cultivate it. She used to pay rent. She leased it from 2010 to 2019. She left cultivating because there was a dispute between Mzee Omar and the defendants. Jacob came and stopped her from cultivating. She reported to Mzee Omar who told her to leave the land if it had an issue. Further, at that time he was sickly. He told her that if she wished to continue cultivating she should liaise with Adhan.
21. During cross examination, she was referred to her written witness statement. She stated that nowhere in it did she state that when she started cultivating the land and when she stopped it. She admitted that she did not have a written agreement showing a lease. She would only give Omar money in cash or by Mpesa but she did not have the mpesa messages as it was a while ago. Further, that she did not testify as to how much land she leased as she was not asked that question.
22. She stated that she would cultivate using a tractor but she had no document to show that she leased a tractor to do so. She paid in cash. She did not produce any receipt for purchase of seeds, fertilizer or other farm inputs. Additionally, to her, there was a dispute between Mzee Omar and the defendants over the land. Both parties wanted to own it. She further testified that it was common to have scuffles and violence on the land.
23. PW5 was Peter Masamaki Bhoke who adopted his statement dated 26th September 2022. He stated that he was a cousin of Jacob Gitingori. The suit land was owned by Chacha Magori. He had a wife called Noreri Chacha but she did not have children. After he died she was inherited by her uncle's younger brother. He did not know what happened between them but she left to an unknown place, and their uncle sold the land to Jacob Sabai. He stated that Omar Marwa Adan was his aunt's son. When he (Adhan) realized that the land had been sold, and Noreri could come back, he thought it wise to recover the land. He offered to pay back the purchase price so that she would have land if she came back, and if she did not, he would keep the land. She never came back and the land remained in the hands of Omar Marwa Adhan. The defendants owned their land parcel No. 64. They do not have any entitlement to the parcel No. 341 because their father had sold it. When Omar recouped it, it came to be owned by Adhan. He stated that Jacob had never used parcel No. 34. Omar used to use it when he was young. When he grew older he started leasing it.
24. During cross examination, he admitted that he did not know the registered proprietor of the suit land and would not be surprised that it was in the name of Noreri Chacha. The husband of Noreri was Chacha Magori. He (the witness) could not tell if he filed a Succession matter to succeed her Estate. When he was referred to Defendants' Supplementary List of Documents dated 13th March 2024, he stated that he saw the Agreement dated 3rd February 1985. It did not have a land parcel number. Further, Noreri had not signed anywhere on it. He also stated that he was not there when the agreement was written. Further, that he testified based on what he heard from Augustine Mwita.
25. He stated that he was not aware of all the cases filed over the disputed parcel. He also did not know whether there was a case before the Tribunal in 2010. That he only knew a case filed at Kisii High Court that was going on when Omar died. Omar died when the case was going on. He (PW5) was not aware that there was a Succession case and dispute. He stated that he neither had any document to show that Omar leased the land nor any document or photograph showing that Omar used to use the land.



26. PW6 was Fidelis Sigiria Mwita who testified that Jacob Gitigori was his blood brother. He stated that parcel No. 64 was the land that belonged to his father Chacha Magori and his wife was Noreri. His father sold land to Nchagua Sabai. Omar questioned where Noreri would come back to. It was agreed that if Noreri returned this would be her land. If she did not, then Omar would keep it. That they inherited the parcel No. 64 from their father.
27. He stated that he was not aware that the court decided that they come to this court to determine who owned the land. Further, he testified that the land belonged to Omar who was now deceased. He stated that his father said that no one should sell Omar's land. That there was a time he (Omar) cultivated it and sometime he leased it. Further, that the suit land was subdivided. Each, all, had shares. That there was a place where they lived but the place had become small for cultivation. He stated that in parcel No. 64 Jacob had a very small portion, maybe half a plot and he sold the rest.
28. During cross examination, he stated that parcel No. 341 was owned by Noreri Chacha. The title was in her name. When Mzee Chacha Magori died the land was left for Noreri. She did not sell it. Additionally, that the land was sold to Nchagua Sabai but he did not have any sale agreement to that effect. That Mzee Omar cultivated the land parcel No. 341 but he could not remember the year since it is a very long time before (the case). Further, that it was more than 12 years ago because he bought the land in 1982. That was when he first cultivated the land then leased it to one Chafua who leased the land for a very long time. He had no lease agreement for the said Chafua to confirm it. The people that the defendants had sold the land to were the ones who were now cultivating it. They had cultivated it for a long time. He stated that he did not have a sale agreement to show that the land was sold.
29. He heard that his brothers had sued Mzee Omar before the Tribunal. Further, he heard that they were successful before the Tribunal. Further, it was said that a son to a woman could not inherit from her home. He knew that the Tribunal decision went to the High Court but he did not know the outcome of it. That the parcel No. 64 had no relation to the parcel No. 341 at all.
30. PW7 was Samuel Magori Bhoke who stated that Chacha Magori was the elder brother of his father. His wife was Noreri who had land in her name. She left home and never came back. Augustine Mwita Magore said in a family sitting, where he was Secretary and took the minutes, that the land belonged to Omar. He also said that he sold the land to Nchagua to get money for dowry and that if anybody wanted the land he should refund Omar his money. Omar recovered the land for the sake of Noreri so that she could have it if she came back. Parcel No. 64 belonged to Augustine Mwita Magori and it was where the defendants lived and sold part thereof. He stated that Omar's mother was a sister to his father. Further, that the defendants said he could not therefore inherit from that home.
31. During cross examination, he stated that parcel No. 341 belonged to Noreri Chacha to date. She did not give it to anybody else. It was not registered in name of her husband as he had died earlier. There was no (written) Will giving the land of Noreri to anybody. He did not know the year the defendants filed cases to claim the land. He also did not know that in 2010 the defendants filed a case before the Tribunal. He was not aware that there was a case in the High Court at Kisii and that at some point Jacob came and told him that they have been given land by the court. He was also not aware of a Succession Cause where Mzee Omar wished to inherit the land.
32. He stated that Noreri did not buy the land but got it from her husband Chacha Magori. She did not have children. The land should go to Mzee Omar. Further, that he (witness) did not know where Noreri went to.



33. PW8 was Peter Sabai Chacha who stated that Nchagua Sabai was his father. Further that his said father bought land from Mwita Magori to have land to settle his second wife. His father later sold it to Omar because his step mother did not wish to stay in the home.
34. During cross examination he stated that his father bought land from Augustine Mwita. However, he never brought the written sale agreement to court. He never saw a sale agreement to that effect. But he added that his father sold the land to Mzee Omar Adan for Kshs. 170,000 =. But he never had title in his name.
35. With that evidence it was the close of the Plaintiff's case.
Defence case
36. DW1 was Jacob Gitogori Mwita who adopted his Replying Affidavit filed on 28th April 2021, and another filed on 31st March 2022, and a written witness Statement dated 18th June 2021. He also stated that he filed a List of Documents dated 13th March 2024.
37. He stated that he attached a search over the land parcel Bukira Buhirimonono 341. It showed that the land was registered in name of Noreri Chacha who left to an unknown destination. She was wife to his father's brother. He produced the search as D-exhibit No.1. He stated that it was his father who was in possession of the land. Further, they had a case at the Tribunal. He was the one who lodged it. He produced the proceedings of the Tribunal case as D-exhibit No.2. He stated that he succeeded at the Tribunal against Mzee Omar. The Tribunal ordered him to make a refund which he did not agree with. They then went to Kehancha, LDT case No. 10 of 2010 and got a decree. He produced it as D-exhibit No.3. After getting the decree, he appealed at Kisii High Court in case No. 46 of 20) and got judgment in his favour. He produced it as D-exhibit No.4.
38. He stated that he filed a succession cause at Kehancha which was transferred to Migori as cause No. 275 of 2015 and the court delivered a Judgment dated 24th August 2020. When shown a sale agreement to show that he purchased the land dated 3rd February 1985 produced as D-exhibit No.6, he stated that the it did not show any land parcel number. He also could not see any witnesses on it. To him it was not a genuine agreement. Noreri Chacha was not a signatory to the agreement. She was never involved. She was not even there as she had left. He stated that Mzee Omar sent a letter dated 21st February 2011 through M s Kerario Marwa demanding Kshs. 1,100,000 = for the parcel No. 341 but he did not pay him because it was a false claim that he had purchased the land. Further, that nowhere did the letter say that Mzee Adan was in possession of the land. He produced the letter as D-exhibit No.7.
39. He further testified that it was his father in possession of the land. When he died, he left the land to them as his sons. Omar Adan had never occupied the land. He presented photographs showing the crops the witness had planted on the land. He added that there is sugarcane, napier grass and a lot of avocados. He produced the two photographs (Marked D-exhibits 8a and 8b). He produced the judgment for the case, Kisii Misc. No. 46 of 2011, as D-exhibit No.9.
40. During cross examination, he stated that Omar never resided on the land parcel No. 341. He admitted that he himself also did not reside there. That his father, however, resided on the land for many years and after he left, his mud houses fell apart. That there was no structure on the land. Sigiria Mwita was his wife who was a witness. She may have said that Mzee Omar was on the land but she was lying. He stated that he was not present when the Agreement of 1985 was drawn.
41. He stated that Mzee Omar was not using the land in 1985. Further, he had been using the land to date (of the testimony). That the photographs he produced were taken by a photographer but he was not



- a witness. The agreement was fake because his father had over 10 sons, and he never involved any son. Noreri left to an unknown place. It was not true that Mzee Omar saved the land.
42. He stated that he did not sell land to Wilkister Manyangi and they exchanged land with her. That she came to town and she gave him land in the reserve (rural area). He gave her a plot of 50 x 100 feet. He denied knowing Evans Nyamweya Ochoro but stated that he knew Joseph Matatiro. He had sold to him 0.04 Ha of land. That he knew Charles Mangiti but did not sell land to him. He denied selling his land at all.
 43. DW2 was Augustine Mwita Peter, the third defendant. He adopted his statement dated 18th June 2021 as evidence in chief.
 44. During cross examination, he stated that he is also known as Augustine Peter Nyamosi which is the name in his identity card (ID) but in his statement he used the name Augustine Peter Mwita as this was how the plaintiff described him in the suit. He stated that the plaintiff and his family do not use this land parcel No. 341 and they took photographs of what they have planted in the land and gave to the advocate.
 45. He stated that he was born in 1976. In 1985, he was about 9 years old and never saw Omar do an agreement. That they grew up on the land, and have been there all along. That they do not reside there but have been using the land. His crops were on the land, even to the date of the testimony, and they (family) all have portions on the land. Additionally, that the title was still in name of Noreri.
 46. DW3 was Robi Harun Makuri, a Senior Chief, Makerero Location, Kuria West. He stated that from the time he became Assistant Chief he knew the parties. That he knew Omar Marwa the father of Adhan Marwa the plaintiff herein and has known the parties for at least the 17 years. He stated that he knew the land parcel No. Bukira Buhirimonono 341 which was being used by Jacob Gitigori, and the late Benedict Gitigori and Thomas Robi who is also deceased. That at the moment, it was Jacob Gitigori who used the land. He added that he had never seen Mzee Omar Marwa and Adhan Marwa using this land. He produced a letter dated 9th November 2022 confirming the same as D-exhibit No.10.
 47. In cross examination, he stated that he did not know that this case was filed in 2020. He did not bring a letter earlier dated because he was not asked to write one until 2022. He stated that he had never seen Mzee Omar on the land even prior to the year 2020. Further, that he was not aware that he was sickly at some time and went to India for treatment. He stated that the defendants did not reside on the land, and it was registered in name of Noreri Chacha whom he never saw.
 48. DW4 was Wilfred Onkangi Mogire who adopted his statement dated 22nd October 2024. He denied knowing or ever seeing the plaintiff. He stated that he knew the defendants as they gave him casual work on their land in Nyamitaburo. That he had worked for them on this land since 2000 and they have planted Napier grass, avocados, bananas, and they also plant maize. That it was Jacob who engaged him often to undertake casual labour on this land and had never seen the plaintiff.
 49. During cross examination he stated that before the year 2000 he used to be in Kisii but had since moved to and resided in Nyamitaburo. He had lived there since the year 2000. He did not know what happened on the land in 1985. He came to know Mzee Omar Adhan as a businessman in the year 2000. He never saw him do any work on the suit land.
 50. DW5 was David Manwa Matini who stated that in 2014, Jacob started giving him 'kibarua' (casual work) on his land. He would engage him to oversee when his crops were being cultivated and also during the harvest time. That he had never seen Adhan on this land or met any workers of Mzee Omar or Adhan on this land.



51. During cross examination, he stated that he knew Mzee Omar about 5 years ago. That he did not know his workers but he knew his children.
52. That closed the Defence case.
53. The parties were directed to file submissions.
Plaintiff's submissions
54. The Plaintiff filed submissions and urged that what culminated to the filing of this suit was the directions by Justice A.C. Mrima, Judge in High Court Succession Cause No. 275 of 2015 which formed part of the Plaintiff's Exhibits in the Judgment delivered on the 24th August 2020. He reproduced the proceedings and urged that as the Petitioner renounced his contention that he was entitled to the land by way of inheritance. He urged that the only issue for determination was whether the Petitioner lawfully purchased the land. He submitted that the issue as to whether a purchaser of land forming part of the estate of the deceased had an entitlement to the estate of the deceased was settled by the Court of Appeal in Kisumu Court of Appeal No.2 of 2014 – Musa Nyaribari Gekone & Others vs Peter Miyiinda & Another (2016) eKLR.
55. Learned counsel reproduced the contents of the supporting affidavit and proceeded to submit that all the witnesses confirmed the sale agreement and the use and occupation of the plaintiff thereof. That it was clear that the Respondents only invaded the Parcel BUKIRA BUHIRIMONO 341, immediately Mzee Omar Marwa Adhan became ill around 2019 or thereabout. Further, that for over 12 years after the sale thereof, the Plaintiff's family had been in occupation and some of the Plaintiff's witnesses confirmed that, besides one who confirmed that she was leased part of the parcel thereof.
56. He reproduced the testimonies of the witnesses and urged that the Respondents, at the Defence, reiterated that they had been in occupation, but never specified time span in their responses and they were not able to confirm whether they were in occupation in 1985 or not; that it was very clear from the Sale Agreement produced by the Defence that the transaction occurred in 1985. That they tried to dispute that parcel number was not indicated on the sale agreement but it is immaterial as the son of Nchagwa Sabai one Peter Sabai Chacha confirmed in his testimony that the sale agreement before court was correct.
57. Counsel urged that the face of the Amended Originating Summons, grounds in support, and statements of various Plaintiff's witnesses, confirmed the issue of sale, use and occupation by the Plaintiff's family thereof which formed the basis of justice A.C. Mrima's Directions Judgment in Migori Succession Cause No. 275 2015 in the matter of the Estate of Noreri Chacha (Deceased). He reproduced the same and urged the court to give judgment based on the same, which would be in favor of the Plaintiff and he be duly registered as the owner.

The Defendants' Submissions

58. Learned counsel for the defendants submitted that during cross examination the Plaintiff was put to task to prove whether he had filed a sale agreement showing that the suit land was purchased by the deceased father. Citing the case of *Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 [2016] eKLR*) he submitted that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. He urged that the Defendant produced an agreement dated 3 2 1985 marked as D-Exhibit 7 and urged that the agreement did not show the suit land or its parcel number. The 1st Defendant also testified that Noreri Chacha was never a party to the agreement. Additionally, that



- PW3 Fidelis Mwita during cross examination averred that there was no agreement showing sale of the suit land.
59. Counsel submitted that the Plaintiffs claim on adverse possession lodged against the Defendants' was not sustainable as the same had not been proved beyond balance of probability. Further, that in Kenya, the Doctrine of Adverse possession is embodied in Section 7 of the *akn ke act 1968 21 Limitation of Actions Act*. Additionally, that in order to succeed on a claim for adverse possession, there are requirements that one has to meet in order to succeed in an application for Adverse Possession, citing the case of *Wambugu -v- Njuguna (1983) KLR 173* in this regard.
 60. Further, that in our jurisdiction, Adverse Possession has also been set out in the case of *Mbira v Gachuhi (2002) 1EALR 137*. Additionally, that the ingredients were recently discussed by the court of Appeal in the case of *Mtana Lewa -v- Kahindi Ngala Mwangandi (2005) eKLR*. Counsel submitted that adverse possession must be actual, visible, exclusive, open and notorious and further, that the Plaintiffs claim was unfounded as he had not met the requirements for adverse possession.
 61. Counsel submitted that the Plaintiff had not shown actual possession on the suit land. Citing the case of *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR* with regard to the burden of proof, he urged that during the hearing, DW1-Jacob Mwita Gitongori, gave evidence that the Plaintiff had never been in occupation of the suit land and the suit land is purely meant for farming. It was his averment that no structures had been erected on the suit land. He produced photographs marked as D-Exhibit 8 showing the Defendants' farming the suit land. He urged that it was also a well settled principle that a party claiming Adverse Possession ought to prove that his Possession was "nec vi, nec clam, nec precario," that is, peaceful, open and continuous. The Possession should not have been through force, nor in secrecy but it had to be without the authority or permission of the owner. He submitted that the Plaintiff could not claim to have had any peaceful and continuous occupation on the suit land for reasons that numerous cases had been filed over the suit land being: land disputes Tribunal Case No. 8 2010, Kehancha SRM SUCC No. 22 of 2010 Kisii H.C Misc. Application No. 46 of 2011 & Migori High Court SUCC No. 275 of 2015.
 62. It was the Defendant's case that in light of the above the Plaintiff had never been in open, actual, visible, exclusive and notorious occupation of the suit land. DW3 Robi Haroon Makuri Senior Chief Makerero location gave evidence that he has been an area chief for the past 17 years accumulatively being an Assistant Chief and now a Senior Chief. It was his testimony that he knew the parties herein, the suit land and he had never seen the Plaintiffs deceased hither nor the Plaintiff tilling the land. It had been tilled all along by the Defendant. That it was his further testimony that the suit land was situated in Nyametaburo where he was an Assistant Chief for 3 years and that's where his home is situated. The suit land was being tilled by the Defendants' and was owed by Noreri Chacha-deceased. There was no iota of evidence availed before this court to contradict the Defendants' averments. They also produced photographs showing extensive farming of crops. DW5-David Manwa Matini being the Defendants' neighbor testified that the 1st Defendant and his brothers have been the ones farming the suit land. He further testified that the 1st Defendant herein had been contracting his services to oversee his farming activities. Counsel maintained that the Plaintiff has failed to prove adverse possession over the suit land and he prayed that the suit be dismissed with costs.
 63. Learned counsel urged that the instant suit was not merited as the Plaintiff had not attached any evidence of proprietorship of the suit land herein. Based on this failure this suit fails and it was for dismissal.



Analysis and Determination

64. Having carefully considered the Plaintiff's case, the Defence case, the law, the evidence of the parties and their submissions, this Court is of the considered view that the following issues lie for determination, and it will proceed to make findings on them sequentially.

a. Whether the Plaintiff has acquired ownership of the suit land by way of adverse possession

65. The doctrine of adverse possession is embodied Sections 7, 13 and 38 of the *akn ke act 1968 21 Limitation of Actions Act*. Section 7 of the *akn ke act 1968 21 Limitation of Actions Act*, which is in these terms:-

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

66. The *akn ke act 1968 21 Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

“(1) (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land.”

67. Under Section 38 of the *akn ke act 1968 21 Limitation of Actions Act*, a party may approach the court for a declaration that the property devolved to it in accordance with the doctrine of adverse possession. Section 38(1) of the Act states as follows;

“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 a proprietor of the land.”

68. In the locus classicus of *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR, the court said;-

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The



process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

69. It follows that in order for a claim of adverse possession to succeed there are certain conditions that must be fulfilled. The Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR stated as follows:-

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land.

Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

70. It trite then that to prove that one had acquired rights of ownership to a suit land he must show that he has had non-permissive or non-consensual actual, open, notorious, exclusive and adverse use of the land by him or those under whom he claims for the statutory prescribed period to have run without interruption.... (See *Mbira –v- Gachuhi* (2002) 1 EALR 137).
71. Turning to the instant case, the Applicant contends that his father had open notorious and exclusive occupation of the suit land. From the testimonies of the witnesses, it emerges that the suit property was registered in the name of one Noreri Chacha who was married to Chacha Magori. She left the suit property and has never returned to date, leaving it in the care of her husband. However, the title deed was still registered in her name and her estate had never been administered as she was assumed to have died. Her husband then fell ill and left the management of the property to his brother, Augustine Mwita Magori who decided to sell it. On learning of this, the late Omar purchased the suit land on the condition that if Noreri Chacha returned, he would return it to her.
72. First, the Plaintiff and his witnesses testified that Noreri Chacha had never been seen since she departed. He and the witnesses gave evidence on this aspect that he had been using the land over twelve years. The issue as to the period of time that the Plaintiff ought to have been on the land, of court which fact of occupation he has not proven, if at all he would have succeeded in the case, was over twelve years.
73. The Plaintiff’s evidence raises very interesting questions but which leave gaps in his quest to succeed in his claim for adverse possession. One is, who gave him permission to reside on the land, if at all. The evidence he adduces is that the land was redeemed by the father for and on behalf of Noreri. If indeed it was true that the land was redeemed, then there was the presumption of advancement that arose immediately the land was bought. The person who resided on the land, that is to say, the Plaintiff’s father and subsequently the Plaintiff after his father’s death, by virtue of that gift of advancement had the permission of the ‘owner’, that is to say the one for whom the redemption was made (being Noreri), hence he cannot now turn against that permission and deny it so as to lay claim over the land by way of adverse possession. For one to claim adverse possession he should not have been permitted by the owner to be on the land. This is not what the facts herein demonstrate.



74. However, it is this Court's finding that there was no sufficient evidence to establish on a balance of probabilities that the suit land which was registered at all material times in the name of Noreri Chacha was ever sold to Nchagwa Sabai and was redeemed from the said Nchagwa Sabai via a re purchase. In any event, from the basic legal position regarding transactions in land, if indeed the land was sold to Nchagwa Sabai by anyone other than the registered owner, one Noreri Chacha, then under Section 3(2) of the *Kenya Act 1960 43 Law of Contract Act*, the sale was illegal and void. It could not pass title to the purported buyer who could then purport to pass the title to any other person. Thus, the purported redemption by way of purchase from the said Nchagwa Sabai was irregular and could not confer any legal ownership of anyone on the property other than the owner who is now alleged to have died.
75. It follows too from the above analysis, if the Plaintiff's case is anything to go by, that any agreement with Augustine Chacha on who the parcel of land could be treated in case Noreri Chacha returned home or did not, as the Plaintiff and his witnesses testified was of no consequence. It was a void 'agreement' which was entered into on "air". This was particularly when the Plaintiff's father and him and others knew that indeed the owner of the suit land, one Noreri Chacha left the home or suit land alive and they neither knew whether she had died or not. And as found elsewhere in this Judgment, even if the said Noreri Chacha never returned to the home all these years, the legal implication was to treat her failure to be traced or heard of as a death upon a presumption being made, and then succession proceedings be taken for her Estate that included the suit land.
76. Furthermore, it was not denied that there were succession proceedings that made the Plaintiff one of the administrators of the Estate of the said deceased Noreri Chacha. Other than a demonstration of being driven by sheer greed the Plaintiff cannot explain how he as a co administrator can sue for a claim of adverse possession against the same land he administrators on behalf of a deceased person. In any event the Plaintiff did not establish when the time started running in order for him to prove having been on the land adversely. Be that as it may, how own witness, PW3 admitted in cross examination that the defendants had been using the land but he did not know for how long and that the Plaintiff had never cultivated the land or made use of it in any way. This corroborated the Defendants' case that the Plaintiff had never been an adverse possessor of the land, at least as against the Defendants. But since the defendants were not the registered owners of the land, his claim for adverse possession was a nonstarter.
77. One important question that the Plaintiff ought to have answered is: the suit land is and has all along been registered in the name of Noreri. This was as evidenced through the Annexure "JGM2" to the Affidavit sworn by the 1st Defendant Respondent. It has never been registered in the names of the Defendants. This was the evidence of PW1 in cross examination, and DW1 and DW3 all whom stated that the land was registered in the name of Noreri. That being so, and the registration having not changed from or to the names of the Defendants, it was clear that the parties whom the Plaintiff sued were not and had never been owners of the suit land hence the Plaintiff's claim of adverse possession cannot be successfully sustained against them. It must fail even on that score alone.
78. The other immediate question that it was the Plaintiff's testimony and that of PW1, PW5 and PW7 that there was an agreement that the land which was in the name of one Noreri would remain in the Plaintiff's father or the Plaintiff if she did not come back. While there was no documentary evidence to support that fact, it was their evidence that the said Noreri never came back. They do not know her whereabouts.
79. In law, the evidence of the Plaintiff's witnesses, if it is anything to go by, is that there was a rebuttable presumption existing or raised that the said Noreri died after she was not heard of for a period of more



than seven years, in terms of Section 118A of the *kenya Evidence Act 1963*. The said provision is to the effect that,

“Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.”

80. The presumption lays the burden on the person who alleges that they have not someone for seven continuous years to adduce evidence in support of the claim. That being so, for the instant matter, whoever claims that the said Noreri was not alive ought to have moved the Court accordingly to have a declaration that the said person was dead. By such a declaration being made, then the law of succession would kick in regarding her properties, which included the suit land. Individuals could not sit in a gathering, be it family or the area chief's baraza's and distribute the land illegally as the Plaintiff and his witnesses purported to do and gave evidence to that effect to convince the Court that it justified the reliefs sought by the Plaintiff being granted. Noreri Chahca, if dead, could not lose her land in the manner the Plaintiff wants this Court to endorse. Her estate is entitled to include the land in the list of assets due to it.
81. Moreover, the defendants merely disputed the occupation of the land by the Plaintiff. According to them, the occupation was the subject of many suits which they listed and provided evidence of. The suit land was the subject of Kehancha Land Dispute Tribunal Case no. 08 of 2010 where it was directed that the Plaintiff be refunded his money and Chacha Magori remain with the property. Additionally, there was Kehancha Senior Resident Magistrates Case No. 10 of 2010 which adopted the order from the tribunal as a judgement of the court. There was Migori Probate and Administration Case No. 275 of 2015 where the court held that the Plaintiff was not entitled to the suit land by way of inheritance on 24th August 2020.
82. It is evident that the suit land has been the subject of various cases where the deceased Omar was involved. The Plaintiff and his witnesses, namely, PW3 and PW7 acknowledged the existence of the various legal disputes over the ownership of the land. The other witnesses of the Plaintiff denied knowledge of the cases. Suffice it to say, in each of the disputes acknowledged to have been in existence, and they were not concluded more than twelve years previous to the institution of this suit, the Plaintiff came out on the losing side, and all these suits were in an effort to assert his rights over the suit property.
83. The Plaintiff's evidence on the open, notorious and quiet occupation of the suit land is, in my humble opinion, not convincing. As it is the Plaintiff seeks to establish that he is deserving of the orders sought because he has been in occupation of the suit land all along as is required by law. The burden of proof lies on him to do so to the required standard.
84. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *kenya Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
85. Additionally, in *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others* (2014) eKLR the Supreme Court held inter alia:



The person who makes such allegations must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.

86. I have considered the pleadings and testimonies alongside the exhibits tendered in court and arrived at the conclusion that there was no evidence tendered in corroboration of the claim of occupation of the suit land. For notorious occupation, a photograph of said occupation would be an effort in the right direction. However, the plaintiffs have made no such effort in pursuit of their rights.
87. Even if this court were to be convince that the Plaintiff had been in occupation of the suit land as claimed, the next port of call would be whether the same has been uninterrupted. The evidence of the multiplicity of suits as given in evidence by the Defendant dislodges, first, the interruption of the continuity as required by law, and then the quietness thereof. In *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] KECA 942 (KLR) the Court held;

From the evidence on record, we find that the appellant's occupation of the suit property was always under constant challenge by the respondent. The fact that the appellant had occupied the suit property for a period in excess of 12 years does not per se prove adverse possession.

The record shows that the appellant's occupation of the suit property was constantly under challenge by the respondent. This was done expressly in writing in 1976; again in 1984 when the appellant informed the respondent he had built on the parcel temporarily; again during the clan meeting in 1992 and finally vide the suit filed before the learned judge in 1992. We further note that the appellant's entry into the suit property was by permission from a person who had no proprietary interest in the parcel.

88. The upshot of the foregoing is that, it is clear that for occupation of land to be considered uninterrupted, within the context of adverse possession, two facts ought to be in existence: there should be absence of litigation and no reentry of the Defendant onto the suit property during the alleged period. While this Court has not found the latter, it has found the opposite of the former. Litigation over said property amounts to interruption of occupation. It is therefore evident that the Plaintiff has not proved that he was in uninterrupted occupation of the suit land for a period of over 12 years.
89. In the premises, the Originating Summons fails in its entirety for lack of merit. The Plaintiff shall bear the costs of the suit.

JUDGMENT DATED , SIGNED AND DELIVERED ORALLY VIRTUALLY VIA THE TEAMS PLATFORM THIS 8TH DAY OF SEPTEMBER 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 09:56 AM to 10:21 AM, in the presence of

Court Assistant: Ms. Lola

Mr. Agure for the Plaintiff

Also, the Plaintiff in open Court



Ms Abisai Aeleon holding brief for Abisai for the Defendants
Defendants in Counsel’s Chambers

