

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC (OS) NO. E012 OF 2022**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS**

ACT

BETWEEN

SAMWEL OBIERO OSANGO ..... APPLICANT

AND

DAVID OTIENO OKELO ..... 1<sup>ST</sup> RESPONDENT

EZEKIA STEPHEN BUNDE ..... 2<sup>ND</sup> RESPONDENT

GEOFFREY OUMA NYAWARE ..... 3<sup>RD</sup> RESPONDENT

**JUDGEMENT**

The applicant herein approached the court vide the Originating Summons dated 21<sup>st</sup> August 2022 claiming to be entitled by way of adverse possession to a land parcel known as KISUMU/OJOLA/778 (which he describes as the original parcel) and the subsequent parcel numbers KISUMU/OJOLA/5924, 5925 and 5926 all measuring 0.06Ha each. He presented the following questions for determination by the court: -

- 1) whether there should be a declaration that the applicant has acquired an interest by way of adverse possession and is entitled to the original land parcel reference number KISUMU/OJOLA/778 and all the subsequent sub-divisions L.R Nos. KISUMU/OJOLA/5924, 5925 and 5926 all of which measure 0.06 Ha.
- 2) whether in the alternative the honourable court should declare that (deceased) OMUNE OKELLO held the land reference number KISUMU/OJOLA/778 in trust and therefore the applicant is entitled to inherit a portion of the said land?
- 3) whether there should be an order directing that the applicant be registered as proprietor of the suit land?
- 4) whether the costs of this suit should be awarded to the applicant.

In response to the Originating Summons, the respondents filed a Replying Affidavit sworn on 29<sup>th</sup> September 2022.

The applicant's case is that the original parcel was ancestral land owned by Omune Okello, deceased, in whose name the land got registered during demarcation. That the respondents illegally sub-divided the original parcel and are in the process of disposing of the same. That the respondents who are the sons of Omune Okello have threatened to evict the applicant. That the applicant has had peaceful and uninterrupted occupation of the suit land for over 46 years and has buried his relatives thereon and has therefore acquired prescriptive rights.

That the respondents transferred the suit land into their names after obtaining Letters of Administration without involving the applicant. That the respondents had no good title to pass because their father held the land in trust for the applicant, his title having become extinguished after 12 years.

The respondents' case is that the suit land belonged to their father and that upon his death they succeeded, administered and distributed it as the deceased's estate.

That the applicant was allowed by the deceased to live on the land as a caretaker whilst looking for his own fortune. That the applicant was the deceased's caretaker (servant) and cannot justify that he has lived on the land to the exclusion of others.

The suit proceeded to hearing by way of viva voce evidence. The applicant testified as PW1 and produced documents namely, his National Identity card, handwritten agreement dated 26<sup>th</sup> June 1977, copies of green cards for L. R. No.s KISUMU/OJOLA/5924, 5925 and 5926.

All the 3 respondents testified as DW1, DW2 and DW3 respectively. The 1<sup>st</sup> respondent produced certificate of official search and green card for KISUMU/OJOLA/778, certificate of confirmation of grant dated 12<sup>th</sup> March 2018, copies of title deeds for KISUMU/OJOLA/5924, 5925 and 5926 and bundle of certificate of official search for KISUMU/OJOLA/5924, 5925 and 5926.

### Submissions

At the close of the evidence parties filed written submissions on the case. Written submissions dated 19<sup>th</sup> January 2026 were filed by Juliet Dima & Co Advocates on behalf of the applicant. Counsel submitted that the applicant's uncontroverted evidence is that he purchased the suit land from the deceased in 1977, took possession and remained on the land pending processing of title. That he was not related to the deceased and did not enter the land as a caretaker, on deceased's sympathy, licensee or tenant.

That at the point that the sale would be presumably deemed void for all purposes as a valid land transaction, the applicant's possession at that instant became adverse to the rights of the deceased and his estate at the time of his demise.

That the applicant's actions on the land of burying his deceased family members, building a permanent homestead and raising children thereon are adverse ownership and not mere caretaking.

That the applicant's adverse ownership rights accrued while the deceased was still alive. That he bought the land in 1977 while the deceased died in 2008. That the deceased's title was already extinguished hence the respondents acquired paper titles. That the applicant's entry onto the land was not permissive.

On whether the applicant has acquired title by adverse possession, Counsel submitted that it was undisputed that the applicant entered the land in the year 1977 and that his

occupation thereof was open, continuous exclusive as a purchaser in possession and uninterrupted.

That the possession was *nec vi, nec clam, nec precario*. That the same was continuous without interruption and that the applicant used the land adverse to the registered owner's rights. That by the time the succession proceedings commenced, the deceased's title had already become extinguished by operation of the law and the estate had nothing capable of transmission.

That although the 3<sup>rd</sup> respondent testified that he bought his land from Bernard Oindo after conducting due diligence in 2018, no sale agreement, proof of consideration, Land Control Board Consent or transfer instrument was produced in evidence. That a party asserting ownership must prove the root of the title. Counsel relied on the case of Munyu Maina vs Hiram Gathitha Maina [2023]eKLR to support the submission.

That the 3<sup>rd</sup> Respondent cannot claim to be an innocent purchaser for value as the land had exchanged hands by operation of law.

On behalf of the respondents written submissions dated 26<sup>th</sup> July 2025 were filed by Okal Odero & Company Advocates. Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acquired the land through a duly gazetted succession process while the 3<sup>rd</sup> respondent is a bona fide purchaser for value without notice of any adverse claim and that his title is indefeasible under section 26 of the Land Registration Act. Counsel relied on case law

inclusive of the case of *Wambugu vs Njuguna* where it was held that in order to acquire by the statute of limitation title to land which has a known owner the owner must have lost his right to the land by being dispossessed of it by having discontinued his possession of it and submitted that the applicant failed to meet the conditions for adverse possession.

Counsel submitted further that the applicant failed to prove purchase as there was no sale agreement, no proof of payment and no transfer.

On whether the deceased held the land in trust for the applicant Counsel submitted that there was no evidence of trust and that the respondents' titles are protected under section 26 of the Land Registration Act.

Counsel urged the court to dismiss the suit.

### Analysis and determination

The first question on the Originating Summons is whether or not the applicant has acquired an interest in the suit lands by adverse possession.

The applicant pleaded in the Originating Summons that he had occupied the suit lands for a period of more than 46 years peacefully and without any interruption. That he built his home on the lands where he settled with his family.

He deposed in the Supporting Affidavit that he had been on the suit land from sometime in the year 1977 till 2022 when the respondents went to the suit land fenced it into 3 portions. That the respondents issued him with demand notices and had since threatened to demolish his homestead. That the subdivision and subsequent transfer of the land was procured by fraud, misrepresentation and illegality aimed at defeating his interest in the land.

On cross examination, the plaintiff stated that he had come to court because he bought land from Omune Okello who passed on and the sons have not transferred the land to him. That the size of the land he is claiming is about a quarter of an acre. That it was the owner of the land who gave him permission to stay there. That there is a case of eviction that was filed against him and that he could not raise the defence of adverse possession in that suit because he is not the one who sued.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents, admitted that the applicant possesses only a portion of the land parcel No. 778 and that he lives there because he was invited by their father.

The 2<sup>nd</sup> respondent stated that the applicant has a house on the suit land which house was built after the death of their father. That the applicant was a caretaker to their father. That the applicant's house is on land parcel No. KISUMU/OJOLA/5925 and that when the applicant built the house, a complaint was lodged to the Chief.

DW3 stated that he is the owner of parcel No. KISUMU/OJOLA/5926 which he bought after doing due diligence. That he cultivates the land and that the applicant does not live on land parcel No. KISUMU/OJOLA/5926.

The ingredients of adverse possession include adverse entry and occupation of land of another in an open, continuous, exclusive, uninterrupted and peaceful manner for a period of 12 years. This is in accordance with the provisions of sections 7 and 13 of the Limitation of Actions. As held in Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR, that

“to establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

The applicant claimed to be having his homestead on the suit and that he had buried his deceased relatives on the land. He produced no evidence in the form of documents, photographs to

demonstrate this or a witness to corroborate his testimony. The 1<sup>st</sup> and 2<sup>nd</sup> defendants conceded that the applicant had a house on parcel No KISUMU/OJOLA/5925 which he built after the death of their father.

The applicant testified that he had been sued for eviction and that he did not raise the issue of adverse possession in the suit. There was evidence that the Respondents had sued the applicant in Case No.s KISUMU CMC E&LC Nos 121,122 and 123 seeking that they be declared as the lawful owners of parcel Nos KISUMU/OJOLA/5924,5925 and 5926 and for the eviction of the applicant therefrom.

It was common ground that the applicant entered the land with the permission of the deceased registered owner of the original parcel. The applicant stated on cross-examination that the owner of the land gave him permission to stay on the land and that that was why he was staying there but that the owner later died.

Such permissive entry and occupation of land cannot confer proprietary rights under the doctrine of adverse possession. One of the key ingredients of adverse possession is that the possession must be non- permissive. In *Gabriel Mbui vs Mukindia Maranya [1993] eKLR* the court held adverse possession to be:

“..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."

In the present case the respondent's claim that the applicant's entry onto the suit land was with the permission of the respondent's father who was the registered owner of the land was conceded to by the applicant in his testimony.

It was also common ground that the respondents entered the land as owners or personal representatives of the owner, fenced the land into 3 portions and took over occupation. That the respondents filed suit seeking eviction of the applicant. Entry of the owner terminates adverse possession as held In Githu vs Ndeete [1994] KLR quoted in Kenya Commercial Bank (suing as Administrator of the Estate of Paul Njoroge Muchene) vs Sarah Njeri Muchene the court held that:

" 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 adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into 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.”

Regarding whether the deceased held the land in trust for the applicant, the applicant stated on cross-examination that the deceased was not holding the title in trust for him.

I find that the applicant has failed to prove his claim. The same is hereby dismissed, each party to bear own costs for the suit.

Orders accordingly.

**Judgement dated and signed at Kisumu and delivered virtually this 29<sup>th</sup> day of January 2026.**

**E. ASATI,  
JUDGE.**

**In the presence of:**

Maureen- Court Assistant.

Atieno for the Applicant.

Oyier for the Respondents.