



**Ogendo v Miyare (Environmental and Land Originating Summons
E035 of 2021) [2025] KEELC 3994 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E035 OF 2021**

E ASATI, J

MAY 8, 2025

BETWEEN

JUDITH AKINYI OGENDO APPLICANT

AND

DANIEL OCHIENG MIYARE RESPONDENT

JUDGMENT

1. Vide the Originating Summons dated 26th August, 2021, Judith Akinyi Ogendo, the Plaintiff/Applicant herein who claims proprietary interest by way of adverse possession in land parcel No.Kisumu/South West Ojola/4565 measuring 0.13Ha placed the following question before court for determination:
 - a. Whether the Plaintiff/Applicant herein is entitled to apportion of land measuring 0.05Ha to be hived off land parcel number No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha by reason of her adverse possession of the same for a period exceeding 12 years.
 - b. Whether the Defendant/Respondent's proprietary interest in the land parcel number: Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha have been extinguished by virtue of the Plaintiff's/Applicant's adverse possession and whether the Defendant/Respondent is now holding the title thereof in trust for the Plaintiff/Applicant.
 - c. Whether the title deed issued in the name of Daniel Ochieng Miyare, as the absolute proprietor of the whole of land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha should now be revoked and cancelled and the said portion of land measuring 0.05Ha, land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha, be transferred to Judith Akinyi Ogendo, the Plaintiff/Applicant as sole proprietor thereof.



- d. Whether the costs of this Summons should be provided for and or who should pay the said costs.
2. The plaintiff/applicant sought for orders of:
- a. A declaration that the Applicant is entitled to the whole of land parcel number No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha by virtue of adverse possession.
 - b. A declaration that upon expiry of 12 years, the Defendant/Respondent holds the said land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha in trust for the Plaintiff/Applicant.
 - c. A declaration that upon expiry of 12 years, the Defendant/Respondent's interest in land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha got extinct.
 - d. A declaration that the Defendant/Respondent do transfer land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha to the Plaintiff/Applicant and/or in default, the Executive Officer of this Court to execute all the necessary documents to effect the transfer.
 - e. A declaration that the registration of the Defendant/Respondent as the proprietor of land parcel number No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha be cancelled.
 - f. An order under section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, that the Plaintiff/Applicant be registered as the proprietor of land parcel number No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha instead of the Respondent.
3. The grounds upon which the Originating Summons were brought are that;
- i. That despite the registration of the title of land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha in the name of Daniel Ochieng Miyare,the Plaintiff/Applicant herein and her children continued to live and or to use the said land and or cultivate the same uninterrupted, undisturbed, peacefully and as of right and without any interference for over 12 years from the Defendant/Respondent since the year 2003's, a period cumulatively totalling to over 18 years to date.
 - ii. That the Plaintiff/Applicant is the widow and personal representative of the estate of Hesbon Ogendo Njagah,after obtaining a Limited Grant of Letter of Administration and ad-colligenda who had purchased a portion of 0.13ha to be hived off land parcel number: Kisumu/South West Ojola/4465, measuring or estimated to measure 0.13Ha from one Philip Miyare Achuch, in the year 2003, now deceased, which was subsequently subdivided by the Defendant without following the succession process to create two (2) separate parcels of land namely: Kisumu/South West Ojola/4565 (0.13ha) and 4566 respectively.
 - iii. That the Plaintiff/Applicant deceased husband Hesbon Ogendo Njagah bought a portion of land parcel No.Kisumu/South West Ojola/4416 now land parcel No.Kisumu/South West Ojola/4565 measuring or estimated to measure 0.13Ha from one Philip Miyare Achuch, in the year 2003.
 - iv. That the Plaintiff/Applicant herein and her family have together been exercising all the right of ownership over land parcel No.Kisumu/South West Ojola/4565 (0.13Ha), without any



interference from the Defendant/Respondent and that her family have been cultivating crops produce, including maize, beans and vegetables for more than 18 years.

- v. That in the premises the Defendant/Respondent's proprietary interest in the said land parcel No.Kisumu/South West Ojola/4565 (0.13ha), have been extinguished by operation of the law and that he is now holding the title in trust for the Plaintiff/Applicant.
 - vi. That it would be just and equitable if the parcel of land parcel No.Kisumu/South West Ojola/4565 (0.13ha) should now be registered in the name of the Plaintiff/Applicant by virtue of his continuous, peaceful, exclusive and uninterrupted occupation of the same for a period totalling more than 18 years and or cumulatively more than 18 years as from the year 2003's to-date.
4. The Originating Summons was supported by the averments in the Affidavit in Support of the Originating Summons sworn by Judith Akinyi Ogendo dated 26th August, 2021.
 5. In response to the Applicant's claim, the Respondent filed Replying Affidavit sworn on 20th March, 2023. The case was disposed of by way of viva voce evidence.

The Evidence

6. Two witnesses testified on behalf of the Plaintiff. PW1 was the Plaintiff. She adopted the contents of her Supporting Affidavit and Further Affidavit as her evidence in chief. She stated in the Supporting Affidavit that her place of abode is in land parcel number No.Kisumu/South West Ojola/4565 (0.13ha). That she is the widow of Hesbon Ogendo Njagah who died on 25th July, 2018. That since the year 2003's her husband, herself together with their children had continued to use and to cultivate the suit land with crops like maize, beans and vegetables.
7. That she was also the personal representative of the estate of her late husband. That her husband had purchased a portion of 0.13ha to be hived off land parcel No.Kisumu/South West Ojola/4416 measuring 0.31ha. That he had purchased the land from Philip Miyare Achuch in the year 2003. That the land No.4416 was subsequently sub-divided by the Defendant without following succession process to create the suit land parcel No.4565 and parcel No. 4566 respectively.
8. That her deceased husband built a home on the suit land and that together they have been cultivating the land continuously and uninterruptedly and have not paid rent to anyone for living on the suit land since the year 2003.
9. That hence the title of the Defendant has become extinguished and the Defendant is now holding title in respect of the suit land in trust for her and that the suit land should be registered in her name by virtue of her continued, peaceful, exclusive and uninterrupted occupation of the land for a period totaling more than 12 years and/or cumulatively more than 18 years from 2003.
10. She stated in the Further Affidavit sworn on 23rd May, 2023 that her husband bought a portion of land that was to be hived from parcel No.Kisumu/Ojola/2128 from Philip Miyare at Kshs.85,000/- sub-divided into various parcels with No.4416 being one of them.
11. That when the Defendant was approached in the 2010 to transfer the sold portion in favour of her husband, the Defendant demanded more money of which he was added Kshs.20,000/-.
12. That they continued to cultivate the land until the year 2015 when the Municipal market at Kisian was closed for renovation and the plaintiff decided to build some stalls whereby the traders who were in the market moved in and are doing business in the stalls at a small fee.



13. She produced a copy of Limited Grant of Letters of Administration Ad Litem dated 24th April, 2019, copy of National Identity Card, Green card in respect of land parcel No. Kisumu/South West Ojola/4416, green card for land parcel No. Kisumu/South West Ojola/4565, certificate of official search for parcel No. Kisumu/South West Ojola/4565, agreement dated 18th August, 2003, another agreement dated 15th July, 2010, agreement dated 28th July, 2010, and bundle of photographs as exhibits.
14. On cross-examination by Counsel for the Defendant, the Plaintiff stated that she was not a witness in the agreement dated 18th August, 2003. That Philip Miyare died in the year 2008. That she did not sign the agreement and that she did not witness payment of the purchase price. That she resides on the suit land.
15. PW2 was Samuel Otieno Otiende. He stated in his witness statement dated 23rd May, 2023 which was adopted as his evidence in chief that he witnessed the purchase of land parcel No. Kisumu/South West Ojola/2128 by the Plaintiff's husband from Philip Miyare Achuch at Kshs.85,000 on 18th August, 2003.
16. That after purchase, the land was sub-divided to produce number 4565 and 4566 after which the Plaintiff occupied parcel number 4565 by cultivating the same. That the Plaintiff cultivated the land till June, 2015 when the Municipal Market at Kisian was being renovated when the Plaintiff decided to build stalls on the land whereby traders are doing business.
17. That the Plaintiff has been in peaceful occupation without any interference from the Defendant and that the occupation has been open with the knowledge of the Defendant.
18. On cross-examination, he stated that he did not sign the agreement but only his name and identity card number were recorded therein. That the size of the land being sold was not indicated in the agreement. That the business stalls on the land were erected in the year 2013.
19. On behalf of the defence, the Defendant testified as DW1. He adopted the contents of his Replying Affidavit sworn on 20th March, 2023 as his evidence in chief. He stated that he was the son of Philip Miyare who was the owner of land parcel known as Kisumu/Ojola/4416, sub-divided to create Kisumu/Ojola/4565 and 4566.
20. That the Plaintiff's husband approached him in the year 2010 and offered him Kshs.10,000/- to clear a debt alleged to be owed to his father, which he (DW1) accepted on condition that the Plaintiff's husband avail to him the sale agreement and any witness with regard to sale of suit land.
21. That the Plaintiff's husband died before bringing the agreement.
22. That the Plaintiff approached him and requested him to allow her erect some stalls on his land after they were chased from the market on an oral agreement which was to lapse 2 months. That the Plaintiff has continued to occupy the premises illegally to date. That he desires that the Plaintiff vacates the land.
23. The Defendant produced copy of green card, agreement and certificate of official search as exhibits.
24. On cross-examination, the Defendant stated that he had no idea that his father sold land. That he signed agreement dated 29th July, 2010 and received Kshs.10,000 on behalf of his father as the Plaintiff told him that it was the balance for sold land. He stated further that he stays on land parcel number 4565.



Submissions

25. On behalf of the Plaintiff, it was submitted vide the written submissions dated 12th April, 2024 filed by the firm of Otieno & Achieng Company Advocates that as held by the Court of Appeal in the case of Wambugu -v- Njuguna adverse possession contemplates two concepts namely; possession and discontinuance of possession.
26. That the Defendant in the suit has never taken any steps to enter the suit land or assert his rights as the owner. That the Plaintiff has been in open and notorious possession of the land to the knowledge of the Defendant. Counsel relied on the case of Mtana Lewa -v- Kahindi Ngala Mwangandi (2005)eKLR where it was held inter alia that;
27. 'Adverse possession is essentially a situation where person takes possession of land, assert 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 period of 12 years'.
28. That when the land was transferred in favour of the Defendant, the Plaintiff was still living in it.
29. Relying on the case of Githu -v- Ndeete (1984)KLR 776 Counsel submitted that change of ownership of land which is occupied by another person under adverse possession does not stop time from running.
30. That time started running against the Defendant and in favour of the Plaintiff from the time the Plaintiff occupied the suit property and was engaged in acts that were inconsistent with the Defendant's title including building houses and cultivating. That the Plaintiff had had adverse possession of the land.

No submissions were filed on behalf of the Defendant.

Issues for Determination

31. The questions on Originating Summons form the issues for determination herein.

Analysis and determination

32. The first question for determination is whether or not the Plaintiff is entitled to a portion of land measuring 0.05 to be hived off land parcel number Kisumu/Ojola/4565 measuring or estimated to measure 0.13ha by reason of adverse possession.
33. The copy of green card and copy of certificate of official search produced as exhibits show that land parcel number Kisumu/Ojola/4565 exists. That the same measures 0.13Ha and was registered in the name of the Defendant on 15th November, 2017.
34. The burden of proof under the provisions of sections 107 to 109 of *Evidence Act* rests with the Plaintiff to prove the ingredients of adverse possession on a balance of probabilities.
35. The Plaintiff's case is that her entry onto the suit land was on the basis of land sale agreement between her husband and Mr. Philip Miyare Achuch, deceased, father of the Defendant, who was the owner of the sold land. That when the owner failed to transfer the land to her late husband or her, her continued occupation and use of the suit land became adverse and time started to run in her favour and against the Defendant's title from the time she occupied the suit land in the year 2003.
36. She produced a land sale agreement dated 18th August, 2003 as exhibit P3. The same was written in dholuo language and a translation thereof into English language was availed.



37. The agreement was in respect of a parcel of land known as plot No.2128. The size of the sold land was not indicated. It was not clear whether it was the entire of the land or only a portion thereof that was being sold. Although the Plaintiff stated in paragraph 3 of the Further Affidavit that the land parcel Kisumu/Ojola/2128 was later sub-divided into different numbers with number KISUMU/OJOLA 4416 being one of them, there is no documentary evidence placed before court to prove this. The green card in respect of Kisumu/Ojola/4416 produced by the Plaintiff as exhibit P.2(a) shows that the same was a sub-division of land parcel number 431. No nexus was established between the sold parcel or portion of land and the suit land herein. The Originating Summons does not mention parcel No.Kisumu/South West Ojola/2128. The Defendant stated that he has no idea that his father sold the suit land to the Plaintiff's husband. He testified that when the Plaintiff's husband approached him in the year 2010 seeking for transfer of the land to him, the defendant demanded for the land sale agreement but that the same was never availed to him. He explained that the Plaintiff's presence on the land was on the basis of an oral agreement for the Plaintiff to be on the land during the time when Kisian Market was undergoing renovation.
38. The Plaintiff claimed that in the year 2010, the Defendant demanded for more money to be added to him in respect of the purchase price in order for him to transfer the suit land to the Plaintiff's husband and that the Defendant was paid a further Kshs.20,000/-. The Plaintiff produced agreement dated 15th July, 2010 and 28th July, 2010 to demonstrate this. In the agreement dated 15th July, 2010, the land being sold was no longer No.2128 but 4416. The amount paid was Kshs.5000 each paid to Daniel Ochieng Miyare and Hezron Omolo Miyare. The amount was stated to be "part of the balance that remained". It was not additional money demanded by the Defendant as stated by the Plaintiff in her evidence. The same applies to the agreement dated 28th July, 2010.
39. The initial agreement dated 18th August, 2003 did not indicate that there was an outstanding balance of the purchase price to be paid.
40. With all these discrepancies, the court is not satisfied that the Plaintiff entered onto the suit land on the basis of a purchase. None of the witnesses in the agreement dated 18th August, 2003 was called to testify. The Plaintiff stated that she was not present when the agreement was written. PW2 conceded on cross-examination that he did not sign the agreement. That it was only her name and identity card that were recorded on the agreement and indeed, perusal of the said agreement dated 18th August, 2003 confirms that there is no signature against the name of PW2.
41. The next element of adverse possession that the Plaintiff needs to prove on a balance of probabilities is that he has had open, exclusive, continuous, peaceful and uninterrupted possession of the suit land for the prescribed period.
42. The Court of Appeal in Mombasa in the case of Mombasa Teachers Co-operative Savings and Credit Society Limited v 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 *nc vi, nec clam, nec precario*. See *Jandu v 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 v Njuguna* [1983] KLR 173."



43. Though the presence of the Plaintiff on the suit land is not denied, the size of the land occupied by the Plaintiff has not been proved. In the Originating Summons, the Plaintiff claims that she is entitled to 0.05ha of the suit land which measures 0.13ha or thereabout. In the rest of the Originating Summons, particularly in the prayers, she claims the entire of the suit land parcel No.Kisumu/Ojola/4565 measuring 0.13ha.
44. (See prayers (a), (b), (c), (d) and (f) of the Originating Summons. The sale agreement did not specify the size of land being sold.
45. The Defendant stated that he lives on the suit land parcel number 4565.
46. In a claim of adverse possession, the portion/size of the land claimed is a material fact that ought to be pleaded and proved. In the case of *Gatimu Kinguru v Muya Gathangi* [1976]KLR 253 the court observed that:
- “the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary...”
47. Further, there is no evidence of occupation of the suit land by the Plaintiff before the erection of the stalls. The photographs produced by the Plaintiff show the stalls. It was common ground that the stalls were constructed in the year 2015 when the Municipal market at Kisian was closed down for renovation. The Defendant testified that he allowed the Plaintiff on the basis of an oral agreement to put up the stalls for use as the market was being renovated. There were no photographs evidencing what was on the land before the stalls put up in the year 2015.
48. From the year 2015 to the date of filing the Originating Summons in the year 2021, the requisite period of 12 years had not elapsed. And even if the period would have elapsed, the entry in the year 2015 was on the basis of the Defendant’s permission.
49. Where entry onto the land is on the basis of purchase, time begins to run from the date of the last payment towards the purchase price. The Court of Appeal in *Kisumu App. No 82 of 2014 Wilfred Kegonye Babu v Henry Mose Onuko* [2019] eKLR quoting from *Wambugu v Njuguna* [1983]KLR 172 held that
- “where the Claimant is a purchaser under a contract of sale of land.... The possession can only therefore become adverse once the contract is repudiated.”
- Further that
- “where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The Claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”
50. Even assuming that the monies paid in 2010 were part of the purchase price, then time began to run from 28th July, 2010 when the last payment was received by the Defendant. The agreement dated 28th July, 2010 stated in part that;
- “This marks the close of the sale.”
51. If that be so, then the requisite 12 years had not elapsed by the year 2021 when the suit was filed.



52. I find that adverse possession has not been proved. Question 1 on the Originating Summons is determined in the negative.
53. The next question is whether the Defendant's proprietary interest in the suit land have become extinguished and whether the Defendant is now holding the suit land in trust for the Plaintiff.
54. Under section 17 of the *Limitation of Actions Act*, the right of the registered owner becomes extinguished by operation of law upon expiry of the time for bringing action for recovery of the land.
55. The court has already found herein that the Plaintiff was on the suit land with the permission of the Defendant and that the requisite period of 12 years had not elapsed from the time of the Plaintiff's entry there onto or last payment of the purchase price. Hence the Defendant's title has not been extinguished.
56. On the third question which is whether the Defendant's title to the land should be revoked or cancelled and the land transferred in favour of the plaintiff, given the findings already made herein, there is no basis for the court to order for cancellation of the title of the Defendant or for making an order for registration of the suit land in the name of the Plaintiff.
57. A finding that a party has had adverse possession of land has the effect of depriving the registered owner of the title and all rights over the subject land. It is critical that adverse possession be proved to the required degree. Without such proof, a finding in favour of the applicant will amount to violation of the registered owner's right to property.
58. In the present case the court finds that the Plaintiff/applicant has not proved her case on a balance of probabilities. The case is therefore hereby dismissed.

Each party to bear own costs of the Originating Summons.

Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 8TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Otieno for the Plaintiff/Applicant.

Omondi T for the Defendant/Respondent.

