

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC (OS) NO.E002 OF 2024

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS

OF KENYA

AND

IN THE MATTER OF A CLAIM BY WAY OF ADVERSE POSSESSION

OVER LR NO.KISUMU/MANYATTA 'B'/309

BETWEEN

JOHN SHIRAHO PLAINTIFF

VERSUS

BENJAMIN KEFA OTIENO DEFENDANT

J U D G E M E N T

Vide the Originating Summons dated 18th January, 2024, the Plaintiff who claims to have acquired ownership of land parcel No. KISUMU/MANYATTA 'B'/309 by adverse possession placed the following questions before court for determination;

- a) whether by virtue of having been in open peaceful and uninterrupted occupation of a portion of land being LR. NO. KISUMU/MANYATTA "B"/309 measuring approximately 0.06 hectares for a period in excess of 36 years, the Plaintiff is

entitled to be declared the owner of the said parcel of land and to have the same registered in his name.

- b) whether the Defendant ought to be ordered to effect transfer of the said parcel of land into the name of the Plaintiff and failing that, the Deputy Registrar of this court to sign such transfer documents in favour of the Plaintiff.
- c) whether the Defendant ought to be ordered to pay the costs of the suit.

The grounds upon which the Originating Summons was based are that;

- 1) By a written agreement for the sale of land entered into in the year 1982, the Plaintiff bought land parcel bearing number LR NO. KISUMU/MANYATTA 'B'/307 from one GEORGE MUKIRI LUNANI.
- 2) The said George Mukiri Lunani had in turn bought the land from one JOANES SEDA OGWAYO but a transfer between the two had not been effected. It was agreed that the latter would transfer the land directly to the Plaintiff, and he did.
- 3) The Plaintiff therefore took what he believed to be the parcel of land that had been sold to him and proceeded

to develop the same by putting up residential houses for let to rent paying tenants.

- 4) It has only come to the attention of the Plaintiff that the parcel of land that he has occupied since the year 1987 is actually parcel of land number KISUMU/MANYATTA 'B'/309 (the suit property).
- 5) Through an official search conducted at the lands registry, the Plaintiff has established that the suit property is registered in the name of the Defendant herein.
- 6) The Plaintiff has been in active possession and use of a portion of the suit property for a period now in excess of thirty-six (36) years. The Plaintiff entered the suit property and has remained upon the same without the consent of the defendant.
- 7) That Plaintiff has therefore had an open, peaceful and continuous occupation and use of a portion of the suit parcel herein for a period well in excess of 36 years. The Plaintiff has thus acquired the suit parcel of land by way of adverse possession.

- 8) It is now desirable that the suit parcel of land be ordered to be transferred in to the Plaintiff's name.
- 9) Equity and the law favours granting of the orders sought by this application.
- 10) It shall be in the interest of justice to grant the prayers sought by this application.

The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the Applicant on 18th January, 2024. To the Supporting Affidavit was annexed certified copy of register in respect of land parcel No. KISUMU/MANYATTA 'B'/309 (the suit land) herein.

Service upon the Respondent was done by substituted service by way of advertisement in the newspaper. He did not respond.

Vide directions given on 18th November, 2024, the matter proceeded to ex parte hearing. The Plaintiff testified as PW1 and adopted the contents of the Supporting Affidavit as his evidence.

He produced the documents attached to the Supporting Affidavit as exhibits p.1 to p.5. The plaintiff had deposed in the Supporting Affidavit that the suit land is registered in the name of the Defendant. That he had been in open, continuous and peaceful

possession and use of a portion of the suit property measuring 0.06 Hectares for a period in excess of 36 years. That his initial entry onto the land was without the consent of the Defendant. That vide a land sale agreement entered into in the year 1987, he bought land parcel known as No. 307 from Geprge Mukiri Lunani.

That after purchase, he had the land transferred in his favour. That it has now turned out that the property identified to him as parcel number 307 which he was buying was actually the suit property herein namely; LR NO. KISUMU/MANYATTA 'B'/309.

That he proceeded to develop the suit property by putting up residential premises for let to rent paying tenants. That the premises have been on the land since the year 1987.

That he only learnt recently that the land he occupies is No. KISUMU/MANYATTA B/309 and that the land he bought namely No. KISUMU/MANYATTA B/307 was neighbouring.

That his entry was adverse to the title of the Defendant since he occupied the same believing it to be his and proceeded to develop it accordingly.

That the Defendant in whose name the land is registered has never ever complained about the Plaintiff's occupying or use of the

property for the period of about 4 decades that the Applicant has been on the land.

That he sought to be declared the legal owner entitled to the suit parcel by way of adverse possession on account of the long period of time for which he had had possession and use of the land.

At the close of the evidence, written submissions dated 6th October, 2025 were filed by the form of Olel Onyango Ingutiah Advocates LLP on behalf of the Plaintiff.

It was submitted that the Plaintiff entered the suit land without the permission of the registered owner and intending to own the same. That the entry onto the suit land and continued use has been adverse to the title of the Defendant.

That the developments that the Plaintiff has put up on the suit property, his occupation and use thereof has also been open and continuous since the year 1987. That the Defendant has never approached him over the suit land or even claimed the same. That the Plaintiff's occupation has been peaceful.

Counsel relied on the case of Mbui -vs- Maranga [1993]eKLR and the cases of Mombasa Teachers' Co-operative Saving and Credit

Society Limited -vs- Robert muhambi Katana & Others [2018]eKLR

to support the submissions.

Counsel submitted further that the Plaintiff had discharged the burden of proof under section 107(1) of the Evidence Act.

Analysis and determination

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

Adverse possession is a doctrine of law vide which a person acquires 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. The possession must be without the permission but with the knowledge of the registered owner. 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* relied on by the Plaintiff the court held inter alia that:

“..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."

The claimant must demonstrate the existence of the registered/true owner of the subject land who has knowledge of the claimant's adverse entry and possession of the suit land but who has failed to take steps to assert his title/right to the suit land by terminating the adverse possession.

The Defendant sued herein is Benjamin Kefa Otieno. His address or whereabouts is not provided in the Originating Summons. His description is also not provided. The Plaintiff does not state whether he knows the defendant. He does not indicate whether the defendant is alive or not, whether he is aware of the Plaintiff's entry and occupation of the suit land or not.

The copy of green card attached to the application shows that the land was registered in the name of the Defendant on 18th March, 1985, land certificate issued on 21st February, 1986 and that since then, no activities/transactions have taken place on the title.

Adverse possession as envisaged in section 7 and 17 of the Limitation of Action Act involves as one of the actors a registered owner of the subject land to whom the cause of action accrues and against whose title/interest time for adverse possession runs so that when he/she fails to take action within the limitation period, his/her title becomes extinguished as the right of the adverse possessor crystalizes.

It is therefore, in my view, paramount for the claimant to prove not only the existence of the registered/true owner, but also the fact that the registered owner was aware of the adverse entry and occupation or possession and failed to take action.

The Defendant herein could not even be traced for physical service of court process so substituted service had to be employed to which there has been no response from him.

The Defendant's right to property is protected by article 40 of the Constitution. To deprive him of the said right it had to be demonstrated that he had opportunity to defendant it as provided for in sections 7, 17 and 26 of the Limitation of Actions Act.

I find that although the Plaintiff has proved that his entry and occupation onto the suit land was adverse to the interest of the Defendant, he has not proved that the Defendant had knowledge of

the same and failed to take action. In *Benson Mukuna Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR*, the court held that: “A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an uninterrupted period of not less than 12 years.”

For the foregoing reasons, I find that the claim of adverse possession has not been proved. The suit is therefore hereby dismissed. No order as to costs.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 18th day of December, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Odhong for the Plaintiff

No appearance for the Defendant