

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ELC L. (OS) CASE NO. E001 OF 2025

NELSON OUMA OKECH.....

PLAINTIFF/APPLICANT

VERSUS

**CHARLES ODUOR OTIENO.....1ST DEFENDANT/
RESPONDENT**

**CLEAFAS MULUMBU OTIENO2ND DEFENDANT/
RESPONDENT**

**MARTIN ONGASA OTIENO3RD DEFENDANT/
RESPONDENT**

JUDGEMENT

1. In the Originating Summons amended on 5th April 2024 the Applicant herein sought for orders;

a) THAT the defendants right over 1.2 HA (3 Acres) out of **LR South Ugenya/Simenya/6 - 3.138 Ha** as possessed by the Plaintiff is extinguished by adverse possession from the time the Plaintiff acquired the same.

b) THAT the plaintiff do and is hereby granted right of Title to an area measuring 1.2 HA (3 Acres) out of **LR South Ugenya/Simenya/6 - 3.138 Ha**

c) THAT an order of permanent injunction be and is hereby issued against the Defendants: permanently restraining them either by themselves, relatives,

servants, workers, agents and or any other persons claiming through them from interfering with the defined portion of LR South Ugenya/Simenya/6 - 3.138 Ha which the plaintiff is claiming

d) THAT this Honorable court do issue further orders it may deem just and expedient

e) THAT the cost of this suit be provided for by the Defendants

2. The Applicant, Nelson Ouma Oketch, swore an Affidavit on 20th February 2024 and Further Affidavit filed on 15th April 2024 in support of the Originating Summons. He deponed that the He deponed that the defendants have been joint registered owners of the parcel LR South Ugenya/Simenya/6 (herein suit land).

3. According to the Applicant his deceased father Stephene Okech arrived in the suit land before land adjudication and during registration invited the Defendants father who came with his family including the defendants to reside with him as the land was bushy and needed to be cleared. In 1973 the Defendants father misled the adjudication team to register him and his sons without considering that the suit land was now co-owned by two families.

4. The applicant avers that upon his father's demise in 1982, he returned home and occupied 1.2 Ha that his father was occupying and also buried him therein. That this was a distinct part of the suit land the Applicant has occupied for 42 years since then. That the 12 year threshold was attained

in 1994 and which has not been interrupted to date. It has been quiet and notorious.

5. It is disclosed that in the year 1997, the applicant instituted **Siaya PMC Civil Suit No.73 of 1997** against the Defendants herein for a claim of his right to title which was determined in his favour and orders made for title to issue in his name. However, upon appeal to **Kisumu High Court Civil Appeal No. 82 of 2003** it was found that the Principal Magistrate Court lacked jurisdiction to determine the case. Consequently, the present suit.
6. The Applicant depones that this suit is not resjudicata as the former suit was dismissed on technicalities.
7. The Defendants filed grounds of opposition to the originating summons dated 21/3/2024 terming the Motion as resjudicata, an abuse of the court process, that there was no pictorial evidence to prove possession and that the applicant was in occupation of a portion on South Ugenya/Simenya/8 which rightfully belongs to him. It also averred that the Originating Summons as filed is a boundary dispute between the two parcels which falls under the jurisdiction of the Land Registrar. That the court lacks jurisdiction to hear and determine the matter.
8. The Defendants in addition to the above filed a replying affidavit to the suit sworn by Charles Oduor Otieno the 1st respondent where he states the supporting affidavit had material nondisclosure. The deponent lists all his siblings and states the parcel South Ugenya/Simenya/6 is ancestral

property. That the bonafide proprietors upon conclusion of adjudication as at 23/01/1973 were Otieno Mulumb, Maranje Otieno and Ongasa Otieno. In the green card his deceased fathers name appeared as Otieno Mulumb and the deponent as Maranje Otieno. That each was entitled to $\frac{1}{4}$ share of the parcel.

9. It is deponed that on reaching majority age each started separate families/homesteads on the portions and presently there were 9 homesteads 6 by the applicants siblings and 3 by nephews.
10. The deponent invited the court to strike out the suit against the 2nd defendant as he was deceased.
11. The deponent adds he knows the Applicant as one of the biological sons of Stephen Okech the first registered proprietor of South Ugenya/Simenya/8 on 23/01/1973 and fully participated in the adjudication process. That this parcel neighbours South Ugenya/Simenya/6. That the Plaintiffs father never laid claim to South Ugenya/Simenya/6.
12. That the homes of the Applicants father, the Applicant and his brother Joseph were all situate in South Ugenya/Simenya/8 allocated to their father. It is contended that Nelson Ouma Oketch has never resided on **South Ugenya/Simenya/6**. Further that the Applicant moved to South **Ugenya/Simenya/11** registered in the names of the deponents' father where he established his home and lives to date. This is subject to court proceedings in Ukwala court.

13. Rehashing the events relating to the proceedings of the Land Disputes Tribunal and its quashing, it is averred that the Applicant has always tried to lay claim on the deponents ancestral land. That he has come back to court thereafter after a lull of 21 years with the same dispute. It is urged that the Plaintiff has never been in peaceful possession as confirmed by the various litigations herein. Further that the plaintiff only entered the land after the orders of injunction were issued in these proceedings at his instance.
14. It is averred that the suit does not meet the threshold for the grant of the orders sought.

Hearing and Evidence

15. The suit was heard viva voce on 30/6/2025. I must also note that Applicant is also referred to as the Plaintiff.
16. Nelson Ouma Oketch testified as PW1. He adopted his witness statement dated 20/2/2024 as his evidence in chief and the documents filed in the list of documents of even date as PEXH 1-4. The witness statement largely reiterates the contents of the supporting affidavit. PW1 asked the court to help him get the parcel since Jonnes has illegally registered himself as proprietor.
17. Cross examined the witness stated besides him his father had another child Joseph Opondo Okech. That he at some point lived in his fathers boma where his brother still lives and where their father was buried. The witness agreed he now lives in a separate boma and his claim is that the

defendant took it illegally and that he has lived therein for over 12 years. He stated that his father died in the 1980s and never filed any proceedings against the defendants. That he PW1 moved from his fathers boma located in Siaya South Ugenya/Simenya / 8 to South Ugenya/Simenya/11 registered in the name of Loyce Ouna. He admitted that every time he tried to enter South Ugenya/Simenya /6 the defendants would take him to the police. It was his evidence that the defendants have never given him peace. He admitted his name was not included as one of the occupants of South Ugenya/Simenya / 6 in the Survey report dated 28/10/2024 in the defendant's bundle. He further conceded that in the proceedings for case No. 73 of 1997 his suit was dismissed with costs.

18. The witness clarified in re-examination that the appeal in Civil Appeal No. 82 of 2003 was allowed for want of jurisdiction and the judge allowed him to file the matter before a court of competent jurisdiction.
19. On inquiry by the court as to why his brother Joseph Oketch was not his witness, PW1 was hesitant to answer the question.
20. The Plaintiff also called PW2 Caleb Otini Nyamogo to testify in support of his case. The witness adopted the witness statement dated 20/5/2025. He told the court he knew the plaintiff as a neighbour in the same village. He also testified that he knew who occupied which plot. He told the court that

the plaintiffs father was buried in the ancestral land in Simenya.

21. Upon cross examination PW2 testified that the plaintiffs father had a homestead where he is buried. That the plaintiffs brother stays in the said homestead.

22. With the above the Plaintiffs case was marked as closed.

23. DW1 was Charles Oduor Otieno the 1st defendant. the witness adopted the replying affidavit sworn 14/06/2024 and witness statement dated 9/10/2024 as his evidence in chief. The statement largely mirrored the supporting affidavit. He confirmed the 2nd defendant was his brother (deceased) survived by the 3rd defendant who was his wife. DW1 also produced the documents in the list of documents dated 9/10/2024 as his evidence DEXH 1-12. The witness pointed that he was aware of the survey and produced the report as DEXH 13.

24. Mr. Otieno stated that the plaintiffs claim was total lies and ought to be dismissed with costs.

25. In cross examination DW1 stated that the tribunal case was dismissed by Justice Tanui on appeal. The plaintiff was given an opportunity to appeal the decision he did not. He agreed that in Ukwala ELC Case No. 43 of 2021 his father was sued together with the entire family by one Maria Juma and the witness was one of the defendants. Maria Claimed the land South Ugenya/Simenya/11 belonged to her. He conceded

that the Plaintiff lives in South Ugenya/Simenya/11. He stated before 2024 the Plaintiff lived in Ugenya/Simenya/8.

26.The witness added that they reported the plaintiff to the chief with regard to his occupancy of South Ugenya/Simenya/11 but conceded the letter dated 24/4/2024 in this regard refers to South Ugenya/Simenya/6. That plaintiffs father was buried in South Ugenya/Simenya/8 where his son still resides. The plaintiff started laying his claims after his fathers demise.

27.With the above the Defence case was closed.

SUBMISSIONS

Plaintiffs Submissions

28.The plaintiffs submissions are dated 16/09/2025.Rehashing the plaintiffs case and documents produced in evidence and the disclosure on the previous litigations in Siaya Civil suit No. 73 of 1997 and Kisumu High Court Appeal No. 82 of 2003 it is submitted that despite jurisdictional issues the trial court was notified that the defendants father had actually defrauded the plaintiff of his land and that the plaintiff was in full use of the same. That the photos showing the plaintiffs occupation were not denied by the defendants and for over his age of 70 years guarantees adverse possession. That the plaintiffs notified the court that the defendants were in the process of evicting him vide Notice of Motion application dated 4/6/2024. That should the plaintiffs suit not be allowed he will definitely be evicted.

29. The Defendants did not file submissions.

ANALYSIS AND DETERMINATION

30. Having carefully considered the pleadings, testimonies and submissions herein, the main issues that arises for determination is Whether the plaintiff has proved his claim on a balance of probabilities to warrant the grant of the reliefs sought against the Defendants.
31. Vide the present suit, the Plaintiff seeks inter-alia, that the court should declare him the owner of 3 acres of LR South Ugenya/Simenya/6 by dint of adverse possession and that title is issued accordingly. Orders of permanent injunction are also sought restraining the defendants from interfering with the plaintiffs occupation thereof.
32. It is the Plaintiffs case that during adjudication the defendants father (deceased) was invited by the Plaintiffs father into the said parcel to assist in clearing the same as it was bushy but he misled the adjudication officers to register the land into his name.
33. The Plaintiff adduced into evidence Copy of Certified Green Card for parcel LR South Ugenya/Simenya/6; Certified Copies of Proceedings in Siaya PMC Civil suit no.73 of 1997; Copies of Judgement in Kisumu High Court Civil appeal No.82 of 2003 and Copies of Photographs of the suit property.
34. The Defendants on their part state that the plaintiff claim is a lie, that parcel LR South Ugenya/Simenya/6 is their

ancestral land whose first bonafide registered owners were Otieno Mulumbu (the defendants father), Maranje Otieno (1st defendant), Mulumbu Otieno (their brother Cleofas) and Ongasa Otieno (3rd defendant), each entitled to a quarter share. It is their case that suit property has 9 homesteads arising from the defendants according to their said shares. That the Plaintiff, his father and brothers homes were located in LR South Ugenya/Simenya/8 registered in their fathers name. That the plaintiff has never resided in LR South Ugenya/Simenya/6 but LR South Ugenya/Simenya/11.

35. The Defendants adduced into evidence Copy of Green card for Land parcel South Ugenya/Simenya 6; Copy of Certificate of official search for Land parcel South Ugenya/Simenya 6; Copy of Title deed for Land parcel South Ugenya/Simenya Copy of Certificate of death for Joanes Otieno Mulumb; Copy of Certificate of death for Cleophas Mulumb Otieno; Copy of Judgment in Kisumu High Court Appeal No. 82 of 2023; Copy of Certificate of Official search for land parcel South Ugenya/Simenya 8; Copy of Chief's letter dated 22nd April 2024; Copy of letter dated 15th May 2024 from OCS Ugunja to Subcounty land surveyor Ukwala; Copy of letter dated 17th May 2024 from Subcounty Surveyor to area chief; Still photograph showing suit land and Still photographs showing Plaintiff's homestead on parcel South Ugenya/Simenya/11

36. From the pleadings the plaintiffs claim is clearly a claim for adverse possession over a portion of LR South Ugenya/Simenya/6 and therefore the issues for determination are; -

1) Whether or not the plaintiff's entry and presence on the suit land was with the knowledge but without the permission and consent of the defendants as the registered owners.

2) Whether or not the plaintiff has had open, actual, exclusive, peaceful, continuous and uninterrupted possession (*nec clam, nec vi, nec precario*) of the suit land for a period of over 12 years.

3) Whether or not the title of the defendants has become extinguished by operation of law.

37 I will first discuss the legal framework and rationale for the doctrine of adverse possession. The doctrine of adverse possession in Kenya is founded under the Limitation of Actions Act CAP 22 Laws of Kenya (herein the Act)

38. The doctrine is anchored on Sections 7, 13, 17 and 38 of the Act which provides 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.”

39. Section 7 therefore places a bar on actions to recover land after 12 years from the date on which the right accrued.
40. Section 13 reads; -
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 this Act referred to as adverse possession), 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 cease 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 purpose 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.
41. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the Act and Order 37 of the Civil Procedure Rules, 2010
42. Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and provides that:

“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.”

43. In the case of **Mtana Lewa -vs- Kahindi Ngala Mwangandi [2015] e KLR** the court of appeal had this to say; -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

44. I will be so guided.
45. 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.

Whether or not the plaintiff's entry and presence on the suit land was with the knowledge but without the permission and consent of the defendants as the registered owners.

46. Firstly, it is a requirement that the land the subject of adverse possession must be registered in the name of a third party. PW1 adduced into evidence Copy of Certified Green Card for parcel LR South Ugenya/Simenya/6 which was also produced by the Defendants. It is not in dispute that the same is registered in the name of the defendants and their deceased father as already stated elsewhere in this judgement.
47. I think it is pertinent to resolve the contention that the Plaintiff has never lived and or is not in occupation of the alleged portion parcel LR South Ugenya/Simenya/6 but instead lives in parcel LR South Ugenya/Simenya/11.
48. The burden of proof first lay on the plaintiff to proof that he was indeed in occupation of the portion in the suit property LR South Ugenya/Simenya/6. There was

produced by PW1 a set of photographs (see page 10, 11, 12). These photos show some three houses, cows grazing under the watch of a male adult and the same person standing by a maize crop with some banana plants seen in the background. I had no means of confirming that the photos were taken in the property LR South Ugenya/Simenya/6 considering that this was a highly contested issue. There was no further corroboration of this evidence

49. The Defendants on the other hand through DW1 produced a survey report dated 28/10/2024 for LR South Ugenya/Simenya/6 prepared by the Sub County Surveyor Ugunja Jared O.Okoth. The occupation of the plot is shown to have 9 names. The Plaintiffs name does not feature among the 9 names. PW1 admitted in cross examination that he was present during the survey. Indeed, he is listed as No. 19 in the list of those who attended. He confirmed that the listed person was actually in occupation. PW1 conceded that he moved from his fathers boma located in Siaya South Ugenya/Simenya/8 to South Ugenya/Simenya/11 registered in the name of Loyce Ouna.
50. Based on the foregoing it is this courts finding that the Plaintiff has not proved his occupation of the alleged portion of the suit property LR South Ugenya/Simenya/6.

Whether or not the plaintiff has had open, actual, exclusive, peaceful, continuous and uninterrupted

possession (nec clam, nec vi, nec precario) of the suit land for a period of over 12 years.

51. Assuming that the Plaintiff was in occupation of the alleged portion as he claims, the evidence shows that such occupation was not peaceful. PW1 admitted that every time he tried to enter South Ugenya/Simenya /6 the defendants would take him to the police. It was his evidence that the Defendants have never given him peace. Additionally, I have already pointed that the plaintiff has not proved actual possession.
52. I must also note that the Plaintiffs case is that the land belonged to his father, however the defendants misled the adjudication officers into registering the defendants as the proprietors yet the land was co-owned by the two families. PW1 testified in cross examination that he has asked the court to return his 'shamba' to him which the defendant illegally took from him. The plaintiff cannot sustain a claim of adverse possession on the basis of these facts. Firstly, he doesn't recognise the ownership of the registered proprietor's. He also cannot claim on the basis of fraud or misrepresentation as this becomes a totally different claim to be ventilated in a separate action. Fraud is not an ingredient of adverse possession.
53. The court is guided and agrees with the decision in **Haro Yonda Juaje -vs- Sadaka Dzengo 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.” Emphasis is mine.

54. I think I have said enough to demonstrate that the Plaintiff has not proved the elements of adverse possession. Consequently, the relief for permanent injunction cannot issue as it is dependent upon a finding of adverse possession of LR South Ugenya/Simenya/6.
55. I find no evidence to hold that the defendant’s title ever became extinguished in accordance with the provisions of Section 17 of the Limitations of Action Act or that the plaintiff is entitled to the reliefs sought.
56. Regarding costs, since costs follow the event I will award the same to the Defendants.
57. The upshot of the foregoing is that the Plaintiffs suit is hereby dismissed with costs to the Defendants.

Orders accordingly.

Dated at Siaya this 5th Day of March, 2026

HON. JUSTICE A. E. DENA

JUDGE

5/03/2026

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

Mr. Ochido Holding brief for Mr. Odera for the Plaintiff

Ist & 2nd Defendants Present

Court assistant: Ishmael Orwa