



**Tiyo v Sire & another (Environment & Land Case 3 of 2022)  
[2023] KEELC 162 (KLR) (16 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 162 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE 3 OF 2022  
EM WASHE, J  
JANUARY 16, 2023**

**BETWEEN**

**MALAKWEN OLE TIYO ..... PLAINTIFF**

**AND**

**PHILIP YIAMPOI SIRE ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL KILUSU NKUTUNI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein filed an Originating Summons dated February 9, 2018 (hereinafter referred to as “the present suit”) seeking to be declared as the registered proprietor of Parcel No Transmara/ Isampin/658 through the provisions of section 7 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
2. The present suit is supported by the Affidavit of the Plaintiff sworn on the February 9, 2018 together with the annexures thereto.
3. The present suit was duly served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant opposed the present suit by filing Grounds of Oppositions dated July 17, 2018, a List of witnesses dated 13<sup>th</sup> August 2018 together with the witness statements thereof and lastly a List of Documents dated August 13, 2018 together with copies of the documents thereof.
5. On the 28<sup>th</sup> of September 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a List of Issues for determination.
6. The hearing of the present suit began on the 20/06/2022 with the evidence of the Plaintiff as Plaintiff Witness No.1.



7. The Plaintiff who introduced himself as a resident of Isampin area indicated that he had come to testify about the property known as LR No Transmara/Ismapin/431 (hereinafter referred to as “the suit property”)
8. The Plaintiff informed the Court that he had lived on the land for the last 30 years and has built his home there.
9. However, the Plaintiff stated that his occupation was recently interrupted by Daniel Kilusu Nkutuni.
10. Consequently therefore, the Plaintiff sought the court to issue an order allowing him to continue occupying the suit property because it was his property.
11. The Plaintiff thereafter proceeded to produce a number of Exhibits to confirm his occupation and developments he had undertaken on the suit property which are outlined below; -
  - a. Plaintiff’s Exhibit No 1- Pictures of the developments built on the suit property.
  - b. Plaintiff’s Exhibit No 2- A certified Copy of the Green Card of the suit property.
  - c. Plaintiff’s Exhibit No 3- A Letter dated 13/09/2017 from the Plaintiff’s Counsel to the 2<sup>nd</sup> Defendant.
  - d. Plaintiff’s Exhibit No 4- A copy of an official postal search of the suit property issued on the March 9, 2017.
  - e. Plaintiff’s Exhibit No 5- a copy of the Green Card of the property LR No Transmara/ Isampin/658.
12. The Plaintiff in closing his evidence in chief also prayed for costs of the suit.
13. In cross-examination, the Plaintiff reiterated that he had occupied the suit property for a period of about 30 years.
14. The Plaintiff nevertheless admitted that he has never been issued with a title to the suit property.
15. The Plaintiff further stated that he is in occupation of the entire suit property and utilises the same for his benefit.
16. The Plaintiff indicated that he sued the 1<sup>st</sup> Defendant because he is the one who had sold him the suit property.
17. The Plaintiff informed the Court that there was a mutual understanding that the 1<sup>st</sup> Defendant would sell the suit property to him although it was not reduced into a written agreement.
18. According to the Plaintiff, a sum of Kshs 115,000/- was paid to the 1<sup>st</sup> Defendant although he could not remember the actually date it happened.
19. The Plaintiff stated that during the execution of the mutual agreement and payment of the consideration, a number of witnesses were present including one Mr Ole Resere or Ledama and Mr. Lemayan.
20. The Plaintiff testified that the suit property was sold to him when he was already in occupation.
21. The Plaintiff admitted being familiar with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants pleadings filed in opposition of his pleadings.



22. In terms of executing any legal documents, the Plaintiff informed the Court that he uses a signature to sign legal documents.
23. The Plaintiff stated that he knew the Advocate known as Mr Makori whose office was located in Kilgoris town.
24. The Plaintiff further stated that at one time, he visited the offices of Mr Makori, Advocate and executed an Agreement For Sale so as to be able to process the title deed to the suit property.
25. The Defence Counsel then referred the Plaintiff to the document No 10 in the Defendants List of Documents dated August 27, 2018.
26. Upon perusing the said document, the Plaintiff stated that he remembers the document referred.
27. The Plaintiff indicated that the document referred therein was an Agreement For Sale of a portion measuring 50 feet by 100 feet known as LR No Transmara/Isampin/660.
28. The Plaintiff then acknowledged the authenticity of the Agreement For Sale indicated as Item No 10 in the Defendants List of Documents dated August 27, 2018.
29. However, the Plaintiff still insisted that his claim was against the property known as LR No Transmara/Isampin/658 which was now registered in the name of the 2<sup>nd</sup> Defendant.
30. The Plaintiff was again referred to Item No 2 of the Defendants List of Documents dated August 27, 2018 which contained a Green Card of the property known as LR No Transmara/Isampin/658.
31. The Plaintiff confirmed that the said property known as LR No Transmara/Isampin/658 was in the names of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
32. Consequently therefore, this was the main reason as to why the Plaintiff filed a suit against both of them.
33. The Plaintiff indicated that he had placed a caution on the suit property claiming purchaser's interest as the same suit property had been sold to him.
34. The Plaintiff admitted that originally, the entire property was known as LR No Transmara/Isampin/431.
35. However, the suit property known as LR NO Transmara/Isampin/431 was sub-divided into three portions in the following manner; -
  - i. LR NO Transmara/Isampin/658- registered in the name of the 2<sup>nd</sup> defendant.
  - ii. LR No Transmara/Isampin/659- registered in the name of Paul Leshao Lamboi.
  - iii. LR No Transmara/Isampin/660- registered in the name of the plaintiff.
36. The Plaintiff informed the Court that during this sub-division, he was entitled to two parcels of land.
37. At the time of testifying before this Court, the Plaintiff indicated that this suit only relates to one portion which LR No Transmara/Isampin/658.
38. The second parcel of land was LR No Transmara/Isampin/660 which he was duly registered as the owner and has no claim on it.



39. The Plaintiff stated that the property measuring 50 Feet by 100 feet contained in the Agreement referred to in Item No 10 of the Defendants List of Documents is what was processed as LR No Transmara/Isampin/660.
40. The Plaintiff reiterated again that there was no Agreement For Sale executed as appertains the property known as LR No Transmara/Isampin/658 but a consideration of Kshs 115,000/- was duly paid and received by the 1<sup>st</sup> defendant.
41. The Plaintiff informed the Court that the property LR No Transmara/Isampin/660 had been sold and transferred to one Roseline Cheruto.
42. The Plaintiff indicated that the pictures produced as Plaintiff's Exhibit No 1 showed the developments confirming his occupation on the property known as LR No Transmara/Isampin/658.
43. The Plaintiff confessed that the 2<sup>nd</sup> Defendant has challenged his occupation on the property known as Transmara/Isampin/658 and requested him to vacate and hand over vacant possession.
44. The Plaintiff stated that the title deed of the suit property known as Transmara/Isampin/658 was issued in the year 2015 and the present suit was filed in the year 2018.
45. Consequently therefore, the dispute been the 2<sup>nd</sup> Defendant and the Plaintiff has been on going for about 3 years now.
46. The Plaintiff further stated that the 2<sup>nd</sup> Defendant has commenced constructing a perimeter fence around the property known as LR No Transmara/Isampin/658 thereby denying him of peaceful occupation.
47. The Plaintiff informed the Court that his efforts to tell the 2<sup>nd</sup> Defendant to remove the fence has not resulted to any positive results.
48. In re-examination, the Plaintiff stated that there was no dispute in regards to property LR No Transmara/Isampin/660.
49. The Plaintiff's position was that the property known as LR No Transmara/Isampin/658 has been occupied by him for over a period of 30 years.
50. In addition to the same, the Plaintiff indicated that he had paid a consideration for the same to the 1<sup>st</sup> Defendant and therefore it should be his property.
51. Upon conclusion of the Re-examination, the Plaintiff Counsel closed their case.
52. The Defence hearing began with the testimony of the 1<sup>st</sup> Defendant who was Philip Yiampoi Sire.
53. The 1<sup>st</sup> Defendant informed the Court that he was a farmer residing within Isampin Area.
54. The 1<sup>st</sup> Defendant further informed the Court that he had prepared a written statement and filed the same in Court on the August 27, 2018.
55. The 1<sup>st</sup> Defendant then adopted the said witness statement filed on the August 27, 2018 as his evidence in chief.
56. The 1<sup>st</sup> Defendant however further testified that he knows the Plaintiff because he had purchased a portion of land measuring approximately 50 Feet by 100 Feet from the original property known as LR No Transmara/Isampin/431.



57. The 1<sup>st</sup> Defendant indicated that the Agreement For Sale between the Plaintiff and the 1<sup>st</sup> Defendant was prepared and executed in the offices of Mr.Makori, Advocate in Kilgoris.
58. The 1<sup>st</sup> Defendant produced the Agreement For Sale dated 12/06/2016 as Defence Exhibit No 1.
59. From the Agreement For Sale dated 12/06/2016, the witnesses present was LARINKUMURA SIRE (the Vendor's wife), OLE SERE OLETIO (the plaintiff's son) and LEMAYAN TIGO (the Plaintiff's son.)
60. All the above witnesses duly executed the Agreement For Sale dated 12/06/2016.
61. The 1<sup>st</sup> Defendant informed the Court that the purchase price for the portion of 50 feet by 100 feet sold to the Plaintiff was Kshs 150,000/-.
62. As appertains the sub-division of the original property known as LR No Transmara/Isampin/431, the same was sub-divided into 3 portions and transferred to the individual owners as follows; -
  - a. LR No Transmara/isampin/658- registered in the name of the 1<sup>st</sup> defendant.
  - b. LR No Transmara/Isampin/659-registered in the name of Lesao Yamboi
  - c. LR No Transmara/Isampin/660- registered in the name of the plaintiff.
63. The 1<sup>st</sup> Defendant then produced the Green-Card of the original property known as LR No Transmara/Isampin/431 as Defence Exhibit No 2.
64. Thereafter, the 1<sup>st</sup> Defendant produced the Green Cards of the properties LR No Transmara/Isampin/658,659 and 660 as Defence Exhibits 3,4 and 5 respectively.
65. The 1<sup>st</sup> Defendant insisted that he sold one portion to the Plaintiff and not two as claimed.
66. Consequently, the Plaintiff's occupation of the property known as LR No Transmara/Isampin/658 is illegal and unlawful.
67. The 1<sup>st</sup> Defendant stated that the property known as LR No Transmara/Isampin/658 belongs to the 2<sup>nd</sup> Defendant having properly purchased the same and duly transferred it to his name.
68. In other words, the 1<sup>st</sup> Defendant informed the Court that the Plaintiff lied when said that property known as L.R.NO. Transmara/Isampin/658 was sold to him.
69. As to occupation, the 1<sup>st</sup> Defendant testified that the Plaintiff trespassed and occupied the property known as LR No Transmara/Isampin/658 in the year 2016 and can only claim occupation for a period of 2 or 3 years only.
70. In conclusion thereof, the 1<sup>st</sup> Defendant prayed to the Court that the Plaintiff's suit be dismissed with costs.
71. In cross-examination, the 1<sup>st</sup> Defendant indicated that he has a valid Agreement For Sale with the Plaintiff executed in the year 2016.
72. The 1<sup>st</sup> Defendant stated that the Plaintiff currently resides in Olalui although the houses produced as Plaintiff's Exhibit No. 1 still are on the ground.
73. The 1<sup>st</sup> Defendant insisted that the houses produced as Plaintiff's Exhibit No. 1 were put up in the year 2016.



74. During the construction of the houses shown in the Plaintiff's Exhibit No 1, the 1<sup>st</sup> Defendant informed the Plaintiff that he had trespassed on another person's property and is when he filed this present suit.
75. In re-examination, the 1<sup>st</sup> Defendant informed the Court that there was a meeting to discuss the Plaintiff unlawful occupation on the 2<sup>nd</sup> Defendant's property LR No Transmara/Isampin/658.
76. During this meeting, the 1<sup>st</sup> Defendant stated that the Plaintiff duly acknowledged his mistake but instead of removing the structures on property LR No Transmara/Isampin/658, he decided to institute these proceedings.
77. In the 1<sup>st</sup> Defendant's testimony, the structures built by the Plaintiff on the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658 are not occupied by anyone as the Plaintiff lives in Ololui.
78. In essence therefore, the Plaintiff has no legal ownership and/or occupation of the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658.
79. The 1<sup>st</sup> Defendant upon completion of the re-examination was discharged from the witness box accordingly.
80. The 2<sup>nd</sup> Defence witness to take the witness box was Daniel Kilusu Nkutuni who is also the 2<sup>nd</sup> Defendant herein.
81. The 2<sup>nd</sup> Defendant informed the Court that he was an Accounts Consultant based in Nairobi.
82. The 2<sup>nd</sup> Defendant confirmed to the Court that he is familiar with both the Plaintiff and the 1<sup>st</sup> Defendant.
83. The 2<sup>nd</sup> Defendant testified that he had prepared a witness statement dated August 13, 2018 which was filed in Court on the August 27, 2018.
84. Consequently therefore, the 2<sup>nd</sup> Defendant requested the Court to adopt the same as his evidence in chief.
85. The 2<sup>nd</sup> Defendant further testified that his presence in Court was based on the fact that he had purchased the property known as LR No Transmara/Isampin/658.
86. The title deed to the property known as LR No Transmara/Isampin/658 was lawfully processed and issued on the April 21, 2015.
87. Upon issuance of the title deed to the property known as LR No Transmara/Isampin/658, the 2<sup>nd</sup> Defendant took possession and occupation of the same in the year 2018.
88. According to the 2<sup>nd</sup> Defendant's testimony, initially when the original property known as LR No Transmara/Isampin/431 was in existence, there were various structures belonging to different people that have been build without any boundary restrictions.
89. Thereafter, when the sub-division was done, some of the structures were found to be on other people's portions and/or properties.
90. However, all the structures on the original property known as LR No Transmara/Isampin/431 were temporary with some being occupied by tenants.
91. The 2<sup>nd</sup> Defendant informed the Court that the Plaintiff was not residing on these temporary structures.



92. The 2<sup>nd</sup> Defendant further stated that at the time of sub-division, all the purchasers including the Plaintiff were present and shown their portion.
93. However, then the Plaintiff was approached to remove the temporary structures which were on the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658, he instituted the present suit.
94. The 2<sup>nd</sup> Defendant produced a copy of the Green Card of the property known as LR No Transmara/Isampin/658 as Defence Exhibit No 6 to confirm his ownership.
95. The 2<sup>nd</sup> Defendant confirmed to be in receipt of the Demand Letter dated September 13, 2017.
96. However, the 2<sup>nd</sup> Defendant denied that the Plaintiff has occupied the property known as LR No Transmara/Isampin/658 for a period of 30 years.
97. The 2<sup>nd</sup> Defendant stated that the structures on the property known as LR No Transmara/Isampin/658 were built in the year 2016 without his consent and/or authority.
98. The 2<sup>nd</sup> Defendant therefore prayed that the present suit be dismissed with costs.
99. In addition to the above, the 2<sup>nd</sup> Defendant sought for costs for his lost materials and income thereof.
100. In cross-examination, the 2<sup>nd</sup> Defendant stated that he was a purchaser of the property known as LR No Transmara/Isampin/658.
101. The 2<sup>nd</sup> Defendant stated that both the Plaintiff and himself purchased their respective portion in the year 2016.
102. The 2<sup>nd</sup> Defendant stated that his building materials were stolen from the site and he reported the theft at the local police station.
103. As regards the caution placed by the Plaintiff, the 2<sup>nd</sup> Defendant informed the Court that he learnt about it in the year 2017.
104. Nevertheless, the 2<sup>nd</sup> Defendant reiterated that there are structures put up by the Plaintiff in his property known as LR No Transmara/Isampin/658.
105. In re-examination, the 2<sup>nd</sup> Defendant reiterated that the structures built on his property known as LR No Transmara/Isampin/658 were illegal and unlawful.
106. In addition to the above, the 2<sup>nd</sup> Defendant indicated that the Plaintiff has not challenged the legality of the property known as LR No Transmara/Isampin/658.
107. The 2<sup>nd</sup> Defendant thereafter concluded his evidence and was discharged from the witness box.
108. The 3<sup>rd</sup> Defence witness was one Nariku Ilmuran Sire.
109. The 3<sup>rd</sup> Defence witness informed the Court that he is a farmer and residing at Shankoe area.
110. The 3<sup>rd</sup> Defence witness stated that he was one of the witnesses in the Agreement between the Plaintiff and the 1<sup>st</sup> Defendant.
111. According to his recollection, the consideration paid by the Plaintiff to the 1<sup>st</sup> Defendant was a sum of KShs 150,000/-.
112. The 3<sup>rd</sup> Defence witness testified that the 1<sup>st</sup> Defendant sub-divided the original property known as LR No Transmara/Isampin/431 into 3 portions which were LR No Transmara/Isampin/658,656 and 660.



113. The 3 portions were then transferred to the purchasers as follows; -
  - a. LR No Transmara/Isampin/658- registered to the 2<sup>nd</sup> defendant.
  - b. LR No Transmara/Isampin/659- registered in the name of Paul Yamboi
  - c. LR No Transmara/Isampin/660-registered in the name of the plaintiff.
114. The 3<sup>rd</sup> Defence witness informed the Court that the property known as LR No Transmara/Isampin/658 is occupied by the 2<sup>nd</sup> Defendant and not the Plaintiff.
115. On the ground, the structures constructed by the Plaintiff on the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658 are not occupied by anyone.
116. Consequently therefore, the 3<sup>rd</sup> Defence witness was of the view that the Plaintiff did not have any claim on the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658.
117. The 3<sup>rd</sup> Defence witness testified that the property which was sold to the Plaintiff was LR No Transmara/Isampin/660 which he has since sold it to other people.
118. In cross-examination, the 3<sup>rd</sup> Defence witness confirmed that he was present during the sub-division of the original property known as LR No Transmara/Isampin/431.
119. In addition to the above, the 3<sup>rd</sup> Defence witness stated that he was one of the witnesses to the Agreement For Sale between the Plaintiff and the 1<sup>st</sup> Defendant.
120. The 3<sup>rd</sup> Defence witness confirmed that the temporary structures built by the Plaintiff were within the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658.
121. The 3<sup>rd</sup> Defence witness nevertheless indicated that he did not participate in the process of the sub-division.
122. The 3<sup>rd</sup> Defence witness stated that he was testifying as the 1<sup>st</sup> Defence witness.
123. In re-examination, the 3<sup>rd</sup> Defence witness confirmed that he was one of the witnesses in the Agreement For Sale between the Plaintiff and the 1<sup>st</sup> Defendant.
124. During the sub-division, the 3<sup>rd</sup> Defence witness testified that every purchaser was shown his portion and boundary.
125. The 3<sup>rd</sup> Defence witness stated that he has no interest in these proceedings because he is not a beneficiary of the 1<sup>st</sup> Defendant's property.
126. At the end of the re-examination, the Defence closed their case.
127. The Court thereafter directed parties file their written submissions which indeed took place with the Plaintiff filing theirs on September 15, 2022.
128. The Court having carefully considered the pleadings filed herein, the oral evidence adduced in Court and the documentary evidence produced therein, the main issues for determination in the present suit are as follows; -

Issue No A- Is the plaintiff's claim of adverse possession against a portion of LR No Transmara/Isampin/431 owned by the 1<sup>st</sup> defendant merited?

Issue No B- Is the plaintiff's claim of adverse possession against the 2<sup>nd</sup> defendant on the property known as LR No Transmara/Isampin/658 merited?



Issue No C- Is the plaintiff entitled to the prayers sought in the originating summons dated February 9, 2018?

Issue No D- Who bears the costs of this suit?

129. The issues for determination having been outlined hereinabove, the Court hereby shall evaluate the same as provided hereinbelow; -

**Issue No A- Is the Plaintiff's Claim of Adverse Possession Against A Portion of LR No Transmara/Isampin/431 Owned by the 1<sup>st</sup> Defendant Merited?**

130. The Plaintiff's position is that he was in occupation of a portion within the original property known as LR No Transmara/Isampin/431 for a period of or exceeding 12 years before the same was sub-divided.

131. The sub-division of the original property known as LR No Transmara/Isampin/431 is what created three properties namely LR No Transmara/Isampin/658, 659 and 660.

132. The Plaintiff's pleadings as well as the evidence produced at the hearing point to the view that the claim for adverse possession begins during the ownership of the property known as LR No Transmara/Isampin/431 by the 1<sup>st</sup> Defendant.

133. Consequently therefore, the subsequent creation of the property known as LR No Transmara/Isampin/658 which was then transferred to the 2<sup>nd</sup> Defendant was irregular and/or illegal due to the Plaintiff's occupation for a period of or exceeding 12 years.

134. The doctrine of adverse possession is expressly provided for under section 7 of the *Limitation of Actions Act*, cap 22 laws of Kenya.

“ An action may be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person ”

135. The plaintiff in his pleadings and oral testimony in court claimed that he had been in occupation of a portion of the original property known as LR No Transmara/Isampin/431 for over 30 years.

136. On the other hand, the 1<sup>st</sup> Defendant denied this allegation and testified that the Plaintiff accessed a portion of the original property known as LR No Transmara/Isampin/431 to put up some temporary structures.

137. However, upon execution an Agreement For Sale on the February 12, 2016 between the Plaintiff and the 1<sup>st</sup> Defendant, the Plaintiff was allocated and transferred the property known as LR No Transmara/Isampin/660.

138. mutual understanding was that any temporary structures which would be in any other portion and/or property that did not belong to the Plaintiff were to be removed and/or relocated to the portion and/or property owned by the Plaintiff.

139. Unfortunately, the Plaintiff's temporary structures being within the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658 should be removed.

140. Looking at the Green Card of the original property known as LR No Transmara/Isampin/431 the Court confirms that the 1<sup>st</sup> Defendant's ownership took effect from July 20, 2000.



141. Thereafter, the said Green Card of the original property known as LR No Transmara/Isampin/431 was closed on the April 30, 2015.
142. However, has the Plaintiff provided sufficient evidence to proof that he had been in occupation of any portion of the original property known as LR No Transmara/Isampin/431 during the ownership of the 1<sup>st</sup> Defendant?
143. Evaluating the evidence tendered by the Plaintiff at the hearing and the Plaintiff's Exhibit No 1 which are the pictures of the temporary houses built on the property known as LR No Transmara/Isampin/658, the Court is not persuaded that the Plaintiff has sufficiently proved occupation on the original property known as LR No Transmara/Isampin/431 for a period of 30 years.
144. First and foremost, the Plaintiff failed to specifically identify the date or year that he openly entered and occupied the original property known as LR No Transmara/Isampin/431.
145. A perusal of the Green Card of the original property known as LR No Transmara/Isampin/431 shows that the 1<sup>st</sup> Defendant was the 1<sup>st</sup> registered owner of the said property.
146. In other words, prior to the July 20, 2000 when the Green Card of the original property known as LR No Transmara/Isampin/431 was created, the said property belonged to the Government of Kenya and therefore computation of time for purposes of adverse possession cannot apply before July 20, 2000.
147. As to the period after July 20, 2000 when the Green Card was issued in favour of the 1<sup>st</sup> Defendant, the Plaintiff has not provided credible evidence of either entry and/or occupation thereof.
148. The only evidence the Plaintiff has produced before the Court are photographs of temporary houses which are erected on the property known as LR No Transmara/Isampin/658.
149. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant have testified that these temporary structures were constructed in the year 2016 after the Plaintiff had purchased a portion of 50 Feet by 100 Feet identified as the LR No Transmara/Isampin/660 through the Agreement For Sale dated 12<sup>th</sup> February 2016
150. Unfortunately, at the time the Plaintiff was constructing these temporary structures, the original property known as LR No Transmara/Isampin/431 had not been demarcated and sub-divided into the three portions known as Transmara/Isampin/658, 659 and 660.
151. It is only after the demarcation and sub-division was complete, it was discovered that the Plaintiff's temporary structures were actually within the 2<sup>nd</sup> Defendant's property known as LR No Transmara/Isampin/658.
152. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants efforts to amicably resolve the issue with the Plaintiff did not succeed and instead the Plaintiff instituted this suit.
153. The Court has taken time to look at the photographs produced by the Plaintiff and note that the houses indeed are temporary mud houses with iron sheets roofing.
154. The Pictures also show relatively new plastic water tanks used for rain water collection.
155. Nothing in these pictures demonstrate a development and/or structure that would have been in place for a period of 30 years as claimed by the Plaintiff.
156. As appertains the trees behind the temporary structures in the said pictures, the Plaintiff has not provided any proof that the same belong to him or have been in existence for the last 30 years as claimed.



157. In the court's opinion, the trees behind the temporary structures are rather young and can not have been on the ground for the claimed period of 30 years by the Plaintiff.
158. It is therefore the Court's considered view that the Plaintiff has not proved the date of entry and/or occupation of any portion of the original property known as LR No Transmara/Isampin/431 as required under section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya.
159. In addition to the above, it is clear from the evidence adduced by both parties and the Green Card of the original property known as LR No Transmara/Isampin/431 was sub-divided on the April 30, 2015 and three separate properties known as LR No Transmara/Isampin/658,659 and 660 created.
160. The closure of the original property known as LR No Transmara/Isampin/431 and creation of the three portions known as LR No Transmara/Isampin/658,659 and 660 discontinued and/or extinguished the Plaintiff's claim of adverse possession against the 1<sup>st</sup> Defendant.
161. In the case of *Wanje v Saikwa (No 2)* [1984] KLR 1984 & *Gabriel Mbui v Mukindia Manyara* [1993] eKLR, the court held as follows; -
- “Discontinuous use on the other hand consists in the owner giving up, ceasing to use, abandonment of the land and cessation of occupation followed by another taking up possession.”
162. The 1<sup>st</sup> Defendant having sub-divided and sold off the portion to other persons who took possession thereof, then any claim of adverse possession being claimed by the Plaintiff were discontinued forthwith.

**Issue No B- Is the Plaintiff's Claim of Adverse Possession Against the 2<sup>nd</sup> Defendant on the Property Known as LR No Transmara/Isampin/658 Merited?**

163. The second issue of determination is whether or not the Plaintiff has a valid claim against the 2<sup>nd</sup> Defendant who is the registered owner of the property known as LR No Transmara/Isampin/658.
164. The 2<sup>nd</sup> Defendant indicated that he purchased the said property in 2015 from the 1<sup>st</sup> Defendant and was issued with a title on the April 21, 2015.
165. The Plaintiff on the other hand entered and/or constructed the temporary structures in the year 2016.
166. Consequently therefore, at the time of filing this suit, the period of 12 years for one to institute proceedings of adverse possession had not lapsed.
167. The 2<sup>nd</sup> Defendant also denied that the Plaintiff had been in occupation of the property known as LR No Transmara/Isampin/658.
168. Indeed, looking at the Green Card of the property known as LR No Transmara/Isampin/658, it is clear that the 2<sup>nd</sup> Defendant became the owner on the April 21, 2015.
169. Consequently therefore, any claim of adverse possession by the Plaintiff against the 2<sup>nd</sup> Defendants as regards the property known as Transmara/Isampin/658 can only arise after the lapse of 12 years from the April 21, 2015.
170. In essence therefore, at the time of filing the present suit on the 8<sup>th</sup> February 2018 the same was premature and therefore this court lacks jurisdiction to entertain this claim.



**Issue No C- Is the Plaintiff Entitled to the Prayers Sought in the Originating Summons Dated February 9, 2018?**

171. The plaintiff having failed to meet the threshold of a claim for adverse possession in both Issue No A and Issue No B, then it is the court's considered view that the entire originating summons dated February 9, 2018 is not merited.

**Issue No. D- Who Bears the Costs of this Suit?\***

172. The court is of the considered view that the costs of this suit should follow the outcome of the suit.

173. In conclusion therefore, the court hereby makes the following orders as appertains the originating summons dated February 9, 2018; -

- A. The originating summons dated February 9, 2018 be and is hereby dismissed.
- B. The costs of the proceedings shall be borne by the plaintiff.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 16<sup>TH</sup> JANUARY, 2023.**

**EMMANUEL M WASHE**

**JUDGE**

**In The Presence Of:**

Court Assistant: Ngeno

Advocates for the plaintiff: Mr Kiruti Holding Brief

Njiri

Advocates for the defendants: Mr Kilele

