

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC OS E032 OF 2025

JOSEPH MWENDA M'MUKIRIPLAINTIFF

VERSUS

**RUTH KATHIGA [SUED AS THE ADMINISTRATIX OF THE ESTATE
OF THE M'TUERANDU M'ITHIURU – [DECEASED] ...DEFENDANT**

JUDGMENT

1. Before me is the Originating Summons [OS] dated the 28.10.2025 brought pursuant to the provisions of **Order 37 Rule 7 of the Civil Procedure Rules, 2010; Sections 1 A, 1B and 3 A of the Civil Procedure Act, Chapter 21 Laws of Kenya; and Section 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.** The reliefs sought at the foot of the summons are:

- I. A declaration that Joseph Mwenda M'Mukiri the Plaintiff herein has become entitled by adverse possession to 1 Acre of Abothuguchi/Gaitu/1143.*
- II. An order that the Plaintiff be registered as sole proprietor of plot of land measuring 1 Acre of Parcel No. Abothuguchi/Gaitu/1143 by the Land Registrar Meru County and the County Surveyor meru do visit parcel Number*

Abothuguchi/Gaitu/1143 and curve out 1 Acre to be registered in the names of JOSEPH MWENDA M'MUKIRI.

III. An order that the Defendant herein do execute all the requisite instruments and/or documents to effectuate transfer to the Plaintiff 1 Acre Parcel No. Abothuguchi/Gaitu/1143; and in default this Honourable Court do empower its Deputy Registrar to so execute the transfer instruments on her behalf.

IV. This Honourable Court do make further or better orders it might deem fit to expedient to meet the ends of justice.

V. Costs of this suit be borne by the Defendant.

2. The Originating Summons is premised on various grounds which have been highlighted in the body thereof. The grounds are: The plaintiff entered and executed a sale agreement with one Adriano Nthamburi; the said Adriano Nthamburi covenanted to sell to and in favour of the plaintiff an aggregate of 1 acre out of LR No. Abuthogochi/Gaiitu /1143 [the suit property]; the vendor and the plaintiff entered into three separate sale agreements; the sale agreement[s] were reduced into writing; the plaintiff paid the agreed deposit; the balance of the purchase price was to be paid upon successful transfer and registration of the sold portion to and in favour of the plaintiff.

3. Additionally, it has been contended that the vendor [Adriano Nthamburi] allowed the plaintiff to enter upon and take possession of the sold portion; the plaintiff has remained in the sold portion of the suit property to-date; the duration of occupation exceeds 12 years; the plaintiff's occupation has been open, continuous and uninterrupted; the

plaintiff has acquired adverse possessory rights to the suit property; and the plaintiff is entitled to the orders sought.

4. The originating summons is supported by the affidavit sworn on 28.10.2025 by Joseph Mwendan M'Mukiri. In addition, the deponent of the supporting affidavit has annexed various documents, including a copy of the Grant of Letters of Administration issued in favor of the defendant; a copy of the sale agreement dated the 21.6.2013; copy of sale agreement dated 17.7.2013; and 9.9.1013; a copy of photographs; and a copy of the green card in respect of the suit property.
5. Furthermore, the deponent of the supporting affidavit, has thereafter reiterated the grounds contained in the body of the originating summons. Besides, the deponent has posited that the defendant has neither taken any action nor steps to interrupt his [deponent's] occupation of the suit property. To this end, the deponent has invited the court to find and hold that same is entitled to the orders.
6. The defendant duly entered appearance and filed a replying affidavit sworn on the 11.11.2025 . The defendant has raised various issues. The issues raised by the defendant are: The suit property belonged to and was registered in the name of M'Ituerandu M'Ithiuru [deceased]; the deceased died on the 09.10.1984; the estate of the deceased has never been succeeded; the deceased never sold any land or portion of land to the plaintiff; the vendor who sold land to the plaintiff did not have the requisite capacity; the sale agreement is illegal and a nullity; the actions of the plaintiff herein constitute intermeddling with the estate of the deceased; the actions of the plaintiff contravened the provisions of **Section 45 of the Law of Succession Act**; and the

Plaintiff has not acquired any rights to and interest over the suit property.

7. The defendant has thereafter invited the court to find and hold that the plaintiff's claim is defeated by illegality; and that a court of law cannot sanction an illegality. In any event, the defendant has posited that the plaintiff has not established the ingredients underpinning adverse possession.
8. The originating summons came up for direction[s] and whereupon the advocate[s] for the parties agreed to canvass same *vide viva voce* evidence. The court thereafter proceeded to and issued directions. The directions were: the originating summons and the supporting affidavit shall be deemed as the plaint; the replying affidavit shall be deemed as the statement of defence; the matter shall proceed on the basis of oral evidence; the plaintiff shall file and serve list and bundle of documents, list of witnesses, and witness statements within 14 days; and the defendant shall also file the named documents within 14 days from the date of service.
9. Suffice it to state that the parties duly complied and filed the requisite documents. Thereafter, the matter was confirmed ready for hearing.
10. The plaintiff's case is premised on the evidence of one witness, namely; Joseph Mwenda. Same testified as PW1.

11.It was the testimony of the witness that same is the plaintiff. The witness further averred that by virtue of being the plaintiff, same is conversant with the facts of this case. In addition, the witness posited that same has since sworn an affidavit in support of the originating summons. The witness thereafter referenced the supporting affidavit sworn on 28.10.2025. The witness sought to adopt the named affidavit as his evidence in chief. The said affidavit was duly adopted and constituted as the evidence in chief of the witness.

12.Furthermore, the witness referenced the further affidavit sworn on 24.11.2025; and a supplementary affidavit sworn on 22.1.2026 and thereafter sought to adopt same as further evidence in chief. Instructively, the further and supplementary affidavit were duly adopted and constituted as further evidence in chief of the witness.

13.Finally, the witness referenced the originating summons dated the 28.10. 2025 and thereafter invited the court to grant the reliefs sought thereunder. In particular, the witness contended that same has been in occupation and possession of the portion suit property for over 12 years. The witness posited that same has since acquired rights to and interest over the designated portion of the suit property.

14.On cross examination by learned counsel for the defendant, the witness testified that suit property belonged to and was registered in the name of M'Ituerandu M'Ithiuri-deceased. Moreover, the witness averred that he has seen a copy of the certificate of official search filed by the defendant. The witness posited that the copy of the search shows that the suit property is registered in the name of M' Ituerandu.

15. In addition, the witness testified that same entered into a sale agreement with Jeremiah Kahuria Randu. The sale agreement is said to be dated 20.12.2010. Moreover, the witness averred that he has produced before the court a copy of the sale agreement.

16. While still under cross-examination, the witness testified that same has since tendered and availed to the court assorted copies of the sale agreements. In particular, the witness averred that he has tendered the sale agreement dated 21.7.2013. In addition, the witness also averred that he has availed a copy of the receipt to confirm full payment of the purchase price.

17. However, when pressed further the witness conceded that he does not have the receipt speaking to payment of the full purchase price. Moreover, upon being referred to paragraph 3 of the sale agreement dated 21.7.2013, the witness admitted that the said paragraph indicates that the balance of [sic] the purchase price was to be paid upon transfer.

18. It was the further testimony of the witness that the balance of the purchase price, which has been highlighted in terms of paragraph 3 of the sale agreement, has not been paid to date. Upon being referred to the green card in respect of the suit property, the witness testified that the suit property is registered in the name of M'Ituerandu M'Ithiuru. In addition, the witness posited that the said M' Ituerandu died on 9.10.1984.

19. While still under cross-examination, the witness testified that the sale agreement was entered into long after the death of the original owner of the suit property. Furthermore, the witness averred that the vendor did not show unto him any authority / grant of letter of administration.
20. Regarding the copy of grant of letters filed by the defendant, the witness testified that same is dated 25.9.2025. In any event, the witness conceded that the sale agreement was entered into long before the appointment of an administrator/ administratrix in respect of the estate of the deceased.
21. The witness further testified that he entered upon and took possession of the portion of land which was sold. In particular, the witness posited that he fenced the portion of land by planting trees on one side. The witness clarified that the other side of the sold portion borders/ adjoins a road.
22. Additionally, the witness testified that even though he has fenced his portion of land, he has not erected any structures thereon. For good measure, the witness posited that he only undertakes farming on the suit property. Moreover, the witness clarified that he cultivates assorted crops and Napier grass.
23. On re-examination by learned counsel for the plaintiff, the witness averred that his land is well demarcated on the ground. The witness added that the portion of the land is identifiable.

24. On further re-examination, the witness averred that he has planted trees on one side of his land, dug trenches/terraces on the other side, and there is a portion that borders the road. In addition, the witness posited that his portion of the land borders the land of Henry Karere Kathuu.

25. Additionally, the witness averred that he is the one who is in exclusive possession; and occupation of the portion of land which was sold to him.

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

27. The defendant's case is premised on the evidence of three [3] witnesses. The witnesses are: Ruth Kiunga, Githinji Kahuria, and Jamlick Mwirigi. The witnesses testified as DW1, DW2 and DW3, respectively.

28. It was the testimony of DW1 [Ruth Kiunga] that she is the defendant in respect of the instant matter. In addition, the witness averred that she has since filed various responses to the originating summons. The witness highlighted the replying affidavit, sworn on 11.11.2025; supplementary affidavit sworn on 23.01.2026; and the witness statement dated 11.11.2025. Thereafter, the witness sought to adopt the named documents as her evidence in chief. Suffice it to state that the various documents [affidavits] and witness statements were duly adopted and constituted as the evidence in chief of the witness.

29. Moreover, the witness referenced the list and bundle of documents dated 11.11.2025 and thereafter sought to produce the documents thereunder. There being no objection to the production of the documents, same were tendered and produced as exhibit D1 to D5, respectively.

30. The witness further referenced the list and bundle of documents dated 10.12.2025 and sought to produce the documents thereunder as exhibits. Similarly, the documents were tendered and admitted in evidence as exhibits. The document was marked as D6 and D7.

31. On cross-examination by learned counsel for the plaintiff, the witness testified that she is a daughter of M'Ituarandu M'Ithiuru [deceased]. Furthermore, the witness testified that the deceased died in the year 1984. In addition, averred that the estate of the deceased had not been succeeded. In any event, the witness testified that she was issued a Grant of Letters of Administration recently in September, 2025.

32. It was the further testimony of the witness that same does not reside on the suit property. In particular, the witness testified that she resides where she is married. However, the witness testified that she occasionally goes to the suit property.

33. It was the testimony of the witness that same is familiar with Jeremiah Kahuria. The witness added that Jeremiah Kahuria was her younger brother. Moreover, the witness posited that Jeremiah is now deceased. In addition, the witness posited that Jeremiah died on 8.8.2025.

34.Regarding whether she is aware of one Jotham Mwirigi, the witness testified that Jotham Mwirigi is a son of her brother. In addition, the witness clarified that the mother of Jotham is known as Catherine.

35.It was the further testimony of the witness that she did not know that portions of the suit property had been sold. However, the witness clarified that she got to know of the said claims when she was served with the court documents.

36.While still under cross-examination, the witness testified that she does not know the plaintiff. Besides, the witness testified that she does not know whether the plaintiff is in occupation of the suit land.

37.The second witness who testified on behalf of the defendant **was Githinji Kahuria**. Same testified as DW2.

38.It was the testimony of the witness that he is familiar with the facts of this matter. In addition, the witness averred that he has since recorded a witness statement in respect of the matter. The witness referenced the statement dated 10.12.2025 and thereafter sought to adopt and rely on the witness statement. The witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

39.On cross-examination by the learned counsel for the plaintiff, the witness testified that he is familiar with M'Ituerandu M'Ithiuru [deceased]. It was the testimony of the witness that M'Ituerandu was

his grandfather. The witness averred that the deceased was the registered owner of the suit property. In addition, the witness testified that he resides on a portion of the suit property.

40. It was the further testimony of the witness that his portion of the suit property borders the portion used by Koome. Moreover, the witness posited that Koome bought his portion from Elias Mutugi. The witness further testified that there is also a portion of the suit property that is being used by Henry Karere Kathuu.

41. While still under cross-examination, the witness testified that Nicholas Muriithi; Elius Mutugi and Jackson Gituma are also using portions of the suit property. Upon being referred to the sketch that was produced by the plaintiff, the witness testified that the sketch accords with the occupation and usage of the suit property by the various plaintiffs.

42. It was the further testimony of the witness that the same has recorded a witness statement. The witness added that he has averred that the sale agreement was entered into unprocedurally. In particular, the witness testified that the same agreement was entered into long after the death of the owner of the suit property.

43. The third witness who testified on behalf of the defendant was Jamlick Mwirigi. The witness testified as DW3.

44. It was the testimony of the witness that he is familiar with the facts of the case. Moreover, the witness intimated to the court that same has

since recorded and filed a witness statement. The witness referenced the statement dated 11.12.2025 and thereafter sought to adopt the same as his evidence in chief. The witness statement was duly adopted as the evidence in chief of the witness.

45. On cross-examination by learned counsel for the plaintiff, the witness testified that same was summoned to the police station on allegations that he had demolished the fence that had been erected on a portion of the suit property. Nevertheless, the witness clarified that same has never been charged with any criminal offence.

46. While still under cross-examination the witness testified that same is aware that Koome; Kahuria; and Geoffrey Kithinji are on a portion of the suit property. However, the witness stated that he does not know whether Henry Karere is below the portion of land used by Koome; Kahuria; and Geoffrey Kithinji.

47. Additionally, the witness testified that even though the plaintiffs are on a portion of the suit property, he [witness] does not recognize the plaintiffs' occupation. On the contrary, the witness only recognized his brothers, whom posited as the only ones in lawful occupation of the suit property.

48. With the foregoing testimony, the defendant's case was closed.

49. Following the conclusion of the hearing, the advocates for the parties sought time to file and exchange written submissions. To this end, the court proceeded to and issued directions. The directions were: The plaintiff shall file and serve written submissions within 14 days from

the date of written submissions; the defendant shall be at liberty for file and serve written submissions within 14 days from the date of service; and the plaintiff shall be at liberty to file rejoinder submissions [if any] within 7 days from the date of service.

50. The plaintiff filed written submissions dated 10/02/2026, wherein same has highlighted one key issue. The issue highlighted pertains to proof of ingredients underpinning adverse possession. In particular, it was contended that the plaintiff entered into a sale agreement with one Adriano Nthamburi Kahuria; the sale agreement was duly executed; the plaintiff was allowed to enter upon and occupy the said portion and that the plaintiff has remained in occupation of the sold portion of land. In addition, it was posited that the plaintiff's occupation and use of the suit property has been adverse/hostile to the rights of the defendants, and by extension the estate of the deceased.

51. Learned counsel for the plaintiff has thereafter sighted and referenced various decisions including; **Leonola Nerima Karani versus William Wanyama Ndege [2012] eKLR** ; **Mwangi Githuu versus Livingstone Ndeete [1980] eKLR**; **Samuel Miki Waweru versus Jane Njeri Richu [2007] eKRL** and **Mbugua Njuguna versus Elijah Mburu Wanyoike and another [2004] eKLR** .

52. Flowing from the foregoing, learned counsel for the plaintiff has invited the court to find and hold that the plaintiff has duly proved/established the claim of adverse possession. The court has thereafter been invited

to grant the reliefs at the foot of the originating summons dated the 28.10.2025.

53. The defendant filed written submissions dated the 25.02.2026, wherein the same has highlighted one singular issue. The issue is: Whether the plaintiff has acquired adverse possessory rights to 1 acre of the suit property or otherwise. It has been contended that the sale agreement, which is being relied upon by the plaintiff to stake a claim to a portion of the suit property, was entered into long after the death of the registered owner of the suit property. Moreover, it has been posited that by the time the plaintiff was entering into the sale agreement, the estate of the deceased had not been succeeded.

54. Additionally, it has been submitted that the sale agreement being relied upon by the plaintiff constitutes intermeddling with the estate of the deceased. To this end, learned counsel for the defendant has invited the court to invoke and apply the provisions of **Section 45 of the Law of Succession Act, Chapter 160 Laws of Kenya.**

55. Thereafter, learned counsel for the Defendant has cited various decisions. The decisions cited include: **Odera versus Were [2025] KECA 1284 KRL; Kimotho versus Mushomba [2025] KEELC 938; Njoki versus Pussy [2023] KEELC 945; Cherere versus Wandarwa and another [2024] KEELC 5445; and Andafu Versus Akhulunya [2025] KECA 714**, respectively.

56. Premised on the foregoing, learned counsel for the defendant has submitted that the Plaintiff's occupation of the suit property, is based on an illegality. In this regard it has been submitted that the person who sold to the plaintiff had no capacity to sell the land.

57. To this end, it has been submitted that the plaintiff's occupation is therefore not adverse/hostile to the rights of the defendant or the estate of the deceased. Simply put, the court has been invited to dismiss the plaintiff's suit.

58. Having reviewed the originating summons, the affidavits in support thereof; the replying affidavit in opposition thereto; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by/on behalf of the parties, I come to the conclusion that the determination of the subject matter turns on two [2] key issues. The issues are: Whether the plaintiff has established the requisite elements underpinning a claim for adverse possession or otherwise, and what relief [if any] ought to issue.

59. Regarding the first issue, it is imperative to recall that the plaintiff's claim to a portion of the suit property is predicated on the sale agreements, which were entered into and executed between the plaintiff and one, Adriano Nthamburi Kauria. The sale agreements are dated 21.6.2013; 17.7.2013; and 9.9.2023, respectively. Furthermore, the plaintiff averred that upon entering into the sale agreement the vendor [Adriano Nthamburi Kauria] allowed him to take possession and occupation of the portion of the suit property which was sold.

60. Additionally, the plaintiff contended that same entered into and took possession of the designated portion in September, 2013 and has remained in occupation thereof to date. To this end, the plaintiff posited that he has been in occupation of the One [1] acre portion of the suit property for more than 12 years. Moreover, the plaintiff has averred that his occupation has been open, continuous and uninterrupted.

61. It was the further testimony of the plaintiff that, despite his occupation and possession of the suit property, neither the defendant nor any representative of the deceased's estate has taken steps or action to interrupt his occupation. In this regard, the plaintiff posits that the defendant's right to recover the portion of the suit property has been extinguished by operation of the law. The plaintiff has thereafter invoked the provisions of **Section 7 of the Limitation of Actions Act, Chapter 22, Laws of Kenya.**

62. In an endeavor to determine whether or not the plaintiff's occupation, possession and use of a portion of the suit property has been adverse/hostile to the rights of the defendant, it is important to discern when [if at all] the occupation became adverse. To start with, where the claim for adverse possession is predicated on a sale/purchase agreement, the claimant can only propagate such a claim upon proof/demonstration that he/she has since fully paid the consideration.

63. Put differently, the occupation of a portion of land by a purchaser [if at all] can only become adverse from the date of payment of the last

instalments. Where the purchaser, who is in occupation on the basis of the sale/purchase agreement, has not concluded the payment of the purchase price, such a purchaser cannot invoke the doctrine of adverse possession. In such a situation, the purchaser remains in occupation/possession, albeit on the basis of a contract, *namely*, permission.

64. In the case of **Ouko & another (Suing as the Personal Representatives and Administrators of the Estate of Jason Atinda Ouko (Deceased)) v Kageni (Sued as the Personal Representative and Administrator of the Estate of Samuel Muhika Kageni (Deceased))** [2025] KECA 2126 (KLR), the Court of Appeal highlighted the foregoing position.

65. The court stated thus:

“In a situation where a claim for adverse position is premised on the existence of a purchase agreement, time only starts running once the contract is repudiated. Thus, in Sisto Wambugu vs. Kamau Njuguna [1983] KECA 69 (KLR), it was held that: “There have been several cases, of which the Livingstone Ndeete case is one, in which the claimant of land puts his case in the alternative, that is to say by pleading the agreement under which he is entered, and then asking for an order based on subsequent adverse possession. For instance, in Hosea vs. Njiru & Others [1974] EA 526, Simpson J, following Bridges vs. Mees [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by

occupation for twelve years, was entitled to become registered as proprietor of it.”

66. It was incumbent upon the plaintiff to prove and demonstrate when same paid the last instalment [if at all]. However, the sale agreements which were produced before the court showed that the last instalment, nay balance of the purchase price was to be paid to the vendor on transfer. Nevertheless, it is not lost on me that no transfer accrued. In this regard, the uncontroverted evidence is to the effect that the final instalment was never paid. For coherence, it remains outstanding to date. Consequently, the impugned occupation did not become adverse or hostile. Time for computing the adverse claim, therefore, did not commence to run in favour of the plaintiff in accordance with the law.

67. Regarding the fact that the full purchase price was not paid, the plaintiff is on record admitting and acknowledging the same. The plaintiff who testified as PW1 stated thus

“Upon being referred to paragraph 3 of the sale agreement dated 21.7.2013, the witness confirms that there was a balance which was to be paid upon the transfer. I do confirm that the said balance has not been paid to date.”

68. The other aspect that will anchor a claim for adverse possession, which flows from a sale/purchase agreement, is where the claimant is able to demonstrate the termination/repudiation of the contract. In this case, the plaintiff contended he entered into a sale agreement with Adriano Nthamburi Kahuria [who was not even an administrator of the estate] but failed to tender evidence to show when [if at all] the contract was repudiated. Barring repudiation or termination of [sic] the contract, the

plaintiff's occupation did not become hostile to the rights of the defendant.

69. Moreover, it is not lost on me that the sale agreement, which was entered into between the plaintiff and Adriano Nthamburi Kahuria, was vitiated by illegality.

70. I wish to repeat that Adriano Nthamburi Kahuria had no capacity to sell or alienate the suit property, which belonged to the deceased. The actions of Adriano Nthamburi Kahuria and the Plaintiff herein amounted to intermeddling with the estate of the deceased. [See **Section 45 of the Law of Succession Act**].

71. Insofar as the vendor who sold a portion of the suit property to the plaintiff did not have the requisite Grant of letters of Administration, the plaintiff herein cannot contend that he became a lawful purchaser and thereafter seek to anchor his claim on the basis of purchase. Simply put, the plaintiff cannot partake of or benefit from the plea of adverse possession.

72. The foregoing position was illuminated by the court of appeal in the case of **Odera v Were [2025] KECA 1284 (KLR)**. The court of appeal stated as hereunder:

32. In the instant appeal, the respondent argued and termed the agreement executed between Leonida Achieng Were and the appellant as void ab initio, as it amounted to intermeddling with the estate of a deceased person, contrary to the provisions of Section 45 of the [Law of Succession Act](#). Indeed, Leonida could

not sell the suit property before succession proceedings of the estate of the deceased had been finalized. The contract of sale was therefore illegal, null and void.

33.From the evidence adduced by the parties and on the admission of the appellant, it is evident that as of March, 2007, when the parties executed a contract for the disposal of half of the suit land, the same belonged to the deceased, and no succession proceedings had been commenced or finalized with regard to the estate of the deceased.

34.In view of the foregoing, Leonida lacked the necessary legal capacity to enable her dispose of the suit land, which property belonged to a deceased person, and no letters of administration had been issued.

73.Flowing from the holding in the decision [supra], I come to the conclusion that the plaintiff herein has not demonstrated the ingredients that underpin adverse possession. Further, and in any event, there is no gainsaying that a claimant must demonstrate the ingredients of *nec vi, nec clam, nec precario* conjunctively.

74.Before departing from this issue, it is worthy to reference the holding of the court of appeal in the case of **Richard Wefwawa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR)**. The court considered the ingredients that underpin adverse possession and highlighted the aspects that require proof.

75. The Court stated thus:

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.

76. The next issue that falls for consideration relates to the reliefs [if any] to be granted. The plaintiff had sought various reliefs at the foot of the originating summons. Most importantly, the plaintiff sought to be declared as the owner of 1 acre out of the suit property on the basis of adverse possession. However, while discussing issue number one, I have found and held that the plaintiff has not demonstrated that his occupation was adverse/hostile to the defendant or, by extension, the estate of the deceased.

77. To the extent that the plaintiff has failed to demonstrate hostility to the rights of the defendant or the estate of the deceased, the plaintiff cannot therefore procure the declarations sought. Simply put, the plaintiff is not entitled to the declaration on the basis of adverse possession.

78. Other than the foregoing, there is an aspect that merits consideration.

The aspect herein relates to whether the plaintiff who entered onto a portion of the suit property on the basis of an illegal contract ought to remain on the property or otherwise. It is important to underscore that **section 45 of the Law of Succession Act** prohibits any dealing with the estate of a deceased person prior to and before the issuance of a Grant of Letters of Administration. Moreover, any such dealings are deemed to constitute intermeddling with the estate.

79. Additionally, the provisions under reference proceed to criminalize any act of intermeddling. In this regard, the position of the law is to the effect that any person who deals with the estate of a deceased in contravention of the law of succession act is guilty of intermeddling and is likely to suffer a criminal/penal sanction.

80. The provisions of **Section 45 of the succession act, chapter 160 Laws of Kenya** states thus:

No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

81. The question that begs the answer is whether the plaintiff ought to remain in occupation or possession of the suit property or a portion thereof. I am aware that the defendant did not file any counterclaim. In any event, the defendant herein should have appropriated the latitude provided for under the law. However, does the failure to file a counterclaim sanitise the illegality and criminal actions underlying the actions of the plaintiff.

82. To my mind, the plaintiff cannot benefit from illegal and criminal acts which are prohibited by the provisions of **Section 45 of the Laws of Succession Act**. In any event, it is common ground that a party cannot be allowed to benefit from an illegality. Moreover, a court of law is called upon to act and avert illegality, once such illegality is brought to its attention.

83. In the case of **Mapis Investment (K) Limited v Kenya Railways Corporation [2006] KECA 344 (KLR)**, the Court of Appeal stated as hereunder:

In the case of Mistry Amar Singh v. Serwano Wofunira Kulubya 1963 EA 408 the Privy Council, on appeal from a judgment and order of the East African Court of Appeal at page 414 of the

report, of Lord Morris of Borth-y-Guest in his speech quoted with approval the following quotation from the judgment in Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728:-

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”

84.Flowing from the *dictum* highlighted in the case above, it is common ground that the plaintiff cannot remain in occupation of the suit property or a portion thereof. In this regard, I find and hold that a basis does exist to warrant the issuance of an order of eviction. Notably, this court has the requisite jurisdiction to grant such a relief in line with **section 13 [7] of the Environment and Land Court Act, 2011.**

85.Other than the provisions of **section 13 [7] of the Environment and Land Court Act** [Supra], this court is also seized of inherent jurisdiction. The scope of the inherent jurisdiction of the court was

elucidated in the case of **Narok County Government v Ntutu & 2 others (Petition 3 of 2015) [2018] KESC 11 (KLR)**. The apex court stated as hereunder:

1. Further in Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR . The Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;“ The jurisprudence that emerges from the case-law from the aforementioned jurisdiction shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the nullity principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection...” (Emphasis added.)

2. The conclusion drawn from the above citations is that this court, indeed any other appellate court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due

process of the law. Therein also lies the power for the court to act to prevent abuse of court process by one party so that fairness is maintained between all parties.

Conclusion

86. The Plaintiff herein sought to rely on the sale agreement and entered into between himself and Adriano Nthamburi Kahuria. However, despite basing his entry onto the suit property on the said sale agreement, the plaintiff failed to demonstrate when [if at all] he paid the final installment. The claim of adverse possession could only commence to run from the date of payment of the last instalment or when the contract was repudiated.

87. Moreover, it is not lost on me that the sale agreement[s] which the plaintiff tendered before the court showed that the balance of the purchase price was to be paid upon transfer of the sold portion. It is common ground that no transfer ever occurred. It therefore means that the balance of the purchase price was never paid. In any event, no such evidence was tendered.

88. Premised on the foregoing, my finding and conclusion is to the effect that the plaintiff has failed to prove his case. Simply put, the plaintiff's case is meritless. To this end, the plaintiff's case courts dismissal.

Final orders:

89. Flowing from the foregoing, the final orders which commend themselves to the court are:

- i. The Plaintiff's 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 [iii] shall be agreed upon and in default be taxed in the conventional manner.*

- iv. *Additionally, and taking into account the provisions of Section 13 [7] of the Environment and Land Act,2011 ; the Plaintiff be and is hereby ordered to vacate and hand over vacant possession of the suit property to the defendant within 90 days from the date hereof.*

- v. *In the event of default, the defendant shall be at liberty to evict the plaintiff either by himself, agents or servants. In this regard, an eviction order shall issue.*

90.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY
OF MARCH, 2026.**

OGUTTU MBOYA, FCIArb; CPM [MTI-EA]

JUDGE

In the presence of

Naserian: Court Assistant

Mr. Mwanzia for the Plaintiff

Mr. Wambua for the Defendant