



**Sapai (Suing as the personal representative of the Estate of Onkware Omwenga (Deceased)
v Sapai (Suing as the legal administrator of the Estate of Konoï Sapai (Deceased) & 3 others
(Environment & Land Case 22 of 2021) [2024] KEELC 1489 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 22 OF 2021**

**EM WASHE, J
MARCH 12, 2024**

BETWEEN

**KENNEDY OLOLWASI SAPAI (SUING AS THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF ONKWARE OMWENGA (DECEASED)) PLAINTIFF**

AND

**ELIZABETH POTISHOI ELIZABETH POTISHOI SAPAI (SUING AS
THE LEGAL ADMINISTRATOR OF THE ESTATE OF KONOÏ SAPAI
(DECEASED)) 1ST DEFENDANT**

DAVID ONDIEKI MOSORI 2ND DEFENDANT

THE LAND REGISTRAR NAROK 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The Plaintiff herein instituted this proceeding by way of an Originating Summons dated the 17th September 2015 which was amended a number of times with the last one being dated 07.12.2017(hereinafter referred to as “the present O.S”).
2. The present O.S is seeking for the following Orders against the Defendants herein jointly and separately; -
 - a. That the Plaintiff herein has acquired title to the said land known as LR.No.transmara/meguara/132 by way of adverse possession.
 - b. The Defendants be ordered to sign necessary documents so as to effect a valid transfer of the aforesaid property known as LR.No.transmara/Meguara/132 measuring 15.5 Acres in favour



of the Plaintiff and in default, the executive officer of this Honourable Court do sign the same for and on behalf of the Defendant.

- c. That costs of this application be provided by the Defendant.
3. The prayers hereinabove are premised on the grounds contained in the body of the present O.S which are summarised as follows; -
- a. The Late Onkware Omwengainitially and on the basis of the Agreement For Sale dated 10.02.1976 purchased a portion measuring approximately 6 acres on the property known as LR.No.transmara/meguara/132 from the late Konoï Sapai.
 - b. Thereafter, the Late Onkware Omwengaagain through a separate Agreement For Sale purchased an additional 9.5 Acres of the property known as LR.no.transmara/meguara/132 from the Late Konoï Sapai.
 - c. The two acquisitions by the Late Onkware Omwengaamounts to a total of 15.5 acres which is the entire LR.No.transmara/meguara/132.
 - d. The mode of payment of the purchase price by the Late Onkware Omwengafrom the second Agreement for Sale with the Late Konoï Sapaiwas a property known as LR.No.transmara/meguara/148 measuring approximately 7.5 acres plus 11 Cows and 4 goats.
 - e. The two transactions being complete as agreed between the Late Onkware Omwengaand the Late Konoï Sapai,the entire property known as LR.No.transmara/meguara/132 was occupied and habited by the Late Onkware Omwenga.
 - f. However, despite the Late Konoï Sapaibeing aware of the Late Onkware Omwenga'sownership of the property known as LR.No.transmara/meguara/132, he proceeded to register the same in his name and obtained Certificate of Title in the year 1979.
 - g. The Plaintiffs state that they have been on the property known as LR.No.transmara/meguara/132 for over 37 years and are therefore entitled to an order of adverse possession against the Late Konoï Sapaiaand/or his estate thereof as sought herein.
4. The Late Konoï Sapaia person filed a Replying Affidavit sworn on the 15.10.2015 upon which he opposed the present O.S on the following grounds; -
- a. To begin with, the Late Konoï Sapaiaadmitted that he is the registered owner of the properties known as LR.No.transmara/meguara/132 measuring 15.5 Acres and another piece of land known as LR.No.transmara/meguara/145 measuring approximately 3 Hectares.
 - b. On the other hand, the Late Onkware Omwengawas the registered owner of the property known as LR.No.transmara/meguara/148 which measures approximately 7.5 Acres.
 - c. According to the Late Konoï Sapai, the property known as LR.Transmara/meguara/132 is next to the property known as LR.No.transmara/meguara/145 with only a road separating the two properties.
 - d. In the year 1978, the Late Onkware Omwengaand the Late Konoï Sapaiaagreed to exchange their properties known as LR.No.transmara/meguara/132 and LR.no.transmara/meguara/148 for a period of time because of the tribal clashes that were ongoing between the Maasai and the Kisii communities.



- e. Keeping in mind that the late Konoï Sapaï's property known as LR.No.transmara/meguara/132 was bigger in size to the Late Onkware Onkware's property known as LR.No.transmara/meguara/148, it was agreed that the difference of 7.8 acres would remain the property of the Late Konoï Sapaï but under the use of the Late Onkware Omwenga.
- f. Unfortunately, because of the continuous fighting between the Maasai and the Kisii community, the Late Konoï Sapaï could not occupy the Late Onkware Omwenga's property known as LR.No.transmara/meguara/148 until the year 1985.
- g. In addition to the above understanding, the Late Onkware Omwenga again approached the Late Konoï Sapaï with an interest to purchase the property known as LR.No.transmara/meguara/145 which was next to the property known as LR.No.transmara/meguara/132.
- h. Indeed, the Late Konoï Sapaï agreed to sale the property known as LR.No.transmara/meguara/145 to the late Onkware Omwenga for a consideration of 11 Cows and 4 Goats which the Late Konoï Sapaï acknowledges receipt and handing over possession to the late Onkware Omwenga.
- i. In essence therefore, the Late Konoï Sapaï pleaded that he never sold the entire 15.5 acres to the Late Onkware Omwenga and that the portion measuring approximately 9.5 acres was his lawful property only being held in trust for him by the late Onkware Omwenga.
- j. As earlier stated, when the Late Konoï Sapaï tried to occupy and/or settle on the property known as LR.No.transmara/meguara/148 which was formerly the property of the late Onkware Omwenga, he faced a lot of challenges because it had a boundary dispute with the neighbouring property belonging to one William Lekakeny Nchoko.
- k. The Late Konoï Sapaï pleaded that the Late Onkware Omwenga had acted in bad faith by not disclosing that the property known as LR.No.transmara/meguara/148 has a dispute and/or encumbrance which makes their initial agreement void.
- l. The Late Konoï Sapaï being unable to take possession of the property known as LR.No.transmara/meguara/148 in the name of the Late Onkware Omwenga decided to move back to the portion measuring 9.5 acres within the property known as LR.No.transmara/meguara/132.
- m. It is at the point of his return to the property known as LR.No.transmara/meguara/132 that the family of the Late Onkware Omwenga denied him entry on the basis that he had sold the entire property to the Late Onkware Omwenga.
- n. The Late Konoï Sapaï stated that the Agreement For Sale presented by the Late Onkware Omwenga claiming that he had sold his entire property known as LR.No.transmara/meguara/132 was not reflective of their intentions and consequently therefore is misleading and a perjury.
- o. The Late Konoï Sapaï pleaded that he was illiterate and did not get an opportunity to be explained the contents of the said Agreement For Sale and understand its implications upon execution thereof.
- p. In essence therefore, his thumb print on the Agreement dated 23.01.2012 was obtained by fraud.



- q. The Late Konoi Sapaiparticularly stated that the occupation of the 9.5 acres on the property known as LR.No.transmara/meguara/132 by the Late Onkware Omwengawas with his express consent and therefore if for any reason the Honourable Court decides that the Agreement for Sale dated 23.01.2012 is valid, then the portion of 9.5 acres was being held in trust for the Late Konoi Sapaience a claim of adverse possession cannot arise.
5. The 3rd and 4th Respondents also opposed the present O.S by filing a Replying Affidavit dated 22.10.2021 and stated the following; -
- a. According to the Land Records, the property known as LR.No.transmara/meguara/132 is registered in the name of the 1st Defendant.
 - b. The 1st Defendant however sold the property known as LR.No.transmara/meguara/132 to the 2nd Defendant herein.
 - c. The 2nd Defendant upon lawfully purchasing the property known as LR.No.transmara/meguara/132 applied for Consent to Transfer the same to his name which Consent was given by the Land Control Board thereof and he paid the necessary Stamp Duty charges.
 - d. However, the Plaintiff herein lodged a caution on the Green Card of the property known as LR.No.transmara/meguara/132 on the basis of an Agreement For Sale attached therein.
 - e. The 3rd Defendant as required by law called for a caution hearing but the Plaintiff failed and/or refused to attend and upon perusal of the alleged Agreement For Sale presented by the Plaintiff, it was found that the same was not legible to clearly understand the intentions of the parties.
 - f. Consequently, the Caution lodged by the Plaintiff was removed on the record of the property known as LR.No.transmara/meguara/132.
 - g. According to the 3rd Defendant, the Late Onkware Omwenga is the registered owner of the property known as LR.No.transmara/meguara/145 since on the 04.10.1978 while the property known as LR.No.transmara/meguara/132 is in the name of the Late Konoi Sapai.
 - h. In essence therefore, if the Late Onkware Omwengais in occupation of the property known as LR.no.transmara/meguara/132, then it must have been with the consent and/or authority of the Late Konoi Sapaiaand therefore a claim of adverse possession cannot arise.
6. After the 3rd and 4th Defendants filed their Replying Affidavit, the pleadings closed and the hearing commenced on the 23.05.2022.

Plaintiff's Case.

7. The Plaintiff's first witness was the Plaintiff himself Kennedy Ololwasin Sapai(PW1).
8. The Plaintiff introduced himself as the son to the Late Onkware Omwengaand resided in Romosha Sub-Location within Meguara Location.
9. The Plaintiff informed the Honourable Court that the case was initiated by his late father and he only came into it after obtaining letters of administration Ad-Litem in Kilgoris Succession No.367 of2017.
10. The Plaintiff further stated that the present O.S had been filed against the Late Konoi Sapaibut upon his demise, the 1st Defendant who was his wife was substituted in his place.



11. The 2nd Defendant on the other hand was brought into the present O.S because he had purchased the property known as LR.No.transmara/meguara/132 from the 1st Defendant yet it had been already sold to his late father Onkware Omwenga.
12. The Plaintiff testified that his family had been in occupation of the property known as LR.No.transmara/meguara/132 for over a period of 40 years.
13. The Plaintiff confirmed to the Honourable Court that the property known as LR.No.transmara/meguara/132 was approximately 15.5 acres.
14. According to the Plaintiff's knowledge, the Late Onkware Omwengapurchased a portion of 6 acres from the Late Konoï Sapaïin the year 1976 and paid a sum of KShs 4,200/- as consideration of the same.
15. Thereafter in 1978, the Late Onkware Omwengapurchased another portion of 9.5 acres.
16. The Plaintiff produced an Agreement For Sale dated 10/02/1976 between the Late Onkware Omwengaand the Late Konoï Sapaïover the property known as LR.No.transmara/meguara/132 (Plaintiff Exhibit1).
17. Thereafter in 1978, the Late Onkware Omwengaand the Late Konoï Sapaïentered into another agreement in the presence of elders that there would be an exchange of the properties known as LR.No.transmara/meguara/132 and LR.No.transmara/meguara/148.
18. The intention of the Agreement of 1978 was that the Late Onkware Omwengawould take over the entire property known as LR.No.transmara/meguara/132 while the Late Konoï Sapaïwould take over the property known as LR.No.transmara/meguara/148.
19. The second Agreement For Sale was therefore prepared and executed between the late Onmware Omwengaand the late Konoï Sapaïtogether with their witnesses.
20. The Plaintiff then produced this second Agreement For Sale as (plantiff Exhibit2).
21. After execution of the 1978 Agreement, the Late Onkware Omwengatook full possession of the property known as LR.No.transmara/meguara/132 while the Late Konoï Sapaïtook possession of the property known as LR.No.transmara/meguara/148.
22. However, to facilitate the Late Konoï Sapaïto procure his ownership documents for the property known as LR.No.transmara/meguara/148 registered in the name of the Late Onkware Omwenga, another Agreement dated 23.01.2012 was prepared before an Advocate of the High Court in Kisii.
23. According to the Agreement For Sale dated 23.01.2012, the Late Onkware Omwengahad agreed to sale and transfer his property known as LR.No.transmara/meguara/148 to the Late Konoï Sapaïwho accepted the terms and conditions in the presence of witnesses thereof (Plaintiff Exhibit3)
24. Similarly, on the same date, another Agreement For Sale was done for the property known as LR.No.transmara/meguara/132 (Plantiff Exhibit4)
25. In this second Agreement For Sale, the Late Konoï Sapaïagreed to sale and transfer the property known as LR.No.transmara/meguara/132 from himself to the Late Onkware Omwengaon the terms and conditions outlined therein.
26. The consideration for the property known as LR.No.transmara/meguara/132 was a total of KShs 1,232,000/- of which a sum of 1,040,800/- had already been received and acknowledge by the Late Konoï Sapaï.



27. The balance of KShs 191,000/- was to be paid within 90 days from the date of the execution of this second Agreement For Sale.
28. In compliance of the period of 90 days mentioned hereinabove, the Late Kono Sapai received the full amount of KShs 191,000/- on the 08/05/2012 through the Acknowledgement Receipt dated 08/05/2012 (plaintiff Exhibit 5).
29. The Plaintiff confirmed to the Honourable Court that they have planted Tea on a portion of the property known as LR.No.transmara/meguara/132 which they sale to Kiamokama Tea Factory.
30. The Plaintiff produced 3 payment receipts from Kiamokama Tea Factory confirming the harvest of tea from the property known as LR.no.transmara/meguara/132 (plaintiff Exhibit 6 (a)(b) and (c)).
31. The Plaintiff further produced two share certificates to confirm that the Late Onkware Omwengawas indeed a member of Kiamokama Tea Factory which were marked as (Plaintiff Exhibit 7 (a) and (b)).
32. The Plaintiff also informed the Honourable Court that they have a home on the property known as LR.No.transmara/meguara/132, planted trees that are mature and have the tea on the property.
33. To confirm this developments and structures, the Plaintiff produced photographs which were then marked as (plaintiff Exhibit 8 (a) and (b)).
34. The Plaintiff therefore reiterated that the property known as LR.No.transmara/meguara/132 is in occupation of the Late Onkware Omwenga's family.
35. However, the Late Kono Sapai breached the Agreements and understanding with the Late Onkware Omwenga and returned into the property known as LR.No.transmara/meguara/132.
36. Further to that, the 1st Defendant who is the wife to the Late Kono Sapai has transferred the entire property known as LR.No.transmara/meguara/132 to the 2nd Defendant knowing too well that the said property was sold to the Late Onkware Omwenga by her late husband Kono Sapai.
37. However, the 2nd Defendant has not taken possession of the said property known as LR.No.transmara/meguara/132.
38. The Plaintiff informed the Honourable Court that he discovered the purchase of the property known as LR.No.transmara/meguira/132 by the 2nd Defendant upon perusal of the Green Card which he produced as (Plaintiff Exhibit 9).
39. The Plaintiff stated that even before the Registration of the Transfer from the 1st Defendant to the 2nd Defendant, he placed a Caution of the said Register of the property known as LR.No.transmara/meguara/132 but the same was removed without his knowledge.
40. The Plaintiff produced a copy of an Official Search dated 15/01/2014 (Plaintiff Exhibit 10) which confirms that the Caution was registered on the 15.08.2014 and the transfer was effected on the 06.10.2015.
41. According to the Green Card of the property known as LR.No.transmara/meguara/132, the 2nd Defendant was issued with a Certificate of Title on the 10.10.2015 and thereafter the Transfer Form was registered on the 06.10.2016.
42. In other words, the 2nd Defendant was issued with a Certificate of Title at least one year before the Transfer Form in his favour was received and recorded in the Green Card of the property known as LR.No.transrama/meguara/132.



43. This is the main reason why the Plaintiff decided to also sue the 3rd Defendant as such conduct is irregular in law.
44. In concluding his evidence in chief, the Plaintiff stated that the property known as LR.No.transmara/meguara/132 should therefore be returned to the family of the Late Onkware Omwenga and thereafter the register be rectified and a Certificate of Title issued to the Late Onkware Omwenga and/or his estate.
45. Similarly, the Defendants are to pay the costs of the present O.S.
46. On cross-examination, the Plaintiff stated that the Late Onkware Omwenga died in the year 2018.
47. The Plaintiff informed the Honourable Court that the present O.S was filed sometime in the year 2015.
48. According to the Plaintiff, the initial O.S had been supported by a number of documents and these documents have been in existence since 1976.
49. The Plaintiff was then referred to Plaintiff Exhibit 1 which was the Agreement For Sale dated 10.02.1976.
50. According to the Plaintiff, the Agreement For Sale related to the property known as LR.No.transmara/meguara/132.
51. However, the property at that time was described as Parcel No.90 within Meguara Scheme)
52. The Plaintiff confirmed that the Agreement For Sale was duly executed by both parties before RTD Justice Onyancha although the good judge has not been called as a witness.
53. The other Agreement For Sale made in the year 1978 was found in some of the Late Onkware Omwenga's documents.
54. In the Plaintiff's view, both the Agreements For Sale made in 1976 and 1978 were legitimate having been executed by both the Late Onkware Omwenga and the Late Kono Sapai.
55. According to the Plaintiff, the description of the land given as Meguara Scheme was what was used before titles began being issued.
56. The Plaintiff reiterated that the initially Agreement For Sale made in 1976 was for 6 acres at a value of KShs 4,000/-.
57. The Plaintiff confirmed that the property known as LR.No.transmara/meguara/148 was still in the name of the Late Onkware Omwenga.
58. The Plaintiff informed the Honourable Court that the value for the balance of the acreage within LR.No.transmara/meguara/132 was finalised in the year 2012.
59. The Plaintiff on being referred to Plaintiff Exhibit 3 & 4, confirmed that both Agreements were prepared and executed before Advocate Sagwe.
60. Again, on being referred to Plaintiff Exhibit 1 & 2, the Plaintiff stated that in the Agreement made in 1976, the name was Onoi Ala Sabai without an Identification Card Number.
61. In the Agreement For Sale made in 1978, the name is Kono Ole Sapai.
62. The Plaintiff stated that the signatures on all the Agreements For Sale were the same.
63. Currently, the Plaintiff informed the Honourable Court that he resides on the property known as LR.No.transmara/meguara/145 and not on LR.No.transmara/meguara/132.



64. The Plaintiff however insisted that the family of the Late Onkware Omwenga are in possession and occupation of the property known as LR.No.transmara/meguara/132 which fact has been confirmed by the various pictures produced herein.
65. The Plaintiff further admitted that the houses on the property known as LR.No.transmara/meguara/132 belong to the family of the Late Kono Sapaia after they returned on the same in the year 2015.
66. In essence therefore, the family of the Late Onkware Omwenga had exclusive possession of the property known as LR.No.transmara/meguara/132 from the year 1976 to 2003.
67. The Plaintiff again restated that the final payment for the property known as LR.No.transmara/meguara/132 was made in the year 2012.
68. This is because the property known as LR.No.transmara/meguara/132 was purchased in intervals.
69. The Plaintiff stated that in the year 2012, the parties went to the Land department and paid the surveyor's fees.
70. The Plaintiff reiterated that their claim against LR.No.transmara/meguara/132 is based on the Agreements For Sale.
71. The Plaintiff informed the Honourable Court that the property known as LR.no.transmara/meguara/145 which he lives is about 4 acres while the property known as LR.No.transmara/meguara/148 is about 7 acres.
72. The Plaintiff further insisted that the property known as LR.No.transmara/meguara/132 has been planted tea by the family of the late Onkware Omwenga which is being sold to Kiamokama Tea Factory through the membership of the late Onkware Omwenga.
73. On further cross-examination by the Counsel for the 3rd and 4th Defendant, the Plaintiff stated that their claim is for the entire property known as LR.No.transmara/meguara/132 which they had been in occupation for the last 40 years.
74. According to the Plaintiff, there was a binding Agreement in the year 1978 between the Late Onkware Omwenga and the late Kono Sapaia both in terms of the ownership and occupation.
75. However, what the two parties did not do was to effect the transfer of the said property.
76. The Plaintiff reaffirmed that the payment of the property known as LR.No.transmara/meguara/132 by the Late Onkware Omwenga was completed in the year 2012.
77. However, the understanding between the Late Onkware Omwenga and the Late Kono Sapaia was that occupation of the property known as LR.No.transmara/meguara/132 was to take effect from the 1978 Agreement For Sale.
78. The final value of the property known as LR.No.transmara/meguara/132 as per 2012 was a sum of KShs 2,232,000/- of which all was duly paid.
79. What has not happened is the Transfer of the property known as LR.No.transmara/meguara/132.
80. Unfortunately, the 1st Defendant despite knowledge of the ownership by the Late Onkware Omwenga on the property known as LR.No.transmara/meguara/132 unlawfully and illegally transferred the same to the 2nd Defendant.
81. The Plaintiff denied being called by the 3rd Defendant to attend a Caution hearing as alleged.



82. In the Plaintiff's view, the actions of removing the Caution without a hearing were irregular and the subsequent transfer unlawful.
83. On re-examination, the Plaintiff clarified that the property known as LR.No.transmara/meguara/132 was initially known as Parcel No. 90 within Meguara Scheme before its registration.
84. This was the reason it was described as such in the Agreement For Sale executed in the year 1976.
85. The Plaintiff confirmed that the signatures of both the Vendor and the Purchaser were witnessed by the D.A. Onyancha.
86. Consequently therefore, the signatures of both the Vendor and the Purchaser were not forgeries but legitimate.
87. In reference to the Plaintiff Exhibit 2, the Plaintiff stated that the terms of the Agreement For Sale were that the Late Onkware Omwenga would take the entire LR.No.transmara/meguara/132 immediately upon execution of the Agreement For Sale.
88. The Plaintiff further reaffirmed that the names of the Vendor in the Agreement For Sale made in 1976 and that made in 1978 were of one and the same person.
89. The Plaintiff clarified that the Caution placed on the property known as LR.No.transmara/meguara/132 was based on purchaser's interest and not licensee as recorded.
90. Lastly, the Plaintiff also confirmed that the property known as LR.No.transmara/meguara/148 had not been transferred to the family of the late Kono Sapai until now.
91. At the end of this re-examination, the Plaintiff was duly discharged from the witness box.
92. The Plaintiff's second witness was one Zacharia Omenga Masieka (PW 2).
93. PW 2 introduced himself as a grandson to the Late Onkware Omwenga and a neighbour.
94. PW 2 informed the Honourable Court that he had prepared a witness statement dated 25.03.2019 to which he adopted as his evidence in chief.
95. PW 2 stated that during the lifetime of the late Onkware Omwenga, he used to keep his personal records for any land transaction he took.
96. According to PW 2 recollection, there were about 5 Agreements For Sale between the late Onkware Omwenga and the Late Kono Sapai.
97. The first Agreement For Sale was the one done in the year 1976 between the late Onkware Omwenga and the late Kono Sapai.
98. The second Agreement was done in the year 1978 in the presence of the elders and which also described the property as LR.No.transmara/meguara/132.
99. The third Agreement for Sale was done in the year 2012 over the property known as LR.No.transmara/meguara/132 with the late Kono Sapai being the seller and the late Onkware Omwenga being the Purchaser.
100. The fourth Agreement For Sale was also done in the year 2012 over the property known as LR.No.transmara/meguara/148 with the late Onkware Omwenga being the Seller and the late Kono Sapai being the Purchaser.



101. The Last Agreement was the payment of the balance of the Purchaser Price to the Late Kono Sapai by the Late Onkware Omwenga over the property known as LR.no.transmara//meguara/132.
102. However, according to PW 2, the Late Onkware Omwenga began occupying and/or took possession of the entire property known as LR.No.transmara/meguara/132 in the year 1976 although it was not the entire property.
103. PW 2 stated that the Late Onkware Omwenga took possession of the entire property known as LR.No.transmara/meguara/132 in the year 1978 after making an Agreement For Sale before the elders.
104. PW 2 informed the Honourable Court that once the late Onkware Omwenga took possession of the property known as LR.No.transmara/meguara/132 in 1978, he planted tea, cultivated maize and built up a house.
105. Similarly, the Late Kono Sapai moved into the property known as LR.No.transmara/meguara/148 and began utilising the same.
106. As regards the 2nd Defendant, PW 2 stated that he was not familiar with him until the year 2016 when he was told that he had purchased the property known as LR.No.transmara/meguara/132.
107. However, PW 2 testified that the 2nd Defendant has never taken possession of the property known as LR.No.transmara/meguara/132 since he was registered as the owner.
108. At the discovery of the 2nd Defendant's ownership over the property known as LR.No.transmara//meguara/132, the Plaintiff herein registered a caution over the same in the year 2016.
109. Prior to the Caution registered in 2016, there had been another caution in the year 2014 which was removed.
110. The 1st caution was registered on the basis of purchaser's interest while the 2nd caution was recorded on a basis of license.
111. According to PW 2, the process of registration of the property known as LR.No.transmara/meguara/132 in the name of the late Onkware Omwenga and LR.No.transmara/meguara/148 in the name of the late Kono Sapai had commenced.
112. Both of them had paid the Surveyor's fees and other charges to effect the said transfers.
113. On cross-examination by Counsel for the 1st and 2nd Defendants, PW 2 reiterated that he was the one in whose custody the various Agreements For Sale executed by the late Onkware Omwenga were.
114. PW 2 confirmed that he has seen the Agreement For Sale made in the year 1976 (Plaintiff Exhibit 1).
115. The contents of the Agreement For Sale made in 1976 was that the late Kono Sapai had sold a portion of 6 acres on the property known as LR.No.transmara/meguara/132 to the late Onkware Omwenga.
116. However, PW 2 stated that he was not present when the same was done and can not confirm if payment of the purchase price was done.
117. In this particular Agreement For Sale, the Vendor executed it by way of affixing a thumb print.
118. The second Agreement For Sale was the one done in the year 1978.
119. Similarly, PW 2 was not present during the execution of the said Agreement but this execution by the Vendor is now by signing.



120. PW 2 reiterated that after the two Agreements For Sale made in 2012, the transfer processes were initiated although the Transfer Forms had not been signed.
121. Referring to Plaintiff's Exhibit 3, PW 2 affirmed that the Agreement For Sale was made on the 23/01/2012.
122. This was in relation to the property known as LR.No.transmara/meguara/148 measuring approximately 7.5 acres of which the late Onkware Omwenga was selling an acre at KShs 80,000/-.
123. This was also the same consideration that had been indicated in the Agreement For Sale entered into in the year 1978.
124. However, PW 2 stated that he was present in 1976 when the Late Onkware Omwenga moved into the property known as LR.No.transmara/meguara/132 and planted tea, maize and trees.
125. PW 2 further stated that the late Onkware Omwenga registered himself as a member of Kiamoko Tea Factory so that he would be able to sell his tea to the said factory.
126. PW 2 informed the Honourable Court that the property known as LR.No.transmara/meguara/145 does not have any tea planted on it.
127. PW 2 testified that he was never aware of the sale transaction between the 1st Defendant and the 2nd Defendant.
128. At the end of this cross- examination, there was no re-examination and PW 2 was subsequently discharged from the witness box.
129. The Plaintiff third witness was Chris Ongagi (PW 3).
130. PW 3 began his testimony by stating that he was 77 years old and residing in Transmara.
131. PW 3 informed the Honourable Court that he knows the Plaintiff herein very well as well as his father the late Onkware Omwenga.
132. PW 3 stated that the late Onkware Omwenga was his neighbour in the property known as LR.No.transmara/meguara/132.
133. According to PW 3 recollection, the late Onkware Omwenga first purchased a portion of 6 acres in the year 1976 from the Late Kono Sapai.
134. Thereafter in 1978, the late Kono Sapai sold the entire property known as LR.No.transmara/meguara/132 to the late Onkware Omwenga.
135. The understanding was that there would be an exchange of the property known as LR.no.transmara/meguara/132 belonging to the late Kono Sapai with LR.No.transmara/meguara/148 which belonged to the late Onkware Omwenga.
136. However, because the property known as LR.No.transmara/meguara/132 was larger in size to the property known as LR.No.transmara/meguara/148, then the Late Onkware Omwenga would pay for the difference by way of 11 cows and 4 goats.
137. After this Agreement for Sale of 1978 was consented, the late Onkware Omwenga moved into the property known as LR.No.transmara/meguara/132 while the late Kono Sapai took over the property known as LR.No.transmara/meguara/148.



138. PW 3 confirmed to the Honourable Court that he was one of the witnesses is the Agreement of 1978 together with other people like Evans Onchomba, Ole Genka and Julious Payu.
139. In concluding his evidence in chief, PW 3 reiterated that the family of the late Onkware Omwenga is still in possession of the property known as LR.No.transmara/meguara/132 while the family of the late Kono Sapai is also in possession of the property known as LR.No.transmara/meguara/148.
140. On cross-examination, PW 2 reiterated that he was one of the witnesses that were there in the 1978 Agreement and confirmed to have signed the same as a witness.
141. PW 2 clarified that the signature that appears against the name of the late Kono Sapai is his own signature which he saw him execute.
142. PW 2 stated that the Agreement made in 1976 was for a portion of 6 acres only within the property known as LR.No.transmara/meguara/132 at a value of KShs 4,000/-.
143. However, PW 3 was not familiar with the person who had prepared the said Agreement For Sale.
144. PW 3 testified before the Honourable Court that the property known as LR.No.transmara/meguara/132 was previously known as Parcel No.90 within Mewala Scheme when the same was still owned by the Group Ranch and later changed to Meguara Adjudication Section at the time of Adjudication in 1978.
145. PW 3 further stated that although there was exchange of the 11 Cows and Goats in the 1978 Agreement relating to the property known as LR.No.transmara/meguara/132, there was still a balance which required to be settled before a Transfer would be effected.
146. It is this balance that was cleared in the year 2012 before Advocate Sagwe in Kisii.
147. PW 3 informed the Honourable Court that he only came to learn about the 2nd Defendant in the year 2016.
148. On re-examination, PW 3 reiterated that the Agreement made in 1978 was to formalise the exchange of the properties known as LR.No.transmara/meguara/132 and LR.No.transmara/meguara/148.
149. According to PW 3, the Late Onkware Omwenga gave the late Kono Sapai his property known as LR.No.transmara/meguara/148 plus 11 Cows and 4 Goats.
150. However, this did not settle the full purchase price of the 9.5 acres were in Mzee Kono Sapai's property known as LR.No.transmara/meguara/132.
151. Clearly therefore, the balance which was still pending that was settled in the year 2012 before Advocate Sagwe.
152. As regards possession, the both the late Onkware Omwenga and the late Kono Sapai immediately took possession of the properties known as LR.No.transmara/meguara/132 and LR.No.transmara/meguara/148 immediately after consenting to the Agreement of 1978.
153. PW 3 stated that it was unfortunate both parties passed away before the transfers were effected and/or registered.
154. PW 3 concluded his re-examination by confirming that the family of the late Onkware Omwenga is the one in possession of the property known as LR.No.transmara/meguara/132 until now.
155. At the end of this re-examination, PW 3 was duly discharged from the witness box thereof.



156. The Plaintiff's fourth witness was Evans Onchomba Ondieki (PW 4).
157. PW 4 informed the Honourable Court that he is now 72 years and residents in Kisii County.
158. PW 4 stated that he knew the Late Onkware Omwenga very well and is also familiar with the Plaintiff herein.
159. Similarly, PW 4 owns a property that neighbours the property known as LR.No.transmara/meguara/132.
160. According to PW 4 recollection, the late Kono Sapai and the late Onkware Omwenga entered into an Agreement for Sale for the property known as LR.No.transmara/meguara/132 in the year 1978.
161. PW 4 indicated that he was one of the witnesses in the Agreement for Sale made in the year 1978 including other witnesses like Mzee Gage, Mzee Olesaila, Christopher Ongaku and Baayo.
162. In the 1978 Agreement, the Late Onkware Omwenga gave the late Kono Sapai a total of 11 Cows and 4 Goats.
163. The understanding was that the late Onkware Omwenga was to surrender his property known as LR.No.transmara/meguara/148 measuring approximately 7.5 acres to the late Kono Sapai.
164. Thereafter, the late Onkware Omwenga took possession of the entire property known as LR.No.transmara/meguara/132 in the year 1978.
165. At the same time, the late Kono Sapai had also taken possession of the property known as LR.No.transmara/meguara/148 which belonged to the late Onkware Omwenga.
166. Currently, PW 4 stated that the property known as LR.No.transmara/meguara/132 is occupied by the children of the Late Onkware Omwenga and LR.No.transmara/meguara/148 is occupied by the children of the late Kono Sapai.
167. PW 4 informed the Honourable Court that he did not know the 2nd Defendant but had been told that he purchased the same property known as LR.No.transmara/meguara/132 which is owned by the late Onkware Omwenga.
168. On cross-examination, PW 4 reiterated that he was one of the witnesses in the 1978 Agreement For Sale.
169. According to PW 4, both the Vendor and the Purchaser executed the said Agreement For Sale before the witnesses.
170. PW 4 however could not confirm if the late Kono Sapai could read and write.
171. PW 4 stated that in the 1978 Agreement For Sale, the Late Onkware Kono gave the late Kono Sapai 11 Cows and 4 Goats.
172. In PW 4's view, the Late Onkware Omwenga finished paying the full purchase price for the property known as LR.No.transmara/meguara/132.
173. PW 4 further indicated that after the Agreement of 1978, the late Onkware Omwenga took possession of the entire property by cultivating and building a house thereof.
174. Similarly, the late Kono Sapai also moved his family to the property known as LR.No.transmara/meguara/148 where they live up to now.



175. PW 2 stated that he only came to know about the 2nd Defendant's interest in the property known as LR.No.transmara/meguara/132 in the year 2016 as a purchaser.
176. However, the 2nd Defendant is not in occupation of the property known as LR.No.transmara/meguara/132.
177. In re-examination, PW 4 informed the Honourable Court that the late Onkware Omwengapaid the full purchase price for the property known as LR.No.transmara/meguara/132.
178. However, the PW 4 could not ascertain who much the total purchase price was.
179. Lastly, PW 4 insisted that the property known as LR.No.transmara/meguara/132 is occupied by the family of the late Onkware Omwenga.
180. At the end of PW 4 re-examination, the witness was discharged from the witness box and the Plaintiff closed his case thereof.

Defence Case.

181. The first defence witness was the 1st Defendant Elizabeth Potishoi Sapai (DW 1).
182. DW 1 introduced herself as the wife to the late Kono Sapai.
183. DW 1 stated that she was familiar with the late Onkware Omwengaand one Kennedy Ondieki Mosorori(2nd Defendant) because they were her neighbours.
184. According to DW 1, the late Kono Sapaiwas the registered owner of the property known as LR.No.transmara/meguara/132 which is approximately 15.5 acres.
185. DW 1 informed the Honourable Court that the late Kono Sapaisold a portion of 3.5 acres to the 2nd Defendant herein.
186. Thereafter, the 2nd Defendant purchased the entire property known as LR.No.transmara/meguara/132 although DW 1 could not state when this transaction happened.
187. DW 1 confirmed that when the 2nd Defendant purchased the property known as LR.No.transmara/meguara/132, there was tea plantation of about 1 acre but she could not tell whose it was.
188. DW 1 affirmed to the Honourable Court that the property known as LR.No.transmara/meguara/132 was subsequently transferred to the 2nd Defendant herein.
189. DW 1 testified that she was not familiar with the late Onkware Omwenga'sproperty.
190. DW 1 stated that it was true the late Onkware Omwengawas sold land by her late husband the late Kono Sapai.
191. DW 1 stated that the property owned by the late Onkware Omwengais separated by a road with the property known as LR.No.transmara.meguara/132.
192. DW 1 informed the Honourable Court that she had been informed her late husband that he had sold only 3 acres to the late Onkware Omwenga.
193. DW 1 confirmed that she was sure the 3 acres purchased by the late Onkware Omwengawas fully paid for.
194. DW 1 however disputed the Agreements For Sale presented by the Plaintiff on the basis that the late Kono Sapaidid not know how to read and write.



195. DW 1 insisted that they have been living on the property known as LR.No.transmara/meguara/132 all her life.
196. DW 1 also stated that the property known as LR.No.transmara/meguara/148 belonging to the late Onkware Omwengais occupied by a family member of the late Konoï Sapai.
197. On the other hand, the family of the late Onkware Omwengalive on a portion of 3 acres they purchased on the property known as LR.No.transmara/meguara/132.
198. The 2nd Defendant consequently has not taken possession of the property known as LR.No.transmara/meguara/132.
199. DW 1 then produced the following documents in support of her case; -
 - Defence Exhibit1- authority to plead dated12.03.2018.
 - Defence Exhibit2- agreement for sale dated14th July 2015.
 - Defence Exhibit3- letter of consent dated29/09/2015.
 - Defence Exhibit4- copy of the green card forLR.No.Transmara/meguara/132.
 - Defence Exhibit5- copy of the title ofLR.No.Transmara/meguara/132.
 - Defence Exhibit6- Copy of an official search for the property known asLR.No.transmara/meguara/132 dated26.09.2017.
 - Defence Exhibit7- copy of official search for the property known asLR.NO.transmara/meguara/145 dated16.08.2017.
 - Defence Exhibit8- Sketch Map of Locationofthe properties known asLR.No.transmara/meguara/132 andLR.No.transmara/meguara/145.
200. On cross-examination, DW 1 reiterated that she is the 3rd wife of the late Konoï Sapai.
201. On being referred to Defence Exhibit 1, DW 1 stated that the date of birth is indicated as 1976.
202. DW 1 informed the Honourable Court that upon getting married to the late Konoï Sapai,she established her home on the property known as LR.No.transmara/meguara/132 where she has been living ever since.
203. In other words, DW 1 testified that neither the late Konoï Sapaiaand/or herself ever took possession of the property known as LR.No.transmara/meguara/148.
204. DW 1 further affirmed that she was aware her late husband Konoï Sapaibold a portion of the property known as LR.No.transmara/meguara/132 to the late Onkware Omwengabut this was before she was married.
205. DW 1 stated that she is aware the property known as LR.No.transmara/meguara/132 is approximately 15.5 acres and has never been sold to anyone apart from the 2nd Defendant.
206. DW 1 confirmed that the property known as LR.no.transmara/meguara/148 belongs to the late Onkware Omwenga.
207. DW 1 denied any knowledge of the purported exchange of the two properties known as LR.No.transmara/meguara/132 and LR.no.transmara/meguara/148.



208. DW 1 informed the Honourable Court that the late Konoï Sapai was buried on the property known as LR.No.transmara/meguara/132 because that was his property.
209. DW 1 could not however give an explanation as to why one of the Late Konoï Sapai's son was in occupation of the property known as LR.No.transmara/meguara/148 belonging to the late Onkware Sapai.
210. DW 1 admitted that at the time she went to occupy the property known as LR.No.transmara/meguara/132, the late Onkware Omwengahad planted tea which he harvested, trees and even had a home.
211. According to DW 1, the presence of the late Onkware Omwengaa on the property known as LR.No.transmara/meguara/132 was based on their friendship and restricted to only a portion of the said property.
212. DW 1 stated that even after the sale of the property known as LR.No.transmara/meguara/132 to the 2nd Defendant, they have not vacated and continue to occupy the said property.
213. On re-examination, DW 1 stated that her late husband Konoï Sapaï sold the late Onkware Omwengaa portion of 3 acres on another parcel of land but not LR.no.transmara/meguara/132.
214. The portion of 3 acres which the late Konoï Sapaï sold to the late Onkware Omwengaa was across the road and within the property known as LR.No.transmara/meguara/145 which was also owned by the late Konoï Sapai.
215. DW 1 stated that the late Konoï Sapaï passed away after the property known as LR.No.transmara/meguara/132 had been transferred to the 2nd Defendant.
216. DW 1 further informed the Honourable Court that the trees and tea planted on the property LR.No.transmara/meguara/132 would be for the benefit of both the late Konoï Sapaï and the late Onkware Omwengaa.
217. DW 1 affirmed that the property known as LR.No.transmara/meguara/132 was occupied by the family of Konoï Sapaï but they have not farmed on the same.
218. At the end of this re-examination, DW 1 was discharged from the witness box.
219. The second Defence witness was the 2nd Defendant David Ondieki Mosorori (DW 2).
220. DW 2 informed the Honourable Court that he resides in Nyaguso within Kisii County.
221. DW 2 stated that in the year 2015, he purchased the property known as LR.No.transmara/meguara/132 from the 1st Defendant herein.
222. DW 2 confirmed that he undertook due diligence of the property known as LR.No.transmara/meguara/132 and found the same to be in the name of the 1st Defendant.
223. However, DW 2 informed the Honourable Court that he was never informed that the property known as LR.No.transmara/meguara/132 had been sold to the late Onkware Omwengaa.
224. DW 2 purchased the property known as LR.No.transmara/meguara/132 for a sum of KShs 2,500,000/- which he fully settled and the said property registered into his name.
225. When DW 2 attempted to take possession by erecting a fence, the Plaintiff herein demolished the said fence.



226. DW 2 stated that the Plaintiff resides on the property known as LR.no.transmara/meguara/145 although he could not state how the late Onkware Omwenga acquired the same.
227. DW 2 informed the Honourable Court that when he was purchasing the property known as LR.No.transmara/meguara/132, DW 1 told him that the trees and the tea was the property of the late Kono Sapai.
228. DW 2 confirmed that the property known as LR.No.transmara/meguara/145 and LR.No.transmara/meguara/132 are divided by a road on the mutation but the said road on the ground is not cleared.
229. According to DW 2, the people in the property known as LR.No.transmara/meguara/132 is the DW 1 and her family.
230. DW 2 testified that the Agreement For Sale done on the 14.07.2015 was done by 1st Defendant and himself.
231. As regards the proceedings known as KilgorisELC No.2 of2022, the Plaintiff herein sued DW 2 for trespass on their property known as LR.No.transmara/meguara/145.
232. DW 2 then produced the Pleadings of the proceedings known as Kilgoris Elc Case No.2as (Defence Exhibit9).
233. Further to that, DW 2 also produced a copy of the Revenue Receipt from the District Land Surveyor dated 12.07.2012 as (Defence Exhibit 10 and 11).
234. Lastly, DW 2 produced a Demand Letter as (defence Exhibit 12).
235. On cross-examination, DW 2 confirmed his name is David Ondieki Mosoroi of Kenyan Identification Card No. 833XXXX.
236. On being referred to Defence Exhibit 2, DW 2 reiterated that the purchase Agreement was done in the year 2015 before Advocate Josiah Abogo in the presence of the late Kono Sapai.
237. DW 2 confirmed that the late Kono Sapai is the one that executed the said Agreement For Sale.
238. DW 2 stated that when he purchased the property known as LR.No.transmara/meguara/132, he built a house of which he still occupies to date.
239. DW 2 insisted that before he purchased the property, he undertook due diligence and there was no caution the Green Card.
240. The caution that had been registered by the late Onkware Omwenga in the year 2014 had been removed by the late Kono Sapai.
241. DW 2 confirmed that after he settled the full purchase price, a Consent to Transfer was obtained from the Land Control Board and thereafter registration effected.
242. The title to the 2nd Defendant was issued on the 06.10.2015.
243. However, the Receipt for payment of the Stamp Duty shows that it was paid on the 14.10.2015.
244. DW 2 admitted that usually, the Stamp duty payment is done before the registration of the Transfer and issuance of a title deed thereof.
245. As regards the Caution hearing in the year 2014, the proceedings from the Land Department show that the summons to the late Onkware Omwenga were effected through the Area chief.



246. However, there is no evidence that the same were duly served on the late Onkware Omwenga.
247. DW 2 denied any intentions to defraud the late Onkware Omwenga of his property known as LR.No.transmara/meguara/132.
248. DW 2 stated that when the transaction of was taking place, the late Kono Sapai was still alive and upon his demise, he was buried on the property known as LR.No.transmara/meguara/132 although it was in the name of the 2nd Defendant.
249. DW 2 however reiterated that the tea on the property known as LR.No.transmara/meguara/132 is being harvested by the family of the late Onkware Omwenga.
250. On re-examination, DW 2 stated that he also stays on the property known as LR.No.transmara/meguara/132 having built a house and planted crop on the same.
251. DW 2 reiterated that upon being registered as the owner of LR.No.transmara/meguara/132, he attempted to put up a fence but the family of the late Onkware Omwenga removed the same.
252. Similarly, DW 2 was of the view that once he purchased the property known as LR.No.transmara/meguara/132, all the trees and tea on the said property because his as well.
253. DW 2 stated that the reason he accepted the late Kono Sapai to be buried on the property known as LR.No.transmara/meguara/132 was on compassionate grounds keeping in mind that he did not have any other property.
254. DW 2 confirmed that in their Agreement for Sale with the late Kono Sapai, he had executed the same by way of signing.
255. DW 2 denied ever doing any forgery in any of the documents produced before the Honourable Court.
256. At the end of this re-examination, DW 2 was discharged from the witness box thereof.
257. The third Defence witness was one Matthew Ole Tindiyok (DW 3).
258. DW 3 introduced himself as a brother-in-law to the late Kono Sapai.
259. DW 3 confirmed that the Plaintiff is a son to the late Onkware Omwenga.
260. According to DW 3, the property known as LR.No.transmara/meguara/132 belonged to the late Kono Sapai until he sold the same to the 2nd Defendant.
261. During the late Kono Sapai ownership, he occupied the same throughout.
262. On the other hand, the late Onkware Omwenga lives on the property known as LR.No.transmara/meguara/145.
263. DW 3 stated that the late Kono Sapai is the one that sold the property known as LR.No.transmara/meguara/132 to the 2nd Defendant and was handed the said property thereof.
264. DW 3 confirmed that so far, there was no complain regarding the sale of the property known as LR.No.transmara/meguara/132 to the 2nd Defendant.
265. DW 3 then adopted his witness statement dated 08.10.2019.
266. On cross-examination, DW 2 stated that he has been living with the family of Kono Sapai since 1988.



267. DW 2 informed the Honourable Court that the late Kono Sapai family would relocate to the property known as LR.No.transmara/meguara/148 belonging to the late Onkware Omwenga during tribal clashes.
268. Once the tribal clashes ended, the family of the late Kono Sapai would then relocate back to the property known as LR.No.transmara/meguara/132.
269. DW 2 denied knowledge that the late Kono Sapai had sold the property known as LR.No.transmara/meguara/132 to the late Onkware Omwenga.
270. However, there are trees and tea on the property known as LR.No.transmara/meguara/132 which was planted by the late Onkware Omwenga.
271. DW 2 stated that he was not aware the property known as LR.No.transmara/meguara/148 belonging to the late Onkware Omwenga was sold to the late Kono Sapai.
272. DW 2 affirmed that the occupation of the family of the late Kono Sapai on the property known as LR.No.transmara/meguara/148 was only for the period of tribal clashes.
273. DW 2 could not tell who allowed the son of the late Kono Sapai to occupy the property known as LR.No.transmara/meguara/148.
274. DW 2 denied any participation to defraud the family of the late Onkware Omwenga of the property known as LR.No.transmara/meguara/132.
275. Similarly, DW 2 denied any knowledge of any agreements between the late Kono Sapai and the late Onkware Omwenga relating to the properties known as LR.No.transmara/meguara/132 and LR.No.transmara/meguara/148.
276. On re-examination, DW 2 reiterated that he was no aware of any Agreement for Sale between the late Kono Sapai and the late Onkware Omwenga.
277. According to DW 2, the reason the late Onkware Omwenga was allowed to plant trees on the property known as LR.No.transmara/meguara/132 was because he was in the charcoal business and therefore for every indigenous tree he cut, he planted another type.
278. As to the occupation of the Late Kono Sapai's son on the property known as LR.No.transmara/meguara/148, the same was only temporary and was not an exchange.
279. At the end of this re-examination, DW 3 was discharged from the witness box and the Defence similarly closed its case.
280. Parties were thereafter directed to prepare, file and exchange their final submissions.
281. The Plaintiff duly filed his submissions on the 08.09.2023 while the 1st and 2nd Defendants filed their submissions on the 19.10.2023.
282. To be able to appreciate the facts on the ground, the Honourable Court visited both the properties known as LR.No.transmara/meguara/132 and LR.No.transmara/meguara/148 and a Ground Report was duly prepared by the Deputy Registrar thereafter.
283. Indeed, this Honourable Court has perused the pleadings herein, the testimonies of the witnesses during the hearing, the exhibits produced and the submissions filed and the issue for determination is whether or not the Plaintiff has proved a claim of adverse possession under Section 37 and 38 of the [Limitation of Actions Act](#), Cap 22.



284. The ingredients and/or principles required to prove a claim of adverse possession have been discussed in various authorities within the Kenyan Jurisdiction.

285. One of the celebrated case relating to the adverse possession is the case of *Mtana Lewa-versus- Kahindi Ngala Mwangandi* (2015) eKLR, which outlined the ingredients of adverse possession as follows; -

“For one to succeed in a claim of adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin maxim *nec vi, nec cla, nec precario.*”

286. In another case of Civil Application No.110 of 2016 Between Richard Wefwafwa Songoi-versus- Ben Muniyifwa Songoi (2020) eKLR, the Court of Appeal further expounded the ingredients of adverse possession in the following manner; -

- a. On what date he came into possession.
- b. What was the nature of his possession.
 - a. Whether the fact of his possession was known to the other party.
- c. For how long his possession has continued and
 - a. That the possession was open and undisturbed for the requisite 12 years.

287. Section 37 of the Limitation of Actions, Cap 22 also provides as follows; -

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

288. In essence therefore, this Honourable Court will now proceed to evaluate the Plaintiff's claim of adverse possession based on the ingredients outlined hereinabove.

Ingredient no. 1- on what date did the plaintiff take possession?

289. The first ingredient that a claimant in adverse possession must demonstrate before any Court is whether or not he or she is in possession of the property being claimed.

290. In this present O.S, the Plaintiff testified that his father the late Onkware Omwengatook possession of the property known as LR.No.transmara/meguara/132 partly in 1976 after purchasing a portion of 6 acres from the late Konoï Sapaiby virtue of an Agreement For Sale dated 10.02.1976.

291. A perusal of the Agreement For Sale dated 10.02.1976 expressly provides under Clause 2 therein as follow; -

“The Vendor hereby further undertakes to hand over the possession of the piece of land to the purchase immediately on the execution of this Agreement”

292. For avoidance of doubt, the Vendor in this Agreement For Sale dated 10.02.1976 was the late Konoï Sapai while the purchaser was Onkware Omwenga.



293. According to the testimony of the Plaintiff and the witnesses thereof, the Purchaser took possession of the initial 6 acres on the property described as Parcel No. 90 within Mewala Scheme which was later registered as LR.No.transmara/meguara/132.
294. The late Konoï Sapai through the Replying Affidavit sworn on the 15.10.2015 when he was still alive did not dispute the existence of the Agreement made in the year 1976 or any of its terms therein.
295. Although the 1st and 2nd Defendants deny the existence of the Agreement For Sale dated 1976, this Honourable Court is satisfied that indeed the Agreement for Sale dated 10.02.1976 is legitimate and was binding on the late Vendor Konoï Sapaï and the late Purchaser Onkware Omwenga.
296. Further to that, this Honourable Court is satisfied that the late Onkware Omwenga took possession of the portion measuring 6 acres within the property known as LR.No.transmara/meguara/132 in the year 1976.
297. In the year 1978, the late Onkware Omwenga again offered to purchase the remaining 9.5 Acres of the property known as LR.No.transmara/meguara/132 from the late Konoï Sapai.
298. According to the testimony of the Plaintiff and his witnesses, the understanding was that the late Konoï Sapai would fully hand over the ownership and possession of the property known as LR.No.transmara/meguara/132 to the late Onkware Omwenga and instead take ownership of the property known as LR.No.transmara/meguara/148 which was in the name of the late Onkware Omwenga.
299. Keeping in mind that the portion which was still owned by the Late Konoï Sapai was 9.5 acres and the property known as LR.No.transmara/meguara/148 was 7.5 Acres, there was an understanding that additional consideration would be required to cover for the extra 2 acres.
300. The Plaintiff and PW 4 in particular confirm that a further payment of 11 Cows and 4 Goats were paid by the late Onkware Omwenga to the late Konoï Sapai but whether this was in full and final payment of the value of the 2 acres is not certain.
301. The Plaintiff testified that after this Oral Agreement in the year 1978, the late Onkware Omwenga took possession of the entire property known as LR.No.transmara/meguara/132.
302. On the other hand, the late Konoï Sapai specifically denied selling the late Onkware Omwenga the remaining portion of 9.5 acres on the property known as LR.No.transmara/meguara/132.
303. Instead, the late Konoï Sapai pleaded under Clause 5 of the Replying Affidavit sworn on the 15.10.2015 that the actual property that was sold to the late Onkware Omwenga in the year 1978 was the property known as LR.No.transmara/meguara/145 which was across the road to LR.No.transmara/meguara/132.
304. In essence therefore, the consideration of 11 Cows and 4 Goats paid by the late Onkware Omwenga was for the property known as LR.No.transmara/meguara/145 and not LR.No.transmara/meguara/132.
305. According to Paragraph 8 of the Replying Affidavit sworn on the 15.10.2015, the late Konoï Sapai stated that the remaining portion of 7.8 acres although it should be 9.5 acres within the property known as LR.No.transmara/meguara/132 was to be used by the late Onkware Omwenga but in trust for the late Konoï Sapai.
306. In other words, therefore, the late Konoï Sapai in Paragraph 8 of the Replying Affidavit admits that indeed the late Onkware Omwenga took possession and use of the property known as



LR.No.transmara/meguara/132 from the year 1978 although the portion of 9.5 acres was still his property and had not been acquired by the late Onkware Omwenga.

307. It is therefore this Honourable court's considered view that portion of the initial 6 acres purchased under the Agreement dated 10.02.1976 was duly taken over by the late Onkware Omwenga in the same year 1976 while the remaining portion of 9.5 acres came into the Possession of the Late Onkware Omwenga in the year 1978.
308. Hence, the entire property known as LR.No.transmara/meguara/132 was possessed and/or occupied by the late Onkware Omwenga from the year 1978.

Ingredient No. 2- What was the nature of Possession?

309. The second issue for determination is the nature of possession asserted by the late Onkware Omwenga over the property known as LR.No.transmara/meguara/132.
310. In case of Nairobi Civil No. 283 of 1990 between Gabriel Mbui-versus- Mukindia Maranya (1993) eKLR, the Court observed as follows; -

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

311. Looking at the cited authority hereinabove, a claimant under this ingredient must demonstrate by way of facts and evidence that the said possession had two aspects namely occupation and use of the said property.
312. The claimant should demonstrate that the possession was both in occupation and use of the property being claimed with a resultant aim of dispossessing the owner of his ownership over the same land.
313. According to the testimony of the Plaintiff and the Plaintiff's witnesses, the nature of possession by the late Onkware Omwenga on the property known as LR.No.transmara/meguara/132 was one that was open, notorious and annoying to the extent that it dispossessed the late Kono Sapai's rights of use and occupation of the same property.
314. The Plaintiff first and foremost in his testimony stated that the late Onkware Omwenga took possession of the property known as LR.No.transmara/meguara/132 by planting trees around the said property.
315. The trees which were planted by the late Onkware Omwenga are still on the property known as LR.No.transmara/meguara/132 and the Plaintiff has produced various pictures to confirm the same.
316. The 1st Defendant in her testimony also admitted that the trees planted on the property known as LR.No.transmara/meguara/132 had been planted by the late Onkware Omwenga.
317. However, the 1st Defendant stated that they were for the benefit of both the late Onkware Omwenga and the late Kono Sapai.
318. DW 3 also confirmed that the trees currently in the property known as LR.No.transmara/meguara/132 had been planted by the late Onkware Omwenga.
319. However, the late Onkware Omwenga was doing so to replace the indigenous trees which he had cut down to burn and make charcoal.



320. What is consistent in the evidence by all the parties and their witnesses is that the trees which was shown on the exhibits produced by the Plaintiff were indeed planted by the late Onkware Omwenga on the property known as LR.No.transmara/meguara/132.
321. The other aspect which the Plaintiff used to demonstrate the nature of possession enjoyed by the late Onkware Omwenga was the existence of tea on the property known as LR.No.transmara/meguara/132.
322. The Plaintiff testified that after the late Onkware Omwenga occupied the property known as LR.No.transmara/meguara/132, he planted tea on a portion of the said property which the family has been harvesting and selling to Kiamokama Tea Factory.
323. The Plaintiff produced two Commercial Share Certificates and as well as payment slips for the year 2013,2014 and 2015.
324. The 1st Defendant in her testimony stated that when she got married to the late Konoï Sapai, the said tea was already on the property known as LR.No.transmara/meguara/132.
325. The 1st Defendant further admitted during the cross-examination that the family of the late Onkware Omwenga was the one that was actually harvesting the said tea.
326. The Plaintiff's witnesses also affirmed that the tea on the property known as LR.No.transmara/meguara/132 had been planted by the late Onkware Omwenga upon taking possession of the said property.
327. The 1st and 2nd Defendants stated that one Kiamokama Tea Factory declared any bonus, it would be shared equally between the late Onkware Omwenga and the late Konoï Sapai.
328. Considering the above evidence placed before this Honourable Court, there is no doubt that the tea planted on the property known as LR.No.transmara/meguara/132 had been planted by the late Onkware Omwenga upon taking possession.
329. The testimony of both the Plaintiff and his witnesses as well as the 1st Defendant and her witnesses confirm that indeed the said tea was planted by the late Onkware Omwenga for his benefit as envisaged by the Commercial Share Certificates and the Payslips for the year 2013, 2014 and 2015.
330. Although the 1st Defendant claimed that the Bonus payments from the said tea was to be shared between the late Onkware Omwenga and the late Konoï Sapai, there is no evidence that such an arrangement existed and or any proof tabled before the Honourable Court to confirm that the late Konoï Sapai was ever a beneficiary of the bonus paid by Kiamokana Tea Factory.
331. In essence therefore, this Honourable is satisfied that the late Onkware Omwenga's occupation on the property known as LR.No.transmara/meguara/132 one which was open and notorious to the late KONOÏ SAPAI and indeed dispossess him of his occupation and use of the same as of right.

Ingredient 3- whether the fact of his possession was known to the other party?

332. The third ingredient in a claim of adverse possession is whether the other party was aware of the claimant's occupation on the said property.
333. In the present O.S, the Plaintiff stated that the late onkware omwenga purchased and occupied the first portion of 6 acres in the year 1976.
334. The occupation of the late Onkware Omwenga for the portion of 6 acres was immediately after the Agreement For Sale dated 10.02.1976 executed with the late Konoï Sapai.



335. The late Konoï Sapai was therefore well aware of the late Onkware Omwenga's possession and occupation of the said 6 Acres within the property known as LR.No.transmara/meguara/132 from the time of executing the said Agreement For Sale in the year 1976.
336. On the second portion measuring approximately 9.5 acres, the Plaintiff position that the late Onkware Omwenga again took possession of the same in the year 1978 after the second Oral Agreement with the late Onkware Omwenga.
337. PW 2 and PW 3 further reiterated the evidence of the Plaintiff that indeed, the late Onkware Omwenga took possession of the entire property known as LR.No.transmara/meguara/132 after the late Konoï Sapai was given the property known as LR.No.transmara/meguara/148 as well as 11 Cows and 4 Goats.
338. The 1st Defendant on the other hand denied that the late Onkware Omwenga ever took possession of the property known as LR.No.transmara/meguara/132.
339. According to the 1st Defendant, upon her marriage, she was taken to the property known as LR.No.transmara/meguara/132 by the late Konoï Sapai and has been occupying the said property up to date.
340. The 1st Defendant admitted that indeed the late Onkware Omwenga used to do farming on the property known as LR.No.transmara/meguara/132 but this was based on a gentleman's agreement.
341. DW 3 reiterated the position by the 1st Defendant that the family of the late Konoï Sapai were the ones that were in occupation of the property known as LR.No.transmara/meguara/132 until it was sold to the 2nd Defendant in the year 2015.
342. According to late Konoï Sapai's Replying Affidavit sworn on the 15.10.2015, he expressly admits that there was an exchange of the properties known as LR.No.transmara/meguara/132 and LR.no.transmara/meguara/148 based on an Oral Agreement in the year 1978.
343. This particular paragraph and the averment of the late Konoï Sapai clears the issue of whether or not the occupation by the late Onkware Omwenga on the property known as LR.No.transmara/meguara/132 was known by the late Konoï Sapai.
344. The late Konoï Sapai expressly has stated that the late Onkware Omwenga took occupation and possession of the property known as LR.No.transmara/meguara/132 in the year 1976 with his knowledge upon an Oral Agreement mutually agreed therein.
345. In essence therefore, the late Konoï Sapai was fully aware of the late Onkware Omwenga's occupation and possession of the said property known as LR.No.transmara/meguara/132.

Ingredient No.4- for how long has the possession continued?

346. The fourth ingredient is the period of time the claimant occupation has continued since entry of the property being claimed.
347. In the present O.S, the Plaintiff as well as the Plaintiff's witnesses have testified that the late Onkware Omwenga took possession of the first portion measuring 6 acres in the year 1976.
348. Thereafter, the late Onkware Omwenga took possession of the remaining 9.5 Acres in the year 1978 after the Oral Agreement with the late Konoï Sapai.



349. The late Kono Sapai in his Replying Affidavit sworn on the 15.10.2015 has admitted that the late Onkware Omwenga took possession of the property known as LR.No.transmara/meguara/132 in the year 1978 during the tribal clashes based on an exchange arrangement.
350. The 1st Defendant however in her testimony disputed this position by stating that when she got married, she was taken to the same property known as LR.no.transmara/meguara/132 and has been living on the same property for over 30 years.
351. DW 3 also supported the evidence of the 1st Defendant as regards occupation of the said property known as LR.No.transmara/meguara/132.
352. During the hearing of this proceeding, the 1st Defendant and/or the DW 3 did not provide any evidence either by way of photographs or otherwise to confirm their occupation on the said property.
353. Nevertheless, the Honourable Court on its ground visit points that there were houses belonging to the family of the late Kono Sapai on the property known as LR.No.transmara/meguara/132.
354. According to Paragraph 11 of the Replying Affidavit sworn on the 15.02.2015 by the late Kono Sapai, he pleaded as follows; -
- “ 11. That I am informed by my advocates which advise I verily believe to be true that the Plaintiff was supposed to inform me of all encumbrances and or boundary dispute appertaining to the land (LR.No.transmara/meguara148), therefore the parcel of land was never given in good faith as the Plaintiff withheld such crucial information letting me walk into a void Agreement”
355. Paragraph 12 of the said Replying Affidavit sworn on the 15.02.2015 further stated as follows; -
- “ 12. The boundary dispute was never resolved and despite the several occasions that the Plaintiff was called he never attended to the hearing at the chiefs camp to try and resolve the boundary dispute and therefore William Lekakeny Nchoko has continuously harassed me and eventually chased me out of the parcel of land (LR.No.transmara/meguara/148), settled and developed the land.”
356. Lastly, paragraph 13 of the Replying Affidavit sworn on the 15.02.2015 pleaded as follows; -
- “ 13. That having never settled in the Plaintiff’s Narok/transmara/meguara/148 as the Boundary dispute never been resolved and since the Plaintiff was not willing to come and have the issued resolved, I decided to move back to the disputed parcel of land (LR.No.transmara/meguara/132) and resettled in the hived portion that the Plaintiff was holding in trust but he became violent and mobilized his family to evict me claiming that I had sold the land to him and therefore I had no right to be on the parcel of land prompting the District County Commissioner to summon us for a hearing on the 22nd of October 2015”
357. Looking at the above captured paragraphs in the Replying Affidavit sworn on the 15.02.2015, it is clear that the late Kono Sapai vacated the property known as LR.No.transmara/meguara/132 and left the same for the occupation and use by the late Onkware Omwenga in the year 1978.
358. On the other hand, the late Onkware Omwenga vacated the property known as LR.No.transmara/meguara/148 and handed possession of the same to the late Kono Sapai in the same year 1978.



359. However, due to a boundary dispute involving the property known as LR.No.transmara/meguara/148, the late Kono Sapai returned to the property known as LR.No.transmara/meguara/132 thereby prompting a meeting before the County Commissioner on the 22.10.2015.
360. Currently, the Plaintiff is still in occupation of the property known as LR.No.transmara/meguara/132 through the trees, the tea and houses on the ground.
361. The Plaintiff occupation of the property known as LR.No.transmara/meguara/132 is still ongoing and the 1st and 2nd Defendants have not interrupted the same so far despite their attempts to re-entry the said land.

Ingredient no. 5- that the possession was open and undisturbed for the requisite 12 years.

362. The last ingredient in a claim of adverse possession is the period of time which a claimant has been in occupation of the land.
363. The Section 7 of the *Limitation of Actions Act*, Cap 22 requires a claimant to have been in occupation and use of the property being claimed for a period of 12 years continuous.
364. The Plaintiff herein stated that on the first portion of 6 acres within the property known as LR.No.transmara/meguara/132, the late Onkware Omwenga took possession of the same in the year 1976 pursuant to the Agreement For sale dated 15.02.1976.
365. The remaining portion of 9.5 Acres was again sold to the late Onkware Omwenga by the late Kono Sapai in the year 1978.
366. The consideration for the second portion of land measuring 9.5 acres was the property known as LR.No.transmara/meguara/148 together with 11 Cows and 4 Goats.
367. The late Kono Sapai stated that the payment of 11 Cows and 4 Goats was for the property known as LR.No.transmara/meguara/145 and not any portion of LR.No.transmara/meguara/132.
368. First and foremost, the 1st Defendant did not present any evidence to show that the property known as LR.No.transmara/meguara/145 ever belonged to the late Kono Sapai.
369. The easiest and straight forward way to have proved the purported sale of the property known as LR.No.transmara/meguara/145 would have been to present the relevant Adjudication Record in the name of the late Kono Sapai and any possible witnesses to confirm that indeed the 11 Cows and 4 Goats were paid as consideration for the property known as LR.No.transmara/meguara/145.
370. Unfortunately, the 1st Defendant failed to present any evidence of this particular transaction and the Honourable Court is of the view that the 11 Cows and 4 Goats were for the Agreement For Sale relating to the property known as LR.No.transmara/meguara/132.
371. The Honourable court having satisfied itself to the fact that the late Onkware Omwenga purchased the entire property known as LR.No.transmara/meguara/132 through the Agreements for Sale dated 1976 and 1978 and taken possession thereof, then at what point did the occupation and/or possession by the late Onkware Omwenga become adverse to enable computation of the 12 years period?
372. In the case of Wambugu-versus- Njuguna (1983) KLR 173, the Court of Appeal stated as follows; -

“ 8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have become adverse to that of the owner



after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

373. In another case of Simon Nganga Njoroge-versus- Daniel Kinyua Mwangi (2015) eKLR, the Honourable Court espoused on the principle outlined in the case of Wanmbugu-versus- Njuguna as follows; -

“Having found the plaintiff’s testimony concerning the said sale agreements more believable, and taking note of the principle espoused in Wambugu -vs- Njuguna (supra) to the effect that where a claimant pleads the right to land under an agreement and in the alternative, seeks an order based on subsequent adverse possession, (Like the plaintiff herein has done) the rule is : the claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price and that the claimant will succeed under adverse possession upon occupation for at least 12 years after such payment . I find and hold that, in the circumstances of this case, the plaintiff possession of the suit property became adverse from 6th June, 1994”.

374. The last case for consideration is the one of Public Trustee-versus- Wanduru (1984) KLR 314 where Hon.justice Madan J.A expressed himself as follows on Page 319; -

“ —that the full purchase price for the land having been paid on the same day, viz March 16, 1967 the learned judge ought to have held that the second appellant had completed adverse possession of the suit land for over twelve years before the institution of the suit on April 2, 1979”.

375. The judge went further to state as follows;-

Of course, calculated from the date of payment of the purchase price on March 16,1967 and on the basis of it, the full span of twelve years adverse possession and more had already run when the suit was filed on April2, 1979. The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day”

376. Lastly, the Learned Judge observed as follows; -

“A purchaser in possession of the land purchased after having paid the purchase price, is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor. Bridges -vs- Mees (1957) ICh 75 at 484; referred to with approval in Wamwangi Githui –vs- Livingstone Ndete and others, CA No.24 of 1979 (unreported).”

377. The import of the above cited decisions is that where an Agreement For Sale is entered into and the Purchaser takes possession thereon on the basis of the same, then such a purchaser cannot claim adverse possession before the last instalment under the said Agreement is received by the Vendor.

378. The Purchaser’s occupation after the execution of such an Agreement For Sale but before the completion of the last instalment is with the consent of the Vendor and no matter how long the delay, such a Purchaser cannot make a claim of adverse possession against the Vendor.

379. However, on the other hand, if the purchaser took possession under an Agreement For Sale and thereafter completed his/her payments under the Agreement For Sale while already in occupation,



then such occupation after the last instalment paid to the Vendor becomes adverse to the Vendor and the purchaser can claim for adverse possession.

380. In this particular case, in the Agreement for Sale dated 15.02.1976 between the late Onkware Omwenga and the late Konoï Sapai for the portion of 6 acres within the property known as LR.No.transmara/meguara/132, the last purchase price was paid in full and final on the date of execution.
381. In other words, the time for computing the period of 12 years commenced on the 16.02.1976.
382. As to the other portion of 9.5 acres remaining within the property known as LR.No.transmara/meguara/132, this Honourable Court is of the considered view that the consideration in Oral Agreement entered into by the late Onkware Omwenga and the late Konoï Sapai was the property known as LR.no.transmara/meguara/148 together with the 11 Cows and 4 Goats.
383. As such, the late Konoï Sapai who was the Vendor was duly given possession of the property known as LR.No.transmara/meguara/148 in the year 1978 together with the 11 Cows and 4 Goats as the last instalment thereof.
384. As such, the occupation of the portion measuring 9.5 acres on the property known as LR.No.transmara/meguara/132 became adverse to the Vendor from the year 1979.
385. In essence therefore, the period of 12 years of occupation on the property known as LR.no.transmara/meguara/132 had since lapsed at the time of filing the present OS as envisaged by Section 7 of the Limitation of Actions Act, Cap 22.
386. In conclusion therefore, the Honourable Court hereby makes the following determination to the present Originating Summons; -
- A. The amended originating summons filed on the 3rd of february 2015 is merited.
 - B. The agreement in writing dated 10th february 1976 by the plaintiff purchasing from the defendant 6 acres comprised in parcel no.90 mewala scheme which upon registration came to be known as lr.no.Narok/transmara/meguara/132 at an agreed purchase price of kshs 4,000/- the sum of which the late konoï sapai acknowledged receipt.
 - C. That In Addition To The Aforegoing Transaction, The Late Onkware Omwenga Purchased 9.5 Acres Comprised on LR.No.narok/transmara/meguara/132 In Consideration of the Late Onkware Omwenga Exchanging His Parcel of Land Known as LR.No.narok/transmara/meguara/148 Measuring 7.5 Acres and in Addition to 11 Heads of Cattle and 4 goats given to the Late Konoï Sapai for the said Land known as LR.No.transmara/meguara/132 and in which the estate of the Late Konoï Sapai is currently in occupation with some members of his family and which he grows subsistence crops such as maize and bananas.
 - D. That for over 37 years the plaintiff has been in peaceful, quiet, notorious and open possession and use of the said 15.5 acres of land known LR.No.transmara/meguara/132 and hence the estate of the late onkware omwenga has acquired title to it by way of adverse possession and/or operation of law.
 - E. That the 1st and 2nd Defendant Were and/or are holding the title to the land known as lr.no.narok/transmara/meguara/132 in trust for the estate of the Late Onkware Omwenga.
 - F. The 2nd Defendant be and is hereby ordered to sign necessary documents within 45 days from the date of this judgment, so as to effect a valid transfer of the aforesaid property known as LR



No.transmara/meguara/132 Measuring 15.5 Acres in favour of the plaintiff and in default, the Deputy Registrar, Kilgoris ELC shall sign the same for and on behalf of the Defendant.

G. That 1st and 2nd Defendants herein will bear the costs of this Originating Summons.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 12TH OF MARCH 2024.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant:mr Ngeno

Advocate for the Plaintiff: Mr. Onsarigo (n/a)

Advocate for the Defendants: Mr. Mulisa for 1st & 2nd Defendant

Attorney General for 3rd & 4th Defendant (N/A)

