



Auma v Athembo (Sued as the Administrator of the Estate of the Late Thomas Anyango Omusi) & another (Environmental and Land Originating Summons E019 of 2022) [2025] KEELC 4858 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2022**

**E ASATI, J
JUNE 26, 2025**

BETWEEN

GRACE ANYANGO AUMA PLAINTIFF

AND

PHILGONA ANYANGO ATHEMBO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE THOMAS ANYANGO OMUSI) ... 1ST DEFENDANT

DICKSON ODHIAMBO OBUNGU 2ND DEFENDANT

JUDGMENT

Introduction

1. Vide the Originating Summons dated 27th August, 2022, Grace Anyango Auma, the Plaintiff, who claims to be entitled to a parcel of land known as Kisumu/Muhoroni/178 (the suit land) by adverse possession and/or prescription sued the Defendants for determination of the following questions;
 1. Whether the deceased 1st Defendant entered sold the land parcel Kisumu/Muhoroni/178 to the Plaintiff's husband on 29th April, 2009?
 2. Whether upon the purchase, the Plaintiff took immediate possession of the entire land parcel Kisumu/Muhoroni/178 and has been in actual, open hostile, continuous and uninterrupted possession of the same for now a period of excess 12 years?
 3. Even upon the death of her husband, whether the Plaintiff maintained continuous occupation of the land without force, without secrecy and without interruption for more than 12 years?
 4. Whether in the circumstances, the 1st Defendant's title to the original land parcel Kisumu/Muhoroni/178 was extinguished after 12 years of such possession/occupation by the Plaintiff



and that the 1st Defendant continued remaining registered against the title only as a trustee for the Plaintiff.

5. Whether the rights of the 1st Defendant to the original land parcel Kisumu/Muhoroni/178 were extinguished after 12 years of such possession/occupation of the land by the Plaintiff and that the 1st Defendant's title to the land was subject to the registrable interest of the Plaintiff that had since crystalized prior to the transfer of the land to the 2nd Defendant.
 6. Whether the subsequent transfer of the land parcel Kisumu/Muhoroni/178 on 27th March, 2022 from the name of the 1st Defendant to that of the 2nd Defendant was lawful in accordance with the law?
 7. Whether the Plaintiff should be registered as the proprietor of original land parcel Kisumu/Muhoroni/178 having acquired the same by way of adverse possession and/or prescription.
2. The Originating Summons was later amended on 26th November, 2023 to substitute the name of the 1st Defendant Philgona Anyango Athembo, deceased, with that of Matilda Onoka Omusi.
 3. The Plaintiff claimed in her Affidavit Supporting the Originating Summons sworn on 27th August, 2022 that she was the widow of one George James Auma Okulu, deceased, who had leased the suit land from one Thomas Onyango Omusi also deceased. That her husband later bought the suit land from the widow of Thomas Onyango Omusi by the name of Philgona Anyango Athembo. That after purchase, the Plaintiff and her late husband continued with possession of the land and have had actual, physical, open, hostile continuous and uninterrupted possession of the land for a period of 15 years as at the time of swearing the Affidavit.
 4. In reply to the Originating Summons, the 2nd Defendant filed his Replying Affidavit sworn on 22nd May, 2023. The Defendant denied the Plaintiff's claim and averred that the Plaintiff was using the land from the year 2004 to 2021 by virtue of the lease agreement between the Plaintiff's husband and the husband of the 1st Defendant that thus her use of the land was with permission and cannot claim adverse possession. That the 1st Defendant passed away on 10th October 2019 before she had taken out any Letters of Administration in respect of the estate of the deceased. He stated further that he is bona fide purchaser of the suit land having bought it from the administrator of the estate of the deceased registered owner one Matilda Onoka Omusi.

Evidence

5. Directions were taken on 29th April, 2024 that the matter be heard by way of viva voce evidence.
6. On behalf of the Plaintiff, the Plaintiff testified as PW1 and called 1 witness. PW1 adopted the contents of her witness statement dated 10th February, 2023 as her evidence in chief. She produced land Sale Agreement dated 29th April, 2009, copy of certificate of death for Gideon James Auma Okulu, copy of certificate of death for Philgona Anyango Omusi, Demand Letter from Ngala Awino & Co. Advocates, Letter from Aluoch & Co. Advocates dated 16th April, 2022, demand letter by the 2nd Defendant dated 22nd April, 2022 and response letter from Bruce Odeny & Co. Advocates dated 20th July, 2022, cane delivery receipt, letter dated 7th January, 2011 and Affidavit sworn on 15th September, 2007.
7. On cross-examination she stated that her husband leased the land in the year 2004 for a lease period of 17 years. That later her husband bought the land from Philgona Anyango the widow of Thomas Onyango Omusi. That she does farming on the land.



8. PW2 was one Lucas Ochieng Ondiek. He stated that he was a son of the Plaintiff. That he witnessed the sale of the suit land by Philgona Anyango to George Auma Okulu. That the suit land is being utilized by the Plaintiff who plants sugar cane and maize thereon.
9. Two witnesses testified on behalf of the Defendants. DW1 was Matilda Onoka. She testified that she was the daughter of Thomas Onyango Omusi. She produced copy of title deed in the name of Thomas Omusi, copy of Grant of Letters of Administration, sale agreement dated 15th July 2021, Certificate of Confirmation of Grant dated 24th September, 2021, copy of title deed in the name of Dickson Odhiambo Obungu and copy of letter dated 8th February, 2022.
10. On cross-examination, she denied that the land was sold to the Plaintiff. She stated that she sent a notice informing the Plaintiff that she was going to sell the land.
11. DW2 was the 2nd Defendant. He testified that he bought the suit land from Matilda who had obtained Letter of Administration in respect of the estate of the registered owner. That the land was transferred to him in the year 2022.

Submissions

12. At the close of the evidence, parties filed written submissions on the case.

Submissions for the Plaintiff

13. Written submissions dated 8th April, 2025 were file on behalf of the Plaintiff by the firm of Bruce Odeny & Company Advocates. Relying on the case of Mtana Lewa -vs- Kahindi Ngala Mwangandi (2015) eKLR, Counsel submitted that to determine whether the Plaintiff's right of adverse possession accrued the following question have to be answered;
 - a. how did the Plaintiff take possession of the suit property?
 - b. when did the Plaintiff take possession and occupation of the suit property?
 - c. what was the nature of her possession and occupation?
 - d. and how long has the Plaintiff been in possession?
14. Counsel submitted that although the Plaintiff's husband had a lease running for 17 years from 2004, when the proprietor of the land died in the pendency of the lease period his family sold the land to the husband of the Plaintiff, one George James Auma in the year 2009. That the Plaintiff had been in possession of the land from the year 2004 to date as a purchaser.
15. Relying on the case of Hosea -vs- Njiru & 8 others (1974)KLR Counsel submitted that once payment of the last instalment of the purchase price was done, the possession became adverse to the vendor.
16. That the estate of the registered owner held the land in trust for the Plaintiff.
17. Relying on the case of Civil Appeal No.121 of 2006 Benson Mukuwa Wachira -vs- Assumption Sisters of Nairobi Registered Trustees [2016]eKLR where it was held that for thereto be interruption of occupation, the proprietor must evict or eject that trespasser but because eviction is not always possible without breach of peace, institution of a suit against a trespasser does interrupt and stop time from running, Counsel submitted that transfer of the suit land to the 2nd Defendant by the 1st Defendant was therefore null and void.

Counsel urged the court to allow the Plaintiff's claim with costs.



Submissions for the Defendants

18. On behalf of the Defendants, written submissions dated 18th March, 2025 were filed by the firm of Ngala Awino & Company Advocates. Counsel framed 5 issues for determination namely;
 - a. whether the Plaintiff is entitled to the suit parcel by adverse possession;
 - b. whether the 1st Defendant's late mother had capacity to sell the land parcel Kisumu/Muhoroni/178 to the Plaintiff's husband one George James Auma Okulu, deceased;
 - c. whether the 2nd Defendant was a bona fide purchaser for value without notice of land parcel No. Kisumu/Muhoroni/178;
 - d. whether the Plaintiff is entitled to the orders sought in the Originating Summons and
 - e. who is entitled to costs?
19. Counsel submitted that a party claiming adverse possession ought to prove that the possession was nec vi, nec clam, nec precario. That the possession should not have been through force, not in secrecy and without the authority or permission of the owner.
20. Counsel submitted that the Plaintiff had not enjoyed possession of the suit land without permission and/or consent. That entry of the Plaintiff onto the suit land was on the basis of lease agreement.
21. Counsel relied on the case of Mbira -vs- Gachuhi (2002)EA LR 137 for this submissions.
22. Counsel submitted further that Philgona Anyango Athembo had no capacity to sell the land to the Plaintiff's husband as no succession had been conducted to the estate of Thomas Onyango Omusi, the registered owner of the suit land.
23. Citing section 45 of the Law of Succession Act, Counsel submitted that land belonging to a deceased person can only be sold by dint of section 82 of the Law of Succession Act. That an action done in respect of such land before succession amounted to intermeddling.
24. On whether the 2nd Defendant was a bona fide purchaser for value without notice, relying on the definition of bona fide purchaser in Black's Law Dictionary 9th edition and the Case of Lawrence Mukiri -vs- Attorney General & 6 others [2019]KEELC 91(KLR) Counsel submitted that the 2nd Defendant was a bona fide purchaser for value without notice as he did due diligence before buying the land.
- 25, Counsel urged the court to dismiss the suit with costs.

Issues for Determination

26. The questions presented by the Plaintiff vide the Originating Summons form the issue for determination herein.

Analysis and determination

27. The 1st question presented is whether the deceased 1st Defendant sold the land parcel No. Kisumu/Muhoroni/178 to the Plaintiff's husband on 29th April, 2009.
28. The Plaintiff pleaded vide the Affidavit in Support of Originating Summons that upon the death of Thomas Onyango Omusi, his widow Philgona Anyango Athembo approached the Plaintiff's husband on 29th April, 2009 and sold the entire of the suit land to him. To demonstrate this assertion, the



- Plaintiff produced a copy of sale agreement. She reiterated the contents of the Supporting Affidavit in her evidence before court. It was submitted on her behalf that her husband bought the land.
29. The Defendants, and more particularly the 1st Defendant who is the daughter of the registered owner, denied that the land was sold.
 30. I have read the copy of the land sale agreement dated 29th April, 2009. The same was allegedly witnessed by the Subordinate Court Tamu. It does not show which specific officer at Tamu Law Courts witnessed the agreement. It is common ground that as at the time of sale, the seller, Philgona Anyango Athembo, had not taken out Letters of Administration in respect of the estate of the deceased registered owner. Under section 2(1) of the Law of Succession Act which provides that: “Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons”, property of a deceased person can be handled in accordance with the provisions of the law of succession Act. Section 79 of the Act vests property of a deceased person in the personal representative duly appointed according to the Act and under section 82 only such personal representative can sell property of the deceased person. This means that the said Philgona Anyango Athembo therefore had no capacity to sell land. The transaction if any that took place between her and the plaintiff or plaintiff’s husband amounted to intermeddling with the property of the deceased.
 31. econdly, there is no evidence of completion of the transaction. There is no evidence that balance of the purchase price mentioned in the agreement was ever settled by the Plaintiff and/or her husband.
 32. The sale was therefore null and void. The relationship that remained between the parties that is recognisable in law is that established vide the lease entered into in the year 2004 to run for 17 years. The purported agreement had no specific clause terminating the lease.
 33. The next issue for determination is whether upon the purchase the Plaintiff took immediate possession of the entire land parcel Kisumu/Muhoroni/178 and has been in actual, open, hostile, continuous and uninterrupted possession of the suit land for now a period in excess of 12 years.
 34. From the evidence place before court by both parties, the Plaintiff and her husband took possession of the suit land in the year 2004 pursuant to a lease agreement.
 35. They were to remain in occupation for 17 years from 2004. No evidence has been placed before court that the Plaintiff entered the suit land upon purchase of the suit land. As at the date of the alleged sale/ purchase, the Plaintiff as per the evidence was already in occupation. Both parties were in agreement that the Plaintiff was utilizing the land by planting cane and maize on the land. Since she entered onto the land and remained thereon on the basis of the lease, adverse possession does not arise.
 36. In *Kimani Ruchure vs Swift Rutherfords & Co. Ltd (1980)KLR 10 Kneller J* held that the Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion)
 37. Also, in in the case of *Beatrice Syokau Gathumba vs Kenya Airports Authority & 2 Others [2012] eKLR* where the court held as follows:

I must emphasize that it is an element of adverse possession that it ought to be ‘hostile’ and without permission from the true owner of the land. The fact that the petitioner’s husband was permitted occupancy of the suit premises at one time as a manager of the animals and in the second time as a licensee is inconsistent with the doctrine of adverse possession because an intruder who is given permission or a license has no cause of action during the period



of his permission or license. This position was stated in the case of *Wanje v Saikwa*, Civil Appeal No. 72 of 1982 (1984) KLR Pg. 284, wherein the Court of Appeal held that; ‘A person who occupies another person’s land with that person’s consent cannot be said to be in adverse possession as in the reality he has not dispossessed the owner of the land and the possession is not illegal.’ This was also confirmed in the case of *Wambugu v Njuguna*, Civil Appeal No 10 of 1992 where it was stated that;

“...an appellant must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or license, which has not been determined.”

38. In the present case the plaintiff’s entry and presence on the land as a tenant was permissive and consensual.
39. The next question is whether in the circumstances, the 1st Defendant’s title to the original land parcel Kisumu/Muhoroni/178 was extinguished after 12 years of such possession/occupation by the Plaintiff and that the 1st Defendant continued remaining registered against the title only as trustee of the Plaintiff.
40. This question is determined together with question 5 which is to the effect that the rights of the 1st Defendant were extinguished by the Plaintiff’s occupation of the land for a period in excess of 12 years.
41. Section 17 of the *Limitation of Actions act* contains provisions as to when title of a registered proprietor of land becomes extinguished by reason of non-action on the part of the registered owner. It provides that if a person entitled to bring action to recover land does not do so within the prescribed limitation period, the title of that person to the subject land becomes extinguished.
42. Having determined that the Plaintiff’s entry and occupation of the suit land was on the strength of the lease agreement and therefore could not amount to adverse possession, the right for the registered owner or his personal representative to bring action had not accrued. Section 13 of the *Limitation of Actions Act* provides that the right to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run and that a right of action does not accrue unless and until some person takes adverse possession of the land.
43. Time could only start running in favour of the Plaintiff if she remained on the land after expiry of the lease. It is agreed that the lease expired in the year 2021. The suit was filed in the year 2022 – obviously the requisite period of 12 years had not elapsed.
44. The last two questions on the Originating Summons relate to whether the suit land should now be transferred to the Plaintiff. The determinations hereinabove are that the Plaintiff has not had adverse possession of the suit land. As such there is no basis to order for the transfer of the suit land in her favour. The 2nd Defendant who is the current registered owner demonstrated that he is a bona fide purchaser for value without notice hence entitled to the suit land which currently registered in her name.

Costs of the suit.

45. Under section 27 of the *Civil Procedure Act* as a general rule costs follow the event and although the court is given discretion for good reason to order otherwise, no reason has been given to the court to exercise the discretion.



Conclusion

46. Having found that the Plaintiff's entry onto the suit land and presence thereon for the first 17 years from the year 2004 was permissive and consensual, and that adverse possession has not been proved, the court finds that the Plaintiff has not proved her case on a balance of probabilities.

47. The suit is therefore hereby dismissed. Costs to the Defendants.

Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 26TH DAY OF JUNE 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Omondi for the Plaintiff

Odah for the Defendants.

