



REPUBLIC OF KENYA



KENYA LAW

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Ouma & 3 others v Kisiara & another (Environmental and Land Originating Summons E009 of 2021) [2025] KEELC 4857 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4857 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2021

E ASATI, J

JUNE 26, 2025

**IN THE MATTER OF SECTION 7 AND 38 OF THE
LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)**

AND

**IN THE MATTER OF LAND PARCEL REGISTRATION NUMBER:
KISUMU/GOD ABUORO/91 & KISUMU/GOD ABUORO/491**

BETWEEN

PAUL ONYANGO OUMA 1ST PLAINTIFF

PETER JUMA ONYANGO 2ND PLAINTIFF

GABRIEL OTIENO ONYANGO 3RD PLAINTIFF

THOMAS OTIENO ONYANGO 4TH PLAINTIFF

AND

RICHARD OTIENO KISIARA 1ST DEFENDANT

DANIS ONYURO ONYANGO 2ND DEFENDANT

JUDGMENT

1. The suit herein was commenced vide the Originating Summons dated 15th March, 2021 brought pursuant to the provisions of Order 37 Rule (1) of the Civil Procedure Rules.
2. The Plaintiffs/Applicants, claiming to be entitled by adverse possession to all that part of and/or portion of parcel of land number Kisumu/God Abuoro/91 measuring approximately 3.1 Hectares and Kisumu/God Abuoro/491 measuring 1.5 Hectares sought for orders that:-



1. The Applicants have occupied, used and enjoyed peaceably and openly as of right and without interruption portions of land parcel known as Kisumu/God Abuoro/91 measuring approximately 3.1Ha and Kisumu/God Abuoro/491 measuring approximately 1.5 Ha for a period exceeding 12 years.
 2. That Paul Onyango Ouma has occupied, used and enjoyed peaceably and openly without interruption portion of land parcel Kisumu/God Abuoro/91 measuring approximately 0.50 Ha and a portion measuring approximately 0.2 Ha in Kisumu/God Abuoro/491, Peter Juma Onyango has occupied, used and enjoyed peaceably and openly without interruption portion of land parcel Kisumu/God Abuoro/91 measuring approximately 0.60 Ha and a portion measuring approximately 0.2 Ha in Kisumu/God Abuoro/491, Gabriel Otieno Onyango has occupied, used and enjoyed peaceably and openly without interruption portion of land parcel Kisumu/God Abuoro/91 measuring approximately 0.65 Ha and a portion measuring approximately 0.2 Ha in Kisumu/God Abuoro/491 and Thomas Otieno Onyango has occupied, used and enjoyed peaceably and open without interruption portion of land parcel Kisumu/God Abuoro/91 measuring approximately 0.50 Ha and a portion measuring approximately 0.2 Ha in Kisumu/God Abuoro/491.
 3. The Applicants have acquired and are entitled by adverse possession to the portions of the said land parcels.
 4. The Applicants be registered as the proprietors of the said protions of the said parcel of Land known as Kisumu/God Abuoro/91 measuring 3.1 Ha and Kisumu/God Abuoro/491 measuring approximately 1.5 Ha.
 5. That the Respondents do sign and or execute transfer forms and the relevant transfer documents for the portions of the suit land parcel number Kisumu/God Abuoro/91 measuring 0.50 Ha into the name of Paul Onyango Ouma, 0.60 Ha into the name of Peter Juma Onyango, 065.Ha into the name of Gabriel Otieno Onyango, 0.50 Ha into the name of Thomas Otieno Onyango and Kisumu/God Abuoro/491 measuring approximately 0.2 Ha into the of each and every Applicant, failure of which the Deputy Registrar to do so.
 6. A permanent injunction do issue restraining the Respondent, their servants, agents, heirs and assignees and/or any other persons acting on their behalf from interfering with the Applicants enjoyment and use of the said land parcel number Kisumu/God Abuoro/91 measuring total of 2.25 Ha and Kisumu/God Abuoro/491 measuring approximately 0.8 Ha.
 7. Costs of this Originating Summons be borne by the Respondents.
 8. Such further and other orders that this honourable court may deem fit and expedient to grant in the circumstances of this case.
3. The grounds upon which the Originating Summons was brought are that the Respondents' title to the said parcels of land has been extinguished by virtue of the *Limitation of Actions Act* and that the Applicants have been in quiet, peaceful and open occupation and use of the portion of the said parcels of land without the Respondents, consent but adverse to them for a period of 12 years.
 4. The Originating Summons was supported by the contents of the Supporting Affidavit sworn by Thomas Otieno Onyango on 15th March, 2021 and the annextures thereto. They also filed a Further Affidavit filed on 10th March, 2022.



5. In response to the Applicants' claim, the 1st Respondent filed his Replying Affidavit sworn on 29th April, 2021. The 1st Respondent's case is that he bought a portion of land parcel No. Kisumu/Border/3261 measuring approximately 0.8Ha from one Prisca Mirongo Onyango, a step mother of the Applicants. That he sued the said Prisca Mirongo Onyango in Kisumu CMC ELC NO.368 of 2020 and got a decree. That a consent was entered into in the suit, that the sale agreement be deemed to be in respect of Kisumu/God Abuoro/91 which was registered in the name of Prisca Mirongo and not in the name of her deceased husband.
6. That the Plaintiffs are not entitled to the said land by adverse possession and that they had no known proprietary rights over the land.
7. That the Plaintiffs were entitled to a share among others in parcel No. Kisumu/Border/3261 which is the property of their late father.
8. The 1st Respondent claimed that he bought the land for value without notice and that the Applicants should be evicted from the land.
9. Attached to the Replying Affidavit was a land sale agreement dated 10th September, 2016 and a decree in Kisumu CMC NO.368 OF 2020 Richard Otieno Kisiara -vs- Prisca Mirongo Onyango dated 5th November, 2020.
10. The 2nd Respondents' response to the Plaintiff's claim was contained in his Replying Affidavit sworn on 7th September, 2021. His case is that the Applicants are his brother's sons and brothers. That land parcel No. Kisumu/God Abuoro/491 was by 24th February, 1995 registered in the name of Prisca Mirongo Onyango who transferred it to him on 16th September, 2019.
11. That the Plaintiffs being members of the family cannot claim title by adverse possession. That the Plaintiffs have their own share in Kisumu/Border /3261 which is registered in the name of their father.
12. That he had only allowed the Plaintiffs to use the said parcels of land on humanitarian grounds. That the Plaintiffs should vacate land parcel No. Kisumu/God Abuoro/491 and move to Kisumu/Border/3261.
13. Prisca Mirongo Onyango was joined in the suit as in Interested Party. Her response to the claim was contained her Replying Affidavit sworn on 12th August, 2021. That the suit land were transferred by her late husband to her in his lifetime. That land parcel No. Kisumu/Border/3261 remained in the name of her late husband and on 10th September, 2016 she sold a portion thereof measuring 0.8 Ha to the 1st Respondent. That the Plaintiffs protested the sale. That the 1st Defendant sued her in Kisumu CMCC NO.368 OF 2020, in which she agreed to give land parcel No. Kisumu/God Abuoro/91 to the 1st Defendant so as to settle the case.
14. That he transferred parcel No. Kisumu/God Abuoro/3261 to her son the 2nd Defendant. That she had allowed the Plaintiffs to use the two parcels of land on humanitarian grounds. That the Plaintiffs should vacate the suit land and move to parcel No. 3261 Kisumu/Border. She also filed a Further Affidavit sworn on 25th July, 2022.

The evidence

15. A total of five (5) witnesses testified on behalf of the Plaintiffs. PW1 was Paul Onyango Ouma, the 1st Plaintiff herein. He adopted the contents of his witness statement dated 20th January, 2023 as his evidence in chief. He produced documents as exhibits namely; Surveyor's report for Kisumu/God Abuoro/491 and 91, bundles of photographs, green cards for the suit lands, search for Kisumu/God



- Abuoro/491 and 91 both dated 22nd February, 2021, Letter dated 8th July, 2020, searches for Kisumu/God Abuoro/91 and 491 dated 26th October, 2022 and Letter dated 10th February, 2021 and a copy of decree and judgement.
16. PW2 was Peter Juma Onyango, the 2nd Plaintiff. He adopted the contents of his witness statement dated 20th January, 2023.
 17. PW3 was a Surveyor, one Isaya Omolo Apwayo. He produced the survey report for the two parcels of land that inter alia give details of occupation of the suit lands.
 18. PW4 was the 3rd Plaintiff who also relied on the contents of his witness statement. PW5 was the 4th Plaintiff.
 19. The summary of the Plaintiffs' evidence is that they entered and occupied the land as children of the original owner. That they occupy identifiable portions of the suit land whereon some of them have their homes. That they do not know that the land was transferred to the Interested Party and that the Interested party sold land to the 1st Defendant.
 20. On behalf of the Defendants, both Defendants testified. DW1 was the 1st Defendant. He relied on the contents of his Replying Affidavit sworn on 29th April, 2021 as his evidence in chief. He produced land sale agreement dated 10th September, 2021, Decree and Green card for Kisumu/God Abuoro/91 as exhibits.
 21. DW2, the 2nd Defendant relied on his Replying Affidavit as his evidence and added that land parcel numbers Kisumu/Border/3261, 2827 and 2902 belonged to his late father.

Submissions

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

Submissions for the plaintiffs

23. It was submitted on behalf of the Plaintiffs vide the written submissions dated 17th March, 2025, filed by the firm of P.D. Onyango & Company Advocates that the Plaintiffs have been in active use and occupation of their respective portion of the suit land for more than 12 years as required by law to the exclusion of the Respondents and the Interested Party. That though the 2nd Respondent claimed that the Applicants were occupying the land on the basis of lease agreement with Prisca Mirongo and were staying on different land, he did not produce evidence to show this.
24. That the decree obtained by the 1st Respondent in a bid to evict the Applicants was later set aside by court and the appeal arising therefrom dismissed by court. That in both decisions, the court recognized that the Applicants as people who were living and working on the land ought to have been considered.
25. That the land parcel No.491 was registered in the name of the 2nd Respondent when the 1st Applicant was already in exclusive possession.
26. That adverse possession runs against the land and is not affected by the change in the title or ownership. Counsel relief inter alia, on the case of Maweu -vs- Lin Ranching & Farming Co-operative Society [1985]eKLR to support this submissions.
27. That the only defence of the 1st Respondent is that he bought the land from Prisca Mirongo and would want the Applicant evicted from the land parcel No. Kisumu/God Abuoro/91.



28. Counsel further submitted that with regard to the claim that the Applicants are related to the 2nd Respondent and therefore they cannot claim adverse possession, that this is not the position in law. Counsel relied on the provisions of section 38 of the *Limitation of Actions Act* and submitted that the law refers to any person who claims to be entitled by adverse possession. That the law does not exclude any claim by family member so long as the claimant meets the threshold for adverse possession.
29. That none of the witnesses disputed the fact that the Applicants have been in continuous use and/or occupation of their respective portions of the suit lands which they are claiming for more than 12 years.
30. Counsel urged the court to allow the claim with costs.

Submissions for the 1st Defendant

31. Written submissions dated 29th April, 2025 were filed on behalf of the 1st Defendant by the firm of Ayoo – See & Associates Advocates. Counsel framed the issues for determination as;
 - a. whether the Plaintiffs have satisfied the requirements for a claim on adverse possession.
 - b. whether the Plaintiffs can claim adverse possession to the title held by the 1st Respondent.
 - c. whether a claim on adverse possession can lie against the Interested Party who is the Plaintiffs' mother.
32. Counsel submitted that in examining whether the Plaintiffs have satisfied the requirements for adverse possession, the court should determine: -
 - a. how did the Applicants take possession of the suit property?
 - b. when did the Applicants take possession and occupation of the property?
 - c. what was the nature of the applicants' possession and occupation?
 - d. how long have the Applicants been in occupation?
33. Counsel submitted that it was the Plaintiffs' case that they gained entry onto the suit land when their father one Onyango Okoth acquired it from the Settlement Fund Trustee (SFT) in the year 1965. That the 2nd Defendant testified that when the land was transferred to the Interested Party, the Plaintiff continued residing thereon with the Interested Party's consent.
34. Counsel submitted that one cannot acquire land by pleading the period of limitation if he has been on the land under a license or permission from the owner.
35. Counsel submitted further that there are inconsistencies and contradictions in respect of the date of entry of the Plaintiffs onto the suit land. That the 1st Plaintiff averred in paragraph 3 of the Supporting Affidavit sworn on 15th March, 2021 that sometime in the year 1965 their father acquired the suit land from the Settlement Fund Trustees upon which the Plaintiffs have been in occupation for over 40 years hence the claim for adverse possession. That however, in their respective witness statements, the Plaintiff gave diverse years when they entered the suit land and took possession.
36. That the 1st Plaintiff asserted that he had been in occupation since 1989, the 2nd and 4th Plaintiffs since 1995, the third Plaintiff since 1966. That PW5 the Surveyor observed in his report that all the portions were shown and given to the sons of Onyango Okoth in the year 1994 when each started farming to date without any interference.



37. Counsel submitted further that from the documentary evidence on record, it is evident that the suit parcel of land known as Kisumu/God Abuoro/91 came into existence in the year 1976 and registered in the name of Settlement Fund Trustee. That later in the year 1986 the same was registered in the name of the late Onyango Okoth who was the late Prisca Mirongo, Interested Party's husband. That in the year 1995, the Interested Party became the registered owner and that it was the Interested Party who sold the land to the 1st Defendant. That when the 1st Defendant visited the land in the year 2016, there were no structures and hence challenging the Plaintiffs' claims that they have established their homes on the land.
38. Counsel submitted that the duration of the Plaintiffs' occupation of the land is immaterial so long as such occupation has not been shown to be adverse to the interests of the first two registered proprietors namely; Onyango Okoth and Prisca Mirongo who were the parents of the Plaintiffs.
39. Relying on the case of Nzyoka -vs- Munyalo (ELC NO.102 OF 2017) [2023] KE ELC 607 (KLR) (2 February 2023) (Judgement) where it was held that occupation that begins with the consent of the registered owner cannot found a claim for adverse possession unless and until such consent is expressly or implicitly withdrawn and the possession becomes hostile, Counsel submitted that the ingredients of non-permissive, non-consensual, actual, open, notorious and exclusive occupation have not been proved by the Plaintiffs as against the title held by the 1st Defendant.
40. Regarding the title held by the 1st Defendant, it was submitted that if time was to be considered to run it would only commence from the date the 1st Defendant was registered as proprietor of the land which was on 1st February, 2021.
41. Counsel urged the court to protect the sanctity of the 1st Defendant's title which was lawfully acquired by him as a bona fide purchaser for value.
42. On whether a claim of adverse possession can lie against a Third Party who is the Plaintiffs' mother, Counsel submitted that the 4th Plaintiff is the biological son of the Interested Party while the 1st, 2nd and 3rd Plaintiffs are the step-sons. That if at all the Plaintiffs cultivated the suit land, the same was done with the consent or permission of their late mother, the Interested Party herein.
43. On whether a child can lay a claim of adverse possession to a parent's land, Counsel relied on the case of David Kipkoeh Kogo -vs- Esther Chesaina Bedford P.M. (2016)eKLR where it was held, inter alia, that "There is no time a child can cease to be a parent's child and acquire a different status to allow him to mount a claim for adverse possess."
44. Counsel further submitted that the Plaintiffs had failed to discharge the burden of proof of their claim and urged the court to dismiss the suit with costs.

Submissions for the 2nd Defendant and the Interested Party

45. Written submissions dated 14th April, 2025 were filed on behalf of the 2nd Defendant by M/s Athunga & Company Advocates. Counsel submitted that the issue to be determined is whether the Plaintiffs are entitled to the suit parcel of land by adverse possession and whether the relief of adverse possession is available to the Plaintiffs.
46. Relying on the case of Samuel Khaemba -vs- Mary Mbaisi [2015]eKLR (KECA 853) KLR and KAKAMEGA ELCA NO.E003 OF 2022 [2023] KCELC (KLR) Counsel submitted that a claim of adverse possession is not available to a person who claims as a relative of the title holder.



47. Counsel submitted that the Plaintiff had not proved the ingredients of adverse possession. That they had not proved that they entered the two parcel of land openly and without let. That the available evidence is that the Plaintiffs were permitted by their father Onyango Okoth to enter the land in the year 1994 – as captured in the Surveyor’s report.

48. Counsel urged the court to dismiss the suit with costs.

Issues for determination

49. Having read the pleadings filed by the parties, the evidence adduced and the submissions made, I find that the issues that emerge for determination are: -

- a. whether or not the Plaintiffs have acquired title to the suit lands by adverse possession.
- b. whether or not the Defendants’ titles to the suit lands have become extinguished.
- c. whether or not the Plaintiffs are entitled to the relief sought in the Originating Summons
- d. Costs of the suit.

Analysis and determination

50. The following core facts of the case are not disputed;

- i. that the all parties in the suit save for the 1st Defendant are related,
- ii. that the Plaintiffs and the 2nd Defendant are all sons of one Wilson Onyango Okoth also known as Onyango Okoth, deceased,
- iii. that the Interested Party one Prisca Mironko Onyango, now also deceased, was widow of the deceased and a mother/step-mother of the Plaintiffs and the 2nd Defendant,
- iv. that the suit lands were originally the property of Wilson Onyango Okoth who later transferred the same to the Interested Party,
- v. that the suit lands namely; No. Kisumu/God Abuoro/91 and No. Kisumu/God Abuoro/491 are currently registered in the name of the 1st and 2nd Defendants respectively.

51. On the first issue of whether or not the Plaintiffs have acquired title to the suit lands by adverse possession, the totality of the Plaintiffs’ evidence, including the evidence of the surveyor was that they were allowed onto the suit land by their father, the deceased. This means that their entry point onto the land was on the basis of permission or licence by their father.

52. The Interested Party who was their mother/step mother to whom the suit lands were later transferred deposed that she allowed the plaintiffs to remain on the land and use it on humanitarian grounds. There is no evidence that the permission given by their father or the Interested party for the plaintiffs to be on the land was ever revoked.

53. Their occupation was therefore permissive and consensual.

54. The Plaintiffs contended that they had no permissions of the Interested Party to be on the suit land. If this contention be true, then it means that it is against her title to the suit lands that time was running in the plaintiffs’ favour under the doctrine of adverse possession. It means that it is the Interested Party’s right to recover the suit lands that was being defeated by the plaintiffs’ continued occupation of the lands under the provisions of sections 7 and 13 of the [Limitation of Actions Act](#). The Interested Party



was however not sued by the Plaintiffs for any relief including a declaration that they had acquired title to the suit lands by adverse possession. The suit was filed in her lifetime and the suit lands had been in her name for much of the period the plaintiffs claim to have been in adverse possession.

55. The Defendants who were sued had only held title since the year 2019 hence by the time the suit was filed in the year 2021, the statutory period of 12 years had not elapsed.
56. The ingredients of adverse possession were not proved.
57. The second issue for determination is whether or not the Defendants' titles to the suit lands have become extinguished.
58. 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. The 1st and 2nd Defendants became registered owners of the suit lands in the years 2021 and 2019 respectively. The right for them to bring action to recover the land accrued to them since the time of registration of the lands in their names and since then the statutory 12 years had not expired. The person registered as owner before them was not sued. I find that in the circumstances, the titles of the defendants to the suit lands had not become extinguished.
59. The next issue for determination is whether or not the plaintiffs are entitled to the relief sought.
60. Having determined that the Plaintiffs have not prove adverse possession or that the Defendants' titles have become extinguished I find the plaintiffs are not entitled to the relief sought.

Costs of the suit

61. As guided by the provisions of section 27 of the *Civil Procedure Act*, costs generally follow the event unless for good reason the court orders otherwise.

Conclusion

62. On the basis of the foregoing determinations, the court finds that the plaintiffs have not proved their claim on a balance of probabilities. The suit is 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.

D. Onyango for the Plaintiffs.

Nyagol for the 1st Defendant.

No attendance for the 2nd Defendant.

