



Nyaata (Suing as the Legal Representative of the Estate of Abishai Nyamweya Mwebi) v Odongo; Machogu & another (Interested Parties) (Environmental and Land Originating Summons 88 of 2011) [2025] KEELC 6677 (KLR) (1 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 88 OF 2011
M SILA, J
OCTOBER 1, 2025**

BETWEEN

**MAKORI NYAATA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ABISHAI
NYAMWEYA MWEBI**

AND

JOANES ABUTO ODONGO DEFENDANT

AND

**FELIX JOSHUA MACHOGU INTERESTED PARTY
JOSEPH MAGAKI ISABOKE INTERESTED PARTY**

JUDGMENT

(Suit for adverse possession; plaintiff claiming adverse possession to land that has already been subdivided and titles issued to other parties who were never sued as substantive defendants; plaintiff cannot claim adverse possession to land that has already been subdivided and no longer exists; neither can he seek titles to the subdivisions as he has no pleadings to that effect and has not sued the owners thereof; plaintiff ought to have sued the owners of the subdivisions but he failed to do so; suit a non-starter and is dismissed with costs)

1. This suit was commenced through an Originating Summons filed on 12 May 2011 by Abishai Nyamweya Nyabuto (the original plaintiff) who died on 4 July 2020. He was substituted by his son who is the current plaintiff. Following the substitution, the Originating Summons was amended but only to reflect the substitution and the substance of the case remained as originally filed.



2. In the Originating Summons, the original plaintiff contended that he has acquired title to the land parcel West Kitutu/Bogusero/872 (the suit land) through adverse possession. It was his case that he purchased the suit land from Joanes Abuto, the defendant, through a sale agreement dated 12 March 1976 and that he took possession thereafter but the defendant did not take steps to transfer the title to him. Initially, the defendant did not enter appearance nor file a response to the Originating Summons and the case proceeded ex parte before Okong’o J, culminating in a judgment delivered on 19 April 2013 in favour of the original plaintiff. The original plaintiff executed the judgment and got registered as proprietor of the suit land on 3 May 2013. Subsequently, the defendant successfully applied to set aside the judgment. Among the issues raised in his application to set aside the judgment, which persuaded the judge, was the averment that the suit land was already subdivided into the land parcels West Kitutu/Bogusero/4432, 4433 and 4434 and the latter two parcels transferred to third parties. In allowing the application, Okong’o J *inter alia* expressed himself as follows :

“ As things stand now, the decree of the court seems to have been issued against a non-existent property and that the same has been executed going by the letter aforesaid from the District Land Registrar upon properties which were not the subject of this suit. This court did not at all order the surrender or the cancellation of the titles for LR Nos. West Kitutu/Bogusero/4342, 4343, and 4344 as the District Land Registrar purported to do. The court could not have done this because, first, these parcels of land were not the subject of this suit and, secondly, Joseph Magaki Isaboke and Joshua Felix Machogu who are the registered proprietors of LR Nos. West Kitutu/Bogusero/4343 and 4344 respectively were not parties to this suit. A court of law would not issue an order or a decree in vain. A decree issued herein on 19th April 2013 could not attach to the suit property as it did not exist as at the date of the decree. The plaintiff’s insistence that the suit property did exist cannot stand in the face of the letter that I have referred to herein above from the District Land Registrar, Kisii County. The decree of this court has apparently been executed against properties which were not in dispute in this suit and contrary to the express terms thereof.”

3. After the judgment was set aside, the defendant filed a replying affidavit to oppose the Originating Summons. *Inter alia*, he deposed that the original plaintiff had intended to buy the suit property but only made a downpayment and did not complete payment of the purchase price. He deposed that in 2005, the original plaintiff sued him in the suit Kisii HCCC No. 444 of 2005 and he filed defence, and further that the original plaintiff withdrew the said suit. He averred that he filed suit in respect of the subdivision in his name i.e the parcel No. West Kitutu/Bogusero/4432 being the suit Kisii CMCC No. 135 of 2011 but it was struck out for want of jurisdiction. He contended that at the time the original plaintiff withdrew the suit Kisii HCCC No. 444 of 2005, his claim for adverse possession had been extinguished. He stated that the suit land was subdivided and the court cannot make orders in a vacuum.

4. Through an application dated 23 June 2015, Joseph Magaki Isaboke and Felix Joshua Machogu, applied to be joined to the case as interested parties given that they were respectively the registered proprietors of the land parcels West Kitutu/Bogusero/4433 and 4434, being subdivisions of the suit land, i.e parcel No. 872, and asserted that the original plaintiff has no claim over what they own. They averred that the suit land was subdivided by the defendant into three to produce the land parcels West Bogusero/4432, 4433 and 4434, and they got registered as proprietors on 7 April 2011 before this case was commenced. The application was opposed by the original plaintiff claiming that the subdivisions were acquired fraudulently and that the beneficiaries were charged in Kisii Criminal Case No. 3420/2015 and further that the Land Registrar cancelled these subdivisions. He contended that



consequently the land parcel No. 872 is still intact. This application was heard by Mutungi J, who delivered ruling on 17 February 2017. He allowed the application and held as follows :

“ As the plaintiff by the Originating Summons claims title by way of adverse possession of land parcel West Kitutu/Bogusero/872 against the defendant but which parcel of land has either validly or illegally been subdivided into parcels 4342, 4343 and 4344 the latter of which have been transferred to the 1st and 2nd proposed interested parties respectively, the plaintiff may consider amending the originating summons to bring the interested parties as respondents. I will grant the plaintiff leave of 21 days from the date of this ruling to amend the originating summons to enjoin the interested parties as respondents. In case the plaintiff chooses not to amend the originating summons, I hereby allow the said Joseph Magaki Isaboke and Felix Joshua Machogu to be enjoined to these proceedings as interested parties and to participate in the proceedings as such.”

5. The original plaintiff did not heed the advice of the good judge and did not amend the originating summons to join the two persons as respondents in the suit. Thus, the two effectively remained in the suit as interested parties. A replying affidavit to oppose the originating summons was filed by Felix Joshua Machogu, the 2nd interested party, on behalf of himself and Joseph Magaki Isaboke, the 1st interested party. In it, he deposed that they purchased the parcels No. 4343 and 4344 from the defendant and were issued with titles. They further averred that they took possession and developed their parcels of land which were hitherto vacant and unoccupied. He deposed that after the original plaintiff obtained judgment, he moved into their parcels of land, destroyed their structures and crops. He also instituted criminal proceedings against them, being Kisii Magistrates’ Court Criminal Case No. 1346 of 2013 claiming that they illegally cut his trees on 23 April 2013. They were acquitted of this charge under Section 210 of the *Criminal Procedure Code*, through a ruling delivered on 13 November 2015. They added that prior to filing the Originating Summons the original plaintiff had filed various other suits in court.
6. It is with these pleadings that the matter proceeded for hearing. Hearing commenced on 27 January 2020 before Onyango J. At that time, the original plaintiff was alive, but he had donated a power of attorney to the current plaintiff and it is the current plaintiff who testified. His evidence was more or less to the effect that the original plaintiff purchased the suit land in 1976 and took possession. He mentioned that he was born on the suit land and that they developed structures on it. He acknowledged that his father had filed the suit Kisii HCCC No. 44 of 2005 seeking to have the land transferred to him but he later withdrew the suit. He testified that the suit land was transferred to the name of the original plaintiff after the *ex parte* judgment and still remains in his name.
7. PW-2 was Retired Justice David Onyancha, whose evidence was that while he was practising as an advocate, he prepared the sale agreement between the original plaintiff and the defendant.
8. PW-3 was Steve Mokaya. At the time he testified on 8 February 2022, he was the Land Registrar, Kisii. He *inter alia* testified that the suit land was transferred to the original plaintiff after the *ex parte* judgment. He claimed not to have any records for the subdivisions No. 4342, 4343 and 4344 but he had the green cards for the same. He testified that he wrote a letter dated 16 October 2019 to the effect that the subdivisions were illegal and were cancelled.
9. With the above evidence, the plaintiff closed his case.
10. DW-1 was the defendant. His evidence was that they had two previous suits before the present one i.e Kisii HCCC No. 44 of 2005 and Kisii CMCC No. 135 of 2011. He testified that the withdrawal of the suit Kisii HCCC No. 44 of 2005 paved the way for him to proceed to subdivide the suit land



which he did to produce the land parcels No. 4342, 4343, and 4344. He testified that after selling the land to the original plaintiff in the 1970s the original plaintiff never used it save for a brief period when he burnt bricks therein and they later had disputes over the land. He asserted that the original plaintiff never occupied the land peacefully for 12 years.

11. DW -2 was Cecila Oswera Harriet. She testified on 25 March 2025, and was now the Land Registrar, Kisii. She testified regarding the records of the suit land and the land parcels No. 4342, 4343, and 4344. She testified that the suit land, i.e parcel No. 872 was subdivided into the parcels No. 4342 , 4343 and 4344 through an entry No. 5. She did mention that there was an entry No.4 (a caution) which was removed prior to the subdivision though the recording in the two entries shared the same line which was unusual. She testified that once a title is closed, e.g upon a subdivision, there should be no further entries. She could however see subsequent entries in the register of the parcel No. 872 including transfer to the original plaintiff and an inhibition order. She had the mutation for the parcel No. 872 confirming the subdivision.
12. DW – 3 was Felix Joshua Machogu and DW-4 was Joseph Magaki Isaboke. Their evidence was that they purchased the parcels No. 4343 and 4344 from the defendant being subdivisions of the parcel No. 872 and therefore this parcel No. 872 does not exist. They also mentioned that they had been put through criminal charges by the original plaintiff but they were acquitted. They hold title deeds to their parcels of land.
13. With the above evidence, the defendants closed their case.
14. I invited counsel to file submissions, which they did, and I have taken the same into account before arriving at my decision.
15. I will be fairly brief in my disposition because it is clear to me that the plaintiff's case must fail. It must fail because his claim is for the parcel West Kitutu/Bogusero/872, but this land has already been subdivided and no longer exists. I observe that in his submissions, Mr. O.M Otieno, learned counsel for the plaintiff submitted that the purported subdivision was created in 2010 upon interference with the register to create backdated entries. He submitted that there were restriction orders in the case Kisii HCCC No. 44 of 2005. He also submitted that the subdivision does not fetter the court's jurisdiction to declare adverse possession. I am afraid that there is no merit in these arguments.
16. What is before me is a suit for adverse possession in respect of the parcel West Kitutu/Bogusero/872. However, the extract of the register (green card) shows that this parcel of land no longer exists. It was subdivided, whether lawfully or unlawfully, to create three subdivisions and this subdivision took place on 7 April 2011 which was before this suit was filed on 12 May 2011. I cannot venture, within the confines of the pleadings before me, to declare whether or not the creation of the parcels No. 4342, 4343, and 4344 was lawful; that would need a suit against all the owners of the subdivisions for cancellation of their titles which is not what is before me. There are no pleadings for cancellation of these titles and I cannot therefore venture into that arena.
17. The reality of the matter is that we no longer have the land parcel West Kitutu/Bogusero/872 existing and it did not even exist when the suit was filed. The evidence of Ms. Oswera was very clear on the availability of a mutation form which created the subdivisions and the existence of the subdivisions themselves. It cannot be argued that the land parcel No. 872 was not subdivided and that it still exists. It no longer exists and what we now have is the parcels West Kitutu/Bogusero/ 4342, 4343, and 4344. There is no suit herein to claim adverse possession to these parcels No. 4342, 4343, and 4344 and Mr. Otieno is wrong in attempting to have this court declare adverse possession over these parcels because they are not the parcels of land in dispute. Moreover, their owners, or at least two of them, are not defendants in the suit. Indeed, Okong'o J, in his ruling on setting aside the ex parte judgment was



categorical that no orders could be made against the parcel Nos. 4342, 4343, and 4344 and I copied his dictum earlier in this judgment.

18. It is apparent that after he obtained the ex parte judgment in his favour, the original plaintiff found the land parcel No. 872 not in existence, and purported to execute the judgment against the subdivisions, which the court found unlawful. What the plaintiff needed to do was simply amend his Originating Summons and bring on board all the subdivisions, and he was indeed advised to do so by Mutungi J, in his ruling of 17 February 2017, but he failed to act accordingly. There was a belated attempt to amend the Originating Summons but I was not persuaded to allow it, for the same came 6 years after the ruling of Mutungi J, and after the plaintiff had already closed his case. As it stands, the land parcel West Kitutu/Bogusero/872 does not exist and the plaintiff cannot purport to claim it by way of adverse possession. It matters not whether I assess the evidence to see whether there has been quiet, continuous possession for a period of 12 years, which is what is needed to prove a case for adverse possession. So long as the claim is for land that does not exist, such suit is a non-starter.
19. There is really no point of saying more or belabouring the issue. The plaintiff cannot purport to seek adverse possession for land that does not exist. Neither can he seek to claim adverse possession for subdivisions of the suit land, for reason that he has no pleadings claiming them and he has also not sued the proprietors as substantive defendants.
20. Before I close, I note that in his submissions, Mr. Nyambati, learned counsel for the defendant and interested parties, submitted that his clients deserve damages and mesne profits, and also for an order of eviction against the plaintiff. I am afraid that the suit herein is only one for adverse possession and there is no countersuit seeking these orders. They cannot therefore be granted within the context of this litigation.
21. All that this court will issue, which is hereby issued, is an order that the Originating Summons fails with costs to the defendant and interested parties.
22. Judgment accordingly.

DATED AND DELIVERED THIS 1ST DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. O.M Otieno for the plaintiff

Mr. G.M Nyambati for the defendant and interested parties

Court Assistant – Michael Oyuko

