

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA (OS)

ENVIRONMENT AND LAND CASE NO. E 020 OF 2022

KENNETH OLUOCH NYAMOLO

Suing as Legal Representatives of the Estate of Silvanus Nyamolo

Obala (Deceased).....

PLAINTIFF

VERSUS

HELEN ATIENO OTIENO

(Sued as the Legal representative of the Estate of Mary

Oketch Owiyo.....

DEFENDANT

JUDGEMENT

1. Vide Originating Summons dated 11th October 2022 the Plaintiffs seek as against the Defendant, the following prayers;-

- a) THAT the family of the Late Silvanus Nyamolo Obala be declared the owners of land parcel No. SIAYA/ABOM/ 2886 the land having been purchased by the late Silvanus Nyamolo Obala in 1973 for a consideration.
- b) THAT the family of the Late Silvanus Nyamolo Obala be declared the owners of land parcel No. SIAYA/ABOM/ 2886 for being in possession of the land for a period of 49 years since 1973.
- c) THAT the Title for parcel of land No. SIAYA/ABOM/ 2886 was obtained by the Defendant through a grant

characterized by concealment of material facts, fraud and misrepresentation to the Honourable Court that the land was available as free property of the deceased when the fact is that the deceased had sold this portion of the land making up the estate to the applicant's father, which fact the petitioner was aware of at the time of filing the petition.

d) THAT in the alternative, upon the cancellation of registration of Mary Okech Owiyo as the proprietor of No. No. SIAYA/ABOM/ 2886, the family of Late Silvanus Nyamolo Obala consent that the title be registered in the name of the Applicant to be held in trust for the family.

e) THAT costs of these proceedings be borne by the Defendant.

2. It is the Plaintiffs case that the parcel of Land No. SIAYA/ABOM/ 2886 (suit property) was sold to his late father, Silvanus Nyamolo Obala in 1973 by the late Jonathan Owiyo Aliwa alias Owiwa Aliwa and the Plaintiff's family has been in actual control, occupation and in quiet possession of the land openly, peacefully and uninterrupted since the year 1973.

3. According to the Plaintiff Mary Oketch Owiyo has never been present in or laid any claim on the suit property and has not made any attempt during the 49 years of the Plaintiffs occupation to contact them or state her true proprietary rights.

4. That the suit property belonged to the late Jonathan Owiyo Aliwa alias Owiwa Aliwa who passed way in 1988 before transferring the land to the Plaintiffs father who also died in 2003. However, the Plaintiff father occupied the land between 1973 and 1988 a period of 15 years yet no claim was raised by Aliwa's family. That no claim has been made since the death of the Plaintiffs father 30 years later.
5. The Plaintiff also avers that in July 2021 or thereabouts the defendants upon discovering that the suit property had not been transferred to the Plaintiffs father fraudulently included it as part of the deceased properties during confirmation of the grant in succession cause for **SIAYA/ABOM/2710**. That following an attempt by the defendant and her children to dispose the suit property the Plaintiff lodged a caution as attempts to resolve the issue were being pursued.
6. That the plaintiff thereafter obtained the petition documents of the said succession from Bondo court and aver that the inclusion of the suit property in the name of the defendant was obtained by misrepresentation of fact vide an affidavit dated 28/07/2021 where the deponent stated they were not aware that the same was the property of her deceased husband.
7. The Plaintiff reiterates that the suit property was not the free property of the defendants deceased husband.
8. On 23/9/2024 the court was informed that the defendant was deceased. Application for substitution dated 7/2/2025 was allowed by consent of the parties. The deceased was

substituted with her legal representative Helen Atieno Otieno. The defendant in her reply sworn on 28/2/2025 deponed that the registered owner of the suit property was Jonathan Owiyo Aliwa but Silvanus Nyamolo Obala the plaintiffs father was a distant uncle who tilled the same. That the only property the family was aware their father sold was to Nehemiah Amondo. The defendant attached a copy of sale agreement and deponed that had their father never told them about the alleged sale to the plaintiffs father and if he sale he would have done the same by agreement.

9. It was further stated that the plaintiffs family never raised issues with the succession proceedings in Bondo Succ. Cause E64 of 2020 and the grant was confirmed. That the plaintiff instead started cajoling her mother to sell him the suit property at Kshs.20,000/- which the deponent objected to as the same was too little but offered Kshs.2 million. That when the sale failed the plaintiff lodged a caution claiming purchasers interest and then filed the present suit.
10. According to the defendant the fact that the plaintiff tried to purchase the land above is because they knew the land belonged to the deponent's father. Further that the plaintiffs were licencees since her father only granted permission to cultivate the land which is confirmed by the fact that the Nyamolo have never used the land for any other purpose.

HEARING AND EVIDENCE

11. The matter proceeded for hearing on 6th March 2024, 21/05/2025 and 1/07/2025. The Plaintiff testified as PW1,

adopted his witness statement filed on 11th October, 2022 as his evidence in chief and produced the documents in the list dated 7/12/2023 as PEX 1-13 (document No. 6,15 16 and pleadings were excluded).

12. It was his evidence that the defendant was cousin to his father. His father never established a home in the suit property. He confirmed the contents of paragraph 8 of his witness statement and reiterated that the succession proceedings only listed plot 2710. He did not object to the succession proceedings. While he was aware of the rectification of the grant, he was not aware if the court allowed the defendant to rectify the grant to include all the assets of the deceased. He did not have evidence of the transaction between Owiyo and the father. That the defendant's husband never gave permission to the father to till the suit property since his father had already bought it.
13. It was his further evidence that he bought the defendant a phone at her request after the conclusion of the probate proceedings.
14. On cross-examination, he stated that he could not object to the succession because it only mentioned plot 1710. That rectification of grant by affidavit introducing new parcels of land is only meant for revocation. That there was no document showing the court made directions for rectification. He did not know why his father never pursued the land after demise of the vendor.

15. PW2 was Judas Odongo Agot, Assistant Chief Bar Chanda sublocation. It was his evidence the parties were his family members who were also his members. That Nyamolos family have used the suit property since the witness childhood. That in May 2022 he received a call from the plaintiff informing him there were people walking in the suit property as if they wanted to buy the same. The plaintiff investigated the issue and PW2 advised him the issue must be resolved since they were all family.
16. That he requested the clan elders to mediate the dispute pitting the two families. A meeting was held on 14/05/2022 but the defendant did not attend despite a request for her to attend. The witness pursued the defendant who suggested a date and venue for another meeting on 1/06/2022 which she failed to attend.
17. It was his further evidence that efforts to bring the defendant on board failed and he advised the plaintiff to seek legal intervention and issued him with a letter of introduction to the Land Registrar.
18. The witness was cross examined and averred that he did not know how the Nyamolos family came into occupation of the suit property. That many of the family members did not attend the meetings. No summons were issued to the defendant. That the Minutes were originally handwritten and typed afterwards though he did not have the former.

19. PW3 was Alice Otieno Ogola, she adopted his witness statement filed on 11th October, 2022 as her evidence in chief.
20. PW3 on cross examination testified that she only heard stories from Nyamolo when he was telling another old man that the suit property was sold to him. She confirmed Nyamwolo and Owiyo were relatives.
21. With the above evidence the plaintiffs case was marked as closed.
22. DW1 was Hellen Atieno Otieno. She adopted the statement dated 28th February 2025 as her evidence in chief and produced the documents filed on even date as DEX 1-7 (except 3 & 4 which were expunged).
23. The statement rehearsed the depositions of her reply to the Originating Summons which have already been enumerated.
24. In cross examination DW1 stated she was born in 1985. She did not know the year the plaintiffs father occupied the suit property. That she did not know the meaning of a licensee but that plaintiffs family were given permission by her father. She was not present when they were permitted. She was not aware about the two meetings called by the assistant chief. She confirmed the contents of paragraph 2 and 3 of her witness statement. That she was 3 years old when her father died and 18 when the plaintiffs father died. She confirmed during the later the plaintiffs father was tilling the suit property. She did not remove him from the land

neither did her mother try to remove him from the property or raise any claim against his use of the suit property.

25.DW1 further confirmed that the plaintiffs and his family continued to use the suit property even after their fathers demise. She had no evidence to proof they tried to remove them from the land. According to her originally their mother was unwell and they wanted only to sell plot 2710 and the buyer advised they must do succession. However, they were informed at court registry that if there were other properties they must be included since succession is done only once.

26.DW1 conceded that based on the defendants reply the rectification occurred at the point of confirmation of grant. That they didn't disclose thar there were people using the suit property. They also did not inform the plaintiffs family about the succession proceedings. She confirmed the plaintiffs family was still using the land and had a maize crop.

27.The witness conceded she had no evidence that the plaintiff wanted to buy the land. She agreed she had not listed the material facts concealed by the plaintiff.

28.DW2 was Monica Awino Owiyo. She adopted the statement dated 28th February 2025 as her evidence in chief. Her evidence largely echoed PW1 statement.

29.Upon cross examination DW2 testified she was 34 years old and she never met Silvanus Nyamolo Obala. That she had never asked the plaintiff to leave the suit property nor

claimed the same. According to the witness the plaintiff lodged the caution because the defendant refused to sell it to him. She informed the court she was not present when her mother and sisters refused to sell the land but they informed her of the same. She also did not know the name of the person who advised them to add the suit property in the succession.

30.DW2 conceded that considering her father died in 1988 and her date of birth (1990) she may not be aware whether there was a transaction between Silvanus Nyamolo and her father. She had no evidence that Silvanus did not buy the suit property. The plaintiffs were only given the suit property for cultivation but never handed it back, though she did not know the date they were supposed to hand it back.

31. DW2 clarified in re-examination that the responsibility to prove the purchase was the plaintiffs.

32.With the above the Defence case was marked as closed.

SUBMISSIONS

34.The Plaintiff filed submissions on 11th August 2025. Counsel submitted that the court has jurisdiction to deal with the subject matter as was earlier held by Lady Justice Koross in this matter. That this court can determine ownership of assets in Estates of deceased then issue a decree to the probate court as was held in **Re Estate of Stone Kathuli Muinde (Deceased)(2016) eKLR.**

35. The plaintiff identified 6 issues for determination i) Whether the Defendant obtained the title documents to parcel of Land **SIAYA/ABOM/ 2886** fraudulently and through concealment. ii) Whether the Plaintiff's family is entitled to ownership and or to become the registered proprietor of the suit property? iii) Whether the absence of the sale agreement would negate the Plaintiff's family occupation on the parcel for 52 years iv) Whether the Plaintiff's father paid the whole of the purchase price of the suit premises to the defendant herein? v) In the alternative, has the Plaintiff become entitled to the title and ownership of the suit property by virtue of adverse possession and occupation of the suit premises? vi) Whether the Plaintiff is entitled to the reliefs sought.

36. On the first issue analysing the oral evidence of the defendants including cross examination it was submitted that the Defendants had surreptitiously included the two parcels of land **SIAYA/ABOM/ 2886** and **SIAYA/ABOM/ 1704**, by way of affidavit in a way that attempts to avoid notice or attention by the Chief and secretly registered the parcel into her name. That the evidence leaves no doubt that the Defendant had actual knowledge of the fraud that ultimately led to registration of the suit property in its name. That the misrepresentations of the defendant led to the issuance of the purported Title Deed in her favour much to the detriment of the Plaintiff's family.

37. The court is invited to apply the provisions of Section 26(1) (a) & (b) of the Land Registration Act.

38. On the second issue it was submitted that it is neither contested nor controverted that at all material times, the Plaintiff's family (The Nyamolo Obala family) have been in actual control, occupation and possession of parcel of Land Parcel No. **SIAYA/ABOM/ 2886**, the suit property from 1973 to date, a period of 52 years.
39. It was contended that there is no evidence that the respondent gave permission to the Plaintiff's father to enter the suit property in 1973.
40. That there is a presumption of continuance and uninterrupted occupation; that the Plaintiff's family occupied and has continued to cultivate the suit property on the same terms upon which he entered in 1973, that is, the sale to the Plaintiff's father.
41. The court is referred to the decision in **Cheromei v Muigai [2024] KEELC 5604 (KLR)** and **Peter Mbiru Michuki vs Samuel Mugo Michuki (2014) eKLR** where the court took the view that where an Applicant claims adverse possession arising out of an agreement for sale, courts have held that the purchaser's possession becomes adverse to the vendor once the purchase price is paid in full. Time starts to run from that point, and on completion of the statutory time limit of 12 years, the purchaser would be entitled to become registered as proprietor of the land under adverse possession.

42. It is stated that in the present case Kshs. 500/- was paid as purchase price as confirmed in the minutes produced in evidence.
43. On whether the absence of the sale agreement would negate the Plaintiff's family occupation on the parcel for 52 years Counsel urged that the limitation claim on land is anchored on the possibility of lose of evidence over time to disprove a stale claim as contained in the case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR.**
44. It was submitted that the plaintiffs possessory rights are not only equitable rights but an overriding interest binding on the land and protected under Section 30 (f) of the Registered Land Act
45. It is submitted that for purposes of the limitation period of 12 years' time started running is either 1973 when the plaintiff took actual possession; 1983 when the property was registered in the name of Jonathan Owiyo or 1988 when Jonathan died for purposes of the licence claim by the defendants with regard to permissive use granted by him, which is not true. The Court of Appeal decision in the case of **Public Trustee v Wanduru, (1984) KLR 314** is relied upon.
46. Further that a purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run, which time started running in 1973 or 1983 when the

title was registered in the name of Jonathan Owiyo and as the true owner is dispossessed of possession.

Defendants Submissions

47. The Defendant identified one issue for determination - Whether the Plaintiff has met the conditions necessary for a claim of adverse possession.
48. It was submitted that the plaintiff has failed to demonstrate the requirements for a claim of adverse possession to wit were in actual occupation of the defendant's land; the occupation was without the consent of the Defendant; that the occupation of the property is open and peaceful and uninterrupted for a period not less than 12 years as follows;-
49. Counsel urged that it was repeated time and again during trial that the Plaintiff and his family have never lived on the suit property but rather just used it for cultivation, a purpose for which they were granted permission. That the mere fact that the Defendant has not been in possession of the suit parcel or has never bothered to occupy the same, is not reason to insinuate that the Defendants gave up their entitlements.
50. That indeed the defendants inheritance of the land through transmission and subsequent actions is a legitimate transfer of ownership which reinforced her claim and assertion of ownership rights. Reliance is placed

in **Joseph Macharia Kairu v Kenneth Kimani Muiruri [2021] eKLR.**

51. It was submitted that Jonathan Owiyo and Silvanus Nyamolo were relatives and Jonathan out of goodwill, allowed Silvanus to cultivate the said parcel. In the circumstances, and in the african spirit of oneness and togetherness, Jonathan’s family did not find anything wrong with allowing their relatives cultivate the suit parcel hence had no reason to interfere with their stay. That upholding a claim of adverse possession amongst relatives, would be a calamity for the innocent Defendant herein. Reliance is placed on the holding of Justice AY Koross in **Marenya v Mududa (Environment & Land Case E20 of 2022) KELC 15208 (KLR).**
52. It was submitted that the Plaintiff and his father cultivated the suit property with the consent of the Defendant’s father and mother. That the permission negates and/or defeats the element of “hostility” as required for one to prove adverse possession. Reliance was placed on **Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001; Antony Mutembei M’nthaka Vs Wingfield Kaburu, HCC NO. 56 OF 2006 (OS)**
53. It was contended by counsel for the defendant that the Plaintiff’s occupation of the suit property has not been open and peaceful since the defendant asserted their rights to the suit property.

54. That the offers by the plaintiff to purchase the suit property were a clear recognition and/or acknowledgment of the registered owner's title and right to the property and which is inconsistent with and/or contradicts the core principle of adverse possession which is hostile possession.
55. That the cultivation of the Plaintiff and his family in the suit land was never open and peaceful as the aforementioned actions by the Plaintiff act as fatal admissions that he never at any point believed neither himself nor his family to be the owners of the suit property.
56. Counsel submitted that the plaintiffs claim is statutorily premature as the same was brought before the lapse of the statutory 12 years period. That Mary Okech Owiyo has been sued not as the administrator of Jonathan Aliwa's estate, but in her capacity as the registered owner of the land. Accordingly, time should run not from 1973 when the Plaintiff and his family were permitted to enter the suit parcel, but from 13th April 2022, when the title became registered in the name of the Defendant's mother, Mary Okech Owiyo, who the current suit was brought against. The court was referred to the case of **Muchambindwiga & another v Octavian Mwaniki Kariuki [2021] eKLR** where the court stated that time only begins to run on the day when the Respondent becomes the registered owner of the property.

57. It is also urged that the proper forum to challenge the inclusion of property in a grant is under section 76 of the Law of Succession Act before the probate court that issued the said grant and not in the present suit.

ANALYSIS AND DETERMINATION

58. I have perused and considered the pleadings, the oral testimonies of the witnesses who testified and the evidence adduced herein. I have equally perused and considered the written submissions and authorities cited.

59. My understanding of the plaintiffs case and or claim based on his pleadings is that; the plaintiff and his family including his mother filed this suit as legal representatives of the Estate of the late Silvanus Nyamolo Obala. The proceedings are commenced by way of Originating Summons under the provisions of sections 7, 17 and 38 of the Limitation of Actions Act. It is trite that these provisions deal with the doctrine of adverse possession.

60. The suit is also brought under the provisions of Section 26(1)(a) & (b) of the Land Registration Act. These provisions provide that registration of title in a persons name constitutes prima facie evidence of ownership. However, the registered title can be nullified on the basis of fraud or misrepresentation involving the registered proprietor or evidence that the title was acquired illegally, unprocedurally or through a corrupt scheme.

61. On the basis of the above provisions the plaintiffs claim is that the Title for the suit property was obtained by the

Defendant through a grant characterized by concealment of material facts, fraud and misrepresentation to the Court which issued the grant of letters of administration and should be cancelled.

62. Having laid out the above understanding an issue therefore has emerged on the jurisdiction of this court to determine this dispute. Consequently I must resolve the issue at the earliest opportunity since jurisdiction is everything without which I must down my tools - see the case of **Owners of Motor Vessel Lilian S Vs. Caltex Oil(Kenya) Ltd (1989)**.

63. As noted above there are allegations of fraud that have been raised. These allegations are that the grant of letters of administration and its confirmation thereto was obtained through concealment of material facts one being that there was no disclosure that the suit was occupied by the plaintiffs and his family by dint of a sale transaction between the defendant's husband the initial owner of the suit property the plaintiffs father. Further that the inclusion of the suit property as one of the deceased assets at the point of confirmation of grant was not only irregular but fraudulent. That this irregular grant led to the suit property being registered by transmission in the defendants name which rendered such registration void and the title ought to be impeached.

64. Does the ELC have jurisdiction to interrogate the title based on the above allegations? My answer is in the negative. I say so because the appropriate forum in this regard would be the court where the grant was issued as envisaged under the

provisions of section 76 of the Law of Succession Act. Based on the material placed before court the grant was issued under the Principal Magistrates Court at Bondo Succession Cause No. E64 of 2020 - In the matter of Jonathan Owiyo Aliwa Alias Owiwa (Deceased) Aliwa Vs Mary Okech Owiyo (Petitioner).

65. Section 76 above provides inter alia that; -

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently

66. It does not matter that the plaintiffs were not parties to the proceedings counsel would have known what to do in the circumstances and after that if further aggrieved move the High Court appropriately. As it is this court is divested of jurisdiction to make a determination on matters of administration of the deceased estate.

67. The court is persuaded and guided by the decision in **Joel Arusei Kipsaina & Ano. Vs. Zipporah Jepketer Kipsaina & Another (2014) eKLR** - Succession proceedings- ELC has no jurisdiction to re - distribute an estate. It has no

jurisdiction to declare null and void succession proceedings that led to the distribution of a suit land to any of the parties.

68. The court has noted the plaintiffs submission that this court has held that it is seized of jurisdiction to determine this matter and has referred the court to the case of Nyamolo (suing as the legal representative of the estate of Silvanus Nyamolo Obala deceased Vs Owiyo KEELC 15208 (KLR)- a ruling delivered by my sister Koross J. I have read the ruling and nowhere in the said ruling did the court pronounce itself on jurisdiction.

69. It is my finding that this court lacks jurisdiction on the issue of fraud as raised by the plaintiff.

70. I will now address the claim on adverse possession and the issue that commends determination is Whether the Plaintiff has met the conditions necessary to be declared owners of the suit property by way of adverse possession.

71. As stated elsewhere in this judgement the Originating Summons has been filed under sections 7,17 and 38 of the Limitation of Actions Act. I will extract relevant legal provisions on adverse possession.

72. Section 7 provides as follows:

“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”.

73. Section 13 states that;-

“(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.”

74. **Section 38**(1) and (2) states;

“(1) 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

75. The **Black’s Law dictionary 11th Edition**, defines Adverse Possession at page 67 in the following terms:

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open, and notorious.

The doctrine by which title to real property is acquired as a result of use or enjoyment over a specific period of time”.

76. Applying the foregoing provisions of the law I will proceed to analyse the Plaintiffs claim. The onus is on the plaintiff who claims adverse possession to prove that she is an intruder, she has been in unlawful occupation for a period of over 12 years to the time of filing suit and the claim is against the registered owner.
77. PW1 testimony is that his father bought the suit property from the defendants husband sometime in the year 1973 and took possession of the same. However, before the land could be formally transferred to the plaintiffs father, the vendor defendants husband died in the year 1988. The plaintiffs claim rides on his fathers interest which was allegedly obtained by way of purchase. This in my view would appear to be permissive and not adverse.
78. However, the defendant has taken the stance that a claim for adverse possession cannot stand in view of the alleged sale transaction and they ought to have sued for purchasers interest. DW1 testified in cross examination the plaintiffs were licensees because they were given permission by her father to cultivate the land.

79. Counsel for the plaintiffs has referred this court to a number of decisions that confirm the position that the claim of adverse possession may be raised on the basis of purchasers interest. I will proceed to examine this proposition.

80. The Court of Appeal in **Peter Mbiru Michuki vs Samuel Mugo Michuki (2014) eKLR** faced with similar arguments had this to say;-

31. The appellant contend that the plaintiff and his elder brother were in possession of the suit property pursuant to consent given by the appellant and there can be no adverse possession when entry is by consent of the registered proprietor. In **Mwinyi Hamis Ali - v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997** it was held that “***adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.***” In **Wambugu - v- Njuguna, (1983) KLR 172 at holding 4**, this Court held:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”. Emphasis is mine

32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant *qua* vendor. In the case of **Public Trustee - v- Wanduru, (1984) KLR 314 at 319** Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August, 1978 from Karuga Wandai & Co. Advocates. From 18th August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18th August, 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7th February, 1991.'

81. The above decision is therefore binding on this court.
82. From the foregoing dictum of the Court of Appeal, to succeed on a claim for adverse possession based on a purchaser's interest, the applicant must prove the existence of a valid sale agreement, the full purchase price having been paid and or termination of the licence/agreement. DW2 clarified in re-examination that it was not the defendant's responsibility to prove that there was no agreement and which I agree.
83. 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.
84. The plaintiff was therefore obligated to prove the existence of a purchase agreement between his father and the defendant's father. PW1 did not produce any agreement in this regard. It was his direct evidence that he did not have evidence of the transaction between the defendant's father and his late father Silvanus.
85. With regard to the payment of the full purchase price, it is contended a purchase price of Kshs. 500/- was paid as evidenced by the minutes of several community meetings allegedly held ostensibly to amicably resolve the dispute. I

have perused the minutes and I have not come across the mention of the payment of the purchase price. The payment of the final purchase price is fundamental in the absence of evidence in this regard the court is left at cross roads and has no basis upon which to proceed on the premise of a purchaser's interest.

86. Additionally for purposes of adverse possession the plaintiff must admit that the land he is laying the adverse claim belongs to the registered proprietor. In the present suit it is the plaintiffs' case that the land does not belong to the estate of the defendants' husband and neither does it belong to the registered owner. See the case of **Haro Yonda Juaje -vs- Sadaka Dzenzo Mbauro & Kenya Commercial Bank (2014) eKLR** where the court stated that;

"One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and the registered owner has never been in possession of that land....one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession."

87. Counsel for the defendant has posited that courts have frowned upon upholding adverse possession where relatives are involved. All the witnesses who gave evidence in this case confirm that the plaintiffs father was a relative to the defendants' husband. PW1 confirmed in cross examination that the defendant is a wife to his late father's cousin. PW2 the confirmed the parties were his family members. PW3 confirmed on cross examination that Silvanus Nyamwolo and Owiyo were relatives.
88. I have read the decision in **Marenya v Mududa (Environment & Land Case E20 of 2022) KELC 15208 (KLR)** cited by the defendants. The court applied strictly the interpretation of adverse possession. I have already given my reasons based on the Plaintiffs case and evidence.
89. I think I have said enough to show why a claim of adverse possession of the suit property by the plaintiff and his family cannot be sustained.
90. The upshot of the foregoing is that the Plaintiff has failed to prove his case to the required standard and the suit is hereby dismissed.
91. Since it is not disputed that parties are relatives, I will make an order that each party should bear its own costs of the suit.

It is so ordered.

**Dated, signed and delivered at Siaya this 29th day of
January 2026**

**HON. A. E. DENA
JUDGE
29/01/2026**

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

Mr. Wangatia for the Plaintiff

Ms. Achieng for Defendant

Court assistant: Ishmael Orwa

ORIGINAL