



Olwal (Suing as a Personal Representative of the Estate of Samson Olwal Opedo, Deceased) v Ojenya (Environmental and Land Originating Summons E025 of 2023) [2025] KEELC 18544 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEELC 18544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2023
SO OKONG'O, J
DECEMBER 17, 2025**

BETWEEN

JACOB OTIENO OLWAL (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMSON OLWAL OPEDO, DECEASED) APPLICANT

AND

NOAH ONYANGO OJENYA RESPONDENT

JUDGMENT

1. The Plaintiff instituted this suit by way of Originating Summons dated 25th May 2023, seeking the determination of the questions, whether the Plaintiff had been in actual, open, continuous, and uninterrupted possession of all that parcel of land known as Title No.Kisumu/Konya/1922(hereinafter referred to as “the suit property”) for over 12 years, and whether the Plaintiff had acquired the suit property by adverse possession and should be registered as the owner thereof.
2. The Plaintiff brought the Originating Summons in his capacity as the personal representative of Samson Olwal Opedo, deceased (hereinafter referred to as “the deceased”). The Originating Summons was supported by the affidavit of the Plaintiff sworn on 25th May 2023. The Plaintiff averred that the deceased purchased the suit property from the Defendant on 27th September 1996. The Plaintiff averred that after purchasing the suit property, the deceased and his family took possession of the suit property and constructed a residential home thereon. The Plaintiff averred that the deceased died in 2002 before the Defendant transferred the suit property to him. The Plaintiff averred that after the death of the deceased, the Defendant started interfering with the deceased’s family’s occupation of the suit property, claiming that he never sold the suit property to the deceased. The Plaintiff averred that the deceased and his family had occupied the suit property since 1996.
3. The Plaintiff averred that the deceased and his family had established their residential homes on the suit property and had also been cultivating it. The Plaintiff averred that the deceased’s family had occupied



the property for over 27 years. The Plaintiff averred that the Defendant's title to the suit property was extinguished after 12 years of the deceased and his family's occupation of the suit property. The Plaintiff averred that the deceased had acquired the suit property by adverse possession and should be registered as the owner thereof.

4. The Defendant opposed the Originating Summons through a replying affidavit sworn on 27th May 2024. The Defendant denied selling the suit property to the deceased. The Defendant averred that if there was any agreement of sale of the suit property, the agreement was between the Defendant's father and the deceased, and it was made in 1995 and not 1996. The Defendant averred that the agreement and the transfer relied on by the Plaintiff as a basis of his claim were forgeries. The Defendant denied that the deceased took possession of the suit property after purchasing the same. The Defendant averred that the suit property had been idle since 2021, when the Defendant had an accident and was hospitalized for a long time. The Defendant averred that it was not until he engaged a surveyor to determine the boundary of the suit property that the Plaintiff started cultivating the property. The Defendant averred that the dispute between him and the Plaintiff was over the boundary of the suit property and Title No. Kisumu/Konya/1920. The Defendant averred that the Plaintiff was his neighbour and was occupying Title No. Kisumu/Konya/1920. The Defendant averred that the Plaintiff's mother had encroached on the suit property, and that was the source of the dispute between the parties.
5. At the trial, the Plaintiff adopted his witness statement dated 11th April 2023 as part of his evidence in chief and produced the documents attached to his list of documents dated 2nd July 2024 and a further list of documents dated 3rd July 2024 as P.EXH. 1 and P.EXH. 2 respectively. The Plaintiff reiterated that his deceased father purchased the suit property from the Defendant in 1996 and took possession thereof. He stated that they were initially cultivating the suit property, but in 2012, he built his home on the property. He stated that the deceased died before the property was transferred to him by the Defendant. He stated that he asked the Defendant to transfer the suit property to him, but the Defendant refused. He stated that the dispute was referred to the area chief, and the chief found that the suit property was sold to the deceased by the Defendant.
6. In his defence, the Defendant adopted his replying affidavit to the Originating Summons as his evidence in chief, and the documents attached thereto as his exhibits. He told the court that he did not wish to add anything to what he had stated in the said replying affidavit.
7. After the close of evidence, the court noted that the Defendant had denied that the Plaintiff was occupying the suit property, and had claimed that the Plaintiff was in occupation of the parcel of land, Title No. Kisumu/Konya/1921. The court therefore ordered that the Kisumu County Land Registrar and Surveyor visit the suit property and Title No. Kisumu/Konya/1921, and determine the boundaries of the two parcels of land and whether the Plaintiff was occupying the suit property, and file a report in court. Following that order, the County Land Registrar and Surveyor visited the suit property and Title No. Kisumu/Konya/1921 and filed a report dated 7th February 2025 in court on 10th February 2025. The Surveyor and the Land Registrar re-established the boundaries between the suit property and Title No. Kisumu/Konya/1921, which were missing on the ground. The Surveyor and the Land Registrar stated that the house belonging to the Plaintiff, Jacob Otieno Olwal was partly on the suit property and partly on Title No. Kisumu/Konya/1923, and the house belonging to the Plaintiff's mother Margaret Olwal was partly on Title No. Kisumu/Konya/1921 and partly on Title No. Kisumu/Konya/1923. The Surveyor and the Land Registrar stated further that all the land comprised in the suit property was under the physical occupation of the Plaintiff, Jacob Otieno Olwal.
8. After the parties had received and perused the said report by the Land Registrar and the Surveyor, the court directed them to make closing submissions in writing.



The Applicants' submissions

9. The Plaintiff filed submissions dated 4th September 2025. Although the Defendant had informed the court when the court reserved the judgment in the matter that he had filed submissions, I have not seen the said submissions on record. The Plaintiff submitted that it was not disputed that the Defendant was the registered owner of the suit property. The Plaintiff submitted that upon payment of the full purchase price, the deceased was given possession of the suit property by the Defendant. The Plaintiff submitted that the deceased remained in occupation and used the land pending the transfer of the same to the deceased. The Plaintiff submitted that after the death of the deceased, the deceased's wife and the Plaintiff, who is the deceased's son, remained in occupation and continued to use the land. The Plaintiff submitted that in 2004, a dispute arose between the Defendant and the deceased's wife Margaret Olwal, which was resolved by the village elders who found that the suit property had been sold by the Defendant to the deceased. The Plaintiff submitted that the deceased had a right to enforce the agreement of sale that he entered into with the Defendant on 27th September 1996, within 6 years of the agreement, which lapsed in 2002. The Plaintiff submitted that the time for the purposes of adverse possession started running in favour of the deceased on 27th September 2002. The Plaintiff submitted that a survey conducted on the suit property pursuant to a court order confirmed that the whole of the suit property was occupied by the Plaintiff. The Plaintiff submitted that he had been in exclusive possession of the suit property with the Defendant's knowledge for an uninterrupted period of over 12 years from 27th September 2002. The Plaintiff submitted that the Defendant's interest in the suit property became extinguished on 27th September 2014. The Plaintiff submitted that he had proved his case against the Defendant on a balance of probabilities. The Plaintiff prayed that judgment be entered in his favour against the Defendant with costs. The Plaintiff cited several authorities in support of his submissions, some of which I will refer to later in the judgment.

Analysis and determination

10. I have considered the Plaintiff's Originating Summons and the response thereto by the Defendant. I have also considered the evidence presented to the court by the parties and the submissions on record. In my view, the single issue arising for determination in this suit is whether the Plaintiff has proved his adverse possession claim over the suit property.
11. In *Gabriel Mbui v. Mukindia Maranya*[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following;
1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or



squatter unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
12. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“18. Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...

19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person's favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* (supra)...

13. In *Mwangi Githu v. Livingstone Ndeete* [1980] eKLR, Potter J. quoted volume 24 of Halsbury's Laws of England, 3rd edition, page 252, where the authors stated as follows:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing



off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

14. In *Githu v. Ndeete* [1984] KLR 776 it was held that:
 1. “Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.
 2. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land to which the owner holds title.”
15. The Plaintiff brought this suit in his capacity as the personal representative of the deceased, Samson Olwal Opedo, which means that the Plaintiff came to court not to pursue his personal interest in the suit property, but that of the estate of the deceased. The effect of that is that the Plaintiff can only claim the interest in the suit property that had accrued to the deceased as at the time of his death. The question that I need to answer before I consider the merit of the Originating Summons, if it becomes necessary, is whether the right of the deceased to claim the suit property by adverse possession had crystallized as at the time of his death on 21st January 2002. In other words, had the Defendant’s proprietary right over the suit property become extinguished as at 21st January 2002? Put another way, had the deceased occupied the suit property openly for an uninterrupted period of 12 years as at 21st January 2002? The issue that I am raising is that the Plaintiff, as the administrator of the estate of the deceased, can only pursue the recovery of a property that devolved to the estate of the deceased upon his death on 21st January 2002, and not otherwise.
16. Section 79 of the Law of Succession, Chapter 160 Laws of Kenya provides as follows:

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”
17. It is clear from the foregoing that only the property of a deceased person vests in his or her personal representative. The Plaintiff’s case is that the deceased purchased the suit property from the Defendant on 27th September 1996 and took possession immediately. The deceased died on 21st January 2002, barely 6 years from when he entered the suit property. This means that as of the date of his death, the deceased had not acquired the suit property by adverse possession. Since the deceased had not acquired the suit property by adverse possession as of the date of his death, the suit property could not be said to be a property of the deceased on account of adverse possession in terms of Section 79 of the *Law of Succession Act*. The Plaintiff, as the administrator of the estate of the deceased, could only file a suit on behalf of the estate of the deceased seeking an order for the registration of the suit property in the name of the estate of the deceased, if the deceased had become entitled to be registered as the owner of the suit property by adverse possession as at the date of his death.
18. I wish to make it clear that the continued occupation of the suit property by the deceased’s family, if at all, after the death of the deceased had nothing to do with the deceased or the deceased’s estate. The deceased had not acquired the suit property, and as such, it did not form part of his estate. In any event, the Plaintiff did not obtain a Grant of Letters of Administration in respect of the estate of the deceased until 9th March 2023. Under Section 80(2) of the *Law of Succession Act*, a Grant of Letters



of Administration takes effect from the date of issuance. The Plaintiff's argument that the time for adverse possession started running in favour of the deceased from 27th September 2002, and that the deceased acquired the suit property by adverse possession on 27th September 2014, is legally flawed. The deceased died on 21st January 2002. Time could not start running in his favour on 27th September 2002. He was no more as of that date. When the deceased is said to have acquired the suit property by adverse possession on 27th September 2014, the deceased had been dead for 14 years. Time cannot run in favour of a deceased person for the purposes of adverse possession, nor can a deceased person acquire land by adverse possession. The estate of a deceased person can acquire land by adverse possession, but only where the right to acquire the land by adverse possession had accrued to the deceased at the time of his death.

19. Due to the foregoing, it is my finding that the Plaintiff, as the administrator of the deceased, has failed to prove that the deceased had acquired the suit property by adverse possession as at the date of his death. The suit by the deceased's estate to be registered as the owner of the suit property by adverse possession has therefore not been proved.
20. On the issue of costs, Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides that the costs of and incidental to a suit are at the discretion of the court, and that, as a general rule, costs shall follow the event unless the court orders otherwise for good reason. The Plaintiff has not succeeded in his claim. He will bear the costs of the suit.

Conclusion

21. In conclusion, the Originating Summons dated 25th May 2023 is dismissed with costs to the Defendant.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF DECEMBER 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Plaintiff

The Defendant in person

Ms. J. Omondi-Court Assistant

