



Rose Akinyi Onyango & Zachary Wandiege Ndege (As Administrators and Legal Representatives of the Estate of John Onyango Ndege, Deceased) & 4 others v Opande & 2 others (Environment & Land Case 58 of 2019 & Environmental and Land Originating Summons 2 of 2018 (Consolidated)) [2025] KEELC 164 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 58 OF 2019 & ENVIROMENTAL
AND LAND ORIGINATING SUMMONS 2 OF 2018 (CONSOLIDATED)**

E ASATI, J

JANUARY 23, 2025

BETWEEN

ROSE AKINYI ONYANGO & ZACHARY WANDIEGE NDEGE (AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN ONYANGO NDEGE, DECEASED) 1ST PLAINTIFF

ELIAKIM APUNDA AKECH (AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF BENTA ACHIENG AKECH, DECEASED) 2ND PLAINTIFF

SOPHIA JOYCE AYOO, ESTHER AWUOR AYOO & EMMANUEL KUTE AYOO (AS ADMINISTRATORS AND LEGAL REPRESENTATIVES OF THE ESTATE OF JORAM OLANG'O AYOO, DECEASED) 3RD PLAINTIFF

FATUMA HASSAN SALIM 4TH PLAINTIFF

ELIJAH AKOMO WERE (AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF HERINE ATIENO WERE, DECEASED) 5TH PLAINTIFF

AND

LAWRENCE ODHIAMBO OPANDE 1ST DEFENDANT

BON NGESO OPANDE 2ND DEFENDANT

SYLVESTER OCHIENG OTIENO 3RD DEFENDANT



JUDGMENT

1. This judgement is in respect of two matters namely; Kisumu Elc Case No. 2 Of2018 (O. S) and Kisumu Elc Case No.58 Of2019 that were vide the court order made on 26th July, 2022 consolidated.

Elc Case No. 2 Of2018 (O.S.) (the Originating Summons)

2. The Originating Summons dated 26th February, 2018, was filed by Lawrence Odhiambo Opande, Bon Ngeso Opande And Sylvester Ochieng Otieno, the Applicants, who claiming to be in adverse possession of 14 parcels of land namely; Kisumu/sidho West/3780, 3781, 3779, 3782, 3784, 3783, 3816, 3238, 2411, 2412, 3248, 3237, 1122 and 1121 (herein called the suit lands) sought the court to determine the following questions;
 - a. whether the Applicants have been in open and uninterrupted occupation of the suit lands for a period of over 12 years.
 - b. whether the Respondents ought to execute instruments to convey the suit lands to the Applicants/Plaintiffs in default of which the Deputy Registrar of the Honourable court or such other officer as the court may designate do execute the same.
 - c. Whether the 8th Respondent should produce the registers and search certificates for Kisumu/sidho West/1121, 1122, 3235, 3258, 2411,2412, 3248, 2337 and 3232.
 - d. Whether the court should condemn the Defendants to pay costs.
3. The Respondents in the Originating Summons were Gordon Otieno Muna, John Onyango Ndege, Benter A. Akech, Joram Olango Ayoo, Fatuma Hassan Salim, Herine Atieno Were, Martin Ouma Okumu, Land Registrar – Awasi And The Registered Owners Of Land Parcels Kisumu Sidho West/1121, 1122, 3535, 3238, 2411, 2412, 3248, 3237 and 3232
4. The personal representatives of the 2nd, 3rd, 4th and 6th Respondents were later, vide the court order dated 30.10. 2018, made parties in the suit on behalf of the estates of the deceased persons.
5. The 2nd, 3rd, 4th, and 5th and 6th Respondents opposed the Originating Summons vide the contents of the Replying Affidavits sworn on 6. 2. 2019 by Zachary Wandiege Ndege, Eliakim Apunda Akech, Sophia Joyce Ayoo and Elijah Akomo. They denied the Applicants' claim, and averred that the respective suit lands belonged to them.
6. Directions on the Originating Summons were taken on 18th September 2019, inter alia, that the matter to proceed by way of viva voce evidence.
7. Although the applicants pleaded in the suit that the Originating Summons was dismissed for want of prosecution, the court record shows that the Originating Summons was reinstated vide court order dated 10. 2. 2022 to be heard on merit.

In the pendency of the Originating Summons, the suit was filed.

Kisumu Elc Case No.58 Of2019 (the suit)

8. Vide the plaint dated 16th December 2016, the Plaintiffs (that is the 5th Respondent and the personal representatives of the estates of the 2nd, 3rd, 4th and 6th Respondents in the Originating Summons) sued the Defendants (the applicants in the Originating Summons) over land parcels known as Kisumu/



- sidho/3781, 3779, 3782, 3784 and 3783 registered in the names of the 4th plaintiff and the deceased persons on whose behalf the suit was brought.
9. The Plaintiffs claimed that sometime in the month of June the year 2011 they discovered that the Defendants were wrangling over ownership of the suit lands, were interfering with, leasing and trying to dispose of the suit lands, had trespassed onto the suit lands and had even filed a suit namely; Kisumu Elc Case No. 2 Of 2018 (O.S.).
 10. The Plaintiffs pleaded that by reason of the Defendants' trespass onto the suit land, the Plaintiffs had been denied access thereto. The Plaintiffs therefore sought for orders that;
 - a. the Defendants do desist, stop and avoid using, interfering and entering the suit land in whatsoever and be ordered to vacate the suit lands.
 - b. the Defendants remove all structures, crops, fixtures and any lease entered with any third party as pertaining the land parcels be declared null and void.
 - c. any other orders this court may deem fit and just to grant in circumstances.
 - d. costs and interest of the suit.
 11. The 1st and 2nd Defendants filed a Statement of Defence and Counterclaim dated 21st January, 2020. They denied the Plaintiffs' claim as contained in the plaint and averred that the Plaintiffs illegally and fraudulently gained ownership of land parcel Numbers Kisumu/sidho/3781, 3779, 3782, 3784 and 3783.
 12. Their case in the counterclaim is that at all material times Romanus Opande Kisaka who was their father and Andrea Akello Magawi and Machere Siabari who were their uncles were the registered joint owners of a parcel of land known as Kisumu/sidho/3232. That the property was later sub-divided to produce land parcel numbers Kisumu/sidho West/3780, 3781, 3779, 3784, 3783, 3778 and 3816. That the families of Romanus Opande and Machere Siabari have continuously and consistently used their respective parcels of land for cane farming which they either do by themselves or otherwise lease the land to farmers for the same use.
 13. That their elder brother by the name of Nicholas Obunde Opande conducted succession secretly and fraudulently transferred the land to strangers. That the plaintiffs' suit is a scheme hatched to defraud and divest the 1st and 2nd Defendants' of the property. They therefore sought the intervention of the court in terms of the prayers in their counterclaim.
 14. The 3rd Defendant filed the 3rd Defendant's Defence and Counterclaim dated 14th March 2020. He denied the Plaintiffs' claim and specifically denied ever trespassing onto, interfering with, subletting or trying to dispose of the plaintiffs' purported parcels of land. The 3rd defendant denied that the plaintiffs had possession or use of the lands. He pleaded that one Nicholas Obunde Opande, now deceased, without the knowledge, permission or authority of the other known legal and/or bona fide beneficiaries of the estates of Romanus Opande Kisaka, deceased, Andrea Akello Magawi, deceased and Machere Siabari also deceased, transferred unto himself and Machere Siabari land parcel number 3232, sub-divided it and/or sold off all the resultant parcels. The 3rd Defendant sought for prayers as contained in his counterclaim.
 15. The pleadings filed place before the court the following matters for determination-
 - a. the questions contained in the Originating Summons,
 - b. the claim by the plaintiffs as contained in the plaint,



- c. the counterclaim by the 1st and 2nd Defendants, and
- d. the counterclaim by the 3rd Defendant.

The evidence

16. Evidence by the Plaintiffs in the suit (Respondents in the Originating Summons).
17. PW1 was Sophia Joyce Ayoo the personal representative of the estate of Joram Olang'o Ayoo, the 3rd Plaintiff. She testified that she was the widow of the deceased who was the registered owner of a parcel of land known as Kisumu/sidho West/3782. That the land was bought by her husband from one Nicholas Obunde Opande who was the owner of land parcel No. Kisumu/sidho West/3232 which was later sub-divided to create various parcels of land including No. Kisumu/sidho West/3782.
18. She testified that the Defendants had not had open and uninterrupted occupation of the suit land. That the Defendants had been hostile and not accommodative. That they chased her sons and agents from the land. That the Defendants have continuously trespassed onto the suit land despite her protests.
19. On cross-examination, PW1 stated that her husband bought the land in the year 1993. That Nicholas Opande was a representative of his late father. That her husband paid the entire of the purchase price. That she has never used the land since they bought it because the children of Nicholas could not allow them as they chased them away.
20. PW1 produced Grant of Letters of Administration in respect of her husband's estate, Certificate of Confirmation of Grant, copy of title deed, copies of land sale agreement and copy of Letter of Consent.
21. PW2 was Elijah Akomo Were the personal representative of the estate the 5th Plaintiff. He relied on the contents of his Replying Affidavit sworn on 6th February, 2019 in reply to the Originating Summons and the Witness Statement dated 9th December, 2020 in the suit.
He testified that Herine Atieno was his late wife.
22. That it was Nicholas Obunde who was occupying the land at the time of purchase. That some relatives of his namely: - Joram Ayoo, Fatuma, Ogando and Leah also bought portions of the land. That he signed exhibit P. 3(a) the land sale agreement for Joram, as a witness. That one Boniface Opande was a witness in the agreement. That Boniface was present at the signing of the agreement and signed as a witness. That Boniface Opande is a party in the suit as Bon Ngeso Opande.
23. He testified further that he was also a witness in the agreement in respect of Kisumu/sidho West/3778 for Leah Akello Ayoo. That one Silvester Ochieng Otieno was present during the signing of exhibit P.8. That his wife bought parcel No.Kisumu/sidho West/3783, which is registered in her name, from Nicholas Obunde Opande in the year 1979. He testified that after the death of Nicholas Obunde Opande there was resistance from Lawrence Odhiambo and they were not able to access the land.
24. On cross-examination, PW2 stated that they were not shown any documents of title and that he was not present when the agreement was written.
25. On re-examination he stated that he went to the land soon after the agreement was written. That the land was an open field. That when they occupied the land, they planted sugarcane and vegetables. That since his wife died in the year 2011, he had not utilised the land.
26. PW2 produced Certificate of Confirmation of Grant in respect of the estate of Herine Atieno Were, title deed in respect of L.R. No. Kisumu/sidho West/3783, sale agreement dated 3rd November, 1993 and title deed for L.R. No. Kisumu/sidho West/3232, Letter of Consent, Certificate of Official Search.



27. PW3 was Fatuma Hassan Salim, the 4th Plaintiff. She adopted the contents of her Replying Affidavit sworn in Originating Summons No.2 of 2018 on 6th February, 2019 and Witness Statement dated 9th December, 2020 as her evidence. She produced copy of title deed for land parcel No. Kisumu/sidho West/3784, Sale agreement dated 17th July, 1987, copy of title deed for No. Kisumu/sidho West/3232 and Letter of Consent. She testified that the Defendants trespassed onto the suit land. She stated that she did not acquire the land fraudulently and that she did due diligence.
28. PW4 was Zachary Wandiege Ndege one of the personal representatives of the estate of the 1st Defendant. He relied on his Replying Affidavit as his evidence. He produced Grant of Letters of Administration Ad Litem, title deed for No. Kisumu/sidho West/3781, Land Sale Agreement, and medical report for Eliakim Apunda Akech.
29. By consent of the parties, PW4 also testified and produced exhibits on behalf of Eliakim Apunda Akech the personal representative of the 2nd Plaintiff who was reported to be sick. He produced Replying Affidavit sworn by Eliakim Apunda Akech, Certificate of Confirmation of Grant, title deed for No. Kisumu/sidho West/3779, sale agreement, letter dated 28th February, 2011 by Odero Okoyo Advocates, Letter from Kondele police station, sale agreement dated 17th July, 1987, agreement dated 2nd October, 1992 and agreement dated 6th May, 1993, agreement dated 8th February, 1994, agreement dated 13th December, 1987, delivery notes for sugarcane planted on parcel No.3781.
30. PW4 testified that after purchase of the land, both his brother and Eliakim occupied their respective parcels of land and planted crops. That he used to work on the lands. That the crops planted namely; sugarcane, maize and rice on the suit land were later destroyed by floods.
31. On cross-examination, he stated that land parcel known as No. Kisumu/sidho West/3781 was a product of subdivision of parcel No. Kisumu/sidho West/3232. That it was his brother who purchased the land.

Evidence by the Defendants (applicants in the Originating Summons)

32. On behalf of the defence, the 3 defendants testified and produced documents. DW1 was Odhiambo Opana Lawrence, the 1st Defendant. He adopted the contents of his Witness Statement dated 30th September, 2019 as his evidence in chief. He produced Certificate of Death, letter from chief and translation thereof and photographs as exhibits. He testified that Nicholas Obunde was his elder brother who conducted succession secretly. That he did not witness sale of any land. He prayed that the registration of the suit lands in favour of the plaintiffs be cancelled.
33. On cross-examination, he stated that his brother got Letters of Administration in a succession cause. That there is a confirmed Grant in respect thereof which has not been revoked. He stated that he was in court in his capacity as one of the sons of Romanus Opande. That he cannot recall how many of the suit lands he occupies. That his family has had occupation of the suit lands since 1965.
34. DW2 was Bon Ngeso, the 2nd defendant. He testified that he found out that his parcel of land had been taken by somebody. He relied on his Witness Statement dated 30th September, 2019. He stated that he did not witness or sign any land sale agreement.
35. On cross-examination, he stated that the land belonged to his grandfather. That the land was parcel No. Kisumu/sidho West/3232. That he did not know the Respondents. He stated that though he is also known as Bonface Ngeso Opande, he did not sign the land sale agreement. That he did not know which of the parcels he occupies. He conceded on cross-examination that he had not conducted succession in respect of the estate of his father



36. DW3 was Silvester Ochieng Otieno, the 3rd defendant. He adopted the contents of his Witness Statements dated 2nd March, 2020 as his evidence in chief. He had stated in his witness statement that land parcel No. Kisumu/sidho West/3232 was originally registered in the names of Romanus Opande Kisaka, Andrea Akelo Magawi and Machere Siabari who was his grandfather. That Nicholas Obunde Opande subdivided the land unlawfully. He produced a copy of green card and certificate of death as exhibits. He stated that currently it is him and other family members who are using the lands. That they have been using the land since the year 1951.
37. On cross-examination he denied knowledge of the suit lands and stated that he only knows parcel number 3232. He stated further that he did not know the size of the land he was occupying.

Submissions

38. It was submitted on behalf of the Plaintiffs vide the written submissions dated 5th June, 2024 filed by the firm of Yonga Odhiambo Associates that the Defendants confirmed during the hearing that they did not know the Plaintiffs' land parcels and repeatedly claimed that they did not know which parcel they claimed to occupy and to what extent.
39. That a mere adverse claim to the land or the period required to form the bar is not sufficient. That adverse possession must rest on de facto use and occupation.
40. That 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 with possession and appropriation of the premises to the occupant's use done publicly and notoriously. That in this case, the Defendants are not aware which parcels they occupy to claim for adverse possession.
41. Counsel relied on the case of Kisumu Civil Appeal No.27 of 2013 Samuel Kihamba -vs- Mary Mbaisi [2015]eKLR and the case of Kweyu -vs- Omutut [1990]KLR 709.
42. Counsel submitted that it is not enough for the Claimant to simply state that they have been in open continuous and uninterrupted occupation, he ought to prove the allegation.
43. Reliance was placed on the case of Nairobi Civil No.283 of 1990 Gabriel Mbui -vs- Makindia Maranya [1993]eKLR where the court held that the advise character of the possession must be established as a fact.
44. Counsel submitted further that the burden squarely lies on the Defendant to demonstrate that they have met the requirement for an order of adverse possession. that since the Defendants are the ones who have alleged, they must prove.
45. Counsel submitted further that the Plaintiffs as the indefeasible owners of the suit land are entitled to enjoy the right of ownership as set out in section 24 and 25 of the [Land Registration Act](#).
46. On whether the Defendants trespassed onto the Plaintiffs' land, Counsel relied on the definition of fraud in Clerk & Lindsell on Tort 18th Edition at paragraph 18 – 01 that trespass is:-

“ any unjustifiable intrusion by one person upon land in possession of another”. Trespass is actionable at the instance of the person in possession and that proof of ownership in prima facie proof of possession”.
47. That the Plaintiffs have proved that the Defendants entered the land unlawfully and that the same amounts to trespass.



48. Relying on the case of Nakuru Industries Limited -vs- S.S. Mehta & Sons [2016]eKLR Counsel submitted that the Defendants are utilizing the suit land forcefully thereby depriving the Plaintiffs of the use and quiet enjoyment of the suit property hence the Plaintiffs are entitled to damages.
Counsel prayed that the Plaintiffs' claim be allowed with costs.
49. On behalf of the 1st and 2nd Defendants, written submissions dated 10th June, 2024 were filed by the firm of Amondi & Company Advocates. Counsel submitted that the 1st and 2nd Defendants are the legitimate owners of land parcel Kisumu Sidho West/3232.
50. That the sale by their estranged brother to the Plaintiffs was fraudulent. That the sale was without the involvement of any other beneficiaries in the said parcel.
51. Counsel relied on the case of Dr. Joseph Arap Ngok -vs- Justice Moiwo Ole Keiwa & 5 Others, Civil Appeal No.CA.60 of 1997 on sanctity of title.
52. Counsel submitted that the suit parcels of land are ancestral land and the same have been held under customary trust for the benefit of the present and future generations. Counsel relied on the case of Samuel Ndambo Ngugi -vs- Stanley Kinuthia Kamau & Another (2020)eKLR.
53. That the suit land has never been subjected to any succession proceedings. Relying on the case of Herbert L. Martin & 2 Others -vs- Margaret J. Kamar & 5 Others [2016] Counsel submitted that the Plaintiffs cannot explain the root of their title as the chain of good title breaks when Nicholas Opande irregularly caused the registration of his name as owner of KISUMU/SIDHO WEST/3232 which he later transferred to the Plaintiffs.
54. Counsel further submitted that after their alleged purchase, the Plaintiffs knew of the Defendants' occupation of the suit land for over 20 years but made no effort to stop them.
55. Relying on the case of Ibrahim Mungaro Mwangi -vs- Francis Ndegwa Murangi [2014]eKLR where the court quoted a passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99 that the Court of Equity has always refused its aid to stale demands where a party has slept upon his right, Counsel submitted that delay defeats equity and that Equity aids the vigilant and not the indolent.
56. Counsel submitted that the title deeds issued to the Plaintiffs were obtained illegally and should be cancelled. That title to land may be impeached under Section 26 of the Land Registration Act on grounds of fraud, misrepresentation to which the person is proved to have been a party, or where the certificate of title has been acquired illegally un-procedurally or through a corrupt scheme.
57. That the court may order rectification of the register by directing that any registration be cancelled as provided for under Section 80 of the Land Registration Act. Counsel relied inter alia the case of Dina Management Ltd. -vs- Counter Government of Mombasa & 5 Others [SC Petition NO.8(E010) of 2021 to support the submissions.
58. Counsel urged the court to cancel the titles held by the Plaintiffs' Counsel prayed for costs of the suit.

Issues for Determination

59. From the pleadings filed, the oral and documentary evidence adduced and the submissions made, the following emerge as the issues for determination;
 - a. whether or not the questions presented in the Originating Summons should be determined in favour of the Defendants (applicants in the O.S).



- b. whether or not the 4th Plaintiff and the deceased persons on whose behalf the suit was brought are the owners of the suit lands.
- c. whether or not the Defendants trespassed onto the suit lands.
- d. whether or not the Plaintiffs are entitled to the relief sought in the plaint.
- e. Whether the Defendants are entitled to the relief sought in their respective counter claims.
- f. What order to make on costs.

Analysis and Determination

60. The first issue for determination is whether or not the questions presented in the Originating Summons should be determined in favour of the Defendants (applicants in the OS)
61. The questions presented by the defendants in the Originating Summons for the court to determine address two issues. Firstly, whether the applicants have acquired title by adverse possession by reason of being in open and un-interrupted occupation of the land parcel numbers Kisumu/sidho West/ 3780, 3781, 3779, 3782, 3784, 3816, 3238, 2411, 2412, 3248, 3237,1122 and 1121 for a period of over 12 years. And secondly, whether the Land Registrar should be ordered to produce the registers and searches as prayed.
62. On the first question, the applicants pleaded in the Originating Summons that they have been in adverse possession of the said parcels for over 12 years prior to the filing of the proceedings. That the plaintiffs (who are the Respondents in the (Originating Summons) though registered owners, acquired the suit lands illegally and that the defendants had had continuous and uninterrupted occupation and usage of the suit parcels of land from the days of their ancestors. The Defendants deposed in the Supporting Affidavit sworn by Lawrence Odhiambo Opande on 26th February 2018 that since childhood, they have been using the parcels to date without interruptions whatsoever. That it was only in November 2017 that they realized that their brother had fraudulently registered the land in the names of strangers who never expressed their interest in the parcels or tried to question the Defendants' occupation.
63. The defendants testified that they had occupation of the suit lands. They denied that the suit lands were sold to the plaintiffs. DW3 denied knowledge of the suit lands and stated that he only knows of land parcel number 3232.
64. Adverse possession is a doctrine of law vide 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. In Kenya, the prescribed period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the [Limitation of Actions Act](#). Section 7 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.”

Section 13 of the [Limitation of Actions 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.
65. In the case of *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR adverse possession was defined as
- “...the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”
66. And in *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
67. It is not in dispute that parcel number 3232 was sub-divided by one Nicholas Obunde Opande and some of the resultant parcels transferred to the plaintiffs. The defendants do not specify which parcels are occupied by which defendants. In their testimonies they stated that they did not know which of the suit lands, how many of the suit lands or what size of the suit lands they occupied. The entire of the original parcel No 3232 according to the green card produced as exhibit measured 44.0 Ha. The Defendants aver that there are more than 30 beneficiaries occupying the land that was originally parcel No. 3232. The Originating Summons was not brought in representative capacity. The applicants are claiming land that they claim to actually occupy yet they are not specific as to parcel number and size. The claims for 14 parcels. There is no evidence that all the 14 parcels of land listed in the Originating summons are resultant parcels from the original parcel No. 3232.
68. And while the defendants claim that they have had occupation of the lands since the time of their ancestors, the plaintiffs’ evidence was that once they bought their respective parcels of the land some of them started utilizing their respective portions before the sons of the seller became hostile and resisted the plaintiffs’ occupation thereof. For the registered owner of land parcel number 3782, PW1 testified that the land was bought in the year 1993 by her late husband one Joram Olang’o Ayoo deceased and that since the date of the purchase they had never used the land because the children of Nicholas could not allow them. For land parcel No 3782 PW2 testified that the land was bought by his late wife Herine



Atieno in the year 1979. He testified that after the death of Nicholas Obunde Opande who was the seller, there was resistance from DW1 and hence he has not been able to access the land.

69. In respect of land parcel number 3784, PW3 testified that the defendants trespassed onto the land. PW4 testified that he used to plant sugarcane, maize and rice on the suit land but that they were destroyed by floods. The burden of proof to prove to the required degree that the applicants have had adverse possession of the suit lands rests with the applicants. Section 107 to 109 of the *Evidence Act* Cap 80 Laws of Kenya provides

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides

“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 for by law that the proof of that fact shall lie on any particular person.”

70. The applicants’ case is that they entered onto the suit land by the virtue of the suit land being their ancestral land. That they have been on the suit Land parcel No 3232 since the time of their ancestors.
71. The applicants further claim that the original parcel of land was transmitted, sub-divided and the resultant parcels transferred fraudulently to the Plaintiffs.
72. They deposed in paragraph 7 of the Supporting Affidavit that it was only on or about November 2017 when they discovered that their brother had fraudulently registered the suit land in the names of strangers. They testified that the sub division of the original parcel and registration of the suit land in favor of the plaintiffs was fraudulent. If this be correct, then a claim based on adverse possession cannot be sustained against title alleged to have been obtained fraudulently.
73. See case of Haro Yonda Juaje –vs- Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR where the court stated that;

“One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and the registered owner has never been in possession of that land....one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

74. And similarly, in *Ravindranath Dahybhay Bhagat v Hamisi Haro & 5 others* [2014]eKLR. the Court held that an adverse possessor is a squatter and he has no rights of his own. The Court stated that

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the



mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

75. In *Njue v Matiabe & 3 others* (Environment & Land Case E050 & E010 of 2021 (Consolidated)) [2023] KEELC 17361 (KLR) it was held that “the moment the person claiming adverse possession contests and impugns the validity of the registered proprietor’s title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.
76. On the basis of material placed before court, I find that adverse possession has not been proved.
77. It has not been proved that the Defendants (applicants in the Originating Summons) have had open and uninterrupted occupation of the suit lands for a period of over 12 years. Hence there is no basis upon which the court can order for execution of instruments for conveying the land in favour of the defendants.
78. Regarding the question as to whether the 8th Respondent (the Land Registrar) should produce the registers and search certificates for Kisumu/sidho West/1121, 1122, 3235 2411, 2412, 3248, 2337 and 3232, no evidence was led on this. There was no evidence that the applicants had requested for the documents and that the 8th Respondent had declined to supply them with the documents.
79. The next issue is whether the 4th plaintiff and the deceased persons on whose behalf the suit was brought are the owners of the suit lands.
80. While the Originating Summons covers 14 parcels of land, the suit according to the plaint dated 16th December, 2019 concerns only five (5) of the 14 parcels. These are No. Kisumu/sidho West/3781, 3779, 3782, 3784 and 3783.
81. The Plaintiffs pleaded in paragraph 7 of the plaint that at all material times, they are the registered owners of the suit lands respectively. A title deed dated 30th April, 1995 in respect of No. Kisumu/sidho West/3781 was produced as exhibit. It shows that the said parcel of land measuring 0.8Ha was registered in the name of John Onyango Ndege. The estate of John Onyango Ndege is the 1st Plaintiff in the suit.
82. A title deed dated 13th February 1995 in respect of land parcel number Kisumu/sidho West/3797 was also exhibited. It shows that the said parcel of land measure 4.0Ha is registered in the name of Benter A. Akech. The estate of Benta A. Akech is the 2nd Plaintiff in the suit.
83. Further, title deed dated 26th April, 1994 in respect of land parcel No. Kisumu/sidho West/3782 measuring 8.0Ha was exhibited. It shows that the land is registered in the name of Joram Olango Ayoo. Joram Olango Ayoo, deceased represented by Sophia Joyce Ayoo and Others is the 3rd Plaintiff in the suit.
84. A title deed dated 21st January, 2009 in respect of land parcel known as No. Kisumu/sidho West/3784 measuring 1.2Ha produced as exhibit shows that the said parcel of land is registered in the name of Fatuma Hassan Salim the 4th Plaintiff herein.
85. And a title deed dated 2nd October, 2015 in respect of land parcel No. Kisumu/sidho West/3783 measuring 1.2Ha shows that the said parcel of land is registered in the name of Herine Atieno Were. The estate of Herine Atieno Were is the 5th Plaintiff in the suit.



86. The Plaintiffs adduced evidence that the 4th plaintiff and the deceased persons bought their respective suit lands from Nicholas Obunde Opande who had taken out Letter of Administration in respect of the estate of the registered owner of the original parcel number Kisumu/sidho/3232. They also produced land sale agreements in respect of their respective parcels of land in support of their claims.
87. The Defendants denied that the Plaintiffs bought the suit lands. They denied knowledge of the suit lands and insisted that they only know of land parcel No.3232 which they testified that it belonged to their father and grandfather. However, the Defendants also pleaded that the Plaintiffs acquired titles to the suit lands illegally because the seller Nicholas Abunde Opande had undertaken succession to the estate of the registered owners secretly and without involving the family.
88. On cross-examination, DW1 admitted that there is a confirmed grant in respect of the estate of the deceased registered owner which has not been revoked.
89. It was submitted on behalf of the Defendants that the plaintiffs' titles were obtained illegally and fraudulently and that hence the root of those titles was questionable. The fraud and illegality has however, not been proved. The degree of proof for allegations of fraud is higher than proof on a balance of probabilities. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR at page 23 the court held that:
- “When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”
90. Under section 24 of the *Land Registration Act* registration of the a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 secures the rights of a registered proprietor. Section 26 of the same Act provides inter alia that certificate of title is conclusive evidence of proprietorship.
91. Taking into account all the evidence placed before the court, I find that the suit lands in the plaint belong to the 4th plaintiff and the estates of the deceased persons in whose names they are registered respectively.
92. The next issue for determination is whether or not the defendants trespassed onto the suit lands.
93. The plaintiffs pleaded in paragraphs 8-12 of the plaint that sometime in the month of June 2011, the plaintiffs discovered that the defendants were wrangling over ownership of the suit land and had trespassed there onto. The plaintiffs itemized the particulars of the trespass by the defendants to include; leasing out the said land parcels to 3rd parties, tilling, ploughing and using the said land parcels, constructing structures on the said land parcels without the consent of the plaintiffs and hindering the plaintiffs from accessing the said land parcels. The plaintiffs pleaded that as a result of the actions of the defendants the plaintiff have been deprived/robbed of their constitutional right to own private property thus causing them loss and damage.
94. The 1st and 2nd defendants' response as contained in paragraph 3 to 8 of the defence and counter claim is that they deny ever trespassing onto the suit land. They pleaded that the families of Romanus Opande Kisaka, Andrea Akelo Magawi and Machere Siabari have continuously and consistently used their respective parcels of land without any interference. They testified that they use the suit lands to do farming which they do by themselves or otherwise lease the lands to farmers to use for the same purpose.



95. The Defendants justify their presence on the suit lands by claiming that the land is their ancestral land. However, no nexus was established between the Defendants, the suit lands and the alleged ancestors
96. In the section 3 of the *Trespass Act*, Cap 294 Laws of Kenya trespass to land is stated to happen when:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or tills or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”
97. Clerk and Lindsell on Tort 18th Edition at page 23 defines trespass as:
- “ any unjustifiable intrusion by one person upon the land in possession of another.”
98. According to Black’s Law Dictionary 11th edition Bryan and Garner at page 667 is:
- “ an interference with or intrusion into another’s property.”
99. In the case of Alex Waigara Mwaura -vs- China Power Company Limited and another [2020]eKLR the court defined it as
- “ an intrusion by a person into land of another who is in possession or ownership.”
100. I find that the defendants’ presence on the suit lands amounts to trespass as it is not justified.
101. The next issue for determination is whether or not the defendants are entitled to the orders sought in their counter claims.
- The prayers in the 1st and 2nd Defendant’s counter claim are -
- a. an order declaring them as lawful and beneficial owner of the property known as Kisumu/sidho/3232.
 - b. an order of permanent injunction restraining the Defendant whether by themselves, servant, workmen, agent, nominees or otherwise howsoever or otherwise however from entering, trespassing, occupying, remaining thereon, selling, leaving licensing, charging, interfering with or in any manner dealing in all the property known as Kisumu/sidho/3232, costs, plus interest thereon at court rates until payment in full.
 - c. Any other order the court may deem just and appropriate.
- And the prayers in the 3rd Defendant’s counter claim are:
- a. All the illegal transfers, transmissions and/or subdivisions in respect land parcel No. Kisumu/sidho West/3232 be cancelled and/or be revoked and or be reverted to land parcel No Kisumu/sidh West/3232.
 - b. Costs of the Counterclaim
 - c. Interest on costs at court rates
 - d. Any other or further relief the honourable court may deem just and expedient to grant.
102. The Defendants pleaded that the plaintiffs illegally and fraudulently gained ownership of the land parcel numbers Kisumu/sidho/3781, 3779, 3782, 3784 and 3783. They pleaded that their father one Ramanus Opande Kisaka and their uncles by the names Andrea Akello Magawi and Machere Siabare



were the joint proprietors and beneficial owners of property known as land reference Kisumu/sidho/ 3232. The green card produced as exhibit shows that the register in respect of the original title No. Kisumu/sidho West/ 3232 was opened on 11.9.1991 in the names of Ramanus Opande Kisaka P O Box 137, Ahero, Andrea Akello Magawi and Machere Siabari. The green card further shows that on 13.1.1994 the land was transmitted to Nichols Obunde Opande and that on the same day the land was transferred to Nicholas Obunde Opande and Machere Siabari and title deed issued to them. The green card shows that on 16.2.1994, the title was closed on sub-division and new numbers namely; 3778, 3779, 3780, 3781, 3782, 3783 and 3784 created.

103. The 1st and 2nd defendants do not deny that succession to the estates of the deceased person was done but allege that the same was done by Nicholas Obunde Opande secretly and fraudulently. The defendants have not taken any steps to challenge and undo the succession. The suit land belonged to the 3 deceased persons before it was transferred/transmitted to Nicholas Obunde Opande who sub divided it and sold portions thereof to the plaintiffs.
104. No nexus between the 3 deceased persons and the defendants has been established. The defendants are not the personal representatives of the deceased persons. They have no locus standi to bring the counterclaims on behalf of the estates of the deceased persons. They claimed that they brought the actions as children and or relatives of the deceased.
105. Having found that the defendants have no locus standi to bring the counter claims and that they have not proved adverse possession, it follows that they are not entitled to the orders sought in the counterclaims.
106. The next issue is whether the plaintiffs are entitled to the relief sought in the plaint.
107. On the basis of the evidence placed before court and more particularly the land sale agreements and the title deeds, I find that the plaintiffs are entitled to the relief sought.
108. Regarding costs of the Originating Summons, the suit and the counterclaim under S.27 of the Civil Procedure Act costs follow the event.
109. On the basis of the determinations herein, I find that the Defendants have failed to prove their claims as contained in the Originating Summons and the Counterclaims on a balance of probabilities.
120. I find that the plaintiffs have proved their claim as contained in the plaint on a balance of probabilities. I therefore make the following orders
 - i. The Originating Summons dated 26th February 2018 and the Counter claims by the 1st and 2nd Defendants and by the 3rd Defendant are hereby dismissed. No order as to costs.
 - ii. Judgement is entered in favour of the Plaintiff for:
 - a. An order directing the Defendants to desist, stop and avoid using, interfering and entering land parcel numbers Kisumu/sidho West/3781, 3779, 3782, 3784 and 3783.
 - b. An order that the Defendants do vacate and hand over vacant possession of land parcel numbers Kisumu/sidho West/3781, 3779, 3782, 3784 and 3783 within 60 days hereof failing which they shall be evicted as by law provided.
 - c. costs of the suit.

Orders accordingly.



JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 23RD DAY OF JANUARY, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Odino for the Plaintiffs.

Nyambeki for 1st and 2nd Defendants.

No appearance for the 3rd Defendant.

