



**Osika v Wanjara (Sued as the Administrator of the Estate of the Late Doris Anyango Wanjara)
(Environment & Land Case 9 of 2019) [2025] KEELC 4144 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 9 OF 2019**

**E ASATI, J
MAY 29, 2025**

BETWEEN

VINCENT OCHIENG OSIKA PLAINTIFF

AND

**SAMUEL AKENO WANJARA (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE DORIS ANYANGO WANJARA) DEFENDANT**

JUDGMENT

1. Vide the Originating Summons filed on 21st February 2019 the Plaintiff Vincent Ochieng Osika sought for orders against the Defendant that: -
 - a. The Plaintiff is entitled by way of adverse possession to ownership and exclusive use of L.R No. Kabondo/Kakangutu East/727 measuring approximately 3.0 HA having possessed, stayed and cultivated the said land peacefully, openly and uninterrupted for a period of 12 years in excess.
 - b. The Defendant's proprietary interest in the said land had been or has been extinguished by the Plaintiff's adverse possession thereof.
 - c. The Plaintiff be registered as the proprietor of all that parcel of land L.R No. Kabondo/Kakangutu East/727 measuring approximately 3.0HA
 - d. The costs of this summons be provided for.
3. The Defendant who was sued in his capacity as administrator of the estate of Doris Anyango Wanjara entered appearance and filed a Replying Affidavit sworn on 20th September 2019

The Plaintiff Case

4. The Plaintiff's case is that his father entered the suit land in 1952 and had continuous, public and unequivocal possession of the suit land and cultivating it yearly until 1997 when he passed on. That



after his death, the Plaintiff and his family have continued to possess and cultivate the land to date. That the Plaintiff's use and occupation of the land has been open uninterrupted and without any opposition whatsoever. That the plaintiff's claim is valid and ought to be allowed.

The Case of the Defendant

5. The Defendant's case as can be gathered from the Replying Affidavit is that his capacity as Administrator of the estate of Doris Anyango Wanjara, who was his mother ceased when his mother's estate was finally distributed hence the suit against him in his capacity as administrator of his mother's estate is incompetent and an abuse of the process of the court. That following the death of his mother in 1993 he obtained exclusive possession of the suit land which he had to date. That he had planted eucalyptus trees and have been cultivating thereon. That it was in the year 2015 that the Plaintiff invaded the suit land and commenced tilling the same. That the plaintiff does not live on the suit property nor has he hoisted any structures thereon. That the Plaintiff has never possessed or stayed on the suit land save for some time in 2015 when the Plaintiff descended on the suit property thereby triggering judicial process. That the orders sought by the Plaintiff are not in the interest of justice.

The Evidence

6. Vide directions taken on 19th November 2019, the matter was disposed of through viva voce evidence.
7. The plaintiff testified and called one witness. He produced exhibits P.1 to P.7 namely; Memorandum of appearance dated 25/3/2029, Grant of Letters of Administration dated 15/9/2009, copy of green card, certificate of official search dated 23/9/2011, copy of rectified green card dated 9/4/2020, an order dated 24/10/2012 and assorted photographs.
8. No evidence was called on behalf of the Defendant who failed to attend court in spite of being served with a hearing notice.

Submissions

10. Written submissions dated 12th February 2025 were filed on behalf of the Plaintiff by the firm of Olel, Onyango, Ingutiah Advocates. No submissions were filed on behalf of the Defendant.

Issues for Determination

11. From the pleadings, evidence and submissions on record, the following emerge as the issues for determination: -
 - a. Whether or not the plaintiff has had adverse possession of the suit land..
 - b. Whether or not the defendant's title to the suit land has become extinguished by operation of the law
 - c. Whether or not the Plaintiff is entitled to the relief sought
 - d. Costs of the suit

Analysis and determination

12. The first issue for determination is whether or not the Plaintiff has had adverse possession of the suit land.
13. Adverse possession is a doctrine of law anchored on section 7 of the *Limitation of Actions Act*. The elements of adverse possession are that the entry onto and possession of the suit land by the Claimant



must be without the permission or consent of the registered owner of the land, the possession must be open, notorious, peaceful, continuous and uninterrupted and exclusive and for a period in excess of 12 years.

In the case of *Mbira v Gachuhi* 2002 I E.A LR 137 it was held that: -

“..... A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non – permissive or non – consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”

14. In *Kasuve v Mwaani Investments Ltd & Others* 2004 I KLR 184, the Court of Appeal stated thus: -

“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

15. Section 28(h) of the *Land Registration Act* 2012 recognizes adverse possession as an overriding interest in land as: -

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

16. And Section 7 of the *Land Act* 2012 as one of the methods of land acquisition

17. In *Mtana Lewa v Kahindi Ngala Mwangandi* 2005 eKLR the Court of Appeal described the doctrine as follows: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya it is twelve (12) years. The process springs into action essentially by default or inaction of the owner.

The essential prerequisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act* which is in these terms: -

“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 occurred to him or, if it first accrued to some person through whom he claims, to that person.”

18. The Plaintiff pleaded in the Originating Summons that his father entered the suit land in the year 1952 and had occupation of the same till 1997 when he passed on and thereafter the Plaintiff and his family continued with the possession of the land to date.

19. In the Supporting Affidavit, the Plaintiff explained that the suit land was registered in the name of Doris Anyango Wanjara who was a step-mother to the Plaintiff's father. That in the year 1952 long before land registration was done, the Plaintiff's father one Alphayo Osika Wanjara moved onto the suit land openly and without the permission of Doris Anyango Wanjara and started cultivating the same. That when the Plaintiff's father's first wife by the name of Mrs Achok Osika died in 1955, he buried her on the suit land where he had set up a home for her.



20. That when land adjudication and registration was done in 1968, Doris Anyango Wanjara never asked the Plaintiff's father to leave the land. That the Plaintiff was born and brought up on the land. That he continued to have possession of the land after the death of his father in the year 1997. That his home is on the suit land. That he has done a lot of developments on the land including cultivating crops and having 2 acres with about 3000 full grown eucalyptus trees.
21. The plaintiff testified vide his witness statement dated 1/2/2021 that Doris Anyango Wanjara, moved from the suit parcel in the year 1960, built her home on LR Kabondo/Kakangutu East/723 and settled therein where she stayed till her death in 1993. That parcel number 723 was registered in the name of the Defendant who is the only son of Doris Anyango Wanjara. That later the Defendant moved out of LR No Kabondo/Kakangutu East/723 and settled in Muhoroni in 1960's where he has been staying ever since. He testified further that his father was buried on the suit land.
22. The Plaintiff stated further that the defendant does not live, work or occupy any part of the suit land, that the Defendant has never constructed any structures on the suit land.
23. The Replying Affidavit filed by the Defendant was treated as a defence. He denied the Plaintiffs claim and stated that it was only in 2015 that the Plaintiff invaded the suit land which action triggered legal process against the Plaintiff. The documents annexed to the Replying Affidavit included private investigation report by Seals Spy Limited who reported that the land was free from any occupation by anybody and that there were no structures erected on the suit land. That there were four (4) year old eucalyptus trees planted on the front of the L-Shaped parcel of land.
24. PW2, the witness called by the Plaintiff testified that the home of the plaintiff has been on the suit land for a long time. That there has never been a dispute concerning the suit land for a long time.
25. It was submitted on behalf of the Plaintiff that in a claim of adverse possession the burden of proof is on the Claimant to prove the elements of adverse possession namely; the person claiming must be in actual and not constructive possession of the land, that the possession must be open and not secret or be clear to all and sundry who know and access the land, that it should be exclusive and against the owner.
26. Counsel relied on the case of Kisumu Civil Application No 110 of 2010 Richard Wafwefwe Songoi v Ben Munyifwe Songa [2020] eKLR.
27. Counsel submitted that the Plaintiff's evidence was not controverted as the Defendant did not adduce evidence. That the Replying Affidavit that was deemed as a defence was therefore mere allegations that are unsubstantiated.
28. Counsel relied on the case of Njogu v Sibashi (Environment and Land Case No 12 of 2018) [2024] to support these submissions.
29. On the evidence placed before court. I find that the Plaintiff has proved that he had acquired title by adverse possession. The assorted photographs produced by the Plaintiff show the development on the land namely a homestead, trees and some crops growing.
30. The green card produced shows that up to 18.1.2010 the suit land was registered in the name of the deceased Doris Anyango Wanjira and that on the said date the land was transmitted in favour of the Defendant upon registration of form RL19.
31. The testimony of the Plaintiff was not controverted. No evidence was produced to support the Defendant's contention that it was in the year 2015 the Plaintiff entered the suit land.



32. In *Edward Muriga (through Stanley Muriga v Nathaniel R Schutts Civil Appeal No. 23 of 1997*, the court held that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed as the allegations in the Defence do not amount to evidence. Similarly, in *Motex Knitwear Limited v Gopites Knitwear Mills Limited [2009] eKLR*, the court observed that

“although the Defendant denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st Plaintiff stand unchallenged but also that the claims made by the defendant in his defence and counterclaim unsubstantiated.”

33. This position was echoed in the more recent decision for instance in *Michael Njiru Kariuki v Ferdinand Ndungu Waititu & 3 others [2021] eKLR* where the court held that

“Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the Defence, such averment stands as a mere statement. Further if there is no rebuttal of evidence by a party, the evidence remains uncontroverted...”

34. Concerning the second issue for determination, under Section 17 of the *Limitation of Actions Act* at the expiry of the period prescribed to bring action the title of that person is extinguished.

35. In *Benjamin Kamau & another v Gladys Njeri C. A Civil Appeal No. 2136 of 1996* it was held that it is now well established that the combined effect of the relevant provision of sections 7, 13 and 17 of the Limitation of Action Act is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession.

36. In the present case the Plaintiff has been in occupation since 1997. 12 years from 1997 elapsed in 2009.

37. There is no evidence that the Defendant has ever had possession of the suit land. I find that the Defendant's title has become extinguished.

38. For the foregoing reasons the court finds that the plaintiff has proved his claim on a balance of probabilities and hereby enters judgement in his favour as prayed in the Originating Summons. Each party to bear own costs of the suit.

Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 29TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Odhong for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

