



REPUBLIC OF KENYA



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Ashivaga (Suing on her own behalf and on behalf of the Estate of the Deceased Adriano Ashibaga) & another v Ichela (Sued on his own behalf and also as the Administrator of the Estate of Peter Ichela Mukabale - Deceased) (Environment and Land Case 29 of 2020) [2025] KEELC 6042 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6042 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND CASE 29 OF 2020

DO OHUNGO, J
SEPTEMBER 18, 2025

BETWEEN

ROSALIA AHEBELWA ASHIVAGA (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF THE DECEASED ADRIANO ASHIBAGA) 1ST PLAINTIFF
JOHNSON ANDUKU MULINYA 2ND PLAINTIFF

AND

JULIUS LUUMBA ICHELA (SUED ON HIS OWN BEHALF AND ALSO AS THE ADMINISTRATOR OF THE ESTATE OF PETER ICHELA MUKABALE - DECEASED) DEFENDANT

JUDGMENT

1. The Plaintiffs moved this Court on 5th October 2017 through Originating Summons (OS) dated 15th September 2017. The matter was later transferred to the Subordinate Court, then back to this Court, hence its current case number.
2. The Plaintiffs averred that they had acquired title to a 0.2 hectares portion of the parcel of land known as Isukha/Shitochi/917 (the suit property) by adverse possession. They prayed for a declaration that the Second Plaintiff had acquired title to the portion by adverse possession, an order that the Defendant transfers the portion to the Second Plaintiff and a declaration that the Defendant holds title to the portion on behalf of the Second Plaintiff.
3. The OS was supported by affidavits sworn by the Plaintiffs. The Defendant swore and filed a replying affidavit in response. Rosalia Ahembelwa Ashivaga (Rosalia) brought the suit on her own behalf and on behalf of the estate of the late Adriano Ashibaga (Adriano) who was her husband. On his



part, the Second Plaintiff sued in pursuit of his interest as a purchaser of the 0.2 hectares portion of the suit property. The Defendant is sued as the registered proprietor of the suit property and as the administrator of the estate of the late Peter Ichela Mukabale (Peter).

4. Hearing of the matter proceeded by way of oral evidence. Rosalia testified on 1st November 2021 as PW1. She later passed away on 18th June 2022 and was substituted by her son Constantine Ashibaka who had obtained Limited Grant of Letters of Administration Ad Litem in respect of her estate.
5. Rosalia adopted her witness statement which she filed on 5th June 2018. She stated therein that together with Adriano, she purchased the 0.2 hectares portion of the suit property from Peter on 24th November 1992 at a consideration of KShs 130,000. That Peter promised to transfer the portion to Adriano, but Adriano passed away in 1995 before the transfer. That she continued to occupy and use the portion with her family and with the Defendant's knowledge until the year 2011 when she sold and handed over vacant possession of the portion to the Second Plaintiff. She added that together with the Second Plaintiff, they had continuously occupied, used and developed the portion for a period of over 12 years. She produced copies of the documents listed as item numbers 1, 2, 4 to 7 in the Plaintiffs' List of Documents dated 8th December 2017 as Plaintiffs' exhibits and urged the Court to order transfer of the portion to the Second Plaintiff who, according to her, was the rightful owner.
6. The Second Plaintiff testified as PW2 and adopted his witness statement which he filed on 5th June 2018. He also produced a copy of the document listed as item number 3 in the Plaintiffs' List of Documents dated 8th December 2017 as Plaintiffs' exhibit.
7. The Second Plaintiff further testified that he purchased the portion from Rosalia on 28th July 2011 at a consideration of KShs 450,000 and that Rosalia immediately handed over vacant possession to him. He added that he continued to use and develop the portion.
8. Constantine Ashibaka (PW3) adopted his witness statement which he filed on 5th June 2023. He reiterated Rosalia's testimony and added that the Second Plaintiff fully paid the purchase price. He also stated that Rosalia received a demand letter dated 2nd August 2011 from the Defendant's advocate demanding that she vacates the portion.
9. Josephat Mbaraka Phabian Likona (PW4) adopted his witness statement which he filed on 5th June 2018. He stated that Rosalia purchased the portion in 1992 and later sold it to the Second Plaintiff.
10. Lastly, Patrick Imboba (PW5) adopted his witness statement dated 3rd June 2024. He too stated that Adriano and Rosalia purchased the portion in 1992 and later sold it to the Second Plaintiff. The Plaintiffs' case was thereafter closed.
11. The Defendant testified as DW1 and adopted the Replying Affidavit which he swore and filed in response to the OS. He also produced annexures to the affidavit as his exhibits.
12. The Defendant deposed in the affidavit that he was the registered proprietor of the suit property as registered proprietor of the suit property as the administrator of Peter's estate and that Adriano was his first cousin. He denied that Adriano and Rosalia ever purchased any portion of the suit property and added that her occupation was not peaceful since there was a demand to vacate and summons to meetings to resolve the matter. He further stated that he filed Kakamega ELCC No. 29 of 2016 through which he sought to evict the Plaintiffs herein together with others.
13. Lastly, Fredrick Machoni Ichela (DW2) adopted his witness statement dated 8th October 2024 in which he stated that he is Peter's son and that his father never sold the portion to Adriano or any other person and that Adriano's family used the land as members of Peter's extended family. The defence case was then closed.



14. Thereafter, parties filed and exchanged written submissions. The Plaintiffs filed submissions dated 18th December 2024 while the Defendant filed submissions dated 20th February 2025.
15. I have carefully considered the pleadings, evidence and submissions. The issues for determination are whether adverse possession has been established and whether the reliefs sought should issue.
16. The prerequisites of establishing adverse possession are found at Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR where it stated that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
17. The Court of Appeal recently discussed these ingredients in *Munyanya v Keya* [2024] KECA 1831 (KLR), with a specific focus on the nature of possession. The Court stated that the possession must be:
 - a. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;
 - b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;
 - c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner’s rights are being invaded. Differently put, the possession must be manifest to the community;
 - d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;
 - e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;
 - f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years. (See *Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa*, Kisumu Civil Appeal No. 149 of 2022).
18. The Plaintiffs trace their occupation of the suit property to sale transactions. Rosalia contended that she took occupation pursuant to a sale agreement dated 24th November 1992 through which, together with Adriano, she purchased the 0.2 hectares portion of the suit property from Peter. On the other hand, the Second Plaintiff’s case is that he purchased the portion from Rosalia on 28th July 2011 and that Rosalia immediately handed over vacant possession to him.
19. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. For a claim of adverse possession to succeed, the claimant must demonstrate that his occupation



was without the proprietor's permission. A person who enters another's land and occupies it pursuant to a sale agreement cannot deny that he had the proprietor's permission to remain on the land. Time for purposes of adverse possession cannot run in favour of such a person for 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 such a scenario, 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.

20. Having parted with possession on 24th November 1992, Rosalia had no basis upon which to claim adverse possession as of 5th October 2017 when she filed this suit. She must have been aware of that since in her pleadings and testimony, she prayed that title should be declared in favour of the Second Plaintiff. Indeed, Section 7 of the Limitations of Actions Act which is the foundation of adverse possession operates by barring actions to recover land. Logically, one would not need to recover land from someone who is no longer in possession.
21. By his own account, the Second Plaintiff took possession on 28th July 2011. By the time this suit was filed on 5th October 2017, he had been in possession for only six years and two months, a far cry from the required twelve years of uninterrupted possession.
22. The Plaintiffs have relied heavily on their sale agreements. In that context, it is important to restate that adverse possession is not a procedure for enforcing sale agreements. A litigant who moves the Court on a claim for adverse possession ipso facto seeks to obtain title not by enforcing the sale agreement but through the doctrine of adverse possession. Consequently, the focus should be on establishing the ingredients of adverse possession as opposed to the contractual relationship.
23. In view of the foregoing discourse, the Plaintiffs have failed to establish adverse possession. I find no merit in the Plaintiffs' case, and I therefore dismiss it with costs to the Defendant.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 18TH DAY OF SEPTEMBER 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Shiloya for the Plaintiffs

No appearance for the Defendant

Court Assistant: B Kerubo

