



**Ochuka v Oruoch & another (Environment and Land Case Civil Suit
18 of 2017) [2025] KEELC 6167 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 18 OF 2017
SO OKONG'O, J
SEPTEMBER 22, 2025**

BETWEEN

ELISHA OCHUKA OCHUKA PLAINTIFF

AND

LAWRENCE OMARI ORUOCH 1ST DEFENDANT

JOHN ANTHONY ONYANGO 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants by way of Originating Summons dated 6th June 2017. The Plaintiff claimed to be the occupier and adverse possessor of all those parcels of land known as Title Nos. Kisumu/Wangaya I/6987 and 6988 (hereinafter referred to as “the suit properties”). The Plaintiff sought the determination of the following questions;
 1. Whether the Plaintiff purchased the suit properties from the 1st Defendant on 29th September 1995, 5th March 1997, and 26th March 2003, but the said Defendant failed to execute the transfer documents in favour of the Plaintiff.
 2. Whether the Plaintiff has an overriding interest under Section 28(h) of the [Land Registration Act 2012](#).
 3. Whether the Plaintiff is an adverse possessor of the suit properties.
 4. If the answers to questions 2 and 3 above are in the affirmative, whether the Kisumu Land Registrar should be directed to register the rights and interests of the Plaintiff upon the suit properties.
 5. Whether the honourable court ought to vest the title of the suit properties in the Plaintiff.
 6. Whether the Plaintiff is entitled to the costs of the application.



2. The Originating Summons was based on the grounds set out on the face thereof and on the affidavit and supplementary affidavit of the Plaintiff, sworn on 8th June 2017 and 11th December 2017, respectively. The Plaintiff averred that he purchased the suit properties from the 1st Defendant on 29th September 1995, 5th March 1997, and 26th March 2003. The Plaintiff averred that in the agreements of sale between the Plaintiff and the 1st Defendant, the suit properties were described as Plot Nos. 262, 2624 and 2641. The Plaintiff averred that he took possession and occupied the suit properties upon purchasing the same. The Plaintiff averred that he later came to realise that the plot numbers given to him by the 1st Defendant were fictitious and that the correct title number for the parcels of land that he purchased was Kisumu/Wangaya I/2631, which was later unlawfully subdivided by the 1st Defendant into two portions on 5th September 2016 to give rise to Title Nos. Kisumu/Wangaya I/6987 and 6988(the suit properties).
3. The Plaintiff averred that after subdividing Title No. Kisumu/Wangaya I/2631, the 1st Defendant, unlawfully transferred Title No. Kisumu/Wangaya/6988 to the 2nd Defendant. The Plaintiff averred that he had been in continuous occupation of the suit properties without force, secrecy, permission or interruption for over 20 years. The Plaintiff averred that on 2nd May 2017, he received a letter of demand from the Defendants' advocates on record claiming that he had trespassed on the suit properties. The Plaintiff averred that he came to learn that the parcels of land that he had purchased from the 1st Defendant and occupied for the last 20 years were the same parcels of land which the Defendants were referring to as Title Nos. Kisumu/Wangaya I/6987 and 6988(the suit properties).
4. The Plaintiff averred that at the time he entered into the said agreements of sale with the 1st Defendant, the 1st Defendant dishonestly failed to disclose the correct title number of the land he was selling and misled him to believe that the parcels of land on sale were Plot Nos. 2624,262 and 2641.
5. The Plaintiff averred that he had acquired the suit properties through adverse possession. The Plaintiff annexed to his affidavit in support of the Originating Summons copies of the agreements of sale that he entered into with the 1st Defendant and copies of the registers for the suit properties.
6. In his supplementary affidavit, the Plaintiff averred that the 1st Defendant and he were charged in Nyando SRM CRC. No. 248 of 2009, Republic v. Lawrence Omoro Oruoch and Elisha Ochuka Ochuka, with the offence of creating a disturbance. The Plaintiff averred that the complainant in the criminal case was Gilbert Menya, and the property the subject of the complaint was Title No. Kisumu/Wangaya I/2631 before its subdivision. The Plaintiff averred that in his defence in the criminal case, the 1st Defendant admitted under oath that he had sold the land that was in dispute to the Plaintiff.
7. The Plaintiff averred that he erred in not confirming the authenticity of the title numbers of the parcels of land he purchased from the 1st Defendant. The Plaintiff averred that he could, however, identify the said parcels of land as he was in occupation thereof.
8. The Defendants filed a replying affidavit and supplementary affidavit, both sworn by the 1st Defendant on 26th July 2017 and 23rd January 2020, respectively, in opposition to the Originating Summons. The Defendants averred that the Plaintiff's Originating Summons was based on false assertions and the affidavit in support thereof was littered with fabricated evidence, making the entire application untenable and therefore warranting dismissal.
9. The 1st Defendant denied entering into any agreement for the sale of land with the Plaintiff. The 1st Defendant averred that the agreements annexed to the Plaintiff's affidavit in support of the Originating Summons were forgeries. The 1st Defendant averred that his mother died in 1969 while he was very young. The 1st Defendant averred that following the death of his mother, he moved from Wangaya



where the suit properties are situated to Kadem, Suna West, Migori District (now County) where he was raised by his maternal grandfather. The 1st Defendant averred that he lived with his grandfather at Kadem until 2000, when he returned to Wangaya. The 1st Defendant averred that when he returned to Wangaya, his father had died 2 years earlier. The 1st Defendant averred that there was no way he could have entered into agreements of sale of the suit properties with the Plaintiff in 1995 and 1997, as he was away living with his maternal grandparents in Kadem, Migori County. The 1st Defendant averred that his national identity card number was 8086636, and not 9594937/71 as indicated in the agreement of sale dated 29th September 95 or 2059597 as indicated in the agreement of sale dated 5th March 1997. The 1st Defendant averred that neither his deceased father nor he was registered as the owner of the parcels of land the subject of the purported agreements of sale between the Plaintiff and the 1st Defendant. The 1st Defendant averred that, in any event, there was no way he could have sold land to the Plaintiff in 1995 and 1997 without the involvement of his father, who was alive at the time.

10. The 1st Defendant averred that his father died on 30th March 1997. He averred that it was inconceivable that he would have entered into agreements for the sale of land with the Plaintiff without involving his father. The 1st Defendant averred further that the sale agreement dated 26th March 2003 was purportedly signed only by the witnesses to the agreement and not the parties thereto. The 1st Defendant averred that the purported witnesses included his wife, Millicent Anyango Omari whom he had not married at the time. The 1st Defendant averred that the said Millicent Omari, who was alleged to have witnessed the agreement dated 26th March 2003 between the Plaintiff and the 1st Defendant, was married by the 1st Defendant in 2015 and was 13 years old in 2003. The 1st Defendant averred that he never received any money from the Plaintiff as payment for the purchase of the suit properties, as alleged or at all. The 1st Defendant averred that land Title No. Kisumu/Wangaya I/2631 was initially owned by his uncle Nyandima Kitengo, who died on 8th March 1977. The 1st Defendant averred that he initiated succession proceedings in respect of his uncle's estate and had the land in question registered in his name.
11. The 1st Defendant averred that he thereafter subdivided Title No. Kisumu/Wangaya I/2631 into Title Nos. Kisumu/Wangaya I/6987 and 6988, and sold Title No. Kisumu/Wangaya I/6988 to the 2nd Defendant. The 1st Defendant averred that the suit properties were different from the parcels of land which were allegedly sold to the Plaintiff. The 1st Defendant averred that the Plaintiff encroached on Title No. Kisumu/Wangaya I/2631 in 2015 and planted sugarcane on a portion thereof measuring approximately 1 acre. The 1st Defendant averred that this was what prompted the demand letter that was addressed to the Plaintiff by the 1st Defendant's advocates on record. The 1st Defendant denied that the Plaintiff had developed and occupied the suit properties for a long period.
12. At the trial, the Plaintiff, Elisha Ochuka Ochuka (PW1), stated that he bought three parcels of land, namely, Plot Nos. 262, 2624 and 2641 from the 1st Defendant. He adopted his witness statement filed on 23rd January 2020, as part of his evidence in chief and produced the documents attached to his affidavit in support of the Originating Summons, as P.EXHS. 1, 2, 3, 4 and 5 respectively. He also produced the proceedings in Criminal Case No. 248 of 2009, attached to his supplementary affidavit filed on 8th January 2018 as P.EXH. 6. He stated that the 1st Defendant changed his mind after selling land to him. He urged the court to grant the orders sought in the Originating Summons.
13. On cross-examination, the Plaintiff stated that he was seeking to be registered as the owner of Title Nos. Kisumu/Wangaya/6987 and 6988 (the suit properties) through adverse possession. He stated that he had occupied the suit properties from the time he purchased them. He stated that he entered the suit properties pursuant to the agreements of sale that he entered into with the 1st Defendant. He stated that the 1st Defendant permitted him to enter into the suit properties, and he had occupied



the properties since then. He admitted that Plot No. 2641 was registered in the name of Peter Oloo Migwala as the first registered owner. He stated that he did not purchase any land from Peter Oloo Migwala. Concerning Plot No. 262 and Plot No. 2624, he told the court that Plot No. 262 belonged to the 1st Defendant, while Plot No. 2624 belonged to the 1st Defendant's father. Concerning the identity card numbers in the sale agreements, which did not match the number in the identity card which the 1st Defendant produced in evidence, the Plaintiff stated that it appeared that the 1st Defendant had two identity cards when he was selling land to him. Concerning the issue of Millicent Omari, who was said to have witnessed the agreement dated 26th March 2003 as the 1st Defendant's wife, the Plaintiff stated that Millicent Omari was the 1st Defendant's first wife, with whom they separated. The Plaintiff denied that Millicent Omari was the Plaintiff's second wife, with whom he was living. He told the court that it was the 1st Defendant who introduced Millicent Omari as his wife

14. The Plaintiff stated that the three parcels of land which he purchased were portions of one parcel of land and were within the suit properties. He stated that he had evidence that he paid the purchase price for the suit properties. He told the court that the 1st Defendant's father was known as Aloyce Oruoch Kitengo, and Michael Ndalo Oruoch was the 1st Defendant's brother.
15. On examination by the court, the Plaintiff stated that the three parcels of land he purchased were together. He stated that he bought land measuring a total of 6½ acres from the 1st Defendant. He stated that he was cultivating the land. He stated that he had planted avocados, bananas and sugarcane. He stated that his homestead was not on the land that he purchased from the 1st Defendant.
16. The 1st Defendant, Lawrence Omari Oruoch (DW1), adopted his replying affidavit and supplementary affidavit, sworn on 26th July 2017 and 23rd January 2020, respectively, in opposition to the Originating Summons as part of his evidence in chief. He produced the documents in his list of documents dated 23rd January 2020 as D.EXH. 1. The 1st Defendant stated that he did not sell land to the Plaintiff. He denied entering into any agreement for the sale of land with the Plaintiff. He denied holding the identity cards whose numbers were indicated in the said agreements. He stated that the agreements of sale relied on by the Plaintiff in support of his case were fraudulent. The 1st Defendant stated that the land parcel Title No. Kisumu/Wangaya I/2631 belonged to his deceased uncle Nyandima Kitengo, and he acquired the same through succession proceedings before selling a portion thereof measuring 10 acres to the 2nd Defendant. The 1st Defendant urged the court to dismiss the Plaintiff's suit with costs.
17. On cross-examination by Ms. Omondi, the 1st Defendant stated that the Plaintiff was not known to him and that he had only met him in court. He stated that before that, he used to see the Plaintiff in Awasi. He stated that he knew the Plaintiff before the Plaintiff filed this suit. He stated that he started living in Suna Migori in 1984 and came back to Awasi in 1997. He stated that the only person who would have been a witness to that fact was his deceased elder brother. He told the court that he married his first wife while in Suna, Migori. He stated that he was born in 1967. He stated that he could not read, but could see letters. The 1st Defendant stated that his purported signatures in the agreements of sale relied on by the Plaintiff were different from his signatures in his replying and supplementary affidavits. He stated that Michael Ndalo Oruoch was his brother, while his father was known as Alloys Oruoch Kitengo. He stated that Nyandima Kitengo was a brother to his father Oruoch Kitengo, and as such was his paternal uncle. The 1st Defendant stated that the 2nd Defendant was known to him. He stated that he sold a portion of Plot No. 2631 to the 2nd Defendant on 20th April 2013.
18. The 1st Defendant stated that apart from Plot No. 2631, his family also owned Plot Nos. 2624 and 2625. He denied that Plaintiff was cultivating Plot No. 2631. He told the court that he was unaware that the Plaintiff was using Plot No. 2631 and that his advocates on record had written to the Plaintiff to vacate Plot No. 2631. He stated that he did not know the parcels of land claimed by the Plaintiff. He



denied selling any land to the Plaintiff. He stated that he had been cultivating maize on Plot No. 2631 for between 9 and 10 years. He denied that the Plaintiff planted sugar cane on Plot No. 2631. He stated that the Plaintiff had not planted anything on the disputed land. He stated that his postal address was P.O. Box 12 Awasi Ladhri, and not P.O. Box 24 Lubao. He admitted that there was a criminal case at Nyando Law Courts involving the Plaintiff.

19. Upon re-examination, the 1st Defendant stated that he returned to Awasi in 1997 and did not find the Plaintiff using Plot No. 2631. He stated that the Plaintiff had not used Plot No. 2631 since his return. He stated that the portion of Plot No. 2631 which he sold to the 2nd Defendant was being used by the 2nd Defendant, and the portion that remained was being used by him.
20. The 2nd Defendant, John Anthony Onyango Orindi (DW2), adopted his witness statement dated 23rd January 2020, filed on 24th January 2020, as his evidence in chief. On cross-examination, he stated that he purchased Plot No. 2631 from the 1st Defendant. He stated that he conducted due diligence before purchasing the property. He stated that he found the 1st Defendant in occupation of the property. He stated that he presumed that the 1st Defendant was the one using the land. He stated that there were various crops on the land, including bananas and sugarcane. He stated that the 1st Defendant confirmed that the crops were his. He told the court that when he conducted a search, he found the property registered in the name of Nyandima Kitengo. He stated that he was given possession between 2015 and 2018 after the 1st Defendant completed the succession process. He stated that he was not sure of the exact date, but he had been given a title. He stated that when he took possession, there were bananas on a portion of the property. He stated that the Plaintiff claimed to own the bananas. He stated that most of the land was vacant save for the few banana plants. He stated that the property was transferred to him by the 1st Defendant. He stated that the Plaintiff was known to him as they came from the same area. He stated that he was not aware that the Plaintiff was using the land. He stated that the 1st Defendant sold to him land parcel, Title No. Kisumu/Wangaya 1/6988, and that he did not know who was using the land parcel, Title No. Kisumu/Wangaya 1/No. 6987.
21. On re-examination, the 2nd Defendant stated that he was occupying the land sold to him by the 1st Defendant when the Plaintiff came to court. On examination by the court, the 2nd Defendant stated that he bought a portion of Plot No. 2631 measuring about 10 acres. He stated that when he purchased the land, it was in the name of Nyandima Kitengo. He stated that the land was large. He stated that a portion of it had banana plants, the other portion had maize plants, while the other part was fallow and was used for grazing. He stated that there was no sugarcane plantation on the land.

The Plaintiff's submissions

22. The Plaintiff filed closing submissions dated 15th January 2025. The Plaintiff submitted that he produced in evidence a sketch map of the land that he was occupying. The Plaintiff submitted that in his evidence on cross-examination, the 1st Defendant confirmed that the land which the Plaintiff was tilling was the same land that belonged to his father and a portion of which he sold to the 2nd Defendant. The Plaintiff submitted that the 2nd Defendant also confirmed on cross-examination that the parcel of land that he purchased, which was a portion of land parcel Kisumu/Wangaya 1/2631 was not vacant, and that the same was occupied by a person unknown to him who had planted bananas thereon. The Plaintiff submitted that he had demonstrated that the parcels of land which he purchased from the 1st Defendant as Plot Nos. 262, 2624 and 2641 through various agreements of sale were the same land parcel known as Kisumu/Wangaya 1/2631, which, upon subdivision, gave rise to the suit properties. The Plaintiff submitted that the 1st Defendant did not bring any witnesses or evidence to corroborate his testimony that between 1995 and 1997, when the first two agreements of sale were made, he was



living in Migori. The Plaintiff submitted that the signatures of the 1st Defendant in both agreements were not disputed, and in any event, the 1st Defendant's signatures in the sale agreements and those in his replying affidavit were similar. The Plaintiff submitted that the 1st Defendant did not claim that his signatures on the sale agreements were forged.

23. On whether he had established his adverse possession claim, the Plaintiff cited *Mtana Lewa v. Kahindi Ngala Mwangandi* [2015] eKLR, and *Nairobi Appeal No. 73 of 1982 Public Trustee v. Wanduru Ndegwa* [1984] eKLR and submitted that he took possession of the suit properties following the sale agreements that he entered into with the 1st Defendant. The Plaintiff submitted that courts have held that claims of adverse possession over land that is sold can be sustained after payment of the last instalment.
24. The Plaintiff submitted that under the first agreement made in 1995, the payment of the full purchase price for the land measuring 2 acres was made on 23rd September 1995. The Plaintiff submitted that he took possession of the land in the same year of the agreement. The Plaintiff submitted that the land measuring 3 acres, which he purchased from the 1st Defendant under the 1997 agreement, was paid for in full on 5th March 1997. The Plaintiff submitted that the last parcel of land measuring 1 acre purchased from the 1st Defendant on 26th March 2003 was paid for in full on the execution of the agreement on 26th March 2003. The Plaintiff submitted that for adverse possession, time started running from 1995, 1997 and 2003, respectively.
25. The Plaintiff submitted that he had been in open, continuous, and exclusive occupation of the suit properties, which he had all along been cultivating, a fact which was supported by photographs of the banana plantation that he produced in evidence. The Plaintiff submitted that although the 1st Defendant claimed that he was the one who was cultivating sugarcane on the suit properties, no evidence was produced by the 1st Defendant in support of the claim. In support of this submission, the Plaintiff cited *Kisumu Civil Appeal No. 27 of 2013, Samuel Kihamba v. Mary Mbaisi* [2015] eKLR.
26. The Plaintiff submitted that he had proved that he had been in occupation of the three parcels of land for 22, 20 and 14 years, respectively, without secrecy, permission or interruption with the intention of dispossessing the 1st Defendant of the same. The Plaintiff submitted that the 1st Defendant never took any step to assert his rights over the suit properties. The Plaintiff submitted that the only interruption to the Plaintiff's occupation came in 2017 when the Plaintiff was served with a demand letter asking him to vacate the suit properties which was followed by forceful eviction by the 2nd Defendant that made him file this suit.

The Defendants' submissions

27. The Defendants filed submissions dated 28th January 2025. The Defendants cited Section 38 of the [*Limitation of Actions Act*](#) and submitted that the courts have, through several decisions over the years clarified that to succeed in a claim for adverse possession, the applicant must demonstrate to the court that; his entry into the property and occupation thereof was without the consent or permission of the registered proprietor, the possession and use has been open and known by the proprietor, the said possession has been peaceful and continuous for not less than 12 years.
28. The Defendants submitted that the Plaintiff claimed that he entered into the suit properties based on three (3) agreements of sale with the 1st Defendant, which the 1st Defendant dismissed as forgeries. The Defendants submitted that the 1st Defendant could not sell land that did not belong to him, and that there was no way in which the agreements of sale could indicate that the land sold was registered in the name of the Oruoch Kitengo, when in fact it was not so registered. The Defendants submitted further



that the 1st Defendant's father, Alloyce Oruoch Kitengo was alive in 1995, and as such, there was no way the 1st Defendant could have sold land that was registered in his name. The Defendants submitted that when the 1995 agreement was made, the 1st Defendant was away from home, having been sent away to live with his maternal grandmother.

29. Concerning the agreement of sale dated 5th March 1997, the Defendants submitted that neither the 1st Defendant nor any member of his family had ever owned Plot No. 262, which was the subject of the agreement. The Defendants submitted that the Plaintiff produced no evidence to demonstrate that the property belonged to the 1st Defendant or his family. Concerning the third agreement dated 26th March 2003 relating to Plot No. 2624, the Defendants submitted that there was no evidence that the agreement was signed by the 1st Defendant. The Defendants reiterated that the said agreements were forgeries. The Defendants submitted that if the agreements were genuine, the Plaintiff could have called as his witnesses the several witnesses who were alleged to have witnessed the agreements. The Defendants submitted that the Plaintiff failed to discharge the burden of proof placed on him by the law.
30. The Defendants cited *Mbui v. Maranga* [1993] eKLR and submitted that for the court to accept an adverse possession claim based on an agreement of sale, the court must first find that the agreement is valid. The Defendants also relied on *Peter Mbiri Michuki v. Samuel Mugo Michuki* [2014] eKLR where the court cited with approval *Public Trustee v. Wanduru* [1984] KLR 314 in which it was held that an adverse possession period should be calculated from the date of payment of the purchase price if the purchaser takes possession of the property because, from that date, the actual owner is dispossessed of the land purchased and time for adversity begins to run in favour of the adverse possessor. The Defendants submitted that there was no evidence of payment of the purchase price. The Defendants submitted that the 1st Defendant had denied having entered into any of the agreements relied on by the Plaintiff or receiving any payment from the Plaintiff. The Defendants submitted that, in the circumstances, it was impossible to calculate the period of adverse possession when there was no evidence of payment.
31. The Defendants cited *Mombasa Teachers Cooperative Savings and Credit Society Ltd. v. Robert Muhambi Katana & Others* [2018] eKLR and *Gatimu Kinguru v. Muya Gathangi* [1976] KLR and submitted that if at all the Plaintiff had possession of any of the suit properties, then that possession was broken before this suit was filed. The Defendants submitted further that the land that was claimed by the Plaintiff by adverse possession was also not identifiable. The Defendants submitted that the Plaintiff claimed the whole of the suit properties, which measured a total of 14 acres, which was more than what was allegedly sold to him. The Defendants submitted that the alleged portions of land sold to the Plaintiff were not determinable from the Plaintiff's case. The Defendants submitted that no boundaries existed for the portion of land alleged to have been bought by the Plaintiff.

Analysis and Determination

32. I have considered the Originating Summons and the response thereto by the Defendants. I have also considered the evidence adduced by the parties and the written submissions. The issues that arise for determination in this suit are the following:
 1. Whether the Plaintiff has proved his adverse possession claim over the suit properties.
 2. Who is liable for the costs of the suit?
33. The Plaintiff claims that he has acquired the parcels of land known as Title Nos. Kisumu/Wangaya I/6987 and Kisumu/Wangaya I/6988(the suit properties) by adverse possession. Kisumu/Wangaya



I/6987 (Plot No. 6987) measures 1.47 hectares (approximately 3.63 acres). The same is registered in the name of the 1st Defendant. Kisumu/Wangaya I/6988(Plot No. 6988) measures 4.4 hectares (approximately 10.87 acres) and the same is registered in the name of the 2nd Defendant. The suit properties are subdivisions of the land parcel, Title No. Kisumu/Wangaya I/2631, which measured 5.87 hectares (approximately 14.51 acres). Title No. Kisumu/Wangaya I/2631 was registered in the name of Nyandima Kitengo, deceased, before it was registered in the name of the 1st Defendant by transmission from the decedent and thereafter subdivided into two portions, Title Nos. Kisumu/Wangaya I/6987 and Kisumu/Wangaya I/6988, which were registered in the name of the 1st Defendant on 5th September 2016. The 1st Defendant transferred Kisumu/Wangaya I/6988 to the 2nd Defendant on 6th October 2016. The Plaintiff is claiming by adverse possession the whole of Title Nos. Kisumu/Wangaya I/6987 and Kisumu/Wangaya I/6988 (the suit properties), measuring a total of 14.51 acres. The Plaintiff claimed that he purchased the suit properties from the 1st Defendant through three (3) agreements of sale, namely, an undated agreement made on or about 23rd September 1995, an agreement dated 5th March 1997 and an agreement dated 26th March 2003. In the agreement made on or about 23rd September 1995, the 1st Defendant was said to have sold the Plaintiff his share in Plot No. 2641 measuring 2 acres, which was allegedly owned by his father, Oruoch Kitengo, at a price of Kshs. 22,000/- which was paid in full on 23rd September 1995. In the agreement dated 5th March 1997, the 1st Defendant was said to have sold to the Plaintiff a portion of Plot No. 262 measuring 3 acres at a price of Kshs. 75,000/-, which was paid in full upon the execution of the agreement. In the agreement dated 26th March 2003, the 1st Defendant, who was said to be “the registered proprietor” of Plot No. 2624, measuring one acre, sold the Plaintiff the said parcel of land at a price of Kshs. 25,000/- which was paid to the 1st Defendant in full on the execution of the agreement.

34. At the trial, the 1st Defendant denied owning any of the parcels of land which the Plaintiff claimed the 1st Defendant had sold to him. The 1st Defendant also denied entering into any agreement for the sale of land with the Plaintiff. The 1st Defendant denied executing any of the agreements that were produced in evidence by the Plaintiff. He also denied the identity card numbers in the said agreements, which the Plaintiff claimed belonged to him. The Defendants denied that the Plaintiff had occupied and used the suit properties as he alleged.
35. 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.
 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.
36. 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, necpccario (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.”
37. 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.”
38. In *Public Trustee v. Wanduru* (supra), Madan JA stated as follows:
- “.... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property, because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.
39. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
- “(16)Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal



right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

40. In Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

41. I am not satisfied that the Plaintiff discharged the burden of proof that was placed upon him by law. The Plaintiff failed to prove how he gained entry, if at all, into the suit properties. The Plaintiff did not prove that the 1st Defendant owned Plot Nos. 262, 2624 and 2641 portions of which he claimed to have purchased from him. The Plaintiff could not have lawfully purchased from the 1st Defendant land which the 1st Defendant never owned. Of the three parcels of land, evidence was produced showing that Plot No. 2641 was registered in the name of one Peter Oloo Migwala. There was, however, no evidence as to the ownership of Plot Nos. 262 and 2624. The court is not convinced that Plot Nos. 262, 2624 and 2641 portions of which the Plaintiff claimed to have purchased from the 1st Defendant, were the same as Title Nos. Kisumu/Wangaya I/6987 and Kisumu/Wangaya I/6988 (“the suit properties”). It was common ground that the suit properties were subdivisions of land Title No. Kisumu/Wangaya I/2631(Plot No. 2631). Plot No. 2631 was registered in the name of one Nyandima Kitengo. There is no way Plot No. 2631 which was registered in the name of Nyandima Kitengo could have been the same as Plot No. 2641 registered in the name of Peter Oloo Migwala, and Plot Nos. 262 and 2624, whose existence and ownership were not established. The Plaintiff did not, therefore, prove that Plot Nos. 262, 2624 and 2641 portions of which the Plaintiff claimed to have purchased from the 1st Defendant and occupied were the same as Title Nos. Kisumu/Wangaya I/6987 and Kisumu/Wangaya I/6988 (“the suit properties”), which he now claims by adverse possession. In any event, the portions of Plot Nos. 262, 2624 and 2641 said to have been purchased by the Plaintiff from the 1st Defendant measured a total of 6 acres, while the suit properties measured a total of 14.51 acres. Land measuring 6 acres cannot be the same as the land measuring 14.51 acres. The court is also at a loss as to why the Plaintiff, who claimed to have purchased land measuring 6 acres, is claiming the whole of the suit properties measuring a total of 14.51 acres. I wish to add that the Plaintiff did not challenge the evidence by the 1st Defendant that he did not sign the agreements of sale relied on by the Plaintiff, and that the identity card numbers used in the said agreements did not belong to him.

42. Even if it were to be assumed that Plot Nos. 262, 2624 and 2641 said to have been purchased by the Plaintiff from the 1st Defendant were within the suit properties; no evidence was placed before the court as to the location of the said parcels of land within the suit properties. The court is unable to determine which of the Plaintiff’s alleged 6 acres of land is on Title No. Kisumu/Wangaya I/6987 owned by the 1st Defendant, and which part of it is on Title No. Kisumu/Wangaya I/6988 owned by the 2nd Defendant. Even if it is taken that the Plaintiff’s alleged parcels of land measuring 6 acres were



within Title No. Kisumu/Wangaya I/2631(Plot No. 2631) before its subdivision, which gave rise to Title Nos. Kisumu/Wangaya I/6987 and Kisumu/Wangaya I/6988 (“the suit properties”), there was no evidence placed before the court as to the identification of this portion of land within Plot No. 2631, which in any event had ceased to exist.

43. The Plaintiff claimed to have planted bananas on the suit properties. There was however no evidence as to the identification of the portion of the suit properties on which the said bananas were planted, when they were planted and the extent of the plantation. Arising from the foregoing, it is my finding that the Plaintiff failed to prove that he purchased, took possession and occupied the suit properties continuously without interruption for 12 years before the filing of the suit. The Plaintiff did not, therefore, prove his adverse possession claim on a balance of probabilities.
44. On the issue of the costs of the suit, Section 27 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya provides that the costs of and incidental to a suit are at the discretion of the court, and as a general rule, costs follow the event unless the court, for good reason, orders otherwise. The parties are living in the same neighbourhood and know each other. In the circumstances of the case, I will order that each party bears its costs of the suit.

Conclusion

45. In conclusion, the Plaintiff’s suit is dismissed. Each party shall bear its costs of the suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 22ND DAY OF SEPTEMBER 2025

S. OKONG’O

JUDGE

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

Mr. Odeny for the Plaintiff

Ms. Odhong h/b for Mr. C.Onyango for the Defendants

Ms. J. Omondi-Court Assistant

