Onyangi (Suing as Personal Representative and Administrator of the Estate of Ebby Minayo Mungasia) v Mwangi & another (Environment & Land Case 45 of 2017) [2025] KEELC 4166 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4166 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 45 OF 2017

EO OBAGA, J

MAY 29, 2025

BETWEEN

ZEDECHA OMINDE ONYANGI (SUING AS PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF EBBY MINAYO MUNGASIA) ..... PLAINTIFF

AND

SHADRACK MACHARIA MWANGI ..... 1ST DEFENDANT

JOSEPH KOROS ..... 2ND DEFENDANT

JUDGMENT

1. By an amended Plaint dated 11th March, 2021, the Plaintiff sought the following reliefs against the Defendants:

    a. An eviction order against the 2nd Defendant and his representatives or assigns.

    b. A permanent injunction against the 1st and 2nd Defendants and/or their representatives or assigns against trespassing or encroaching into the said land.

    c. Court order to issue compelling the District Land Registrar Uasin Gishu to remove a caution registered against the title by the 1st Respondent.

    d. Mesne profits.

    e. General damages

    f. Special damages

    g. Cost of the suit

h. Interest on [d][e] and [f] above at court rates.

i. Any other order and/or relief that this honourable court may deem just and fit to grant.

2. By an amended defence and counterclaim dated 15th March, 2021, the Defendants sought the following reliefs against the Plaintiff;

a. Dismissal of the Plaintiff's suit with costs.

b. A declaration that the Plaintiff's registration as proprietor of L. R. No. Uasin Gishu/ Lelmolk/15 is a nullity and was obtained fraudulently.

c. An order cancelling the title registered in the Plaintiff's name and substituting the Defendant's name as legal representative of Mary Njeri Mwangi [Deceased].

d. A declaration that the Plaintiff's title to LR No. Uasin Gishu/Lelmolk/15 has been extinguished pursuant to Section 38 of the *Limitation of Actions Act* Cap 22 and that they be registered as proprietors in place of the Plaintiff by virtue of adverse possession.

e. Costs and interest.

Plaintiff's Case

3. The Plaintiff testified that he is the administrator of the Estate of his wife Ebby Minayo Mungasia who died on 30th December, 2017 [Deceased]. The deceased was allotted Plot No. 15 at Lelmolk Settlement Scheme by the Settlement Fund Trustee [SFT] on 21st February, 2002. The deceased met all the requirements by paying the requisite amounts. The deceased was taken to the ground and shown boundaries of the land. The deceased took possession of the land and started utilizing it. After a while, the 1st Defendant came and started claiming the land. The deceased had obtained title to the land on 23rd December, 2002.

4. The 1st Defendant put in the 2nd Defendant who was a caretaker. The Plaintiff called PW2 Eliab Muchiri Kamaru a Deputy Director Land Adjudication and Settlement, Nairobi who testified that parcel No. 15 at Lelmolk Settlement Scheme had been allotted to Mary Njeri Mwangi who failed to accept the offer by paying 10% deposit required. The land was then offered to the deceased who accepted the offer, made the required payments, was taken to the land and shown its boundaries after which title was processed and given in the deceased's name.

Defendant's Case

5. The 1st Defendant testified that he is the administrator of the Estate of his late mother Mary Njeri Mwangi who was allotted plot No. 15 at Lelmolk Settlement Scheme. His mother died on 30th May, 1989. As he was young, the family brought in the 2nd Defendant who occupied the land as caretaker. The 2nd Defendant died in 2017 and his remains were interred on the suit property with his family's consent.

6. The 1st Defendant testified that his mother purchased the suit property in 1974. He did not know the deceased until this case started. He stated that he is the one who grows maize on the suit property which he gives to the family of the late Joseph Koros and he consumes the rest. The 1st Defendant called DW2 William Cherwon Biego who testified that he knew the 1st Defendant's mother who was given the suit property in 1974. He stated that it is the family of Joseph Koros who stay on the land which has houses and trees on it.

Parties Submissions

Plaintiff's Submissions

7. The Plaintiff submitted that the suit property belonged to the SFT who had powers to deal with the same in terms of the conditions set by them. In the instant case, he submitted that the suit property had been allotted to May Njeri Mwangi who failed to pay the 10% deposit within the 90 days given. He submitted that the letter of offer was clear that if Mary Njeri Mwangi was not going to meet the conditions on the offer letter, the offer would be cancelled without any further notice to her.

8. He further submitted that the officer from SFT produced the entire parcel file which showed that Mary Njeri Mwangi did not accept the offer or pay the required amount. He submitted that if Mary Njeri Mwangi was paying rates to an entity different from SFT, she was doing so without clearance from the SFT.

9. The Plaintiff relied on the Court of Appeal Case in Eliud Nyongesa Lusenaka & Another v Nathan Wekesa Omacha [1994] eKLR where it was held as follows:

> " The short answer to that proposition is that land owned by the SFT is not land owned by the Government. Under Section 167[1] of the Agriculture Act, the SFT is a body corporate with a perpetual succession and can acquire and own property on its own right and can sue and be sued. The interest of the Settlement Fund Trustees [SFT] is that of a charge over the parcel of land that it owns. [Emphasis ours]".

10. The Plaintiff further relied on the case of Boniface Oredo v Wabumba Mukile Civil Appeal No. 170 of 1989 [unreported] where it was held as follows:

> " The interest of the Settlement Fund Trustees is really that of a charge. It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property."

11. The Plaintiff further submitted that the title held by the deceased is indefeasible. He relied on Section 26[1] of the *Land Registration Act* which states as follows:

> " 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."

12. The Plaintiff further relied on the case of Botwa Farm Limited v Settlement Fund Trustee & Another [2019] eKLR. This was an appeal from my decision. The Court of Appeal at paragraph 8 of their judgment quoted from my judgment as follows:

> " It is common knowledge that the settlement officer allocates land upon certain conditions. These conditions include payment of 10% deposit and payment of the balance afterwards. In this case, the Plaintiff paid only 10% deposit. The balance was not paid. When the settlement officer demanded for the balance plus accrued interest, the Plaintiff did not pay.... The Plaintiff cannot have land for which they did not pay for. The allocation of the land to the Plaintiff was cancelled for breach of the terms and conditions in the letter of allotment. The land was allocated to those who met conditions set by the Settlement Fund Trustees. These are the ones who have obtained titles. Their titles cannot be cancelled".

13. The Plaintiff urged me to maintain the reasoning which was the subject of the appeal whereby I had dismissed the claim by Botwa Farm Limited. Botwa Farm Limited had failed to pay the balance of the purchase price and their allotment was cancelled by the SFT.

14. The Plaintiff lastly submitted that as evidence was given that Joseph Koross had died and that his family was on the land, there was need to issue an eviction order and an injunction to bar their re-entry into the land.

Defendant's Submissions

15. The Defendants submitted that there was no reply to defence or defence to counterclaim and as such the counterclaim is deemed to have been admitted. They relied on Order 2 Rule 11[a] of the Civil Procedure Rules which provides as follows:

> " Subject to subrule [4], any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it".

16. The Defendants submitted that the Plaintiff's title was obtained fraudulently. They relied on the case of Munyu Maina v Hiram Gathia Maina [2013] eKLR where it was held as follows:

> " We have stated that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register".

17. The Defendants further submitted that the suit property was not available for allocation to the deceased and that Mary Njeri Mwangi or her legal representatives were not notified of the re-allocation of the suit property.

18. The Defendants relied on the case of Thanaga v Nyaga & 2 Others [2023] KEELC 22011 [KLR] where Justice Angima held as follows:

> " 24. The court has noted that in its defence to counterclaim SFT did not plead that the 3rd Defendant was in breach of the terms and conditions of allotment of Plot No. 588 and no particulars of breach were pleaded in the defence to

counterclaim. The SFT did not also plead that a notice to remedy any breach of conditions was ever served upon the 3rd Defendant. It was not even pleaded that he was served with a notice of re-possession or notice of cancellation of his allotment.

25. The court has also considered the decision in the case of Arthur Matere Otieno –vs –Dorina Matsanza [2003] eKLR which was cited by the Defendants' advocates on the question of service of notice of repossession by SFT. The court is not prepared to go as far as the High Court went in holding that the SFT had no power of repossession under any circumstances. The court is content to adopt the High Court's holding on the issue of service. The court is thus of the opinion that in the absence of any evidence of service of the requisite notice upon the 3rd Defendant, the purported repossession and subdivision of Plot 588 was irregular, unlawful and of no legal consequence and did not extinguish the 3rd Defendant's interest over Plot 588".

19. The Defendants further relied on the case of Toroitich Misoi Mereng v Mohammed Ali & Another [2017] eKLR where Justice Dr. Odeny held as follows:

> " From the evidence it can be concluded that there was something fishy happening at the settlement office in respect of this plot. The Plaintiff had to visit the settlement office in Eldoret and Nairobi to try and clear the air. The Plaintiff also went to pay the SFT loan but was told that the amount had been cleared by the 1st Defendant who had been irregularly allocated his land. At one point he sought assistance from the Provincial Administration including the local area chief but did not get any help necessitating the court action. The above narrative settles the 3rd issue as to whether the subsequent allotment of suit land to the 1st Defendant was irregular, fraudulent and/or unlawful. The answer is in the affirmative".

20. The Defendants submitted that there was something wrong as the deceased was given a charge of Kshs.14,000 on 23rd December, 2002 and got a discharge on the same date. They relied on the case of Eliud Nyongesa Luseneka & Another v Nathan Wekesa Omache [1994] eKLR where it was held as follows:

> " With respect, we agree. Mr. Machio told us the 2nd Appellant was an innocent purchaser of value and that we ought not to visit the sins of the 1st Appellant upon him. We very much doubt the claim of innocence by the 2nd Appellant. While there is really nothing unlawful in applying for the obtaining consent of the Land Control Board in one day and applying for and obtaining registration and title to the land one day after the grant of consent, we cannot help remarking that in the circumstances of this case, the speed with which all these things were done strongly smacks of an attempt to do the respondent out of his acquired rights. We can find no merit in any of the seven grounds of appeal and we order that the appeal be and is hereby dismissed with costs".

21. The Defendants also relied on the case of M'Mugwika Rugongo v Settlement Fund Trustee where & Another [2022] EKLR where Justice Nzili held as follows:

> " 43. In Arthur Matere Otieno v Dorina Matsanza [2003] eKLR, the court held that the right to repossess or forfeit land was the preserve of the Central

Land Board. Without the minutes, the notices of repossession, the approval of forfeiture and reallocation by the board thereof.

44. The 1st Respondent produced no repossession notice, so did the 2nd Respondent. The Respondents did not also produce a cancellation notice. There was nothing produced to show when the 1st Respondent took the decision to repossess the Appellant's land. None of such documents were produced and or retrieved from the file at the Director of Land Adjudication office Nairobi by PW6. PW6 did not visit the Central Land Board which has the mandate to repossess plots. No minutes to that effect were supplied to the court by either the 2nd Respondent or PW6".

22. The Defendants submitted that the suit property was in an area subject to Land Control Board and that as no consent of the board was obtained, the title held by the deceased is a nullity.

23. On *Limitation of Actions Act* the Defendants submitted that the Plaintiffs is time barred. They submitted that the Plaintiff did not seek to evict them within 12 years. They relied on the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR where it was held as follows:

> " With respect, we agree with the learned Judge that the Appellant ought to have exercised diligence at the time it purchased the suit premises by inspecting it. The manner it dealt with the acquisition was evidently contrary to its own policy not to purchase land occupied by squatters or one with a dispute. As this court state in Mweu v Kiu Ranching & Farming Co-operative Society Ltd [1985] KLR 430:
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> "Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it".

It follows therefore that when the Appellant instituted the action in 2008 its title to the suit premises had been extinguished.

It was the Appellant's contention that the learned Judge wholly misunderstood its case by basing his decision on the doctrine of adverse possession while the claim was premised on the tort of trespass to land; that the issue before the trial court was simply whether the Respondent entered on the suit premises without its permission. We think it is futile to draw such a distinction. Section 13 and 38 of the *Limitation of Actions Act*, respectively simply recognize "some person in whose favour the period of limitation can run" and "where a person claims to have become entitled by adverse possession to land ....." Invariably all cases of adverse possession arise from claims to recover land from persons regarded as trespassers".

Analysis and Determination

24. I have considered the evidence adduced by the Plaintiff and that of the Defendants. I have also considered the submissions by the parties. The following are the issues which emerge for determination:

    1. Whether the suit property was lawfully allotted to the deceased.

    2. Whether the title in the name of the deceased was lawfully obtained.

    3. Whether the Defendants are entitled to the suit property by way of adverse possession.

4. Are the Plaintiffs and Defendants entitled to their respective reliefs in the plaint and counterclaim respectively.

5. Which order should be made on costs.

1. Whether the suit property was lawfully allotted to the Deceased.

25. There is no contention that the suit property was initially allotted to Mary Njeri Mwangi. Evidence which emerges from the parcel file from the SFT is that May Njeri Mwangi failed to pay 10% deposit as required and as such, the suit property was allotted to the deceased. Copies of the entire parcel file held by SFT was produced as exhibit 13. Other than Mary Njeri Mwangi accepting the offer, she did not make any payment to the SFT. On 28th June, 2016, the Plaintiff's lawyer wrote a demand letter [exhibit 11] to the SFT. The SFT responded to this letter [Exhibit 12] in which they stated that the suit property had been allotted to Mary Njeri Mwangi but that she did not pay the mandatory fees of 10% and she did not take possession. This evidence of non-occupation by Mary Njeri Mwangi is confirmed by the evidence of the Plaintiff that upon allocation of the land to the deceased, they took possession and used it for a while before the 1st Defendant came demanding for it. They left the land fearing for their lives.

26. As I had said in the case which was the subject of the appeal in Botwa Farm company Limited [Supra], the 1st Defendant cannot be heard to say that the allotment to his mother was unlawfully given to the deceased. The SFT gives land subject to conditions which have to be fulfilled. In the instant case, Mary Njeri Mwangi did not pay for the land which she was allotted. The suit property was therefore available for allocation.

27. The allotment to the deceased was through SFT's letter of 21st February, 2002 which was produced as exhibit 4. The deceased paid all the monies which were required to be paid to SFT. The deceased was taken to the ground and was shown the boundaries of suit property as per letter dated 28th March, 2002 produced as exhibit 6. The amount the deceased was required to pay for the outright purchase of the suit property was Kshs.14,833. The deceased paid this money on 17th July, 2002. On 23rd August, 2002, the SFT accountant confirmed that the deceased had paid all the required amounts. I therefore find that the suit property was lawfully allotted to the deceased.

28. The first allottee Mary Njeri Mwangi had only accepted the offer and did not make a single payment. The SFT was therefore under no obligation to initiate the process of re-possession by notifying her. To this extent the case of Thananga v Nyaga & 2 Others [Supra] is not applicable. Equally, the case of M'Mugwika M'Rugongo v Settlement Trustee [Supra] is not applicable.

2. Whether the tile in the name of the deceased was lawfully obtained.

29. While dealing with issue number one hereinabove, I have demonstrated that the deceased met all the requisite conditions set by the SFT. She was given clearance from the SFT. A discharge was duly given by the SFT. The deceased went to Eldoret Lands Registry where she paid for the discharge of charge simultaneously with the transfer on 23rd December, 2002. There was stamp duty of Kshs.320 paid. The deceased was then given title on the same day.

30. The Defendants tried to argue that as there was discharge and transfer made on the same day that smacked of fraud. This is not the case. The deceased had paid all the monies required by SFT which had given her a discharge. For purposes of processing title, there was nothing wrong in her lodging a discharge of charge and transfer simultaneously and getting title on the same day.

31. The deceased had followed all the procedures required upto obtaining title. She paid money required for processing of title and the requisite stamp duty which is clearly shown on the receipt issued to her on 23rd December, 2002. Her title was obtained lawfully. There were no particulars of fraud pleaded or proved in evidence as against the deceased. The Plaintiff therefore showed that the root of the title in the deceased's name was clear of any fraud or corrupt scheme. I therefore find that the title in the name of the deceased was lawfully obtained.

3. Whether the Defendants are entitled to the suit property through adverse possession.

32. The evidence which was adduced showed that Mary Njeri Mwangi died on 30th May, 1989. The extract of title shows that the suit property was first registered under SFT on 2nd July, 1992. The title was later registered in the name of the deceased on 23rd December, 2002. Time for purposes of adverse possession could not run against a government or an entity which is affiliated to the government. Time could not therefore run against SFT from 2nd July, 1992 when it became the registered owner of the suit property until 23rd December, 2002 when the suit property was transferred to the deceased.

33. The 1st Defendant's evidence is that when his mother died on 30th May, 1989, he was very young and was taken in by his aunt. They then brought in the 2nd Defendant Joseph Koross to be their caretaker. The 1st Defendant stated that he does not reside on the suit property. The 2nd Defendant is said to have died in 2017. There is no one who took out grant of letters of administration in respect of his estate. This means his suit by way of counterclaim abated a year later that is 2018.

34. The evidence of DW2 is that it is the family of the late Joseph Koross who are still on the suit property. There is no evidence given to show that the 1st Defendant is in control or in any way in possession of the suit property. The law on adverse possession is that the claimant has to be in possession peacefully, without force or interruption for a period of 12 years. The evidence on record is that the 1st Defendant forcefully ejected the Plaintiff from the land. His efforts to regain entry has been thwarted by the 1st Defendant through hired goons. The 1st Defendant cannot therefore qualify to have acquired the suit property through adverse possession.

4. Are the Plaintiff and Defendants entitled to their respective reliefs in the Plaint and counterclaim

35. As has been stated hereinabove, the 2nd Defendant's claim abated one year after his demise in 2017. The 1st Defendant has also failed to prove that he has been in quiet and peaceful occupation of the suit property for the statutory period required that is 12 years. The Defendants did not prove that the title in the name of the deceased was either obtained fraudulently, unlawfully or through a corrupt scheme. They are therefore not entitled to any of the reliefs in the counterclaim.

36. As for the Plaintiff's case, he prayed for an order of eviction against the 2nd Defendant or his representatives or assigns. As I have already said hereinabove, the 2nd Defendant died in 2017. There is therefore no eviction order which can be given against a deceased person. However, there is evidence that his family is still on the suit property. They have no right to be there. They should be evicted therefrom in accordance with the law.

37. The Plaintiff is also seeking an order of permanent injunction restraining the 1st and 2nd Defendants or their representatives or assigns from trespassing or encroaching on the suit property. The evidence has shown that the 1st Defendant though not physically on the suit property, he has intentions of claiming it. The family of the late Joseph Koross is on the suit property. A permanent injunction ought to issue restraining them from encroaching or trespassing to the suit property once evicted.

38. There is evidence that a caution was registered by the 1st Defendant against the title to the suit property on 7th May, 2003. As the court has found that he has no interest in the suit property, the caution lodged ought to be removed.

39. There is no evidence which was led by the Plaintiff to warrant this court to grant mesne profits which are in the nature of special damages. The law is clear that one cannot claim both mesne profits and general damages. There was a claim for special damages. These were neither pleaded nor proved.

40. As the Plaintiff has failed on mesne profits, there is however evidence that the 2nd Defendant has been in possession of the suit property since 23rd December, 2002 when the deceased obtained title to the suit property. There is no evidence that the 1st Defendant has been benefitting in any way from the suit property as he does not stay there. The court cannot order general damages against the family of the late Joseph Koross as they have not been sued as his administrators.

41. From the above analysis I find that the Plaintiff has substantially proved his case against the 1st Defendant on a balance of probabilities. On the other hand, I find that the 1st Defendant has failed to prove his counterclaim which is hereby dismissed. Consequently, I enter judgment in favour of the Plaintiff against the 1st Defendant in the following terms:

    1. An eviction order against the family of the late Joseph Korosss or his representatives or assigns from LR No. Uasin Gishu/Lelmolk/15.

    2. A permanent injunction against the 1st Defendant or his agents or assigns and the family of Joseph Koross, or their agents or assigns against trespassing on to LR No. Uasin Gishu/Lelmolk/15.

    3. An order compelling the Land Registrar Uasin Gishu to remove a caution lodged against title No. Uasin Gishu/Lelmolk/15 by the 1st Defendant.

    4. Costs of the suit and counterclaim to be paid by the 1st Defendant.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF MAY, 2025.

IN THE PRESENCE OF:

Mr. Kiprop for Mr. Wambua Kigamwa for Defendants.

Court assistant – Steve Musyoki.