

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. E011 OF 2024**

KIUNGA M'RUGUARU .....PLAINTIFF

**VERSUS**

LUKE MWITI KINOTI .....DEFENDANT

1. What is before me is the amended Originating Summons [OS] dated the **6<sup>th</sup> December 2024**; brought pursuant to the provisions of **Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya**; **section 28 B of the Land Registration Act 2012**; and **order 37 rule 7 of the Civil Procedure Rules 2010**; and wherein the Plaintiff has sought the following reliefs/declaration[s]:

- i. Whether the Plaintiff have been in a continuous, exclusive and uninterrupted possession and occupation of the whole of L.R No. Abothuguchi/Igane/1099 measuring 4.05 ha for a period of over 12 years.*
- ii. Whether the said occupation has been adverse to the registered owner and whether the Defendant's ownership and title over L.R No. Abothuguchi/Igane/1099 has been distinguished by dint of Sections 37 & 38 of Limitations of Actions Act Cap 22 Laws of Kenya.*
- iii. Whether the Plaintiff has now acquired absolute ownership of L.R No. Lower Abothuguchi/Igane/1099 thorough the doctrine of adverse possession.*
- iv. Whether an order that the Plaintiff should be registered as the proprietor of L.R No. Lower Abothuguchi/Igane/1099*

v. ***Whether the Defendant should be ordered to transfer L.R No. Abothuguchi/Igane/1099 to the plaintiff***

vi. ***Whether the Defendant should pay costs of the suit***

2. The originating summons is premised on the various grounds which have been enumerated in the body thereof. In addition, the summons is supported by the affidavit of the plaintiff sworn on even date; and to which the plaintiff has annexed various documents including a copy of the register in respect of L.R No. Abothuguchi/Igane/1099 [the suit property].
  
3. The defendant duly entered appearance and thereafter filed a replying affidavit sworn on 6<sup>th</sup> November 2024; and wherein the defendant has denied the claims by the plaintiff. Moreover, the defendant has averred that same bought the suit property from James Mwangi Kariuki and thereafter the suit property was transferred and registered in his name. Furthermore, the defendant averred that upon purchase and acquisition of the suit property same entered upon and took possession of the suit property. In addition, it was contended that the plaintiff has never been in occupation or possession of the suit property save for an attempt in October 2024 when the plaintiff chased away his [defendant's] caretaker from the suit property.
  
4. The Originating summons came up for directions on 10<sup>th</sup> March 2025; whereupon the parties agreed to canvass the summons by way of *viva voce* [oral] evidence. Furthermore, the parties agreed to have the originating summons and the supporting affidavit constituted as the plaint while the replying affidavit was deemed as the statement of defence. For

coherence, the directions were issued in line with order 37 rules 16, 17 and 19 of the civil procedure rules, 2010.

5. The Plaintiff's case is premised on the evidence of six [6] witnesses namely; Kiunga M'Rugwaru, Jeniffer Mubea, Edward Kimathi, Simon Miriti Kiunga, Catherine Kabundo and John Muturi Kiunga. Same testified as PW 1 to PW 6 respectively.
6. It was the testimony of PW 1 [Kiunga M'Rugwaru] that same is the plaintiff in the respect of the subject matter. Moreover, the witness averred that by virtue of being the plaintiff same is conversant with the facts of the case. In addition, the witness averred that same has filed the supporting affidavit sworn on 15<sup>th</sup> October, 2024 and supporting affidavit sworn on the 18<sup>th</sup> December 2024, which affidavits the witness sought to adopt and rely on as his evidence in chief. To this end, the two [2] sets of supporting affidavit[s] under reference were duly adopted and constituted as the evidence in chief of the witness.
7. Furthermore, the witness referenced the witness statement dated the 11<sup>th</sup> February 2025; and which statement the witness sought to adopt and rely on as his evidence in chief. In addition, the witness also reference, the further witness statement dated the 27<sup>th</sup> March 2025, and which witness statement the witness similarly sought to adopt and rely on as his evidence in chief. Suffice it to state, that the two [2] witness statement[s] were duly adopted and constituted as further evidence of the witness.

8. Additionally, the witness adverted to the list and bundle of documents dated the 11<sup>th</sup> February 2025; containing 13 documents and which documents the witness sought to adopt and rely on as exhibits. There being no objection, the documents at the foot of the list dated the 11<sup>th</sup> February 2025; were adopted and constituted as exhibit[s] P1 to P13, respectively on behalf of the Plaintiff.
9. The witness further referenced a supplementary list and bundle of documents containing four[4] documents and which the witness sought to tender before the court. Nevertheless, the production of the documents at the foot of the supplementary list dated the 27<sup>th</sup> March 2025 was objected to by learned counsel for the Defendant.
10. Pursuant to the objection, the documents under reference were withdrawn by learned counsel for the Plaintiff. Same were therefore abandoned.
11. On the other hand, the witness referenced the amended originating summons dated the 6<sup>th</sup> December 2024; and which summons the witness sought to adopt and rely on. Instructively, the contents of the amended originating summons were adopted as evidence. In addition, the witness sought the reliefs highlighted at the foot of the amended originating summons.
12. On cross examination, by learned counsel for the Defendant, the witness testified that the Defendant was registered as the owner of the suit property in 1996. Nevertheless, and upon further cross examination, the witness changed tune and stated that it is not true that the Defendant was

registered as the owner of the suit property in 1996. To this end, the witness thereafter averred that the contents of paragraph 4 of his supporting affidavit are not correct.

13. Whilst still under cross examination and upon being referred to paragraph 5 of the supporting affidavit, the witness testified that the contents thereof are not correct.

14. It was the further testimony of the witness that in 1965 the suit property was registered in the name of his [witness] grandfather. The witness further stated that same is not knowledgeable of one Ndungu Gikonyo. However, whilst still under cross examination the witness conceded that same has referenced one Stephen Ndungu Gikonyo in his witness statement. However, the witness averred that now he wishes to state that same does not know the said Stephen Ndungu Gikonyo.

15. It was the further testimony of the witness that same is knowledgeable of one Cypriano Mburugu. In particular, the witness averred that Cypriano Mburugu is his cousin. Moreover, the witness testified that it is Cypriano who had sold the suit property to Stephen Ndungu Gikonyo.

16. The witness further testified that same is knowledgeable of the parcel of land, namely; number 1096. However, the witness added that same is not privy to the acreage of the said parcel of land. Moreover, the witness averred that the said parcel of land namely [1096] was sub-divided into two portions.

17. It was the further testimony of the witness that same is aware of the ground location as pertains to parcel numbers 1100 and 1099. For good measure, the witness averred that the two parcel[s] of land border each other.
18. Nevertheless, it was the testimony that there is no clear boundary between the two parcels of land.
19. On further cross examination, the witness testified that same has brought photographs of the bananas planted on the land. In particular, the witness averred that same took the photos from parcel number 1095. Moreover, the witness reiterated that the photographs before the court were taken from the bananas growing on parcel number 1095. Furthermore, the witness averred that it is him who is in possession and undertaking cultivation on parcel 1095.
20. The witness further averred that same is aware of parcel number 1120. To this end, the witness testified that the said parcel of land, namely; 1120 is registered in his name. Moreover, the witness posited that same has the Certificate of title relating to parcel number 1120. In addition, the witness testified that same resides on parcel number 1120 with his family.
21. Upon being referred to the further affidavit sworn on the 11<sup>th</sup> February 2025; the witness testified that parcel number 65 belongs to him. Furthermore, it was the testimony of the witness that same recalls having gone to the police station. The witness averred that the reason why same went to the police station is because some people had entered into his

land without permission. In particular, the witness testified that those people entered on parcel number 1096; and commenced to clear the fence.

22. Moreover, the witness averred that the said people wanted to streamline the boundary.

23. Upon being referred to paragraph 19 of the supporting affidavit, the witness testified that it is the Defendant herein who sent his servants/employees to the land. Furthermore, the witness averred that the Defendant and his employees destroyed the crops which he [witness] had planted on the land. In this respect, the witness averred that same was thereafter constrained to report the incidence to the police.

24. Whilst still under cross examination, the witness averred that same is familiar with Joseph Mwenda. The witness stated that the said Joseph Mwenda is his neighbor. However, the witness clarified that the said Joseph Mwenda had never cultivated/rented any portion of the suit land.

25. It was the further testimony of the witness that same does not know one Joseph Mwangi. In particular, the witness testified that Joseph Mwangi does not own any land in the neighborhood. Nevertheless, whilst still under cross examination, the witness changed tune and averred that Joseph Mwangi Kariuki stole parcel number 1095. Be that as it may, the witness added that it is him who cultivates both parcel number 1095 and 1099.

26. Additionally, the witness testified that same became aware/knew that the Defendant herein was the registered owner of parcel 1099 in the year

2021. For good measure, the witness clarified that it is not true that same knew that the Defendant was the owner of parcel 1099 in the year 1996.

27. On re-examination, the witness testified that same resides on parcel number 1120. In particular, the witness posited that his homestead is situated on parcel number 1120; and not parcel number 1099.

28. On further re-examination, the witness averred that same is aware of the day when he reported the incidence to Gaito Police Station. The witness clarified that he reported the incidence to Gaito Police Station because the Defendant claimed to be the owner of the land. Moreover, the witness averred that the Defendant had sprayed his crops with herbicide.

29. Other than the foregoing, it was the testimony of the witness that the date of spraying of his crops with herbicide is different from the date when the Defendant sent his people to clear the fence.

30. The 2<sup>nd</sup> witness who testified on behalf of the plaintiff was Jeniffer Mubea. Same testified as PW 2. It was the testimony of the witness that same is a farmer. Furthermore, the witness averred that same has since recorded a witness statement dated 11<sup>th</sup> February 2025; and which witness statement same sought to adopt and rely on as her evidence in chief. To this end, the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.

31. On cross examination, the witness averred that same has indicated in her witness statement that the Plaintiff has been in occupation of parcel 1099

and the original parcel. Nevertheless, the witness averred that same is not privy to the registration details of the original parcel of land.

32. In addition, the witness testified that same is aware that the Plaintiff buried his first wife on the suit property. However, the witness conceded that same has no evidence to demonstrate that the remains of the Plaintiff's first wife were interred on the suit property.

33. Whilst still under cross examination, the witness testified that same is aware that the Plaintiff has built on parcel number 1099. In particular, the witness averred that the Plaintiff has a permanent house/structure on the suit land. Moreover, the witness reiterated that the Plaintiff resides on parcel number 1099 with his family.

34. When it was put to the witness that the Plaintiff himself had testified that same does not reside on parcel 1099, the witness [PW2] averred that same is not aware of whether that was the evidence of the Plaintiff.

35. On further cross examination, the witness averred that same is aware that the Plaintiff had another parcel of land. However, the witness posited that same does not know the registration details of the other land owned by the Plaintiff.

36. The 3<sup>rd</sup> witness who testified on behalf of the plaintiff was Edward Kimathi. Same testified as PW 3. It was the testimony of the witness that same is conversant with the facts of this case. In addition, the witness averred that same has since recorded a witness statement dated 11<sup>th</sup> February 2025; and which witness statement the witness sought to adopt

as his evidence in chief. Suffice it to state that the witness statement under reference was duly adopted and constituted as evidence in chief of the witness.

37. On cross examination by learned counsel for the Defendant the witness averred that same is a neighbor of the Plaintiff. Furthermore, the witness testified that there is no house on parcel number 1099. However, on further cross examination, the witness changed tune and averred that the Plaintiff resides on parcel number 1099.

38. Be that as it may, it was the testimony of the witness that same does not know who is the registered owner of parcel number 1099 at the lands office.

39. Whilst still under cross examination, the witness added that she occasionally goes to parcel number 1099. Nevertheless, the witness conceded that same does not know the extent/acreage of parcel number 1099.

40. On re-examination, the witness [PW3] averred that it is the Plaintiff who resides on parcel number 1099. Moreover, the witness reiterated that the Plaintiff resides thereon with his family. In addition, the witness posited that the Plaintiff resides on parcel 1099 and not otherwise.

41. The 4<sup>th</sup> witness who testified on behalf of the plaintiff was Simon Miriti Kiunga. Same testified as PW 4. It was the testimony of the said witness that same is a son of the plaintiff. Furthermore, the witness averred that same is conversant with the facts of the case. Moreover, the witness alluded to the witness statement dated 11<sup>th</sup> February 2025; and which statement the witness sought to adopt and rely on as his evidence in chief. Instructively, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

42. On cross examination, the witness testified that same is aware of the reason why he [witness] is before the court. In particular, the witness averred that same is before the court because of parcel number 1099. Additionally, the witness testified that the Plaintiff and his family reside on parcel number 1095. However, whilst under further cross examination, the witness changed tuned and averred that the Plaintiff and family resides on parcel 1099. For good measure, the witness averred that the Plaintiff and family have a home on parcel number 1099.

43. It was the further testimony of the witness that the Plaintiff and the family are still residing on parcel number 1099. The witness reiterated the same position.

44. Next is Catherine Kabundo. Same testified as PW 5. It was the testimony of the witness that same is the wife of the plaintiff. To this end, the witness averred that same is therefore familiar with the facts of the case. Additionally, the witness averred that same has since recorded a witness statement dated 11<sup>th</sup> February 2025; and which witness statement the witness sought to adopt as her evidence in chief. Suffice it to state

that the witness statement was duly adopted as the evidence in chief of the witness.

45. On cross examination, the witness testified that same is aware of the dispute before the court. In particular, the witness testified that the dispute before the court concern[s] plot number 1099. Moreover, the witness averred that plot number 1099 belongs to the Plaintiff.

46. In addition, the witness reiterated that the said plot is registered in the name of the Plaintiff.

47. Whilst still under cross examination the witness testified that she resides on parcel number 1120. Nevertheless, the witness posited that same is not aware of the distance between plot number 1120 and 1099. Be that as it may, the witness clarified that when working on plot number 1099 same ordinarily return[s] to her home on 1120 for purposes of taking lunch.

48. Additionally, the witness testified that same resided on parcel number 1099. However, the witness posited that same vacated parcel number 1099 and went to reside on parcel number 1120.

49. It was the further testimony of the witness that the Plaintiff and his family have been using parcel number 1099. For good measure, the witness averred that same cultivates on a portion of the land.

50. The final witness who testified on behalf of the plaintiff was John Muturi Kiunga. Same testified as PW 6. It was the testimony of the witness that

same is a son of the plaintiff. Furthermore, the witness averred that same is familiar with the facts of the case. In addition, the witness testified that he has recorded a witness statement dated 11<sup>th</sup> February 2025; and which witness statement same sought to adopt as his evidence in chief. For good measure, the witness statement under reference was adopted and constituted as the evidence in chief of the witness.

51. On cross examination, the witness testified that the contents of the witness statement are correct. Furthermore, the witness added that same is knowledgeable of the plots in dispute. Instructively, the witness clarified that the disputed plot is 1099. Moreover, the witness averred that parcel number 1099 belongs to Paul Kiunga.

52. It was the further testimony of the Witness that the said Paul Kiunga is the same as Kiunga M'Rugwuro, namely; the Plaintiff herein.

53. With the foregoing testimony, the Plaintiff's case was closed.

54. The Defendant's case is premised on the evidence of five [5] witnesses, namely; Luke Mwiti Kinoti, Cypriano Mburugu, John Kiara Mathayo, Josephat Kilele Gituma and Cypriano Mukana M'Ikabu. Same testified as DW 1 – DW 5, respectively.

55. It was the testimony of DW1 [Luke Mwiti Kinoti] that same is the defendant in respect of the instant matter. Furthermore, the witness averred that by virtue of being the defendant same is familiar with the facts of the case. In addition, the witness testified that same

bought/purchased the suit property from the previous registered owner and thereafter the suit property was transferred and registered in his name.

56. Furthermore, the witness testified that same has since recorded a replying affidavit sworn on 6<sup>th</sup> November 2024; and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the replying affidavit under reference was duly adopted and constituted as the evidence in chief of the witness.

57. Additionally, the witness referenced the list and bundle of documents dated the 6<sup>th</sup> November 2024; containing seven[7] documents and which documents the witness sought to tender and produce as exhibits before the court. Nevertheless, documents number 6 and 7 were objected to. Suffice it to state that the objection to the said documents was concede by learned counsel for the Defendant. Moreover, learned counsel for the Defendant thereafter sought to withdraw documents number[s] 6 and 7, respectively. For good measure, the said documents were duly marked as withdrawn.

58. On the other hand, the rest of the documents, namely; documents 1 to 5 were duly admitted and constituted as exhibits on behalf of the Defendant.

59.It was the further testimony of the witness that the Plaintiff herein has never been in occupation/possession of the suit property either in the manner claimed or at all.

60.Moreover, the witness averred that it is him who has been in occupation of the suit property. In particular, the witness testified that the only time the Plaintiff attempted to enter the suit plot was in October 2024 culminating into a report being made to the OCS Gaitu Police Station and the Area Chief.

61.On cross examination, the witness testified that same does not live/reside on the suit property.

62.The witness clarified that same lives; reside[s]/has a home at Kaungu area-Meru County.

63.It was the further testimony of the witness that same bought/purchased the suit property from Stephen Ndungu Gikonyo. Nevertheless, the witness clarified that before he bought the suit property same undertook due diligence and confirmed that the land was registered in the name of Stephen Ndungu Gikonyo.

64.It was the further testimony of the witness that thereafter same entered into a sale agreement with the vendor. Moreover, the witness added that same paid the entire purchase price. In addition, the witness averred that a land control board consent was obtained prior to the transfer of the suit property in his name.

65. Whilst still under cross examination, the witness testified that same visited/viewed the land in question in the company of Mr. Gikonyo's agents before purchasing the land. For good measure, the witness posited that it is the said agent who pointed out the ground location of the suit property. In addition, the witness averred that the vendor was not residing on the suit property.

66. It was the further testimony of the witness that same also commissioned/instructed a surveyor to visit the land with a view to demarcating the boundaries therein. However, the witness conceded that same has not tendered a copy of the survey report before the court.

67. It was the further testimony of the witness that the suit property is fenced. However, the witness averred that same has not supplied any evidence to confirm that the land in question is fenced.

68. On further cross examination, the witness stated that same has been renting the suit property to various tenants through his caretaker. However, the witness averred that the renting out of portion of the suit property has been done on the basis of oral [parole] leases between his caretaker and third parties.

69. The witness further testified that same made a report to the police against the Plaintiff herein. In particular, the witness averred that the report related to an incidence where the Plaintiff chased away his [caretaker] and servants from the suit property.

70. Additionally, the witness testified that the incidence that led to him reporting the matter to the police related to the day when his caretaker went to the land and found the Plaintiff and his family member were working on the land.

71. On re-examination, the witness testified that when same visited the suit property in the presence of Mr. Gikonyo's agents there was no one occupying the suit property. In particular, the witness averred that the suit property was vacant.

72. On further re-examination, the witness testified that even though same reported the incidence between the Plaintiff and his caretaker, the Plaintiff has never been charged with any criminal offence. Moreover, the witness averred that same is not aware of the reason why the Plaintiff has not been arrested.

73. The 2<sup>nd</sup> witness who testified on behalf of the defendant was Cypriano Mburugu. Same testified as DW 2. It was the testimony of the witness that same comes from Ntarangwi location. In addition, the witness averred that same is familiar with the facts of the subject matter. Moreover, the witness referenced the witness statement dated 14<sup>th</sup> March 2025; and which witness statement same sought to adopt and rely on as his evidence in chief. The witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.

74. On cross examination, the witness testified that same was the previous owner of the suit property. Furthermore, the witness averred that the suit property was given unto him by the witness's grandfather.

75. It was the further testimony of the witness that same was given the land when the plaintiff was also given his land. The witness further averred that the original parcel of land namely; parcel number 65 was subdivided.

76. Moreover, the witness testified that the said parcel of land was subdivided on or about 1981.

77. Whilst under further cross examination, the witness testified that it is same [Witness] who sold the suit property to Stephen Ndungu Gikonyo. However, the witness testified that same could not recall the year when he sold and transferred the suit property to Stephen Ndungu Gikonyo.

78. The 3<sup>rd</sup> witness who testified on behalf of the defendant was John Kiara Mathayo. Same testified as DW 3. It was the testimony of the witness that same is familiar with the plaintiff herein. In addition, the witness averred that same is also familiar with the defendant. Moreover, the witness averred that the defendant is his brother in law.

79. It was the further evidence of the witness that same has since recorded a witness statement dated 6<sup>th</sup> November 2024; and which witness statement the witness sought to adopt and rely on as his evidence in chief. suffice it

to state that the witness statement was duly constituted as the evidence in chief of the witness.

80. On cross examination by the Learned counsel for the Plaintiff; the witness averred that his home is approximately 10 KM away from the suit land. Moreover, the witness testified that same was instructed by the Defendant to take a surveyor to the suit property. For good measure, the witness posited that the surveyor was taken onto the suit property in the year 2014.

81. Additionally, the witness testified that the surveyor was going to install the beacon[s]. Nevertheless, the witness clarified that the suit property had long been surveyed.

82. On further cross examination, the witness testified that the suit property is currently being used by the people who have rented the land from the Defendant and not by the Plaintiff. Nevertheless, the witness conceded that same does not have any lease agreement to demonstrate that the land in question has been leased out to third parties by the Defendant.

83. On re-examination, the witness averred that the land is leased out to various people on behalf of the Defendant.

84. Next was Josephat Kilele Gituma. Same testified as DW 4.

85. It was the testimony of the witness that same was employed by the defendant herein as a caretaker/manager of the suit property. To this end, the witness averred that same is therefore conversant with the facts of the

case. Furthermore, the witness referenced the witness statement dated the 6<sup>th</sup> November 2024; and which witness statement same [Witness] sought to adopt and rely on as his evidence in chief. Instructively, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

86. On cross examination, by learned counsel for the Plaintiff, the witness averred that same does not reside on the suit property. In addition, the witness testified that same resides approximately 5 kilometers away from the suit property. Nevertheless, the witness clarified that same was employed by the Defendant as a caretaker/manager in the year 2016.

87. It was the further testimony of the Witness that same was chased away from the suit land when he went to plough thereon. Moreover, the Witness averred that same was warned not to return to or enter upon the suit land by the Plaintiff. Furthermore, the witness averred that when same was ploughing and using the suit land, the Plaintiff and his sons came to the land and told him to stop using the land.

88. Whilst still under cross examination, the witness testified that the Defendant has not built on the suit land. For good measure, the witness reiterated that the suit land is only being used for cultivation.

89. On re-examination, the witness testified that when same entered onto the land in 2016; there was no one cultivating the suit property.

90.The last witness who testified on behalf of the defendant was Cypriano Makana M'Ikabu. Same testified as DW 5.

91.It was the testimony of the witness that same is conversant with the defendant. In addition, the witness averred that same previously rented a portion of the suit property. Moreover, the witness intimated to the court that same had filed a witness statement dated 7<sup>th</sup> March 2025; and which witness statement the witness sought to adopt and rely on as his evidence in chief. For good measure, the witness statement was duly adopted and constituted as the evidence in chief of the witness.

92.On cross examination, the witness averred that same resides approximately half a kilometer from the suit property. Moreover, the witness posited that same is a neighbor of the Plaintiff.

93.It was the further testimony of the witness that the Plaintiff herein does not reside on the suit property.

94.Whilst still under cross examination, the witness testified that the suit property belongs to and is registered in the name of the Defendant. Furthermore, the witness added that same has previously rented/leased a portion of the suit property from the Defendant's caretaker.

95.Nevertheless, the witness conceded that same has not tendered any lease/renting agreement.

96. Whilst still under cross examination, the witness testified that the agreement[s] were never reduced to writing. Nevertheless, the witness averred that same used to pay the rental money to the Defendant through his caretaker.

97. Additionally, it was the testimony of the witness that same planted maize on the portion of the suit property which he rented. Nevertheless, the witness conceded that same has not brought any evidence to demonstrate/show that he ever planted maize on the rented portion of the suit property.

98. On re-examination, the witness clarified that though he entered onto and rented a portion of the suit property, same was never given any written lease agreement. In any event, the witness clarified that the renting was never reduced into writing.

99. With the foregoing testimony, the Defendant's case was closed.

100. Upon the close of the hearing, the advocate[s] for the parties sought time to file and exchange written submissions. To this end, the court proceeded to and issued directions pertaining to the filing and exchange of submissions. Additionally, the court circumscribed the timelines for the filing of the written submissions.

101. The plaintiff filed written submissions dated 16<sup>th</sup> September 2025; and wherein same has highlighted two [2] issues for consideration. The issues highlighted by the plaintiff are namely; the plaintiff has been in occupation and possession of the suit property for a duration of more than

12 years; and the plaintiff has therefore acquired adverse possessory rights to and in respect of the suit property.

102. The defendant filed written submissions dated 16<sup>th</sup> September 2025; and wherein same has highlighted five [5] issues. The issues highlighted by the defendant are namely; whether the originating summons as drawn complies with the law; whether the applicant has fulfilled all the conditions necessary to warrant orders sought; whether the applicant appealed the findings in a ruling made on 4<sup>th</sup> December 2024 by Justice Nzili; whether the applicant has proved the case to the requisite standard; and whether the applicant is entitled to the orders sought or otherwise.

103. Having reviewed the originating summons; the supporting affidavit; the response by the defendant; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject dispute turns on three [3] key issues, *namely*; whether the plaintiff has established/proved occupation, possession and use of the suit property; whether the occupation, possession and use [if at all] has been adverse or hostile to the rights of the registered proprietor or otherwise; and whether the occupation, possession and use [if at all] was continuous and uninterrupted for the statutory duration or otherwise.

104. Regarding the first issue, namely; whether the plaintiff has placed before the court evidence to demonstrate occupation, possession and use of the suit property, it is important to underscore that whosoever seeks to

accrue a proclamation of adverse possession must first and foremost establish occupation and possession of the designated property. Instructively, occupation, possession and use of the designated property [if at all], is the precursor to proving the rest of the ingredients that underpin a claim for adverse possession.

105. To this end, it was therefore incumbent upon the plaintiff to demonstrate that same has been in exclusive occupation and possession of the suit property. Absent evidence of exclusive possession, occupation and use, the claimant cannot succeed in proving/establishing adverse possession.

106. Did the plaintiff herein establish exclusive possession, occupation and use? To start with the plaintiff had contended at the foot of the originating summons that same has been in continuous occupation and possession of the suit property. To this end, one would have expected the plaintiff to tender evidence *inter alia* photographic evidence [subject to compliance with the provisions of section 106 B of the evidence act] showing the nature of activities underpinning occupation and possession.

107. It is instructive to observe that the plaintiff herein tendered and produced photographs in an endeavor to demonstrate occupation and possession. The photographs in question shows evidence of cultivation of crops including bananas, maize and various food crops. However, when the plaintiff [PW 1] was cross examined by learned counsel for the defendant, same testified that the photographs which had been tendered and produced before the court were taken from parcel number Abothuguchi/Igane/1095; and not 1099 [the latter which is the suit property].

108. For ease of reference, it is instructive to reproduce the evidence of PW 1 while under cross examination by learned counsel for the defendant. Same testified thus;

*“I am aware of the ground positions of the two parcels of land. The two parcels of land are bordering each other. The two parcels of land are namely; 1099 and 1100. **There is no clear boundary between the two parcels of land. I have brought photos of the bananas. I took the photos from parcel number 1095. I repeat that I took the photos before the court relating to the bananas from parcel 1095.** I am also in occupation of parcel 1095. I do farming on parcel 1095. I have also been farming on parcel number 1096.*

109. In my humble view, if the photos which were tendered and produced before the court were taken from the parcel number 1095 [which is separate and distinct from the suit property] then same cannot be deployed for purposes of proving occupation, possession and use of the suit property.

110. Other than the foregoing, it is also important to recall that PW 1 stated that same does not reside on the suit property. On the contrary PW 1 posited that same merely farms/cultivates the suit property. On the contrary, PW 2 [Jeniffer Mubea] testified to the effect that the plaintiff actually occupies, namely; reside[s] on the suit property. Moreover, the witness reiterated that the plaintiff has a house on the suit property. In addition, PW 2 posited that the plaintiff resides on the suit property with his family.

111. Additionally, PW 3 [Edward Kimathi] testified that the plaintiff resides on the suit property. Similarly, PW 4 [Simon Miriti Kiunga] who is a son of the plaintiff also testified that the plaintiff resides on the suit property. Perhaps it is important to reproduce the testimony of PW 4 while under cross examination by learned counsel for the defendant.

112. Same testified thus;

*“I do wish to add that parcel number 1099 is not bordering parcel 1120. We reside on parcel 1095. I now say that we reside on parcel number 1099. We have a home on 1099. I do not know where and on which land our home is situated. I now wish to state that we are still residing on parcel number 1099.*

113. It is also imperative to take cognizance of the evidence of PW 5. According to PW 5, the plaintiff and family reside on parcel 1120 and not parcel 1099. Nevertheless, the witness added that same only farm[s] on parcel 1099. For good measure the witness clarified that there is no house on parcel number 1099.

114. I have endeavored to reproduce the foregoing testimony to demonstrate that the evidence which was tendered by and on behalf of the plaintiff is inherently contradictory. To this end, the evidence on record falls short of proving exclusive occupation and possession of the suit property. Pertinently, proof of exclusive occupation of the suit property is paramount and integral.

115. In the case of **Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR)**, the Court of Appeal expounded on the need to prove occupation as a precursor to demonstrating adverse possession.

116. For coherence the court stated thus;

18. *In the case of Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR, this Court stated as follows:*

*“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without 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 clam, nec precario. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:*

*‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’”*

117. The need to establish and demonstrate exclusive possession [physical possession/use] was also highlighted in the case of **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR)**, where the court stated thus;

*36. For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and*

**the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.**

**37. In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was *nec vi, nec clam, nec precario*. (See Kimani Ruchine -v- Swift, Rutherfords Co. Ltd. [1980] KLR 1500 and Karnataka Board of Wakf -v- Governemnt of India & Others [2004] 10 SCC 779).**

**38. In this appeal, the learned judge held that the appellant's occupation of the suit property was interrupted in 1992 when he filed suit before the Bungoma Principal Magistrate's Court.**

**39. In Wambugu -v- Njuguna, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.**

118. Turning to the second issue, it is not lost on me that I have found and held that the plaintiff herein has neither established nor proven exclusive occupation, possession and use of the suit property. Nevertheless, it is imperative to highlight that it is not just a mere occupation, possession and use that would provide a basis for adverse possession. Instructively, the claimant is called upon to prove that the

occupation/possession under reference is hostile/adverse to the interests of the registered owner.

119. However, in respect of the instant matter the position that comes to the fore is that the plaintiff is staking a claim to the suit property as the owner thereof. To this end, it suffices to reproduce the evidence of the plaintiff while under cross examination.

120. The plaintiff stated thus;

***“I have been farming on parcel number 1096. I wish to add that both parcels belong to me”.***

121. Suffice it to underscore that the parcels being referenced include the suit property. In this regard, it is important to state that the plaintiff cannot stake a claim to the suit property on the basis of adverse possession, while at the same time claiming to be the owner thereof. Notably, a claim for adverse possession is mutually inconsistent with a claim for ownership. The two are antithetical to each other. In any event, one must first acknowledge the legitimacy of the title of the registered owner before propagating a claim for adverse possession. [See **Richard Wefwafwa Songoi vs Bernard Munyifwa Songoi (2020) eKLR; Catherine Koriko & 3 others vs Evaline Rosa (2020) eKLR**].

122. Before departing from this issue, it is also important to state that PW 5 [wife of the plaintiff] testified that the suit property belongs to the Plaintiff. The same position was also reiterated by PW 6. Quite clearly, the plaintiff’s claim to ownership of the suit property by way of adverse possession cannot suffice.

123. To my mind, the plaintiff has not brought forth evidence to demonstrate hostility to the interests and rights of the registered owner. In this regard, I am afraid that the plaintiff's claim falls by the way side; or dissipate[s] into thin air.

124. Next is the issue as to whether the plaintiff enjoyed continuous and uninterrupted possession, occupation of the suit property. I beg to state that the analysis of this issue, is superficial and academic. Nevertheless, and for the sake of completeness, it is important to recall the evidence of DW 4 [Josphat Kilele Gituma].

125. Same testified that he was employed by the defendant as a caretaker of the suit property. Same averred that by virtue of being the caretaker, he was charged with supervising the farm and more particularly same rented out portions of the Land to various tenants for farming purposes. For good measure, the witness confirmed that it is the defendant who was using the land on the basis of renting it out.

126. First forward there is the evidence of DW5 Cypriano Makana M'Ikabu. Same testified that he had rented a portion of the suit property from the defendant through the defendant's caretaker. The evidence of the said witness [DW5] was not controverted.

127. What becomes apparent, is that the defendant maintained his possession and use of the suit property. In this regard, it cannot be said that the defendant had been dispossessed of the suit property by the plaintiff. Moreover, it cannot equally be said that the defendant had discontinued his possession in respect of the suit property, to warrant invocation of the plea of adverse possession. **[See Mtana Lewa vs**

**Kahindi Ngala Mwangandi (2015) eKLR; See Wambugu –v- Njuguna, (1983) KLR 173; Kasuve vs Mwani Investment Lts & 4 Others [2004] 1KLR].**

128. Moreover, and in my humble view, the plaintiff equally failed to demonstrate continuous and uninterrupted occupation of the suit property. If anything, evidence abound that the plaintiff was seeking to resort to force and violence to gain entry onto and occupation of the suit property in October 2024, culminating into a complaint being lodged with the OSC Gaitu Police Station and the Area Chief. [***See the evidence of Josephat Kilele Gituma, who testified as DW4***].

129. In particular, the said witness is on record confirming that the Plaintiff and his sons went to the suit property and warned same [DW4] never to return to the suit property.

130. It is imperative to reproduce the evidence of DW4 whilst under cross examination by learned counsel for the Plaintiff.

131. Same testified thus;

***“I was chased from the land when I went to plough thereon. I was warned not to enter the land by the Plaintiff. I do wish to state that the truth of the matter is that when I was continuing to plough and use the land, the Plaintiff and his sons came and told me to stop using the land because the land had a case in court”.***

132. Notably, the Plaintiff and his sons were seeking to resort to violence and force to achieve/retain possession of the suit property. To

my mind, adverse possession cannot accrue when the claimant resorts to force and violence. For coherence, adverse possession is anchored on the existence of the elements referenced in latin as *Nec vi, nec clam, nec precario* [no force, no secrecy and no permission].

133. In addition, possession must never be interrupted. However, in respect of the instant matter, evidence abound that the possession [if at all] was variously interrupted culminating into the violence and/or threat of violence highlighted at the foot of the evidence of DW4.

134. Before concluding on this matter, I beg to take cognizance of the holding of the Court of Appeal in the case of **Wilson Katana Kazungu & 101 Others vs Salim Abdala Barshwein & Another [2015]eKLR** where the court stated as hereunder;

*“On his demise however, the respondents using every means and avenue available to them, attempted albeit unsuccessfully to evict the appellants from the suit premises at times with disastrous consequences. All these happened because the respondents were in law asserting their title to the suit premises which action had the effect of stopping the time from running for purposes of adverse possession. In the premises, the appellants’ possession or occupation of the suit premises between 1970 and the filing of the Mombasa O.S. cannot be said to have been peaceful and uninterrupted as all along there were attempts to evict the appellants from the suit premises. As stated by this Court in the case of Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR):*  
*“...the possession must not be broken, or any endeavours to interrupt it.”*

135. From the foregoing, I am not persuaded that the plaintiff has proven and established his claim at the foot of the amended originating summons dated 6<sup>th</sup> December 2024.

**FINAL DISPOSITION.**

136. For the reasons which have been highlighted in the body of the judgment, it must have become crystal clear that the plaintiff has failed to prove his claim to the requisite standard. In this regard, the plaintiff's suit is *devoid* of merits.

137. Same courts dismissal.

138. In the upshot, and for the reason[s] highlighted; the final orders that commend themselves to the court are as hereunder;

*(i) The Plaintiffs' suit be and is hereby dismissed.*

*(ii) Costs of the suit be and are hereby awarded to the Defendant.*

*(iii) Costs in terms of (ii) shall be agreed upon and in default be taxed in the conventional manner.*

139. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 9<sup>TH</sup> DAY OF OCTOBER 2025**

**OGUTTU MBOYA, FCIArb; CPM [MTI-EA].  
JUDGE**

**In the presence of:**

Hussein – Court Assistant

Mr. Mwirigi Kaburu for the Plaintiff

Mr. Leonard Ondari for the Defendant

