



**Abwoto v Makokha & another (Environment & Land Case
92 of 2019) [2025] KEELC 4280 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4280 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 92 OF 2019**

DO OHUNGO, J

JUNE 5, 2025

BETWEEN

PATRICK AKOI ABWOTO PLAINTIFF

AND

SALEH MWEMBE MAKOKHA 1ST DEFENDANT

FEDELIS ONJARI MASAYI 2ND DEFENDANT

JUDGMENT

1. Litigation in this matter commenced in the High Court at Kakamega on 24th June 2015 as HCC No. 184 of 2015 (OS) when the Plaintiff filed Originating Summons (OS) dated 25th May 2015 against Rajab Makokha Murambi as the sole Defendant. He averred in the OS that he was in occupation of the parcel of land known as E/Wanga/Lubinu/766 and sought determination of the following questions:
 1. Whether the applicant has been in occupation of L.R.NO. E/WANGA/LUBINU/766 and has developed and used the same peacefully for a period of over forty (40) years.
 2. Whether the applicant purchased the said land parcel in 1973 from the respondent who is the registered proprietor and has continued in adverse possession for a period of over forty (40) years and if an order may be issued that he be registered as the proprietor of the same in terms of section I, 17 and 38 of the *Limitation of Actions Act* as the title of the proprietor has been extinguished.
 3. That even if the LR. NO, E/WANGA/LUBINU/766 is currently registered in the names of the respondent, he is not in occupation of the same and the said land should be registered in the names of the applicant who has been in adverse possession peacefully, uninterrupted and without evasion and/or secrecy ever since 1973.
 4. That costs of this application be provided for.



5. That any other order be made as this Honourable (sic) Court may deem fit and just to grant.
2. The OS was later transferred to this Court, then to the Subordinate Court and ultimately back to this Court, hence its current case number.
3. On 2nd March 2020, the Plaintiff filed Amended OS amended on 2nd March 2020. No leave was sought or obtained to file the Amended OS. In the Amended OS, Patrick Akoi Abwoto was retained as Plaintiff while the name of Rajab Makokha Murambi was struck off and replaced by Saleh Mwembe Makokha as “1st Proposed Respondent” and Fedelis Onjari Masayi as “2nd Proposed Respondent.”
4. The Plaintiff averred in the Amended OS that he was in occupation of the parcel of land known as E/Wanga/Lubinu/4223 and sought determination of the following questions:
 - a. Whether the applicant has been in occupation of L.R.NO. E/WANGA/LUBINU/4223 and has developed and used the same peacefully for a period of over forty (40) years.
 - b. Whether the applicant together with his late brother one Alphonse Manda Wabwoto purchased the said land parcel in 1973 from the former respondent one Rajab Makokha Murambi who was the registered proprietor and has continued in adverse possession for a period of over forty (40) years and if an order may be issued that he be registered as the proprietor of the same in terms of section 7, 17 and 38 of the Limitation of Actions Act as the title of the proprietor has been extinguished.
 - c. That even if the LR. NO, E/WANGA/LUBINU/4223 is currently registered in the names of the 2nd proposed respondent, he is not in occupation of the same and the said land should be registered in the names of the applicant who has been in adverse possession peacefully, uninterrupted and without evasion and/or secrecy ever since 1973.
 - d. That costs of this application be provided for.
 - e. That any other order be made as this Honourable Court may deem fit and just to grant.
5. The Amended OS was supported by an “Amended Supporting Affidavit” sworn by the Plaintiff on 2nd March 2020. He deposed in the affidavit that that in 1973, he (the Plaintiff) and Alphonse Manda Abwoto who was his brother purchased parcel number E/Wanga/Lubinu/766 from Rajab Makokha Murambi at a consideration of KShs 726 which they paid in full. That the portion that they purchased turned out to be E/Wanga/Lubinu/4223 after Rajab Makokha Murambi secretly subdivided parcel number E/Wanga/Lubinu/766. He added that both Rajab Makokha Murambi and Alphonse Manda Abwoto were since deceased and that the 1st Proposed Respondent is a son of Rajab Makokha Murambi. He also deposed that he had been in occupation of the parcel since 1973 and that the parcel that they purchased measures 0.50 hectares which is the same size as E/Wanga/Lubinu/4223.
6. The 2nd Proposed Respondent opposed the Amended OS through a Replying Affidavit which he swore on 12th January 2021 and filed on 27th April 2021.
7. I have agonised over what to make of the situation of this matter considering that no leave to file the Amended OS was obtained, the fact that the initial Defendant passed away and also considering that new parties were purportedly introduced through the amendment. I started handling the matter from 10th November 2021, after the said developments had taken place. Ultimately, I decided to proceed to render judgment in the interest of justice since the two “Proposed Respondents” participated in the hearing. In view of the amendment, the claim against Rajab Makokha Murambi is deemed withdrawn and the current defendants are Saleh Mwembe Makokha and Fedelis Onjari Masayi as First and Second Defendants, respectively.



8. The Plaintiff testified as PW1. He adopted his witness statement which he filed on 24th June 2015 as well as his affidavit which he swore in support of the Amended OS. The contents of affidavit are as reproduced at paragraph 5 above.
9. The Plaintiff produced copies of the documents annexed as “PAA” and “PAA2” to his initial supporting affidavit (P. Exhibits 1 and 2 respectively). He stated in the statement that he and his late brother Alphonse purchased parcel number E/Wanga/Lubinu/766 from Rajab Makokha in the year 1973 and fully paid the purchase price of KShs 726. He added that he had been in occupation since the date of purchase and that he had buried the remains of seven of his children and his wife on the parcel. That on 17th July 2014, he was surprised when Rajab Makokha stopped him from burying his child on the land. He urged the Court to order Rajab Makokha to transfer the land to him and to stop Saleh Mwembe Makokha who was Rajab’s son from interfering with his peaceful occupation.
10. The Plaintiff went on to testify that he was residing on the parcel as of the date of his testimony. Under cross examination and re-examination, he stated that he was not a purchaser but only a witness in the sale agreement pursuant to which his brother Alphonse purchased the land from Rajab Makokha.
11. Ishmael Sakwa Pela Eshikumo (PW2) testified that he was Senior Assistant Chief of Emakhwale Sub-location and that he had known the Plaintiff since mid-1980s and that the Plaintiff had been in occupation of E/Wanga/Lubinu/4223 from 1973 to the date of his testimony while Saleh Mwembe Makokha was in occupation of another portion of the mother title. He also stated that the Plaintiff was in occupation with his brother and that his brother later moved away.
12. Justus Okumu Malala (PW3) testified that he was Senior Chief of Lusheya Location and that he wrote a letter dated 28th July 2014 in which he stated that the Plaintiff was in occupation. He added that the Plaintiff was still in occupation as of the date of his testimony and had developed his homestead on the property.
13. The Plaintiff’s case was then closed.
14. The Second Defendant, Fedelis Onjari Masayi (DW1), adopted his Replying Affidavit which he swore on 12th January 2021 and filed on 27th April 2021. He produced copies of annexures FOM5 to FOM12 in the said affidavit (D. Exhibits 1 to 8, respectively).
15. DW1 deposed in the affidavit that Rajab Makokha Muramba was the registered owner of parcel number E/Wanga/Lubinu/766 and that the said parcel was subdivided into 5 portions being E/Wanga/Lubinu/4220 to 4224. He added that on 21st July 2014, he purchased parcel number E/Wanga/Lubinu/4223 from Rajab Makokha Muramba and that he became the registered owner of the said parcel.
16. Under cross-examination, DW1 testified that the Plaintiff was in occupation of E/Wanga/Lubinu/4223 as of the date of his testimony and was also in occupation of the portion together with his brother when DW1 was buying it from Rajab Makokha Muramba. He added that he did not know if the Plaintiff evicted Rajab Makokha Muramba prior to occupying the portion.
17. The First Defendant, Saleh Mwembe Makokha (DW2), testified that his father, Rajab Makokha Muramba, sold the land to Alphonse who was the Plaintiff’s brother and completed the transfer process before he passed away. He added that the Plaintiff was living on the land with Alphonse and that Alphonse later vacated. That his father decided to sell the land when the Plaintiff refused to vacate. DW2 also testified that Alphonse and the Plaintiff occupied the land immediately after buying it and that the Plaintiff had houses on the parcel as of the date of DW2’s testimony.



18. Defence cases were then closed. Directions were then given that the parties file and exchange written submissions. The Plaintiff filed submissions dated 6th March 2024 while the Second Defendant filed submissions dated 24th June 2024. The First Defendant did not file any submissions. He opted to rely on the Second Defendant's submissions.
19. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether the case is res judicata, whether adverse possession has been established and whether the reliefs sought should issue.
20. The Second Defendant submitted that the Plaintiff sued Rajab Makokha Muramba in HCC No. 184 of 2015 (OS) which case was dismissed thereby rendering this case res judicata. Res judicata is a doctrine of general application which has been statutorily encapsulated in Section 7 of the [Civil Procedure Act](#) as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

21. The ingredients that must be established for res judicata to be upheld are that there must be a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined by a competent Court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See also *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
22. The Second Defendant has cited HCC No. 184 of 2015 (OS) in support of his argument that this case is res judicata. As narrated at the opening paragraph of this judgment, HCC No. 184 of 2015 (OS) was in fact this very case before it was transferred to this Court, then to the Subordinate Court and ultimately back to this Court. Besides, the Second Defendant has not demonstrated that there was any decision dismissing the case upon hearing and determination on the merits. As I held earlier in this judgment, the effect of the Amended OS that the Plaintiff filed was that his case against Rajab Makokha Muramba was deemed withdrawn. I find that this case is not res judicata.
23. The next issue for determination is whether adverse possession has been established. The Court of Appeal discussed the law on adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyiwa Songoi* [2020] eKLR as follows:

Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner. (See comparative Indian cases of *S. M. Kenni alias Tamanna Sabeel – v- Mst Bibi Sakina* AIR 1964 SC 1254; and *Parsimi – v- Sukhi*, 1993 4 SCC 375).

39. In *Wambugu –v- Njuguna*, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not



the claimant has proved that he or she has been in possession for the requisite number of years.

40. A person who claims adverse possession must inter alia show:
- (a) on what date he came into possession.
 - (b) what was the nature of his possession?
 - (c) whether the fact of his possession was known to the other party.
 - (d) for how long his possession has continued and
 - (e) that the possession was open and undisturbed for the requisite 12 years.

24. The Plaintiff's case is that he entered parcel number E/Wanga/Lubinu/766 in 1973 when his brother Alphonse Manda Abwoto purchased a portion of it from Rajab Makokha Murambi. The portion later became parcel number E/Wanga/Lubinu/4223 whose registered proprietor is the Second Defendant. A perusal of the copies of the title deed and certificate of official search dated 26th September 2018 confirm that indeed the Second Defendant is the registered proprietor and that the said parcel is a subdivision of parcel number E/Wanga/Lubinu/766.
25. There is no dispute that the Plaintiff is in possession of parcel number E/Wanga/Lubinu/4223. Both Defendants confirmed that he is in possession. The Second Defendant testified that the Plaintiff was in occupation of E/Wanga/Lubinu/4223 on 21st July 2014 when he (Second Defendant) was buying the said parcel from Rajab Makokha Muramba. On his part, the First Defendant, testified that the Plaintiff occupied the land immediately after buying it from Rajab Makokha Muramba and remained in occupation with houses on the parcel even at the date of trial. The Plaintiff produced an agreement dated 18th October 1973 pursuant to which he purchased the portion that later became E/Wanga/Lubinu/4223.
26. Ordinarily, entry and possession pursuant to a sale agreement is deemed to be by permission of the proprietor and does not therefore amount to adverse possession. Time for purposes of adverse possession does not run in favour of such a claimant as long as his presence on the land is by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the purchased property is no longer by permission of the seller. In that case, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.
27. The Plaintiff testified that he fully paid the purchase price of KShs 726. A perusal of the agreement dated 18th October 1973 shows that the Plaintiff paid KShs 500 on 18th October 1973, KShs 126 on 4th July 1974, and KShs 100 on 10th November 1975. The entire purchase price was thus settled. In his testimony, the First Defendant who is Rajab Makokha Muramba's son did not at all doubt the transaction between his father and the Plaintiff. I find that time for purposes of adverse possession started running from 10th November 1975 and that by 2nd March 2020 when claim against the Defendants was commenced through the Amended OS, the requisite 12 years of possession had been established.
28. In the circumstances, I find that adverse possession has been established. Consequently, the Plaintiff is entitled to relief. I therefore enter judgment in favour of the Plaintiff as follows:



- a. It is hereby declared that the Plaintiff has established adverse possession in respect of parcel number E/Wanga/Lubinu/4223 and that the Second Defendant's title in respect of the said parcel is extinguished.
- b. The Land Registrar to register the Plaintiff as the proprietor of parcel number E/Wanga/Lubinu/4223.
- c. Each party to bear own costs.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 5TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Mango for the Plaintiff

No appearance by the First Defendant

The Second Defendant present in person

Court Assistant: B Kerubo

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