



**Ondu v Ondu (Enviromental and Land Originating Summons E017 of 2020) [2025] KEELC 404 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 404 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2020**  
**E ASATI, J**  
**FEBRUARY 6, 2025**  
**IN THE MATTER OF REGISTERED LAND ACT CAP.300 (REPEALED)**  
**AND**  
**IN THE MATTER OF LAND REGISTRATION ACT 2012**  
**AND**  
**IN THE MATTER OF SECTION 7, 17 AND 38 OF THE LIMITATION OF**  
**ACTIONS ACT CAP 22**  
**AND**  
**IN THE MATTER OF LAND PARCEL NUMBER KISUMU/BLOCK 4/296**  
**IN THE MATTER OF SILA OKAL ONDU AND MARY AUMA ONDU**  
**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE**  
**RULES**

**BETWEEN**

**SILAS OKAL ONDU ..... APPLICANT**

**AND**

**MARY AUMA ONDU ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Silas Okal Ondu, the Plaintiff/applicant herein, who claims proprietary interest by way of adverse possession in land parcel number Kisumu/Block 4/296 approached this honourable court vide the



Originating Summons dated 22<sup>nd</sup> October 2020. He sought that the court determines the following questions; -

- a. Whether the plaintiff herein is entitled to land parcel number Kisumu/Block 4/296 by reason of their adverse possession having been in quiet, peaceful, continuous and uninterrupted occupation for a period exceeding 12 years?
  - b. Whether the defendant's proprietary interest in the land parcel number Kisumu/Block 4/296 have been extinguished by virtue of the Plaintiff's/Applicant's adverse possession and whether the defendant is now holding the title in trust for the plaintiff?
  - c. Whether the title deed issued in the name of Mary Auma Ondu, as the absolute proprietor of the whole of land parcel number Kisumu/Block 4/296 should now be revoked and cancelled and the said parcel of land be transferred to the plaintiff as the sole proprietor?
  - d. Whether the costs of this Summons should be provided for and/or who should pay the said costs?
2. The Originating Summons is based on the grounds the Supporting Affidavit sworn by the plaintiff on 22<sup>nd</sup> October 2020 and the annexures thereto.
  3. In response to the Originating Summons, the Defendant/Respondent filed her Replying Affidavit sworn on 19<sup>th</sup> October 2022.
  4. Directions were taken on 13<sup>th</sup> March, 2023 that the matter be disposed of by way of viva voce evidence.

### **The Evidence**

5. On behalf of the plaintiff, a total of 4 witnesses testified. PW1 was the Plaintiff. He adopted the contents of his witness statement dated 22/10/2020 and the Affidavit in support of the Originating Summons as his evidence in chief. He had stated in the witness statement dated 22/10/2020 that the suit land was voluntarily given to him by the defendant who is his sister on the understanding that he would possess, develop and use it exclusively as his property considering their relationship. That based on that understanding and with the full knowledge of the defendant he secured possession of the suit land and undertook serious developments thereon and has been in continuous and uninterrupted, peaceful and quiet use of the land for 18 years. That he now seeks to be declared the lawful owner of the suit land by way of adverse possession. That the defendant had just resurfaced after 18 years and is determined to take control of the property and has initiated measures to evict him and his tenants. That he had been exercising all rights of ownership over the suit land for more than 18 years with the full knowledge of the defendant.
6. In the Supporting Affidavit, he deposed that he moved into the property and in the year 2004, he built a residential flat that he occupies and leases to various tenants and that he has remained in peaceful, quiet and uninterrupted occupation and use of the property.
7. He testified that his sister, the defendant, had gone to his house and told him that the suit land was being repossessed and that instead of the repossession, the plaintiff should go and build on the land. That it was the Kisumu City Council that was repossessing the land. That it was in the year 2018 when the defendant wanted to take her land back. That she gave a letter to the tenants indicating that she was the Landlady. That from the year 2002 to 2018 the defendant never interfered with the plaintiff's occupation of the suit land. The plaintiff produced exhibits namely; bundle of building plans, photographs and Western Union Money Transfer documents.



8. On cross examination, PW1 stated that it is the owner who was giving the money to pay the rents and rates for the suit plot. That it was Mary who sought for approval from the City Council of Kisumu for construction in the year 2004. That the defendant never visited the suit land. That Mary Wafula was brought to stay on the land and she stayed from 2004 to 2015. That he had been collecting rent from the suit land. That he has never paid land rates and that he had been staying on the suit property.
9. PW2 was Carlyne Aboge. She stated that the parties herein are her uncle and aunt respectively. She adopted the contents of her witness statement dated 14<sup>th</sup> October 2020 as her evidence. She testified that she stays on the suit land as a tenant paying rent of Kshs.15,000/= per month and that it is the plaintiff who collects the rent. That she was introduced to the land by the defendant who requested the plaintiff to give her a house thereon. That the defendant came with letters to the land to direct tenants to pay the rent to her and not Silas. That this was in the year 2020 and that the defendant had not come to the land before then.
10. On cross examination, PW2 stated that it is Mary (defendant) who took her to the land because she was concerned about her safety. That since she occupied the premises no construction has taken place to date.
11. PW3 was John Gwara Ondu. He adopted the contents of his witness statement dated 10/1/2023 as his evidence. On cross examination, he stated that the defendant allowed the plaintiff to develop the land to avoid repossession. That it is Silas who developed the property and that Mary had been visiting the property from time to time to get money for school fees which money was coming from abroad.
12. PW4 was Carlyne Lunda Ochieng. She stated that the plaintiff is her husband and that the parties herein agreed that the defendant will develop the property. That she took a loan and was sending the money. That in return they were to build a house for the defendant. That the building on the suit land was for the plaintiff and that she contributed money for it.
13. On cross examination, the witness stated that the husband, the Plaintiff herein, entered onto the suit land with the consent of the defendant. That the defendant was being built for a house at Milimani estate Kisumu on a separate parcel of land. That she has never been to the suit land but she had only seen photographs of the building. That she has never met the tenants who live on the suit land.
14. On behalf of the Defendant, 3 witnesses testified. DW1 was the Defendant. She adopted the contents of her witness statement dated 19/10/2022 as her evidence. She had stated in the witness statement that she is the registered owner of land parcel No. Kisumu/Block 4/296 which she bought from PHYLLIS A. OURO. That she has never given the suit land to the plaintiff. That after purchase she sought for approval from Kisumu Municipal Council before she began the construction and that she paid the necessary fees.
15. She stated further that in the year 2002, the plaintiff was staying with her in Mangu High School Thika with her family. That she hadn't yet started construction nor had she acquired the title deed to the property. That when she began construction of the rental units in the year 2004 the plaintiff approached her and requested to assist her by supervising the activities at the property. That the defendant accepted and was paying him. That after construction of the first rental unit around the year 2006 she requested the plaintiff to be collecting rent from the tenants and to inject it back by constructing more rental units on the suit property and the balance he would pay the caretaker, himself and send the rest to defendant. She stated further that the plaintiff has never stayed on suit land as he resides in Makasembo estate Kisumu. R5/114.
16. That the rental units on the suit land have been developed by her entirely using rental proceeds, loans from Mwalimu Sacco and her monthly earnings as a teacher. That she has been paying land rates. That



- in the year 2015, the plaintiff stopped remitting the rents collected to her and that the plaintiff being her younger brother without any source of income, she did not seek any redress against him. That she therefore asked her advocate to inform all the tenants to stop remitting the rent to the plaintiff. That she also served Rent Restriction Tribunal with the letter. That she never received any rent from the tenants. That she also registered a complaint with the police. She prayed that the Originating Summons be dismissed and the plaintiff ordered to pay her Kshs 80,000/= per months from the year 2015 monthly collection per month from all the 10 units on the suit property, that the tenants be ordered to pay monthly rent to her and that she be paid costs. She produced documents as exhibits D1 to D7.
17. On cross examination the Defendant stated that her property has never been at any risk of repossession. That she allowed the plaintiff to enter the land in the year 2006 to assist the caretaker in supervising the work. That by then 8 units had been developed on the land. That she used her salary, dividends and money given to her by her husband to build. That the building on the suit land is not yet complete.
  18. DW2 was Joel Omondi Ondu. He adopted the contents of his witness statement dated 30/9/2022 as his evidence. On cross examination he stated that the parties in the suit were his siblings. That the defendant began the construction in the year 2004. That Mary was buying the building materials and that sometimes the plaintiff would buy. That the plaintiff has never lived on the suit land.
  19. DW3 was Mary Wanjala Wafula. She relied on the contents of her witness statement dated 30/9/2022. On cross examination she stated that she started staying on the suit land in the year 2004 as a caretaker having been placed there by the defendant. That the place was then a bush. That there was no house except an iron sheet temporary structure which was made for her occupation. That she first saw the plaintiff on the land in the year 2006 when he was brought to be in charge of the construction which the defendant had started on the land. That construction on the land began in the year 2004. That it was her and the plaintiff who were caretakers on the plot. That she was chased from the land in the year 2015 by Silas who said he did not recognize her.

## Submissions

24. Parties filed written submissions on the case. On behalf for the plaintiff written submissions dated 10<sup>th</sup> September 2024 were filed by the firm of Odhiambo Ouma & Company Advocates. Counsel relied on the provisions of section 7 of the *Limitation of Actions Act* and the case of Mtana Lewa Vs Kahindi Ngala Mwangandi (2015)eKLR and submitted that if the limitation time is tabulated from the period when the plaintiff was put into possession of the suit land to when the suit was filed the time sums up to 18 years. That the defendant's rights over the suit property extinguished 6 years before the suit was instituted by the plaintiff. That if the defendant wished to reclaim back the suit property then she ought to have commenced a claim within the time prescribed under section 7 of the *Limitation of Actions Act*. That by the time the plaintiff filed the suit, the defendant's claim over the suit property was already statute barred. That the defendant failed to prove that the plaintiff was collecting rent on her behalf. That the defendant has never filed any claim against the plaintiff for recovery of the unremitted rent. Counsel urged the court to allow the plaintiff's case with costs.
25. On behalf of the defendant written submissions dated 14<sup>th</sup> March 2024 were filed by the firm of Otieno, Yogo, Ojuro & Company Advocates. Counsel submitted that under section 107 and 108 of the *Evidence Act*, he who asserts or pleads must prove. That as held in the case of Annah Muthoni Ileri vs William Njeru Mbogo (2020)eKLR a gift of a parcel of land is valid upon compliance with the necessary registration formalities. That section 36 of the *Land Registration Act* provides for a mandatory procedure for disposition of an interest in land. Counsel relied on the cases of Re- estate of Gideon Manthi Nzioka (Deceased) (2015)eKLR Registered Trustee Anglican Church of Kenya Mbeere Diocese Vs David Waweru Njoroge (2007) to submit that gifts of land must be by way of



registered transfer. Counsel submitted further that there was no evidence tabled by the plaintiff that the defendant gifted the suit land to him.

26. On the issue of trust, Counsel relied on the provisions of sections 24, 25, 26 and 28 of the [Land Registration Act](#), 2012 and the case of Mumo Vs Makau (2002)eKLR where it was held that trust is a question of fact to be proved by evidence and submitted that the plaintiff did not call any evidence to prove trust.
27. On whether the defendant is the owner of the suit land, Counsel submitted that the defendant gave overwhelming evidence including a copy of title deed to show that she is the registered owner of the land.
28. On whether the plaintiff can claim adverse possession on the suit land Counsel submitted that for a claim for adverse possession to succeed the claimant must prove that the possession claimed was adequate in continuity, in publicity and in extent and that it was adverse to the registered owner and that to claim adverse possession one has to satisfy all of these conditions. Counsel relied on the case of Maweu vs Liu Ranching and Farming Cooperative Society 1985 KLR 430 for this submission. Counsel also relied on the decision of the Court of Appeal in Kisumu Civ App. No, 110 of 2016 Richard Wafwafwa Songoi vs Ben Munyifwa Songoi (2020)eKLR
29. Counsel submitted that an application by the plaintiff in respect of which a ruling was delivered herein on 8/10/2021 failed because the plaintiff did not prove on prima facie basis that he was in adverse possession of the suit property.
30. Counsel urged the court to dismiss the suit with costs to the defendant.

#### **Issues for determination**

31. The parties herein filed a statement of agreed issues dated 14<sup>th</sup> April, 2023 signed by both parties. The issue framed therein are as follows;
  - i. Whether the plaintiff herein is entitled to land parcel No. Kisumu/Block 4/296 by reason of adverse possession.SUBPARA ii.

Whether the Defendant's propriety interest in land parcel Number Kisumu/Block 4/296 have been extinguished by virtue of the plaintiff's adverse possession and whether the Defendant is now holding the title in trust for the plaintiff.

  - iii. Whether the lease Title in the name of MARY AUMA ONDU as the absolute proprietor of the whole of land parcel number Kisumu/Block 4/296 should now be revoked and cancelled and the said parcel of land be transferred to the plaintiff as the sole proprietor.
  - iv. Did the defendant voluntarily grant the plaintiff the authority/consent to possess develop, and use the suit property exclusively as his property.
  - v. Whether the plaintiff served possession of the suit property and undertook serious developments thereon and has been in possession to date.
  - vi. Was the Respondent/Defendant served with demand notice and notice of intention to sue.
  - vii. Is the plaintiff entitled to the relief sought?
  - viii. Who should bear the costs of this suit.



## Analysis and determination

40. Order 21 Rules 4 and 5 of the Civil Procedure Rules requires that Judgment in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. It requires that in suits in which issues have been framed, the court shall state its findings or decision with the reasons therefor upon each separate issue.
41. The first issue framed for determination is whether or not the plaintiff is entitled to the suit land by adverse possession.
42. Adverse possession is a legal doctrine by 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. The elements of adverse possession as submitted by the Respondent are that the claimant must prove possession that is adequate in continuity, publicity and extent.
43. In the present case, it was common ground that entry by the plaintiff onto the suit land was with the permission and/or consent of the defendant. According to the defendant, she brought the plaintiff to the suit land as a supervisor of the construction works and caretaker for which the defendant was to pay the plaintiff. That the defendant instructed the plaintiff to use part of the rent he collected from the rental units on the suit land to pay himself and DW3, the caretaker. The plaintiff on the other stated that he came onto the suit land with the permission of the defendant who allowed him as her brother to enter the land take possession, develop and own it so as to save it from repossession by the Kisumu County Council. He pleaded in paragraph 2 of the Affidavit in support of the Originating Summons that
- “The Respondent being my sister and the registered proprietor of the suit land herein gifted me the suit land and therefore permitted me to secure its ownership, possession and use in the year 2002.”
44. Where entry onto the land is consensual and with the permission of the registered owner, it cannot result in adverse possession by the entrant. There can only be a claim of adverse possession where one proves open, actual, non-permissive, non-consensual and undisturbed entry onto and occupation/possession of the suit land for a period of more than 12 years.
45. 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.”
46. Secondly the Plaintiff claimed that he had had exclusive, continuous, uninterrupted and peaceful possession of the suit land for the requisite period of more than 12 years. The evidence from PW3 was that the defendant came to the suit land from time to time to collect money for school fees.



47. The defence evidence was that the plaintiff never resided on the suit land but lives at Makasembo estate in Kisumu. The burden of proof was with the plaintiff to demonstrate that he had had possession that was adverse to the rights of the defendant for the requisite period.
48. There was evidence from the plaintiff and PW2 that at some point, the defendant demanded to take over collection of rent. According to the defendant, when the plaintiff failed to remit rent to her she decided to write a letter instructing the tenants to cease remitting the rent to the plaintiff but instead remit it to her directly.
49. According to the plaintiff, the defendant had just resurfaced after 18 years and was determined to take control of the property and had initiated measures to evict him and his tenants. That she gave the tenants a letter to pay the rent to her.
50. Further there was evidence from both parties that it was the defendant who has been paying the rent and rates in respect of the property.
51. Although the plaintiff claimed to have developed the land, he stated that in addition to paying the rent and rates, it was the defendant who obtained the approvals for the developments on the land.
52. PW4, the plaintiff's wife, claimed that she is the one who used to send money to the plaintiff to be utilized on the construction. No evidence was led as to how much money she sent and whether it was sufficient to do the developments.
53. The defendant's witnesses testified that the defendant used to buy the materials for the construction.
54. The plaintiff also claimed that the land was given to him by the defendant as a gift. If this is true, which it is not as no evidence was produced on the same, the plaintiff cannot sustain a claim of adverse possession on his own land which he was given as a gift.
55. For the foregoing reasons it cannot be said that the plaintiff has had actual, open, continuous, notorious, peaceful, exclusive and uninterrupted possession of the suit land as envisioned by law.
56. I find that the plaintiff is not entitled to the suit land by adverse possession.
57. The second issue is whether the Defendant's proprietary interest in land parcel Number Kisumu/Block 4/296 have been extinguished by virtue of the plaintiff's adverse possession and whether the Defendant is now holding the title in trust for the plaintiff.
58. Section 17 of the *Limitation of Actions Act*, provides that upon the expiration of the period prescribed by the Act for a person to bring an action to recover land, the title of that person to that land is extinguished. The period within which to bring the action to recover land is prescribed by section 7 of the Act which 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.”

59. As to when the right of action accrues, Section 13 of the Act 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.
60. In the present case the court has already found that the plaintiff has not proved that his entry and presence on the suit land was adverse to the title of the defendant and further that the plaintiff is not entitled to the suit land by adverse possession. Time only runs against the title of the registered owner when there is adverse possession and the right of action accrues to the registered owner from the date the adverse possessor takes possession of the land. Having found that adverse possession has not been proved, there is no basis to hold that the defendant's title to the suit property had become extinguished by operation of law or that she held the land in trust for the plaintiff. Nothing had happened that affected her title to the land.
61. The third issue is whether the lease Title in the name of MARY AUMA ONDU as the absolute proprietor of the whole of land parcel number Kisumu/Block 4/296 should now be revoked and cancelled and the said parcel of land be transferred to the plaintiff as the sole proprietor.
62. The right to own land is protected by the *Constitution* of Kenya and other laws particularly sections 24, 25 and 26 of the *Land Registration Act*. Cancellation of title to land therefore is a grave matter that can only happen on grounds provided for by law. Adverse possession has not been proved. None of the grounds for cancellation of title under Sections 26 and 80 of the *Land Registration Act* have been proved.
63. Issue No. 4 for determination is whether the defendant voluntarily granted the plaintiff the authority/ consent to possess develop, and use the suit property exclusively as his property.
64. No evidence was tendered by the plaintiff on this. Though he claimed that the defendant told him to take over the land and develop to save it from repossession by the Kisumu County Council, there was no evidence that the land was threatened with repossession. PW4 alleged that they (PW4 and the Plaintiff) were supposed to construct a house for the defendant at Milimani estate Kisumu. There was no evidence that there was such agreement between the parties herein or such house was ever constructed. And if the land was indeed gifted to the plaintiff as claimed there was no explanation as to why there was therefore the requirement or purported agreement for construction of a house for the defendant at Milimani estate Kisumu.
65. Counsel for the defendant submitted that gifts in land can only be demonstrated by transfer and registration of the land in favour of the donee. There is no evidence that the plaintiff has ever pursued transfer of the land in his name since 2002 when he claims the same was gifted to him.
66. The fifth issue is whether the plaintiff secured possession of the suit property and undertook serious development thereon and has been in possession todate.
67. Regarding possession, the court has already made a finding that the plaintiff has not proved that he has been in possession of the suit land.
68. The evidence placed before the court is that the developments on the suit land were done by the defendant and that the Plaintiff and DW3 were the supervisor and caretaker of the property. The Defendant proved that she took loans and that she expended her money in the developments.



**On whether or not the defendant was served with demand notice.**

69. No such notice was produced in evidence and no evidence was led on the same.

**On whether or not the plaintiff is entitled to the relief sought.**

70. On the basis of the findings already made herein namely; that adverse possession has not been proved, that the defendant's title to the suit land has not become extinguished by operation of law and that the defendant does not hold the suit land in trust for the plaintiff and further that no grounds have been demonstrated for cancellation of the defendant's title in favour of the plaintiff and that the developments on the suit land were done by the defendant, I find that the plaintiff is not entitled to the relief sought. The law cannot allow him to unlawfully take away his sister's property.

71. On cost of the suit, under the provisions of section 27 of the *Civil Procedure Act*, costs follow the event.

72. The upshot is that the Plaintiff has not proved his case on a balance of probabilities. His suit commenced vide the Originating Summons dated 22<sup>nd</sup> October 2020 is 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.

M.C. Ouma for the Plaintiff/Applicant.

Yogo holding brief for Anyango for the Defendant/Respondent.

