

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC CASE No. E012 OF 2024 (OS)

**IN THE MATTER OF: THE ESTATE OF MUGO WAWERU
(DECEASED)**

&

**IN THE MATTER OF: L.R. No. CHEPTIRET/CHEPLASGEI
BLOCK 3 (SERTWET)/136 AND 138**

&

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP
22 LAWS OF KENYA**

-BETWEEN-

JOHN KIMUTAI RUTTO
APPLICANT

-VERSUS-

MIRIAM NJOKI WAWERU 1ST
RESPONDENT

PETER KINYANJUI WAWERU 2ND
RESPONDENT

MARY WAMBOI GACHAHI
..... 3RD RESPONDENT

(As administrators of the Estate of the late Samwel Mugo Waweru)

JUDGEMENT

1. The Applicant Amended Originating Summons dated 10.03.2025 (hereinafter referred as **“the present OS”**) seeks for determination of the following issues:

- (a) **Whether Mugo Waweru (deceased) was the original owner of parcel no. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/136 and 138 CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102.**
- (b) **Whether or not the Applicant herein has acquired interest in the suit property by way of purchase and/or adverse possession and by trust to the extent of that interest.**
- (c) **Whether or not the Respondents hold the said parcels of land identified as L.R. No. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/136, L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/138 in trust for the estate of the late SAMUEL MUGO WAWERU, MUGO WAWERU.**
- (d) **Whether or not the suit properties should be registered in the names of the plaintiff.**
- (e) **Whether or not the respondent should be condemned to pay the costs of his suit.**
2. The Applicant in seeking a determination of the above issues based on the following facts pleaded in the Supporting Affidavit dated 10th March, 2025:
- (i) The Applicant pleaded that he resides and/or occupies two properties namely L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/136 and 138 (hereinafter referred to as **“the suit properties”**).
- (ii) The Applicant further did plead that the suit properties were a subdivision of an original property known as L.R. No. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102.
- (iii) The Applicant stated that on 05.01.1996 and 18.03.1998 he entered into two Agreements for sale for the purchase of 1 Acre and $\frac{1}{2}$ an acre respectively from one Reuben Maiyo Kesho who had purchased the two portions from the original owner, Waweru Mugo (deceased).

- (iv) According to the Applicant, the 1 acre purchased through the Agreement dated 05.01.1996 is what is now described as L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/136, while the ½ acre purchased through the Agreement For Sale dated 18.03.1998 is identified as L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/138
 - (v) That upon purchase, the Applicant took possession of the suit properties and has been living on the suit properties for over a period of 12 years.
 - (vi) The Applicant therefore stated that the suit properties belong to him by virtue of purchase, trust and or adverse possession having fully paid for them to Reuben Maiyo Kesho.
 - (vii) The Applicant stated that the late Mugo Waweru made various attempts to evict him from the suit properties including through the proceedings known CMCC NO. 1665 OF 2003 but has been unable to do so.
 - (viii) The Applicant lastly stated that the late Mugo Waweru had sub-divided the original property known as L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102 as early as 1999 and had intended to transfer the same to him.
3. The present OS was duly served on the 4th-6th Respondents (hereinafter referred to as **“the Respondents”**) who stated as follows in opposition;-
- (i) The Respondents introduced themselves as the administrators of the estate of the late Samwel Waweru Mugo having been appointed on 7th February, 2024 in the proceedings known as Eldoret High Court Succession Cause No. 231 of 2010.
 - (ii) The Respondents were of the view that the ownership of the suit properties had been an issue in another

proceeding known as Eldoret CMCC No. 479 of 2002 between Samwel Waweru Mugo vs Reuben Maiyo Kesho and others, wherein the Applicant was a party.

- (iii) The Respondents stated that in the Judgment pronounced on 5th June, 2018, the Court had made the following orders; -
 - (a) A declaration against the 1st Defendant that the Sale Agreement of May 1995 is null and void and unenforceable and that the 1st Defendant is only entitled to a refund of the sums paid to the deceased.
 - (b) A permanent injunction restraining the Defendants jointly and severally either by themselves, their servants and/or agents from trespassing upon, occupying, wasting alienating and or in any other way dealing with the Plaintiff's parcel of land in a manner inconsistent with the Plaintiff's interest herein.
 - (c) An order that the Defendants' occupation and refusal to vacate from the suit property constitutes and offence under section 22 of the Land Control Act.
 - iv. The Respondents' position was that the suit properties herein were one and the same as that in the proceedings known as Eldoret CMCC No. 479 of 2009 and therefore the present OS is Res Judicata.
 - v. The Respondents alleged that the Applicant failed to disclose the existence of the previous suit over the same subject matter and has come to this Court with unclean hands.
4. The Replying affidavit by the Respondents was served on the Applicants who filed a Supplementary Affidavit dated 17.03.2025 stating as follows:-
- (i) That the proceedings known as Eldoret CMCC 479 of 2002 were between Samwel Waweru Mugo vs Reuben Maiyo

- Kesho & 2 others but did not deal with the issue of adverse possession.
- (ii) The Applicant reiterated the fact that he took possession of the suit properties in 1996 and has continued to occupy the same continuously and uninterrupted to date.
 - (iii) Consequently, the Applicant was of the view that the Defence of *Res Judicata* could only come to play if the issue of adverse possession had been raised earlier.
 - (iv) The Applicant insisted that the Defense of adverse possession can be raised even against the administrators of the deceased owner.
 - (v) In conclusion, the Applicant stated that the present OS was merited.
5. The Supplementary Affidavits filed by the Applicants was served on the Respondent who also filed a Supplementary Affidavit dated 09.04.2025 stating as follows: -
- (i) The Respondents reiterated that their late father had sued the Plaintiff for trespass and mesne profits as well as an Injunction prohibiting them from occupying or dealing with the suit properties therein.
 - (ii) During the pendency of those proceedings, an Order of Injunction was issued on 12.06.2002 prohibiting the Applicant and the other Defendants from dealing with the suit properties pending the hearing and determination of the suit
 - (iii) After a long and protracted litigation, the proceedings known as ELDORET CHIEF MAGISTRATES COURT CASE NO. 479 OF 2002 was determined through the Judgement issued on 05.06.2018 wherein a Permanent Injunction was issued against the Applicant herein.
 - (iv) So far, the Applicant herein has never appealed against the Judgment pronounced on 05.06.2018 in the

proceedings known as ELDORET CHIEF MAGISTRATES COURT CASE NO. 479 OF 2002 and/or had the same set aside.

(v) In view of the litigation known as ELDORET CHIEF MAGISTRATES COURT CASE NO.479 of 2002, the Applicant's occupation and use of the suit property has always been challenged and cannot be said to have been continuous.

(vi) As such, the Respondents sought the present OS to be dismissed with costs.

6. After the Respondents filed their supplementary affidavit, the matter was listed down for hearing.

THE APPLICANT'S TESTIMONY & DOCUMENTARY EVIDENCE

7. The Applicant's first witness was the Applicant who was marked as PW1.

8. The Applicant introduced himself as a resident of Cheplasgei.

9. The Applicant informed the Court that he was familiar with the Respondents who were the administrators of the estate of the late Samwel Mugo Waweru.

10. The Applicant stated that he had sued the respondents because of the failure to transfer the suit properties to his name.

11. The Applicant averred that the suit properties were originally owned by the late Samwel Waweru Mugo who sold them to Reuben Maiyo before Reuben Maiyo selling them to him (Copies of the two Agreements for Sale dated 05.01.1996 and 18.03.1998 respectively were produced as PLAINTIFF'S EXHIBITS 1 & 2 respectively).

12. The Applicant pointed out that in the above Agreements for sale, the suit properties purchased by Reuben Maiyo were to be created out of the mother title known as L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/130. (The Mutation of the Original property known as CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/130 was produced as PLAINTIFF'S EXHIBIT 3).
13. The Applicant further stated that the property known as L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/130 was a subdivision of L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102 (Copies of the Register and/or Green Card of CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102 produced as PLAINTIFF'S EXHIBIT 4).
14. The Applicant then produced the two Registers and/or Green Cards of the Suit properties. (Copies of the Registers and/or Green Cards were produced as PLAINTIFF'S EXHIBIT 5 & 6 respectively.)
15. The Applicant confirmed that the late Samwel Waweru Mugo attempted to evict him from the suit properties resulting to the Applicant filing a case known as ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 1665 OF 2003 IN which a Judgment was pronounced to the effect that the Respondent herein was trespasser and ordered to compensate him for the unlawful destruction of his properties. (A Copy of the Judgement read in ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE 1665 of 2003 was produced as PLAINTIFF'S EXHIBIT 7).
16. The Applicant thereafter proceeded to adopt his witness statement dated 10.03.2025 and reiterated the fact the he had been on the suit properties since he purchased the same 29 years ago, hence was entitled to a claim of adverse possession.

17. On cross-examination, the Applicant was referred to PLAINTIFF'S EXHIBIT 1 which was executed on the 05.01.1996.
18. The Applicant confirmed that he purchased the property from Reuben Maiyo and had paid KShs.61,000/- for the same.
19. The Applicant stated that the name of the Respondent was not in the Agreements for Sale.
20. On being referred to PLAINTIFF'S EXHIBIT 2, the Applicant admitted that the Respondent was not a party to the Agreement for Sale.
21. On being referred to PLAINTIFF'S EXHIBIT 7, the Applicant stated that the Judgment in the proceeding known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO. 1665 OF 2003 only provided for damages but did not have a declaration that he was the owner of the suit properties.
22. The Applicant nevertheless reiterated that he is the one in occupation and use of the suit property although he did not provide any evidence to that effect.
23. The Applicant was referred to the Defendants List of Documents dated 11.03.2025 and in particular Items C-G.
24. On Item D, the Applicant confirmed that it was a suit known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 in which he was a party therein.
25. On being referred to Item D, the Applicant confirmed that it was a decree dated 04.09.2018 but denied being a party in those proceedings.
26. On being referred to Item E and F, the Applicant denied any knowledge of the cheque dated 15.09.2018.

27. In concluding his cross-examination, the Applicant stated that even if the vendor Reuben Maiyo did not own the property, he was still entitled to a claim of adverse possession.
28. On re-examination, the Applicant was referred to PW1 EXHIBIT 7 in which he stated that the Respondent had demolished his house and taken away various farm products.
29. The Applicant was referred to Item D on the Defendant's List of Documents dated 11.03.2025 which he accepted he was a party in the proceeding.
30. However, the Applicant stated that they have never been evicted from the suit properties even after issuance of the said Orders.
31. At the end of this re-examination the Applicant was discharged from the witness box and his case closed thereafter.

RESPONDENTS' TESTIMONY & DOCUMENTARY EVIDENCE

32. The Respondents' case begun with the testimony of PETER KINYANJUI WAWERU the 5th Respondent who was marked as DW1.
33. DW1 introduced himself as a businessman from Thika town.
34. DW1 proceeded to adopt the Replying Affidavit dated 11.03.2025 and Supplementary Affidavit dated 09.04.2025 as his evidence-in-chief.
35. DW1 produced the following documents in support of his evidence: -

DW1 EXHIBIT 1 - copy of a Grant dated 7/02/2024 in HCC Succession No. 231 of 2010

DW1 EXHIBIT 2 - Copies of the Suit properties both issued on 18.01.2004.

DW1 EXHIBIT 3(a) & (b) - A Copy of Decree in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO. 479 OF 2002 dated 04.09.2018 and the Judgement dated 05.06.2018.

DW1 EXHIBIT 4 - Copy of A Letter dated 17.09.2018 from Kalya & Co. Advocates to Chepkwony & Co. Advocates, plus a copy of a cheque from SBM dated 15.09.2018 and Receipt No. 792 dated 15.04.2019 from Chepkwony & Co. Advocates

DW1 EXHIBIT 5 - Copy of a Complaint dated 22/05/2002 in the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO. 479 of 2002.

DW1 EXHIBIT 6 - Copy of a Chamber Summons dated 22.05.2002 in the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO. 479 of 2002.

DW1 EXHIBIT 7 - Copy of the 2nd Defendant's Defence and Counterclaim dated 13.06.2002 in the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002.

DW1 Exhibit 8(a) & (b) - copy of the orders dated 12/06/2002 and 1/04/2003 in the proceedings known as ELD CMCC No. 479 of 2002

36. DW1 admitted that the Applicant was one of the people in occupation of the suit property.
37. DW1 on being referred to PW1 EXHIBIT 1 & 2 stated that the Agreements for Sale did not have his deceased father as a party.
38. DW1 informed the Court that Reuben Maiyo had intended to purchase a portion of the mother property known as L.R.

CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102 but failed to pay the full purchase price and could not complete.

39. Based on the failure by Reuben Maiyo to complete the sale with the late Samwel Mugo Waweru, the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 were instituted against Reuben Maiyo and other parties including the Applicants herein.
40. Subsequently thereafter, the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 were concluded with an Order rescinding the Agreement for Sale and issued a Permanent Injunction against Reuben Maiyo and the Applicant herein.
41. On being referred to PW1 EXHIBIT 7, DW1 confirmed that at one point his deceased father had demolished the Applicant's house which had been developed on the suit properties.
42. However, DW1 stated that the case filed by the Applicant was not about ownership of property but whether there had been unlawful destruction.
43. On being referred to PW1 EXHIBIT 3, DW1 stated that the Mutation produced in Court did not indicate the author or when it was prepared.
44. DW1 denied the allegation that the Applicant had been residing on the land for the last 29 years.
45. DW1 informed the Court that the Applicant attempted to take possession in the year 2000 but was not successful as his structures and crops were demolished in the same year leading to the proceedings which were in court.
46. DW1 therefore sought this Court to dismiss the present OS with costs.

47. On cross-examination, DW1 was of the view that once possession is interfered with, then the accumulation of time should stop.
48. DW1 referred to Defence EXHIBITS 3(a) & (b) and stated the Court had pronounced the Respondent as the lawful owner of the property.
49. DW1 informed the Court that they had not issued any notice of eviction because there was a Judgment on record.
50. On being referred to PW1 EXHIBIT 7, DW1 confirmed that his father was convicted in a criminal case.
51. DW1 did reiterated to the Court that there were no structures on the suit properties.
52. DW1 stated that although the original plot no. L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102 had been subdivided, the subdivisions had not yet been transferred.
53. DW1 reiterated that the Applicant herein did not have any authority to occupy the suit properties and in fact did not live on the same.
54. DW1 concluded his cross-examination by stating that after the Applicants house was demolished in 2000 there has been no new development on the ground.
55. On re-examination, DW1 was referred to DW1 EXHIBITS 3(a) and (b) which he stated that there was no need of an eviction order as the Plaintiff was not in occupation.
56. The Applicant averred that a Permanent Injunction prohibiting the Applicant from entering the suit property been issued.

57. DW1 reiterated that the Applicants herein had not been in occupation since 2000 when his structures were removed.
58. At the end of this re-examination, DW1 was discharged from the witness box and the Respondents closed their case.
59. The Court then directed parties to file their final submissions in which the Applicant filed his submissions dated 2.07.2025 while the Respondents filed their submissions dated 15.07.2025.
60. The Court has indeed perused the pleadings filed by both parties, the testimonies adduced at trial, the documentary evidence produced and the submissions by the parties and identifies the following issues for determination:

ISSUE No. 1 WHETHER THE PRESENT IS RES JUDICATA THE PROCEEDINGS KNOWN AS ELDORET CMCC No. 479 OF 2002?

ISSUE No. 2 WHETHER THE APPLICANT HAS SATISFIED THE INGREDIENTS OF ADVERSE POSSESSION?

ISSUE No. 3 - WHETHER THE PRESENT OS IS MERITED?

ISSUE No. 4 - WHO BEARS THE COSTS OF THE PRESENT OS?

61. The Court having identified the issues above, the same will now be discussed as hereinbelow;

ISSUE No. 1 - WHETHER THE PRESENT IS RES JUDICATA THE PROCEEDINGS KNOWN AS ELDORET CMCC No. 479 OF 2002?

62. The first issue for determination is whether the present OS is Res Judicata the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO. 479 of 2002.

63. According to the Respondents, the issue of ownership of the suit properties was fully litigated and determined in the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO. 479 OF 2002.
64. According to the Respondents, the parties in the proceeding known ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 are the same as those in the present OS.
65. The suit property known as L.R. CHEPTIRET/CHEPLASGEI BLOCK 3 (SERTWET)/102 which gave rise to the suit properties herein is the same as the suit property in the present OS.
66. The ownership dispute that was under discussion in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 is the same that the Applicant is seeking to raise in the present OS.
67. Lastly, the decision pronounced in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 concluded the dispute between the Applicant and the Respondents as regards the ownership of the suit properties herein.
68. The Applicant on the other hand is of the view that the present OS raises a new cause of action which is adverse possession.
69. According to the Applicant, the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 did not address the issue of adverse possession or make any declaration to that effect.
70. Consequently, the Applicant was of the view that the present OS was not Res Judicata the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002.
71. The doctrine of Res Judicata is anchored on section 7 of the Civil Procedure Act which provides as follows: -

“7. Res judicata

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

72. The Court having looked at the proceedings known ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 which were produced by the Respondent, it is clear that indeed the parties herein are the same as in the proceedings in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002.
73. Similarly, the suit properties that was under litigation in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 are the same as those being litigated in the present OS.
74. However, in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002, the Cause of Action was the contract between the late Samwel Mugo Waweru and the purchasers known as Reuben Maiyo Kesho and the Applicant herein.
75. Based on that Cause of Action, the reliefs sought in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 were geared towards determining the issues of ownership emanating from the said Agreement for Sale between the person known as RUEBEN MAIYO and the Respondent.
76. In the present OS, the Cause of action is premised on the entry, occupation, use within the period of time provided for under the Limitation of Actions Act.

77. In other words, the reliefs sought by the Applicant in the present OS are not premised on contract but rather on the ingredients of adverse possession as prescribed under the Limitation of Actions Act.
78. In essence therefore, the present OS cannot be Res Judicata the proceedings in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 as the Causes of Action are distinct and different with one based on the Law of Contract Act and the other based on Limitation of Actions Act.

ISSUE No. 2 - WHETHER THE APPLICANT HAS SATISFIED THE INGREDIENTS OF ADVERSE POSSESSION?

79. The second issue is to determine whether the Applicant herein satisfied the ingredients of adverse possession as prescribed by law based on the facts.
80. **In the case of TABITHA WAITHERERO KIMANI-VERSUS-JOSHUA NGANGA (2017) eKLR, the mandatory requirements of adverse possession were identified and expounded as follows; -**

“(A) OPEN AND NOTORIOUS USE OF THE PROPERTY. For this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

(B) CONTINUOUS USE OF THE PROPERTY - The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time.

This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

(C) EXCLUSIVE USE OF THE PROPERTY - The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

(D) ACTUAL POSSESSION OF THE PROPERTY - The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession."

81. Based on the above authority, this Court will now evaluate the ingredients and make a finding on whether the Applicant has succeeded in proving the same or not.

Ingredient 1-open and notorious use of the suit property

82. The first ingredient in a claim of adverse possession relates to the entry into the suit properties by the Applicant.

83. The law requires that the Applicant's entry into the suit properties must be one which is open and notorious in nature.

84. The open and notorious entry into the suit properties is meant to serve as a notice to the legal owner of the use and occupation by the Applicant.
85. In the present OS, the Applicant stated that he entered into the suit properties in the year 1996 based on an Agreement for Sale between REUBEN MAIYO KESHO and himself.
86. Similarly, the Applicant stated that his occupation of the suit properties continued after entering the second Agreement For Sale in the year 1997.
87. The Applicant testimony was that he developed structures on the suit properties which were then demolished by the Respondent in the year 2000.
88. The Applicant relied on the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL SUIT NO.1665 of 2003 which found the Respondent to have been liable for the destruction of the Applicant's structure and crops.
89. Beyond the destruction that occurred in 2000, the Applicant did not produce any evidence of whether there were any structures or improvements on the suit properties thereafter.
90. The Respondents on the other hand, pleaded and testified that there were no structures that have been on the ground belonging to the Applicant to demonstrate any occupation of the suit properties since the year 2000.
91. The Respondents did admit that the Applicant had attempted to enter the suit properties by constructing a structure and planting maize thereon.
92. Nevertheless, their deceased father demolished the structures and the maize that had been planted leading to the

proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL SUIT NO. 1665 OF 2003.

93. The Respondents sought to rely on the proceeding known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002.
94. The Respondents first relied on the Application dated 22.05.2002 which was produced as DW EXHIBIT 6 seeking for an Injunction to Restrain the Applicant herein as well as the other purported purchasers from trespassing, entering, cultivating or ploughing on the suit properties pending the hearing and determination of the case.
95. The Application dated 22.05.2002 was determined on 12.06.2002 by issuance of an Injunctive Order pending the hearing and determination of the main suit which was produced as DW1 EXHIBIT 8.
96. The Applicant did not dispute the validity of both the Application and the Orders produced as DW1 EXHIBIT 6 & 8.
97. The interpretation of this Court as relates to the order of 12.06.2002 and produced as DW1 EXHIBIT 8 is that the Applicant was barred from entering the suit properties and therefore there could be no entry which can be deemed to be open and notorious against the Respondents as required by law.
98. It is clear in the mind of the Court that after the demolition of the Applicant's structures and crops in the year 2000, there was no re-entry into the suit properties by way of any structures and crops until the Judgment was read in the year 2018.

Ingredient 2-continuous use of the property

99. On the second ingredient, an Applicant is required to demonstrate the continuous use of the suit properties after entering in an open and notorious manner.

100. The Applicant herein pleaded and testified before the Court that upon entry into the suit properties in 1996 he has continued to use the same until the institution of the present OS.
101. The Applicant states that the period he has continued to use of the suit properties is now 29 years which is more than the 12 years prescribed by law.
102. The Respondents dispute this fact and state that the Applicant is not in use of the suit properties.
103. The Respondents state that since the year 2000 when the Applicants crops were destroyed, there have been no new structures or crops done by the Applicant.
104. The Applicant, during cross-examination confirmed that he had not produced any documentary evidence to demonstrate his occupation of the suit properties.
105. Be as it may, this Court has already made a finding at Ingredient No. 1 to the effect that the Applicant's structures and/or crops were removed in the year 2000.
106. After the Applicants structures and crops were removed, the Respondents got an Injunction on 12.06.2002 that prohibited the re-entry of the Applicants into the suit properties.
107. In other words, the Court is of the view and finding that the Applicant has never been in continuous use of the properties since the year 2000 when his structures and crops were removed until the year 2018 when ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 was concluded.

108. In the Judgment pronounced in 2018 in ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002, the Applicant was again Permanently Restrained from going back to the suit properties.

109. This means that the Applicant cannot have been in the suit properties after 2018, and if he was, such an occupation is in contempt of a Court Order and this court cannot rely on the same to grant a prayer of adverse possession.

110. In conclusion therefore, the Applicant has not demonstrated any continuous use of the suit properties as required by law in this ingredient.

Ingredient 3-exclusive use of the suit property

111. The third ingredient is whether the Applicant has been in exclusive use of the suit property for a period of at least 12 years.

112. Based on the finding of Ingredient No. 2 hereinabove, it is clear that the Applicant has not been in occupation and/or possession of the suit properties and cannot therefore satisfy the ingredient of exclusivity to use the suit property.

113. In any event, the Applicant had been prohibited by way of a Permanent Injunction pronounced in the year 2018 in the proceedings known as ELDORET CHIEF MAGISTRATES COURT CIVIL CASE NO.479 of 2002 from entering into the suit properties herein.

114. Consequently, the Applicant has failed to prove exclusive possession of the suit property for a period of 12 years prior to institution of the present OS.

Ingredient 4-actual possession of the suit property

115.The last ingredient requires the Applicant to prove that he is in actual use of the suit properties.

116.However, based on the findings at Ingredient No. 2 and 3 hereinabove, there is no demonstration or any documentary evidence that the Applicant has been in actual possession of the suit properties for a period of 12 years prior to filing the present OS.

117.As such, the Applicant also fails to prove this ingredient.

ISSUE No. 3 - WHETHER THE PRESENT OS IS MERITED?

118.The third issue is whether the present OS is merited or not.

119.Based on the findings at Issue No. 2, the Applicant herein has failed to prove the mandatory ingredients of a claim for adverse possession.

120.Consequently, this Court is of the considered view and finding that the present OS is not merited and therefore fails.

ISSUE No. 4 - WHO BEARS THE COSTS OF THE PRESENT OS?

121.On costs, the Applicant must be condemned to pay costs in view of the fact that the present OS is not merited.

CONCLUSION

122.In conclusion, the Court hereby makes the following Orders;-

A. THE AMENDED ORIGINATING SUMMONS DATED 10.03.2025 IS NOT MERITED AND IS THEREFORE DISMISSED.

B. THE APPLICANT IS CONDENMED TO PAY THE COSTS OF THE PROCEEDING TO THE RESPONDENT.

DATED, SIGNED & DELIVERED Virtually at **ELDORET ELC** on this **19TH DAY OF NOVEMBER 2025**.

EMMANUEL.M. WASHE
JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: BRIAN

COUNSEL FOR APPLICANT: DR. CHEBII

DEFENDANT: MR. MWINAMO