

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC CASE NO. E003 OF 2024

BENTA OPONDO ONYANGO.....
PLAINTIFF

VERSUS

ROSE ACHIENG ONDIEGE.....
DEFENDANT

JUDGEMENT

1. The applicant vide an Originating Summons dated 27th March 2024 seeks the following orders; -

- 1) That the Applicant/Plaintiff to be declared the proprietor of 0.30Ha parcel of land **EAST GEM/NYAMNINIA/1348** which he has occupied openly, exclusively, continuously and without interruption from 1994 to-date for a period of 30 years.
- 2) That the applicant has acquired a bonafide title 0.30Ha portion of parcel of land **EAST GEM/NYAMNINIA/1348** by adverse possession
- 3) That the applicant is entitled to be registered as the proprietor of parcel of land **EAST GEM/NYAMNINIA/1348** by adverse possession
- 4) That the defendant be ordered to transfer portion of the parcel of land **EAST GEM/NYAMNINIA/1348**
- 5) That in default of the defendants failing to transfer the said parcel to the Applicant, the Deputy Registrar

to execute the necessary documents to effect the transfer of ownership of 0.30Ha portion of parcel of land **EAST GEM/NYAMNINIA/1348** from the respondent to the applicant

6) That the costs of this suit be awarded to the plaintiffs/ applicant.

2. The grounds upon which the above prayers are sought shall become clear later in this judgement. The applicant Benta Opondo Onyango also swore an affidavit in support of the originating summons.
3. During pretrial directions the Originating Summons was deemed to be a plaint and the response thereto vide a replying affidavit of the respondent Rose Achieng Ondiege sworn on 10/07/2024 as the defence. Parties also filed witness statements and list of documents in compliance to the provisions of Order 11 of the Civil Procedure Rules.
4. The suit was heard viva voce. The plaintiff called 3 witnesses and the defendant two.

The plaintiff's case and evidence

5. Benta Opondo Onyango the plaintiff testified as PW1. She adopted her affidavit in support of the originating summons sworn on 27/3/2024, witness statement dated 20/3/2024 and documents that she produced in her testimony which were produced as **PExh 1 - 7**.
6. PW1 testified that together with her husband they entered the parcel of land EAST GEM/NYAMNINIA/1348 (suit land) in

1994, constructed their homestead and their sons also built their house. That they stayed on the suit land without any interruption undertaking farming where they planted food crops and trees. That she also buried her husband and two of their sons in the suit land. That it is only in 2019 when she was arrested charged and convicted in **SIAYA PM CR. CASE NO.332 OF 2019** and convicted for the offence of forcible detainer following a complaint by the defendant. The witness also testified that she was not a party to Kisumu High Court Civil Suit 2006

7. On cross-examination by the defendant, PW1 testified that she was not aware that his sons were evicted from the suit land pursuant to any court case. She conceded the plaintiff in Kisumu High Court Civil Suit 2006 was her son and who testified against her in the said case. She reiterated she was claiming the land as the wife of her late husband.
8. The plaintiff called Florence Aseka Andika who testified as PW2. Her testimony was that she is an adjacent neighbour to the plaintiff. She adopted the contents of her witness statement dated 20/3/2024 as her evidence in chief. She confirmed that the land originally belonged to her husband Essande Michael Obonyo. The rest of her evidence echoed that of PW1 and that nobody else has used the suit land since 1994 except the plaintiff.
9. On cross examination the witness testified she did not know Thomas, Rose, William, Maurice, George and even the relationship between Thomas Ochogo and Joseph Onyango.

10. PW3 was Joseph Henry Ongayo. He confirmed that the plaintiff had asked him to testify on her behalf. The witness stated he did not understand anything about the case.
11. With the above the plaintiffs case was marked as closed.

The Defendants case and evidence

12. The defendant testified on her behalf as DW1 and adopted the contents of her replying affidavit as her evidence in chief and documents that she produced in her testimony which were produced as **DEx 1-14.**
13. Briefly DW1 case is that she purchased the suit land in 2015 from Thomas who had purchased the same from Esande Michael Obonyo sometime in 1994. She was issued with title. She reiterated the existence and outcome of the proceedings in favor of Thomas in Kisumu High Court Civil Suit 2006 were part of Thomas efforts to evict the defendants therein who had illegally occupied his land while he was away working in Uganda. According to her witness statement, while some of the defendants left others adamantly refused to leave and hand over possession to her. The witness also narrated of a burial she stopped and the complaint she lodged culminating into the criminal proceedings already referred to earlier. That her efforts to remove the plaintiff and her agents have been met with hostility and destruction of her trees and developments.
14. Cross examined DW1 testified that she does not stay in the suit land and has never used it. She confirmed the plaintiffs house is on the suit property. That the plaintiff was the one

using the suit land though without her permission as registered owner. She clarified on being re-examination that she had always wanted to use the suit land but was always chased away by unknown youths.

15. DW2 was Thomas Ochago. He confirmed selling the land to the defendant. He confirmed the plaintiff was his step mother. The witness adopted his witness statement dated 5/6/2024 as his evidence in chief. His testimony largely echoed that of DW1.
16. The witness was cross examined where he testified that his father and his children forcefully entered the land. They constructed in 1996 and he has never consented to their staying on the suit land. DW2 affirmed Benta and his father were not part of the proceedings in Kisumu High Court Civil Suit 2006. He reiterated in re-examination that her relationship with the plaintiff and her people with regard to the suit land was characterised with too much hatred and animosity.
17. With the above the defence case was closed.

SUBMISSIONS

The plaintiff's submissions

18. The plaintiff submissions are dated 23/06/2024. Citing various authorities that guide on proof of adverse possession namely open occupation without secrecy, licence or permission of the owner with the intention of dispossession or having the land, it is submitted on behalf

of the plaintiff that DW2 confirmed the plaintiff entered into the land in 1996 and constructed a home forcefully. DW2 did not sue the plaintiff for eviction but instead opted to sell the land to the defendant who had knowledge of the plaintiff occupation. That the only interruption was when the criminal proceedings were lodged. DW2 lost possession in the year 1994 and his rights to claim the land were extinguished in 2005. Further that the sell of the land in 2015 did not affect the expiry of time.

The Defendants submissions

19. The defendants submissions are dated 27/03/2025. Outlining the ingredients of the doctrine of adverse as enunciated in case law it is submitted that the statutory clock on adverse possession could have been ticking since the parties involved except the defendant were relatives to Thomas Ochogo Onyango. That the principles of adverse possession did not apply to families. Reliance is placed on the Court of Appeal holding in **Kihamba V Mary Mbaisi (2015) eKLR.**
20. It is submitted that the plaintiff has never enjoyed peaceful possession and or occupation of the suit land as there has been several and persistent attempts by Thomas and the defendant to evict the plaintiff from the suit land. The defendant also made attempts to enter the land to no avail due to violent resistance by the plaintiff. The plaintiff should not be allowed to use her criminal actions to acquire the land following conviction of forcible

detainer which she has not appealed against. It is contended that the plaintiff did not discharge the burden of proof required of her and the suit ought to be dismissed.

ANALYSIS AND DETERMINATION

21. Having considered the plaintiff's pleadings and evidence, parties' written submissions and authorities cited and availed to this court, it is my considered view that the main issue for determination is whether the plaintiff has met the threshold to be declared an adverse possessor of the suit land.
22. Adverse possession is grounded in sections 7, 13, and 38 of the Limitation of Actions Act, (Cap 22) as follows; -

Section 7

“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 is first accrued to some person through whom he claims, to that person”.

Section 13

“(1) A right of action to recover land does not accrue unless the land is in 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 of this Act 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 a fresh 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) of this Act, the land in reversion is taken to be adverse possession of the land.”

Section 38

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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 proprietor of the land.”

23. The prerequisites to be demonstrated by an applicant for adverse possession are elaborated in the following decisions

24. In **Ongwen & another v Keya & another (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR)** the court stated

29. This right to be adverse to land does not automatically accrue unless the person in whom this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for orders of adverse possession. See the findings of the Court in Malindi App No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR where it held;

30. 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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

25. The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:**

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

The onus is on the person or persons claiming adverse possession:

“.. 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 evasion). So the Applicants must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

26. Also see the Court of Appeal decision of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** and **Tabitha Waitherero Kimani Vs Joshua Ng’ang’a (2017) eKLR**.

27. Arising from the provisions of the law and judicial precedents above I have decanted a number of requirements that must be met by a litigant claiming adverse possession.

- 1) The land must be registered in the name of a third party. A known owner.
- 2) There must be possession which possession ought to be adverse and to the exclusion of the owner

- 3) The possession must be without permission of the owner for a continuous/uninterrupted period of 12 years
 - 4) The owner of the land fails or neglects to take action against the 'intruder'
28. Guided by the statutory provisions and caselaw above I will proceed to analyse the plaintiffs claim and whether it meets the threshold set. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act, which provides as follows: (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
29. The plaintiff claims that she entered the suit land together with her husband in the year 1994, they built a home and have been cultivating thereon and she has remained on the property even after her husbands demise. Her sons also joined her on the suit land but according PW1 testimony in re-examination they left to go and start their own homes.
30. The plaintiff produced in evidence a copy of a green card for land **EAST GEM/NYAMNINIA/1348** which shows the ownership history of the suit land since 24/6/1994. The same confirms the suit land is registered in the names of a third parties following subdivisions resting with Rose

Achieng Ondiege the defendant. This satisfies the first requirement that the land must be registered under any of the statutes referred to in section 37 of the Limitation of Actions Act.

31. Having surmounted the above hurdle the applicant must satisfy they have been in possession, without the permission of the said registered owner of the land. Besides this it must be for a continuous/uninterrupted period of 12 years.
32. PW1 testified in court that she entered the suit land in 1994 together with her husband. The green card for **EAST GEM/NYAMNINIA/1348** produced in evidence shows that at the time of the entry (1994 – 1996) the parcel was registered in the name of Thomas Ochogo Onyango. Thomas Ochogo testified in these proceedings as DW2. He confirmed that the plaintiff was his step mother and that she entered into the suit land in 1996 and constructed a home forcefully. This therefore confirms that the plaintiffs initial entry into the suit property was without the permission of the owner.
33. The entry into the suit land was therefore adverse to the ownership of Thomas. In Benson **Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR** the court stated thus;

“It is precisely because adverse possession does not arise where a person is on another’s land with the latter’s consent or permission...”

34. It is trite that the entry must not only be adverse but must be for the uninterrupted period of 12 years. DW2 conceded in cross examination that he never took any action against the plaintiff and his father with a view to evict them from the suit land. The Court of Appeal in Benson **Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees (supra)** further stated

‘It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There does not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run.’

35. As the owner of the land upto the year 2015 when he sold the property to the defendant he failed and or neglected to take action against the plaintiff and her husband whom he said entered his land forcefully. Upon being shown the proceedings commenced by Thomas PW1 confirmed she was not a party to the suit Kisumu HCCC No. 11 of 2006. My review of the same reveals it sought eviction of only William Ochieng, Morris Ooko, Charles Owuor and George Omulo. The deceased and the plaintiff were indeed not among them and in my view time in adverse possession was therefore still running.

36. Does the above period meet the statutory timeline. My answer is in the affirmative as the period spans over 12 years. There was no action against the plaintiff and her husband but only as against their sons. Even after her husband's death PW1 continued living on the land accruing the years in possession from 1994. The court was not led of any evidence that the same was interrupted as against the plaintiff. It is trite that the owner of the land must take real action to remove the adverse possessor.
37. The applicant claiming under adverse possession must further demonstrate that the said period of occupation was open, without secret and without interruption. It is not in dispute in the entire proceedings that the plaintiff has been in occupation of the suit land. PW1 produced photographs showing activities on the land. Her occupation was confirmed by PW2, DW1 and DW2.
38. DW1 case is that she purchased the land from DW2 and who confirmed that indeed he sold the land to the defendant Rose Achieng in the year 2015.
39. The question that arises at this juncture is whether a change of ownership has the effect of interrupting a claim of adverse possession. Would time therefore start running afresh at the registration of Rose Achieng as proprietor.
40. The Court of Appeal in **Githu Vs Ndeeta (1984). KLR 776** held that a change of ownership does not interrupt a claim for adverse possession.

41. Additionally, the Court of Appeal in **Titus Kigoro Munyi Vs. Peter Mburu Kimani (2015) eKLR** observed thus; -

'it must be noted that under section 7 of the Limitation of Actions Act , the law relating to prescription affects not only the present holders of the title but their predecessors'.

42. The defendant purchased the land while the plaintiff was already in adverse occupation of the same and had actually dispossessed DW2 on the ground. Her rights as an adverse possessor had crystallised as at the time the defendant acquired the title. Moreover, this was an overriding interest protected by law under the repealed Registered Land Act. See **Kariuki Vs. Mica (Civil Appeal 196 of 2018) (2025) KECA 31 (KLR)**.

43. It has been urged by the defendant that the plaintiffs stay in the suit property has not been peaceful. I will respectfully differ for the reason that the plaintiff was never a party to the suit for eviction but her sons. The next disturbance was by the defendant who filed criminal proceedings in 2019 but I have already noted that the plaintiffs right had already crystallised by the time the defendant came into the picture.

44. It is contended by the defendant that time stopped running for purposes of adverse possession as the parties were relatives being step brothers and step mother. I have read the decision in **Kihamba V Mary Mbaisi (2015) eKLR**. authority cited to buttress this point. I have noted

that the land in dispute was ancestral land unlike in the present case where it was by purchase. There was no evidence in the present case that the entry of the plaintiff and her husband was permissive. DW2 was very clear in his testimony he did not consent to the entry.

45. I think I have said enough to affirm that the plaintiff has on a balance of probabilities met the threshold to be declared an adverse possessor over the land **EAST GEM/NYAMNINIA/1348**.
46. The court therefore enters Judgement for the plaintiff against the defendant in the following terms;-

- 1) That the Applicant/Plaintiff to be declared the proprietor of 0.30Ha parcel of land EAST GEM/NYAMNINIA/1348 which he has occupied openly, exclusively, continuously and without interruption from 1994 to-date for a period of 30 years.**
- 2) That the applicant has acquired a bonafide title of the 0.30Ha parcel of land EAST GEM/NYAMNINIA/1348 by adverse possession**
- 3) That the applicant is entitled to be registered as the proprietor of parcel of land EAST GEM/NYAMNINIA/1348 by adverse possession**
- 4) That the defendant be ordered to transfer the parcel of land EAST GEM/NYAMNINIA/1348 in tandem with this judgement within 45 days of this judgement.**

- 5) That 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 0.30Ha parcel of land EAST GEM/NYAMNINIA/1348 from the respondent to the applicant**
- 6) The costs of the entire exercise of executing the decree of the court shall be borne by the Plaintiff.**
- 7) Since the award of costs is discretionary as held in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, each party shall bear its own costs.**

Orders accordingly

HON. JUSTICE A. E. DENA

JUDGE

04/12/2025

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Kowino for the plaintiff

Ms. Onsongo for the defendant

Court assistant: Ishmael Orwa

ORIGINAL