



**Ogilo v Odhiambo (Environmental and Land Originating Summons  
12 of 2021) [2025] KEELC 4737 (KLR) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 12 OF 2021**

**FO NYAGAKA, J**

**JUNE 10, 2025**

**BETWEEN**

**JANES OROGE OGILO ..... PLAINTIFF**

**AND**

**JOSEPH KIRIBO ODHIAMBO ..... DEFENDANT**

**JUDGMENT**

1. By way of Originating Summons dated 3<sup>rd</sup> March 2021, the Plaintiff seeks the following orders;
  1. This Honorable Court be pleased to declare that the Plaintiff and any other person claiming under him has acquired by way of Adverse Possession the whole of L.R NO. Suna West/Wasimbete/3223 measuring 0.85 Ha.
  2. This Honorable Court be pleased to declare that the Plaintiff is the owner of L.R NO. Suna West/Wasimbete/3223 wholly to the exclusion of the Defendant.
  3. This Honorable Court be pleased to Order for the Transfer of L.R NO. Suna West/Wasimbete/3223 measuring 0.85Ha and that same be registered into the Plaintiff's name.
  4. The Defendant be Ordered and/or directed to execute and/or sign all the necessary transfer instruments/documents and facilitate the Transfer and registration of the Suit property into the names of the Plaintiff in default of which the Deputy Registrar to execute the same in order to facilitate the Transfer.
  5. This Honorable Court be pleased to order the Defendant to bear the Cost of this Suit.
2. The Summons is premised on the grounds on the face of it and the averments of the Plaintiff in the Affidavit in Support of Originating Summons. The contents of the grounds were pretty similar with the depositions in the Supporting Affidavit.



3. In it, the Plaintiff averred that he is the beneficial owner of the suit land known as L.R NO. Suna West/Wasimbete/3223 measuring 0.85 Ha which was illegally registered in the name of the Defendant. He annexed a copy of the official search as JOO-1. Further, that he has been in full occupation of the suit land for a period exceeding twenty (20) years and the said land was curved out of L.R NO. Suna West/Wasimbete/3047. He bought the parcel from Richard Sirari Chacha who was the initial registered owner and he produced a copy of the sale agreement dated 18/02/1997. Additionally, he annexed as JOO-4 copies of photographs showing his homestead and vegetables on the suit land.
4. The Plaintiff stated that he has been in long, open, continuous and uninterrupted occupation of the suit property for more than 20 years and further, that his possession of the suit constitutes an overriding interest protected by section 28 of the *Land Registration Act*.
5. The Defendant filed a replying affidavit dated 14<sup>th</sup> December 2021, sworn by the Defendant. He stated that he is the proprietor of the suit land known as L.R NO. Suna West/Wasimbete/3223. He urged that he obtained his title to the suit land legally and procedurally. Further, he denied the allegations that the Plaintiff is in possession or has ever been in possession of the suit land. He stated that the suit land and L.R NO. Suna West/Wasimbete/3224 was procedurally created on L.R NO. Suna West/Wasimbete/3047 and he disposed of L.R NO. Suna West/Wasimbete/3224 to Japheth Masina Mazini legally. He denied the suit land ever being registered in the name of Richard Sirari Chacha. The Defendant further stated that the houses in the pictures were of his homestead and not the Plaintiffs'. He prayed the court dismiss the suit with costs.

#### **- Plaintiff's Evidence**

6. The Plaintiff testified as PW1. He adopted his supporting affidavit as his evidence in chief and marked his documents produced in court as P-Exh1-4.
7. In his cross examination, he stated that he purchased the 2 ½ acres from the land parcel known as LR 738. He repeated much of the evidence in chief. Then the Plaintiff closed his case.

#### **Defendants' Evidence**

8. The Defendant testified as DW1. He adopted his witness statement as his evidence in chief. His statement was that as the content of the Replying Affidavit.
9. He also testified that the Plaintiff has not lived on the suit land. He however stated that he had not seen the green card for the parcel of land.
10. On cross examination, he stated that he knew the Plaintiff and stated that he did not know whether the Plaintiff inherited the suit land. Further, that they have built in the land and they continue to live in the land. That he had never evicted the Plaintiff but had reported him to the chief. During Re-examination, he stated that the Plaintiff has lived in the land for about 3 ½ years.
11. The parties opted not to file submissions on the suit.

#### **Issue, Analysis And Determination**

12. This Court has carefully considered the submissions, the parties' pleadings, the law and the evidence. It is of the view that only two issues commended themselves for consideration. The first one was whether the originating summons is merited. The second one is who to bear the costs of the originating summons.



13. It is trite law that he who alleges must prove. I am guided by Section 107 of the *Evidence Act* that provides;
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
14. Also, Section 109 of the *Evidence Act* provides as follows;
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
15. In *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR, it was held,
- “Pleadings are mere allegations. Pleading do not prove an allegation which can lead to the entry of judgment unless the allegation/the claim is undefended and is a claim for liquidated demand. In the case before the trial court, the claim was for damages due to alleged negligence of the respondent.”
16. The Respondent filed a Replying Affidavit which was filled with allegations of ownership of title but did not provide any evidence in support of the averments. In cross examination, he confirmed that the house and the trees in the pictures showed the Plaintiff’s house and land which he knew. Further, that the Plaintiff had been living in the land and he had never attempted to evict them.
17. In *Mbira –v- Gachuhi* (2002) 1 EALR 137 it was held that:
- “..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
18. Regarding adverse possession, the Court of Appeal in *Kweyu Versus Omutut* (1990) eKLR observed as follows:
- “By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there



must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

19. The evidence of the Plaintiff shows that he got into the suit land in an open manner through the purchase transaction, evidenced by the Sale agreement made on 18/02/1997. He has been in quiet possession since the year 1997. The period is over 12 years. There is no evidence that he faced hostility or even any court process aimed at removing him during that time. His residence on it was peaceful, quiet and uninterrupted. Therefore, I find that he has proved his case on a balance of probabilities.
20. The upshot is that the Plaintiff is entitled to judgment in his favour. I now enter judgment for the Plaintiff against the Defendant as follows:
  1. A declaration is hereby issued that the Plaintiff and any other person claiming under him has acquired by way of adverse possession the whole of L.R NO. Suna West/Wasimbete/3223 measuring 0.85 Ha.
  2. A declaration is hereby issued that the Plaintiff is the owner of L.R NO. Suna West/Wasimbete/3223 wholly to the exclusion of the Defendant.
  3. The Defendant, is hereby ordered to forthwith transfer parcel L.R. NO. Suna West/Wasimbete/3223, measuring 0.85 HA (Ha) to the Plaintiff herein, and the parcel be registered in the Plaintiff's name.
  4. In furtherance to relief (3) above, the Defendant is hereby Ordered and/or directed to execute and/or sign all the necessary transfer instruments/documents and facilitate the Transfer and registration of the Suit property in the name of the Plaintiff within the next thirty (30) days, in default thereof the Deputy Registrar of this Court to execute the same in order to facilitate the Transfer.
  5. Costs of this suit to the Plaintiff.
21. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MIGORI VIA THE TEAMS PLATFORM  
THIS 10<sup>TH</sup> DAY OF JUNE 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

In the presence of,

The Plaintiff (in open Court)

The Defendant (in open Court)

