

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELC ORIGINATING SUMMONS 02 OF 2022**

**JOHN OTIENO**  
**ODHIAMBO.....PLAINTIFF**  
**VERSUS**  
**SAMUEL OUMA**  
**ANYANGO.....DEFENDANT**

**JUDGEMENT**

**1.** By way of Originating Summons dated 15<sup>th</sup> February 2022, the Plaintiff seeks the following orders;

- 1) That the Applicant has acquired title to a half portion of land reference Kamagambo/Kanyamaba/359 containing by measurement 1.2 Ha by adverse possession.**
- 2) That an order do issue vesting title to a half of that parcel known as Kamagambo/Kanyamaba/359 in the name of JOHN ODHIAMBO OTIENO as absolute proprietor and that all necessary forms be signed by the Deputy Registrar of the High Court as the situation may require.**

**3) That an order do issue directing the land registrar to rectify the register of land parcel Kamagambo/Kanyamaba/359 by deleting the name of ANYANGO ODOYO - deceased as the proprietor of half of the suit property or any other name whatsoever entered thereafter and substituting it with the name of as absolute owner of the half of the suit property.**

**4) Costs of the suit.**

**2.** The Summons is based on the grounds on the face of it and supported by the averments in the Supporting Affidavit sworn by the applicant. He deponed that together with his family, he has, without permission, been in continuous exclusive and uninterrupted occupation and use of the parcel known as Kamagambo/Kanyamaba 359 since 1961 up to recently. Further, that he has acquired the suit land by way of adverse possession and additionally, that he has been tilling the land for 12 years.

**3.** Urging that the defendant holds the suit land in trust for him, he annexed a copy of the green card to the Affidavit. He stated further that the Respondent succeeded the Estate of

the late Anyango Odooyo since Rongo Succession Cause No. 253 of 2012. In the succession cause he together with the Respondent were granted letters of administration of the estate. He annexed as JOO-2 the copy of the Grant. Further, he deponed that the Grant of Letters of Administration was then revoked later. He annexed a copy of said ruling as JOO-3(a) & (b).

- 4.** He stated that the issuance and revocation of Grant and the fact of the suit parcel reverting to the name of the deceased was after he had already acquired the portion he lays claim to by way of adverse possession. He annexed a bundle of photos as proof of his occupation on the land, marking them as JOO-4(a) & (b). He further deponed that the Respondent never wanted anything to do with the land. Further, that he only came to claim that same on 21012. That he had filed a suit in Migori ELC 100 of 2018 which was dismissed for want of prosecution. He annexed the as JOO6(a) and (b) the Notice to Show Cause for Summons and Summons for Revocation. He prayed that the Summons be allowed by the court.
- 5.** The Respondent filed a Replying Affidavit dated 8<sup>th</sup> March 2022 in response to the Summons. He stated that he was the

surviving son and legal representative of the estate of Anyango Odoyo who was his father (now deceased). Further, that his father and the applicants' father were jointly registered as proprietors of the suit land, with each holding half share as per the green card. He urged that the Plaintiff/Applicant fraudulently carried out the proceedings in Rongo Succession Cause No. 253 of 2012. In them he held himself as the absolute holder of the entire parcel. The Respondent then challenged the same and the court revoked the Grant. It issued a new one enjoining himself and the plaintiff as administrators of the estate. He stated that annexure JOO-4 is his house. Further, that he even has a sugarcane plantation on the said land. He stated that the allegation that the plaintiff had been using the land was misleading.

### **Evidence in court**

- 6.** The matter proceeded for hearing with the Plaintiff, **John Otieno Odhiambo**, testifying as **PW1**. He testified that the Defendant was his neighbour who owns parcel number 220 while he lives on parcel number 359. Further, that he filed the succession cause in court. He later realised that the land was

registered in the names of two people. He further stated that the Defendant advised him to file a Succession cause as the land did not belong to them. That was in a bid to have it registered in their names. After six years, the Defendant then came back to claim the land. He reiterated that he, PW1, had been living on the suit land since 1961.

7. During cross examination, he stated that he was the son of Matthews Odhiambo (deceased) and that the defendant was the son of the late Anyango Odoyo. Further, that their parents both owned the suit land. He did not challenge the joint registration. He stated that the he knew that the defendant did not live on the suit land but he had no proof of the same.
8. With that evidence above, the plaintiff closed his case. Then the defendant proceeded with his case.
9. **DW1** was the defendant, **Samuel Otieno Anyango**. He began by adopting his Replying Affidavit as evidence in chief. He testified that their fathers both passed away; and parcel no. 359 was registered in both their names. He testified that he resided on half of the land whereas the defendant resides on the other half.

- 10.** During cross examination, he stated that his father had half share of the suit land, and is buried on it. Further, that he lived on the land. However, he had no proof of the same. He denied ever filing Migori ELC 100 of 2018. Further, he denied agreeing that the plaintiff takes the whole parcel of land. He closed his case.
- 11.** Parties were then directed to file submissions. The Plaintiff filed submissions dated 24<sup>th</sup> June 2025 through the firm of Messrs. O.J. Okoth and Company Advocates whereas the defendant filed submissions dated 20<sup>th</sup> March 2025 through the firm of Messrs Owaka and Co Advocates.

### **The Plaintiff's submissions**

- 12.** Learned counsel for the Plaintiff submitted that he had acquired a half of the suit parcel by adverse possession for the reasons that; for a claim of adverse possession, the applicant must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. He placed reliance on the case of **Martha Njeri Karanja v Solomon Mukundi Gichinga; Equity Bank Limited (Interested Party) [2018] eKLR** which set out the requirements for one to be considered to have

acquired property by way of adverse possession. Counsel posited that in this present case, a half of the suit parcel KAMAGAMBO/KANYAMAMBA/359 measuring 1.2 Ha is in the name of the respondent's father ANYANGO ODOYO - Deceased (Ref. to applicant's exhibit—1; green card for the suit parcel). He added that the applicant testified that he together with his family have been in exclusive possession and use of the suit land since 1961 when he built his home on the land. He referred the court to applicant's exhibit—4a; bundle of pictures of the suit parcel and the homestead demonstrating the same.

- 13.** Counsel submitted that the applicant told the court that he entered and occupied the suit property in the year 1961 and is still in occupation to date. The applicant's occupation of the whole suit property, including the other half in the name of the respondent's father, had been open and uninterrupted. The applicant produced in evidence photographs of his homestead on the suit property to demonstrate that he has been in occupation of the property for several years. He urged that the applicant has satisfied the conditions for adverse possession. He has been in occupation for over 50

years since 1961 and still counting; the occupation has been open since he has built his home on the land; and it is without the permission of the registered owner. Further, the full intention of the applicant is to have the whole of the suit land since he has established his home on the land and cultivates the land for subsistence of his family for all those years. He prayed that the court allow the summons as prayed and the applicant be issued with the title to the suit land he has ever known as his home.

### **The Defendants' submissions**

- 14.** Learned counsel for the defendant submitted that the only issue that comes for determination is whether the Plaintiff's suit should be entertained and whether the Plaintiff can succeed on claim of adverse possession in this matter or not. He urged that the background of the case that he laid out forms the evidence that was presented by the Defendant in this matter during his Defence. The Plaintiff acknowledged that indeed as per the copy of green card annexed the suit property was jointly owned between his father and the Plaintiff's father. The Plaintiff's father died in the year 1992 yet the Defendant's father died in the year 1997 and both

used and occupied the parcel until their demise. The Defendant was still young when his father died in the year 1997. For the Plaintiff to claim that his family have been in exclusive occupation of the suit parcel is misleading since the Defendants father cultivated half of the land until his demise in the year 1997 and passed the button upon the Defendant who was the only son.

- 15.** He urged that the Plaintiff cannot convince the court of his exclusive use of the suit parcel through photographs that cannot speak to tell whose house or sugarcane photographed. He stated that one of the houses photographed belongs to the Defendant and the sugarcane plantation as well. The suit parcel is well demarcated on the ground since the years the parties' fathers were alive and the same boundary on the ground still exists to date. He urged that the Plaintiff never challenged the ruling in Kongo magistrate court revoking the Grant issued to him and which declared that the suit property was jointly owned. Instead he filed a new suit introducing adverse possession which is a mischief and which should not be entertained at all. He urged

that the Plaintiffs suit is unmerited and the same should be dismissed with costs to the Defendant.

### **Analysis and Determination**

**16.** This court carefully considered the Summons and the evidence before it. What is for determination is a simple issue: **Whether the Plaintiff has acquired the suit land by way of adverse possession.**

**17.** The doctrine of adverse possession is embodied in **Section 7** of the Limitation of Actions Act, which is in these terms:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

**18.** The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

**“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9,**

**10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

**(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.**

**(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land.”**

**19.** Under section 38 of the Limitation of Actions Act, a party may approach the court for a declaration that the property devolved to it in accordance with the doctrine of adverse possession. Section 38(1) of the Act states as follows;

**“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as a proprietor of the land.”**

**20.** The reference to the High Court in the above provision has been now interpreted to be the Environment and Land Court as established under the Environment and Land Court Act, pursuant to Article 162(2) of the Constitution of Kenya. This is then followed by a number of decisions which expound on the ingredients of a successful claim for adverse possession, some of which I now turn to below.

**21.** In the *locus classicus* of **Mtana Lewa v Kahindi Ngala Mwagandi (2015) eKLR**, the court said:-

**“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such**

**person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.**

**22.** It follows that in order for a claim of adverse possession to succeed there are certain conditions that must be fulfilled. The Court of Appeal in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** stated as follows:-

**“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land.**

**Therefore the critical period for the determination whether possession was adverse**

**is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College (1900)*1 Ch.19, 21.**

**23.** It is clear from the evidence and the pleadings that his matter stems from land that was jointly registered in the names of the fathers of the parties herein to wit; Matthews Odhiambo and Anyango Odoyo. The joint registration is not disputed in any way, shape or form and is evidenced by annexure JOO-1, the green card. The property was then transferred, pursuant to Rongo Succession Cause 253 of 2012, to the plaintiff. However, the plaintiff has, in evidence currently, misled the court about his earlier actions, because he omitted the fact

that initially, the succession cause had resulted in a certificate of Confirmation of Grant being issued to him, and wherein he was the sole beneficiary. Later, the grant was revoked and issued in the names of both the parties. That was upon the Respondent filing a Summons for Revocation of Grant dated 3<sup>rd</sup> November 2020. It is clear that the plaintiff had fraudulently obtained the Grant, claiming to be the only beneficiary of the land.

**24.** He now claims that by the time the Grant was revoked he had acquired the suit land by way or adverse possession. Adverse possession against who? Himself, since he was registered as owner then? That would be an absurdity if it were to be so. In any event, even if he could not have been legally registered as he obtained the Grant fraudulently, and the land remained jointly registered in the names of their deceased fathers, he could not acquire the same by virtue of adverse possession against them because he and the Respondents resided on the parcel of land by virtue of the permission of their deceased parents because he and the Respondent were children of the said parents. This behaviour of people who happen to be children (of owners) claiming

land yet they have been permitted by owners to reside on as children is evidence of sheer greed.

**25.** It follows that the Plaintiff's claim is misplaced and an abuse of the court process. His intention, from my interpretation, is to deprive the defendant of his rightful share of the half of the land that belonged to his father. One cannot lay claim to ownership of land by way of adverse possession where there exists a joint registration for part of the land. He is only entitled to his portion of the land by transmission. The Plaintiff has failed to establish any of the elements required to lay claim to land by way of adverse possession as by virtue of the succession cause, he is jointly registered as an owner of the land. The correct procedure for him to acquire his rightful share in the suit land is by way of Succession, which process is already on course and therefore the proceedings before this court are unnecessary.

**26.** In the premises, the Originating Summons is dismissed with costs to the defendant.

**JUDGMENT Dated, SIGNED and Delivered VIRTUALLY** via the **Teams Platform** on this **4<sup>th</sup>** day of **November 2025**.

**HON. DR. IUR NYAGAKA**

**JUDGE**

From **1:24 PM, in the presence of,**

Mr. Owaka Advocate for the Defendant

Mr. Okoth for the Applicant/Plaintiff