



Living Water Church (Suing through its Registered Trustees and Officials) v Aden (Sued as the Legal Representative of the Estate of Sylphanus Owino Sewe, Deceased) (Environmental and Land Originating Summons 10 of 2021) [2025] KEELC 4803 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2021**

SO OKONG'O, J

JUNE 26, 2025

BETWEEN

LIVING WATER CHURCH PLAINTIFF

SUING THROUGH ITS REGISTERED TRUSTEES AND OFFICIALS

AND

OWINO FREDRICK ADEN DEFENDANT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SYLPHANUS
OWINO SEWE, DECEASED**

JUDGMENT

1. The Plaintiff instituted this suit by way of an Originating Summons dated 22nd March 2021 against Sylphanus Owino Sewe, deceased. Sylphanus Owino Sewe [hereinafter referred to only as “the deceased”] died on 3rd July 2021 while this suit was pending and was substituted by his son and legal representative, Owino Fredrick Aden. The Plaintiff claimed to have acquired all that parcel of land known as Title No. West Kisumu/Ojola/2212 [hereinafter referred to as the “suit property”] by way of purchase for a valuable consideration and/or by adverse possession.
2. In the Originating Summons, the Plaintiff sought for the determination of a number of questions which included; whether the Plaintiff should be declared the owner of a portion of the suit property measuring 0.10 Ha. by adverse possession, whether the Plaintiff had acquired title to the said portion of the suit property by way of adverse possession for 14 years and whether the court should order the Defendant to execute all relevant documents of conveyance relating to the suit property in favour of the Plaintiff and in default of the Defendant so effecting the requisite transfer, the Deputy Registrar of the court should be ordered to effect such transfer. The Plaintiff also prayed for the court’s determination of whether a permanent injunction should be issued restraining the Defendant from interfering with the Plaintiff’s quiet possession of the suit property.



3. The Originating Summons was brought on the grounds set out on the face thereof and on the affidavit and further affidavit sworn by Julius Dans Otieno Oloo on 22nd March 2021 and 25th May 2021, respectively. The Plaintiff averred that the deceased sold to the Plaintiff a portion of the suit property measuring 0.10Ha. at a consideration of Kshs. 100,000/-. The Plaintiff averred that it took possession of the said portion of the suit property on 1st January 2007 and put up a church building thereon. The Plaintiff averred that the deceased undertook to obtain land control board consents for the subdivision and transfer of the said portion of the suit property to the Plaintiff, which he failed to do. The Plaintiff averred that it had had uninterrupted possession and quiet enjoyment of the suit property for over 14 years. The Plaintiff averred that the deceased had made no claim of any nature to the suit property.
4. The Plaintiff averred that it had used the suit property openly without any secrecy and without any interruption from 2007. The Plaintiff averred that the deceased voluntarily surrendered to it the original title deed to suit property on 3rd March 2021 with instructions to identify a surveyor to excise a portion of the suit property measuring 0.10Ha. for the purposes of obtaining a consent of the land control board for the subdivision of the suit property.
5. The Plaintiff averred that on 16th March 2021 its archbishop Julius Dans Otieno Oloo was informed by the deceased that with effect 1st March 2021, the Plaintiff no longer had any rights over the said portion of the suit property because the deceased had identified a purchaser for the property who would refund to the Plaintiff the purchase price that the Plaintiff had paid to the deceased. The Plaintiff averred that it had no alternative but to come to court to protect its rights over the suit property. In his affidavit in support of the Originating Summons, the Plaintiff's archbishop Julius Dans Otieno Oloo stated that the deceased contacted the Plaintiff in 2007 and offered to sell to the Plaintiff a portion of the suit property at a consideration of Kshs. 100,000/-.
6. The Plaintiff's archbishop Julius Dans Otieno Oloo stated further that they paid to the deceased Kshs. 50,000/- in cash as a deposit. He stated that the Plaintiff paid to the deceased a further sum of Kshs. 15,000/- on 30th March 2007 through a cheque leaving a balance of Kshs. 35,000/- which was paid to the deceased in cash. He stated that upon receiving the balance of the purchase price, the deceased assured the Plaintiff that he was committed to ensuring the successful transfer of the said portion of the suit property into the name of the Plaintiff. He annexed to the affidavit a copy of the Land Certificate for the suit property dated 7th September 1984 in the name of the deceased, a certificate of official search for the suit property dated 22nd March 2021, a copy of the cheque counterfoil dated 30th March 2007 for Kshs. 15,000/- said to have been paid to the deceased, and a note to the effect that the balance payable to the deceased was Kshs. 35,000/-. In his further affidavit, the Plaintiff's said archbishop Julius Dans Otieno Oloo denied that the Plaintiff had given the deceased the sum of Kshs. 15,000/- as a loan and not on account of the purchase price. He stated that the deceased gave the Plaintiff possession of the disputed portion of the suit property on which the Plaintiff put up a church building.
7. The Originating Summons was opposed by the deceased through a replying affidavit sworn on 15th April 2021. The deceased stated that he was the registered owner of the suit property. The deceased stated that at no time did he sell the suit property to the Plaintiff or any other person. The deceased averred that he approached the Plaintiff for a loan of Kshs. 15,000/- to assist him pay legal fees in a civil case that he was involved in. The deceased stated that as a security for the said loan of Kshs. 15,000/-, he deposited with the Plaintiff the original title deed for the suit property which was to be returned to him once he paid back the loan.
8. The deceased averred that after 3 months, he went to see the Plaintiff with a view of repaying the loan said loan of Kshs. 15,000/- so that he could get back his original title deed for the suit property. The deceased averred that the Plaintiff refused to return his title deed for the suit property. The deceased



- averred that the Plaintiff claimed that the title deed was misplaced. The deceased averred that he had been to the Plaintiff on numerous occasions concerning his title deed, but the same had not been returned to him. The deceased denied that the Plaintiff was in possession of the suit property. The deceased averred that at no time had the Plaintiff or its officials been in occupation of the suit property.
9. The deceased averred that the Plaintiff was illegally and fraudulently trying to alienate his land for its benefit. The deceased averred that he was in occupation of the suit property and no one had displaced him from the same. The deceased urged the court to dismiss the Originating Summons with costs.
 10. At the trial, the Plaintiff called one witness, archbishop Dr. Julius Otieno [DW1]. DW1 stated that he was the presiding Bishop of the Plaintiff. DW1 adopted his affidavit and further affidavit sworn in support of the Originating Summons as his evidence in chief. DW1 produced the documents that he had annexed to the affidavit in support of the Originating Summons as P.EXH. 1, 2 and 3 and the documents attached to the Plaintiff's further list of documents dated 10th June 2021 as P.EXH. 4 [a], 4[b] and 5 respectively.
 11. On cross-examination, PW1 stated that the Plaintiff entered into a contract with the deceased for the purchase of a portion of the suit property at a consideration of Kshs. 100,000/- of which the Plaintiff paid to the deceased a deposit of Kshs. 50,000/-. He stated that after paying the balance of the purchase price, the Plaintiff was given the original title for the suit property. PW1 stated that they applied for land control consent. He admitted that he had not produced the consent in evidence. PW1 stated that the Plaintiff had occupied the suit property for 14 years as of the time it brought the suit.
 12. PW1 told the court that the church building on the suit property was built with clay soil and iron sheets. He stated that apart from the church building, the Plaintiff also had a latrine on the suit property, which was not captured in the photograph that he had produced in evidence. PW1 stated that the Plaintiff's church was registered in 1994. PW1 denied that the deceased had given him the original title deed for the suit property as security for a loan that the Plaintiff had advanced to the deceased.
 13. On re-examination, PW1 stated that the Plaintiff did not enter into a written agreement of sale with the deceased. He stated that the parties entered into a gentlemen's agreement.
 14. The Defendant also called one witness, Owino Fredrick Aden [DW1]. DW1 told the court that he was the son of the deceased, Sylphanus Owino Sewe. He adopted the deceased's replying affidavit sworn in opposition to the Originating Summons as his evidence in chief. On re-examination, DW1 stated that his deceased father did not sell the suit property. On examination by the court, DW1 stated that he was not familiar with the building in the photographs that had been produced by the Plaintiff in evidence. He stated that initially, there was a structure on the disputed land which was being used as a church, which structure had collapsed and was no longer on the suit property.
 15. PW1 was recalled by the court to respond to the evidence of DW1 regarding the said structure, which was on the suit property and which was said to have collapsed. PW1 admitted that the structure was no longer on the suit property. He stated that he could not remember when the structure that was being used as a church collapsed. He stated that one day, when they went to worship, they found the church building down. He stated that when they attempted to rebuild the church, the deceased's son chased them away. He stated that they had not rebuilt the church. He stated that the church collapsed while the suit was pending. On cross-examination, PW1 stated that when they put up the church building, the original title deed was in their possession.
 16. After the conclusion of the evidence, the parties were directed to make closing submissions in writing. The Defendant filed his submissions while the Plaintiff failed to do so even after the time was extended for it for that purpose.



The Defendant's submissions

17. The Defendant submitted that the main issue for determination by the court was whether the Plaintiff had acquired title to the suit property by adverse possession. The Defendant cited Sections 7, 13 and 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya, *Gabriel Mbui v Mukindia Maranya* [1993] eKLR and *Wambugu v Njuguna* [1983] KLR 172 and submitted that adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, which in Kenya, is twelve [12] years. The Defendant submitted that a title by adverse possession is created by the default or inaction of the land owner. The Defendant submitted that the essential prerequisites of adverse possession were that the adverse possessor enters and occupies the land neither by force nor stealth nor under the licence of the owner. The Defendant submitted that the possession must be adequate in continuity, in publicity, and in extent to show that it is adverse to the title owner. The Defendant submitted that the Plaintiff had failed to prove its case on a balance of probability and submitted that the suit should be dismissed with costs to the Defendant.

Analysis and determination

18. I have considered the pleadings, the evidence tendered and the submissions by the advocates for the Defendant. The Plaintiff's claim being that of title to the suit property by adverse possession, the issues that arise for determination in my view are;
1. Whether the plaintiff has proved his adverse possession claim in respect of the suit property.
 2. Who is liable for the costs of the suit?
19. In *Gabriel Mbui v Mukindia Maranya* [supra], the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period;
 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else;
 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied;
 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people;
 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it;
 6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land;



7. The possession must be continuous, uninterrupted, and unbroken for the necessary statutory period;
 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period;
 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession; and
 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
20. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:
- “The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpalcario [no force, no secrecy, no evasion] ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration.”
21. In *Githu v. Ndeete* [1984] KLR 776 it was held that:
- a. Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.
 - b. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”
22. In *Wilfred Kegonye Babu v. Henry Mose Onuko* [2019] eKLR, the Court of Appeal, quoting from *Wambugu v. Njuguna* [supra] stated that:
- “...where the Claimant is a purchaser under a contract of sale of land... The possession can only therefore become adverse once the contract is repudiated.”
23. In that case, the court stated further that:
- “Where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The Claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”



24. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* [1975] EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...

19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* [supra].”

25. I am not satisfied that the Plaintiff entered into a valid agreement of sale of land with the deceased. The purported agreement of sale fell short of the statutory requirements for an agreement of the sale of land provided in Section 3[3] of the *Law of Contract Act*, Chapter 23 Laws of Kenya. The Plaintiff claimed to have purchased from the deceased a portion of the suit property measuring 0.10Ha. at a consideration of Kshs. 100,000/-. It was admitted that the agreement was not in writing. The only documentary evidence of the agreement produced by Plaintiff was a counterfoil of a cheque for Kshs. 15,000/- allegedly issued to the deceased and a note allegedly signed by the deceased acknowledging that as at 30th March 2007, there was a balance of Kshs. 35,000/- due to him from the Plaintiff on account of payment for the suit property. These documents, in my view, could not amount to an agreement of sale. None of the documents is signed by the Plaintiff. The documents do not provide for the terms of the agreement, such as the purchase price and how it was to be paid, the measurement of the portion of the suit property allegedly sold to the Plaintiff by the deceased and the obligations of each party to the other. In the absence of a valid agreement of sale, it is difficult to determine when time began to run in favour of the Plaintiff, who claimed to have purchased the suit property, for the purposes of adverse possession.

26. Even if it were assumed that the Plaintiff and the deceased entered into a valid agreement of sale on which the Plaintiff could base its adverse possession claim, which is not the case, I would still reject the Plaintiff’s adverse possession claim over the suit property for other reasons. In its affidavit in support of the Originating Summons, the Plaintiff averred that the deceased sold to the Plaintiff a portion of the suit property measuring 0.10 Ha. This could not be the case because according to the Land Certificate for the suit property dated 7th September 1984 and the Certificate of Official Search dated 22nd March 2021 produced in evidence by the Plaintiff, the whole of the suit property measures 0.06Ha. There was no way the Plaintiff could have acquired land measuring 0.10Ha. from a parcel of land measuring a total of 0.06 Ha. In his evidence on cross-examination upon recall, PW1 told the court that the Plaintiff



bought land measuring about ¼ of an acre from the deceased and that that was the portion of the suit property which was occupied by the Plaintiff. ¼ of an acre [0.25 acres] upon conversion into hectares still comes to 0.10Ha. Apart from the oral evidence given by PW1 regarding the size of the land said to have been purchased by the Plaintiff from the deceased, which was in line with its pleading, no other evidence was placed before the court on the measurement of the land that was purchased by the Plaintiff or the portion of the suit property in actual occupation of the Plaintiff. Having found that the Plaintiff could not have acquired land measuring 0.10Ha. from the suit property which measured 0.06Ha., the Plaintiff has failed to prove that it possessed adversely an identified, defined or at least an identifiable portion of the suit property with a clear boundary or identification which is a prerequisite for a claim to land by adverse possession. The court is unable to declare that the Plaintiff has acquired a portion of the suit property measuring 0.10Ha. by adverse possession while the whole of the suit property measures 0.06 Ha. only.

27. On the issue of costs, Section 27 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya provides that the costs of and incidental to a suit are at the discretion of the court. The Plaintiff has failed to prove its claim against the Defendant and is therefore liable for the costs of this suit.

Conclusion

28. In the final analysis and for the foregoing reasons, I find no merit in the Plaintiff's suit. The Plaintiff has failed to prove its case on a balance of probabilities. The suit is dismissed with costs to the Defendant.

DELIVERED AND SIGNED AT KISUMU ON THIS 26TH DAY OF JUNE 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Cheruiyot h/b for Ms. Juliet Dima for the Plaintiff

Mr. R.Odhiambo for the Defendant

Ms. J. Omondi-Court Assistant

