



**Malmale v Kipeno (Environment & Land Case 20 of 2021)
[2024] KEELC 1342 (KLR) (11 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 20 OF 2021**

**EM WASHE, J
MARCH 11, 2024**

BETWEEN

SUMBI MALMALE PLAINTIFF

AND

MOSES OLE KIPENO DEFENDANT

JUDGMENT

1. The Plaintiff herein filed an Originating Summons dated 18.07.2018 (hereinafter referred to as “the present O. S”) seeking adverse possession over the property known as LR.No. Transmara/Moita/199 upon determination of the following questions: -
 - a. Whether the Plaintiff has been in adverse possession of the Defendant’s parcel of land No.Transmara/Moita/199 for a period of 12 years?
 - b. Whether the Plaintiff should be registered as the Proprietor of Parcel No. Transmara/Moita/199?
 - c. Whether the District Land Registrar, Narok should be directed to register the Plaintiff as the Proprietor of Parcel No. Transmara/Moita/199 in place of the Defendant?
 - d. Whether the Deputy Registrar of this Honourable Court should execute transfer documents to effect transfer to the Plaintiff herein in the event the Defendant refuses?
 - e. Whether the Defendant should be restrained by an order of injunction from selling, transferring, entering or in any other manner howsoever interfering with the Plaintiff’s peaceful use, occupation and or enjoyment of Parcel No. Transmara/Moita/199 both pending the hearing of this suit and after the determination hereof?
 - f. Who should pay the costs of this suit?



2. The issues for determination hereinabove have been supported by the grounds adduced in the Supporting Affidavit sworn by the Plaintiff on the 18.07.2018 which are summarised as follows; -
 - a. The Plaintiff has been in open occupation and use of the property known as LR.No. Transmara/Moita/199 way before the adjudication of Moita Adjudication Section.
 - b. During the demarcation process, the Plaintiff was duly recorded as the beneficial owner of the property known as LR.No. Transmara/Moita/199.
 - c. However, in the year 1997, the title to the property known as LR.No. Transmara/Moita/199 was issued to the Defendant.
 - d. In the year 2018, the Defendant attempted to dispossess the Plaintiff of possession to the property known as LR.No. Transmara/Moita/199 using goons but was not successful.
 - e. It is therefore imperative that this Honourable Court do declare the Plaintiff the lawful owner of the said property known as LR.No. Transmara/Moita/199 by virtue of adverse possession.
3. The present O.S was duly served on the Defendant who opposed it by filing a Replying Affidavit sworn on the 06.08.2018.
4. The Defendant in the Replying affidavit sworn on the 06.08.2018 adduced the following grounds in opposition to the present O.S; -
 - a. The Defendant is the registered owner of the property known as LR.No. Transmara/Moita/199.
 - b. On the other hand, the Plaintiff is in occupation of the property known as LR.No. Transmara/Moita/198.
 - c. The Defendant stated that the property known as LR.No. Transmara/Moita/199 has been unoccupied but when he went to take possession in the year 2018, the Plaintiff herein chased him away.
 - d. The Defendant pleaded that the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 are separate and distinct.
 - e. Consequently therefore, there is no sufficient proof that the Plaintiff has been in occupation of the property known as LR.No. Transmara/Moita/199 to claim adverse possession thereof.
5. The matter was then listed for pre-trial and after confirmation that all the documents required for hearing are on the file, the same was listed for hearing on the 01.03.2023.

Plaintiff's Case

6. The Plaintiff's first witness was Sumbi Malmale(PW1).
7. PW 1 stated that he was a resident of Masurura Location where he stays with his two wives and 17 children.
8. PW 1 informed the Honourable Court that he had been in occupation of the property known as LR.No. Transmara/Moita/199 since 1984.
9. During adjudication of Moita Adjudication Section, the property known as LR.No. Transmara/Moita/199 which is formerly Plot.No.199 within Moita Adjudication Section was recorded in his name.



10. However, in the year 2019, the PW 1 learnt that the title deed of LR.No. Transmara/Moita/199 had been issued in the name of the Defendant.
11. According to the PW 1, there was no person who had claimed the property LR.No. Transmara/Moita/199 before the year 2018.
12. PW 1 admitted that he did not have any legal documents to confirm that Plot.No. 199 within Moita Adjudication Section had been allocated and/or recorded in his name.
13. However, PW 1 denied that the Defendant has ever been in occupation and/or possession of the property known as LR.No. Transmara/Moita/199.
14. According to PW 1, the property known as LR.No. Transmara/Moita/199 is used as a grazing field by himself and over herders who also graze on the said property.
15. PW 1 therefore sought to have the said property known as LR.No. Transmara/Moita/199 declared his property by way of adverse possession and thereafter registered in his name.
16. On cross-examination, PW 1 confirmed that he became aware of the Defendant's ownership on the property known as LR.No. Transmara/Moita/199 in the year 2018.
17. Once PW 1 learnt about the Defendant's ownership, he proceeded to place a Caution on the Green Card of the property known as LR.No. Transmara/Moita/199.
18. However, on being referred to the Official Search dated 31.03.2022, PW 1 could not find any entry of a Caution on the same.
19. PW 1 reiterated that during the demarcation of Moita Adjudication Section, he was recorded as the beneficial owner of Parcel No. 199 therein.
20. According to the official search dated 31.03.2022, the registered owner of the property known as LR.No. Transmara/Moita/199 is the Defendant herein.
21. However, PW 1 insisted that his homestead occupies the property known as LR.No. Transmara/Moita/199.
22. PW 1 informed the Honourable Court that he is the registered owner of the property known as LR.No. Transmara/Moita/198 having purchased the same from one Purere Ole Koromo.
23. Unfortunately, the transfer of the property known as LR.No. Transmara/Moita/198 from Purere Ole Koromoto himself has not been finalised and the said property is still in the name of Purere Ole Koromo.
24. PW 1 admitted that the properties known as LR.No. Transmara/Moita/198, LR.No. Transmara/Moita/199 and LR.No. Transmara/Moita/200 had no clear boundary demarcations and he could be staying on any of the said properties.
25. PW 1 stated that in the year 2019, the Defendant instituted legal proceedings against him over the property known as LR.No. Transmara/Moita/199.
26. PW 1 confirmed to the Honourable Court that the property known as LR.No. Transmara/Moita/199 is also used by other herders and not him alone.
27. PW 1 informed the Honourable Court that the other herders on the property known as LR.No. Transmara/Moita/199 include John Limpasowho is his neighbour, Daniel Ologoro, Lamakalaa, Letialaland Susan.



28. According to PW 1, Teleo Lemisois the herder of the cattle belonging to John Limpaso.
29. PW 1 insisted that during the demarcation, he filed an objection against the Adjudication Record of Parcel No. 199 within Moita Adjudicatio Section.
30. However, PW 1 did not have a copy of the said Objection and/or any evidence that any objection had been filed against the Adjudication Record of Plot.No.199 within Moita Adjudicatio Section.
31. PW 1 confirmed that he filed this present O.S after the title deed to the property known as LR.No. Transmara/Moita/199 was issued in the year 2018.
32. On re-examination, PW 1 stated that the other herders on the property known as LR.No. Transmara/Moita/199 came in the year 2019 and 2020 after he had already occupied the said property.
33. PW 1 also reiterated that he purchased the property known as LR.No. Transmara/Moita/198 in the years 2016 and 2018.
34. At the end of this re-examination, PW 1 was discharged from the witness stand thereof.
35. The Plaintiff's second witness was Raphael Ole Marapa(PW 2)
36. PW 2 introduced himself as a Pastor of P.A.G Church which is located in Masurura Location.
37. According to PW 2, the Plaintiff herein was known to him from the year 2002 and has been living on the same parcel of land up to now.
38. PW 2 informed the Honourable Court that the Plaintiff herein does not live very far away from where the church is located.
39. PW 2 denied knowledge of the Defendant and stated that he is not on the property known as LR.No. Transmara/Moita/199.
40. PW 2 testified that he only came to learn about the Defendant's ownership over the property known as LR.No. Transmara/Moita/199 in the year 2019.
41. However, to his knowledge, the property known as LR.No. Transmara/Moita/199 is occupied by the Plaintiff herein who has built various structures on the same and is in actual possession.
42. On cross-examination, PW 2 stated that he did not have any property within Moita Adjudicatio Section.
43. Similarly, PW 2 denied having any knowledge of when Moita Adjudication Section was administered.
44. PW 2 admitted that he had no evidence that the Plaintiff was actually in occupation of the property known as LR.No. Transmara/Moita/199.
45. PW 2 also confirmed that he did not know the boundary demarcating the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199.
46. However, PW 2 reiterated that the Plaintiff has been in the same property he currently occupies for over 12 years.
47. On re-examination, PW 2 testified that he is aware that there is a dispute relating to the parcel of land that the Plaintiff occupies.
48. Consequently, he therefore came to testify on what he knows and the Plaintiff's occupation.
49. At the end of this re-examination, PW 2 was discharged from the witness stand thereof.



50. The Plaintiff's third witness was one Raphael Ole Marapa (PW 3).
51. PW 3 introduced himself as a resident of Masurura Location and the chairman of Nyumba Kumi.
52. PW 3 stated that he had been the Chairman of Nyumba Kumi for the last 20 years.
53. PW 3 admitted being well known to the Plaintiff herein.
54. PW 3 testified that the Plaintiff has been living on the same parcel of land since he was a young boy.
55. PW 3 informed the Honourable Court that the Defendant is not a resident of the Masurura location.
56. PW 3 stated that he came to learn about the Defendant in the year 2019 or 2020 when a dispute relating to the property known as LR.No. Transmara/Moita/199 arose.
57. On cross-examination, PW 3 informed the Honourable Court that he owns and resides on the property known as LR.No. Transmara/Moita/404.
58. PW 3 however could not state which adjudication section the property known as LR.No. Transmara/Moita/199 was located.
59. According to PW 3, the property which the Plaintiff occupies is LR.No Transmara/Mara/199.
60. There was no re-examination to PW 3 after this cross-examination and he was released from the witness box thereafter.
61. The Plaintiff closed his case after the testimony of the PW 3.

Defence Hearing.

62. The first Defence witness was one Moses Ole Kipeno(DW 1).
63. DW 1 introduced himself as an employee of Narok County Service Board.
64. DW 1 stated that he resides within Nkararo area but not on the property known as LR.No Transmara/Moita/199.
65. According to DW 1, the property known as LR.No. Transmara/Moita/199 is occupied by him through employees.
66. DW 1 confirmed that the property known as LR.No. Transmara/Moita/199 belongs to him having been duly registered and issued with the necessary title in the year 2018.
67. DW 1 produced a Copy of the Certificate of Title dated 09.01.1998 as Defence Exhibit1, a copy of the Official Search dated 21.03.2022 as Defence Exhibit2 and a Copy of the Mutation of the property known as LR.No. Transmara/Moita/199 as Defence Exhibit3.
68. DW 1 informed the Honourable Court that one of his employees on the property known as LR.No. Transmara/Moita/199 is Lemiso Teleo.
69. DW 1 admitted being familiar with the Plaintiff herein.
70. DW 1 testified that the Plaintiff resides on the property known as LR.No. Transmara/Moita/208.
71. DW 1 stated that the Plaintiff herein was the registered owner of the property known as LR.No. Transmara/Moita/208 and produced an Official Search dated 31.03.2022 as Defence Exhibit4.



72. DW 1 also informed the Honourable Court that the Plaintiff is in occupation of LR.No. Transmara/Moita/198 which he purchased in the year 2015 from one Purere Ole Kironkai Koromoand produced an Official Search dated 26.01.2023 as Defence Exhibit5.
73. According to DW 1, the property known as LR.No. Transmara/Moita/199 borders LR.No. Transmara/Moita/198 on one side and LR.No. Transmara/Moita/200 on the other side.
74. The boundaries between the three above properties is well demarcated and there has never been any issues among the owners.
75. However, in the year 2022, the Plaintiff herein tried to enter the property known as LR.No. Transmara/Moita/199 which attempt was repulsed by DW 1 and a report made with the police department.
76. DW 1 categorically informed the Honourable Court that the Plaintiff during the attempted entry did not manage to fence or erect any structures on the property known as LR.No. Transmara/Moita/199.
77. According to DW 1, the relationship between the Plaintiff and himself has been bad because there are instances where the Plaintiff causes harm to DW 1 cattle thereby resulting to criminal proceedings between them over and over.
78. DW 1 referred and produced two Criminal Charge Sheets at the Kilgoris Law Court particularly Criminal Case No.E 145 of2022 (Defence Exhibit6) and Criminal Case No.150 of2022 (Defence Exhibit7).
79. In concluding his evidence in chief, DW 1 testified that indeed the Plaintiff is not in occupation of the property known as LR.No. Transmara/Moita/199 and is not deserving to be declared the lawful and beneficial owner of the said property.
80. On cross-examination, DW 1 informed the Honourable Court that he had been in occupation of the property known as LR.No. Transmara/Moita/199 since the year 1984.
81. DW 1 reiterated that the Plaintiff herein is in occupation and use of LR.No. Transmara/Moita/198.
82. DW 1 confirmed that the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 border each other.
83. However, the boundary between LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 is well demarcated.
84. DW 1 informed the Honourable Court that the homestead of the Plaintiff was about 1 Kilometre from the boundary between LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199.
85. According to DW 1, the Plaintiff purchased the property known as LR.No. Transmara/Moita/198 in the year 2015 and took possession thereof.
86. However, the dispute between the Plaintiff and the Defendant began in the year 2022 when the Plaintiff purported to erect a fence on the property known as LR.No. Transmara/Moita/199.
87. Before the year 2022, there was not dispute between the Plaintiff and the Defendant.
88. On re-examination, DW 1 reiterated that there was no dispute between the Plaintiff and the Defendant before the year 2022.
89. DW 1 stated that this was because each land owner respected the boundary and there was no attempt to encroach on the other person's land.



90. DW 1 reiterated that the boundary between the Plaintiff's property known as LR.No. Transmara/Moita/198 and the Defendant's property known as LR.No. Transmara/Moita/199 is well demarcated and not in dispute.
91. DW 1 therefore sought this Honourable Court to dismiss the present suit with costs.
92. DW 1 was then discharged from the witness box after this re-examination.
93. The second Defence witness was Pirere Ole Kironkai Koromo(DW 2).
94. DW 2 informed the Honourable Court that he was the registered owner of the property known as LR.No. Transmara/Moita/198.
95. DW 2 testified that the properties known as LR.No. Transmara/Moita/198 is next to LR.No. Transmara/Moita/199 which is also next to LR.No. Transmara/Moita/200.
96. DW 2 stated that LR.No. Transmara/Moita/200 belongs to one Samuel Kisorok.
97. DW 2 confirmed to the Honourable Court that the property known as LR.No. Transmara/Moita/199 is occupied by the Defendant herein.
98. DW 2 further stated that the Plaintiff herein was allocated and registered as the owner of the property known as LR.No. Transmara/Moita/208 by the Adjudication Committee.
99. In essence therefore, the Plaintiff resides and is in occupation of the property known as LR.No. Transmara/Moita/208
100. However, in the year 2015, DW 2 sold his property known as LR.No. Transmara/Moita/198 to the Plaintiff herein through the Agreement For Sale dated 22/09/2015 (Defence Exhibit8).
101. Since 2015, the Plaintiff has been in occupation and possession of LR.No. Transmara/Moita/198 and not LR.No. Transmara/Moita/199.
102. DW 2 informed the Honourable Court that the demarcation marks between LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 are visible on the ground and there is no dispute as to the location of such boundary markings.
103. DW 2 confirmed preparing and filing a witness statement dated 12.01.2023 as his evidence in chief.
104. On cross-examination, DW 2 reiterated that he was the one in occupation of the property known as LR.No. Transmara/Moita/198 before he sold it to the Plaintiff in the year 2015.
105. However, before the Plaintiff purchased and occupied the property known as LR.No. Transmara/Moita/198, the Plaintiff was residing in his property known as LR.No. Transmara/Moita/208.
106. DW 2 informed the Honourable Court that he is still in the property known as LR.No. Transmara/Moita/198 together with the Plaintiff because he still owns a portion of it.
107. DW 2 insisted that the boundary markings between the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 are very visible even now.
108. The boundary has been marked by sisal which was planted long time ago.
109. In re-examination, DW 2 confirmed to the Honourable Court that there has never been a boundary dispute between the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199.



110. DW 2 reiterated that the portion occupied by the Plaintiff was within the property known as LR.No. Transmara/Moita/198.
111. At the end of this re-examination, DW 2 was discharged from the witness box thereof.
112. The third Defence Witness was Samuel Kinamba Kisorop (DW3).
113. DW 3 introduced himself as the registered owner of the property known as LR.No. Transmara/Moita/200.
114. DW 3 confirmed that he is a neighbour to the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199.
115. DW 3 informed the Honourable Court that the Plaintiff herein was in occupation of LR.No. Transmara/Moita/198.
116. On the other hand, the property known as LR.No. Transmara/Moita/199 is occupied by the Defendant who is the registered owner.
117. On cross-examination, DW 3 stated that he is very well aware of the facts of this dispute.
118. DW 3 informed the Honourable Court that he has known the Plaintiff for over 40 years.
119. According to DW 3, the Plaintiff was residing in an area known as Enkutoto and was allocated the property known as LR.No. Transmara/Moita/208.
120. Consequently therefore, the Plaintiff started occupying the property known as LR.No. Transmara/Moita/198 after he purchased a portion of it from DW 2.
121. There was no re-examination to DW 3 and the witness was discharged thereafter.
122. The fourth Defence witness was Lemuso John Teleu (DW4).
123. DW 4 began his testimony was confirming that he knows both the Plaintiff and the Defendant.
124. DW 4 stated that the Defendant is the registered owner of the property known as LR.No. Transmara/Moita/199.
125. DW 4 testified that he resides on the property known as LR.No. Transmara/Moita/199 on instructions and/or authority of the Defendant who is his employer.
126. DW 4 confirmed before the Honourable Court that he is the only person in occupation and use of the property known as LR.No. Transmara/Moita/199.
127. DW 4 further affirmed that the property known as LR.No. Transmara/Moita/199 is used to rear cattle for the Defendant and well as his personal cattle.
128. DW 4 informed the Honourable Court that unfortunately, the Plaintiff attempted to enter the property known as LR.No. Transmara/Moita/199 but he was arrested and criminal charges preferred against him.
129. In concluding his evidence in chief, DW 4 reaffirmed that he is the only person who resides on the property known as LR.No. Transmara/Moita/199.
130. On cross-examination, DW 4 stated that he has been in occupation of the property known as LR.No. Transmara/Moita/199 for over 20 years.
131. DW 4 confirmed that the Plaintiff resides on the property known as LR.No. Transmara/Moita/198.



132. Further to that, DW 4 reiterated that the boundary between LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 is well demarcated by boundary markings/beacons.
133. DW 4 stated that the Plaintiff stated occupying the property known as LR.No. Transmara/Moita/198 not so long ago.
134. On re-examination, DW 4 confirmed that he was an employee of the Defendant and had been authorised to occupy the property known as LR.No. Transmara/Moita/199.
135. According to DW 4, the property known as LR.No. Transmara/Moita/199 is well demarcated.
136. At the end of this re-examination, DW 4 was discharged from the witness box and the Defence closed its case as well.
137. Parties were thereafter directed to prepare, file and exchange their submissions thereof.
138. The Plaintiff unfortunately did not file any submissions as directed by this Honourable Court on the 14.12.2023.
139. On the other hand, the Defendant prepared and filed their submissions on the 24.01.2024.
140. Similarly, the Sub-County Land Registrar, Transmara East, West and South filed a Ground Report on the 14.12.2023 to confirm the location and/or manner in which occupation existed between the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199.
141. Indeed, this Honourable Court has perused the pleadings herein, the evidence by the parties and their witnesses and the documents produced and the submissions.
142. The issue at hand is whether or not the Plaintiff has satisfied the ingredients of a claim under Adverse possession.
143. A claim for land under Adverse Possession is usually founded under Section 7 of the Limitation Act, Cap 22 as well as Section 37 and 38 therein.
144. Within our Kenyan Jurisdiction, many courts have considered claims of adverse possession and it can now be said that the ingredients of this claim are settled.
145. Making reference to the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the ingredients of adverse possession were stated to be 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*.”

146. In another case of Civil Application No.110 Of 2016 Between Richard Wefwafwa Songoi v Ben Muniyifwa Songoi [2020] eKLR, the Court of Appeal simplified the principles for consideration in a claim of adverse possession as follows; -
 - a. On what date he came into possession.
 - b. What was the nature of his possession.
 - c. Whether the fact of his possession was known to the other party.



- d. For how long his possession has continued and
 - e. That the possession was open and undisturbed for the requisite 12 years.
147. On the guidance of the two above authorities, this Honourable Court will now proceed to evaluate the various principles and ingredients of adverse possession against the evidence presented by the parties herein.

Ingredient No. 1- On What Date Did The Plaintiff Take Possession?*

148. The first ingredient when considering a claim of adverse possession is to establish whether the claimant is in actual possession and if positive, which is the possible date that such a claimant took possession thereof.
149. In this present O.S, the Plaintiff states that he has been in occupation of the property known as LR.No. Transmara/Moita/199 even before Adjudication of Moita Adjudicatio Section.
150. The Plaintiff who testified as PW 1 indicated that he was actually recorded as the beneficial owner of Parcel No. 199 within Moita Adjudicatio Section.
151. However, the Plaintiff did not present the relevant Adjudication Record for Parcel No. 199 within Moita Adjudication Section to confirm the said recording of this occupation on the said land.
152. On the other hand, during cross -examination, the Plaintiff changed his testimony and alleged that the Parcel No. 199 within Moita Adjudication Section was allocated to someone else.
153. However, after the completion of the Adjudication Record, the Plaintiff lodged an objection against the person who had been recorded as the beneficial owner of Parcel No. 199 within Moita Adjudicatio Section.
154. Once again, the Plaintiff did not have any record to show that indeed such an Objection was ever filed and/or received by the Land Adjudication Officer.
155. The Plaintiff's witnesses known as PW 2 and PW 3 stated that the Plaintiff has been living in the same place for the last 20 years.
156. However, both PW 2 and PW 3 were not sure whether the Plaintiff's homestead was within the property known as LR.No. Transmara/Moita/198 or LR.No. Transmara/Moita/199.
157. What the Plaintiffs' witnesses specifically emphasized on was that the Defendant was not a resident on the area and not in actual occupation of the property known as LR.No. Transmara/Moita/199.
158. On the other hand, the Defendant reaffirmed that he is the registered owner of the property known as LR.No. Transmara/Moita/199 with a Certificate of Title issued in the year 2019.
159. The Defendant stated that he is in occupation of the property known as LR.No. Transmara/Moita/199 through his employee who is DW 4.
160. DW 4 confirmed that indeed the property known as LR.No. Transmara/Moita/199 belongs to the Defendant who is in occupation of the same.
161. DW 4 indicated that the Defendant's occupation on the property known as LR.No. Transmara/Moita/199 by way of cattle keeping.
162. DW 4 further stated that his occupation on the property known as LR.No. Transmara/Moita/199 is on behalf and with the authority of the Defendant has been ongoing for the last 20 years.



163. DW 4 reiterated that the Plaintiff is not in occupation of the property known as LR.No. Transmara/Moita/199 or any portion thereof as alleged by the Plaintiff.
164. DW 2 who is the registered owner of the property known as LR.No. Transmara/Moita/198 further collaborated the evidence of the Defendant and DW 4.
165. DW 2 admitted to have sold apportion of the property known as LR.No. Transmara/Moita/198 to the Plaintiff herein in the year 2015.
166. Upon execution of this Agreement For Sale, the Plaintiff took possession of a portion within LR.No. Transmara/Moita/198 and his occupation is within the property known as LR.No. Transmara/Moita/198.
167. DW 2 informed the Honourable Court that the boundary markings between the properties known as LR.No. Transmara/Moita/198 and LR.No. Transmara/Moita/199 are well established on the ground and there is no dispute about it.
168. Section 107(1) and (2) of the *Evidence Act*, Cap 80 provides as follows; -
 - “(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any facts it is said the burden of proof lies on that person.”
169. The plain and simply understanding of the above proviso is that he/she who alleges must proof.
170. In the present O.S, the Plaintiff has the burden to proof that he is in actual occupation of the property known as LR.No. Transmara/Moita/199 and give the appropriate date upon which he entered the said property.
171. According to this evidence, the Plaintiff was not sure whether he is in occupation of the property known as LR.No. Transmara/Moita/199 or in LR.No. Transmara/Moita/198.
172. Occupation and/or possession requires to be proofed by the existence of structures, developments and/or use of the land.
173. Unfortunately, the Plaintiff herein did not present any evidence by way of pictures and/or other documentary evidence to confirm that he is in the property known as LR.No. Transmara/Moita/199.
174. The two Plaintiffs ‘witnesses did not make matter any better as they were not sure whether the Plaintiff was in occupation of LR.No. Transmara/Moita/198 or LR.No. Transmara/Moita/199.
175. On the other hand, the Defendant and his witnesses all confirmed that the Plaintiff is not in occupation of LR.No. Transmara/Moita/199.
176. DW 2 who is still the registered owner of LR.No. Transmara/Moita/198 and is the one that sold a portion of it to the Plaintiff specifically stated that the Plaintiff is in occupation of LR.No. Transmara/Moita/198 and not LR.No. Transmara/Moita/199.
177. DW 4 who is the employee of the Defendant also reiterated this fact that he is the only occupant on the property known as LR.No. Transmara/Moita/199 with the consent and/or authority of the Defendant.



178. The Sub-County Land Registrar's Ground Report dated 13.12.2023 similarly makes a finding that indeed, the Plaintiff's homestead is in the property known as LR.No. Transmara/Moita/198 and not LR.No. Transmara/Moita/199.
179. It is therefore clear and without any doubt that the Plaintiff herein is not in occupation of the property known as LR.No. Transmara/Moita/199 and there is no entry into the said property as alleged.
180. In other words, the Plaintiff herein fails to prove this initial and fundamental ingredient of adverse possession.

Ingredients 2,3,4 & 5

181. The Honourable Court having made a finding that the Plaintiff did not make any entry and/or take possession of the property known as LR.No. Transmara/Moita/199, then the remaining ingredients can not come into play as they are dependent on the actual entry and occupation of the Plaintiff hence also fail at this instance.

Conclusion.

182. In conclusion thereof, this Honourable Court hereby makes the following Orders in determination of the Originating Summons dated 18.07.2018; -
- a. The Originating Summons Dated 18.07.2018 Is Not Merited.
 - b. The Originating Summons Dated 18.07.2018 Be And Is Hereby Dismissed Forthwith.
 - c. The Plaintiff Will Bear The Costs Of The Said Originating Summons.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 11TH MARCH 2024.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Mr. Ngeno

Advocate for The Plaintiff: Mr. Andayi(N/A)

Advocate For The Defendant: Mr. Shira

