



**Oyaya & 2 others v Oyugi & 4 others (Environment & Land Case
5 of 2023 & Environmental and Land Originating Summons 14 of 2021
(Consolidated)) [2025] KEELC 201 (KLR) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 201 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 5 OF 2023 & ENVIRONMENTAL AND
LAND ORIGINATING SUMMONS 14 OF 2021 (CONSOLIDATED)**

SO OKONG'O, J

JANUARY 27, 2025

(FORMERLY KISUMU ELC NO. 25 OF 2014 AND WINAM SPMC NO. 47 OF 2018)

BETWEEN

CHARLES OMONDI OYAYA 1ST PLAINTIFF

MARY WARINDA ALOO 2ND PLAINTIFF

AND

SILPER ODETE OYUGI DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 14 OF 2021

BETWEEN

SILPER ODETE OYUGI APPLICANT

AND

CHARLES OMONDI OYAYA 1ST RESPONDENT

MARY WARINDA ALOO 2ND RESPONDENT

LOICE ANYANGO WAYODI 3RD RESPONDENT

DANIEL ODIWOR WAYODI 4TH RESPONDENT

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF PETER ODIWOR
WAYODI**



JUDGMENT

1. This judgment is in respect of two consolidated suits, ELC No. 5 of 2023(formerly Winam SPMCC NO. 47 of 2018 and Kisumu ELC No. 25 of 2014), and ELC No. 14 of 2021(O.S).

ELCC No. 5 of 2023

2. The Plaintiffs in this suit, Charles Omondi Oyaya and Mary Warinda Aloo sued the Defendant, Silper Odete Oyugi. The Plaintiffs averred that at all material times to the suit, they were and were still the registered proprietors of all that parcel of land known as Kisumu/Konya/5326(hereinafter referred to only as "Plot No. 5326"). The Plaintiffs averred that they acquired Plot No. 5326 in 2006 from one Peter Odiwor Wayodi. The Plaintiffs averred that on or about 27th December 2007 they tried to take possession and fence Plot No. 5326 but the Defendant and her agents or servants stopped them from doing so and threatened to use force against them should they continue with the fencing of the land.
3. The Plaintiffs averred that the suit property was the subject of an earlier dispute before the Land Disputes Tribunal in Land Disputes Case No. 25 of 2011 which Silper Odete Oyugi filed against the previous owner of Plot No. 5326, the late Peter Odiwor Wayodi and the Plaintiffs. The Plaintiffs averred that the tribunals' award was in their favour and Silper Odete Oyugi was directed to give them vacant possession of the property.
4. The Plaintiffs averred that instead of the Defendant giving them vacant possession of Plot No. 5326, the Defendant, her agents and other persons claiming through her returned to the property without their authority and continued with acts of trespass notwithstanding demands that she vacates the property and give vacant possession. The Plaintiffs averred that the Defendant was in the process of developing the property and had even fenced the same thereby denying them the use and quiet possession of the land.
5. The Plaintiffs prayed for judgment against the Defendant for; a permanent injunction restraining the Defendant whether by herself, her agents, servants or other persons claiming through her from trespassing on and /or remaining in, developing, transferring, selling, exchanging, disposing of or dealing with Plot No. 5326 in any other manner whatsoever, and an order compelling the Defendant whether by herself, her agents, servants or any other person claiming through her to vacate the property and in default, they be evicted therefrom. The Plaintiffs also sought an order for general damages for trespass to property, the costs of the suit, and interest.
6. The Defendant filed a defence on 21st February 2014. The Defendant denied the Plaintiffs' claim in its entirety. The Defendant averred that the Plaintiffs acquired the suit property illegally through collusion with Peter Odiwor Wayodi deceased who had acquired Plot No. 2589 fraudulently and caused it to be subdivided to give rise to among others, Plot No. 5326. The Defendant averred that for over 13 years that the Defendant's house had existed next to Plot No. 5326, the Plaintiffs had not raised any objection. The Defendant averred that the Plaintiffs had no right over Plot No. 5326 which resulted from the fraudulent acquisition and subdivision of Plot No. 2589. The Defendant urged the court to dismiss the Plaintiffs' suit with costs.

ELC No. 14 of 2021 (O.S)

7. This suit was brought by Silper Odete Oyugi, the Defendant in ELCC No. 5 of 2023 against Charles Omondi Oyaya and Mary Warinda Aloo, the Plaintiffs in that case, and Peter Odiwor Wayodi deceased,



by way of Originating Summons dated 15th April 2021. Peter Odiwor Wayodi was substituted in the suit with Loice Anyango Wayodi and Daniel Odiwor Wayodi who were the administrators of his estate through an amendment that was done on 23rd November 2023. For ease of reference, I will refer to Silper Odete Oyugi as “the Applicant”, Charles Omondi Oyaya and Mary Warinda Aloo as “the 1st and 2nd Respondents” and, Peter Odiwor Wayodi, deceased as “the deceased” where the context so permits. In her amended Originating Summons, the Applicant claimed to be the occupier, user and person in actual possession of all those parcels of land known as Kisumu/Konya/5326, Kisumu/Konya/5327 and Kisumu/Konya/5328 (hereinafter referred to as “Plot No. 5326, 5327 and 5328”) and sought the determination of the following questions;

1. When did the 1st and 2nd Respondents purchase Plot No. 5326 from the deceased, Peter Odiwor Wayodi?
 2. Did the 1st and 2nd Respondents purchase Plot No. 5326 or a portion of the original land parcel No. Kisumu/ Konya/2589(Plot No. 2589) and was the Applicant in actual possession of the purchased land?
 3. Whether the Applicant’s late husband one Jacob Oyugi Odongo(the Applicant’s husband) sold any land to the deceased, Peter Odiwor Wayodi particularly Plot No. 2589.
 4. Whether the deceased, Peter Odiwor Wayodi was entitled to procure the registration of Plot No. 2589 into his name in place of the late Jacob Oyugi Odongo during the adjudication process.
 5. Whether the sub-division of Plot No. 2589 was unlawful hence resultant titles being Plot No. 5326, 5327 and 5328 are deemed illegal and of no legal consequence.
 6. Whether Plot No. 2589 was the Applicant’s ancestral land and belonged to and was still the property of the Applicant’s family through her late husband Jacob Oyugi Odongo- deceased.
 7. Whether the Applicant and her family before the adjudication process at Konya Adjudication Section and thereafter had been and were still in active occupation, possession and user of Plot No. 2589 and the subsequent resultant titles being the suit properties.
 8. Whether the said active occupation, possession and user have been uninterrupted, peaceful, normal, serene, productive, and cumulatively for more than 30 years.
 9. Whether the Applicant obtained entry, possession, user and peaceful occupation of Plot No. 2589 and upon its sub-division, the resultant suit properties by virtue of her marriage to her late husband Jacob Oyugi Odongo who also inherited the same.
 10. Whether the Respondents’ proprietary rights and interest in Plot Nos. 5326, 5327 and 5328 ceased and were extinguished by the Applicant’s possession and active exclusive user of the properties for more than 30 years.
 11. Whether the Applicant had fulfilled all and singular the requirements for a declaration that the Applicant was the legitimate and an adverse possessor and had also obtained prescriptive rights over Plot No. 5326, 5327 and 5328.
8. The Applicant sought judgment against the Respondents for; a declaration that the Applicant was the legitimate adverse possessor against the proprietary interest of the 1st and 2nd Respondents over Plot No. 5326 and the deceased, Peter Odiwor Wayodi’s interest over Plot Nos. 5327 and 5328, a declaration that the deceased, Peter Odiwor Wayodi never purchased Plot No. 2589 from the Applicant’s late husband and therefore did not acquire any registrable or proprietary interest in the said parcel of land,



a declaration that the subsequent sub-division of Plot No. 2589 and the registration of resultant titles being the suit properties were of no legal consequence and the same should be deemed to belong to the Applicant, an order cancelling the sub-division of Plot No. 2589 that gave rise to the suit properties and restoration of the original Plot No.2589, and in the alternative, an order cancelling the registration of the 1st and 2nd Respondents as the proprietors of Plot No. 5326 and the deceased, Peter Odiwor Wayodi as the proprietor of Plot Nos. 5327 and 5328 and replacing their names with the name of Applicant as the registered proprietor of the said properties. The Applicant also prayed that the decree issued be served on the Kisumu County Land Registrar for compliance and for the costs of the suit and the matters incidental thereto.

9. The amended Originating Summons was supported by the affidavit of the Applicant sworn on 23rd November 2023. The Applicant averred that she got married to Jacob Oyugi Odongo deceased in Tanzania in the 1960s while he was doing some work there. The deceased took her to his home in Kajulu and they established their matrimonial home in Konya before the land adjudication process. The Applicant averred that they stayed in Tanzania for a while but they would visit their Konya home from time to time when necessary. The Applicant averred that sometime in the early 1990s, they came back and settled their family in their home in Konya. The Applicant averred that her family settled well and did not experience any problems. The Applicant averred that sometime in 2000 her husband started ailing and died thereafter in 2005 or thereabouts and was buried on the land she was occupying.
10. The Applicant averred that in 2013, she discovered that their family land namely, Plot No. 2589 was registered in the name of the deceased, Peter Odiwor Wayodi and that the deceased had caused the same to be sub-divided into three portions namely, Plot Nos. 5326, 5327 and 5328. The Applicant averred that Plot No.5326 was registered in the name of the 1st and 2nd Respondents while Plot Nos. 5327 and 5328 were registered in the name of the deceased. The Applicant averred that she reported the matter to the then Kisumu District Commissioner who referred her to the then District Officer Winam.
11. The Applicant averred that the deceased never purchased Plot No. 2589 from her late husband and therefore could not purport to be registered as a purchaser of the property for valuable consideration. The Applicant averred the deceased could not also purport to cause the same to be subdivided. The Applicant averred that she had been in active occupation of the whole of Plot No. 2589 without any interruption since the 1960s and even after the illegal and unlawful subdivision thereof. The Applicant annexed several documents to her affidavit in support of the Originating Summons.
12. The 1st and 2nd Respondents to the Originating Summons filed Notice of Preliminary Objection to the same dated 3rd August 2021. The 1st and 2nd Respondents contended that the court had no jurisdiction to entertain the application and to grant the orders sought. The 1st and 2nd Respondents contended that the application offended the provisions of Section 7, 9(1) and 39(1)(b) and 2 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The 1st and 2nd Respondents contended further that the issues raised for determination in the Originating Summons had already been raised in Winam SPMCC NO. 47 of 2018(formerly Kisumu ELC No. 25 of 2014). The 1st and 2nd Respondents termed the application bad in law, vexatious and an abuse of the court process. The court was urged to dismiss or strike out the same with costs.
13. In opposition to the Originating Summons, the 3rd and 4th Respondents who were the administrators of the estate of Peter Odiwor Wayodi, deceased filed a replying affidavit dated 10th April 2024 sworn by the 3rd Respondent Loice Anyango Wayodi. The 3rd Respondent averred that her deceased husband Peter Odiwor Wayodi bought Plot No. 2589 from Oyugi Odongo also deceased in 1978. The 3rd Respondent averred that the agreed purchase price of Kshs.7,500/- was paid in full to Oyugi Odongo. The 3rd Respondent averred that her late husband Peter Odiwor Wayodi was registered as the proprietor



of Plot No. 2589 on 14th March 1991 and a title deed was issued to him for the said plot on 3rd June 1991. The 3rd Respondent averred that in 2005, her late husband subdivided Plot No. 2589 into three portions and disposed of one of them, Plot No. 5326 to the 1st and 2nd Respondents. The 3rd Respondent averred that Oyugi Odongo migrated to Tanzania where he lived and died in 2005 or thereabouts. The 3rd Respondent averred that the Applicant was estopped from denying the transaction between Oyugi Odongo and Peter Odiwor Wayodi which they performed during their lifetime.

14. The 3rd Respondent averred that contrary to the allegation by the Applicant that she had been in an uninterrupted occupation of the disputed parcels of land, such occupation was with the consent of the 3rd Respondent's late husband.
15. The 3rd Respondent averred that the Applicant had not discharged the burden of proof that was upon her by specifically identifying or even describing the portion of the larger Plot No. 2589 that she was claiming. The 3rd Respondent averred that the Applicant had not satisfied the requirements for the grant of the orders sought.

The evidence

16. By the time ELC No. 14 of 2021(O.S) was filed on 16th April 2021, ELC No. 5 of 2023 (formerly Winam SPMCC No. 47 of 2018 and Kisumu ELC No. 25 of 2014) was part heard in the lower court. The Plaintiffs in the case had already testified and closed their case and the Defendant in the case had given evidence and was to call more witnesses. On 18th July 2022, this court (Ombwayo J.) ordered that Winam SPMCC No. 47 of 2018(formerly Kisumu ELC No. 25 of 2014) be transferred to this court and consolidated with ELC No. 14 of 2021. Winam SPMCC No. 47 of 2018(formerly Kisumu ELC No. 25 of 2014) was transferred to this court and given its current case number, ELC No. 5 of 2023. On 19th October 2022, the court directed that ELC No. 5 of 2023 would be the lead file. The court re-opened both parties' cases in ELC No. 5 of 2023 and gave the Plaintiffs in the suit the liberty to call witnesses in response to the adverse possession claim by the Defendant in that suit, in ELC No. 14 of 2021(O.S). The court also gave liberty to the Defendant in ELC No. 5 of 2023/Applicant in ELC No. 14 of 2021(O.S) the liberty to give further evidence and call witnesses in proof of her adverse possession claim. The 3rd Respondent in ELC No. 14 of 2021(O.S) was given the liberty to give evidence in his defence.
17. When the consolidated suits came up for hearing before this court on 30th April 2024, the advocates for the Plaintiffs in ELC No. 5 of 2023 informed the court that the Plaintiffs wished to rely entirely on the evidence they had tendered before the lower court in proof of their case in ELC No. 5 of 2023 and in opposition to the adverse possession claim in ELC No. 14 of 2021(O.S). ELC No. 5 of 2023 was therefore closed with the evidence on record and the defendant in the suit was allowed to give further evidence in proof of her adverse possession claim in ELC No. 14 of 2021(O.S). The 3rd Respondent in ELC No. 14 of 2021(O.S) was also allowed to give evidence in his defence in the suit.
18. Evidence given in ELC No. 5 of 2023 (formerly Winam SPMCC NO. 47 of 2018 and Kisumu ELC No. 25 of 2014), and ELC No. 14 of 2021(O.S)
19. The 1st Plaintiff in ELC No. 5 of 2023/ 1st Respondent in ELC No. 14 of 2021(O.S) Charles Omondi Oyaya gave evidence before the lower court as PW1. He stated as follows: He was looking for a parcel of land to buy in Kisumu. In 2004, One, Osborne Mabalalu introduced him to the deceased, Peter Odiwor Wayodi who had land to sell. Before purchasing the land from the deceased, he did due diligence on the land. They visited the land at Riat. The land was about 2 acres and it was vacant. The deceased agreed to sell to him a portion of the land. He conducted a search on the land in June 2005. The search



- indicated that the land parcel Kisumu/Konya/2589(Plot No. 2589) belonged to the deceased, Peter Odiwor Wayodi. He produced a copy of the search as P.EXH. 1. He entered into an agreement of sale with the deceased. The deceased undertook to survey and subdivide the land. He produced the agreement of sale dated 5th June 2005 as P.EXH.2.
20. They applied for the Land Control Board's consent and obtained the same after which the portion of land that had been sold to him; that is Plot No. 5326 was transferred and registered in his name. He was thereafter issued with a title deed. He produced the application for Land Control Board consent, the consent, and the title deed as P.EXH.3, P.EXH. 4 and P.EXH.5 respectively. He stated that he did an official search after the transaction which confirmed that the land was registered in his name. He produced a copy of the certificate of official search as P.EXH.6.
 21. PW1 stated that from 2006 when he acquired the property until 2011 when he learnt of the Defendant's claim over the property, he never received any complaint from anyone concerning the land. He stated that in 2011 he was joined as an Interested Party in an application made to the Land Disputes Tribunal by the Defendant in Tribunal Case No. 25 of 2011.
 22. PW1 stated that they visited Plot No.5326 on 24th December 2013 and found the land that was owned by the deceased, Peter Wayodi being fenced and there were people on site. He informed the deceased who told him that he was not aware of the fencing exercise. He stated that on his land, they found a latrine that was being dug and there were people excavating stones. The people on the site told him that the land owned by Peter Wayodi had already been sold and that their land was in the process of being sold. The people on site told him that the sale was being conducted on behalf of the Defendant, Silper Odete Oyugi who was alleged to be the owner of the land. He stated that he reported the matter at Kondele Police Station in January 2014 under OB No. 54/15/01/2014.
 23. The Plaintiff's next witness was Kepha Opiyo Odado(PW2). PW2 stated that PW1 called him on 27th December 2013 and gave him the work of fencing PW1's land. He cleared the land with the assistance of a friend. While undertaking the exercise, people came claiming that they were taking the Defendant's land. He informed PW1 of the incident. He stated that before that he had visited the Defendant in her house and the Defendant had told him that he had no problem with PW1.
 24. The Plaintiffs' last witness was the deceased, Peter Odiwor Wayodi(PW3). PW3 stated as follows: He owned Plot No. 2589. He subdivided Plot No. 2589 into two portions and sold one portion to the Plaintiffs. He bought Plot No. 2589 from Oyugi Odongo in 1978. He met with the seller and entered into an agreement of sale with him through the chief through whom he also paid the purchase in full. He stated that the whole transaction was done in the chief's office. He stated that Oyugi Odongo sold the land because he was migrating to Tanzania. He stated that he only met the chief who informed him that the seller's family had moved to Tanzania. He stated that he did not know the background of the family. He stated that it was 33 years after he acquired the property that his title was challenged. He stated that the Defendant challenged his title at the Land Disputes Tribunal and lost. He stated that after buying the land, he employed someone who was in charge of it and no one raised an objection to that.
 25. After the close of the Plaintiffs' case, the Defendant, Silper Odete Oyugi gave evidence as DW1. The Defendant stated as follows: She got married in the 1960s in Tanzania. She was married as a second wife. They had a piece of land in Kajulu but used to live with her husband in Tanzania. They came back from Tanzania in 1961 and settled in their Kajulu land. Her husband got sick in 2001 and died in 2005. Her husband was buried in Tanzania. In 2011, the deceased Daniel Odiwuor Wayodi came to her home with the police station from Riat Police Station and claimed that she had put up a house on his land. She stated that her husband could not have sold the disputed land without her knowledge.



- She stated that she fenced the piece of land. She stated that the deceased purportedly bought the land from Charles Onyango Oriema who was a former chief of the area. She stated that the deceased did not buy the land from her husband. She stated that she wanted the court to give her the land. She stated that she was staying on the land in dispute.
26. On cross-examination, DW1 stated that she filed a case against the deceased Daniel Odiwor Wayodi at the Land Disputes Tribunal in 2011 and the case was determined against her. She stated that she was claiming the whole land.
 27. When the hearing resumed before this court, DW1, Silper Odete Oyugi gave further evidence in proof of her Originating Summons. DW1 adopted her affidavit in support of the Originating Summons as her further evidence in chief and produced the annexures to the said affidavit as exhibits D.EXH.1. She stated that she lived at Ukweli in Kajulu and did not know the reference number of the land she was occupying. She stated that the land she occupied belonged to her father-in-law Cornel Odongo Oyugi the father of her deceased husband, Jacob Oyugi Odongo. She stated that she had never lived on and cultivated any other land apart from the suit property. She stated that she was the only one living on the disputed land.
 28. She stated that Charles Onyango Oriema from whom the deceased Peter Odiwor Wayodi claimed to have purchased the disputed land was their area chief. She stated that her husband was the one who built for her a home on the suit property and she was settled there in 1980. She stated that they did not move elsewhere after they settled on the land. She stated that they were just visiting other places. She stated that her husband was a fisherman and was fishing in Mwaugi in Tanzania. She stated that she would visit the place but would return home.
 29. She stated that the Respondents in her Originating Summons had not done anything on the disputed land. She urged the court to declare her as the owner of the disputed land. She stated that she had occupied the land since she was married. She stated that the disputed land was her ancestral land. She stated that she had produced photographs showing her homestead on the property.
 30. On cross-examination, the Applicant stated that after she was married, she lived in Kajulu and would visit her husband in Tanzania from time to time. She stated that she could not recall when her husband died. She stated that her husband was buried in Kajulu. She stated that the deceased, Peter Wayodi purchased the disputed land from the chief and not from her husband.
 31. DW1 stated that the disputed property was ancestral land and that the same was given to her husband by his family. She stated that she came to know of the deceased Peter Wayodi's claim over the property when he came to her home to claim the land. On further cross-examination, DW1 stated that she did not know the parcel number of the land she was occupying. She stated that the land was hers but she could not recall the reference number. She reiterated that she could not recall the date of her husband's death. She stated that she thought he died in 2005 in Tanzania. She stated that her husband was buried in Tanzania and not in Kajulu as she had mentioned earlier. She stated that she was not aware that she was supposed to take out a grant of letters of administration. She stated that she was cultivating the disputed land.
 32. After Silper Odete Oyugi's further evidence, Loice Anyango Wayodi testified on behalf of the estate of Peter Odiwor Wayodi, deceased. She stated that the deceased who was her husband died in November 2020. She stated that the disputed parcels of land belonged to the deceased. She stated that her husband remained with two parcels, Plot No. 5327 and Plot No. 5328. She stated that the Applicant, Silper Odete Oyugi had put up a "Kibanda" in the two parcels of land. She stated that the Applicant was not cultivating the parcels of land she had claimed.



33. On cross-examination, Loice Anyango Wayodi stated that her late husband sold land to the 1st and 2nd Respondents in the Originating Summons. On further cross-examination, Loice Anyango Wayodi stated that her husband purchased the original parcel, Plot No. 2589 which was subsequently subdivided. She admitted that the agreement of sale dated 24th September 1978 was between Charles Oriema Onyango and her deceased husband and that Oyugi Odongo did not sign the agreement. Loice Anyango Wayodi stated further that they were not doing anything on the land. She stated that Charles Oriema did not sell the land to her husband. On re-examination, Loice Anyango Wayodi reiterated that the Applicant was not staying on the land and was not cultivating the same.
34. On examination by the court, Loice Anyango Wayodi stated that they did not develop the land because they had other engagements that took priority and when they wanted to develop the land, there were court cases and there was an order for status quo. She stated that she did not know the Applicant before she met her at Winam Law Courts where she (Loice Anyango Wayodi) had accompanied her husband who had a case with the Applicant.
35. After the close of evidence, the parties made closing submissions in writing. The Plaintiffs in ELC No. 5 of 2023/1st and 2nd Respondents in ELC No. 14 of 2021(O.S) filed submissions dated 24th July 2024. The Defendant in ELC No. 5 of 2023/Applicant in ELC No. 14 of 2021(O.S) filed submissions dated 26th July 2024. The 3rd and 4th Respondents in ELC No. 14 of 2021(O.S) also filed submissions dated 26th July 2024.
36. The Plaintiffs in ELC No. 5 of 2023/1st and 2nd Respondents in ELC No. 14 of 2021(O.S) submissions
37. The Plaintiffs in ELC No. 5 of 2023/1st and 2nd Respondents in ELC No. 14 of 2021(O.S) (hereinafter referred to as “the Plaintiffs”) framed the following issues for determination; whether the Plaintiffs proved their case against the Defendant in ELC No. 5 of 2023/Applicant in ELC No. 14 of 2021(O.S) on a balance of probabilities and hence entitled to the reliefs sought, and whether the Applicant in ELC No. 14 of 2021(O.S)/Defendant in ELC No. 5 of 2023 (hereinafter referred to as “the Applicant”) had established her adverse possession claim. The Plaintiffs submitted that they had proved that they were the legal owners of Plot No. 5326. The Plaintiffs submitted that the Applicant alleged collusion and fraud against them but did not produce any evidence to prove the same as is required under Section 26 of the [Land Registration Act](#), 2012.
38. The Plaintiffs submitted that it was clear from the Applicant’s pleadings that her home was not on Plot No. 5326 and as such her claim to the property by adverse possession was not sustainable. The Plaintiffs submitted that they were given vacant possession of the suit property and it was not until 2013 that they realised that the Applicant had fenced the suit property and built a pit latrine on it when they went to fence the same necessitating the filing of this suit after the Applicant refused to vacate the property.
39. On whether the Plaintiffs were entitled to damages, the Plaintiffs submitted that since they bought Plot No. 5326 in 2006, they had not been able to enjoy the use of the said property because of the Applicant’s acts of trespass and violent denial of access to the property. The Plaintiffs cited Section 3 (1) of the [Trespass Act](#) and invited the court to determine the appropriate damages payable for the Applicant’s trespass.
40. On the Applicant’s adverse possession claim, the Plaintiffs cited *Jandu v. Kirplal & Another* [1975] E.A 225 where it was held that a person seeking to acquire title to land by way of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. The Plaintiffs submitted that a party relying on the doctrine of adverse



possession bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period.

41. The Plaintiffs submitted that they acquired title to Plot No. 5326 in 2006. The Plaintiffs submitted that Plot No. 5326 was vacant when they acquired it and there was no one on the land. The Plaintiffs submitted that it was not clear at what point the Applicant trespassed upon the land. The Plaintiffs submitted that they discovered the trespass in 2013 when they visited the suit property to begin fencing and developing the same. The Plaintiffs submitted that the Applicant could not therefore claim that she had enjoyed uninterrupted occupation of Plot No. 5326 since 1991. The Plaintiffs submitted that time started running in 2013 when they discovered the trespass on their land. The Plaintiffs submitted that the Applicant could not claim the land by adverse possession since the 12 years had not lapsed at the time they came to court to seek the recovery of the suit property.
42. The Plaintiffs submitted that the Applicant did not have access to the suit property and had also failed to identify and demonstrate the land for which an adverse possession order was sought. The Plaintiffs submitted that the Applicant produced in evidence still photographs that did not indicate the portion, size and location of the property on which the photographs were taken and whether the developments captured in the photographs were indeed situated on the land she sought by adverse possession. The Plaintiffs submitted that it was upon the Applicant to prove and specifically identify or even describe the property she claimed by adverse possession. In support of his submission, the Plaintiffs cited, *Titus Mutuku Kasuve v. Mwaani Investments Limited & 4 Others* [2004] eKLR and *Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakshwein & Another* [2015] eKLR.
43. The Plaintiffs submitted that the Applicant had not proved uninterrupted occupation and use of Plot No. 5326 for 12 years to warrant the grant of the reliefs sought in the Originating Summons.
44. The Defendant in ELC No. 5 of 2023/Applicant in ELC No. 14 of 2021(O.S) submissions
45. The Defendant in ELC No. 5 of 2023/Applicant in ELC No. 14 of 2021(O.S) (hereinafter referred to only as “the Applicant”) framed the following issues for determination; whether the Applicant ever occupied/ utilised the suit properties, and whether the Applicant could legally acquire titles to the suit properties by adverse possession.
46. On the first issue, the Applicant submitted that the Respondents had admitted that the Applicant was in occupation of the disputed parcels of land. The Applicant submitted that the evidence adduced by the Applicant about her entry, occupation and use of the disputed parcels of land were not controverted by the Respondents. On the issue of whether she had acquired titles to the disputed parcels of land by adverse possession, the Applicant submitted that a claim for adverse possession is attached to land and not title and as such it mattered not that the title to the land had changed hands. The Applicant cited section 38 of the Limitations of Actions Act and submitted that she has been in open, continuous and exclusive occupation of the suit properties, a fact that was proved by the Applicant and admitted by all the Respondents. The Applicant submitted that she had settled on and occupied the three parcels of land for over 12 years. The Applicant submitted that she produced photographs showing that she had put up a home and planted trees on the suit properties while all the Respondents admitted that they neither had homes nor were they cultivating the suit properties. The Applicant submitted that possession of land by another person without the consent of the registered owner is adverse possession and confers title to the occupant/adverse possessor if he remains in occupation for 12 years. The Applicant submitted that in the instant case, time started running against the registered proprietors from the date of the first registration on 14th March 1991 as indicated in the extract of the register. The Applicant submitted that the Respondents never took steps to assert



- their rights to the suit properties until 2014 by which time the Applicant had acquired the properties by adverse possession having occupied the same for 12 years.
47. The 3rd and 4th Respondents in ELC No. 14 of 2021 (O.S) submissions
48. The 3rd and 4th Respondents framed the following issues for determination;
- i. Who had the onus of proof?
 - ii. Whether the Applicant had proved title by adverse possession.
 - iii. Whether the 3rd and 4th Respondents had a good title to the disputed parcels of land.
49. On the first issue, the 3rd and 4th Respondents submitted that he who alleges must prove. The 3rd and 4th Respondents submitted that when claiming land by adverse possession, the burden of proof is on the claimant and the standard of proof is higher than in other civil claims. In support of this submission, the 3rd and 4th Respondents cited Joseph Macharia Kairu v. Kenneth Kimani Muiruri [2021] eKLR. The 3rd and 4th Respondents submitted that the Applicant failed to prove her case. The 3rd and 4th Respondents submitted that the Applicant's lack of adequate information on the location of the suit properties and/or her inability to ascertain the acreage of the parcels clearly showed that the case was not proved on a balance of probabilities. The 3rd and 4th Respondents submitted that in addition, throughout the hearing of the case, the Applicant failed to provide evidence to corroborate her claim. The 3rd and 4th Respondents submitted neither the death certificate nor marriage certificate was produced to prove the relationship between the Applicant and the deceased Oyugi Odongo whom she claimed was her husband.
50. On the second issue, the 3rd and 4th Respondents submitted that the doctrine of adverse possession had been developed, established and enshrined within the Kenyan Legal system by both statutes and jurisprudence. The 3rd and 4th Respondents cited Sections 7, 9, 13, 37 and 38 of the *Limitation of Actions Act* and the cases of James Maina Kinya v. Gerald Kwendaka [2018] eKLR, Murunga Kabangi & 2 others v. Hannah Wairimu Gitau & another [2019] eKLR and David Munene Wamwati & 4 Others v. The Registered Trustees of the Anglican Church of Kenya & Another, Civil Appeal No. 36 of 2015 (UR) and Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v. Ben Munyifwa Songoi [2020] eKLR and submitted that the court needs to look at whether the Applicant had met all, not some, of the requirements for her to prove adverse possession.
51. The 3rd and 4th Respondents submitted that it was paramount for the Applicant to prove that she had been in open possession of the suit properties, without force, and license or permission from the land owner. The 3rd and 4th Respondents submitted that based on the Applicant's averments in her pleadings and during the hearing, and the inadequacy of evidence adduced to buttress her claims, it was evident that the Applicant had never been in any actual possession of the suit properties. The 3rd and 4th Respondents submitted that the Applicant had flagrantly tried to mislead the court by annexing random uncertified photographs claiming that they were a representation of the suit properties on which she was domiciled. The 3rd and 4th Respondents submitted that the Applicant also claimed that her alleged husband was buried on the suit properties without the production of even a burial permit.
52. The 3rd and 4th Respondents submitted that a salient ingredient of adverse possession that must be proved is the quiet and continuous possession of the land for 12 years by the trespasser. The 3rd and 4th Respondents submitted in line with this requirement, the courts have developed jurisprudence as to what amounts to quiet possession and when time starts to run when adverse possession is claimed. In support of this submission, the 3rd and 4th Respondents cited Githu v. Ndeete [1984] KLR 776. The 3rd and 4th Respondents submitted that their quiet possession of the suit properties was only



interfered with after 2005 following the Applicant's husband's death and burial in Tanzania where he had relocated after selling the suit properties.

53. The 3rd and 4th Respondents submitted that the Applicant's claim for adverse possession was premature since it had not met the requirement of continuous possession of the property for 12 years as time stopped running in 2011 to date, pending the hearing and determination of the court cases, which suits are before the court and are yet to be determined. The 3rd and 4th Respondents submitted that a party that claims ownership through adverse possession needs to demonstrate animus possidendi. The 2nd and 3rd Respondents submitted that the Applicant did not establish animus possidendi. The 2nd and 3rd Respondents submitted that in addition, the Applicant did not in any way demarcate the area that she was claiming to have settled on and neither did she put any measures to inhibit the Respondents from accessing or using the parcel.
54. The 3rd and 4th Respondents submitted that the court needs to take into account the Applicant's conduct throughout the hearing and determination of this case. The 3rd and 4th Respondents submitted that the Applicant in her bid to mislead the court and infringe on the Respondents' proprietary rights came before the court of equity with unclean hands. The 3rd and 4th Respondents submitted that the Applicant made averments in the initial Originating Summons which she knew were far from the truth. These averments according to the 3rd and 4th Respondents included but not limited to her position that the family had lived on the disputed land from the 1990s and further that her alleged husband was buried on the land in dispute, while knowing quite well that these averments were false. The 3rd and 4th Respondents submitted that the Applicant continued with her perjury by attaching still photographs from a parcel of land that was in no way related to the suit properties.
55. The 3rd and 4th Respondents submitted that for a claim of adverse possession to be proved, there needs to be in existence a valid title. In support of this submission, the 3rd and 4th Respondents cited *Wellington Lusweti Barasa & 75 others v. Lands Limited & another* [2014] eKLR.
56. On whether the 3rd and 4th Respondents acquired good titles to the disputed properties, the 3rd and 4th Respondents cited Section 26 of the *Land Registration Act*, 2012 and submitted that the Applicant failed to prove her claim that the 3rd and 4th Respondents' titles were fraudulently acquired. The 3rd and 4th Respondents submitted that the 3rd and 4th Respondents acquired good titles to the suit properties.
57. Regarding costs, the 3rd and 4th Respondents submitted that the costs of the suit follow the event. The 3rd and 4th Respondents submitted that they had proved that the Applicant's claim had no ground and was vexatious. The 3rd and 4th Respondents prayed that the Applicant's suit be dismissed with costs.

Analysis and determination

58. ELC No. 5 of 2023 (formerly Winam SPMCC NO. 47 of 2018 and Kisumu ELC No. 25 of 2014)
59. This suit concerned land parcel Kisumu/Konya/5326(Plot No. 5326) only. Plot No. 5326 was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya(RLA) (now repealed).
60. Sections 27 and 28 of the Registered *Land Act* provide as follows:
 27. Subject to this Act -
 - (a) a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;



- (b) b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

61. Section 143(1) and (2) of the Registered *Land Act* provides as follows:

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

62. Sections 24, 25 and 26 of the *Land Registration Act*, 2012 that repealed the Registered *Land Act* provides as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

64. Under both the Registered *Land Act* and the *Land Registration Act*, 2012, the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in case of a lease, the leasehold interest in the land. Such registration can however be nullified where it is established that the same was made or obtained through fraud, mistake, misrepresentation, illegality, procedural impropriety or corruption.
65. The Plaintiffs in this suit averred that they were the lawful registered proprietors of Plot No. 5326. The Plaintiffs averred that they acquired Plot No. 5326 from Peter Odiwor Wayodi, deceased (the deceased) and that the Defendant in the suit, Silper Odete Oyugi prevented the Plaintiffs from entering the property and fencing the same on 27th December 2013. From the evidence on record, Plot No. 5326 is a subdivision of Kisumu/Konya/2589 (Plot No. 2589). Plot No. 2589 was registered in the name of Peter Odiwor Wayodi as the first registered owner on 14th March 1991. On 27th May 2005, Plot No. 2589 was subdivided into three portions, Kisumu/Konya/ 5326, 5327 and 5328 (Plot No. 5326, Plot No. 5327 and Plot No. 5328 respectively). On 5th June 2005, Peter Odiwor Wayodi, deceased (the deceased) sold to the Plaintiffs Plot No. 5326 at a consideration of Kshs. 400,000/-. Plot No. 5326 was transferred to the Plaintiffs by the deceased on 23rd February 2006 after the consent of the Land Control Board for the transaction was issued on 9th August 2005. The Plaintiffs were issued with a title deed for Plot No. 5326 on 23rd February 2006. The Plaintiffs produced in evidence a copy of certificate of official search dated 2nd March 2006 showing that they are the registered proprietors of Plot No. 5326.
66. As mentioned earlier, the Defendant in the suit claimed in her defence that the deceased, Peter Odiwor Wayodi who sold Plot No. 5326 to the Plaintiffs acquired the original parcel, Plot No. 2589 fraudulently and that the subdivision of Plot No. 2589 and sale of a portion thereof Plot No. 5326 was an act of collusion between the Plaintiffs and the deceased to dispossess the Defendant of Plot No. 2589. The Defendant contended that Plot No. 2589 was owned by her deceased husband, Jacob Oyugi Odongo. The Defendant claimed that her deceased husband never sold the property to the deceased,



Peter Odiwor Wayodi and as such the registration of Peter Odiwor Wayodi as the owner of Plot No. 2589 was fraudulent which fraud tainted the Plaintiffs' title to Plot No. 5326.

67. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

68. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)

69. The term fraud is defined in Black's Law Dictionary 9th Edition as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, and intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

70. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

71. I am not satisfied from the evidence on record that the registration of the deceased, Peter Odiwor Wayodi as the proprietor of Plot No. 2589 was fraudulent and that the alleged fraud tainted the Plaintiffs' title to Plot No. 5326. To start with, the Defendant claimed that Plot No. 2589 was owned by her deceased husband Jacob Oyugi Odongo and that the deceased did not sell the property to Peter Odiwor Wayodi. It was not contested at the trial that the Defendant was not a legal representative of



her deceased husband, Jacob Oyugi Odongo. She did not therefore have the legal capacity to challenge the sale agreement said to have been entered into between her deceased husband and Peter Odiwor Wayodi. Secondly, when the agreement of sale was said to have been entered into, the land had not been adjudicated. There is no evidence before the court that the parcel of land which became registered as Plot No. 2589 was recorded and/or registered in the name of the Defendant's husband, Jacob Oyugi Odongo to justify the Defendant's claim over the same on behalf on her deceased husband. The agreement dated 24th September 1978 between Charles Onyango Oriema as the seller and Peter Odiwor as the purchaser did not have a land reference number. According to Peter Odiwor he negotiated the sale of what became Plot No. 2589 with the Defendant's husband Oyugi Odongo to whom he made payment of the purchase price. He stated that he was introduced to Oyugi Odongo by the then Senior Chief of the area, Charles Onyango Oriema. He contended that when the time came to sign a formal agreement of sale, Oyugi Odongo had already migrated to Tanzania and as such the agreement was signed by the chief Charles Onyango Oriema on his behalf. Although there is no evidence that Oyugi Odongo had authorised Charles Onyango Oriema to sign the agreement of sale on his behalf, the evidence by Peter Odiwor Wayodi that he met, discussed and agreed on the sale of the suit property with the deceased Oyugi Odongo to whom he also paid the purchase price was not controverted. I believe that if indeed Oyugi Odongo did not sell what became Plot No. 2589 to the deceased, Peter Odiwor, either him, Oyugi Odongo or his many brothers whose names are set out in the Defendant's witness statement dated 3rd March 2021 one of whom was still alive at the commencement of these proceedings should have objected to the recording and subsequent registration of Plot No. 2589 in the name of Peter Odiwor Wayodi during the land adjudication. In the absence of any such objection, I find the evidence of Peter Odiwor Wayodi that he purchased the property from Oyugi Odongo more believable compared to that of the Defendant who is not a legal representative of Oyugi Odongo and was not present during the transaction.

72. It is therefore my finding that Plot No. 2589 was lawfully registered in the name of Peter Odiwor Wayodi as the first registered owner and that the Plaintiffs lawfully acquired a portion thereof known as Plot No. 5326. Since the Plaintiffs were the lawful proprietors of Plot No. 5326, they were entitled to unrestricted access and quiet possession and enjoyment thereof. The Defendant did not deny that they prevented the Plaintiffs from entering and fencing the property, and that she had entered Plot No. 5326 and was carrying out some activities thereon without the Plaintiffs permission.
73. In Halsbury's law of England 3rd edition, Volume 38 at page 739 paragraph 1205 trespass is defined as follows:

“A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.”
74. In addition to claiming that the title to Plot No. 5326 held by the Plaintiffs was fraudulent and that she was in occupation of the property as of right the same having been owned by her deceased husband, the Defendant also claimed that she had acquired Plot No. 2589 of which Plot No. 5326 was a portion by adverse possession. I have considered the Defendant's claim to Plot No. 5326 by adverse possession below. I have found no merit in the claim.
75. From the evidence on record, I am satisfied that the Plaintiffs have proved on a balance of probabilities that the Defendant entered Plot No. 5326 without any lawful excuse and denied the Plaintiffs access to



the same. The Plaintiffs have therefore proved that the Defendant is a trespasser on the suit property. The Plaintiffs are in the circumstances entitled to the injunctive relief and an order of possession sought in their plaint dated 12th February 2014. On assessment of general damages for trespass, the authors of Halsbury's 4th Edition Volume 45 at Paragraph 26, 1503 have stated as follows:

- “(a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any loss.
- (b) If the trespass has caused the plaintiff actual damage he is entitled to receive such amount as will compensate him for his loss.
- (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to recover by way of damages such a sum as would reasonably be paid for that use.
- (d) Where there is an oppressive arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain, by his unlawful conduct, exemplary damages may be awarded.
- (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased”.

76. There is no evidence before the court that the Plaintiffs suffered actual damage as a result of the Defendant's trespass. The Plaintiffs are therefore entitled only to nominal damages for the Defendant's acts trespass. The Plaintiffs are also entitled to the costs of the suit. The court will give appropriate orders at the conclusion of the judgment.

ELC No. 14 of 2021 (O.S)

77. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

- “18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...
- 19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from



running in that other person's favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* (supra)...

21. Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed: -“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndete* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

78. In *Githu v. Ndete* [1984] KLR 776 it was held that:

- “1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.
2. Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.
3. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”

79. In *Kairu v. Gacheru* [1988]2 KAR 111, it was held that,

“The law relating to prescription affects not only present holders of the title but their predecessor (57, *Limitation of Actions Act*).”

80. I have answered most of the questions raised by the Applicant, Silper Odete Oyugi in her Originating Summons. I must add that the questions that I have not answered were beyond the scope of the Originating Summons as a procedure for determining disputes. What remains for determination is whether the Applicant has acquired Plot Nos. 5326, 5327 and 5328 registered in the names of the Respondents by adverse possession. It is common ground that Plot No. 2589 was registered for the first time on 14th March 1991 while Plot Nos. 5326, 5327 and 5328 came into existence on 27th May 2005 following the subdivision of Plot No. 2589. Plot No. 2589 measured 0.8 of a hectare, Plot No. 5326 measured 0.40 of a hectare while Plot No. 5327 measured 0.20 of a hectare. There is no evidence as to the ownership or the size of Plot No. 5328. The Applicant did not annex a copy of the title or the certificate of official search in respect of the property. It is common ground that the Applicant and her deceased husband lived in Tanzania. The Applicant's husband died in 2005 and was buried in



Tanzania. The Respondents denied that the Applicants' residence is on their respective parcels of land. The burden was on the Applicant to prove that her residential houses the photographs of which she produced as evidence of her occupation of Plot Nos. 5326, 5327 and 5328 were on the said parcels of land or any of them. The Applicant also had the burden of proving when she entered the plots and put up the houses. The 3rd and 4th Respondents denied that the Applicant is residing on Plot Nos. 5327 and 5328 while the 1st and 2nd Respondents claimed that the Applicant's pit latrine was on a portion of Plot No. 5326. In the absence of evidence as to when the Applicant entered the suit properties and what activities or activity she was involved in on the three parcels of land, the court is not in a position to say when the time started running for the purposes of adverse possession. In her statement filed in ELC No. 5 of 2023 on 21st February 2014, the Applicant stated that she came back from Tanzania and settled on Plot No. 2589 in 1991. The Applicant stated that as of the date of her statement, she had resided on the said parcel of land for 13 years. In her replying affidavit filed in the same suit on 23rd May 2014, the Applicant stated that she settled on the disputed land in 1960 upon her marriage and had remained in occupation for over 40 years. In her affidavit in support of the Originating Summons the Applicant stated that her husband and she came back from Tanzania in 1990s and settled on the disputed land where her husband died and was buried in 2005. In her evidence given in the same suit before the lower court, the Applicant told the court that they came back from Tanzania in 1961 and settled on the disputed land. She told the court that when her husband died in 2005 he was buried in Tanzania and not in Kenya. She also told the court that she had filed a suit against Peter Odiwor Wayodi at the Tribunal in 2011 in Tribunal Case No. 25 of 2011 which suit was determined against her. The Applicant told the court that she had only put up her home on a portion of the disputed land although she owned the entire land. In her evidence before this court on 30th April 2014, the Applicant told the court that her deceased husband settled her on the suit property in 1980.

81. From the evidence on record, it is difficult to say when the Applicant came back to Kenya from Tanzania and put up the buildings she claims to be on a portion of the disputed land. It is also not clear whether the buildings are on a portion of Plot No. 5326, Plot No. 5327 or Plot No. 5328. Although the Applicant claimed to have been cultivating a portion of the disputed land, no evidence of such activity was placed before the court and was not even evident from the photographs produced in evidence by the Applicant.
82. For the foregoing reasons, it is my finding that the Applicant failed to prove her claim over Plot No. 5326, Plot No. 5327 and Plot No. 5328 by adverse possession.
83. On the issue of costs of the Originating Summons, Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that costs of and incidental to a suit are at the discretion of the court. The Applicant has failed in her claim against the Respondents and shall therefore bear the costs of the suit.

Conclusion

84. In conclusion, I hereby make the following final orders in the consolidated suits;
 1. ELC No. 14 of 2021 (O.S), Silper Odete Oyugi v. Charles Omondi Oyaya & 3 others is dismissed with costs to the Respondents in the suit.
 2. Judgment is entered for the Plaintiffs against the Defendant in ELC No. 5 of 2023 (formerly Winam SPMCC NO. 47 of 2018 and Kisumu ELC No. 25 of 2014), Charles Omondi Oyaya & Another v. Silper Odete Oyugi for:
 - a. A permanent injunction restraining the Defendant whether by herself, her agents, servants or other persons claiming through her from trespassing on and /or remaining



in, developing, transferring, selling, exchanging, disposing of or dealing with Plot No. Kisumu/Konya/5326 in any other manner whatsoever;

- b. An order compelling the Defendant whether by herself, her agents, servants or any other person claiming through her to vacate Plot No. Kisumu/Konya/5326 or any portion thereof occupied by the Defendant within 60 days from the date hereof in default of which the Plaintiffs shall be at liberty to apply for warrants for her forceful eviction therefrom;
- c. Kshs. 200,000/- being general damages for trespass together with interest at court rates from the date hereof until payment in full;
- d. The costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 27TH DAY OF JANUARY 2025

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Anyul for the Applicant in ELC No. 14 of 2021(O.S) and Defendant in ELC No. 5 of 2023

Ms. Olum for the 1st and 2nd Respondents in ELC No. 14 of 2021(O.S) and Plaintiffs in ELC No. 5 of 2023

Mr. Castroe for the 3rd and 4th Respondents in ELC No. 14 of 2021(O.S)

Ms. J. Omondi-Court Assistant

