

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC OS E025 OF 2025

ELIAS MUTUGI MWITHIMBUPLAINTIFF

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 dated the 26.9.2025; 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.**
2. The reliefs sought at the foot of the summons [OS] are:

- I. A declaration that Elias Mutugi Mwithimbu, the Plaintiff herein has become entitled by adverse possession to 50” X 100” feet of Abothuguchi/Gaitu/1143.*
- II. An order that the Plaintiff be registered as the sole proprietor of the plot of land measuring 50” X 100” feet 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 carve out 1 Acre to be registered in the names of ELIAS MUTUGI MWITHIMBU*

III. An order that the Defendant herein do execute all the requisite instruments and/or documents to effectuate transfer to the Plaintiff 50” X 100” feet of 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 shall be borne by the Defendant.

3. The originating summons is anchored on various grounds which have been enumerated in the body thereof. The grounds include: The Plaintiff entered into and executed a sale agreement in respect of a portion **Abothuguchi/Gaitu/1143** [suit property]; the sale agreement was reduced into writing; the sale agreement spoke to the size/portion of land that was being sold; the vendor was Jeremiah Kahuria[now deceased]; the vendor allowed the Plaintiff to enter upon and take possession of the sold portion of land; the Plaintiff duly entered upon and took possession; the Plaintiff has remained in occupation of the sold portion for a duration of 14 years; the occupation by the Plaintiff has been open continuous and uninterrupted; and the Plaintiff has acquired adverse possessory rights to the designated portion.

4. Furthermore, the Plaintiff has posited that he has since constructed assorted rental rooms and a front shop on the sold portion; the Defendant herein has never taken steps to recover vacant possession; the rights of the Defendant to commence recovery proceedings has lapsed; the

defendants rights to the sold portion stand extinguished by operation of law; and the Plaintiff is entitled to the portion of the suit land based on adverse possession.

5. The Originating Summons is supported by the affidavit sworn on 26.9.2025. The deponent of the named affidavit has reiterated the grounds contained in the body of the summons. In addition, the deponent has also annexed assorted documents, including a copy of the grant of a letter of administration *ad litem*; a copy of the Sale agreement entered into on 21.2.2011; a copy of the photographs [sic] showing activities on the portion of the Suit Land; and a copy of the green card in respect of the suit property.
6. The Defendant duly entered appearance and filed a replying affidavit sworn on 7.11.2025. The Defendant has raised various issues. The issues raised include: the suit property belonged to and was registered in the name of M' Ituerandu M' Ithiuru- deceased; the estate of the deceased has not been succeeded; the vendor who sold the portion of the suit property to the Plaintiff had no capacity; the sale agreement constitute[s] intermeddling with the estate of the deceased; the actions of the Plaintiff are illegal and criminal; and the Plaintiff has not acquired any adverse possessory right[s] to and in respect of the suit property.
7. Moreover, the Defendant has also contended that the time for the acquisition of adverse possession could not run against the estate of the deceased, insofar as no grant of letters had been issued. The Defendant has therefore contended that the claim by the Plaintiff is legally untenable.

8. The originating summons came up for direction[s], and whereupon the advocate[s] for the parties agreed to canvass the same *vide viva voce* evidence. The court thereafter proceeded to issue 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 based on 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; Elias Mutugi Mwithimbo. Same testified as PW1.
11. It was the testimony of the witness that he is the Plaintiff in respect of the instant matter. The witness posited that he is familiar with the facts of the case. In addition, he averred that he swore an affidavit in support of the originating summons. To this end, the witness referenced the affidavit sworn on 26.9.2025. He thereafter sought to adopt and rely on the named affidavit as his evidence in chief.
12. Additionally, the witness adverted to a further affidavit sworn on 24.11.2025. The witness sought to adopt and rely on the further affidavit as his evidence in chief. The affidavit sworn on 26.9.2025 and the further

affidavit sworn on 24.11.2025; were thereafter adopted and constituted as the evidence in chief of the witness.

13. It was the further testimony of the witness that same has also filed the originating summons dated 26.9.2025, which the witness sought to rely on. Moreover, the witness invited the court to grant the relief[s] contained at the foot of the originating summons.

14. On cross-examination by learned counsel for the defendant, the witness testified that he bought a portion of the suit property in the year 2011. The witness averred that the sale agreement was reduced to writing. The sale agreement was also executed by the respective parties. It was the further testimony of the witness that he paid the stakeholders' sum, leaving a balance of Ksh 140,000/=. The witness added that thereafter he paid the balance of the purchase price in instalments until he completed the purchase price.

15. While still under cross-examination, the witness testified that the suit property belonged to and was registered in the name of M'Ituerandu M'Ithiuru[deceased]. The witness conceded that the person who sold a portion of the suit property to him was Jeremiah Kahuria. Nevertheless, the witness conceded that the vendor was not the registered owner of the land.

16. It was the further testimony of the witness that he was not aware whether the person who sold the land to him had taken out a letter of administration. However, upon being shown a copy of the grant of letters of administration, the witness averred that the grant is indicated to have

been issued on 25.9.2025. In addition, the witness clarified that the deceased [owner of the land] is indicated to have died in 1984.

17. It was the further testimony of the witness that by the time the portion of the suit property was being sold to him, M'Ituerandu was already dead.

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

19. 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.

20. It was the testimony of DW1 [Ruth Kiunga] that same is the Defendant in respect of the instant matter. In addition, the witness averred that same has since filed various responses to the originating summons. The witness highlighted the replying affidavit, sworn on 7.11.2025, 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.

21. 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, the same were tendered and produced as exhibits D1 to D5, respectively.

22.The witness further referenced the list and bundle of documents dated 26.11.2025 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.

23.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, the Witness averred that the estate of the deceased had not been succeeded. In any event, the witness testified that the same was issued with a Grant of Letters of Administration recently in September, 2025.

24.The witness testified that she is familiar with Jeremiah Kahuria. The witness clarified that Jeremiah Kahuria was her younger brother. In addition, the witness posited that Jeremiah Kahuria is now deceased. He died on 8.8.2025.

25.It was the further testimony of the witness that the 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.

26.It was the further testimony of the witness that she did not know that portions of the suit property had been sold. In particular, the witness averred that she does not know whether Jeremiah sold land to Julius and

Henry Karere. However, the witness clarified that she got to know of the said claims when she was served with the court documents.

27. 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.

28. The second witness who testified on behalf of the Defendant was, Githinji Kahuria. Same testified as DW2.

29. 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.

30. On cross-examination by the learned counsel for the Plaintiff, the witness testified that he is familiar with M'Itearandu M'Ithiuru [deceased]. 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.

31. 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.

32. The witness further testified that there is also a portion of the suit property that is being used by Henry Karere Kathuu and Elias Mutugi.

33. While still under cross-examination, the witness testified that Nicholas Muriithi 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.

34. 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.

35. The third witness who testified on behalf of the Defendant was Jamlick Mwirigi. The witness testified as DW3.

36. 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 the 11.12.2025 and thereafter sought to adopt same as his evidence in chief. The witness statement was duly adopted as the evidence in chief of the witness.

37. On cross examination by learned counsel for the Plaintiff, the witness averred that he is a son of Jeremiah Kahuria. The witness posited that Jeremiah Kahuria is now deceased.

38. He testified that he 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.

39. While still under cross examination, the witness testified that same is aware that Koome Kahuria, Elias Mutugi and Geoffrey Kithinji are on a portion of the suit property. Moreover, the witness confirmed that Elias Mutugi has built 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.

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

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

42. 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 to 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.

43. The Plaintiff filed written submissions dated the 10/02/2026 and 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 Jeremiah Kahuria; the sale agreement was duly executed; the Plaintiff was allowed to enter upon and occupy the said portion measuring 50ft by 100ft; and that the Plaintiff has remained in occupation of the sold portion of land. Further, and 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.

44. Learned counsel for the Plaintiff has thereafter cited 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 .**

45. 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 26. 9.2025.

46. The Defendant filed written submissions dated the 25.02.2026 and wherein same has highlighted one singular issue. The issue is: Whether the Plaintiff has acquired adverse possessory rights to 50ft by 100ft 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.

47. 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.**

48. 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.

49. 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.

50. 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.

51. 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 reliefs [if any] ought to issue.

52. 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 agreement, which was entered into and executed between the Plaintiff and one Jeremiah Kahuria. The sale agreement is dated the 21.2.2011. Furthermore, the Plaintiff averred that upon entering into the sale agreement, the vendor [Jeremiah Kahuria] allowed him to take possession and occupation of the portion of the suit property which was sold.

53. Additionally, the Plaintiff contended that same entered into and took possession of the designated portion in September 2011 and has remained in occupation thereof to date. The witness further averred that

he constructed a house of 5 rooms for residential purposes and a front shop. To this end, the Plaintiff posited that he has been in occupation of the 50ft by 100 ft portion of the suit property for more than 14 years.

54. Moreover, the Plaintiff has averred that his occupation has been open, continuous and uninterrupted.

55. 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.**

56. 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.

57. 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. In respect of the instant matter, the plaintiff contended that

same paid the entire purchase price vide installment. However, the oral testimony by the plaintiff is at variance with the sale agreement which was tendered before the court and in particular clause 1 thereof.

58. Although the Plaintiff posited that he paid the entire purchase price vide installments, no acknowledgements or documentary evidence [if at all] was tendered before the court. It is instructive to note that the person who was alleged to have been paid has since passed on. To this end, the contention of full payment [if at all] could only be demonstrated on the basis of documentary evidence. None was tendered.

59. At any rate, it is not lost on me that the oral evidence tendered before the court is at variance with the terms of the sale agreement dated 21.2.2011. In this regard, if any payment[s] were made contra to the terms of the sale agreement, there was need for an addendum; or documentary evidence, to demonstrate such payments.

60. 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, *nay*, permission.

61. 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.

62. 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.”

[Underlining supplied]

63. It was incumbent upon the Plaintiff to prove and demonstrate when same paid the last installment [if at all]. However, the sale agreement which was produced before the court showed that the last installment, 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 installment was never paid. Consequently, the impugned occupation did not become adverse or hostile. Time for computing adverse claim therefore did not commence to run in favor of the Plaintiff in accordance with the law.

64. 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 Jeremiah 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.

65. Moreover, it is not lost on me that the sale agreement which was entered into between the Plaintiff and Jeremiah Kahuria, was vitiated by illegality. I wish to repeat that Jeremiah Kahuria had no capacity to sell or alienate the suit property which belonged to the deceased. The actions of Jeremiah Kahuria and the Plaintiff herein amounted to intermeddling with the estate of the deceased. [See **Section 45 of the Law of Succession Act**].

66. 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.

67. 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.

68. 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. In any event, there is no gainsaying

that a claimant must demonstrate the ingredients of *nec vi, nec clam, nec precario* conjunctively.

69. Before departing from this issue, it is worthy to reference the holding of the Court of Appeal in the case of **Richard Wefwafwa 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.

70. 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.

71. 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 50ft by 100ft 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.

72.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.

73.Other than the foregoing, there is another 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** [supra] 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.

74.Additionally, the provisions under reference proceeds 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.

75.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.

76. 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 counter claim. In any event, the Defendant herein should have appropriated the latitude provided for under the law. However, does the failure to file a counterclaim sanitize the illegality and criminal actions underlying the actions of the Plaintiff.

77. 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.

78. It matters not whether the illegality has been pleaded by the adverse party or otherwise. The critical point is that the illegality shall have been brought to the attention of the court.

79. 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.”

80. 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.**

81. 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 under:

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

82. The Plaintiff herein sought to rely on the sale agreement entered into between himself and Jeremiah 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 instalment. 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.

83. Moreover, it is not lost on me that the sale agreement 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.

84. 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:

85. 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.*

86.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