

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ORIGINATING SUMMONS NO. 77 OF 2019**

**SAMSON PETER MUCHUMA.....**

**PLAINTIFF**

**VERSUS**

**MAGABE NGOINA MAGABE.....1<sup>ST</sup>**

**RESPONDENT**

**NGOINA MAGABE.....2<sup>ND</sup>**

**RESPONDENT**

**JOSEPH SAMSON NGOINA.....3<sup>RD</sup>**

**RESPONDENT**

**EVANS MOGENDI.....4<sup>TH</sup>**

**RESPONDENT**

**SUSAN MAGABE.....5<sup>TH</sup>**

**RESPONDENT**

**JOHN WAISIKO CHACHA.....6<sup>TH</sup>**

**RESPONDENT**

**JUDGEMENT**

**1.** The Applicant came to this court vide an Amended Originating Summons dated 15<sup>th</sup> October 2019, seeking the determination of the following questions;

**a) Whether the Applicant/Plaintiff has resided on a portion of land measuring 6 hectares out of land parcel No. BUKIRA/BWISABOKA/217 for over 12 years.**

**b) Whether the Applicant/Plaintiff should be declared the owner of the said 6 hectares out of land parcel**

**No. BUKIRA/BW1SABOKA/217 to the exclusion of the Respondent/Defendant.**

**c) Whether this Honourable Court should direct the County Surveyor and Land Registrar Kuria to demarcate the said 6 hectares acres and give them a number and register them in the name of the applicant.**

**d) Whether the Respondent should pay the costs of this Originating Summons.**

- 2.** The Applicant, in the Affidavit in support of the Summons, deponed that on 27<sup>th</sup> March 1985 he bought a portion of land parcel no. Bukira/Bwisaboka/217 measuring 210 meters by 315 meters from Burure Ngoina Magabe who was the 1<sup>st</sup> wife to the registered owner, Ngoina Magabe (Deceased). He took possession of the land upon. He annexed and marked as SPM1 the copy of the sale agreement. He annexed as SPM2 copies of the agreement and green card. He urged that the land belongs to Ngoina Magabe (deceased).
- 3.** He deponed further that on 17<sup>th</sup> October 1985 he bought another portion of land out of Land Parcel No. BUKIRA/BWISABOKA/217. It measured 160 meters by 450 meters from Sabina Nchagwa Ngoina who was the 3<sup>rd</sup> wife to the registered owner Ngoina Magabe (Deceased). He then took possession of the land and has been in occupation since then. He annexed and marked as 'SPM1' a copy of the agreement dated 17<sup>th</sup> October 1985. Further, on or about 7<sup>th</sup> May 1991 he bought a further portion out Land Parcel No. BUKIRA/ BWISABOKA/217. He bought it from Joseph Samson

Ngoina who is a son to the registered owner. It measured approximately 1 acre. He took possession of the same.

4. The deponent averred that in total he has bought over 6 hectares from the Land Parcel No. BUKIRA/ BWISABOKA/217. He has also built his home on the said parcel. He has been occupying and using the said portion for cultivation and livestock farming. His occupation has been definite, open and uninterrupted for a period exceeding twelve years thus conferring him adverse possession. Further, his occupation of the land was and is known to the Respondents and the whole world.
5. The Respondent filed in opposition of the Summons a Replying Affidavit sworn by Magabe Ngoina Magabe. It was sworn on 7<sup>th</sup> January 2021. He urged that he was aware the Plaintiff purchased a portion of the suit land. Further, the applicant should then wait for distribution and subsequent transfer of the suit land to the respective sellers before he can file a claim against each of them. Further, that the suit is baseless as the plaintiff alleges that he purchased portions of the suit land from the widows of the deponent's father and not the father himself.
6. He urged that the Plaintiff was not a liability to him or the Estate of his late father which comprises of LR BUKIRA/BWISABOKA/217. He deposed that the applicant should sue independently (*sic*) the people who sold the claimed portions of the suit land to him. Further the Plaintiff is a liability to the deceased's widows and son respectively. That they sold to him the claimed portions of the suit land

hence should wait until they acquire ownership of their respective portions of L.R BUKIRA/BWISABOKA/217 and then file a claim against them independently claiming for his debt or the portions of land he bought from them.

7. The 2<sup>nd</sup> Respondent, Joseph Samson Ngoina, filed a Replying Affidavit to the Further Amended Originating Summons on 22<sup>nd</sup> October 2021. He reiterated the contents of the Replying Affidavit. He urged that the 2<sup>nd</sup> - 5<sup>th</sup> defendants were unsuited because they too were purchasers of the suit land.
8. He urged that the Plaintiff be guided to lodge claim against each of the beneficiaries who sold land to him, independently, since the Land Agreements were entered at different times and are independent of each other. Further, that the Plaintiff terribly failed to show cause of action against him and the entire Estate of his late father.
9. The deponent averred that the Defendant ought to have acquired ownership of the claimed portions of the suit land within six months from the date of the alleged sale transactions hence the said land sale agreements were rendered null and void in law. That the Defendant had never been in peaceful and uninterrupted occupation of the claimed portions of the suit land hence his claim for adverse possession had no proof at all. He urged the court to dismiss the applicant's claim with costs.
10. The matter then proceeded for hearing.
11. **PW1** was **Samson Peter Muchuma** who adopted his witness statement dated 6<sup>th</sup> March 2022 as evidence in chief.

In it, he stated that in the year 1985 he bought part of land parcel no. Bukira/Bwisaboka/217 from Sabina Nchagwa Ngoina who was the 3<sup>rd</sup> wife to Ngoina Magabe measuring 160 meters by 450 meters. In the year 1985 he also bought part land parcel no. Bukira/Bwisaboka/217 from Burure Ngoina Magabe the wife of Ngoina Magabe measuring 210 meters by 315 meters. She sold the land to him together with her son Magabe Ngoina Magabe. In the year 1991, he bought a parcel of land no. Bukira/Bwisaboka/217 from Joseph Samson Ngoina, a son to Ngoina Magabe Ngoina and the 2<sup>nd</sup> wife of Ngoina Magabe Ngoina.

**12.** He stated that in 1993 he also bought 1 acre of land out of parcel no. Bukira/Bwisaboka /217 from Magabe Ngoina a son to Ngoina Magabe Ngoina vide an agreement dated 14<sup>th</sup> November 1993. In total, he bought over 6 hectares from land parcel No. Bukira/Bwisaboka /217. All the land agreements were witnessed by before the Area Chief and Advocate Mainye and there were witnesses present at execution. The witnesses were, Rtd Chief Joseph Marwa Muniko; Charles Boke Matiko and Advocate Mainye.

**13. PW1** stated further that in the year 2016 he filed a citation against the sons of Ngoina Magabe (deceased) to accept or refuse Letters of Administration in Migori Misc. Succession cause No.224/16. He served them and upon doing so, they refused to accept the citation. In 2017, Magabe Ngoina Magabe, one of the sons of the deceased filed a succession in Kehancha being Kehancha Succession Cause No.14 of 2017. He did not include him as one of the

beneficiaries of the estate of Ngoina Magabe despite the fact that he had lawfully bought the over 6 hectares (*sic*) from the Estate of the deceased.

**14. PW1** added that he filed an objection in Kehancha Succession Cause No.14 of 2017 because he was not included in it. He stated that he had built a permanent home on the land and it was where he lives with my family and cultivates to date.

**15.** During cross examination, PW1 stated that he bought the land from the family of Magabe Ngoina Masaba, the 1<sup>st</sup> defendant, and his brother who was since deceased, on 27<sup>th</sup> May 1985. The seller was not alive at the time of the said sale. He first purchased about 210m X 315m for Kshs 24,600/= and paid the whole amount by way of installments. First, he paid 14,600 and later Kshs 10,000/=. He also bought a parcel from Sabina Nchagwa who is the widow of the deceased. That was on 17<sup>th</sup> October 1985. It measured 160M X 450M. He did not get a surveyor to measure it. he had not outstanding balance.

**16.** He stated that he later bought another parcel from Joseph Samson Chacha on 7<sup>th</sup> May 1991. It measured one acre. The owner of the land was deceased. The sellers were living on the suit land. They did not have a title deed to thereto. But the family promised they would give him a title once they did succession for the land. He testified further that he had photographs to show he lived on the said land. He had grown trees on it. He urged that he filed an Objection on the Succession as a beneficiary of the Estate although he was

not the son of the deceased. He wanted to protect his interest as a purchaser for value.

**17.** PW2 was **Joseph Marwa Muniko** who adopted his witness statement as evidence in chief. In it, he stated that on 27<sup>th</sup> May 1985, he witnessed an agreement between Samson Peter Muchuma and Nchagwa Ngoina Magabe and Magabe Ngoina Magabe. Peter Muchuma was buying a portion of land measuring 210 x 315 meters from land parcel No. Bukira/Bwisaboka/217. He witnessed the agreement in my capacity as the chief of the area. Samson Peter Muchuma took immediate possession of the land he had bought and put up a home thereon and he has been staying thereon to date. He recalled that again, on 7<sup>th</sup> May 1991, Samson Peter Muchuma bought 1 acre of land out of the same Bukira/Bwisaboka/217. This time, the seller was Joseph Samson Ngoina a son to Ngoina Magabe (deceased). He witnessed the agreement in his capacity as the Chief of the area where the land is situated.

**18.** He stated that he recalled again on 14<sup>th</sup> November 1993, Samson Peter Muchuma bought a further 1 acre from one Magabe Ngoina Magabe a son to Ngoina Magabe deceased. He witnessed the agreement in his capacity as the Chief of the area where the land was located. Samson Peter Muchuma was adding the new portions to the original portion that he had bought and all the portions were being bought from land parcel No. Bukira/Bwisaboka/217. He further testified that he knew that the family members being wives and sons of Ngoina Magabe willingly sold those portions of

land to Samson Peter Muchuma and put him into possession of the same.

**19.** During cross examination, he stated that he knew all the parties since they all resided in his village. He couldn't recall when the late Ngoina Magabe died. He recalled that there were about three agreements of sale that were executed in his office. He knew the deceased and the agreement was done by his son Ngoina Magabe.

**20. PW3** was **Charles Boke Martiko** who adopted his witness statement dated 6<sup>th</sup> March 2023. In it, he stated that in the year 1985 Samson Peter Muchuma he bought 160 meters X 450 meters from Sabina Nchagwa a wife of the deceased Ngoina Magabe and he was a witness to this agreement. The agreement was done voluntarily and it was further witnessed by the area chief. Further, that in the same 1985, Mr. Samson Peter Muchama also bought 210 meters X 315 meters from Burure Ngoina Magabe, another wife of Ngoina Magabe. He witnessed the agreement. The agreement was also witnessed by the area chief Mr. Joseph Marwa Muniko and the agreement was also voluntary. He stated that in the year 1991, Samson Peter Muchuma bought a further 1 acre from one Joseph Samson Ngoina a son to Ngoina Magabe which agreement he also witnessed together with the chief.

**21.** He testified that all the portions that Samson Peter Muchama bought were out of Land Parcel No. Bukira/Bwisaboka/217. Samson Peter Muchama put up his home on the land that he bought from the year 1985 and he

has since been staying there on. The sons and wives of deceased Ngoina Magabe sold the land voluntarily and they used the proceeds of the sale.

- 22.** During cross examination he stated that he had no photos to show that the Plaintiff lived on the land. Further, that the plaintiff had purchased land from the 1<sup>st</sup> Defendant's father and from Joseph Chacha and Sabina Nchagwa. Ngoina Magabe was deceased at the time of sale and he didn't know if they were appointed as the administrators. He was the witness to the sale of the land but did not see the title deed.
- 23.** The defendants called 3 witnesses. DW1 was Magabe Ngoina who adopted the witness statement dated 6<sup>th</sup> December 2022. During cross examination, he stated that the plaintiff lives on the suit land and he has developed the land with about 6 houses thereon and has crops on the land. He stated that it was true that he started using the land from 1985. That he had not sued the plaintiff to ask for the eviction. Further, that he knew Sabina Ngoina who was his Aunt and was also deceased.
- 24.** DW2 was the 5<sup>th</sup> Defendant John Waisiko Chacha who adopted his witness statement as evidence in chief. During cross examination he stated that it was true that the plaintiff had lived on the land since 1985 and he has built on the said land. That he had purchased a portion of the land which the plaintiff is also claiming. He had bought the land in 2000 and the plaintiff was by then living on the suit land.
- 25.** DW3 was Joseph Samson Ngoina who stated that he had filed his statement but from the record of the court, it

emerged that the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants were unrepresented and never filed statements. They were granted leave to file and serve their statements but they never filed any.

**26.** The parties were directed to file submissions on the suit.

### **Plaintiff's submissions**

**27.** On whether The Plaintiff/Applicant has resided on the suit land for a continuous, open and uninterrupted period of over 12 years, Counsel urged that the plaintiff purchased the said parcel of land on diverse dates and upon the said purchase, he proceeded to take possession of the said parcels of land and has been using the said parcels for agricultural purposes in an open manner without secrecy and/or interruption for a period well over 12 years. He relied on his documents which prove that the most recent purchase on the said parcel of land was done on 4<sup>th</sup> November 1993 and he has been in continuous, open and uninterrupted occupation of the entire 6 Ha for the entire period. He also called the retired chief to the subject area and the witness confirmed that the applicant has indeed been in continuous, open and uninterrupted occupation of the portion of land measuring approximately 6ha for well over 12 years.

**28.** The defence witness, the 1<sup>st</sup> Defendant, during his cross examination also confirmed that the Applicant has been in open continuous and uninterrupted occupation of the portion measuring approximately 6Ha since 1985 where he has planted trees. From the foregoing, it is apparent beyond reproach that the Applicant is a purchaser to the suit land

parcel and upon purchase he has been in continuous, open and uninterrupted occupation on suit land since the date of purchase which is well over 12 years.

**29.** On whether the applicant has acquired title By Adverse Possession he urged that adverse possession is a legal principle that allows someone to claim ownership of another person's property without their permission. That the doctrine of adverse possession in Kenya is founded under Limitation of Actions Act CAP 22 Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation.

**30.** He cited Section 38 of the act and additionally cited the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the Court of Appeal laid out the definition and requirements to prove adverse possession. He also cited *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR in this regard.

**31.** The plaintiff urged that from the definition of adverse possession given in the *Mtana Lewa Case*, the claimant must convince the court that his possession satisfies the criteria set forth; a. Exclusive possession: You must have occupied the land without the owner's consent; Open possession: You must have occupied the land openly, without force, secrecy, or permission; Continuous possession: You must have occupied the land continuously and without interruption for

at least 12 years; Intention to possess: Dispossession of the owner: The owner must have been dispossessed of the land or have discontinued possession of it.

**32.** He urged that adverse possession can only arise out of non-permissive possession. It is in no doubt that in this instance, the entry into the land was permissive, but that the permission ended after payment of the final purchase value. He cited the decision in *f Public Trustee vs Wanduru Ngegwa* (1994) eKLR and *Hosea vs Njiru & Others* (1974) EA 526 in this regard and urged that the Applicant avers that he paid the full purchase price of the sale of land agreement dated 4<sup>th</sup> November 1993 and took possession immediately thus time started running in 1993. That this element of permissive possession was well explained in *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR. Further he urged that in *Cheromei vs Muigai* (Environment & Land Case E005 of 2023) [2024] KEELC 5604 (KLR) (25 July 2024) (Judgment) it was held that having been allowed possession under a sale, the Applicant can only claim that his occupation became adverse if he can prove that the license was determined. In such circumstances where an Applicant claims adverse possession arising out of an agreement for sale, courts have held that the purchaser's possession becomes adverse to the vendor once the purchase price is paid in full.

**33.** The Applicant cited the decision in the case of *Peter Mbiri Michuki vs Samuel Mugo Michuki* (2014) eKLR and urged that the law stipulates that the Applicant is required to pay the entirety of the purchase price before time can start running

for adverse possession. Where the purchase price is paid in instalments, time starts to run once the last instalment of the purchase price has been paid. The Applicant testified and produced evidence that he had paid the full purchase price of KShs.5, 000/-. The element of non-permissive possession infers the finding that the Respondents permission ended on receipt of the purchase price in full on the date of signing the Agreement for Sale and thus time started from that date hence.

- 34.** On open possession, he urged that since the initial entry into the land was through the sale, it can safely be concluded that there was no force in the manner of the Applicant's entry into the suit land. Neither was there any secrecy in the manner of occupation of the suit land parcel. The occupation of the suit parcel was open and without force of secrecy as per the demands and dictates on the qualifications for Adverse possession.
- 35.** On continuous possession, he urged that the period of 12 years is counted from the date that possession becomes adverse to the title and interests of the registered owner, the general rule being that time cannot run in favour of a permitted occupier of land. Time, therefore, does not run as the occupier/licensee remains in occupation with the permission of the owner. He reiterated that the possession was non-permissive on payment of the Purchase price on 14<sup>th</sup> November, 1993 thus time started to run from the said date. Twelve years from 14<sup>th</sup> November, 1993 ended on 14<sup>th</sup> November, 2005 from which date, the Respondent's title was

extinguished by operation of Section 37 of the Limitation of Actions Act.

**36.** Further, that from 14<sup>th</sup> November, 1993 to the date of filing of this suit on 16<sup>th</sup> October, 2019 indeed 26 years had passed. This was well over the required time period of 12 years. It follows therefore that from 2005 when the 12-year limit was reached, the Respondent became a trustee holding the title to the suit property for the benefit of the Applicant.

**37.** On intention to possess, he urged that that Claimant has shown that his possession and occupation of the land is not only adverse to the rights of the registered owner, but also that his said possession is hostile and to the exclusion of the said owner. The Applicant has since taken occupation of the parcel of land and has planted trees thereon as well as carrying out various agricultural activities on the land parcel. He cited the case of James Maina Kinya vs Geral Kwendaka (2018) eKLR in this regard and maintained that it is plain and apparent beyond any degree of doubt that the Applicant intended to and has been exercising open and continuous possessory rights over the suit parcel as if he were the owner for a period well over 12 years.

**38.** Counsel submitted that it is trite law that in a claim for adverse possession the Applicant needs to demonstrate that his occupation of the land has dispossessed the registered owner of the land. The burden of proving this fact to the Court lies with the Applicant. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. He urged that the Applicant satisfied the

qualifications to be deemed as an Adverse Possessor of the suit land.

**39.** Having proven that the Applicant is entitled to be registered as the Proprietor of the suit land it is only judicially prudent that this Court does direct the County Land Registrar and the County Land surveyor to demarcate the said 6 Ha out of Parcel No. BUKIRA/BWISABOKA/217 and give them a number and register them in the names of the Applicant. He urged the court to award him costs as costs follow the event.

### **1<sup>st</sup> and 5<sup>th</sup> Respondents' Submissions**

**40.** Counsel for the respondents submitted that DW1 and 5 and their witnesses confirmed to this Court that the suit land is registered in the names of the late Ngoina Magabe therefore leaving this Honorable Court between a rock and a hard place on who will execute the transfer documents in favor of the Plaintiff as sought if this matter is determined in favor of the Plaintiff. He urged that the law is very clear that every Claim for Adverse Possession by virtue of section 17 of the limitation of action must be mounted directly against the registered owner of the claimed suit Land and not an Administrator hence this entire suit is badly suited and should be dismissed with Cost on technicality grounds.

**41.** Counsel urged that the 1<sup>st</sup> and 5<sup>th</sup> Defendants has no capacity to be sued in this matter and that reality was not challenged by the Plaintiff hence remains uncontroverted and no amendment can cure the defect of suing a party with no legal capacity. Further, he set down the definition of locus

standi as defined in black's law dictionary, 9<sup>th</sup> Edition and placed reliance on the case of Alfred Njau & Others vs City Council of Nairobi (1982) KAR 229. He submitted that it is important to note that land known as LR BUKIRA/BWISABOKA/217 is currently registered in the names of a deceased person hence there is no way the orders being sought by the Plaintiff will be executed.

**42.** Counsel urged that the Plaintiff failed to prove his case beyond any reasonable doubt to warrant the issuance of the orders sought in this matter. Further, that the onus of proof has not been met on a balance of probabilities. He urged the court to dismiss the suit with costs.

### **Analysis and Determination**

**43.** The germane issue for determination is; **Whether the Plaintiff has acquired the parcel of land known as Bukira/Bwisaboka/217 by way of adverse possession.** Attendant to it is the question of **who to bear the costs** of this Originating Summons.

**44.** Starting with the first and main issue, the law on the doctrine of adverse possession in Kenya is founded under Limitation of Actions Act. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued as follows;

**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.”**

**45.** Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

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

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

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

Section 17 goes on to provide as follows:

**“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.**

**46.** Finally, Section 38(1) and (2) states 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.**

**(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.**

**47.** The doctrine of adverse possession was aptly defined in **Mtana Lewa - v- Kahindi Ngala Mwangandi (2015) eKLR** where the Court of Appeal held that: -

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

**owner. The essential prerequisites being that the possession of the adverse possessor is neither by force of stealth not under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”**

**48.** The principles in order to establish a claim of adverse possession, the possession must be:

- a) Adverse to the interests of the owner - meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;**
- b) Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;**
- c) Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner’s rights are being invaded. Differently put, the possession must be manifest to the community;**
- d) Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;**
- e) Exclusive - meaning that the possession must be of such exclusive character that it will operate as an**

**ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;**

**f) Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years.**

**See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of 2022; Titus Mutuku Kasuve (Supra); Titus Kigoro Munyi (Supra); Wambugu vs. Njuguna (supra) and Karuntimi Raiji (supra).**

**49.** From the evidence on record, there was evidence led on the fact that there were three portions out of the suit land that the Plaintiff purchased on various occasions. The most recent payment on them was made in 13<sup>th</sup> November 1993. The Claimant had purchased the portions from the wives to the deceased and produced sale agreements to that effect.

**50.** Given that the claim for adverse possession arose out of the sale agreements, it follows that the time would begin to run when the final payment for the portion of land on 13<sup>th</sup> November 1993. By this I mean that before the completion of the payment for the sale, the Claimant was on the suit parcels of land by permission of the owner or seller. Immediately upon the completion of the agreed purchase

price, or the breach of any of the conditions of the agreement, the buyer (herein claimant) remained on the suit land absent of the permission of the owner because the residence thereon was now adverse to that of the owner. Computation of time in adverse claims starts to run when a person who is not the owner of a parcel of land or property remains on it without the permission of the owner and asserts the occupation as to give him or her rights over the property. Thus, in **Gabriel Mbui v Mukindia Maranya (1993) eKLR** the court explained that:-

**“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price.”**

**51.** The testimony of PW1 was that he entered into the first two sale agreements with two of the wives of the deceased in the year 1985 and the final agreement with the son in the year 1991. He made the final instalment for the land on 13<sup>th</sup> November 1993, bringing the total land purchased to 6 hectares. His evidence was corroborated by the evidence of the area chief who testified as PW2. The Chief witnessed the agreements being entered into and the applicant taking possession of the portions of the land. This evidence was

supported by that of PW3 who witnessed the sale agreements and the entrance of the applicant into the land after purchase. During his testimony in open court, DW1 conceded that the Applicant resided on the land and had built 6 houses on said land. It follows that the applicant was evidently in possession of the land despite DW2's initial denial in his witness statement.

**52.** The time began to run upon payment of the final instalment in the year 1993. Twelve years ended in 2005. Therefore, even by the time of filing the succession cause in the year 2017, the 12 years period had long passed. That being so, the title of the deceased had been extinguished by effluxion of time and the portions that would have fallen as part of his estate were no longer available for distribution as such. Therefore, the succession cause did not interrupt the applicants' possession and occupation of the land.

**53.** The 1<sup>st</sup> Respondent's averment that the Applicant was a stranger to him, goes to the root of permissiveness. If, indeed, the applicant was not known to him, yet the applicant occupied the land openly and peacefully, and the 1<sup>st</sup> Respondent conceded never attempting to evict him, it follows that the occupation which was clearly non-permissive (according to the 1<sup>st</sup> Respondent) fell in the arm bit of adverse possession. Since it was uninterrupted it firmed the requirements of the doctrine.

**54.** The evidence of the applicants' witnesses was consistent and supported by the defendants' witnesses. Having considered the testimonies of the witnesses, and the other

evidence tendered in court, and the submissions by the parties, I find that the Applicants' claim succeeds in its entirety. I enter judgment for him against the Respondents accordingly.

**55.** I hereby order that;

- i) The Applicant has acquired title to 6 hectares out of land parcel No. BUKIRA/BWISABOKA/217 by way of adverse possession, and the Respondents' title over the respective portions is extinguished.**
- ii) The national surveyor in charge of the Migori County and the Land Registrar in charge of the County or Registry the suit land falls under are hereby ordered to demarcate, at the cost of the Applicant, the said approximately six (6) hectares or thereabouts which the applicant occupies, and rectify the register by issuing the applicant with a title deed to his respective portions.**
- iii) The Respondents in whose names or names of the respective estates the affected portions are to be excised from the title(s) are registered are ordered to execute within thirty (30) days of preparation and presentation the instruments of transfer thereof including mutation forms accordingly, in favour of the claimant, upon presentation of the same, in default the Deputy Registrar of this Court to execute the same in that behalf.**
- iv) Each party shall bear its own costs.**

Judgment **dated, signed and delivered virtually via the Teams Platform this 17<sup>th</sup> day of March 2026.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**In the presence of,**

Achola Advocate for the Applicant

Mr. Muniko Advocate for the Respondents