

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC(OS) CASE NO. 24 OF 2022
JOSEPH WAMAYA OTIENOPLAINTIFF/APPLICANT
VERSUS
MARGRET OTIENO OKUMU.....
DEFENDANT/RESPONDENT

JUDGEMENT

1. This suit is commenced by way of Amended Originating Summons dated 26/11/2023 under the provisions of Order 37 rule 7 of the Civil Procedure Rules, Section 7 and 38 of the Limitations of Actions Act Cap 22 Laws of Kenya. The Summons seek to answer the following questions:
 - i. Whether the Applicant has been in open continuous and uninterrupted occupation of 1.3 Hectares of the land parcel currently known as Uholo/Sigomre/1837 and with knowledge of the owner.
 - ii. Whether the occupation has been without the consent of Mzee Akal
 - iii. Whether the time that ran from 1984 to date qualifies one to claim for adverse possession.
 - iv. Whether the Applicant is entitled to be declared the proprietor of the land parcel no. Uholo/Sigomre/1837

by virtue of adverse possession for the period prescribed in section 7 of the Limitation of Actions Act.

- v. Whether the Registrar of Lands is to be directed that the order herein shall be an instrument of transfer of ownership of land parcel no. Uholo/Sigomre/1837 from the Respondent to the Applicant.
 - vi. Who should bear the costs of the application.
2. The summons is supported by an affidavit sworn on 31st October 2022 and supplementary affidavit sworn on 14/03/2023 by JOSEPH WAMAYA OTIENO the Applicant herein. The Respondent responded vide a replying affidavit sworn on 17th May 2023.
 3. The originating summons following the directions of the court was converted into a plaint and the reply thereto as the defence. The case was then heard viva voce.

EVIDENCE OF THE PARTIES.

4. The plaintiff testified on his behalf as PW1. He adopted the witness statement dated 1/2/2024 as his evidence in chief. The same rehashes the content of the supporting affidavit that the land originally Uholo/Sigomre/188 measuring 11.4 Ha was registered in the name of Mzee Owino Akal between the year 1972 until 1995 when he died. That PW1 utilized 1.3

Ha of the same during the lifetime of Mzee Owino wherein he later in the year 2002 proceeded to construct his home.

5. According to PW1 the Respondent was married to the son of Mzee Okal one Herman Ochiel Owino. That they coexisted peacefully with the Respondent and the Respondent would even attend events at PW1 home. That in the year 2009, the Respondent subdivided the land into nine portions namely; L.R. NO. 1837,1838,1839,1840,1841,1842,1843,1844 and 1845.
6. It is PW1 case that he enjoyed peaceful, uninterrupted and continuous possession of what is now Uholo/Sigomre/1837 above. That the Respondent has sold out a number of the land parcels which necessitated PW1 to place a caution on parcel Uholo/sigomre/1837. That in the year 2009, the Respondent subdivided the land into nine portions namely: L.R. No. 1837,1838,1839,1840,1841,1842,1843,1844 and 1845.
7. PW1 also produced the documents listed in the Plaintiffs amended List of Documents (Pexh 1-5).
8. PW1 was cross examined by counsel for the defendant. He confirmed that his father was the registered owner of plot Uholo/Sigomre/346 and that it was not adjacent to parcel 1837. He told the court he entered parcel 1837 with

permission of the owner. That though he was using a portion thereof he had not presented a survey report in this regard. He testified that Owino Akal and his son Herman died in 1994 but he PW1 did not claim the portion from them. He admitted the group photo produced as Pex4 did not identify the people therein by name.

9. PW1 clarified in reexamination that the photo portrayed peaceful relationship and that the house in the photo was his house erected in plot 1837.
10. PW2 was Gabriel Odhiambo Otieno the plaintiffs younger brother. He adopted his witness statement dated 6/12/2024. Based on the witness statement PW2 confirmed he knew plot 1837 very well as having initially belonged to Mzee Okal and who in 1984 gave a portion thereof to PW1. That PW1 started tilling the land in 1984 and set a home in 2002 peacefully and uninterrupted. He testified that the plaintiff and the defendant have lived peacefully attending all family events until the year 2020 when the defendant threatened the plaintiff with intention of evicting him so that he can sell the plot 1837.
11. The witness was cross examined by Mr. Otieno. He confirmed that his father owned plot 346. He stated the plaintiff left plot 346 because the land became small and was given land for use by his fathers elder brother Akal.

That they had an elder brother who lived in plot 346. On being shown the photograph (PEX5) he conceded it did not show the same was of plot 1837.

12. The Plaintiffs case was marked closed.

The Defendants Case.

13. The respondent Margret Otieno Okumu opposed the Originating Summons vide a replying affidavit dated 17th May 2023. She gave evidence as DW1 and adopted the replying affidavit and witness statement dated 29/02/2024 as her evidence in chief. She also produced the documents annexed in the replying affidavit as her evidence DEx 1-8.
14. Based on the Replying affidavit and the witness statement above DW1 evidence was that the Applicant's father and her father in law were brothers. That the former was the owner of LR No. Uholo Sigomre 346 while the later was the proprietor of L.R. No. Uholo/Sigomre/188. She alleged that Mzee Okal, bequithed L.R No. Uholo/Sigomre/188 to her husband one Herman Ochiel Okal. However, DW1 husband died before transferring the land to his name. That she therefore went into the shoes of her husband and transmitted the land parcel N. Uholo/Sigomre 188 to her name and subdividing the same for the beneficiaries of the estate.

15. According to DW1, even though the Applicant used a portion of the plot 1837 the same was not peaceful nor Continuous nor uninterrupted as alleged. She explained that she has taken the issue to the chief severally and the chief determined the Applicant was not entitled to the said land parcel. It is was her evidence that the Applicant was a beneficiary of land parcel no. Uholo/Sigomre/346 which belonged to his father.
16. DW1 averred in her reply that the matter was Resjudicata as the same had been heard and determined in Ukwala ELC case number 9 of 2020 where the court dismissed the Applicants suit for lack of merit. The Respondent avered further that she has lived and cultivated on the suitland since 1989 and lives there with her children to date, and the Applicant has never lived thereon openly, exclusively, continuously for 12 years or more.
17. It was DW1 evidence that the Applicant would occasionally trespass without her consent nor the consent of Mzee Okal because parcel no. 1837 is adjacent to land parcel 346 which belonged to the Applicants father. DW1 urged the court to return the parcel to her.
18. Cross examined the witness testified that she learnt of the plaintiffs occupation in the year 2002 though she has never filed a case against him.

19. The Defendants case was closed.

SUBMISSIONS

18. Pursuant to the courts directions parties filed and exchanged written submissions. The plaintiff submissions are dated 17/6/2025 while the defendants are dated 16/06/2025 filed on 17/6/2025.

ANALYSIS AND DETERMINATION

19. I have considered the originating summons, its supporting affidavit, the replying affidavit, the evidence adduced during the hearing and the rival submissions and find the main issue for determination is whether the plaintiff has satisfied the legal threshold for the grant of the suit property by way of adverse possession.

20. I will first lay out the legal framework and what the courts have held the above threshold for adverse possession.

21. Section 7 of the Limitation of Actions Act states that:

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 first accrued to some person through whom he claims, to that person.

22. Section 13 of the Limitation of Actions Act provides

“(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) *and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.*

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

23. Section 38 of the Limitation of Actions Act stipulates that:

(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.

24. But what is adverse possession? The Court of Appeal in the case of **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, stated thus; -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

“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 first accrued to some person through whom he claims, to that person.”

25. The learned Court of Appeal Judges further stated as hereunder

“...a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See Kyeyu v Omuto, Civil Appeal No. 8 of 1990. See also the present position in Johnson Kinyua v Simon Gitura Civil Appeal No.265 of 2005, where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it”.

26. The Court of Appeal in Kisumu Civ App. No. 110 of 2016
Richard Wefwafwa Songoi v Ben Munyifwa Songoi

[2020] eKLR cited by counsel for the defendant opined that a person claiming adverse possession must establish the following;

(a) On what date he came into possession.

(b) What was the nature of his possession?

(c) Whether the fact of his possession was known to the other party.

(d) For how long his possession has continued and

(e) That the possession was open and undisturbed for the requisite 12 years.

27. What is clear therefore from the foregoing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adverse entry into the land, the applicant must also

demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner.

28. Applying the above to the present case I will proceed to consider if the threshold set has been met by the Applicants since the burden of proof lies on them - See section 107 of the Evidence Act Chapter 80 of the Laws of Kenya.
29. The plaintiff applicant lays claim on a portion of parcel number 1837. PW1 the plaintiff produced a green card in respect of parcel Uholo/Sigomre/1837 which shows Margaret Atieno Okum as the registered proprietor as at 2/11/2010. The defendant also produced in evidence a certificate of title for the same parcel registered in her name. This therefore confirms that the land claimed is registered to a third party as required under section 38 of the Act.
30. I will then consider if the period of possession has met the statutory requirement of 12 years. PW1 states that he used the portion he claims since the life of Mzee Okal from 1984 and he later constructed his house therein in 2002. DW1 evidence is that the applicant trespassed into the land in the year 2002. It is important to address the year of entry which is critical for purposes of computation of time.
31. What appears not be in dispute is the fact that in the year 2002 the applicant constructed a house in the suit property.

This is corroborated by PW2 who stated that the applicant plaintiff constructed his house in plot 1837 in the year 2002.

32. However, I must discount the period starting 1984 to the year 1995 which is the period when Mzee Okal was alive. I say so because during the said period the plaintiff lived and used the suit property with the permission of Mzee Okal. PW1 stated in her oral testimony he entered parcel 1837 with permission of the owner. PW2 confirmed in his testimony before court that PW1 was given the portion in 1984 by Mr. Okal. It is trite law that in a claim for adverse possession the entry into another's land should not have been with the consent of the owner. There was no adverse possession therefore as the applicant was working on the land with the permission of Mzee Okal.
33. PW1 further stated that in the year 2002 he set up his home peacefully continued to live thereon uninterrupted. It has been submitted that the photo produced by the applicant depicted that the applicant was standing in front of his home together with the respondent way back. Cross examined on the said photo PW1 conceded that the same did not identify the persons therein by name. PW2 on being shown the photograph (PEx5) conceded it did not show the same was of plot 1837.

34. The defendant is sued as the registered proprietor. She became the registered proprietor in November 2010 as evidenced in the green card produced. Time started running against her then from that time until the filing of the present proceedings in 1922. This makes a period of 12 years.
35. The question that arises is whether the possession was peaceful and interrupted. DW1 testified that she complained to the Chief several times. I have seen the letter dated 19/2/2020 by the office of the assistant chief where the chief states that the applicant and respondent appeared before him on the issue of the suit property 1837. A letter dated 24/02/2020 confirms the dispute having existed by 2018 and which was 8 years after the respondents registration.
36. Moreover, the search dated 3/6/2021 shows that a Caution lodged on 10/01/2020 meant that there was no longer peace even before the 12 years crystalized. Entry No. 3 dated 30/5/2019 of the green card produced by PW1 shows the applicant was claiming as licensee. A license is defined by the **Land Act** (section 2) as a permission to use land that would otherwise constitute trespass. PW1 confirmed he is the one who applied and lodged the restriction. It is established that a person who occupies another's persons land with that person's consent, cannot be said to be in

adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

37. It has been pleaded by the defendant that the present suit is resjudicata. The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

38. The **Black’s law Dictionary 10th Edition** defines **“res judicata”** as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

39. I have perused the judgement dated 16/9/2020 in SRM ELC Case No. 9 of 2020. The finding on the claim for customary trust failed. On adverse possession the court made a finding that it lacked jurisdiction on the same. My hands would be tied on the first limb because I have not seen any orders overturning the said decision. However, on the plea of adverse possession a final determination was not made on the issue and this court is seized of the requisite jurisdiction. The court finds guidance in the case of **John Florence Maritime Services Ltd & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**.
40. I think I have said enough to show that the Applicant /Plaintiff has failed to prove on a balance of probabilities the requirements for the grant of the suit parcel to him by dint of adverse possession.
41. The suit is hereby dismissed with costs to the Respondent

Delivered and Dated at Siaya This 30th of January 2026

HON. LADY JUSTICE A.E. DENA
JUDGE

30/01/2026

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Agina for Applicant Plaintiff

Mr. Otieno for Defendant Respondent

Court Assistant: Ishmael Orwa

ORIGINAL