



**Nyaguti v Okore (Sued as the Administrator of the Estate of the Late Okore Rakwaro (Deceased)) (Environmental and Land Originating Summons E029 of 2021) [2025] KEELC 528 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 528 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E029 OF 2021**  
**E ASATI, J**  
**FEBRUARY 6, 2025**

**BETWEEN**

**MICHAEL OTIENO NYAGUTI ..... PLAINTIFF**

**AND**

**DAVID OTIENO OKORE ..... RESPONDENT**

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE OKORE RAKWARO (DECEASED)**

**JUDGMENT**

1. Vide the Originating Summons dated 14<sup>th</sup> July, 2021, Michael Otieno Nyaguti, the Plaintiff herein, who claims title to land parcel No. Kisumu/korando/1863 by adverse possession seeks for the following orders against David Otieno Okore (sued as the Administrator of the estate of the late Okore Rakwaro, deceased) that:
  - a. the Applicant has obtained title over land parcel No. Kisumu/korando/1863 measuring 0.2 hectares by way of adverse possession having actually, openly, notoriously, exclusively and peacefully occupied nec clam, nec vi, nec precario the said whole parcel of land for a period exceeding 12 years.
  - b. consequently, upon the foregoing, land parcel No. Kisumu/korando/1863 be registered in the name of the applicant as the sole absolute and indefeasible proprietor and a declaration that the title held by the estate of the late Okore Rakwaro, deceased, is extinguished by virtue of adverse possession.
  - c. consequently, upon the foregoing, the County Land Registrar, Kisumu County, to enter the name of Michael Otieno Nyaguti as the proprietor of the said land parcel No. Kisumu/korando/1863, measuring 0.20 hectares in lieu of the estate of the late Okore Rakwaro.



- d. this honourable court do make further or better orders it might deem fit and expedient and meet the ends of justice.
2. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the Applicant on 14<sup>th</sup> July, 2021.
3. In response to the Originating Summons, the Respondent filed a Replying Affidavit sworn on 14<sup>th</sup> September, 2022 denying the Applicant's claim.
4. The matter was, vide the directions taken on 20<sup>th</sup> November, 2022, disposed of by way of via voce evidence.

### **The Evidence**

5. The evidence for the Plaintiff comprised of the Plaintiff's testimony, the testimony of the witness he called and the exhibits produced. The Plaintiff testified as PW1 and adopted the contents of the Supporting Affidavit to the Originating Summons as his evidence in chief. He had stated in the said Affidavit that he was the son of the late Joseph Nyaguti Otieno who entered into a land transfer agreement over land parcel No. Kisumu/korando/1863 with one Okore Rakwaro, deceased on 20<sup>th</sup> August, 1976 during land adjudication. That his father took possession of the land immediately after the agreement. That the father occupied the land planted crops including sugarcane, sunflower and cotton. That at some point, the father allowed factories doing construction works nearby to deposit loamy top soil on the land which was later spread on the land for ease of cultivation.
6. That from mid 1980s, his father allowed the Plaintiff and his brother John Otieno Nyaguti to take over possession of the suit land. That together with his late father, he has been in open, exclusive and uninterrupted occupation of the suit land from 20<sup>st</sup> August 1976, a period of over 44 years.
7. That he has done substantial development on the land namely; built a house, planted fruit trees, fixed piped water, planted over 4000 sugarcane and developed the place into a food-secure homestead with chain linked wire-fencing. That the family of Okore Rakwaro at no time made claim over the suit land. That they never made attempts to recover the land from the Plaintiff's occupation.
8. He testified that he has been occupying the land without the consent of Okore Rakwaro, deceased or the Respondent herein. That there is no license or landlord and tenant relationship with the Respondent.
9. That the Respondent filed succession cause No.498 of 2016. He deposed that he is entitled to the land under the doctrine of adverse possession.
10. The plaintiff produced a copy of green card for the suit land, photographs and copy of Grant of Letters of administration in respect of the estate of Andrew Okore Rakwaro as exhibits.
11. On cross-examination, he stated that an earlier case he had filed claiming title to the suit land by adverse possession was discontinued by consent of both parties.
12. That time begun to run for purposes of adverse possession from the time his father entered the land. That his father told him that he was given the land by the late Okore.
13. That on adjudication sketch map, the first name written was Okore Rakwaro which was cancelled. That he does not know how his father's right over the suit land arose but his father told the family that he was given the land by Okore Rakwaro.



14. He stated further that the first registered proprietor of the suit land was Okore Rakwaro. That the Respondent was given a Grant of Letters of Administration in respect of the estate of Okore Rakwaro.
15. He testified that he established a home on the suit land in the year 2014 which was the same year when case No.81 of 2014 was filed. That he had been on the land with his father.
16. PW2 was Benjamin Oduge, an Assistant Director of Land Adjudication and Settlement – Kisumu County. He produced the demarcation sketch as exhibit and explained the cancellations and replacement of the names in the document.
17. On cross-examination, he stated that the document showed that the land is owned by Okore Rakwako.
18. On behalf of the defence, the Defendant testified and adopted the contents of his witness statement dated 26<sup>th</sup> January, 2023 as his evidence in chief.
19. He had stated in the said witness statement that he is the beneficiary of the estate of Okore Rakwaro, having been granted Letters of Administration. That the Plaintiff has never been in occupation of the suit land for a period in excess of 12 years to the exclusion of the true owner.
20. That in the year 2014, the plaintiff/Applicant forced his way into the suit land and unlawfully erected a semi-permanent structure after which he moved and settled therein. That the Plaintiff then filed case No.Misc. Applic. No.159 OF 2014 seeking orders that he had acquired the land by adverse possession which case was later withdrawn in the year 2020.
21. That the land belonged to his grandfather by the name Okore Rakwaro who got registered as owner in the year 1990 and that his title was never challenged by the Plaintiff's father who died on 3<sup>rd</sup> December, 2000.
22. That the property is part of the estate of the deceased. That his grandfather Okore Rakwaro being a first registered proprietor, his rights are indefeasible. He produced a grant of Letters of Administration and copy of green card as exhibits.
23. On cross-examination, he stated that Okore Rakwaro was his grandfather. That the other people who survived Okore Rakwaro are all deceased. That the Plaintiff's father had been given the land to plant sugarcane which land he used and left it. That it is not true that the Plaintiff's father entered the land upon adjudication and upon agreement with Okore Rakwaro. That it is the Plaintiff who wants to take the land.

### **Submissions**

24. At the close of the evidence, parties filed written submissions on the case. Written submissions dated 12<sup>th</sup> February, 2024 were filed by the Plaintiff. The Plaintiff submitted that together with his late father entered into and occupied the suit parcel after an agreement with the Respondent's late grandfather that was entered in the demarcation sketch record on 20<sup>th</sup> August, 1976.
25. That the Respondent has not provided any controverting evidence of a different entry date onto the suit land by the Applicant and his father. That the Applicant is not claiming specific performance of the agreement registered in the demarcation sketch but only using it as evidence to prove the date that he together with his late father they made entry and possession of the suit land to enable the court to compute whether the claim is within the prescribed time for adverse possession.



26. He submitted that time begun to run for him and his late father immediately the name of Joseph Nyaguti was cancelled in the demarcation sketch, thus negating, the earlier consent by the original owner and that their possession has never been interrupted.
27. The Applicant submitted that since entry onto the suit land, he together with his late father had occupied the land openly, actually, peacefully and exclusively with the knowledge of but without the consent or permission of the Respondent or any member of his family.
28. That they have developed the land. That at no time did the Respondent or any member of the family of Okore Rakwaro make any attempt to discontinue the Applicant's occupation or register any dispute.
29. That the Applicant and his father have been in uninterrupted/continuous possession of the suit land for over 44 years and therefore entitled to the orders sought in the Originating Summons.
30. The Applicant relied on the provisions of the Limitations of Action Act. He submitted further that the Respondent is a litigant who is hellbent to mislead the court through false testimony and that the court should not ignore the unbecoming conduct of the Respondent.
31. The Plaintiff prayed that the court in exercising its discretion on the issue of costs should consider the fact that the Plaintiff has been dragged to court.
32. Written submissions dated 18<sup>th</sup> March, 2024 were filed on behalf of the Defendant by the firm of Omondi Abande & Company Advocates.
33. Relying on the provisions of Section 30 of the Land Adjudication Act, Counsel submitted that the honourable court has no jurisdiction to entertain issues regarding the land adjudication process. That even if consent would have been issued by the Land Adjudication Officer, the Applicant would be time barred in bringing up the issues before this court.
34. That an action for adverse possession can only be brought against a registered proprietor and proof of registration is a title deed as provided for in Section 26 of the Land Registration Act, 2012.
35. Counsel submitted that adverse possession is a legal doctrine that has specific requirements that must be met for a claim to be successful. That the requirements include open, notorious possession, continuous possession, hostile or adverse claim, exclusive possession and the statutory period.
36. That there was no proof of use of the land by the Applicant's father. Counsel relied on the case of Kariuki -v-s Ndungu (2019)eKLR where the court noted that for the possession to be considered notorious, it must be so open that the true owner could not be mistaken about the occupier's intentions. That in the present case, the Applicant's clandestine entry and occupation do not meet this requirement.
37. That the occupation must be continuous and uninterrupted for the entire statutory period. That it is in the year 2014 when the Applicant developed an interest in the suit property going by the exhibits and evidence. That the period of occupation had therefore not amounted to 12 years.
38. That possession must be actual and real and that there is no evidence whatsoever that the Plaintiff and his father entered the suit land in the year 1976. That the applicant has no locus standi to talk about his father's occupation without Letters of Administration. That the Applicant can only do so if he filed the suit as the administrator of the estate of his father.

Counsel urged the court to award costs to the Respondent.



## Issues for Determination

39. The claim before court is based entirely on the doctrine of adverse possession. From the pleadings, evidence and submissions placed before court, the following emerge as the issues for determination;
- a. whether or not the court has jurisdiction to entertain the suit without compliance with the provisions of section 30 of the [Land Adjudication Act](#).
  - b. Whether or not the Applicant has locus standi to claim on behalf of his late father.
  - c. whether or not the Plaintiff has proved a claim of adverse possession.
  - d. who pays costs of the suit.

## Analysis and determination

40. The first issue for determination is whether the court has jurisdiction.
41. This was raised by Counsel for the Respondent citing the provisions of Section 30 of the [Land Adjudication Act](#). Section 30 the [Land Adjudication Act](#) divests the court of jurisdiction to entertain any civil proceedings concerning an interest in land in an adjudication area until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of the Act.
42. Perusal of the pleadings and evidence placed before court reveals that the claim before court is one purely on adverse possession. Secondly, the suit land was not a subject of adjudication process as at the time of filing suit. The green card produced by the Respondent as exhibit shows that the register in respect of the suit land was opened on 13<sup>th</sup> March, 1990 when the suit land was registered in the name of Okore Rakwaro. This is testimony that the adjudication register in respect of the area was had become final before the suit was filed as registration of the land had taken place in the year 1990. Hence the requirement for consent of the Land Adjudication Officer was not applicable.
43. This court under the provisions of Section 38 of the [Limitation of Actions Act](#), Order 37 of the Civil Procedure Rules, Section 13 of the [Environment and Land Court Act](#) and article 162 of [the Constitution](#) has jurisdiction to entertain claims based on adverse possession. See Court of Appeal decision in *Sugawara vs Kiruti (Suedin her capacity as Administratrix of the Estate of Mutarakwa Kiruti Lepaso and in her own capacity) & 3 others (Civil appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024)* Judgement on jurisdiction of the court in claims based on adverse possession to land.
44. I find that section 30 of the [Land Adjudication Act](#) is not applicable in this case as adjudication register became final and the land registered long before the filing of the suit hence the court has jurisdiction.
45. The next issue is whether the Applicant has locus standi to bring the claim on behalf of his father.
46. In his pleadings, evidence and submissions, the Applicant stated consistently and repeatedly that they entered the suit land together with his father in the year 1976 and occupied the land adversely. In the Supporting Affidavit, he averred that in the mid1980s, his father left the land for him and his brother and that they continued with the adverse possession.
47. However, a reading of the applicant's pleadings shows that the suit was not filed on behalf of the applicant's father. As rightly submitted on behalf of the Respondent without Letters of Administration, the applicant has no capacity to plead, testify or claim on behalf of his father or for period he alleges his father was in occupation of the suit land.



48. But as the suit has been brought by the applicant for his own benefit I find that he has locus standi and as to whether he has had possession for the period that he claims to have been in exclusive possession is a matter that he has the burden to prove.

49. On whether or not the Plaintiff has had adverse possession of the suit land;

50. Adverse possession is a legal doctrine vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on sections 7, 13 and 38 of the Limitation of Actions Act. 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.”

51. Under section 13 of the Act provides that the right of action to recover land will not accrue and therefore time for adverse will not start to run unless the adverse possessor is in possession of the land in question. Section 13 provides;

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), 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 cease 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 purpose 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.

52. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the Court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

53. The Court of Appeal in Mombasa in the case of *Mombasa Teachers Co-operative Savings and Credit Society Limited vs Robert Muhambi Katana & 15 Others* [2018] eKLR held that-

“Likewise, it is settled that a person seeking to acquire title 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 un-interrupted period of 12 years as espoused in the Latin maxim of *nev, 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 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."

54. In the present case the applicant traces his entry onto the suit land to what he calls a transfer agreement between his father and Okore Rakwaro during the land adjudication process. He claims that the said agreement is reflected in the adjudication sketch produced by PW2. He claimed that as a result of the agreement his father took possession of the suit land in the year 1976 and had possession of it until the 1980s when he left it to the applicant and the applicant's brother. He claimed further that time started to run for adverse possession purposes when his father's name was cancelled from the adjudication record. He stated that he did not know how his father's claim to the land arose but that his father told the family that he was given the land by Okore Rakwaro.
55. It is noteworthy that the applicant's father never took any steps to recover the land from Okore Rakwaro, the registered owner, either on the grounds that the land had been given to him or on grounds of adverse possession.
56. The Respondent stated that the applicant's father had been given the land to plant sugar cane after which he left it and that now the applicant wanted to take the land which was an asset of the estate of the deceased.
57. The adjudication sketch produced by PW2 only served to prove that the end result of the adjudication process in respect of the suit land was that the suit land was adjudicated in favour of Okore Rakwaro in whose name it was consequently registered as evidenced by the green card. Although the Plaintiff referred to an agreement contained the adjudication sketch, a reading of the said document does not reveal any agreement.
58. There is no evidence that the applicant occupied the suit land with his father from the year 1976 to date. I also find no evidence that the suit land was given to the plaintiff and his brother by their father in the 1980s. The totality of the evidence placed before court shows that the Plaintiff's activities in relation to the suit land begun in the year 2014. That is when he filed the first suit which was later discontinued, it is when he entered the land, built a structure and settled thereon and according to the annexures to the Further Affidavit particularly his letter dated 5<sup>th</sup> March 2014 addressed to the Deputy County Commissioner, it is when he complained to the authorities about a dispute on ownership of the suit land. It was in the same year that the applicant caused a restriction to be placed on the land.
59. From 2014 to 2021 when the present suit was filed, a period of 12 years as envisaged by Section 7 of the *Limitation of Actions Act* had not elapsed. The applicant produced a copy of green card in respect of the suit land as exhibit. The same shows that the suit land was registered in favour of Okore Rakwaro in the year 1990 and that it remains so registered to date. He also produced photographs to demonstrate the developments he has undertaken on the suit land. There is however no evidence that the said developments were undertaken before the year 2014.
60. The Respondent explained that the Plaintiff forcefully entered onto the suit land in the year 2014, built a structure and moved in and settled. This version of the story is what is supported by the evidence placed before court.
61. The consequences of a finding that a party has had adverse possession of land are grave because the registered owner loses the title to that land and the right to own the land as secured by article 40 of *the Constitution* of Kenya. In order for this to happen, adverse possession must be proved to the required



degree. The burden of proof as per the provisions of sections 107 to 109 of the Evidence Act Cap 80 Laws of Kenya is with the applicant. In this case, that burden has not been discharged.

62. Regarding costs, under the provisions of section 27 of the Civil Procedure Act, costs follow the event. No reasons have been placed before the court to order otherwise.

63. For the foregoing reasons, I find that the Plaintiff/Applicant has not proved his claim on a balance of probabilities. The Plaintiff's/Applicant's case commenced vide the Originating Summons dated 14<sup>th</sup> July 2021 is therefore hereby dismissed.

Costs to the Defendant.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen - Court Assistant.

Plaintiff/Applicant present in person.

Abande for the Defendant/Respondent.

