

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LAND CASE E003 OF 2023 (OS)

IN THE MATTER THE LIMITATION OF ACTIONS ACT, CHAPTER 22,

AND

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

BETWEEN

ANDREW OGOL OWINO APPLICANT

VERSUS

CONSOLATA AWITI OBUNGA 1ST RESPONDENT

ELIAS OCHIENG OUKO 2ND RESPONDENT

J U D G E M E N T

Vide the Originating Summons dated 31st July, 2023, the Plaintiff sought for the following relief against the Defendants;

- 1) The Plaintiff herein who is the current occupant of all that parcel of land known as KISUMU/KANYAWEGI/4525 be declared and registered as the legal owner of the said parcel of land through the doctrine of adverse possession.
- 2) The Land Registrar Kisumu do issue a title deed for the said land parcel known as KISUMU/KANYAWEGI/4525 to the Plaintiff.

3) Costs be provided for.

The Originating Summons was based on the grounds that: -

1. the Applicant herein is the current occupant of land parcel No. KISUMU/KANYAWEGI/4525 having entered into and possessed the land in the year 1991.
2. the Applicant herein has been in open, uninterrupted, quiet possession of the said land parcel No. KISUMU/KANYAWEGI/4525 for the past over 30 years.
3. the Applicant's occupation of the said land parcel for the past over 30 years has been without permission from anyone or any institution and he has built a homestead on one portion of the land parcel while the rest of the land he has donated to the local church who have equally constructed a church building on the land.
4. the Respondents have without any colour of right and illegally issued a demand notice to the Applicant allegedly claiming ownership of the land and that the Applicant do give vacant possession of the said land parcel.

5. That it is in the interest of justice that the orders sought be granted.
6. no prejudice whatsoever shall be occasioned to the Respondents if the orders sought are granted.
7. the Applicant has acquired the land parcel lawfully after occupying and possessing the land for over 30 years hence he invokes the prescriptive doctrine of adverse possession against the Respondents and any other misguided claimant.

The Originating Summons was supported by the averments in the Supporting Affidavit sworn by the Applicant on 31st July, 2023.

In response to the Originating Summons, the Defendants filed a Replying Affidavit sworn by the 2nd Defendant on 27th September 2023.

Vide directions given on 23rd October, 2023, the matter was disposed of by way of *viva voce* evidence.

The plaintiff's evidence

The Plaintiff testified as PW1 and called a witness. He adopted the contents of his Supporting Affidavit in which he stated that in 1991 he entered into and occupied all that parcel of land known as KISUMU/KANYAWEGI/4525 and since then he has possessed and

utilized the said parcel of land. That he then arranged for a portion of the land to be donated to the local church to put up a church building and the rest of the portion he put up his homestead.

That together with his family they have been utilizing the land parcel for cultivation and as a home for a period of over 30 years.

That the occupation had been without permission or consent of anyone and that it has been uninterrupted, persistent and open for the entire period of over 30 years until recently when the Defendants began threatening them with eviction.

That upon inquiry, he found out that the Defendants had obtained Letters of Administration to the estate of the deceased registered owner and proceeded to transfer title into their own names in the year 2023.

The plaintiff had rehashed the contents of the Supporting Affidavit in his witness statement dated 15th February, 2024 also adopted as part of his evidence in chief.

He produced photographs, copy of chief's letter dated 8th June, 2021, copy of title deed and sale agreement dated 17th March, 1991 as exhibits.

In court he stated that he stays on the suit land. That his home is on parcel number KISUMU/KANYAWEGI/4527 which he also owns.

On cross-examination, he stated that the church is on land parcel No. KISUMU/KANYAWEGI/4525 which land he had bought for the church. That the suit land belonged to Elias and that when Elias died, and his wife, the 1st Defendant herein, went away, the land remained and his (Elias's) brothers sold part of the land to him.

That the 1st Defendant's home used to be on the suit land parcel No. KISUMU/KANYAWEGI/4525 where her husband was buried. That the brothers of the 1st Defendant's husband demolished her house when the 1st Defendant got married elsewhere.

PW2 was John Onyiego Okombo who adopted the contents of his witness statement dated 15th February, 2024. He had stated in the witness statement that he remembered the church being gifted a portion of land by the plaintiff herein to allow the church build and practice/carry out their religious activities thereon.

That sometime in 1997, they were allowed to come into the suit land where they built a toilet, a church priest/lay person's house christened Abraham's house and further erected a white cross in the middle of their set up occupation.

He stated further that besides the suit land there were other buildings of the church extending into a different land parcel but still forming one compound with no boundary. That they have been

in continuous, peaceful and uninterrupted occupation of the suit land while carrying out religious activities until sometime in the year 2021 when they learnt that the Defendants had done succession and transmitted the ownership of the suit land into their names.

In PW2 court testified that the Plaintiff uses land parcel No. KISUMU/KANYAWEGI/4525 and that there are structures thereon including a foundation for a church.

That the 1st Defendant started claiming the suit land in the year 2023.

On cross-examination he stated that he was given a portion of land parcel No. KISUMU/KANYAWEGI/4525 by the Plaintiff as a gift. That he does not stay on the said portion of the land. That the Plaintiff does not till or live on the suit land.

The Defendant's evidence

The 2nd Defendant testified as DW1. He adopted the contents of the joint Replying Affidavit sworn on 27th September, 2023. He produced a copy of summons by Office of the Chief, death certificate for Elias Obunga, Certificate of Official Search, application for certificate of official search, Grant of Letters of Administration, Certificate of Confirmation of Grant, Certificate of

Official Search for KISUMU/KANYAWEGI/4526, Certificate of Official Search for KISUMU/KANYAWEGI/4527 and for KISUMU/KANYAWEGI/10679 as exhibits.

He stated that there are no structures on the suit land. That the photographs produced show structures on other parcels of land and not the suit land.

That the suit land had been in possession of the Defendants since the year 2020. That the land belongs to Elias Obunga Okumu. That the Plaintiff's home is on land parcel number KISUMU/KANYAWEGI/4527 and the church is on No. KISUMU/KANYAWEGI/4530.

The 1st Defendant was DW2. She adopted the contents of the joint Replying Affidavit as her evidence in Chief. She stated that she is the wife of Elias Obunga, deceased who was the owner of the suit land and that she owns only one piece of land which is the suit land herein.

That she had left home when her husband died and that when she came back during the period of Covid-19, she found the Plaintiff on the land and after they had talked, she took over the land. That there is no church on the suit land. That the church land shares a boundary with the suit land.

Submission

Written submissions dated 10th July 2025 were filed on behalf of the plaintiff by Peter M. Warindu & Co. Advocates and written submissions dated 24th September 2025 were filed for the Defendants by Sigoma Advocates.

Issues for determination

- a) Whether or not the Plaintiff has acquired title to the suit land by adverse possession
- b) Whether a title deed should be issued to the Plaintiff in respect of the suit land.
- c) Costs of the suit.

Analysis and determination

The first issue for determination is whether or not the Plaintiff has acquired title to the suit land by adverse possession.

Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya adverse possession is anchored on the provisions of sections 7, 13, 17 and 38 of the Limitation of actions Act. Adverse possession is recognized by the law in section 7 of the

Land Act as one of the ways of acquiring title to land and in section 28 of the Land Registration Act as an overriding interest to which registered land is subject. Under section 7 of the Limitation of Actions Act, the prescribed period of exclusive possession for adverse possession to crystalize is 12 years. That is to say that if the registered/true owner of the subject land takes no action to assert his/her title or rights to the land within 12 years from the date the adverse possessor took possession, then the title of the registered/true owner becomes extinguished under the provisions of section 17 of the Act and the adverse possessor's claim matures. The adverse possessors can then seek redress as provided for under section 38 of the Limitation of actions Act and Order 37 of the Civil Procedure Rules, 2010.

The burden of prove of adverse possession as provided for in sections 107 to 109 of the Evidence Act, rests with the claimant/adverse possessor as the party who desires that the court gives judgement in his favour and as the party who would fail if no evidence at all were given by either party also as the party who wishes the court to believe the existence of adverse possession.

In order for a claim based on adverse possession to succeed, the claimant must prove that the land belongs to a registered owner

who or whose personal representative is the defendant in the suit, that the claimant's entry and occupation of the suit land is contrary to the interest of the registered owner. That the occupation was with the knowledge but without the consent of the registered owner and that the occupation has been open, hostile, continuous uninterrupted and peaceful for the period of 12 years.

These ingredients of adverse possession have been outlined in case law for instance in Kimani Ruchure vs Swift Rutherfords & Co. Ltd (1980)KLR 10 Kneller J held that "the Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion)

And in Gabriel Mbui vs Mukindia Maranya [1993] eKLR the court held adverse possession to be:

"..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it."

In the Originating Summons, the Plaintiff claims to be the current occupant of the suit land having entered into possession in the year

1991 and that he had had open, uninterrupted and quiet possession thereof for the past over 30 years. In his evidence in court, he testified that on land parcel No. KISUMU/KANYAWEGI/4525 (the suit land) there is a church. That he has his home on parcel No. KISUMU/KANYAWEGI/4527. That when he bought the suit land he gave it to the church. That he has no interest in the land and he does not use it and that the court should give the land to the church. He confirmed this on cross-examination. That it is only the church that was on land parcel No. KISUMU/KANYAWEGI/4525. That he has no other evidence apart from the church to show that he stays in the church on parcel number KISUMU/KANYAWEGI/4525. That he had never been served with eviction order. That the side of the land he bought he donated to the church and part of it he was tilling.

PW2's evidence was contradictory because at the beginning of his testimony he stated that it is the Plaintiff who uses the suit land and that the structures which are on the suit land include a foundation for a church, toilets, a house for the pastor, Abraham's house and the cross.

On cross-examination, he testified that he also owns a piece of the suit land which he was given as a gift.

He concluded that that the church had been on the land for over 30 years and that the Plaintiff did not live on or till the suit land. This testimony leaves gaps as to whether it is the church or the plaintiff who has possession of the land and whether the plaintiff can in the circumstances claim to have had exclusive possession of the land.

It is clear that the Plaintiff as an individual has no interest in the suit land. He urged the court to give the land to the church. Although he claims to have bought the land, no sale agreement between him and the registered owner was produced. He claimed to have donated the land to the church, again no evidence was given to show this.

Although the plaintiff produced photographs to show the developments on the land as evidence of possession, no nexus was established between the photographs, the suit land and the Plaintiff's claim. The defence case was that the structures shown on the photos are on a neighbouring land. It was incumbent upon the plaintiff to bring evidence that connects the images in the photographs to the suit land and the plaintiff's claim.

The plaintiff stated on cross examination that the evidence he has that he is in occupation of the suit land is the presence of the

church on the land. However, no evidence was produced in the form of a survey report to prove that the church is actually situated or built on the suit land. He also had no evidence that he is one and the same entity as the said church, or that he is the authorized agent of the church with capacity to sue on behalf of the church.

The effect of a finding that a party has acquired title by adverse possession is that the registered owner loses his/her rights to the land. As the right to land is protected by both the Constitution and statute law, such finding must be based on cogent evidence lest the court aids arbitrary deprivation of the right to property and thus violate the provisions of article 40 (2) of the Constitution of Kenya 2010.

It was common ground that the suit land belonged to Elias Obunga the husband of the 1st Defendant before the year 2023 when it was transmitted in favour of the Defendants. The Defendants produced a copy of death certificate No 0291522 in respect of Elias Obunga Okumu. It showed that Elias Obunga Okumu died on 28.4.1986. PW1 testified that the suit land was sold to him after the deceased had died. He testified further that it was in the year 1991 when he entered the suit land and begun doing activities thereon. If this evidence were to be taken to be true, it means that the plaintiff

bought, entered and carried activities on land belonging to a deceased person and in respect of which no succession had been undertaken in accordance with the provisions of the Law of Succession Act. That he even gave out part of it as a gift to the church/PW2. This is contrary to the provisions of section 45 of the Law of succession Act. The actions of the plaintiff amount to an offence of intermeddling as defined in section 45 of the Law of Succession Act and not adverse possession. Such acts cannot create an overriding interest as provided for in section 28 (h) of the Land Registration Act.

The Defendants have been sued in their personal capacities yet they only became registered owners in the year 2023 between which period and the date of filing the current suit, the requisite period of 12 years had not elapsed.

After carefully analysing the evidence presented, I find that the plaintiff has not proved his claim of adverse possession of the suit land.

The second issue for determination is whether a title deed should be issued to the Plaintiff in respect of the suit land.

Having found that the claim of adverse possession has not been proved, I find no basis for making an order that title deed in respect of the suit land be issued to the plaintiff.

I find that the Plaintiff has not proved his claim on a balance of probabilities. The suit is dismissed. Costs of the suit are awarded to the Defendants to be paid by the Plaintiff.

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.

Gwada for the Plaintiff/ Applicant

No appearance for the Defendant/Respondent.