



Oloo v Otiemo & 3 others (2nd, 3rd and 4th Defendants Sued as the Legal Representatives of James Odhiambo Oteno - Deceased) (Environmental and Land Originating Summons 1 of 2023) [2025] KEELC 176 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 176 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2023
AY KOROSS, J
JANUARY 24, 2025**

BETWEEN

HEZRON NAMAN OLOO PLAINTIFF

AND

BELDINA WAYODI OTIENO 1ST DEFENDANT

KENNEDY OCHIENG ODHIAMBO 2ND DEFENDANT

MAGARET OSIGA 3RD DEFENDANT

JULIA ARWA 4TH DEFENDANT

2ND, 3RD AND 4TH DEFENDANTS SUED AS THE LEGAL REPRESENTATIVES OF JAMES ODHIAMBO OTENO - DECEASED

JUDGMENT

Background

1. This suit was instituted by an originating summons (OS) dated 14/08/2018 in which the plaintiff sought to be deemed an adverse possessor of the entire land parcel no. East Gem/Uranga/386 (suit property) which measures 2.6 Ha.
2. The suit property is registered in the 1st defendant's name and that of James Odhiambo Otieng' (James). Both registered proprietors are deceased, and the suit property is registered in their names as tenants in common, each having ½ share.
3. The 1st defendant died during the subsistence of the suit. Before she died, she and the plaintiff recorded a consent dated 19/11/2018 by which judgment was entered for the plaintiff for the ½ share she held over the suit property.



4. This consent was adopted as a judgment of the court on 2/09/2020. At the same time, judgment was entered against the 2nd—4th defendants for failing to appear and file a defence.
5. Upon successful application and by a ruling dated 6/07/2023, the ex parte judgment was set aside only to the extent that judgment against the 2nd- 4th defendants was set aside. The significance of this is that it left the adopted consent judgment intact.

Parties' cases

6. Turning to the pleadings, the OS was supported by an affidavit deposed by the plaintiff on 14/08/2018 and a further affidavit he deposed on 27/10/2023. In it, the plaintiff sought the following reliefs from this court:-
 - a. A declaration the registered proprietors' rights and or interests over the suit property had been extinguished.
 - b. A declaration the proprietors' rights and or interests over the suit property be registered in the plaintiff's name.
 - c. The district land registrar be ordered to delete the names of the 1st defendant and that of James from the register of the suit property and in its place, the plaintiff's name be registered as the proprietor of the entire suit property.
 - d. The defendants to bear the costs of the suit.
7. It was anchored on grounds inter alia; the 1st defendant and James were the registered owners of the suit property; the plaintiff had met the ingredients of adverse possession and the defendants had alternative parcels of land that they occupied with their families.
8. The OS was strenuously opposed by the 2nd defendant's affidavit sworn on 20/07/2023 and it was sworn with the authority of the 3rd and 4th defendants.

Plaintiff's evidence

9. The matter thereafter proceeded for hearing by viva voce evidence and the plaintiff testified as PW1 and his evidence was composed of his oral testimony, affidavits, and documents he produced in support of his case and were marked as Pex.1- 8.
10. His evidence was led by several witnesses who adopted their witness statements as their evidence in chief and they were Elisa Nyangwan Ochola (PW2) and Paul Odhiambo Nyangwan (PW3).
11. The plaintiff explained his relationship with the 1st defendant and the 1st registered owner Oyaya Mugwala (Oyaya). Oyaya was described as his younger brother, older brother, half-brother or brother to his father Naman Oloo.
12. In the same breath, the 1st defendant was described as his sister, a sister to his father Naman Oloo (his aunty) or his paternal cousin.
13. Moreover, at one time he stated his father was Mugwala Odhoni who was the 1st defendant's father and at another, he averred his father was Namaan Oloo who was a brother to Thomas Mugwala Odhoji.
14. He was also uncertain of the name of the said 1st registered owner as he stated his name was either George Mugwala, Oyaya Mugwala or Juma Mugwala and stated their sisters were the 1st defendant, Yuanita Ngeso Mugwala (DW5) and Phoebe Angweny Mugwala.



15. He stated he had been tilling the suit property since 1994 and grazed his cattle thereupon but at one point stated his house was on the suit property but later stated his house was on adjacent land and it was only his children who had constructed on the suit property between 2019 and another in 2021 or 2023.
16. It was his evidence that he occupied the suit property from the 1970s, 1980 or since birth and when questioned about the 1970s date of entry, he stated he had been untruthful and that Oyaya did not leave behind any dependants as he neither had a wife or children.
17. He stated James was not a relative and his registration and that of the 1st defendant was irregular and illegal as it was conducted after Oyaya's demise which took place on 31/08/1982 yet probate proceedings had not been conducted over his estate.
18. PW2 testified that Oyaya and the plaintiff were siblings and that the plaintiff's son Martin Ooko and another son had built on the suit property and they respectively did so around 2021 and 2023 while the rest was utilised by the plaintiff either for cultivation or grazing and that neither James nor the 1st defendant had ever taken possession. She stated the plaintiff's home stood on another parcel of land.
19. PW3 testified and corroborated PW2's statement. However, he stated a small portion of the suit property is utilised for communal grazing and he had grazed therein for 35 years but the larger portion was cultivated by the plaintiff.
20. Furthermore, the suit property had 3 homesteads- the plaintiff's which had 6 houses, his (plaintiff's 1st son) which had 2 houses and construction thereof took place 7 years ago and the last homestead was for another of the plaintiff's sons Bobby Oloo which was constructed in 2023.

2nd-4th defendants' evidence

21. The 2nd and 4th defendants respectively testified as DW5 and DW1. Their evidence was led by Amon Oogo Achola (DW2), George Ngoye Otieng' (DW3) and lastly, Yuanita Ngeso Mgwalla (DW4). Apart from documents which were produced by DW5 and were marked as Pex.1- 6, all the parties' evidence was composed of their oral testimonies and adopted witness statements.
22. DW1 testified she was one of James' widows. She stated James had purchased the suit property from Thomas Mugwala who was the then-registered owner but she never witnessed the said agreement for sale or payment of the consideration of kshs. 96,000/-.
23. She stated her family had tilled it from 1978 to 2018 together with the 1st defendant but sometime in 2018, the 1st defendant brought the plaintiff into the suit property and in 2018, one of his sons constructed therein while another son constructed in 2023/2024. According to her, the plaintiff was currently in occupation of the suit property.
24. DW2 testified Thomas Oyaya Mugwala who was the then registered owner was a brother to his father Acholla Killion and he was aware James bought the suit property from Oyaya by verbal agreement and did not know the purchase price. Besides, he saw the plaintiff for the 1st time in 2018 when the 1st defendant brought him into the suit property but the plaintiff did not construct a house therein.
25. DW3 stated he was a brother to James who bought the suit property from Thomas Oyaya Mugwala around 1978, he sighted the agreement for sale and the purchase price was 96,000/-. Additionally, the plaintiff's 2 sons had homesteads in the suit property one of which was built around 2018 and the other 2023.
26. DW4 testified she was a daughter to Thomas Oyaya Mugwala and her siblings were the 1st defendant, Phoebe Angwen and Patrick Oyaya and their mother was Truphosa Oyugi. She stated she was privy



their father had sold the suit property to James and the 1st defendant was registered as a co-owner to secure their family interests. She averred the plaintiff was a villager and not her brother as he was Oloo's child.

27. DW5 testified he was James's son and his family had been in occupation of the suit property since 1985 and the plaintiff's son entered the suit property in 2021 which was after the suit was filed but later contradicted himself and stated that the 2 sons of the plaintiff entered the suit properties in 2018 and 2023. Further, he was unfamiliar with how James acquired the suit property. He stated his family started using the land in 2009 and stopped using it in 2018.

Parties' submissions

28. Upon closing parties' cases, this court directed counsels to canvass it by written submissions, and in compliance, their counsels filed written submissions.
29. The plaintiffs' law firm on record Ms. Maxwell O.Ogonda & Co. Advocates filed their written submissions dated 17/10/2024 and they identified 3 issues for determination which were whether the plaintiff had met the threshold of adverse possession, whether the plaintiff ought to be registered as the proprietor of the suit property having acquired it by adverse possession and who should bear the costs of the suit.
30. The defendant's law firm on record M/s. Ochieng Ogutu & Co. Advocates for the 2nd- 4th defendants filed written submissions dated 28/10/2024 and submitted on the principles of adverse possession while juxtaposing the facts of the case against them. Counsel urged the court to dismiss the plaintiff's case with costs.
31. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective counsels' arguments on the particular issue and also consider provisions of the law and judicial precedents they relied upon to advance their respective arguments.

Issues for determination

32. I have considered the pleadings, adduced evidence, and rival written submissions. Being guided by well-cited provisions of law that have been highlighted in the submissions, I shall now proceed to consider the merits or otherwise of the plaintiffs' claim, and the issues for determination are:-
- I. Whether the plaintiff proved his claim of adverse possession to the required standards.
 - II. What appropriate orders should be granted including an order as to costs?

Analysis and Determination

33. The 2 issues that have been identified as arising for resolution shall be dealt with together.
34. The doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act*. The relevant provisions are found in Sections 7, 13 and 38 thereof.

Section 7 provides that:

“An action may not 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.”



Section 13 states that: -

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Lastly, Section 38 (1) elucidates that: -

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

35. The principles of law on adverse possession are settled in Kenya and the burden is usually on the adverse possessor to strictly prove all the elements of adverse possession to the required standards.
36. In their submissions, both counsels thrashed these issues to the pulp with the plaintiffs’ counsel contending that the plaintiff had met the threshold of adverse possession while the 2nd – 4th defendants’ counsel was of a contradictory position.
37. Pointedly, it must be borne in mind that claims of adverse possession are matters of facts that are observed on the land.
38. The principles of adverse possession are settled and reliance was made by the defence counsel on the Court of Appeal decision of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR which summarised them thus: -
 - “In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”
39. It was undisputed the 2 plaintiff’s sons are in occupation of the suit property and to the very least, they entered the suit properties between 2018 and 2023. What was in dispute was whether the plaintiff had possessed the suit property before his sons’ entry.



40. But before I deal further with the plaintiff's alleged adverse possession, significantly, he challenged James's title by contending the plaintiff acquired the title irregularly and illegally.
41. The 2 claims of illegality and adverse possession could not be dealt with together because, in a claim of adverse possession, the plaintiff needed to first concede to the legality of James's title.
42. As held in the Court of Appeal decision of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR, when one challenges the validity of the registered owner's title, the claim for adverse possession is defeated and thus becomes legally untenable. On this alone, the plaintiff's claim fails.
43. Even if this court proceeds to analyze whether the claimant has met the other conditions, the plaintiff's claim would have been unsuccessful for several reasons that shall be advanced shortly.
44. Firstly, although the plaintiff attempted to ground his claim on customary trust as was allowed in the Court of Appeal decision of Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja [2013] eKLR, he did not meet the non-exhaustive principles that were summarized by the Supreme Court of Kenya in Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR.
45. He was unable to demonstrate that before registration, the suit property was family, clan or group land and the plaintiff belonged to such family, clan, or group.
46. This court did not establish any form of relationship between the 1st registered owner Oyaya Mugwala who was interchangeably referred to as Thomas Oyaya Mugwala with the plaintiff as he kept on wavering whether he was his younger or older brother, half-brother or uncle and it can only be concluded he was an imposter who had no relationship with the 1st registered owner.
47. Therefore, his purported entry by birth or adjudication that took place on 2/06/1972 could only be a figment of his imagination, and by his admission, he had been untruthful on this entry date of the 1970s.
48. Although he testified he entered the suit property in 1994, I was unable to establish that he had been in occupation since then because the photographic evidence demonstrated there were only 2 houses on the suit property and another incomplete structure therein which lends credence only his sons houses stood on the suit property.
49. By his evidence, his house stood on another parcel of land. Notwithstanding evidence of crops growing on the suit property, that was not sufficient proof of occupancy for over 12 years. I find his sons entered the suit property between 2018-2023. The suit was filed on 30/08/2018 and I find the suit was premature.
50. From the evidence, I am not satisfied James has ever been in occupation of the suit property since his registration. This is so as the defence witnesses' evidence was contradictory as to the date of taking possession. This court is uncertain whether they entered the suit property in 1978, 1985 or 2009.
51. This non-entry by James was lent credence by PW2's uncontroverted evidence that the community members including himself grazed on a portion of the suit property. Nonetheless, James's non-occupancy did not mean he had been dispossessed.
52. There was also uncontroverted evidence that the plaintiff was not in exclusive occupation of the entire suit as he had claimed and this also defeats his claim.
53. In conclusion of the plaintiff's evidence, I find it was contradictory, untruthful and full of falsehoods. I need not say more.



54. In the end and for the reasons and findings stated above, I find the plaintiff did not prove his claim of adverse possession to the required standards.
55. Nevertheless, this does not interfere with the consent judgment that has not been set aside. It is trite law costs follow the event and since the plaintiff was unsuccessful, I award costs to the 2nd, 3rd and 4th defendants. Ultimately, I make the following final disposal orders;
- a. The plaintiff's suit against the 2nd, 3rd and 4th defendants is hereby dismissed.
 - b. A declaration that the title in the name of BELDINA WAYODI OTIENO over ½ share of land parcel no. EAST GEM/URANGA 386 has been extinguished by HEZRON NAMAN OLOO's adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act*.
 - c. A declaration that HEZRON NAMAN OLOO has become entitled by adverse possession to ½ share of EAST GEM/URANGA 386 which is registered in the name of BELDINA WAYODI OTIENO.
 - d. An order that the Land Registrar Siaya or any other competent land registrar does register HEZRON NAMAN OLOO as a tenant in common of ½ share of land parcel no. EAST GEM/URANGA 386 in place of BELDINA WAYODI OTIENO.
 - e. That the registration of James Odhiambo Otieng's ½ share over EAST GEM/URANGA 386 shall not be interfered with.
 - f. Costs are awarded to the 2nd, 3rd and 4th defendants.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF JANUARY 2025.

HON. A. Y. KOROSS

JUDGE

24/01/2025

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Ogonda for the plaintiff

N/A for the 1st defendants

Mr. Ochieng Ogutu for the 2nd- 4th defendants

Court assistant: Mr. Ishmael Orwa.

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