

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ELC NUMBER E016 OF 2025 (OS)**

**GEORGE KIUNGA M'RINKANYA .....1<sup>ST</sup> APPLICANT/RESPONDENT**  
**EARNESTI KIRIMI M'RINKANYA.....2<sup>ND</sup> APPLICANT/RESPONDENT**

**-VERSUS-**

**KITHIMA FARMERS CO-OPERATIVE**  
**SOCIETY LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. Before me is the Originating Summons [OS] dated 20<sup>th</sup> June 2025 brought pursuant to the provision of **section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya** and **Order 37 Rule 7 of the Civil Procedure Rules 2010** and wherein the Plaintiffs have sought various determinations/declarations, namely:

- i. Whether the Respondent is the registered owner of all that parcel of land known as LR NO. ABOTHUCHI/GITIE/437 and whether such registration was effected on 2.6.2011.*
- ii. Whether the plaintiffs/applicants have been in continuous uninterrupted and peaceful occupation of LR NO. ABOTHUGUCHI/GITIE/437 for a period of over 12 years.*
- iii. Whether the Defendant/Respondent has ever taken possession, worked upon or occupied LR NO. ABOTHUGUCHI/GITIE/437 or any part thereof.*
- iv. Whether the Plaintiffs/Applicants have become entitled, by way of adverse possession, to the ownership of LR NO. ABOTHUGUCHI/GITIE/437 and whether the current title deed*

*thereof should be extinguished to reflect the plaintiffs/applicants as owners thereof.*

*v. Who should bear the costs of this summons.*

2. The Originating Summons is premised on various grounds which have been enumerated in the body thereof. It has been contended that though the defendant is the registered proprietor of the suit property, same has never taken possession thereof. Furthermore, it has been posited that the plaintiffs have been in open, continuous, and uninterrupted possession of the suit property for more than fourteen years.
3. Moreover, it has been contended that the Plaintiffs' occupation and possession of the Suit Property have been open and known to the defendants; and that the Defendant has never taken any action to remove the plaintiffs from the suit property.
4. The Originating Summons is supported by the affidavit of George Kiunga M'Rinkanyaa [1<sup>st</sup> Plaintiff] and wherein the deponent has highlighted and reiterated the grounds contained in the body of the application. Moreover, the deponent has annexed assorted documents including photographic evidence; copy of the register of the suit property, and copy of authority donated by the 2<sup>nd</sup> Plaintiff in favor of the 1<sup>st</sup> Plaintiff.
5. The Defendants duly entered appearance and thereafter filed a replying affidavit sworn on **8<sup>th</sup> July 2025**. The deponent of the replying affidavit has provided a background including the fact that the suit property was purchased from the Plaintiffs' father [now deceased] by Nkando Farmers' Cooperative Society Limited. Furthermore, it has been deponed that upon purchase of the suit property, the society entered upon, took possession, and erected various structures thereon.
6. Nevertheless, the deponent of the replying affidavit has posited that on or about the year 2011, the society [Nkando Farmers Cooperative Society] ceased operating; was wound up; and fragmented into three local

societies, one of them being the defendant herein. Additionally, it has been averred that the suit property was thereafter transferred to and registered in the name of the defendant.

7. It has further been averred that because of decreased coffee activities in the area; the Defendant herein was not able to resume factory operations on the suit property. To this end, the deponent has averred that the factory on the suit property remained closed. However, it has been posited that arising from the closure of the Factory, the buildings on the suit property and the machineries therein were subjected to vandalism by unknown people and because of the vandalism, the defendant entrusted the 2<sup>nd</sup> Plaintiff to superintend over the property of the Defendant including assorted machineries.
8. Additionally, the deponent of the replying affidavit has averred that on or about the year 2024, the 1<sup>st</sup> Plaintiff approached the leadership of the society and sought to be allowed to cultivate/farm on the vacant areas of the suit property. The deponent thereafter stated that the request by the 1<sup>st</sup> Plaintiff was conceded to and the Plaintiffs were permitted to undertake farming activities on the vacant portions of the suit properties.
9. Instructively, the deponent has averred that the occupation, possession, and use of various portions of the suit property by the plaintiffs is premised on the permission; license; and consent of the leadership of the Defendant. To this end, the deponent of the replying affidavit has posited that the Plaintiffs' claim based on adverse possession is premature, mischievous and legally untenable.
10. The originating summons came up for directions whereupon the advocates for the parties covenanted to dispose of same by way of *viva voce* evidence. Furthermore, the parties agreed to file and exchange witness statements; list and bundle of documents; and Witness

Statements. The court thereafter gave directions in line with the agreement of the parties.

11. The Plaintiffs' case is premised on the evidence of three [3] witnesses, namely; George Kiunga M'Rinkanya; Geoffrey Gatobu M'Miriti; and Elias Kinoti, respectively. Same testified as PW1, PW2, and PW3.
12. It was the testimony of George Kiunga M'Rinkanya [PW1] that same is the 1<sup>st</sup> Plaintiff in the matter. Furthermore, the witness averred that by virtue of being the 1<sup>st</sup> Plaintiff, same is therefore conversant with the facts of this matter.
13. Additionally, the witness referenced the Originating Summons dated **20<sup>th</sup> June 2025**; and the Supporting Affidavit sworn on even dates and which affidavit the witness sought to adopt and rely on as his evidence in chief. Moreover, the witness also adverted to the replying affidavit sworn on **29<sup>th</sup> July 2025** [*which was sworn in opposition to an application of temporary injunction*] and which affidavit the witness sought to rely on. Suffice it to state that the replying affidavit was equally adopted and constituted as further evidence in chief of the witness.
14. The witness also referenced the list and bundle of documents dated **9<sup>th</sup> September 2025** containing seven documents and which documents the witness sought to produce before the court. There being no objection to the production of the documents, same were admitted and marked as exhibits P1 to P7 respectively.
15. On cross-examination by learned counsel for the defendant, the witness averred that same has tendered and produced various photographs before the court. Moreover, the witness averred that the photographs before the court were taken by him in the year 2025. However, the witness averred that he could not recall the date/month when the photograph[s] were taken.

16. While still under cross examination, the witness testified that the photographs before the court show various houses/structures. In addition, the witness testified that the houses/structures captured in the photographs were erected by Nkando Farmers' Cooperative Society.
17. It was the further testimony of the witness that the photographs do not show any fence. However, the witness posited that the photographs show banana plants.
18. While still under cross-examination, the witness testified that there is a fence on the suit property. Furthermore, the witness averred that if the court was to visit the suit property, then the court will find a fence.
19. It was the further testimony of the witness that he has not constructed/erected any house on the suit property. On the contrary, the witness averred that his home is approximately five [5] meters from the suit property. It was the testimony of the witness that his homestead neighbors the suit property. Moreover, the witness averred that the photographs produced before the court show the boundaries between his land and the suit property. Further and in addition, the witness testified that the boundary he showed is based on the fence that is appearing on the face of the photographs.
20. Furthermore, the witness testified that in 1998 the suit property belonged to and was registered in the name of Nkando farmers. However, the witness clarified that Nkando Farmers Cooperative Society ceased to operate.
21. Upon being cross-examined based on a meeting that was convened and held by the defendant herein, the witness averred that he [Witness] was not aware of the said meeting.
22. Regarding the 2<sup>nd</sup> Plaintiff, the witness testified that the 2<sup>nd</sup> Plaintiff is the area manager for Gitie Sub-location. However, the witness added that the

2<sup>nd</sup> Plaintiff was not given any machinery/machines to keep at his home in the year 2016 when the factory closed.

23. It was the further testimony of the witness that same has filed the suit before the court seeking adverse possession. In particular, the witness averred that he has been in occupation of the suit property for more than 12 years. Besides, the witness stated that he has planted various crops and trees including avocados and banana plants on the suit property.
24. The second witness who testified on behalf of Plaintiffs was Geoffrey Gatobu M'miriti. Same testified as PW2.
25. It was the testimony of PW2 that same hails [comes] from Katuatani village. Furthermore, the witness adverted to the affidavit sworn on **29<sup>th</sup> July 2025**; and which affidavit the witness sought to adopt as his evidence in chief.
26. Further and in addition, the witness testified that he is familiar/conversant with the plaintiffs.
27. On cross examination by learned counsel for the Defendant, the witness testified that his home is approximately two [2] kilometers from the suit property. Moreover, the witness averred that he is familiar with the home of the plaintiffs.
28. While still under cross-examination, the witness testified that the suit property previously belonged to Nkando Farmers' Cooperative Society. Additionally, the witness posited that Nkando Farmers had constructed a factory on the suit property. However, the witness averred that the factory ceased to operate on or about the year 1998.
29. On further cross examination, the witness testified that he is aware that the Plaintiffs are the ones on the suit property. In particular, the witness testified that the plaintiffs have been in the property since the year 1998.
30. The 3<sup>rd</sup> witness who testified on behalf of the Plaintiffs was Elias Kinoti. Same testified as PW3.

31. It was the testimony of the witness that same hails from Gitie village. Moreover, the witness posited that he is familiar/conversant with the Plaintiffs.
32. Additionally, the witness referenced the affidavit sworn on **29<sup>th</sup> July 2025**; and thereafter sought to adopt and rely on the said affidavit as his evidence in chief. Instructively, the affidavit under reference was adopted and constituted as the evidence in chief of the witness.
33. On cross examination by learned counsel for defendant, the witness testified that he was a coffee farmer. However, the witness added that he stopped coffee farming and uprooted the coffee trees.
34. It was the further testimony of the witness that same is familiar with plaintiffs. Moreover, the witness clarified that his home is approximately one kilometer away from the Plaintiffs' homes.
35. Regarding the status of the suit property, the witness testified that the land in question has avocado trees; banana plants; maize and arrowroots. In addition, the witness averred that there are also houses on the land.
36. While still under cross examination, the witness averred that the land in question is fenced and it has a gate. Upon being referred to photographs that were tendered before the court, the witness acknowledged that there are houses which are apparent on the photographs. Nevertheless, the witness clarified that the houses were constructed by Nderia Farmers' Cooperative Society.
37. Upon being referred to annexure GK4 [b] the witness stated that there are houses which are discernable from the photographs. The witness also confirmed that there are also houses discernable from annexure GK4[d].
38. With the foregoing testimony, the plaintiffs' case was closed.

39. The Defendant's case is premised on the evidence of two [2] witnesses, namely; Zaberio Kaburu and Robert Murori Karima. Same testified as DW1 and DW2 respectively.
40. It was the evidence of DW1 [Zabelio Kaburu] that same is the chairperson of the defendant society. The witness averred that he was elected by the members of the society. To this end, the witness testified that he is therefore authorized to swear affidavit on behalf of the Defendant society.
41. It was the further testimony of the witness that same is familiar with the facts of this case. Moreover, the witness testified that he has sworn an affidavit [Replying Affidavit] dated **8<sup>th</sup> July 2025** and which replying affidavit the witness sought to adopt and rely on as his evidence in chief. The replying affidavit was thereafter adopted and constituted as the evidence in chief of the witness.
42. The witness further referenced the list and bundle of documents dated 10<sup>th</sup> September 2025; containing six [6] documents and which documents the witness sought to adopt and tender before the court. There being no objection, the documents under reference were admitted and marked as Exhibits D1- D6 respectively.
43. On cross examination by learned counsel for the Plaintiffs, the witness reiterated that same was elected as the Chairperson of the Defendant society. Moreover, the witness clarified that he was elected by the management of the society. In addition, the witness averred that has availed various documents before the court, including minutes confirming his election as the chairperson.

44. It was the testimony of the witness that the suit property previously belonged to and was registered in the name of Nkando Farmers' Cooperative Society Limited. However, the witness clarified that the society collapsed and thereafter the suit property was transferred to and registered in the name of the Defendant. However, the witness clarified that he does not have the minutes underpinning the transfer of the suit property from Nkando farmers to the Defendant society.
45. It was the further testimony of the witness that the land in question contains structures/buildings which were erected by Nkando Farmers. However, the witness averred that the houses on the premises have since been vandalized. Moreover, the witness further stated that doors and windows have been removed from the houses.
46. While still under cross examination, the witness testified that the houses in the premises are not in use. In particular, the witness averred that the houses stopped being used in the year 2016.
47. Additionally, it was the testimony of the witness that the remnants of the machineries were added over to the area manager for safe keeping and custody. Furthermore, the witness reaffirmed his evidence that the machineries were added over to the area manager.
48. The witness further testified that the area manager to whom the items were added over for safe custody is the 2<sup>nd</sup> Plaintiff before the court.
49. Furthermore, the witness averred that there were minutes to confirm the handing over of machineries to the 2<sup>nd</sup> Plaintiff [Area Manager]. To this end, the witness referenced minutes dated **29<sup>th</sup> June 2025**.
50. It was the further testimony of the witness that the suit property is fenced. In addition, the witness testified that the suit property also has a

gate. Moreover, the witness averred that the Plaintiffs do not reside or live in the suit property.

51. The second witness who testified on behalf of the Defendant was/is Robert Murori Karima. Same testified as DW2.
52. It was the testimony of the witness DW2 that same is the Chief-Kiija Location. Furthermore, the witness averred that the 2<sup>nd</sup> Plaintiff herein is his area manager.
53. Additionally, the witness testified that same is familiar with the facts of the case and in this regard, the witness referenced the witness statement dated **10<sup>th</sup> September 2025**; which statement the witness sought to adopt and rely on as his evidence in chief. The witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
54. On cross examination by learned counsel for the Plaintiff, the witness testified that same has been the chief for Kiija Location since the year 2016. Moreover, the witness averred that same is aware of the meeting that was held at Nderia Factory. Nevertheless, the witness clarified that he has never seen the minutes arising from the said meeting because the minutes are kept by the management of the society.
55. Regarding the identity of the chairperson of the Defendant society, the witness averred that the chairperson is Zaberio Kaburu [DW1].
56. As pertains to the meeting that was held on **23<sup>rd</sup> November 2016**, the witness testified that same attended the meeting. Moreover, the witness added that the 2<sup>nd</sup> Plaintiff was present during the said meeting. However, the witness added that he does not know whether the name of the 2<sup>nd</sup> Plaintiff was captured at the foot of the minutes.

57. Regarding the status of the houses/buildings on the suit property, the witness averred that same have been vandalized. Nevertheless, it was the testimony of the witness that he does not know whether anyone has ever been arrested and charged in respect of the vandalism.
58. Additionally, the witness testified that the machineries belonging to the Defendant society were given to the 2<sup>nd</sup> Plaintiff [Area Manager] for safe custody.
59. With the foregoing testimony, the Defendant's case was closed.
60. Following the conclusion 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 gave directions pertaining to the filing and exchange of the written submissions. In addition, the court also circumscribed the timelines for the filing and exchange of written submissions.
61. The Plaintiff filed written submissions dated **21<sup>st</sup> November 2025**; and wherein the Plaintiff has highlighted three [3] key issues for consideration and determination. The issues canvassed by the Plaintiffs are, namely: Whether the Plaintiffs have been in an open, continuous, an un-interrupted and exclusive possession of the suit land for a period of over 12 years; Whether the Plaintiffs' occupation/possession of the suit property has been hostile to the rights/interests of the Defendant; and Whether the Plaintiffs have established the requisite ingredients underpinning a claim for adverse possession or otherwise.
62. Learned counsel for the Defendant has filed written submissions dated **8<sup>th</sup> January 2026**; and wherein same has equally highlighted and canvassed three [3] key issues. The issues highlighted by the defendant

are: Whether the Plaintiffs wherein open, continuous, and uninterrupted occupation of the suit property for more than twelve years; Whether the possession by the plaintiffs was hostile or permissive; and Whether the Plaintiffs' have proven all the ingredients underpinning adverse possession or otherwise.

63. Having reviewed the pleadings filed by/on behalf of the parties; the evidence tendered [*both oral and documentary*] and upon consideration of the written submissions on record, two [2] key issues crystalize for consideration and determination. The issues are: Whether the Plaintiffs herein have proven and established the requisite ingredients underpinning the claim of adverse possession or otherwise; and what reliefs [if at all] ought to be granted.

64. Regarding the first issue, it is common ground that whosoever seeks to be declared as having acquired adverse possessory rights to a designated property, or portion thereof, must no doubt meet/satisfy the requisite ingredients. The requisite ingredients underpinning a claim for adverse possession are referenced as *nec vi, nec clam, and nec precario*.

65. The bottom-line is that the claimant seeking adverse possession must demonstrate that same has been in open, continuous and an uninterrupted possession/occupation of the designated property, in this case, the suit property. Pertinently, the claimant must also demonstrate that his or her occupation [if at all] were not secretive in nature. [**See the holding of the Court of Appeal in the case of Mtana Lew versus Kahindi Ngala Mwangandi [2025] eklr-per Makhandia-JA**]

66. Put differently, the claimant in this case [the Plaintiffs] must demonstrate that the registered owner of the suit property and against whom the claim

is being raised was knowledgeable and aware of the claimant's possession and occupation of the suit property. For good measure, a claimant cannot raise and propagate the plea of adverse possession where it turns out that the registered owner was not aware of the offensive occupation or where the occupation is secretive.

67. In the case of *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another* [1977] KEHC 30 (KLR); the Court considered the position and held thus:

*“The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec plecario (No force, no secrecy, no evasion). So, the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration; see Wanyoike Gathure v Beverly [1965] EA 514, 518, 519, per Miles J.”*

68. Regarding the instant matter, though the Plaintiff's claim is that they had been in occupation and possession of the suit property since 1990s, it appears that the Plaintiffs themselves were not privy to or knowledgeable of the ownership of the land in question. In fact, the plaintiffs are on record stating that in the month of February 2025 same sought to establish the position of the suit property by purchasing a green card.

69. Moreover, the Plaintiffs are on record saying that it was then that they discovered that the suit property had been alienated to a third party, namely; the defendant. [See paragraph 10 of the supporting affidavit

**sworn on 20<sup>th</sup> June 2025 and which was constituted as the evidence in chief on behalf of the Plaintiffs].**

70. Surely, how can the Plaintiffs contend that their possession and occupation of the suit property was hostile to the rights of defendants yet they [Plaintiffs] were neither privy to or knowledgeable of the Defendant's ownership rights to the land.

71. Furthermore, in the case of *Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR)*, the Court of Appeal underscored that the mere fact that one has been in possession of the land for more than twelve years is not enough. In particular, the court highlighted the necessity of the claimant to demonstrate knowledge of the registered owner against whom time could start running. Where the claimant was not knowledgeable of the details of the registered owner, then the ingredient namely; *animus possidendi* could not be established.

72. For coherence the court stated thus;

***“The mere fact that one has been in possession of land for more than twelve years is not enough. In fact, the assertion by a claimant that he was not aware that the land was registered in favor of some person against whom time would start running means that he did not have animus possidendi to acquire the land by way of adverse possession and he can therefore not be able to succeed to defeat the title of the true owner.”***

73. Secondly, the Defendant herein through its chairman [Zaberio Kaburu] swore a Replying affidavit dated **8<sup>th</sup> July 2025**; and which was adopted as the evidence in chief of DW1. The contents of the said replying affidavit are pertinent.

74. For the sake of clarity and coherence, it suffices to reproduce certain paragraphs of the said replying affidavit. Paragraphs 13, 14,15, 16,17, and 18 thereof are instructive and pertinent.

75. The same are reproduced as hereunder;

***“13. That following the vandalism, the factory became difficult to reopen as expected.***

***14. That on or about 2024, the 1<sup>st</sup> Plaintiff approached its leadership seeking to be allowed to use part of the vacant area of the suit land for farming pending the normal operations of the factory.***

***15. That taking into consideration the constant cases of vandalism, the management allowed the Plaintiffs to utilise a portion of the suit land so as to defer further instances of vandalism.***

***16. That the Plaintiffs were given firm instructions that they were to farm seasonal crops and that they should not erect structures thereon.***

***17. That in view of the foregoing, it is not true that Plaintiffs have been in possession of the suit land for over 27 years as alleged in their evidence.***

***18. That when the new officials took office on 17<sup>th</sup> June 2025, we embarked on plans to revamp the factory and operationalize it now that the members have been experiencing increased produce.***

***19. That owing to the decision, I personally informed the Plaintiffs that they should vacate the suit land upon harvesting the crops currently therein to allow re-operationalization of the factory.”***

76. Several pertinent issues arise/flow from the foregoing disposition. However, it is imperative to highlight the aspect touching on permission, consent and authority of the management of the Defendant company granted to the Plaintiffs to enter upon and use the vacant area on the suit property.

77. From the disposition under reference, what becomes apparent is that the Plaintiffs' entry, occupation, and use of the suit property are premised on the permission. Quite clearly, the occupation/use has never been hostile/adverse to the rights of the Defendant.
78. Furthermore, it is important to underscore that the contents of the replying affidavit sworn on **8<sup>th</sup> July 2025** were never controverted or challenged. Firstly, the Plaintiffs did not file any further/supplementary affidavit to respond to this pertinent issue.
79. The failure by the Plaintiffs to file further/supplementary affidavit and to answer the said pertinent averments connotes that the dispositions/averments were conceded/admitted by the Plaintiffs. Simply put, the failure to respond to those averments was fatal.
80. In the case of *Abdul Samji Mohamed and Another v Abdul Wadood Haidara (Civil Appeal No. 42 of 1971) [1972] EACA 5* the Court of Appeal for Eastern Africa [EACA] considered similar position and observed thus;

*“However, the appellants filed an affidavit in reply. In it, they admit that there was a contract of sale entered into between themselves as vendors and the respondent as purchaser but they say that this contract was determined by mutual agreement. **The respondent made no attempt to reply to these allegations and they therefore remain un rebutted. Mr. Gautama submitted that it would have been***

**improper to put in a further affidavit. He argued that there is no prescribed procedure and that in any case an excess of affidavits is undesirable. I cannot agree. The position would be different if the respondent's affidavit had averred facts and the appellant's denied them.**

*Here, the respondent's affidavit gives no material facts and the only real evidence of fact is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellant were denied. I think the leave of the court would have had to be obtained to file such an affidavit, but I do not think that any court, in the circumstances, would have refused it."*

81. Secondly, other than the failure to file a supplementary affidavit [rejoinder] the plaintiffs herein also failed to subject DW1 [Zaberio Kaburu] to cross examination on the pertinent averments at the foot of the said replying affidavit. Notably, the said replying affidavit was adopted and constituted as the evidence in chief of Zaberio Kaburu.

82. In so far as the evidence in chief of DW1 was not controverted, it suffices to find and hold that the Plaintiffs' possession and use of portions of the suit property were predicated on consent/permission.

83. I beg to state that consent and permission by the registered owner of the land negates a claim of adverse possession. In this regard, the plaintiffs who are on the land by virtue of permission cannot become chameleons and seek adverse possession.

84. In the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR)*, the Court of Appeal reviewed several decisions on the issue of adverse possession and thereafter stated as hereunder;

*“40. A person who claims adverse possession must inter alia show:*  
*(a) on what date he came into possession.*  
*(b) what was the nature of his possession?*  
*(c) whether the fact of his possession was known to the other party.*  
*(d) for how long his possession has continued and*  
*(e) that the possession was open and undisturbed for the requisite 12 years.”*

85. Finally, it is important to highlight that the Defendant tendered evidence to show that the 2<sup>nd</sup> Plaintiff, who is the area manager, was handed over various machines/properties of the Defendant for safe custody. This means that the Defendant entrusted the 2<sup>nd</sup> Plaintiff with the power to superintend and safeguard its assets inter alia the machinery and I dare say, the buildings on the suit property.

86. 2<sup>nd</sup> Plaintiff was also in attendance in the meeting of the defendant company held on **23<sup>rd</sup> November 2016**, which was held on the compound of the factory sitting on the suit property. For good measure, the 2<sup>nd</sup> Plaintiff is reported at the foot of the minutes of the said meeting to be the one who offered the closing prayers.

87. Pertinently, various issues were discussed during the meeting held on **23<sup>rd</sup> November 2016** including vandalism of the houses/buildings on the

suit property and safe custody of the machineries belonging to the Defendant. Notably, the machineries were handed over to the subarea, namely; the 2<sup>nd</sup> Plaintiff.

88. Despite the evidence on record which showed that the 2<sup>nd</sup> Plaintiff [who is the area manager] was given the machineries for safe custody and by extension tasked to superintend over the suit property, the said 2<sup>nd</sup> Plaintiff chose not to testify before the court.

89. It is not lost on me that when DW1 was testifying, the 2<sup>nd</sup> Plaintiff was pointed out and was indeed in attendance in court. Suffice it to state that the Second Plaintiff had the authority and mandate to testify and [sic] discredit the incriminating evidence. However, he chose not.

90. I must state that the 2<sup>nd</sup> Plaintiff owed unto the court no explanation as to why he chose not to testify. For good measure, a court of law is not called upon to seek any explanation; or reason[s] as to why a particular person/ Witness, has declined to testify.

91. Nevertheless, I must point out that where a party who is a compellable witness and is available to testify, fails to testify despite incriminating evidence, then a court of law is enjoined to invoke and deploy the doctrine of adverse inference. In respect of the instant case, the 2<sup>nd</sup> Plaintiff appears [I say appears] to have been running away from the truth.

92. In the case of ***General & another v Hussein & 3 others (Civil Appeal 100 (ELD NO. 32) of 2018) [2025] KECA 1022 (KLR) (5 June 2025)***

*(Judgment)*, the Court of Appeal dealt with the circumstances where adverse inference may be deployed/invoked.

93. For coherence, the court held as hereunder;

*“36. As mentioned earlier, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ case is that the land was initially registered in the name of Liberio Farm Limited, as per the certificate of lease issued on 3<sup>rd</sup> December 1997. However, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not call the directors of the said company as witnesses to shed light on how they acquired the land. In Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd [1979] (1) SA 621 (A) it was held that:*

*“Where a party fails to call as his witness as one who is available and able to elucidate the facts, whether the inferences that the party failed to call such a witness because he feared that such evidence would expose facts unfavourable to him should be drawn would depend on the facts peculiar to the case where the question arises.”*

*37. In Just Names Properties II CC & Another v Fourie & Others 2007 (3) SA. 1 (W) the court held that:*

*“In the present matter I am not persuaded that an inference against the Defendant should not be drawn from the fact that they did not call Oosthuizen as a witness. There were many issues that called out for her testimony. This was not forthcoming. I was not informed as to what the reasons for her nonappearance was. Strictly speaking, I am not entitled to an explanation, however, at the end of the day, I must draw certain reasonable inferences from such a decision...”*

94. Flowing from the foregoing analysis, there is no gainsaying that the Plaintiffs have neither established nor proven the requisite ingredients underpinning the plea of adverse possession. Suffice it to state that the

burden of proving the ingredients lay squarely on the Plaintiffs [see **section 108 and 109 of the Evidence Act Chapter 80 Laws of Kenya**].

95. Before concluding on this issue, it is instructive to reiterate the holding of the Court of Appeal in the case of *James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)*, where the court reaffirmed the obligation of the claimant to discharge both the evidential and legal burden before a positive finding can be returned by the court.

96. The court stated thus;

*“18. The Evidence Act is clear enough upon whom the burden of proof lies. Section 107 provides as follows:*

*“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 facts, it is said that the burden of proof lies on that person.”*

*Section 109 of the same Act further provides:*

*“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person.”*

*19. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.”*

97. Turning to the second issue, namely; what reliefs [if at all] ought to issue, it is worthy to point out that the Plaintiffs had sought various declarations including: declaration of acquisition of the suit property on

the basis of adverse possession; cancellation of the defendant's title; and rectification of the register of the suit property to reflect the names of the Plaintiffs.

98. However, while discussing issue number one, I have found and held that the Plaintiffs are on the suit property albeit on the basis of permission/consent. In this regard, I held that the plea of adverse possession was not proven.

99. Flowing from the findings contained elsewhere herein before, I conclude that the plaintiffs are not entitled to the various declarations; reliefs; and or orders that were sought at the foot of the Originating Summons dated **20<sup>th</sup> June 2025**.

#### **FINAL DISPOSITION.**

100. From the analysis of the issues herein before, there is no gainsaying that the Plaintiffs' case is meritless. Same is a sure candidate for dismissal.

101. In the end, and for the reasons alluded to; 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. The costs in terms of clause [ii] shall be agreed upon and in default be taxed in the conventional manner.**

102. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU this 29<sup>th</sup> day of  
January 2026**

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

In the presence of:  
**Hussein – Court Assistant**

**Mr. Basilio Gitonga for the Plaintiffs**

**Mr. Miriti for the Defendant**