



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 334 OF 2009 (O.S)**

**IN THE MATTER OF AN APPLICATION UNDER SECTIONS 37 AND 38 OF THE  
LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION OVER TITLE NO.  
KAJIADO/OLOOLOITIKOSHI/KITENGELA/44**

**BETWEEN**

**JAMES RITEI KATITA.....PLAINTIFF**

**VERSUS**

**HARCHI TRANJAN DHAMPAL S. CHAWLA.....DEFENDANT**

**DANIEL KIERU WACHIRA .....1<sup>ST</sup> INTERESTED PARTY**

**JOSEPH KETUTUA WUANTAI .....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction:**

1. This suit was commenced by way of Originating Summons dated 10<sup>th</sup> November, 2009 in which the Plaintiff is seeking for the following orders:

- a. For a declaration that the Applicant James Ritei Katita is entitled to be registered as proprietor of all that parcel of land known as Title No. Kajiado/Olooloitikoshi/ Kitengela/ 44.***
- b. An order for rectification of the land register by registration of the Applicant James Ritei Katita as the proprietor of Title No. Kajiado /Olooloitikoshi/ Kitengela/44 in place of Harchi Tranjan Dhampal S. Chawla the current registered proprietor.***
- c. An order directing the Respondent Harchi Tranjan Dhampal S. Chawla to execute all documents of transfer in favour of the Applicant in respect of Title No. Kajiado/Olooloitikoshi/ Kitengela/44 in default whereof the Deputy Registrar of this Honourable Court be empowered to execute the same in place of the Respondent.***
- d. That the costs of this suit be in any event given to the Plaintiff/Applicant.***

2. The Originating Summons is premised on the grounds that the Plaintiff has been openly, peacefully and as of right in possession of parcel of land known as Kajiado/Ololoitokishi/Kitengela/44 (*the suit land*) for an uninterrupted period of nineteen (19) years commencing August, 1990 to date; that the Plaintiff has a fence, a homestead and uses the land exclusively for grazing his livestock and that he has been in adverse possession of the land for more than twelve (12) years.
3. In his Supporting Affidavit, the Plaintiff deponed that in 1990, while in search of pasture for his livestock, he took shelter at Mr. Ole Wuntai's homestead, which is about 200 metres away from the suit land; that he then learnt of a fenced and abandoned land by the Defendant and that he moved on the land and started grazing on it.
4. The Plaintiff deponed that in 1990, he erected a wooden homestead for himself and a barn for his livestock together with a wooden gate and that the said homestead is visible from the Namanga Highway.
5. That although a man of Indian origin stopped by the suit land in October, 1990, he left him on the land; that he has since been living on the land with his family, that is, his wife and four children, and that all the children were born on the suit land.
6. When the Originating Summons was served by way of advertisement, the 1<sup>st</sup> Interested Party filed an Application dated 24<sup>th</sup> February, 2010 and asked to be joined in the suit.
7. According to the Affidavit in support of the Chamber Summons, the 1<sup>st</sup> Interested Party alleged that the suit land had been sold to him by the Defendant in 1987. That Application was never prosecuted.
8. The 2<sup>nd</sup> Interested Party was enjoined in the suit by the consent of the parties on 26<sup>th</sup> January, 2017.
9. The Defendant filed his Replying Affidavit in respect to the Originating Summons on 2<sup>nd</sup> July, 2015 while the 2<sup>nd</sup> Interested Party filed his Affidavit on 2<sup>nd</sup> February, 2017.
10. In his Affidavit (*which was disputed by the Plaintiff*), the Defendant deponed that he bought the suit land from one Allan Njoroge Mbugua in July, 1980; that by then, the land was inhabited by wild animals and that it was also used as grazing grounds by the neighbouring Maasai pastoralists.
11. The Defendant deponed that he used the suit land as a collateral to secure a loan of Kshs. 250,000 from the Kenya Commercial Bank and that the suit land was discharged in 1987.
12. It is the Defendant's case that he decided to fence the land using a barbed wire fence to avoid any encroachment; that in the year 2010, he discovered that the land had fraudulently been transferred to the proposed 1<sup>st</sup> Interested Party and that when he lodged a complaint with the Ministry of Lands, the title was reinstated to him.
13. The Defendant further deponed that he instructed his advocate, Joshua Nyawira, to keep an eye on the land.
14. The Defendant finally deponed that the suit land has been and still remains vacant save for a temporary wooden structure put up by the Maasai's grazing on the land; that the Plaintiff is attempting to disinherit him of his land and that the Plaintiff has never enjoyed quiet possession of the suit land.
15. The 2<sup>nd</sup> Interested Party on the other hand deponed that he was the original owner of the suit land which part of a portion of land measuring approximately 1,000 acres comprised in the title number Kajiado/Ololoitokishi/Kitengela/44 having acquired it with parcel number 43; that he sold the suit land to the Defendant through a broker called Mbugua and that after the Defendant made part payment of the purchase price and in consideration of the Defendant granting him partnership in his intended hatchery business on the land, he transferred the land to him.

16. When the Defendant travelled out of the country, the 2<sup>nd</sup> Interested Party deponed that he was left with the responsibility of looking after the suit land; that in 1990, Mzee Sironga Josphat Kirruti requested him to allow him graze his cattle on the land and that he granted him the license to do so on the suit land and on parcel number 43. He was also to generally act as a caretaker of the two parcels of land.

17. When Mzee Kirruti left the land in the year 2004, the 2<sup>nd</sup> Interested Party deponed that the Plaintiff's father, Mzee Morrokia Katita, who was his employee, requested him to allow his son, the Plaintiff, operate a kiosk on the land; that he allowed the Plaintiff to operate the said kiosk so as to sell food to the employees working for Carnations Limited and that the said licence did not allow the Plaintiff to erect any other structures(s) on the land.

18. The 2<sup>nd</sup> Interested Party deponed that it is not true that the Plaintiff has erected structures on the suit land or that he lives on the land; that the structures appearing on the exhibited photos are in respect to the adjacent land which he hived off from parcel number 6240 and gave it to the Plaintiff as a gift.

19. The 2<sup>nd</sup> Interested Party finally stated that when the Plaintiff's father died in the year 1993, his remains were interred, with his permission, on his land parcel number 6240 since he did not have any other land in Kitengela; that the Plaintiff entered on the suit land to operate a kiosk with his permission and that the suit is bad in law and is meant to defeat his interest in the land.

20. In his Supplementary Affidavit sworn on 16<sup>th</sup> February, 2017, the Plaintiff deponed that it is untrue of the 2<sup>nd</sup> Interested Party to allege that he does not live on the suit land; that he has lived on the land since the year 1990 to date and that the 2<sup>nd</sup> Interested Party has not protected his interest in the suit land for the last thirty seven (37) years.

21. The Plaintiff finally averred that he has never sought the permission of the 2<sup>nd</sup> Interested Party to build a kiosk on the suit land and that he is the one who fenced the suit land.

22. The Plaintiff finally averred that the whereabouts of the Defendant are unknown and someone could be signing documents for the purpose of impersonating the Defendant.

23. The matter proceeded for hearing by way of *viva voce* evidence.

#### **The Plaintiff's case:**

24. The Plaintiff, PW1, informed the court that his evidence is contained in his Supporting Affidavit and the Supplementary Affidavit; that the Defendant was on the suit land in the year 2000 and never spoke to him and that in the year 2008, the Defendant again went on the suit land when he found his wife whom he never spoke to.

25. It was the evidence of PW1 that he has a "*boma*" for his cattle and goats on the land and that he cultivates a portion of the suit land.

26. PW1 denied that it is the Defendant who fenced the land and that to the contrary, he is the one who fenced the land.

27. In cross-examination, PW1 stated that the 2<sup>nd</sup> Interested Party is known to him because they hail from the same clan; that the suit property used to belong to the 2<sup>nd</sup> Interested Party and that he sold the suit land.

28. It was the evidence of PW1 that they moved from Mashuru area in 1990 due to drought and that he moved on the land to look for pasture for his cattle.

29. It was the evidence of PW1 that when he entered the land, he was with his wife and children and that

his homestead occupies 2 acres of the suit land, including where the kiosk stands.

30. PW1 informed the court that he has one big house, a toilet and another small house on the land; that there is also a “*boma*” for his cattle and that he uses the remainder of the land to graze the cattle.

31. PW1 informed the court that when he entered the land, he did not know the Defendant. However, he knew the 2<sup>nd</sup> Interested Party; that it is not the 2<sup>nd</sup> Interested Party who allowed him on the land and that he fenced the land in the year 2008.

32. PW1 stated that although the house he put up was made of timber, he later changed it and used iron sheets; that the house has three rooms and that there is an additional one roomed house for his workers. According to PW1, his house has a bed and furniture and that is where he lives with his wife and two children who are now adults.

33. PW1 informed the court that his house and that of his worker is divided by a fence which he later on removed. PW1 referred the court to the photographs showing his houses.

34. PW1 stated that the 2<sup>nd</sup> Interested Party sold to his father land measuring 2½ acres and that is where his father was buried when he died.

35. According to PW1, although he was initially living on the 2<sup>nd</sup> Interested Party’s land, he moved on the suit land with his family and that he engaged the services of a private investigator because of the suspicious signatures on the Defendant’s Supporting Affidavit.

36. A document examiner, PW2 informed the court that he was requested by the Plaintiff’s advocate to examine documents annexed on the Defendant’s Affidavit sworn on 17<sup>th</sup> June, 2015 which included the copy of the Transfer dated 28<sup>th</sup> August, 1980.

37. According to PW2, he was to compare the signature on the Transfer document and the questioned signature on the Defendant’s Affidavit and that after examining the said signatures, he came to the conclusion that the questioned signatures were done by a different author.

38. PW2 produced in court the comparison chart and his report as evidence. PW2 stated that he also examined the copy of the Defendant’s passport and found that he had been in the country between 25<sup>th</sup> June, 2014 and 29<sup>th</sup> June, 2014.

39. In cross-examination, PW2 stated that he did not have the specimen handwriting of the Defendant as at the time he prepared his report; that he compared the signature of the Defendant which was done in 1980 and the questioned signature on the Affidavits that were done in 2015 and that he used a photocopy of the known handwriting of the Defendant to arrive at his conclusions.

40. PW3 informed the court that he has known the Plaintiff since they were young boys; that the Plaintiff has been in occupation of the suit land since 1990 to date and that it is the Plaintiff who fenced the suit land.

41. PW3 stated that the Plaintiff’s children were all born and brought up on the suit land and that his home is 2½ km away from the suit land.

42. In cross-examination, PW3 stated that the Plaintiff moved on the suit land in 1990 with his brothers and mother; that when his brother died, he was buried in Machakos; that he met the Plaintiff’s father once and that the Plaintiff’s father has since died.

43. PW3 stated that the suit land has three houses and that the Plaintiff’s brother also has his house on the land, and so is his mother.

44. PW3 was emphatic that the Plaintiff's mother is still living on the land in her own house.

45. According to PW3, one of the houses on the suit land belongs to the Plaintiff's mother while the other two belong to his brother Francis Katita and the Plaintiff himself.

46. PW3 stated that the Plaintiff has four children who all live in his house.

**The Defendant's case:**

47. An advocate of this court, DW1, informed the court that he met the Defendant in the year 2001; that the Defendant is his client and that he has always known the Defendant as the owner of the suit land which is along Kitengela-Kajiado road.

48. According to DW1, the Defendant requested him to watch over the suit land prior to the year 2005 when the Defendant relocated to the United Kingdom; that the Defendant had already fenced the land with a barbed wire fence and that the land did not have any structures.

49. It was the evidence of DW1 that around the years 2009/2010, he realised a kiosk had been constructed at a corner of the suit land together with a cow-shed; that he asked the Defendant about the structure and that the Defendant informed him that he had allowed the Defendant to put up the kiosk.

50. DW1 stated that he never found anyone in occupation of the kiosk and that when the Plaintiff filed this suit, the Defendant instructed him to defend the matter.

51. It was the evidence of DW1 that the Plaintiff does not occupy the suit land and that there is only a kiosk and an abandoned cow-shed on the land; that it is the 2<sup>nd</sup> Interested Party who allowed the Plaintiff to graze on the land and that he was asked to watch over the suit land by the Defendant on a friendly basis.

52. The 2<sup>nd</sup> Interested Party DW2, stated that he is 87 years old; that he knows the Plaintiff well and that the Plaintiff used to live with him on his land.

53. It was the evidence of DW2 that the suit land arose from the sub-division of parcel number 43 which measured approximately 1000 acres and that the suit land measures approximately 11 acres.

54. DW2 informed the court that a Mr. Mbugua proposed to buy the suit land and he paid him a deposit of Kshs. 50,000 leaving a balance of Kshs. 50,000; that he gave him the original Title Deed and that he later told him that he had a buyer for the land.

55. Although he sold the land in 1980, DW2 stated that he never saw Mr. Mbugua again or the person who had purchased the land from Mr. Mbugua and that the Plaintiff requested to be allowed to put up a kiosk at the corner of the suit land.

56. DW2 stated that he allowed the Plaintiff to put up a kiosk on the suit land to enable him sell tea and mandazi to the workers who were working in the neighbouring flower farms; that the Plaintiff informed him that he will be watching over the land and that Mr. Mbugua had informed him that the Defendant wanted to conduct a hatchery business on the land.

57. DW2 informed the court that he hived from his land 1½ acres which he gave to the Plaintiff's father; that the Plaintiff's father was buried on the suit land when he died and that the Plaintiff has always lived on the land that he allocated to his father and not the suit land.

58. DW2 stated that having allowed the Plaintiff to put up a kiosk at the corner of the suit land, he is the one who is still in possession of the land to date.

59. In cross-examination, DW2 stated that he sold the suit land to Allan Mbugua who in turn sold it to the

Defendant.

60. By the time he allowed the Plaintiff to put up a kiosk on the suit land, DW2 stated that the Plaintiff was already living with his father on the land that he had allocated them.

61. Every time people attempted to grab the land, DW2 informed the court that the Plaintiff used to report to him; that Mr. Mbugua disappeared and that the Plaintiff still lives on the land he gave his father and the entire family and not on the suit land.

**Submissions:**

62. The Plaintiff's advocate submitted that the Plaintiff moved on the suit land in the year 1990 and constructed a food kiosk; that the Plaintiff also erected a fence and that time started running in the year 1990.

63. Counsel submitted that the evidence by the Plaintiff was not rebutted in cross-examination and that his possession of the suit land has been continuous.

64. Counsel for the Plaintiff submitted that the Plaintiff's possession of the suit land has not been secretive; that the Defendant had actual knowledge of his possession of the land since the 1990's and that the said possession was without the consent of the Defendant.

65. The Plaintiff's counsel relied on numerous authorities which I have considered.

66. The Defendant's counsel submitted that the evidence by the Plaintiff that he has been in possession of the suit land was not only contradicted and rebutted by the testimony of PW2 and the 2<sup>nd</sup> Interested Party, but also by the report recorded by the court upon visiting the *locus quo*.

67. Counsel submitted that there is no evidence of actual, continuous occupation and possession of the suit land by the Plaintiff as alleged.

68. In any event, it was submitted, the Plaintiff only put up a kiosk on the suit land in the year 2009; that before then the suit land was vacant and that time should start running from the year 2009 and not 1990.

69. The Defendant's counsel submitted that the Plaintiff has not done anything positive on the land to indicate that his possession of the suit land was to the exclusion of the true owner; that the Plaintiff only intended to graze on the land and that the Plaintiff's possession of the land, if at all, was not inconsistent with the owner's interest in the land.

70. The Defendant's counsel relied on numerous authorities which I have considered.

71. The 2<sup>nd</sup> Interested Party's advocate submitted that he who alleges a fact must prove the existence of that fact; that the burden of proof has never been on the Defendant and that the Plaintiff failed to discharge his burden of proof.

72. Counsel submitted that the site visit by the court established that the Plaintiff's testimony was false and that there was no evidence of human settlement on the land neither was there evidence of fresh cow-dung on the land.

**Analysis and findings:**

73. The Plaintiff is seeking to be declared the owner of parcel of land known as Kajiado/Ololoitikoshi/Kitengela/44 (*the suit land*) for having been in possession of the land openly, peacefully and as of right for uninterrupted period of nineteen (19) years.

74. According to the grounds on the face of the Originating Summons "*the Plaintiff has a fence, a*

*homestead and uses the land exclusively for grazing his livestock.”*

75. Adverse possession is the process by which a person can acquire a title to someone else’s land by continuously occupying it in a way that is inconsistent with the right of the owner.

76. Where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of Section 38 of the Limitation of Actions Act to apply to this court for an order that he be registered as the proprietor.

77. For one to succeed in a claim for adverse possession, he must prove the following elements:

***a. He must have made physical entry and be in actual possession of the land for the statutory period of twelve (12) years;***

***b. The entry and occupation must be with or maintained under some claim or colour of right.***

***c. The Occupation must be non-permissive;***

***d. The occupation must evidence unmistakable animus possidendi, that is occupation with the clear intention of excusing the owners and;***

***e. The acts of the adverse possession or must be in consistent with the owner’s enjoyment of the soil for the purpose which he intended to use it.***

78. It is trite that for one to succeed in a claim of adverse possession, he has to prove that he has been in actual, open, hostile and continuous possession of the land to the exclusion of the true owner for twelve (12) years.

79. Whether a claimant has been in continuous and uninterrupted possession of the land for twelve (12) years is a question of evidence.

80. When a person is bound to prove the existence of any fact, the burden of proof always lies on the person who wishes the court to believe in the existence of that fact, unless the law provides otherwise (*See Sections 107 and 109 of the Evidence Act*).

81. Before I venture into the issue of whether the Plaintiff discharged the burden of proof bestowed on him by the law, I would like the parties to appreciate the distinction between the legal and evidential burden of proof.

82. In civil cases, the legal burden of proof is always on the person alleging the existence of a fact. The legal burden always remains on the person making the allegation. It never shifts. On the other hand, the evidential burden initially rests with the person bearing the legal burden, but after a prima facie case has been adduced, it shifts to the other party. This is the position that the Supreme Court took in the case of ***Raila Odinga vs. IEBC & 3 others (2013) eKLR*** in which the court held as follows:

***“... a Petitioner should be under the obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden...”***

83. In the case of ***Kirugi & Another vs. Kabiya & 3 others (1987) KLR 347***, the Court of Appeal stated that the burden was always on the Plaintiff to prove his case on the balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

84. Although the Defendant did not testify in this matter, and even though it might be in doubt that he indeed signed the Replying Affidavit, the burden to prove that the Plaintiff is entitled to the suit land was on the Plaintiff.

85. The Plaintiff in this matter gave both oral and Affidavit evidence. The Plaintiff also called his childhood friend, PW3, to testify on his behalf.

86. In his Affidavit in support of the Originating Summons sworn on 10<sup>th</sup> November, 2009, the Plaintiff deponed as follows:

***“ a. In August, 1990 while in search of pasture for my livestock from Mashulu area in Kajiado, took (sic) shelter at Ole Wuntai’s homestead about 200 metres away from the suit property for two days when I learnt of the suit property although fenced abandoned by the Respondent and thereupon moved into the same and started grazing my livestock thereon.***

***b. In or about September, 1990, I erected a wooden homestead of myself and a barn for the housing of my livestock and storage of cattle feed...***

***c. ...***

***d. From October, 1990 to date I have used the suit property peacefully, exclusively and without interruption...***

***e. That I live with my family namely my wife and four children all who have been born and brought up on the suit property that they now call home the eldest being in form three...”***

87. The Plaintiff annexed on the Affidavit three (3) sets of photographs, which according to him, show his homestead and livestock.

88. In his oral testimony, the Plaintiff repeated the above depositions save that he is the one who put up the fence and not the Defendant.

89. It was his evidence that when he entered the suit land in 1990, he was with his wife and children and that he put up a homestead occupying approximately 2 acres of the suit land.

90. When he was asked whether his house was made of timber or iron sheets, he stated that initially it was made of timber before he changed it and used iron sheets; that the house he stayed in was a three roomed house and that he had an extra house for his worker.

91. PW1 further informed the court that his father purchased 2½ acres from the 2<sup>nd</sup> Interested Party and that he was buried there. He however denied that he lives on the said 2½ acres with his family.

92. His childhood friend, PW3 stated that the Plaintiff has been living on the suit land with his mother, brother, children and his wife.

93. It was the evidence of PW3 that the land had three houses: one for the Plaintiff’s mother and the other two for the Plaintiff and his brother respectively.

94. Neither the Plaintiff nor his friend, PW3, informed the court that the only structure that was on the land was a kiosk which was used to prepare and sell tea, amongst other food stuffs.

95. PW1 and PW3 did not also inform the court that behind the iron sheet kiosk, there exists a small pit latrine for use by the people frequenting the kiosk.

96. Indeed, when the court visited the *locus quo* after taking the Plaintiff’s evidence, none of the structures described by PW1 and PW2 were on the suit land. There were no residential houses made from iron sheets or otherwise.

97. To the contrary, the court found an iron sheet structure partitioned in three sections solely used as a restaurant, a pit latrine and a cow-shed which had not been used the previous day or at all.

98. While on site, the court went in the restaurant and found a few people who were either eating or talking in one of the rooms. The other room was being used as a kitchen. The room at the front of the structure was being used as a shop.

99. The visit of the site by the court showed that the Plaintiff and PW3 lied on oath.

100. Although the evidence of PW3 was that the suit land was not only occupied by the Plaintiff, but by his mother and his brother Francis, there was no evidence of such occupation on the ground.

101. Indeed, when the court entered the temporary cow-shed, there was no evidence to show that any cow had been there the previous night or at all.

102. The evidence of PW3, which was at variance with the evidence of PW1, that the Plaintiff lives on the same property with his mother and his brother Francis could only have meant that the Plaintiff lives on the neighbouring land measuring 2½ acres, which, according to PW1 and DW3, was either donated or sold to the Plaintiff's father by DW3.

103. Indeed, the Plaintiff's father was buried on this particular land. This is the land that the Plaintiff has always lived on with his entire family and not the suit land.

104. DW3, who is 87 years, and whose evidence this court believes, informed the court that he donated to the Plaintiff's father 2½ acres and that it is on this land that the Plaintiff has always lived with his family.

105. DW3 further informed the court that the suit property was one of his properties which he sold to a Mr. Mbugua, who in turn sold it to the Defendant; that he allowed the Defendant to put up a kiosk at the corner of the suit land in the year 2009 so as to wade off grabbers and that the Plaintiff has never lived on the said land.

106. The failure by the Plaintiff to mention in his pleadings and testimony that the only thing that is on the land is a temporary kiosk, which is at one corner of the suit land, confirms that indeed it is DW3 who allowed him to put up a temporary kiosk on the land, not for the purpose of occupying it, but for selling food to the people who were working in the neighboring flower firms.

107. Having lied on oath that he lives on the suit land with his entire family, the Plaintiff did not discharge the legal and evidentiary burden that he made physical entry of the suit land and that he has been in actual possession of the suit land since 1990 or at all.

108. All I can state, from the evidence of DW3 and after the court visited the *locus quo*, is that the Plaintiff only used the property to take profits from it by grazing on the land and selling tea in a small kiosk which occupies less than 50 x 100 feet at the corner of the suit land.

109. As was held in the case of *Wabala vs. Okumu (1999) Civil Appeal No. 208 of 1997*, it would be wrong and dangerous to introduce the concept of constructive occupation in a claim of adverse possession.

110. In the *Wabala case (supra)*, the Court of Appeal held as follows:

***“To be able to acquire title to land registered in another person's name, one has to literally be in occupation of the land...”***

111. The Plaintiff admitted in his Affidavit that he moved on the suit land when it was already fenced, meaning that the land was not abandoned.

112. However, when he testified, he informed the court that he is the one who fenced the land, again contradicting himself.

113. The evidence before me, and the site visit by the court, clearly shows that the Plaintiff failed to discharge the burden of showing that he has been in actual and continuous occupation of the suit land without the consent of the Defendant for twelve (12) years.

114. Having not proved that he entered and lived on the suit land, or that he even cultivated the said land, the evidence by DW3 that the Plaintiff only moved on the suit land in the year 2009/2010 to put a kiosk is believable.

115. I say so because whereas the Plaintiff stated that he put up two residential houses on the suit land in 1990, he never stated when he put up a kiosk/restaurant on the land.

116. In the circumstances, the assertion by DW3 that the Plaintiff, whom he has known for many years, only put up the kiosk on the land in the year 2009/2010 has not been controverted by the Plaintiff.

117. If that is so, even if the presence of the kiosk on the land can be taken as evidence of actual, continuous and hostile possession of the suit land, the period of twelve (12) years had not lapsed from when the said kiosk was put up.

118. The totality of my analysis of the evidence before me shows that the Plaintiff did not prove his case on the required standards. He neither showed that he has a prima facie case to call for the rebuttal of his evidence by the Defendant, nor proved his case on a balance of probabilities.

119. Instead, he lied, both in his Supporting Affidavit and testimony, that he was living on the land.

120. For those reasons, I dismiss the Plaintiff's Originating Summons dated 10<sup>th</sup> November, 2009 with costs.

121. The Plaintiff is hereby directed to remove the kiosk standing on parcel of land known as Kajiado/Ololoitikoshi/Kitengela/44 forthwith.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**