

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC MISC NO. E020 OF 2021**

**LOICE MANOTI MARWA (Suing as the Administratrix  
of the estate of JOHNES MARWA ROGORO).....  
.....PLAINTIFF**

**VERSUS**

**DANIEL CHACHA NGERA.....1<sup>ST</sup>  
DEFENDENT**

**MARWA DICKSON CHACHA.....2<sup>ND</sup>  
DEFENDANT**

**Initially registered as**

**ELC. CASE NO. 409 OF 2017 (OS)**

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT,  
CHAPTER 22**

**AND**

**IN THE MATTER OF: CLAIM FOR ADVERSE POSSESSION  
PURSUANT TO SECTION 38 OF LIMITATION OF ACTIONS  
ACT**

**AND**

**IN THE MATTER OF: LR NO. BUKIRA/BWISABOKA/3649 &  
3651**

**BETWEEN**

**JOHNES MARWA ROGORO.....**  
**PLAINTIFF**

**VERSUS**

**DANIEL CHACHA NGERA)**  
**MARWA DICKSON CHACHA).....**  
**DEFENDANTS**

**AS CONSOLIDATED WITH**  
**MIGORI ELC. NO. 548 OF 2017**

**MARWA DICKSON CHACHA.....**  
**PLAINTIFF**

**VERSUS**

**JONES MARWA ROGORO.....**  
**DEFENDANT**

**JUDGMENT**

**Introduction**

**1.** This judgment arises from two consolidated suits; one commenced by way of an Originating Summons and the other by way of a Plaint. Both were over the same parcels of land, namely, Bukira/ Bwisaboka/3649 and 3651. The two suits were originally filed in the Environment and Land Court at Kisii in the

year 2015. The first one was the Originating Summons, dated 26th February 2015, filed as number 86 of 2015 on the 2nd March 2015. It was supported by an Affidavit sworn by one Johnes Marwa Rogoro on 26th February, 2015. To the supporting Affidavit were four Annextures attached. The second suit was by way of a Plaint dated 5th March 2015 verified through an Affidavit sworn by Marwa Dickson Chacha on the same date and instituted as Kisii High Court Civil Suit No. 95 of 2015 on 6th March 2015.

- 2.** The court record shows that when the Migori Environment and Land Court Registry was created in or about the year 2017, the two suits were transferred to it. The Originating Summons, Kisii ELC No. 86 of 2015 was registered in the said Registry as Migori ELC No. 409 of 2017 (OS), while suit number Kisii ELC No. 95 of 2015 was registered as Migori ELC No. 485 of 2017.
- 3.** The record further shows that on 29th August 2017, the Plaintiff in Migori ELC No. 485 of 2017 moved this Court vide a Notice of Motion dated 12th August 2017 filed on 29th August 2017 to have the two suits consolidated for purposes of hearing

and determination. The order of consolidation was granted because on 08/12/2022 when both parties appeared before the Hon. Judge, they were in agreement that the two files were consolidated and apparently soon after that, the consolidated court file got lost/ disappeared, and the court ordered for a reconstruction on 30<sup>th</sup> November 2021.

**4.** In brief, the Plaintiff, in the said suit, moved this Court, this time through a Miscellaneous application, being number, Migori ELC Misc. Civil Application No. E020 of 2021 for the reconstruction of the two (consolidated) files. An order for this was granted on 8<sup>th</sup> November, 2022.

**5.** The record bears that the reconstruction took a while, with the matter being mentioned a number of times both before the learned Judge and before the Deputy Registrar respectively, for instance, on 30/01/2023, 08/02/2023, 28/02/2023, 22/03/2023, 06/04/2023 and 02/05/2023 for confirmation of the reconstruction. Finally, on 22/05/2023 the Court confirmed the completion of the reconstruction.

**6.** The record shows further that when the reconstruction finally took place, on the same date of confirmation of the reconstruction, the Deputy Registrar directed that the file be placed before the learned trial Judge for substitution of the Plaintiff in the Originating Summons because learned counsel reported the Plaintiff/ Applicant had since died. The Miscellaneous Application in which the proceedings still took place came for the hearing of an application dated 26/09/2023 by which the Court allowed the substitution of the deceased Plaintiff with one Loise Manoti Marwa. This error was committed by the Plaintiff's counsel in the Originating Summons when he drew the application for substitution in the Miscellaneous Application. The orders granting the amendment were made on 22<sup>nd</sup> November 2022 when the application came for inter partes hearing. The learned trial judge directed further that the Originating Summons be amended accordingly. By 19<sup>th</sup> February 2024 when the matter came up for confirmation, the Claimant in the Originating Summons (OS) had not filed the amended OS.

- 7.** On 20th May 2024 the Applicant/Plaintiff in the Originating Summons filed an Amended Originating Summons dated 24th February 2024 supported by the Affidavit sworn on the same date by the current Plaintiff, Loice Manoti Marwa on 26<sup>th</sup> February 2024.
- 8.** The record shows further that during the said step/ process, rather than the Applicant amending the Originating Summons in Migori ELC No. 409 of 2017 (OS), she instead filed the Amended Originating Summons in the Migori Miscellaneous Application No. E020 of 2021 as Migori Misc. Civil Application No. E020 of 2021.
- 9.** It would appear that neither of the parties nor the Court noticed this error which was carried forward to this date. Therefore, as time progressed, the Court directed the matter of Miscellaneous Application now ‘amended’ as the Originating Summons proceeds for hearing. Indeed, the consolidated matter proceeded for hearing as Miscellaneous Application No. E020 of 2017 as consolidated with file No. 485 of 2017. That is how the learned trial judge, in the interest of justice and

bearing in mind that the matter had been in courts of over ten (10) years and that from the evidence relied on by the parties the dispute has been before courts for over twenty years, this Court decided, under Article 159(2)(d) of the Constitution of Kenya and Sections 1A(1) and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya, to carry on with the Miscellaneous Application as the successor of the Originating Summons in Migori ELC No. 409 of 2017, rather than expunging the entire from the amendment and sending back the parties many years' steps back, thereby prejudicing the parties greatly.

**10.** In respect of ELC. Misc. E020 of 2021, the Plaintiff filed an amended originating summons dated 21<sup>st</sup> February, 2024 seeking the following orders:

**1. Declaration that the defendant's rights to recover the whole of LR NO BUKIRA/BWISABOKA/3649 & 3651 is barred under the Limitation of Actions Act Chapter 22 Laws of Kenya and his titles thereto extinguished on the grounds that the current plaintiff herein has openly, peacefully and continuously been in**

**occupation and possession of the aforesaid parcels of land for a period exceeding 20 years.**

**2. There be an order that the current plaintiff or in the estate of JOHNES MARWA ROGORO be registered as the proprietor of the whole of L.R NO BUKIRA/BWISABOKA/3649 & 3651 in place of the 2<sup>nd</sup> defendant herein who currently holds titles to the suit properties.**

**3. An order be issued that LR NO BUKIA/BWISABOKA/3649 and 3651 do form part of the estate of JOHNES MARWA ROGORO (now deceased)**

**4. The defendants and in particular the 2<sup>nd</sup> defendant herein be ordered and/or directed to execute and/or sign all the necessary transfer instruments to facilitate the transfer and registration of the suit properties, in the names of the current plaintiff and/or in the name of the estate of JOHNES MARWA ROGORO (now deceased). In default, the Deputy Registrar of this Honourable court be granted liberty**

**to execute the transfer instruments in favour of the plaintiff.**

**5. There be an order restraining the defendants either by themselves, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the said parcels of land that is LR NO. BUKIRA/BWISABOKS/3649 & 3651 in any manner whatsoever and/or however.**

**6. There be an order restraining the defendants either by themselves, agents, servants and/or employees from interfering with the current plaintiff, family members, agents and servants' peaceful possession and occupation of the said parcels of land that is LR NO. BUKIRA/BWISABOKS/3649 & 3651 in any manner whatsoever.**

**7. Costs of this originating summons be borne by the defendants.**

**8. Costs of this amended originating summons be borne by the defendants.**

**9. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.**

**11.** In Migori No. 485 of 2017, the 2<sup>nd</sup> Defendant claimed that he was the registered proprietor of LR NO. BUKIRA/BWISABOKA/3649 and LR NO BUKIRA/BWISABOKA/3651 and that the Plaintiff had trespassed onto his land. For ease of reference the parcels of land shall be referred to herein by their respective numerical digits and not the full parcel names or titles as appear on the title deeds or green cards.

**12.** Specifically, regarding the claim the Plaintiff, it was the Plaintiff's averment that he was the sole registered proprietor with an absolute title to parcel numbers LR. Bukira/Busaboka/3649 and 3651 measuring approximately 0.2 hectares and 0.27 hectares respectively. That in mid-February 2010, the Defendant unlawfully and without any color of right entered onto the plaintiff's parcels of land and had continued causing waste thereon. He listed the particulars of the trespass as follows:

- a. Destroying crops.*
- b. Chasing the plaintiff's workers away from working on the properties in issue.*
- c. Preventing the plaintiff from accessing his land.*
- d. Unlawfully letting out (the parcels) on rent to third parties.*
- e. Unlawfully grazing their animals on the plaintiff's land.*
- f. Denying the plaintiff's use of his land.*
- g. Defacing the plaintiff's boundaries and features.*
- h. Unlawfully putting up a fence and or erecting new border marks on the plaintiff's land.*

**13.** He pleaded further that as a result he had been deprived of the use of the two parcels of land because they were occupied (now) by the defendant. Further, sometime in 2010 the defendant filed Kehancha Land Disputes Tribunal Case No. 4 of 2010 claiming the plaintiff's 1.5 acres out of His parcel of land No. 3649 and 3651 which parcels neighbor each other.

**14.** The plaintiff filed High Court Miscellaneous Civil Application No. 40 of 2010 Judicial Review at the High Court of Kenya at

Kisii. The decision of the Tribunal was quashed on 14th November 2015. But the Defendant had all along used the decision of the Land Disputes Tribunal to encroach and trespass onto both parcels of land in issue. This she had done by cultivating, grazing his animals on the said parcels of land and also leasing them to third parties. The defendant had on several occasions wielded weapons against the plaintiff and chased him from the suit land to retain possession.

**15.** The plaintiff claimed against the defendant for an order of eviction and a permanent injunction against him barring him from trespassing, occupying, cultivating, grazing or doing any other filling dealings and all transactions on the two parcels of land. Further, the plaintiff had issued a demand notice, but it had been ignored. Further, this court had jurisdiction to hear and determine the dispute. He prayed for the reliefs as listed above.

**16.** The Plaintiff (in the OS) never entered appearance nor filed a defence in the suit. Thus, the 2<sup>nd</sup> Defendant proceeded to

request for judgment in default but the same was never issued (as this is procedural).

- 17.** The Originating Summons was based on the grounds that the 1<sup>st</sup> Defendant entered into a sale agreement with Johnes Marwa Rogoro (deceased) for purchase of a portion of LR NO. BUKIRA/BWISABOKA/94 being the original parcel.
- 18.** That he immediately took possession until when he died. That the 1<sup>st</sup> Defendant subdivided the parcel creating the suit parcels BUKKIRA/BWISABOKA/3649 & 3651.
- 19.** The 1<sup>st</sup> Defendant caused the said parcels to be transferred to the 2<sup>nd</sup> Defendant who currently held the titles to the suit properties. That occupation of JOHNES MARWA ROGORO has been open, continuous and uninterrupted.
- 20.** That at the time of subdivision, sale and transfer in favour of the 2<sup>nd</sup> Defendant, the said JOHNES MARWA ROGORO (deceased) was in occupation of the suit parcels.

**21.** That JOHNES MARWA ROGORO (deceased) and the current Plaintiff's occupation of the suit properties has been adverse to the interests of the Defendants.

**22.** The 2<sup>nd</sup> Defendant in response filed Replying Affidavits sworn on 2<sup>nd</sup> April, 2015 and 5<sup>th</sup> June, 2024 in opposition to adverse possession claim. He stated that the 1<sup>st</sup> Defendant never sold or intended to sell L.R No. BUKIRA/BWISABOKA/3649 and L.R No. BUKIRA/BWISABOKA/3651 to JOHNES MARWA ROGORO (deceased). He added that any purported agreement was fraudulently framed with misrepresentation of facts.

**23.** He went on to state that the deceased has never been in occupation of the suit properties. He stated that he was the heir of NGERA KIBUCHIKI (deceased) who was the original owner of L.R No. BUKIRA/BWISABOKA/94 which was later transferred to ALFONCE MWITUSIA NGERA his uncle.

**24.** He deponed that his uncle subdivided L.R No. BUKIRA/BWISABOKA/94 into four portions being L.R No. BUKIRA/BWISABOKA/1581-1584. He also deponed that ALFONCE MWITUSA transferred LR No.

BUKIRA/BWISABOKA/1581 to MARGARET MWITUSA WANGERA who again subdivided it into BUKIRA/BWISABOKA/1690-1708, BUKIRA/BWISABOKA/2230-2248 and BUKIRA/BWISABOKA/2547.

**25.** He stated that Margaret later subdivided BUKIRA/BWISABOKA/1692 to form BUKIRA/BWISABOKA/3443-3446. He further stated that Margaret transferred BUKIRA/BWISABOKA/3444 to him. He added that he subdivided the said parcel to form BUKIRA/BWISABOKA/3536 and 3537.

**26.** He stated that he subdivided BUKIRA/BWISABOKA/3536 to create BUKIRA/BWISABOKA/3559 which he again subdivided to form BUKIRA/BWISABOKA/3646-3652.

**27.** He stated that on 14<sup>th</sup> Jul, 2009 his name was entered into the Land Register as the sole proprietor of L.R No. BUKIRA/BWISABOKA/3649 and 3651 and was issued with a title. He added that on 26<sup>th</sup> February, 2010 the deceased invaded into his suit parcels and cultivated it.

**28.** He further stated that the deceased also filed a case with the Kuria District Land Dispute Tribunal vide case No. 4 of 2010 challenging his titles which case was decided in his favour. He

stated that the tribunal's award was however quashed in Msc Civil Application No. 40 of 2010 (JR).

**29.** He stated that he filed a trespass case against the deceased vide Kisii ELC No. 95 of 2015 and thus the deceased's occupation over the suit parcels has not been continuous and uninterrupted.

**30.** He also stated that at the time of subdivision, the deceased was not in possession of the suit parcel. He added that his name was entered in the register on 14<sup>th</sup> July, 2009 while the suit commenced in 2015 hence the same had not met the statutory timeline of 12 years.

**31.** In conclusion, he stated that the Plaintiff's application for adverse possession was without any foundation and ought to be dismissed.

## **EVIDENCE**

**32.** The matter proceeded to full hearing with Loice Manoti Marwa as PW1. She testified that her deceased husband bought the suit parcel from Chacha Ngera. She testified that

they gave the money and continued to pay while Ngera's son, the 2<sup>nd</sup> Defendant was in school. She added that after he completed school, her husband was yet to receive the title and when he asked for the transfer, the son transferred the title to his name.

**33.** She went on to testify that after the son sold the land to another person, her late husband sued him in Kehancha Law courts where he won the case and the seller ordered to transfer the land to her husband.

**34.** It was her testimony that the court had ordered the land registrar and surveyor to take measurements of the land and have it transferred. She added that they have resided on the land since 1990 up until 2024 when she was evicted.

**35.** She testified that she had not brought the documents in court since she knew that that her advocate would be present in court. She requested to be given time to present her documents in court which the Defence counsel did not object.

- 36.** The court adjourned the matter and the Plaintiff was given time to produce her documents. She however failed to do so and on 7<sup>th</sup> April, 2025, the Plaintiff's case was closed.
- 37.** The 2<sup>nd</sup> Defendant, Chacha Marwa testified as DW1. He testified that he did not know the Plaintiff. He went on to testify that he knew Johnes Marwa Rogoro (deceased) as they had a case over the suit parcel in 2010 where the deceased claimed that he had bought the suit land from his father, Chacha Daniel Mwita. He adopted his Replying Affidavit dated 5<sup>th</sup> June, 2024 and 2<sup>nd</sup> April, 2015 as his evidence in chief.
- 38.** He further testified that the original owner of Bukira/Bwisaboka/94 was Ngera Kibuchiki (deceased) and after succession, Alfonce Mwitusa Ngera, his uncle, became the registered owner. He added that in 1995 the property was subdivided into four parcels 1581, 1567, 1583 and 1584 where he became the owner of 1581. He added that the said property was later subdivided on 11<sup>th</sup> May, 1995. He produced a certified copy of Bukira/Bwisaboka/94 as DExh1 issued on 19<sup>th</sup> March, 2015.

- 39.** He testified that the property was later transferred to Margaret Mwitusia Ngera, his uncle's wife. He went on to testify that the property was again subdivided to parcels no. 1690, 1708, 2230, 2248 and 2547. He produced the green card for parcel No. 1581 as DExh2. He further testified that the subdivision for 1692 established the registered owner as Margaret. He produced the green card for 1692 as DExh 3.
- 40.** He testified that the above property was also subdivided into four parcels being 3443, 3444, 3445 and 3446 where he was given parcel no. 3444. He added that the same was transferred to him by Margaret on 16<sup>th</sup> April, 1988 as part of his father's share. He produced the green card for parcel 3444 as DExh 4.
- 41.** It was his testimony that he subdivided the family land parcel being 3444 into several parcels and that 3559 was registered in his name. He produced the green card for 3559 as DExh 5. He testified that he went on to subdivided the said parcel into 3646, 3647, 3648, 3649, 3650, 3651 and 3652. He produced the green card for the same as DExh 6.

**42.** He testified that the Plaintiff's claim that he has been in occupation of 3649 for over 20 years was false since the said parcel was registered in his name on 14<sup>th</sup> July, 2009. He produced the green card for parcel 3649 as DExh 7. He added that the claim that the Plaintiff has been in occupation of parcel no. 3651 for over 21 years was also false. He produced the green card for parcel 3631 as DExh 8.

**43.** It was his testimony that the case was filed in 2015 and that from 2009 to 2015, he was the registered owner for over 6 years. He testified that from the documents produced, his father never owned any of the parcels.

**44.** He testified that the Plaintiff was given the award in the tribunal case no. 4 of 2010 but that he appealed the said verdict in the High court in Kisii vide JR 40 of 2010 where the tribunal's and lower court's decision in favour of the Plaintiff were quashed. He produced a copy of the proceeding in the High court as DExh 9.

**45.** He testified that he has since been cultivating the suit parcel. He produced a photo of the parcel of land as DExh 10.

He denied the allegation by the Plaintiff that he has been the one ploughing the suit land. He added that there was no surveyors report that the Plaintiff was cultivating the land.

**46.** In cross examination, he stated that he was not aware of any agreement between the deceased Plaintiff and his father. He further stated that he was not aware that before subdivision of parcel 94, that the Plaintiff was in possession.

**47.** He added that he was not aware that the Plaintiff was in actual possession of parcels 3649 and 3651.

**48.** Upon re-examination, he stated that 3649 and 3651 belonged to him and denied that the Plaintiff and her husband were ever in occupation as he would have known. He stated that after and before subdivision, the family administrator, Margaret Mwitusia was the one in occupation.

**49.** That marked the close of the Defence case.

### **Submissions**

**50.** Counsel for the Defendant filed his submissions dated 19<sup>th</sup> May, 2025 where he identified three issues for determination.

The first issue was whether the Plaintiff has established a case for adverse possession in respect of the suit property. While submitting in the negative, he relied on **Section 7** of the **Limitation of Actions Act**, the Court of Appeal case in **Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi V Ben Munyifwa Songoi [2020] eKLR** and **Kasuve V Mwaani Investments Limited & 4 Others 1KLR 184**.

**51.** It was his submission that the Plaintiff failed to substantiate her claim that they have been in occupation of the suit parcel having purchased the same from the 1<sup>st</sup> Defendant. He submits that there was no evidence produced in court by the Plaintiff in support of her claim despite having been granted leave to do so.

**52.** He further submits that the 2<sup>nd</sup> Defendant's testimony established that the 1<sup>st</sup> Defendant never owned LR No. Bukira/Bwisaboka/94, Bukira/Bwisaboka/3649 nor Bukira/Bwisaboka/3651. He submits that the Plaintiff failed to produce any sale agreement or surveyor's report that confirmed her possession, acreage of the property the

deceased alleged to have occupied and the activities being carried out on the suit land. He cited **Section 107 (1)** of the **Evidence Act**.

**53.** He submits that there was no evidence of use of the land by the Plaintiff in a continuous manner up to 12 years.

**54.** The second issue was whether the Plaintiff is entitled to the suit property by adverse possession. Counsel submits that the Plaintiff failed to demonstrate to the required standard the elements to be ascertained before one acquires land under the doctrine of adverse possession. He relied on the case in **Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba V Mary Mbaisi [2015] eKLR**.

**55.** It was his submission that the Plaintiff failed to show de facto occupation on the suit land either by farming or occupation of the land. He urged the court to dismiss the Plaintiff's suit with costs.

### **Analysis and Determination**

**56.** Having considered the pleadings, evidence on record and submissions, two issues arise for determination:

**a) Whether the Plaintiff's claim for adverse possession is merited.**

**b) Whether the 2<sup>nd</sup> Defendant's claim for eviction and injunction against the Plaintiff is merited.**

**c) Who to bear the costs of the suits**

**57.** This court begins with the analysis of the issues in the order they appear above. Suffice it to say that the Plaintiff in the Originating Summons seems to have engaged different counsel towards to end of this matter, particularly, by the time she gave testimony and thereafter. But, for instance, one, Bwondika Advocate who was said to have not had a valid practicing certificate when engaged sent two counsel to hold brief and they did what the record shows the did while later it was said that the party employed again another law firm. Be that as it may, the record does not bear the changes of advocates by way of Notices of Change as required. Thus, it to avoid confusion, would be vital

for anyone carrying on with this matter henceforth to note which of the counsel or party was on the record last.

**a) Whether the Plaintiff's claim for adverse possession is merited**

**57.** In order for a claim of adverse possession to succeed there are specific conditions that must be fulfilled. The doctrine of adverse possession is embodied in **Sections 7** and **38** of the **Limitation of Actions Act. Section 7** provides that:

*“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.”*

**58.** Similarly, **Section 38(1)** of the **Act** provides that

*“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the*

*proprietor of the land or lease in place of the person then registered as proprietor of the land.”*

**59.** PW1 contends that her late husband purchased the suit properties Bukira/Bwisaboka/3649 and 3649 from the 1<sup>st</sup> Defendant and that they have been living on the said parcel since 1990 thus acquired the same adversely.

**60. PW1** gave her testimony and despite being granted an opportunity to file her documents, she failed to do so.

**61.** In the Court of Appeal case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

**“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the**

**owner or there having been discontinuance of possession by the owner.”**

**62.** 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."**

**63.** It is this court's view that to the extent that the Plaintiff contends that they have been in possession of the suit property, it was incumbent upon her to present before the court evidence to show the same.

**64.** It is this court's view that failure by a party to adduce evidence in support of their allegations does not shift the burden of proof of the party's case to the other, the Defendant in the instant matter. The Plaintiff still bore that burden on a balance of probabilities.

**65. Section 107 and 108 of the Evidence Act** provides that: -

**"107. Burden of proof**

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**66.** On the incidence of burden, Section 108 of the Act provides that,

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

**67.** Despite the obligation on the shoulders of the Plaintiff to tender \_\_\_\_\_ and prove her claim that they have been in continuous and uninterrupted possession of the suit parcel for more than 12 years, she failed to tender any credible evidence. Instructively, proof and or demonstration that the stay was continuous with the 2<sup>nd</sup> Defendant’s knowledge was a key ingredient on the pathway to demonstrating adverse possession.

**68.** In addition, the contention of continuous and peaceful possession on the suit property by the Plaintiff since 1990 to 2024 was not proved to the required standard since PW1 in her

oral testimony contradicted herself when she confirmed that the deceased had filed a case in 2012 at the Tribunal.

**69.** Furthermore, and in sum, it also behooved the Plaintiff to tender and place before the court evidence of the sale agreement between Johnes Marwa Rogoro (deceased) and the 1<sup>st</sup> Defendant as well as a copy of the title deed in the 1<sup>st</sup> Defendant's name which she failed to do so. Moreover, even if the Plaintiff in the Originating Summons were to be taken to have resided on the parcel of land since 1990 as she claim, it is clear from the Defendant's evidence that her quiet and continuous occupation was interrupted or broken before the end of the twelve year period when the parties moved to the Kehancha Dispute's Tribunal in No. 4 of 2010 which was finally quashed by the High Court at Kisii in Judicial Review (JR) No. 40 of 2010 which was concluded on 14/11/2014 as evidenced by PExh 9. It was incumbent on the Plaintiff to prove the quiet, continuous, open and non consensual occupation of the land for over twelve years. She failed on this important aspect.

**70.** It follows that the Plaintiff failed to prove her case on a balance of probabilities and thus, the entire claim of adverse possession is not merited and fails in its entirety.

**b) Whether the 2<sup>nd</sup> Defendant's claim for eviction and injunction against the Plaintiff is merited.**

**71.** The Defendant on the other hand gave evidence to the effect that the suit property was never owned by the 1<sup>st</sup> Defendant. He produced documentary evidence in form of the green cards which showed the history of how the suit parcel being family property was originally owned by his grandfather Ngera Kibuchiki (deceased) after which it was transferred to his uncle Alfonce and later to his wife Margaret.

**72.** It was his testimony that he acquired the suit properties as inheritance from the 1<sup>st</sup> Defendant and this was backed up by the green card and title deed which the Plaintiff never rebutted. It is not in dispute that the suit property was registered in the 2<sup>nd</sup> Defendant's name on 14<sup>th</sup> July, 2009 as evidenced from the green card he produced in court. It is also not in dispute that there was no evidence that the suit parcel was ever owned by

the 1<sup>st</sup> Defendant to warrant the claim of adverse possession by the Plaintiff.

**73. Section 24(a)** of the **Land Registration Act** provides that:

**“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

**74.** Further, **Section 26(1)** of the same Act also provides that:

**“...the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner...”**

**75.** It is this court’s view that the 2<sup>nd</sup> Defendant on the other hand vide his replying affidavit, testimony and evidence adduced remained cogent and sufficient to disprove the Plaintiff’s case. Consequently, the Plaintiff in Suit No. 485 of 2017 discharged the burden to the required standard, in

respect of the suit parcels of land. Furthermore, his evidence by way of **PExhs 1** (the certified copy of the register for Buikira/Bwisaboka/94), **PEXh 2** (the green card for Bukira/Bwisaboka/1581), **PEXh 3** (the gree card for parcel No. 1092), **PEXh 4** (green card for No. 3444), **PEXh 5** (green card for No. 3559), **PEXh 6** (green card for 3652), **PEXh 7** (green card for No. 3649), **PEXh. 8** (green card for No. 3651), **PEXh 9** (proceedings in **Kisii JR No. 40 of 2010**) and **PEXh. 10** (photographs) all show that the Plaintiff was the owner of the suit parcels of land on which the Defendant in the suit, No. 485 of 2017 was said to be occupying or residing and which she admitted in her claim in the Originating Summons. It has been proved that she is not the owner and she is not lawfully residing on the two parcels of land. She is therefore a trespasser who must be evicted from the parcels of land and thereafter be barred by way of an order of this court, of injunction, as prayed, from entering or remaining on the two parcels whether by herself or her agents, servants and or assigns.

**76.** Furthermore, the Defendant failed to file a defence to counter the averments in the Plaint in suit No. 485 of 2017. It means that the pleadings were unchallenged and all the plaintiff was required to prove was the evidence on a balance of probabilities that he was the owner and the Defendant was on the land without his permission or colour of right. This he did.

**77.** Having carefully evaluated the evidence adduced herein, this court finds that the Plaintiff failed to prove his claim for adverse possession on a balance of probabilities. The upshot of the foregoing is that the Amended Originating Summons dated 21<sup>st</sup> February, 2024 is dismissed in its entirety with costs to the 2<sup>nd</sup> Defendant. The Plaintiff's claim in Migori ELC. No. 485 of 2017, as consolidated with the Originating Summons herein, succeeds. This court therefore enters judgment for the Plaintiff against the Defendant as follows:

**a) An order of permanent injunction is hereby issued restraining the Defendant (Loice Manoti Marwa) from trespassing, occupying, cultivating, grazing and/or carrying out any dealings on LR NO.**

**BUKIRA/BWISABOKA/3649 and LR NO BUKIRA/BWISABOKA/3651. The further cultivation and/or planting (of any new crops), tending the already planted ones, grazing and other further activity to stop forthwith except the harvesting of any crops already growing on the land which should be done by end of the period stipulated below.**

**b) The area Chief and/ or Assistant Chief to oversee this temporary implementation of the order before the end of the period of sixty (60) days.**

**c) An eviction order is hereby issued against the Defendant to vacate the suit properties within 60 days failure which the OCS Migori Police Station shall ensure compliance with the said orders**

**d) In the event of failure of (b) above, an eviction to take place immediately upon the expiry of sixty (60) days from the date of this Judgment, with the assistance of the OCS Migori Police Station.**

**e) Costs of this suit to be borne by the Plaintiff (in the OS)/ the Defendant in suit No. 485 of 2017 while she is to**

**bear the costs of the Originating Summons (now E020 of 2021).**

**78.** Orders accordingly.

**JUDGMENT** Dated, SIGNED and DELIVERED virtually via the Teams Platform

**this 13<sup>th</sup> day of November, 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**In the presence of**

Court Assistant: Lola  
Abisai Advocate for the Respondent and Plaintiff in the Consolidated suit  
No Appearance for the Applicant/ Defendant in the Consolidated suit  
(served )