

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

KISUMU ELCL (OS) NO. E013 OF 2024.

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF
ACTIONS ACT

AND

IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF TITLE BY
ADVERSE POSSESSION OF THE PARCEL OF LAND KNOWN AS
KSM/BORDER/697

BETWEEN

RONALD REAGAN ODHIAMBO.....PLAINTIFF/APPLICANT

VERSUS

JOHN OPANDE ONGARO (Sued as the Personal representative

of the estate of DOMNICUS ONGARO OBAP) DEFENDANT/RESPONDENT

JUDGEMENT

Vide the Originating Summons dated 12th July 2024, the plaintiff who claims proprietary interest by way of adverse possession in a portion of land parcel number KSM/BORDER/697 sought for determination of the following:

- (a) A declaration be issued that the applicant has been in adverse possession of the whole of parcel of Land number Kisumu/BORDER/697 for a period of 12 years.
- (b) A declaration be issued that the applicant has acquired title to 2 acres comprised in the land title number Kisumu/BORDER/697.
- (c) An order be issued that the respondent holds the title to land parcel Kisumu/BORDER/697 in trust for the applicant.
- (d) An order that the portion of land parcel number Kisumu/BORDER/697 measuring approximately 2 acres be transferred to the applicant/plaintiff and the applicant/plaintiff be registered as the owner of the land parcel number KSM/BORDER/697.
- (e) An order that the respondent do execute all transfer documents in favour of the applicant/plaintiff, the Deputy Registrar of the court do execute the same documents for transfer.
- (f) That the costs of the application be provided for.

The Originating Summons was based on the grounds that the applicant has been in constant exclusive occupation, use, possession of the land parcel known as Kisumu/Border/697 since 1987 and to date there have been no interruption of the occupation for a period of over 37 years, he has acquired title to the said parcel of land by adverse possession. That the applicant has been cultivating sugar cane on the suit land since the year 2004.

That the land is registered in the name of Domnicus Ongaro Obap, deceased, and that the Defendant is his personal representative.

That the Respondent holds title in trust in favour of the applicant/plaintiff by operation of law. That the applicant has been exercising all the rights of ownership over the said portion of land parcel number Kisumu/Border/697 without any interference from the respondent and that he has built permanent structures which has taken more than 12 years.

That the Respondent's proprietary interests in the land parcel number Kisumu/Border/697 have been extinguished by operation of law and he is holding the same in trust for the applicant.

The Originating Summons was supported by the contents of the Supporting Affidavit sworn by the applicant/plaintiff on 12th July 2024.

There was no response to the Originating Summons. Affidavit of Service sworn by Martin Oola Otiende on 29th October 2024 shows that the Defendant was served with the Originating Summons and other document on 29th September 2024 personally.

Vide directions given on 7th May 2025, the case proceeded by way of *viva voce* evidence.

The evidence

The plaintiff testified as PW1. He adopted the contents of the Supporting Affidavit sworn on 12/7/2024 as his evidence in chief. He had deposed in the said Supporting Affidavit that his father had entered into a sale agreement in respect of land parcel number

Kisumu/Border/697 with Ongaro Obap. That after the sale, the plaintiff's father occupied the land by planting sugar cane until his demise in the year 2004 when he (plaintiff) without the consent or permission of the registered owner of the said land entered the said land and continued with the cultivation of sugarcane.

That Dominicus Ongaro Obap (deceased) is the current registered owner and the Respondent is the administrator of his estate. That despite the registration of the land in the name of Dominicus Ongaro Obap, he has continued to stay on the said parcel of land uninterrupted, undisturbed and peacefully without any interference for 12 years from 2004 July.

That he has exercised all the rights of ownership over the said land without any interference from the respondent by cultivating sugar cane. That in the premises the respondent's proprietary interests on the land have been extinguished by operation of the law and that the Respondent is now holding the land in trust. That it is just and equitable if the said land be registered in his (plaintiff's) name.

The plaintiff produced copy of sale agreement dated July 1987 chief's letter dated 13/6/2024, photographs, certificate of official search and copy of Kenya gazette as exhibit.

He testified further that the Defendant's family are aware that he is occupying the land because they occupy part of the land.

Submission

At the close of the evidence, written submissions dated 23rd October 2021 were filed by Otieno Achieng Company Advocates on behalf of the plaintiff. Counsel relied on the case of Richard Wefwafwa vs Ben Munyiwa Songoi (2020) eKLR for the element of adverse possession and the cases of Wambugu vs Njuguna (1983) KLR and Mtana Lewa vs Kahindi Mwangandi (2005) eKLR and submitted that time started running against the Defendant in favour of the plaintiff from the time the plaintiff occupied the suit property and was engaged in acts that were inconsistent with the Defendant's title. That there was no evidence to contradict the plaintiff's assertions.

That the plaintiff has proved his case.

Issues for determination

The sole issue that arises for determination is whether the plaintiff has acquired title to the suit land by adverse possession.

Analysis and determination

It is the plaintiff's case that the suit land is registered in the name of one Dominicus Ongaro Obap deceased. The Defendant is sued in his capacity as administrator of the estate of the deceased. However, no Letters of Administration were exhibited to show that the respondent has that capacity.

A copy of the Kenya Gazette produced as exhibit only contained a notice that an application had been made in Nyando SPM's court by the Defendant, who is the deceased's son for a grant of letters of Administration Intestate to the estate of Dominicus Ongaro Obap who

died on 5th August 2000 and that the court was going to proceed to issue the same unless cause be shown to the contrary and appearance be entered within 30 days from the date of publication of the Notice.

There is no evidence that the court proceeded to issue the grant of Letters of Administration as no copy thereof was produced.

The way to prove that one is the administrator of estate of a deceased person who died intestate is by exhibiting Letters of Administration.

Secondly, the plaintiff brings the suit in his personal capacity and claims adverse possession from the date he entered the land which was in the year 2004.

In paragraph 5 of the grounds upon which the Originating Summons was brought, the plaintiff pleaded that despite registration of the suit land in the name of the respondent, he (plaintiff) had continued to stay on the said parcel of land uninterrupted, undisturbed and peacefully without any interference for over a period of 12 years from 2004 July. He repeated this assertion in paragraph 10 of the Supporting Affidavit and in his submissions.

As at the year 2004, the suit land was the property of a deceased person protected by the provisions of the Law of Succession Act. The gazette Notice contained in the Kenya Gazette produced as exhibit shows that the deceased registered owner of the land died on 5th August 2000. The Succession Cause the subject of the Kenya Gazette Notice is No. Nyando SPMC Succession Cause No. 165 of 2016.

So if any Letters of Administration were issued in respect of the estate of the deceased, it was in the year 2016 or after. This means that the respondent's entry and possession of property of a deceased person could not amount to adverse possession.

While the plaintiff may have entered the land and planted sugar cane as shown in photographs produced as exhibit the said activities only amounted to intermeddling with the estate of the deceased which a criminal offence under the provisions of section 45 of the Law of Succession Act. And although the plaintiff claims to have developed permanent structures on the suit land, the photographs produced do not show this.

The plaintiff claimed that his father, on the basis of a land sale agreement, occupied the land since the year 1987 until 2004 when he died and the plaintiff took over the occupation. The claim is however not filed on behalf of the estate of the plaintiff's father. The applicant has come to court in his personal capacity.

The size of the land claimed is also not clear from the plaintiff's pleadings and evidence, it is not clear whether it is the whole of the suit land he claims or only a portion measuring 2 acres thereof.

I find that adverse possession has not been proved.

The plaintiff's suit is hereby dismissed. No order as to costs.

Judgement dated and signed at Kisumu and delivered virtually this 22nd day of January 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

Achieng for the Plaintiff/Applicant.

N/A for the Defendant/Respondent.