

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC (OS) E003 OF 2023

IN THE MATTER OF SECTIONS 7, 17, 37 AND 38 OF THE LIMITATION

OF ACTIONS ACT, CHAPTER 22, LAWS OF KENYA

IN THE MATTER OF THE LAND REGISTRATION ACT NO.3 OF 2012

IN THE MATTER OF APPLICATION FOR ACQUISITION OF TITLE BY

RIGHT OF ADVERSE POSSESSION ON LAND PARCEL NO.

KISUMU/NYALUNYA/829

BETWEEN

BEATRICE AUMA NYANGOR.....PLAINTIFF

VERSUS

WILFRIDA AOKO MUGA.....DEFENDANT

J U D G E M E N T

Vide the Originating Summons dated 20th February, 2023, the Plaintiff who claims to be entitled to land parcel known as KISUMU/NYALUNYA/829 presented the following questions for determination by this court against the Respondent: -

- 1) whether the Plaintiff is entitled by way of adverse possession to all that piece of land comprised in title KISUMU/NYALUNYA/829 registered in the names of the

- Defendant herein because the Plaintiff has been in possession and occupation for more than 12 years immediately preceding the presentation of this suit.
- 2) whether the Defendant's title to the said piece of land that is KISUMU/NYALUNYA/829 has been extinguished in favour of the Plaintiff under section 7, 17, 37 and 38 of Limitation of Actions Act.
 - 3) whether the Defendant should transfer to the Plaintiff the suit land being land parcel number KISUMU/NYALUNYA/829 free from all encumbrances failing which the Deputy Registrar of this Court be authorized to sign all necessary papers, documents and transfer forms, application for the consent of the Land Control Board to ensure that the Plaintiff is registered as owner of the said piece of land free from all encumbrances.
 - 4) whether the costs of this suit should be borne by the Defendant.

The Originating Summons was supported by the contents of the Plaintiff's Supporting Affidavit sworn on 20th February, 2023 and the annexures thereto.

The Originating Summons was opposed vide the contents of the Replying Affidavit sworn by the Respondent on 7th March, 2023.

Vide directions taken on 30th January, 2024, the matter was disposed of by way of oral evidence.

The Plaintiff's evidence

The Plaintiff testified as PW1 and called 2 witnesses. She adopted the contents of her Supporting Affidavit sworn on 20th February, 2023 and her witness statement as her evidence in chief.

The Plaintiff had stated in the witness statement that she is the current possessor and occupant of land parcel known as KISUMU/NYALUNYA/ 829. That the suit land was first registered in the name of Muga Sule (deceased in 1991) and later upon his demise, devolved to his widow the Defendant herein in 2019.

That both were well known to the Plaintiff as they are her village mates. That she together with her husband openly moved onto the suit land and settled thereon on one Saturday in April, 2008 and have since openly stayed thereon in peace and without any interruption or attempts at eviction by the registered.

That the current market value of the suit land and improvements thereon is estimated at Kshs.12,800,000/-.

That her husband died in the year 2016, was buried in his first wife's home away from the suit land but that the Plaintiff and their children continue to occupy the suit land.

That her entry, possession and use of the suit land have acquired the qualities of being peaceful, continuous, uninterrupted and notorious occupation that is adverse to any other claim to the ownership and occupation of the said parcel.

She produced as exhibits, a copy of her national identity card, copy of the green card for the suit land, copy of valuation report, 3 copies of birth certificates for the Plaintiff's children and a copy of death certificate of Silvanus E. Okoth.

On cross-examination, the Plaintiff stated that they did not buy the land. That the land was abandoned as nobody was using it so they decided with her husband to build on the land. That nobody gave them permission to build on the land.

PW2 was Luka Okeyo Madende, a valuer who testified that he received instructions from the Plaintiff and prepared a valuation report of the property which he produced as exhibit. That he found that there were 3 buildings on the land and that the overall

valuation was at Kshs.12,800,000/-. That the building had been on the site for 16 years.

On cross-examination, PW2 stated that according to the search, the registered owner of the land was Winfrida Aoko Muga.

PW3 was Vincent Wando Okwako who adopted the contents of his witness statement dated 3rd February, 2025 as his evidence in chief.

On cross-examination PW3 stated that he had stayed on the suit land since 2012 to date. That he stays in a single room on the suit land which has 10 semi-permanent rooms which have sitting rooms and bedrooms. That there are 6 single rooms that the Plaintiff has her home on the suit land. That him and the other tenants have lived peacefully on the land.

The Defendant testified as DW1. She adopted the contents of her Replying Affidavit as her evidence in chief. She had deposed to in the Replying Affidavit that it is true that the suit land was registered in the name of Muga Sule who is her husband, now deceased. That she commenced succession cause No. 616 of 2018 and in the year 2019, she transmitted the land to her name.

That it is not true that her husband sold the land. That sometime in the year 2013, the Plaintiff's husband forcefully encroached and/or

illegally remained on the suit land without consent of the registered owner.

Submissions

At the close of the evidence, directions were given for parties to file written submissions.

On behalf of the Plaintiff written submissions dated 30th June 2024 were filed by the firm of Joshua Nyamori Advocate for the Plaintiff. Counsel relied on the decided cases of Wambugu vs Njuguna [1983] KLR 172 where it was held that time begins to run when the claimant takes possession adverse to the interests of the true owner's title, Kweyu vs Omutu [1990-1994] EA 284 which established that actual, open, exclusive and uninterrupted possession for 12 years extinguishes the registered owners title and Mbira vs Gachui [2002] 1 EA 137 which held that a person is in adverse possession if he has occupied land openly and as of right, without force, secrecy or permission for the prescribed period.

Counsel submitted that the plaintiff and her husband who entered the suit land in the year 2008 were never challenged or evicted by the registered owner. That they had developed the land and had continuous and uninterrupted possession from the year 2008 to

2022 a period of 14 years without any challenge from the defendant or her predecessors. That the Defendant presented no evidence of any attempt to evict or assert ownership over that period. That the evidence of the valuer confirms long term, permanent occupation consistent with ownership.

Counsel submitted further that the Defendant failed to rebut the plaintiff's claim as she admitted that the plaintiff did not purchase the land and had no consent and provided no evidence to rebut the core facts of peaceful, open, uninterrupted possession for over 12 years. That the Defendant's title stands extinguished under section 7 of the Limitation of Actions Act and that the plaintiff is entitled to be declared the lawful owner and to be registered as such.

The Defendant filed written submissions dated 22nd May, 2025. She submitted that the plaintiff had failed to prove the legality of the encroachment onto the suit land. That she buried her late husband in the year 1987 who died intestate leaving behind people surviving him and assets one of them being the suit land. That the suit land was later transferred to her.

The Defendant urged the court to dismiss the claim tabled by the plaintiff and to proceed to issue eviction orders against the plaintiff

from the suit land or amicable purchase of only the portion of the same parcel at the current market value in reference to where the plaintiff has built her residential house/rental rooms.

Analysis and determination

The first question on the Originating Summons is whether or not the Plaintiff is entitled by way of adverse possession to all that piece of land comprised in the title KISUMU/NYALUNYA/829 registered in the name of the Defendant herein because the Plaintiff has been in possession and occupation for more than 12 years immediately preceding the presentation of suit.

In the case of *Mtana Lewa -vs- Kahindi Ngala Mwagandi [2015] e KLR* the court of Appeal held that:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that 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.”

In order therefore for a claim of adverse possession to succeed the claimant must prove existence of the subject land and a registered or true owner thereof against whose title time runs in favour of the adverse possessor/trespasser. The law requires in Order 37 Rule 7 (2) that a certified extract of the title to the land in question be annexed to the Affidavit in support of Originating Summons. This is to confirm to the court from the very onset of the suit existence of the suit land and the name of the registered owner thereof

In this case, copy of register (green card) in respect of the suit land attached to the Supporting Affidavit shows that the land parcel No. KISUMU/NYALUNYA/829 measuring 0.15Ha was registered in the name of Muga Sule on 10th May, 1991 as a first registration. Certificate of official search produced showed that the land was later registered in favour of Wilfrida Aoko Muga, the Defendant herein on 30th July, 2019.

This information was confirmed by the Defendant who averred in paragraphs 3 - 5 of her Replying Affidavit that the suit land was registered in the name of Muga Sule who was her husband but who

is now deceased. That after the death of her husband, she undertook succession in the year 2018 and the land was transmitted to her on 30th July, 2019.

The other requirement for a claim of adverse possession to succeed is that the entry onto the suit land by the claimant must have been non-permissive and adverse to the interest of the registered owner.

In the present case, the Plaintiff deposed in the Supporting Affidavit that the suit land though, registered in the name of Muga Sule remained abandoned vacant and unoccupied over the years. That in 2008 her husband by the name of Silvance Dee Okoth, deceased, and her had a need for a place to settle in as home and to use for cultivation. That they identified the suit land as the most ideal location for their habitation. That in the same year 2008 they announced to friends, relatives and members of the public that they had identified the suit land as their future and permanent home and they would soon move there to build a dwelling house. That they did not seek anyone's permission, not even the permission of the then registered owner.

That on a Saturday, in April, 2008 at around 10 a.m. she together with her husband set forth from their previous dwelling place which

was the home of her co-wife and openly moved onto the suit land whereupon with the assistance of neighbours, relatives, friends, church mates and hired workers commenced construction of a dwelling house, putting up a 2 roomed semi-permanent building that they settled in and utilized as their family home. That in doing this, they were assisted by about 30 people in number. That they have since openly stayed on the suit land in peace.

According to the Defendant, as she stated in paragraphs 7 and 8 of the Replying Affidavit, it was in the year 2013 that the Plaintiff's husband forcefully encroached onto and illegally remained on the suit land without consent of the registered owner and the bona fide beneficiaries. The date of entry onto the land is in contention although the manner of entry seems not to be disputed. While the Plaintiff pleaded and averred that the date of entry onto the suit land was on a Saturday in April, 2008, the Defendant's position is that it was in the year 2013, that the Plaintiff and her husband entered the suit land. For a claim of adverse possession to succeed, a claimant must prove that a period of 12 years has elapsed from the time of non-permissive entry or from the start of his/her non-permissive exclusive, present on the suit land. This requirement is anchored on the provisions of section 7 of the Limitation of Actions

Act which provides a period of 12 years from the date of unlawful entry or encroachment being the date when the cause of action arose for the true/registered owner to bring action for recovery of the land. When the limitation period ends without the true/registered owner taking action to assert his title, the adverse possessor's right to claim title on the basis of the adverse possession crystalizes.

The burden therefore rests with the Plaintiff to prove the date of entry and that since then the period of 12 years has elapsed in terms of section 7 of the Limitation Act.

The Plaintiff adopted the contents of her witness statement dated 2nd April, 2024 wherein she had rehashed the contents of her Supporting Affidavit on her she together with her late husband entered and developed the suit land. She maintained that her entrance there onto was in the year 2008.

Although PW2 claimed to have been a tenant on the suit land since the year 2012, no documentary evidence in the form of tenancy agreement or rent payment receipts or rent book were produced to confirm that PW2 was indeed a tenant of the Plaintiff in respect of

the suit land since 2012. He adduced no evidence in respect of the date when the plaintiff entered the land.

The next element of adverse possession that the claimant needs to prove is that his/her occupation of the suit land has been exclusive, open, peaceful and without interruption and as right and hostile to the rights of the registered owner. The Plaintiff's case is that since they entered the suit land in April, 2008, they have since stay thereon openly in peace and without any interruption or attempts at eviction by the registered owner, his family members or any third party. That they built a permanent bungalow on the suit land where to they moved to from their previous 2 roomed semi-permanent house and without interruption stayed as a family ever since. That in addition to the family dwelling house, they built other dwelling houses which they leased to tenants including;

- (i) One permanent building with six (6) single units
- (ii) One permanent building with five (5) units each comprising of a sitting room and bedroom; and
- (iii) One semi-permanent building with 10 single room units.

That they sunk and built a cemented septic tank and further piped and connected the dwelling house to water supply from Kisumu Water and Sewerage Company (KIWASCO) and power supply from Kenya Power and Lighting Company (KPLC) Limited. That she and her husband planted trees in the compound and grew bananas which developments are all valued at Kshs.12,800,000/-.

That since her husband died in the year 2016 and was buried at the home of his first wife by the name of Florence Oyucho, the Plaintiff together with her children continued to stay within the suit land openly, peacefully and continuously without interruption or interference.

The Defendant's position as stated in paragraphs 13 and 14 of the Replying Affidavit is that the Applicant and her family members forced themselves on the suit land in spite of them being aware of the consequences of continuing to develop the same. That it was within the plaintiff's knowledge that the suit parcel was illegally acquired.

The presence and developments of the Plaintiff on the suit land were not denied.

The registered owner of the suit land as the evidence shows was Muga Sule who owned the land from the year 1991 when it was registered in his name till 2019 when it was transmitted in favour of the Defendant vide Successions Cause No.616 of 2018.

One the documents produced by the Defendant was a certificate of death No.C303016 dated 10th July, 2012 in respect of James Muga Sule. It shows that he died on 21st December, 1987 aged 52 years at Kasule sub-location. The date of death of the registered owner was not challenged. The registered owner did not feature in the plaintiff's narration of how she and her late husband entered the suit land. She did not indicate where the registered owner was as at the time of her entry onto the land and whether he was aware of the entry.

The evidence contained in the death certificate means that in the year 2008 when the Plaintiff claims to have entered the suit land with her husband, or even the year 2013 which according to the Defendant was the year of entry, the registered/true owner thereof was deceased. He was not available to act and assert his rights as anticipated by section 7 of the Limitation of Actions Act. Time could not therefore start to run against the interests or title of the deceased registered owner.

The law protects property of deceased persons until such time as there is appointed a personal representative in accordance with the provisions of the Law of Succession Act. Section 2(1) of the Law of Succession Act provides that:

“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

All other acts done in respect of the property of a deceased person without complying with the Act, like the Plaintiff's entry and developments on the suit land amount to intermeddling with the estate of the deceased under the provisions of section 45 of the Law of Succession Act which provides that no person shall for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person except as provided in the Act. Hence acts done contrary to these provisions cannot have the effect of causing the title of the deceased to the suit land to become extinguished or conferring title to the claimant.

The Defendant herein only became administrator of the estate of the deceased on 22nd October, 2018 when the Grant of Letters of Administration Intestate was issued. From the date of the Grant to the date of filing the Originating Summons, the requisite period of twelve (12) years had not expired. The court notes that the Defendant was not sued in representative capacity as administrator of the estate of the deceased.

The court has also noted on reading the green card produced as exhibit that the Plaintiff did on 23rd November, 2016 place a caution on the suit land on the grounds that she claimed a beneficial owner's interest on the land. It further shows that later again after the land had been transferred in favour of the Defendant, the plaintiff placed another caution on 12th December, 2021 on the grounds that she claimed a purchaser's interest in the land. In this suit, she testified that together with her deceased husband, she just entered the land as it was unoccupied, vacant and abandoned and took possession and begun to develop it without seeking anybody's permission even the permission of the registered owner.

It is only the Plaintiff who knows which of these versions is the true position on how she entered the suit land. But whether she entered as a beneficial owner, or as a purchaser or as a trespasser who

found land that was vacant, abandoned and unoccupied and entered and begun to develop it, it is clear that it happened when the owner was long deceased and unable to protect his interest and his estate was not yet succeeded so as to have a personal representative who could take appropriate action.

I find that the entry of the Plaintiff onto the suit land was not with the knowledge of the registered owner, and that the said entry onto and occupation/possession of the suit land do not meet the elements of adverse possession.

The 1st question on the Originating Summons is therefore determined in the negative.

The second question is whether the Defendant's title to the suit land has been extinguished in favour of the Plaintiff under section 7, 17, 37 and 38 of the Limitation of Action Act.

Under section 17 of the Limitation of Actions Act, title of the registered owner becomes extinguished when the registered owner fails to take action within the limitation period. In this case, the registered owner was deceased as at the time of entry of the Plaintiff onto the suit land hence unable and unavailable to take action to assert his rights.

Further, the Defendant did not inherit the Plaintiff as a liability in the estate of the deceased as the entry occurred after the deceased's death.

For the foregoing reasons the 2nd question on the Originating Summons is determined in the negative.

The third question is whether the Defendant should be ordered to transfer the suit land to the Plaintiff.

On the basis of the determinations herein above, there is no basis for the court to make an order for transfer of the suit land in favour of the Plaintiff.

The court notes that the Defendant in her submissions offered to the plaintiff an option of purchase of the portion of the suit land where the residential/rental houses are at current market value.

Conclusion

Having determined that the plaintiff has not proved that she has had adverse possession of the suit land and that the registered owner's title to the suit land has not become extinguished and that there is no basis upon which the court can make an order for transfer of the suit land in favour of the plaintiff, this court finds that the plaintiff has failed to prove her case on a balance of

probabilities. The suit commenced vide the Originating Summons dated 20th February 2023 is hereby dismissed. Costs of the suit are awarded to the Defendant.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 27th day of November, 2025.

**E. ASATI
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Omanga h/b for Nyamori for the Plaintiff

Defendant present in person.