

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC SUIT NO. E005 OF 2022(O.S)

JOSEPH OBUYA WAGUDA.....
PLAINTIFF

VERSUS

SAMWEL AMBASA OUNDO....

.....DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendant by way of an Originating Summons dated 14th February 2022, seeking the determination of the question whether the Plaintiff had acquired a portion of all that parcel of land known as South Nyakach/Lower Kadianga/1165 measuring 1.3 Hectares (hereinafter referred to as “the suit property”) by adverse possession, and whether he should be registered as the owner thereof.
2. The Originating Summons was supported by the affidavit and further affidavit of the Plaintiff, sworn on 14th February 2022 and 17th October 2022, respectively. The Plaintiff’s case, in summary, was that he purchased the suit property from the Defendant in 1996 and had had quiet, open, and exclusive

possession thereof for over 25 years. The Plaintiff averred that he had acquired the suit property by adverse possession and was entitled to be registered as the owner thereof.

3. The Defendant opposed the Originating Summons through a replying affidavit sworn on 22nd February 2022. The Defendant averred that he entered into an agreement of sale of land with the Plaintiff on 20th September 1995. The Defendant averred that the subject of the said agreement was a portion of all that parcel of land known as South Nyakach/Lower Kadianga/1590 (hereinafter referred to as "Plot No. 1590") and not the suit property. The Defendant averred that, although what was sold to the Plaintiff was a portion of Plot No. 1590, the Plaintiff entered the suit property sometime in 2003 without the Defendant's knowledge and built a home thereon. The Defendant averred that the Plaintiff had not occupied the suit property peacefully, a fact borne out by the documents presented to the court by the Plaintiff in support of his case. The Defendant averred that this suit was brought by the Plaintiff

to legalise his acts of trespass. The Defendant averred that the Plaintiff was only occupying a portion of the suit property, with the rest under the Defendant's son's occupation, who also had his home on a portion of the property. In his supplementary affidavit, the Plaintiff denied that he purchased a portion of Plot No. 1590.

4. At the trial, the Plaintiff adopted his witness statement dated 14th February 2022, and his further affidavit sworn on 17th October 2022 as his evidence in chief. The Plaintiff produced the documents attached to his list of documents dated 14th February 2022 and the further list of documents dated 17th October 2022 as Plaintiff's exhibits 1 and 2, respectively. The Plaintiff averred that he entered the suit property in 1996 and that the Defendant had not taken steps to evict him from the property. The Plaintiff averred that the agreement dated 9th November 1996 between him and the Defendant was not a forgery. He stated that the agreement was executed in the presence of witnesses. He stated that he purchased land measuring 70 by 52 steps, and that the Defendant had refused to issue a title for the land. He stated

that he entered into two agreements with the Defendant, one handwritten and the other typed, in respect of the same property, with the handwritten agreement being the first one and the typed being the last. The Plaintiff's wife, Caren Anyango Obuya (PW2), corroborated the Plaintiff's evidence.

5. PW3, William Wagala Ouma, told the court that he witnessed the signing of the typed agreement of sale between the Plaintiff and the Defendant dated 9th November 1996, on 23rd November 2021. He stated that the Plaintiff's and the Defendant's wives and sons were present during the execution of the agreement. He stated that the Plaintiff and the Defendant had entered into a handwritten agreement of sale on 9th November 1996, and there was a balance of the purchase price that remained, which was paid on 23rd November 2021. He stated that it was during the payment of the said balance of the purchase price in the sum of Kshs. 20,000/-, that the parties also signed the typed agreement of sale, which was also dated 9th November 1996, as the handwritten agreement. He stated that the Plaintiff had

occupied the suit property since 1996, and that the location of the property had not changed.

6. In his evidence, the Defendant adopted the contents of his replying affidavit sworn on 22nd February 2022 in response to the Originating Summons as his evidence in chief. The Defendant produced the documents attached to his replying affidavit and supplementary list of documents as Defence exhibits. The Defendant stated that the only agreement he entered into with the Plaintiff for the sale of land was the handwritten agreement dated 20th September 1996, and that it concerned Plot No. 1590. He stated that he never sold the suit property to the Plaintiff. He stated that the Plaintiff occupied the suit property in his absence. He stated that the Plaintiff refused to move to Plot No. 1590 even after he was asked to do so by the area chief and Assistant County Commissioner (D.O). He stated that he sold a portion of Plot No. 1590 to the Plaintiff at a consideration of Kshs. 16,000/- of which the Plaintiff paid only a sum of Kshs. 12,700/-, leaving a balance of Kshs. 3,300/-. He stated that Plot No. 1590 was still available, but the Plaintiff had refused to move

to the same. The Defendant admitted in cross-examination that the Plaintiff entered the suit property in 1996. He stated that he did not sue the Plaintiff because the Plaintiff had undertaken to vacate the suit property.

7. After the close of evidence, the parties were directed to make written closing submissions. The Plaintiff filed submissions dated 12th November 2025, while the Defendant filed submissions dated 13th October 2025. The parties supported the submissions by several authorities. I have considered the Originating Summons together with the supporting affidavits. I have also considered the replying affidavit filed by the Defendant in opposition to the Originating Summons. Finally, I have considered the evidence tendered by the parties and the submissions of counsel. In Gabriel Mbui v. Mukindia Maranya[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following;

- a) He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
- d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.
- e) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

- f) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.**
- g) The possession must be continuous uninterrupted, unbroken for the necessary statutory period.**
- h) The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
- i) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.**
- j) The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.**

8. In Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others [2018] eKLR, the Court of Appeal stated as follows:

“18. Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See Jandu vs. Kirplal & Another (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in Wambugu vs. Njuguna [1983] KLR 173. Did the respondents discharge this burden?...

19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their

rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others (supra)...”

9. In Mwangi Githu v. Livingstone Ndeete [1980] eKLR, Potter J. quoted volume 24 of Halsbury’s Laws of England, 3rd edition, page 252, where the authors stated as follows:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

10. In Githu v. Ndeete [1984] KLR 776 it was held that:

1. “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 the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into

the 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.

2. A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land to which the owner holds title.”

11. In Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, nec vi, nec clam, nec plecario (no force, no secrecy, no evasion) ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

12. The property claimed by the Plaintiff by adverse possession is a portion of all that property known as South Nyakach/Lower Kadianga/1165, measuring 1.3 Hectares (“the suit property”). The Plaintiff has claimed that he purchased the suit property from the Defendant in 1996 and took possession of the same in the same year. On his part,

the Defendant has contended that what he sold to the Plaintiff in 1996 was a portion of all that property known as South Nyakach/Lower Kadianga/1590 (“Plot No. 1590”). The Defendant has contended that instead of occupying the land sold to him, the Plaintiff entered and occupied a portion of the suit property in 2003 and had remained in occupation despite several requests and notices sent to him to vacate the same.

13. From the evidence placed before the court by the parties, I find it more probable that the land that was sold to the Plaintiff by the Defendant was the suit property rather than Plot No. 1590. The only agreement of sale admissible in evidence produced at the trial was the agreement dated 9th November 1996, which was produced by the Plaintiff. The agreement was signed by the Plaintiff and the Defendant, and their signatures were witnessed. According to the agreement, the land that was sold by the Defendant to the Plaintiff was a portion of all that property known as South Nyakach/Lower Kadianga/1165, measuring “70 x 52 spaces”. The purchase price was Kshs. 32,700/-, which was paid in

full. The other two agreements produced in evidence by the Plaintiff and the Defendant, which had conflicting particulars of the land sold, were not in the language of the court. The court cannot, therefore, base any finding on the same. I have also noted that Plot No. 1590 was registered in the name of the Defendant and a third party as joint registered owners. The Defendant alone could not, therefore, have sold the property to the Plaintiff.

14. In any event, even if the land sold by the Defendant to the Plaintiff was Plot No. 1590 and not the suit property, it was common ground that the Plaintiff was occupying the suit property and not Plot No. 1590. According to the Plaintiff, he had occupied the suit property since 1996. The Defendant, on his part, claimed that the Plaintiff entered the suit property in 2003 and has occupied the property since then.

15. It was also common ground that the Plaintiff entered the suit property without the Defendant's permission and had occupied the property openly without any interruption since he took possession. I did not understand the Defendant's argument that the court should presume that

the Plaintiff had occupied the suit property with the Defendant's permission because the Defendant had sold to the Plaintiff Plot No. 1590 and not the suit property. I believe that is all the more reason why the Plaintiff's occupation of the suit property was without the Defendant's consent.

16. The Defendant told the court that he never took legal action against the Plaintiff to recover possession of the suit property because the Plaintiff had promised that he would vacate the property. The evidence of the Plaintiff's alleged promise to vacate the suit property was not produced by the Defendant at the trial. The Plaintiff brought this suit on 14th February 2022. Whether the Plaintiff entered and occupied the suit property in 1996 as claimed by the Plaintiff or in 2003 as claimed by the Defendant, the Plaintiff had occupied the suit property for over 12 years at the time he brought this suit.

17. The property, South Nyakach/Lower Kadianga/1165, measures 1.7 Hectares. The Plaintiff is claiming a portion of the property measuring 1.3 Hectares by adverse possession.

According to the agreement of sale between the Plaintiff and

the Defendant dated 9th November 1996, the portion of South Nyakach/Lower Kadianga/1165 sold to the Plaintiff measured “70 x 52 spaces”. At the trial, the Plaintiff told the court that by the word “spaces”, the parties meant “steps”. The parties did not address the court as to the meaning of “a step”. I would take it that the parties meant “a footstep”. The court takes judicial notice of this traditional way of measuring land using footsteps.

18. A foot step from my own research measures between 2.2 feet and 2.5 feet, depending on whether the person taking the measurement is a woman or a man. There was no evidence as to who carried out the measurement. I would therefore take an average measurement of a footstep, which is 2.35 feet. It follows, therefore, that 70 by 52 steps would be equivalent to 164.5 feet by 122. 2 feet, which comes to 20,102 square feet. 20,102 square feet is equivalent to approximately 0.187 Hectares. The Plaintiff is therefore entitled to a portion of South Nyakach/Lower Kadianga/1165 measuring 0.187 Hectares and not 1.3 Hectares. The Plaintiff did not lead evidence that he was occupying more land than

what he purchased. He did not contest the Defendant's claim that part of South Nyakach/Lower Kadianga/1165 is occupied by the Defendant's son.

19. I am satisfied that the Plaintiff has proved his adverse possession claim against the Defendant. I therefore enter judgment for the Plaintiff against the Defendant as follows;

a) I declare that the Plaintiff has acquired a portion of all that parcel of land known as Title No. South Nyakach/Lower Kadianga/1165 measuring 0.187 Hectares by adverse possession.

b) The Defendant shall subdivide at the Plaintiff's cost through a Government Surveyor within ninety (90) days from the date hereof, all that parcel of land known as Title No. South Nyakach/Lower Kadianga/1165, and shall transfer to the Plaintiff a portion thereof currently occupied by the Plaintiff, measuring 0.187 Hectares.

c) The Deputy Registrar of this court shall execute on behalf of the Defendant all documents necessary to facilitate the subdivision and transfer of a portion of all that parcel of land known as Title No. South Nyakach/Lower

- Kadianga/1165 measuring 0.187 Hectares to the Plaintiff if the Defendant refuses or fails to do so within the prescribed period.
- d) The Plaintiff shall pay all fees and other statutory charges required for the subdivision and transfer of the said portion of Title No. South Nyakach/Lower Kadianga/1165 measuring 0.187 Hectares from the Defendant to the Plaintiff.
- e) The portion of Title No. South Nyakach/Lower Kadianga/1165, measuring 0.187 Hectares, to be transferred to the Plaintiff, should be on the part of the property where the Plaintiff's home is situated.
- f) Each party shall bear its own costs of the suit.

Written and signed at Kisumu by

**S. OKONG'O
JUDGE**

**Delivered, dated, and countersigned at Kisumu on this
17th day of February 2026**

**E.ASATI
JUDGE**

Judgment delivered through Microsoft Teams Video Platform in the presence of:

for the Plaintiff
for the Defendant
-Court Assistant

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