



Ondui v Ogutu; Omenya (Interested Party) (Environmental and Land Originating Summons E002 of 2022) [2025] KEELC 7357 (KLR) (27 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2022**

SO OKONG'O, J

OCTOBER 27, 2025

IN THE MATTER OF LAND PARCEL KISUMU/BORDER/2387

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

AND

IN THE MATTER OF ORDER 37 RULE 7 (1) OF THE CIVIL PROCEDURE RULES

BETWEEN

MICHAEL OMOLO ONDUI APPLICANT

AND

JANET ODWAR OGUTU RESPONDENT

AND

CARILUS JUMA OMENYA INTERESTED PARTY

JUDGMENT

1. The Applicant instituted this suit by way of an Originating Summons dated 18th January 2022. The Interested Party was added to the suit in that capacity on 12th March 2024. The Applicant sought the determination of the following questions:

1. Is Janet Odwar Ogutu the registered proprietor of that entire parcel of land known as Kisumu/Border/2387 and its resultant subdivisions/intended subdivisions; Kisumu/Border/4737, 4738, 4736, 4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754,



4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787, 4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779 which mutations are yet to be registered.

2. Has the Applicant been in actual, factual, active, physical possession and occupation of all that parcel of land known as Kisumu/Border/2387 and its resultant subdivisions/intended subdivisions; Kisumu/Border/4737, 4738, 4736, 4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754, 4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787, 4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779 to date.
 3. Has the said occupation and possession been peaceful, uninterrupted, and has the same been known to the Respondent and previous registered owners?
 4. What is the cumulative duration of such occupation to date?
 5. Was the entry or ingress of the applicant without permission, or at the instance of the Respondent and/ or previous registered owners?
 6. Has the Applicant fulfilled all and singular the requirements for the declaration of the extinction of the registered proprietor's interest in the said parcel of land and the registration of the same in his favour by virtue of the doctrine of adverse possession?
 7. Should a declaration be made that the ownership and proprietary rights of the registered owner, Janet Odwar Ogutu are extinguished and that she holds the suit property in trust for the Applicant.
 8. Should an order be issued to the land registrar at Awasi land registry for the registration of the Applicant as the proprietor of all that parcel of land known as Kisumu/Border/2387 and its resultant subdivisions; Kisumu /Border /4737, 4738, 4736, 4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754, 4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787, 4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779
2. The Applicant sought the following orders;
1. A declaration that the Respondent's right to recover all that parcel of land known as Kisumu/Border/2387 and its resultant subdivisions; Kisumu/Border/4737, 4738, 4736, 4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754, 4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787, 4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779 is extinguished under the Limitations of Action Act Chapter 22 Laws of Kenya and her title thereto is extinguished on the ground that the Applicant has openly, peacefully and continuously been in occupation and possession of the suit property for a period exceeding 12 years.
 2. An order directing the land registry at Awasi to enter the name of the Applicant in the parcel register of the suit property as the sole and absolute proprietor thereof.



3. Costs of the originating summons.
3. The originating summons was supported by the affidavit of the Applicant, sworn on 18th January 2022. In the affidavit, the Applicant averred that all that parcel of land known as Kisumu/Border/2387 (hereinafter referred to as “ the suit property”) and its resultant subdivisions; Kisumu/Border/4737, 4738, 4736,4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754, 4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787,4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779 (hereinafter referred to as “the subdivisions”) were registered/yet to be registered in the name of the Respondent, Janet Odwar Ogutu. The Applicant averred that he was born in 1958 and found his grandparents and parents living on the suit property that had since been subdivided into several portions. The Applicant averred that he built a home on the suit property in 1971, while his parents settled on the property in 1914. The Applicant averred that he was still occupying the suit property several years after the death of his parents.
4. The Applicant averred that his parents were buried on the suit property. The Applicant averred that some of his siblings who died were also buried on the suit property. The Applicant averred that he entered the suit property and had remained in occupation thereof without the consent, or permission, of the registered owners and/or proprietors thereof. The Applicant averred that he had been in actual and physical occupation and possession of the suit property to the exclusion of the registered owners and/or proprietors of the same.
5. The Applicant averred that his occupation and possession of the property had been peaceful and uninterrupted for more than 12 years. The Applicant averred that his occupation had been open, overt, noticeable, and hostile to the rights and interests of the registered proprietors thereof, current and past. The Applicant averred that he had established permanent structures on the property, which he had been occupying with his family over the years. The Applicant averred that he had also been cultivating and leasing out part of the property to third parties.
6. The Respondent opposed the application through a replying affidavit sworn on 7th April 2022. The Respondent averred that the resultant subdivisions of the suit property the Applicant was claiming by adverse possession, were not available to the Applicant as they were registered on 4th June 2015, barely seven (7) years as at the time the Applicant brought his claim on 20th January 2022. The Respondent averred that the subdivisions of the suit property were the subject of an ongoing litigation between the Respondent and the Applicant in Nyando PMCC No. 219 of 2015, which was at the defence stage.
7. The Respondent averred that there were other ongoing litigations over the suit property and the subdivisions thereof in other courts between the Respondent and other parties. The Respondent averred that the ongoing litigations included: Nyando SRMC ELC No.14 of 2018 (formerly Kisumu HCC No. 156 of 2015), Kisumu ELC No.50 of 2019(OS), Kisumu PMCC Misc. Appl. No. 15 of 2010 and Kisumu CMCC No. 212 of 1987. The Respondent averred that the Applicant forcibly entered a portion of the suit property recently, which led to an eviction suit being filed against him in Nyando PMCC No.219 of 2015. The Respondent denied that the Applicant had entered the suit property earlier, as alleged. The Respondent averred that she inherited the suit property from her deceased husband, the late Hezron Ogutu Chama, through Kisumu HC. Succession Cause Number 377 of 2006.
8. The Respondent averred that the Applicant had not demonstrated any registrable rights to be entitled to the orders sought. The Respondent averred that the Applicant’s suit was vexatious, an afterthought,



and sub-judice, Nyando PMCC No.219 of 2015, in which the Applicant was a party. The Respondent urged the court to dismiss the Originating Summons with costs.

9. The Interested Party filed an affidavit sworn on 8th March 2024 in support of his application to be joined in the suit as an interested party. The Interested Party averred that at all material times he was the registered owner of the suit property jointly with his brothers Julius Ayuko Omenya (Deceased) and Dalmas Ngicho Omenya (Deceased). The Interested Party averred that he and his brothers agreed to sell the suit property to Hezron Ogutu Chama (the Respondent's deceased husband), who ignored, neglected, delayed, and/or refused to pay the full purchase price, forcing them to institute a suit against him at the Kisumu Chief Magistrate's Court namely, Civil Case No.212 of 1987 (the Kisumu suit).
10. The Interested Party averred that the trial court in the Kisumu suit referred the matter to a panel of elders to deliberate on and determine the dispute. The Interested Party averred that the panel of elders deliberated on the dispute and made the following findings: that the Interested Party and his brothers sold to the Respondent's deceased husband, Hezron Ogutu Chama, a portion of the suit property measuring 1 acre at Kshs 1500/-, of which the deceased paid Kshs750/- leaving a balance of Kshs 750/-.The Interested Party averred that the panel of elders directed that the Respondent's deceased husband retain the land measuring 1 acre sold to him, having set up a home thereon, provided he paid the balance of the purchase price in the sum of Ksh. 750/-. The Interested Party averred that the panel of elders directed further that the remaining portion of the suit property measuring 5 acres should be registered in the name of the Interested Party and his deceased brothers. The Interested Party averred that the panel of elders ordered further that if the Respondent's deceased husband, Hezron Ogutu Chama, failed to pay the balance of the purchase price, the whole of the suit property would be registered in the name of the Interested Party and his brothers upon their refunding the deposit paid by the Respondent's deceased husband, Hezron Ogutu chama.
11. The Interested Party averred that the decision of the panel of elders was forwarded to the Kisumu suit and adopted as judgment of the court on 14th May 1991. The Interested Party averred that the suit property was thereafter registered in his name jointly with his brothers on 30th January 2012, following an order issued by Hon. C.O. Ongudi PM as he then was on 14th May 1991. The Interested Party averred that he discovered later in 2012 that the Respondent applied for and purportedly obtained a court order in the Kisumu suit issued by Hon. Ezra Awino PM (as he then was) on 20th February 2012, cancelling the Interested Party's title to the suit property without giving him an opportunity to be heard.
12. The Interested Party averred that the Respondent was thereafter issued with a title deed for the suit property, notwithstanding that the Interested Party and his brothers were in possession of the suit property and held the original title. The Interested Party averred that all efforts by him and his advocate to get the court file for the Kisumu suit for perusal and further action were unsuccessful.
13. At the trial, the Applicant, Michael Omollo Ondui (PW1) adopted the contents of his affidavit in support of the Originating Summons and undated witness statement as part of his evidence in chief. He produced his bundle of documents filed on 20th October 2023 as P.EXH. 1. He stated that his father, Zacharia Ondui Opiyo, gave him the land parcel, Kisumu /Border/1834 (Plot No. 1834). He stated that his Plot No. 1834 was mysteriously converted to Kisumu /Border/2387 (the suit property) and registered in the name of the Respondent. He stated that the conversion of Plot No. 1834 into the suit property was done by the Respondent's deceased husband, Hezron Ogutu Chama, who was not related to them. He stated that the Respondent is the wife of Hezron Ogutu Chama. He stated that after the death of her husband, Hezron Ogutu Chama, the Respondent came to claim the suit property. He stated that he was the one occupying the suit property.



14. In his undated witness statement, the Applicant stated that he was born in 1955 and that his father established a home on the suit property in 1968. He stated that after his father settled on the suit property, the Interested Party's father, Joseph Omenya Orwa, filed a suit against him in 1970 claiming the property. He stated that Joseph Omenya Orwa lost the case, and his father took full control of the property. The Applicant stated that in 1974, another person, Joannes Ombayi lodged a criminal complaint against his father in relation to the suit property. He stated that his father was charged at Nyando Law Court, in Criminal Case No. 1208 of 1974, with the offence of trespass. He stated that his father was acquitted of the charge. The Applicant averred that his father's title over the suit property was never challenged again until 1986, when the Respondent's deceased husband came to the scene claiming to have purchased the property from the Interested Party and his two brothers. He stated that the Respondent's deceased husband occupied the lower portion of the suit property in 1986, but vacated in 1990 and never returned. The Applicant stated that his father died in 1994 and his mother followed in 2005. The Applicant stated that the Respondent sued him at Nyando Law Court in 2015 for trespassing on the suit property, in Nyando PMCC No. 219 of 2015. The Applicant averred that while that suit was pending, the Respondent subdivided the suit property on paper without going to the ground in an attempt to change the nature of the property and defeat the Applicant's interest. The Applicant stated that the Respondent vacated the suit property in 1991 and never resumed possession since then.
15. On cross-examination by the Respondent's advocate, the Applicant stated that he was born in 1955, although in his National Identity Card, his year of birth is indicated as 1958. He stated that his father built a home on the suit property in 1968, and he built a house in his father's homestead when he got married in 1982. He stated that he had not moved out of his father's homestead since he was the lastborn in the family. He stated that his parents were buried on the suit property. He stated that the suit property was created from Plot No. 1833, and that the Respondent acquired the property illegally. He stated that he occupied the suit property peacefully until 2015, when the Respondent came forward to claim the property. He stated that the persons who purported to sell the suit property to the Respondent's deceased husband were not related to his father, who settled on the suit property in 1968. On re-examination, the Applicant stated that he had at one time rented out portions of the suit property to third parties.
16. On examination by the court, the Applicant stated that apart from him, there were 5 other families living on the suit property who were the children of Carilus Juma Omenya, the Interested Party, and the children of Julius Ayuko Omenya. He stated that these were the people who allegedly sold the suit property to the deceased husband of the Respondent. He stated that the families of the Interested Party and Julius Ayuko Omenya settled on the suit property in 2018/2019. He stated that they occupied a portion of the property measuring 2Ha. He stated that apart from the two families, there was another person known as Angura who was also occupying a portion of the land. He stated that Angura acquired the land he was occupying from the Interested Party. The Applicant stated that Angura was occupying land measuring about 1.5 acres (0.2Ha). He stated that he remained with land measuring 4 acres. He stated that he was claiming the whole property.
17. The Respondent, Janet Odwar Ogutu (DW1), adopted her witness statement dated 11th March 2024 as her evidence in chief. The Respondent produced her bundle of documents filed on 11th March 2024 as D.EXH.1. In her witness statement, the Respondent reiterated what was deposed in her replying affidavit. It is not necessary to repeat the same.
18. On cross-examination by the Interested Party, the Respondent stated that she acquired the suit property from her deceased husband. She stated that it was her husband who knew how he acquired the suit property. She stated that she was not aware that her deceased husband, Hezron Ogutu Chama



got the suit property from his father. She stated that she was not staying on the suit property. She stated that she was staying at Wangaya while the suit property was at Awasi Border. The Respondent stated that she did not know whether her husband purchased the suit property or not. She stated that the suit property belonged to her deceased husband and not her father-in-law. The Respondent stated that her husband died in 1992. On re-examination, the Respondent stated that her husband had a house on the suit property.

19. On examination by the court, the Respondent stated that the suit property was under the occupation of some people who entered and settled thereon without her permission. She stated that it was in 2021/2022 that she learnt that there were some people occupying the suit property. She told the court that the Applicant was one of the occupants of the suit property. She stated that she did not know when the Applicant entered the suit property. She stated that she did not know whether the Interested Party was occupying the suit property. She stated that what she knew was that the Interested Party's home was adjacent to the suit property. The Respondent stated that her husband put up a house on the suit property in 1987, which they occupied until 1992 when her husband died. The Respondent stated that she vacated the house in 1992 after the death of her husband, and the house collapsed. She stated that no strangers were occupying the suit property as at 1992 when she vacated the land and left for Wangaya.
20. The Interested Party, Carilus Juma Omenya stated that he was 80 years old. He adopted as his evidence in chief the affidavit he swore on 8th March 2024 in support of his application to be joined to the suit as an Interested Party. He stated that as far as he was concerned, the Applicant and the Respondent were not entitled to the suit property. He stated that the Applicant's father settled on the suit property illegally. He told the court that at the time, the Respondent had not occupied the property. He stated that he and his brothers wanted to sell a portion of the suit property to the Respondent's deceased husband. He stated that the Respondent's husband only paid Kshs. 750/-. The Interested Party stated that they were surprised to learn that the suit property was registered in the name of the Respondent. He stated that they had sued the Respondent in the Kisumu suit. He stated that the Respondent's husband was ordered to pay them the balance of the purchase price, and he was to get land measuring only 1 acre.
21. The Interested Party stated that the Respondent's husband failed to pay the balance of the purchase price. He stated that the court ordered the Respondent's husband to vacate the suit property if he was not willing to pay the balance of the purchase price. He told the court that the Respondent's husband neither paid the balance of the purchase price nor vacated the land. He stated that the court told them to refund the money that they were paid by the Respondent's husband, which they did, and the Respondent's husband vacated the suit property and went to Wangaya. The Interested Party stated that, as far as he was concerned, the suit property belonged to him, and the Applicant and the Respondent should vacate the same. He stated that the Applicant had occupied the suit property since the 1990s, but illegally because his father had lost a suit over the same.
22. On cross-examination by the Respondent's advocate, the Interested Party stated that he was not aware that the Applicant had filed this suit. He stated that he wanted the Applicant to vacate the suit property. He stated that he was occupying the suit property. He stated that he had a title deed for the suit property, which showed that he occupied the suit property. He told the court that he was not aware that the suit property, Kisumu/Border/2387, had been subdivided. He stated that he wanted the Applicant and the Respondent to vacate the suit property. He stated that the suit property belonged to the Omenya family, many of whom were already in occupation of the same. He stated that he did not sue the Applicant because he was still having a case against the Respondent. He told the court that he intended to sell to the Respondent's husband land measuring 1 acre. He stated that they refunded the



purchase price to the Respondent's husband. The Interested Party stated that he did not have evidence of receipt of the money by the Respondent's husband. He stated that the area chief who presided over the proceedings regarding the refund was deceased and could not be called as a witness. He stated that he was not aware of the order obtained by the Respondent for the registration of the suit property in her name.

23. The parties made closing submissions in writing.

The Applicant's submissions

24. The Applicant filed submissions dated 20th June 2025. The Applicant framed the following issues for determination;
1. Whether the Respondent and the Interested Party's interests in the suit property (if any) have been extinguished by operation of the provisions of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 2. Whether the Applicant has acquired a beneficial/legal interest in the suit property by virtue of the application of the doctrine of adverse possession.
 3. Which orders as to costs would best serve the interests of justice, given the findings in (a) and (b) above?
25. The Applicant cited Section 7 of the *Limitation of Actions Act* and Nyandarua ELC No. 7 of 2023, Samwel Njoroge Iragu v. Ayub Muthama Kabata, and submitted that the suit property was being claimed by three parties: the Applicant under the doctrine of adverse possession, the Respondent as a beneficiary of the same by transmission from the estate of her deceased husband, and the Interested Party, as a registered joint proprietor. The Applicant submitted that the time started running in his favour in 1968 when his father occupied the suit property. The Applicant submitted that the Respondent's husband constructed a home in 1986 on a portion of the suit property, which he purportedly bought from the Interested Party and his deceased brothers. The Applicant averred that the Respondent vacated the suit property in 1990, and not 1992 as she claimed. The Applicant submitted that even if the Respondent vacated the suit property in 1992, the Respondent's interest in the suit property was extinguished by the end of 2004. The Applicant cited section 38 (1) of the *Limitation of Actions Act* and Kericho HCCC No. 124 of 2004 (OS), Kipkoech Arap Langat & Another v. Kipngeno Arap Laboso, and submitted that the court should find that the Applicant has acquired a registerable interest in the suit property by operation of law under the doctrine of adverse possession.

The Respondent's submissions

26. The Respondent filed submissions dated 12th June 2025. The Respondent submitted that the main issue for determination was whether the Applicant was entitled to the suit property by adverse possession. The Respondent submitted that the Applicant failed to demonstrate that he had indeed acquired the suit property by adverse possession. The Respondent cited Mtana Lewa v. Kahindi Ngala Mwangandi [2015] eKLR and Gabriel Mbui v. Mukindia Maranva [1993]eKLR in support of this submission.
27. The Respondent submitted that the Applicant claimed to have been born in 1958 in his supporting affidavit and in 1955 in his witness statement. The Respondent submitted that, given his age, the Applicant could not have put up a house on the suit property in 1971 as he was a minor by then. The Respondent submitted that it was worth noting that the subdivisions of the suit property over which



the Applicant sought to assert his adverse possession claim were registered barely 7 years ago and were not even 12 years old at the time the suit was filed by the Applicant.

28. The Respondent submitted that there was no evidence to substantiate the year in which the Applicant or his family entered the suit property. The Respondent submitted that the Applicant had not produced any evidence showing that he had a home on the suit property. The Respondent submitted that the entry and occupation of land for the purposes of adverse possession 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. The Respondent submitted that the Applicant had failed to prove this condition. The Respondent submitted that during his examination in chief, cross-examination, and in his witness statement, the Applicant stated that the Respondent did not follow due process in acquiring title to the suit property and termed the title fraudulent.
29. The Respondent submitted that the occupation of land by an intruder who pleads adverse possession must be non-permissive, that is, without permission from the true owner of the land occupied. The Respondent submitted that the Applicant's occupation of the suit property, if at all, was not without the permission of the true owner. The Respondent submitted that the Applicant claimed that the suit property was owned by his grandfather, who bequeathed the same to his father, who later established his home on the same. The Respondent submitted that the Applicant's possession was interrupted on several instances. The Respondent submitted that the Applicant, in his testimony, stated that in 1970, a man named Omenya Orwa lodged a case against his father claiming that part of the suit property belonged to him and that the case was heard by the local chief. The Respondent submitted that from the record, it was clear that the Applicant's possession, if at all, had never been peaceful and uninterrupted owing to several cases between the Applicant and the Respondent, namely, Nyando PMCC No. 219 of 2015, Nyando SRM ELC No. 14 of 2018, Kisumu PMCC Misc Appl No. 15 of 2010, and Kisumu CMCC No. 212 of 1987. In support of this submission, the Respondent relied on *Githu v. Ndeete* [1984]1KLR 776.

The Interested Party's submissions

30. The Interested Party filed two sets of submissions dated 9th June 2025 and 16th June 2025, in which he reiterated what he stated in his affidavit sworn on 8th March 2024 in support of his application to be joined in the suit.

Analysis and Determination

31. I have considered the pleadings, the evidence tendered, and the submissions by the parties. The Applicant's claim being that of adverse possession of land, the issues that arise for determination in my view are;
1. Whether the Applicant has proved his adverse possession claim over the suit property.
 2. Whether the Applicant is entitled to the reliefs sought in the originating summons.
 3. Who is liable for the costs of the suit?
32. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR, 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, that is, 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.
33. 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, necplecario (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.”
34. In *Wambugu v. Njuguna* [1983] KLR 172, the court stated as follows:
- “First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not



whether or not the claimant has proved that he has been in possession for the requisite number of years.”

35. 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.”
36. The Applicant’s case is that he was born on the suit property in 1955. He stated that he built a house on his father’s homestead on the suit property. He stated that his parents died and were buried on the suit property. He stated that his father died in 1994 and his mother followed in 2005. He stated that he had never left the suit property. He stated that since he was the lastborn in the family, he remained in his father’s homestead on the suit property. The Applicant claimed that the suit property was his family land and that the Respondent’s husband caused it to be registered in his name fraudulently. The Applicant contended that the Respondent and her deceased husband lived on the suit property but vacated in 1992 after the death of the Respondent’s husband.
37. It is not disputed that the Applicant is in occupation of the suit property, which has since been subdivided. The Applicant’s evidence that he was born on the suit property was not challenged. The Applicant produced in evidence court proceedings showing that his father was in occupation of the suit property in 1970. The Applicant produced evidence in the form of photographs showing his homestead on the suit property and other activities he was carrying out on the suit property, from which it was clear that he had been in occupation of the suit property for several years. The Respondent admitted that she was not occupying the suit property. On examination by the court, the Respondent stated that the suit property “is under occupation of some people who entered and settled thereon without my permission.” The Respondent stated that she learnt of these people’s occupation of the land in 2021/2022 and that the Applicant was one of those who were in occupation of the suit property. The Respondent stated that she did not know when the Applicant entered the suit property. The Respondent admitted that she vacated the suit property in 1992 after the death of her husband.
38. The Interested Party, who was 80 years old at the time of his testimony and who also has a claim over the suit property, admitted that the Applicant’s father settled on the suit property before the Respondent and her deceased husband came to the scene. He told the court that the Applicant’s father settled on the suit property illegally. According to the Interested Party, the Applicant occupied the suit property in the 1990s, but illegally because the Applicant’s father had lost a case over the property.
39. On the evidence on record, I am convinced that the Applicant’s father was the first to settle on the suit property and that the Applicant built his house on his father’s homestead, and remained in occupation thereof after the death of his parents. In his testimony, the Applicant told the court that his father settled on the suit property in 1968 and that he built his house in his father’s homestead in 1982 and had remained in occupation since then. The Respondent did not rebut this evidence, which was supported by the proceedings of the civil suit that the Applicant’s father and the Interested Party’s father had at Nyando Law Court in 1970 over the ownership of the suit property. The Respondent told the court that she did not know when the Appellant entered the suit property. According to her, she vacated the suit property in 1992 and only learned in 2021/2022 that there were people on the suit property.



This evidence by the Respondent is not true because the Respondent filed a suit against the Applicant at Nyando Law Court on 12th November 2015 (Nyando PMCC No. 2019 of 2015). In her plaint, the Respondent stated as follows in relation to the Applicant's occupation of the suit property: "The Defendant without any iota of right, authority and/or sanction from the Plaintiff trespassed into the Plaintiff's land and is residing therein to the total exclusion of the Plaintiff." With that statement made on 15th November 2015, the Respondent cannot claim that she only became aware that people were occupying the suit property in 2021/2022 and that the Applicant was one of them. I am satisfied that the Applicant built a house on his father's homestead on the suit property in 1982 when he got married, as he claimed on cross-examination. The Applicant had therefore occupied the suit property for more than 12 years at the time he filed the present suit by way of Originating Summons on 20th January 2022. Even if it were taken that the Applicant occupied the suit property in 1992 after the Respondent vacated the property, he would still have been in occupation for more than 12 years at the time he brought this suit.

40. I am not in agreement with the Respondent that the Applicant's occupation was interrupted by the various suits filed over the ownership of the suit property. Many of the suits mentioned by the Respondent as interrupting the Applicant's occupation were between the Respondent and the Respondent's deceased husband, with third parties. The only suit that could interrupt the Applicant's occupation and stop time from running was Nyando PMCC No. 219 of 2015. This was a suit brought by the Respondent against the Applicant for possession of the suit property on 12th November 2015. At the time this suit was brought, the Applicant had occupied the property for more than 12 years and, as such, had acquired the portion thereof under his occupation by adverse possession. For the purposes of the *Limitation of Actions Act*, the Applicant had occupied the suit property for the statutory period of 12 years, and as such, time could not be stopped from running. The Respondent had also contended that the subdivisions of the suit property now claimed by the Applicant came into existence in 2015, and as such, the Applicant could not claim to have occupied the same for 12 years. My answer to this is that at the time of the subdivision of the suit property in 2015, the Applicant's adverse possession claim over the portion thereof under his occupation had crystallised. The Applicant's adverse possession claim was therefore not affected by the subdivision of the suit property. The Applicant's interest as an adverse possessor of a portion of the suit property would still attach to such portions/subdivisions of the suit property under his occupation. The Applicant's claim is also not affected by the fact that there were other people claiming portions of the suit property. The Applicant is only entitled to the portion of the suit property in his possession. He cannot claim those portions of the suit property not occupied by him. He admitted that other people were occupying the suit property apart from him. The Interested Party had claimed that neither the Respondent nor the Applicant is entitled to the suit property, which he claimed to belong to him and his two deceased brothers. At the time of the hearing of this suit, there was no evidence of the Interested Party's legal interest in the suit property. The title held by the Interested Party and his deceased brothers over the suit property had been cancelled and not reinstated at the time of the hearing of the suit. Even if the Interested Party and his brothers were to be the legal owners of the suit property, they would still not have defeated the Applicant's adverse possession claim. The Interested Party, as mentioned earlier, stated that the Applicant had been in occupation of the suit property since the 1990s. There was no evidence that the Interested Party had filed a suit against the Applicant for possession of the suit property. The Applicant produced at the trial the proceedings of a civil suit that the Interested Party's father filed against the Applicant's father at Nyando Law Court in 1970 over the suit property. The court in a judgment delivered on 8th May 1970, rejected the claim by the Interested Party's father and the Applicant's father over the suit property, which the court found belonged to a third party, Otieno Abandu. There is no evidence that the Applicant's father, who was in occupation of the suit property, vacated the same. Apart from that suit, no evidence was placed before the court of any other suit between the Applicant and the



Interested Party over the suit property. The Interested Party's legal interest in the suit property, which was acquired on 30th January 2012 and cancelled on 23rd February 2012, cannot therefore defeat the Applicant's adverse possession claim.

41. It is my finding that at the time of filing this suit, the Applicant had occupied a portion of the suit property openly and continuously without the Respondent's permission for an uninterrupted period of more than 12 years. The Applicant has therefore proved that he has acquired the portion of the suit property he is occupying by adverse possession. The Applicant told the court that the portion of the suit property, which he occupied, measured 4 acres (approximately 1.62Ha). He did not, however, adduce evidence in the form of a survey report to show the portions/subdivisions of the suit property under which the land being claimed by him falls, and its exact measurement. I do not, however, think that this should disentitle the Applicant to the relief sought, having established his occupation of the suit property for the statutory period, and the fact that the subdivision of the suit property was carried out while he was in occupation without his involvement.

Conclusion

42. In conclusion, I hereby make the following orders in the matter;
1. I declare that the Applicant has been in peaceful, unauthorised and an uninterrupted actual occupation of a portion of all that parcel of land known as Kisumu/Border/2387 now subdivided into; Kisumu/Border/4737, 4738, 4736,4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754, 4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787,4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779 for more than 12 years, and has acquired that portion by adverse possession.
 2. I declare that the Respondent's proprietary interest in the said portion of all that parcel of land known as Kisumu/Border/2387 now subdivided into; Kisumu/Border/4737, 4738, 4736,4735, 4734, 4733, 4732, 4731, 4730, 4729, 4728, 4727, 4726, 4725, 4724, 4723, 4722, 4721, 4720, 4750, 4749, 4748, 4747, 4746, 4745, 4744, 4743, 4742, 4741, 4740, 4739, 4767, 4768, 4766, 4765, 4764, 4763, 4762, 4761, 4760, 4759, 4758, 4757, 4756, 4755, 4754, 4753, 4752, 4751, 4778, 4777, 4776, 4775, 4774, 4773, 4772, 4771, 4770, 4792, 4791, 4790, 4789, 4788, 4787,4786, 4785, 4784, 4783, 4782, 4781, 4780, and 4779 in the possession of the Applicant has been extinguished, and the Respondent holds the said portion of Kisumu/Border/2387 as subdivided in trust for the Applicant.
 3. I order that the Respondent shall within 90 days from the date hereof transfer to the Applicant all the subdivisions of the former Kisumu/Border/2387 which fall within the portion of the former Kisumu/Border/2387 which is in the Applicant's actual possession, which shall include all the land on which the Applicant's homestead is situated and the land he has been cultivating with the necessary access roads.
 4. I order that the subdivisions of the former Kisumu/Border/2387 to be transferred to the Applicant under order 3 above shall exclude such subdivisions of the former Kisumu/Border/2387 occupied by third parties, such as the Interested Party, and those not in the actual possession of the Applicant.
 5. I order that the Applicant shall meet the cost of the transfer of the said subdivisions of the former Kisumu/Border/2387 to his name and shall be at liberty to engage a government



surveyor in charge of the area where the suit properties are situated at his cost to point out the locations of the various subdivisions and assist in the amalgamation if necessary of such number of the subdivisions of the former Kisumu/Border/2387 as may form part of the land in his possession and to ensure that appropriate allowances are made for the access road/s to serve the land transferred to the Applicant.

6. I order that if the Respondent fails to transfer the said subdivisions of the former Kisumu/Border/2387 to the Applicant, the Deputy Registrar of this court shall be authorised to sign all the documents necessary to facilitate the execution of the orders given herein.
7. The Applicant and the Respondent shall be at liberty to apply in respect of orders 3, 4, 5, and 6 above.
8. Each party shall bear its costs of the suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 27TH DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

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

Mr. Oriwa for the Applicant

Ms. Akinyi for the Respondent

The Interested Party in person

Ms. J.Omondi-Court Assistant

