

REPULC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC (OS) NO. E009/2023

SIMON AKWALA PETER AKOTH APPLICANT

VERSUS

PETER OMOLLO OSANO RESPONDENT

J U D G E M E N T

Vide the Originating Summons dated 13th September, 2023, the Plaintiff who claims to be entitled to be declared as the proprietor of 0.07 Ha of land parcel Number KISUMU/KASULE/1060 by virtue of adverse possession prayed the court to determine and order that;

- (1) the Applicant/Plaintiff to be declared the proprietor of 0.07 Ha parcel of land No. KISUMU/KASULE/1060 which he has occupied openly, exclusively, continuously and without interruption from 1991 to-date, for a period over 30 years.
- (2) the applicant has acquired a bona fide title to 0.07 Ha of land parcel number KISUMU/KASULE/1060 by adverse possession.

- (3) the Applicant is entitled to be registered as the proprietor of land KISUMU/KASULE/1060 measuring 0.07 Ha.
- (4) the Defendant be ordered to transfer 0.07 Ha. portion of the said parcel number KISUMU/KASULE/1060.
- (5) in default of the Defendant failing to transfer the said parcel to the Applicant, the Deputy Registrar to execute the necessary documents to effect the transfer of ownership of 0.07 Ha of land parcel number KISUMU/KASULE/1060 from the Respondent to the Applicant.
- (6) the Defendant be restrained from entering, wasting, damaging and/or in any way alienating the whole of the suit parcel No. KISUMU/KASULE/1060 until the hearing and determine of this matter.
- (7) the costs of this suit be awarded to the Plaintiff/Applicant.

The Originating Summons was supported by the averments in the Supporting Affidavit of the Plaintiff sworn on 13th September, 2023.

The Defendant's response to the Originating Summons was vide his Replying Affidavit which he swore on 5th March, 2024.

Vide directions given on 4th November, 2024, the hearing proceeded by way of *viva voce* evidence.

The evidence

Plaintiff's case

The Plaintiff testified as PW2 and called 3 witnesses. He adopted the contents of his witness statement dated 13th September, 2023 as his evidence in chief. He had stated in the witness statement that sometimes on 2nd May, 1991 he was introduced to one Morris Juma Osewe who showed him land parcel known as KISUMU/KASULE/1060 (the suit land herein) but which he identified as KISUMU/KASULE/976. That after executing an agreement on 2nd May, 1991, he paid a total sum of Kshs.37,000/-.

That he immediately took possession of the entire suit land by constructing a semi-permanent structure housing 9 tenants as from 1992 and that he also built toilets, *kiosks* and 2 bathrooms and fenced the entire compound with concrete poles and chain link.

That when he brought a surveyor to the site to confirm for him the boundary in the year 1994, the Surveyor confirmed that the land sold to him was not parcel No. KISUMU/KASULE/976 but KISUMU/KASULE/1060.

That however, since he took possession of the suit land in the year 1991, he had had continues use and occupation of the entire parcel and had been colleting rent from the said premises, that is, the 9 units and 2 *kiosks* as the landlord without any interruption whatsoever.

That in June, 2023, the Defendant went to the premises and told the Plaintiff's tenants that he (Defendant) was the new registered proprietor of the premises, that they should vacate or sign lease agreements with him.

The Plaintiff also adopted the contents of his Supporting Affidavit as his evidence. He produced 7 documents as listed in the list of documents dated 13th September, 2023 as exhibits in the case namely; certificate copy of register for KISUMU/KASULE/1060, agreement for sale, ground survey report for parcel No. KISUMU/KASULE/1060, transfer of Land form for parcel No. KISUMU/KASULE/2661, title deed for KISUMU/KASULE/2661, Title

deed for KISUMU/KASULE/5145 and defendant's Advocate's demand letter.

On cross-examination, he stated that the parcel number indicated on exhibit P.2, (the land sale agreement) was No.976 Kisumu Kasule. That he was buying where the seller was showing him and that he did not conduct search at the time of purchase. That he did not get a Surveyor to confirm the position of the land he was buying.

That he settled on the land with the permission of the seller. That he sued the Defendant because he was interfering with the tenants.

PW1 was one Patrick Wasonga Mbasu. He adopted the contents of his witness statement where he had stated that he is the owner of land parcel No. KISUMU/KASULE/2661 and that the Plaintiff was his neighbour. That when he took possession of his land in the year 2002, he found the Plaintiff had already constructed structures on the suit plot which he had leased out to various tenants. That his land shares a common boundary with that of the Plaintiff.

On cross-examination, PW1 stated that the Plaintiff showed him his (Plaintiff's) title deed to the suit land reading KISUMU/KASULE/1060. That although in the witness statement he had stated that his parcel number was KISUMU/KASULE/2661, the correct number was KISUMU/KASULE/2261.

PW3 Colling Odhiambo Odera adopted the contents of his witness statement stating that he was employed by the Plaintiff as a caretaker in respect of rental property on the suit land in the year 2007.

On cross-examination, he stated that he had known the Plaintiff since the year 2007 when he became the Plaintiff's tenant.

PW4 was Argwings Kodhek Onyach who stated vide his witness statement that the Plaintiff was his neighbour since 1999 and that at the time he acquired his land No. KISUMU/KASULE/5145 the Plaintiff was already in occupation of the suit land.

On cross-examination, he stated that the Plaintiff bought the land from Mzee Samson Ngwena Osome with whom the Plaintiff lived in peace until his (Osome's) death.

Defendant's case

The Defendant testified as DW1. He relied on the contents of his Replying Affidavit sworn on 5th March, 2024 and his witness statement dated 8th October, 2024 as his evidence in chief. He had stated in the Replying Affidavit that the suit land was previously registered in the name of Helter Bosire Nyakundi who after passing on, succession to the estate was conducted vide Winam Succession Cause No. E140 of 2022.

That he bought the land from Moses Bosire Nyakundi on 3rd December, 2022 at Kshs.2,600,000/- which he paid in full. That thereafter the land was registered in his name and he was issued with a title deed.

That immediately he bought the land, he took possession thereof. That the Plaintiff has not been in occupation of the land as claimed.

That the Plaintiff had, with the authority of one Moris Juma Osewe, been granted occupation of parcel number KISUMU/KASULE/976 and not the suit land.

That the people he bought the land from used to till the land and were in occupation of the same until they sold it to him.

The Defendant produced the documents which were attached to the Replying Affidavit as exhibits. These were certificate of official search, copy of Grant of Letters of Administration Intestate, application for confirmation of Grant Certificate of confirmation of Grant, land sale agreement, abstract from police, copy of advertisement, Kenya gazette and copy of the title deed.

On cross-examination he stated that he had never taken possession of the land since he bought it. That prior to his purchase of the land, he visited the land and saw the developments thereon.

DW2 was Moses Bosire Nyakundi. He relied on the contents of his witness statement dated 8th October, 2023 as his evidence in chief.

On cross-examination he stated that the land was in the name of his father by the name of Helter Bosire Nyakundi before it was transmitted to his name.

That Helter Bosire Nyakundi died in the year 1995. That it was Helter Bosire Nyakundi who let the people build on the land. That the people were to build temporary structures/houses.

At the close of the evidence parties filed written submissions on the case.

Plaintiff's written submissions

Written submissions dated 1st October, 2025 were filed on behalf of the Plaintiff by the firm of K'Owino & Company Advocates.

Counsel submitted that the issue for determination is whether the Plaintiff has been in continuous and uninterrupted occupation and use of the suit parcel without interruption for a period of over 12 years.

Counsel relied on the cases of Elira Nyongesa Luseneka & Another -vs- Nathan Wekesa Omach – Kisumu Civil Appeal No.134 of 1993 (Ur) and the case of Kasuve -vs- Mawani Investment Ltd & 4 Others [2004]eKLR 184 at page 188 and the case of Wambugu -vs- Njuguna (1983)eKLR and submitted that the Plaintiff moved into the suit land in the year 1991 pursuant to an agreement with Moris Juma Osewe who was not the registered owner of the suit land and is not in any way related to the Defendant or DW2.

That the entry of the Plaintiff onto the suit land was non-permissive. That the witnesses for the Plaintiff corroborated that

as at the time of entry onto their lands, the suit land was occupied and fully developed.

That by the time the Defendant got registered as proprietor of the suit parcel in the year 2023, DW1's right to the same was already extinguished and that the Defendant purchased the land subject to the Plaintiff's right which had been acquired and crystalized by virtue of the doctrine of adverse possession.

Counsel urged the court to allow the claim.

Written submissions for the Respondent

It was submitted on behalf of the Defendant vide the written submissions dated 25th July 2025 and filed by Otieno, Yogo, Ojuro & Company Advocates, that the Applicant's claim of adverse possession is legally untenable. That the Applicant had no lawful basis or agreement entitling him to occupy parcel KISUMU/KASULE/1060 and that his occupation was not only unauthorized but also legally indefensible. That such occupation cannot be transformed into adverse possession merely through lapse of time especially where it begun as an unjustified intrusion. That the Applicant's occupation of the suit land parcel No.

KISUMU/KASULE/1060 was neither in contract nor defensible under contract or adverse possession.

That the Applicant has not met the threshold required to sustain the claim.

On when did the Applicant take possession and occupation of the suit property, Counsel submitted that the occupation that the Applicant claim to have taken in 1992 was legally irrelevant to a claim of adverse possession at that time as the Respondent was not yet the registered owner.

Counsel relied on the case of Francis Gitonga Macharia -vs- Muiruri Waithaka [1998] KECA 277 (KLR) to support the submissions and submitted further that from the time the Respondent became registered owner on 8th May, 2023 to the date of filing suit 12 years had not yet lapsed.

That hence the Applicant's claim is not only premature but also legally untenable.

That as the Applicant admitted during cross-examination that his entry and possession of the land was with the permission of one Teresa Atieno Juma, such admission negates the fundamental

requirement of adverse possession that the occupation must be adverse to the title holder's interest.

Relying on the provisions of section 24 and 26(1) of the Land Registration Act, Counsel submitted that the Respondent's title remains valid and indefeasible until and unless declared otherwise by the court.

Counsel urged the court dismiss the claim in its entirety with costs to the Respondent.

Issues for determination

The sole issue for determination is whether or not the Applicant has had adverse possession of the suit land.

Analysis and determination

The suit land is land parcel No. KISUMU/KASULRE/1060 and the claim seems to be in respect of a portion thereof measuring 0.07 Ha. The Plaintiff's explanation on how he entered the land is that he bought a different land No. KISUMU/KASULRE/976 from a person who was not the registered owner of the suit land. That the seller, one Morris Juma Osewe instead of showing the Plaintiff

the sold parcel of land, showed him the suit land, allowed him to enter and settle thereon and develop the same.

The Plaintiff's evidence was that he discovered this in the year 1994 when he brought a surveyor who informed him that the land he was occupying was No.1060 and not the sold land. There is no evidence that the Plaintiff took any step against the seller to rectify the anomaly. He has not sued the seller herein.

The Plaintiff however continued to remain on the suit land and develop the same. According, to the Plaintiff, this was adverse to the interest of the registered owner. The certificate of official search produced as exhibit shows that as at the time of entry of the plaintiff onto the suit land, the registered owner thereof was Helter Bosire Nyakundi, the father of DW2 who became registered owner on 18. 12. 1990. According to the Defendant, the registered owner allowed the people to be on the land but to develop temporary structures/houses only. There was no evidence of any agreement between the registered owner and the people on the land particularly the Plaintiff to the effect that they were to remain on the land and develop temporary structures only.

According to DW1, (the Defendant) the Plaintiff had not had exclusive possession of the land as the people who sold the land to him (defendant) used to till it. No evidence was adduced to support this allegation.

The doctrine of adverse possession is anchored on Section 7, 13, 17 and 38 of the Limitation of Actions Act. A successful litigant in a claim of adverse possession must prove actual, open and continuous occupation of the subject land to the exclusion of the registered owner for the prescribed period. Section 7 prescribes the period to be 12 years.

In the present suit, the Plaintiff took possession of the suit land in the year 1991 in the life time of the registered owner. The registered owner according to DW2 died in the year 1995. There is no evidence that he took any steps to assert his title during his life time. It is common ground that the Plaintiff has been on the land since 1991 to the date of the filing suit. That he has developed structures from which he collects rent, he fenced the portion and had exclusive possession thereof. Although the Defendant claimed in his evidence in chief that immediately he bought the suit land he took possession thereof, in his testimony on cross examination he stated that he had not taken possession

of the land since he bought it. In *Kigoro Munyi vs Peter mburu Kimani [2015] eKLR* the court observed that “It must be noted that under section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of title but their predecessors.”

Under the provisions of sections 7 and 13 of the Limitation of Actions Act, his claim crystalized at the expiry of twelve (12) years from 1991 when he took possession of the land. Under the provisions of section 17 of the Limitation of Action Act, the title of the registered owner became extinguished in respect of the claimed portion of the suit land upon expiry of the period of limitation. And under section 28 (h) of the Land Registration Act, adverse possession is an overriding interest to which registered land is subject.

The Defendant acquired land from the estate of the deceased which was subject to an overriding interest in the form of a right of adverse possession in favour of the Plaintiff over a portion thereof measuring 0.07 Ha.

The doctrine of adverse possession allows a trespasser or squatter to gain legal title to the land after satisfying the

elements of the doctrine. Counsel for the Defendant submitted that the plaintiff's claim of adverse possession was legally untenable and indefensible as the plaintiff had no lawful basis or agreement entitling him to occupy the land. In Lewa vs Mwangandi (Civil Appeal 56 of 2014) [2015]KECA 532 (KLR) July 2015 Judgement, the Court of Appeal observed that;

“The justification for the law of adverse possession has variously been given as the need to discourage land owners against, as it were, sleeping on their rights hence the maxim *“vigilantibus non dormientibus, jura subveniunt”*, an equivalent to the maxim that equity aids the vigilant. Paper owners of land are encouraged to utilize their land or else a squatter would be prepared to make use of it, invoke the equitable defence of laches and the law will protect him.”

The court further observed that the right acquired by the registered owner under section 24 of the Land Registration Act is subject to the overriding interests under section 28 of the Act. Section 28 (h) provides that one of the overriding interests is rights acquired or in the process of being acquired by virtue of any law relating to the limitation of actions or by prescription.

The court also referred to section 7 (d) of the Land Act which recognizes prescription as a method of acquiring title to land. The court concluded that the doctrine of adverse possession is neither arbitrary nor an unconstitutional limitation of the right to property.

From the evidence placed before court herein, the Plaintiff's occupation was open and active as he had developed the suit land and the Defendant ought to have seen it. He did testify that at the time of purchase, he visited the land and saw the developments thereon. This was sufficient notice to him that the land was not vacant.

I find that the Plaintiff has proved the claim of adverse possession. Judgement is entered in favour of the Plaintiff and against the Defendant for;

- (1) a declaration that the Plaintiff/applicant has acquired a title to the portion measuring 0.07 Ha which he occupies of land parcel number KISUMU/KASULE/1060 by adverse possession.

- (2) A declaration that the Plaintiff/Applicant is entitled to be registered as the proprietor of the portion measuring 0.07 Ha of land parcel No. KISUMU/KASULE/1060.
- (3) An order for transfer of the portion measuring 0.07 Ha. of the parcel number KISUMU/KASULE/1060 by the Defendant in favour of the plaintiff and in default of the Defendant to transfer the said portion to the Plaintiff/applicant, the Deputy Registrar of the court to execute the necessary documents to effect the transfer.
- (4) Costs to the plaintiff.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 11th day of December, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

K'Owinoh for the Plaintiff

Ojuro for the Defendant