



**Opondo & another v Ogutu (Environment and Land Case
E001 of 2022) [2026] KEELC 1686 (KLR) (23 March 2026) (Judgment)**

Neutral citation: [2026] KEELC 1686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE E001 OF 2022**

AE DENA, J

MARCH 23, 2026

BETWEEN

LAWRENCE OTIENO OPONDO 1ST PLAINTIFF

VINCENT ODONGO OKUMU 2ND PLAINTIFF

AND

JOHN ODHIAMBO OGUTU DEFENDANT

JUDGMENT

1. The Plaintiffs brought this suit initially vide a plaint dated 7/12/2022 which was amended on 22/5/2023 seeking the following reliefs; -
 1. An order of permanent injunction restraining the Defendant either by himself or whether by acting through his agents, servants, employees and or anybody claiming title under the Defendant otherwise jointly and severally from continuing to trespass upon unlawfully or illegally managing, receiving rent proceeds, occupying, letting out leasing charging and or in any other manner unlawfully interfering with the property on the land parcel LR number 12045/61 now known as Siaya Municipality/Block 1/252
 2. An order do issue authorising the plaintiffs to retain a land/ estate valuer to take truthful just and honest accounts of the suit property and tabulate the sums of rental income that the suit property has yielded and or has been received by the Defendant from the year 1988 but not remitted
 3. An order of eviction against the Defendants tenants, leases and or licensees or any person claiming under the Defendant from the suit property
 4. General Damages for continuing trespass, intermeddling, conversion and detinue
 5. Mesne Profits



6. Cost of the suit together with interest at such rate and for such period as the court may deem fit to grant.
2. The Plaintiffs case is that they are son and grandson respectively of Erasto Opondo Otieno(deceased) who was allocated the parcel LR number 12045/61 now known as Siaya Municipality/Block 1/252 (suit property) vide a letter of allotment dated 19/2/1973 and issued with a 33 year lease by the Commissioner of Lands on behalf of the Siaya County Council. The lease was extended for a further term of 66 years from 1/07/2011.
3. That upon possession in 1978 Erasto commenced development of a commercial shopping complex but died when it was partially complete but he had started collecting rent from some of the completed shops.
4. The plaintiffs claimed that the defendant took possession of the suit land around 1984 as a tenant of Erasto. He then entered into a verbal agreement with one of Erastos widows Magdalina Ahenda Apondo and Richard Okumu Opondo the father to the 2nd plaintiff) of the deceased. That the agreement required the defendant to complete constructing the shops that the Erasto had started constructing on the suit land and to act as an agent to collect rent and share rental income from the said completed shops with Erastos three widows and himself at the ratio of 30:70 respectively until he recovered his construction costs.
5. According to the Plaintiffs the said agreement also tasked the defendant to hand over the suit land and the shops thereon to the estate of the deceased upon the full recovery above. However, despite completing the said construction and collecting his full costs from rental income by 1988, the defendant had allegedly refused to share the said rental income with the estate of the deceased and give back possession of the suit land to Erastos widows to date unjustly enriching himself to the detriment of Erastos bonafide heirs and beneficiaries of the estate.
6. It is averred that the defendant breached the said agreement with Erastos relatives as follows; -
 - a. Failing to pay the monthly rent due to the widows as and when required, or at all and thus fell into arrears.
 - b. Failing to keep accounts of the amount he spent in completing the construction of the suit property and or remittances to the deceased's widows.
 - c. Subletting the premises to 3rd parties without the express written consent of the deceased's widows.
 - d. Making further structural adjustments and other illegal structures without the express consent and authority of the deceased's widows and lawful authority.
 - e. Failing and or refusing to handover the suit property back to the deceased's family members after refunding himself his entire capital input
 - f. Attempting to fraudulently and illegally transfer the suit property to himself thus intermeddling with the deceased's estate.
 - g. Failing and or refusing to keep accounts of all the income that he has been receiving from the deceased's said property and or estate.
 - h. Unlawfully and illegally registering himself as the reteable owner of the suit property in place of the deceased.



7. The plaintiffs allege all the three widows are deceased. That the Defendant illegally and fraudulent made an attempt to carry out succession in Erastos name and transfer the suit property to his name. The particulars of fraud and unlawful attempt are outlined in paragraph 13 of the amended plaint as follows; -
 - a. Unlawfully and illegally filing Siaya Principal Magistrate's Succession Cause Number 22 of 1997: In the matter of the Estate of Erasto Opondo Otieno (Deceased) without involving all the beneficiaries of the deceased's estate and or disclosing the deceased's entire properties.
 - b. The Defendant and his cohorts filed the said succession cause by misrepresenting facts and or failing to disclose material facts to the court in their petition.
 - c. Intermeddling with the estate of the late Erasto Opondo Otieno (deceased)
 - d. Entering into an illegal and unlawful agreement dated 7th August 1997 which purported to dispose off the deceased's land parcel L. R. Number 12045/61 (now known as Siaya Municipality/Block 1/252) to the Defendant yet the grant of probate over the deceased's estate had not been confirmed.
 - e. Fraudulently having himself registered as the reteable owner of the land parcel Siaya Municipality/Block 1/252) when he knew very well that he had not legally acquired title of the said property.
 - f. Fraudulently claiming that the deceased's family members had sold the property to the Defendant, a fact which he knew was false.
 - g. Forging the Chief's letter dated 31st May 1997, which he used to file the said succession cause claiming it was genuinely issued by the Area Chief by the name FREDRICK OJUANG ONGONGO, a fact which he knew was false.
 - h. Giving false representations to the court, non disclosures and failing to inform the court all the relatives of the deceased.
8. That subsequently the 1st plaintiff procedurally and legally petitioned the High Court at Kisumu Succession Cause No. 460 of 2008 and was issued with grant of letters of administration for the estate of Erasto which was confirmed and the property distributed as outlined in paragraph 17 of the Plaint.
9. The Plaintiffs contend Teresia Aluoch Ochieng (now deceased) was a wife and beneficiary of the deceased's estate. She was also the 1st Plaintiff's mother and the 2nd Plaintiff's step- grandmother. She passed away on 11th June 2020 and thus her interest in the estate of the deceased passed on to the 1st Plaintiff in terms of the grant.
10. The defendants occupation is termed as continuing trespass as particularised in paragraph 20A of the amended plaint to wit letting tenants and collecting rent, occupying the suit property and carrying out business without the Plaintiffs authority including threatening the plaintiffs with physical harm if they attempt to use or recover the property.
11. The plaintiffs further contend that the foregoing has infringed on their rights to own, possess and derive benefit from the suit property and seek protection under article 68 (c) (vi) of *the Constitution* of Kenya 2010.
12. The defendant mainly averred in his statement of defence and counterclaim dated 12/1/2023 and amended on 2/6/2023 that he was not a trespasser on the suit land. He admitted that the took possession of the suit land around 1984 upon orally purchasing the then undeveloped suit land from



the said widow and son of the deceased. He then developed it and later entered into a written agreement with the said widow and son of the deceased on 7/8/1997 to purchase the suit land.

13. In his counterclaim, the defendant averred that he had become entitled to the suit land through adverse possession from either 1996 or year 2000 to date. He seeks the following reliefs; -
 - a. A declaration that the defendant became entitled through adverse possession to the land parcel L.R No. 12045/61 alias Siaya Municipality/Block 1/252 between around 1996 and around 2000.
 - b. An order that the defendant's name be registered as the proprietor of land parcel L. R. NO. 12045/61 alias Siaya Municipality/Block 1/252 in place of the name of the late Erasto Opondo alias Erasto Opondo Otieno or any beneficiary of the estate of the said deceased person including the plaintiff's herein.
 - c. An order of permanent injunction restraining the plaintiffs personally and/or through their agents or heirs or representatives or defendants or any member of the estate of the late Erasto Opondo alias Erasto Opondo Otieno from whatsoever interfering with the defendant's propriety rights in the Land parcel L. R. NO. 12045/61 alias Siaya Municipality/Block 1/252 including exclusive possession, use and enjoyment.
 - d. Cost of the amended counterclaim and interest thereon at court rates until payment in full.
 - e. Any other order this Honourable court shall deem fit and just.
14. The plaintiff filed their reply to the said amended defence and defence to amended counterclaim on 18/9/2023. In turn, the defendant filed his reply to defence to amended counterclaim on 19/9/2023.

Hearing And Evidence Of The Parties

The Plaintiffs Evidence

15. The matter proceeded for hearing on 4/06/2025.
16. PW1 was the 1st Plaintiff Lawrence Otieno Opondo, adopted his witness statement dated 1st November, 2022 as his evidence in chief and produced the documents in the List of Documents dated 7/12/2022 – PEX 1-43.
17. It was his evidence that he had filed the suit on behalf of his deceased father Erastus Opondo Otieno who died on 29/5/1981 and that the 2nd plaintiff was the grandson of the deceased. He gave the particulars of the 6 wives of the deceased and the number of children from the marriages. It was his evidence that the deceased was issued with a letter of allotment for a plot in Siaya town center which he processed into a lease in 1975.
18. It was his evidence that the defendant approached the widows and became a tenant in the above property in 1984. That the plot was never sold to the defendant after succession of the deceased estate. Referring to Affidavit of Justification of proposed sureties he only recognised John Odhiambo Ogutu the defendant who he stated was their tenant and disowned the name of Maria Opondo appearing as the other surety as there was no such person in their family. He termed the defendants allegation that he had lived on the property for over 40 years a lie.
19. The witness added that he discovered the defendant had registered himself as rate payer and reported the matter to CID. The witness outlined the cases filed by the defendant against him and which were dismissed by the court including an objection over confirmation of grant of the deceased estate which



- the defendant withdrew. That the plaintiff had therefore tried to remove him from the premises. That the occupation by the defendant had caused suffering denying them income including support for medical expenses for the 6 wives of the deceased who had all died.
20. PW1 seeks the assistance of the court to remove the defendant from the suit premises.
 21. On cross-examination, and referring to paragraph 7 of his witness statement PW1 confirmed the agreement was in 1987 but stated it was verbal. He only heard about it from Richard Opondo since he PW1 lived in Webuye but had no evidence to support the allegations. He had written to the defendant to move out though this evidence was not before court. On being shown the agreement between John Ogutu and the Family of Erasto he termed it a lie since Richard and Magdalene did not sell the land. On being referred to the letter dated 18/6/1997 (page 12 of defendants bundle) and being shown the Minute 57/98 (page 16 of defendants bundle) he admitted change of name was approved. He confirmed the defendant had been paying rates since 1992 after his fathers death. The witness conceded the defendant has never been charged with any criminal offence concerning the property.
 22. The witness stressed in re-examination that it was his desire the property to revert to all beneficiaries. The Plaintiffs case was marked as closed.
 23. John Odhiambo Ogutu testified on his own behalf as DW1. He adopted the statement dated 12th January 2023 as his evidence in chief and produced the documents filed vide a list dated 12th January 2023 as DEXH 1-13. It was his evidence that he started using the land without any force in 1984. He denied that he was permitted to use the house and spilt rent. He entered the premises as a purchaser and not as tenant. He did not use fraud to have the name changed into his name but Richard Opondo was the one who wrote to the Council to replace it with his name since the defendant was the one who had developed it. That he did not use any force against the plaintiffs family. That he has occupied the suit property since 1984 and the plaintiffs have never tried to get possession.
 24. It was Mr. Ogutus testimony that he started paying rates since 1981 since the plaintiffs father was not paying. The deceased had not started any construction on the property. That the he was summoned to DCI where he explained the arrangement on the use of the property and upon investigation they found that the complainants were lying and they left the matter at that. That he was never summoned by the town council pursuant to a complaint by the plaintiffs. He told the court he had lived on the property for very long and put all his energy thereon. He asked the court to dismiss the suit.
 25. Cross examined DW1 stated he entered the land as a buyer in 1984 though he did not produce the requisite agreement. He was aware the land was in the deceased name but the family granted him authority to enter the same. He conceded on being shown paragraph 4 of his witness statement that he would assist the deceased family. That he used to pay Kshs.600 to the three widows (Magdalene Opondo, Teresia Aloo Opondo and Patricia Agolla Opondo) monthly upto the year 1997 when he was offered to purchase the land which he did at Kshs.100,000/- through a loan. He did not have records of the monthly payment to the widows as well as the said loan. The 1st plaintiff mother was not in the deceased boma. That Patricia and Teresia did not sign land sale agreement. He admitted he was the main beneficiary of the deceased estate but he was not aware a beneficiary cannot stand surety. He stated that Richard Okumu undertook the entire process of succession of the deceased estate.
 26. DW1 added in cross examination that he now receives rent of Kshs 60,000/- compared to Kshs.79,000/- pleaded which he clarified in re-examination was because some tenants left the premises. He clarified the purchase amount was received before witnesses as seen in the sale agreement at page 16.
 27. DW2 was Maurice Juma Odhiambo the defendant's son. He adopted his witness statement dated 12/01/2023 as his evidence in chief. He told the court he lives in the suit property and denied that



the defendant has used force to grab the property. He told the court the defendant developed it from scratch. The witness was aware of the sale agreement since he was a witness to the same and also signed it on behalf of his father.

28. Upon cross examination DW2 told the court he was 22 years old at the time of signing the sale agreement and he knew the three wives and Richard Okumu Opondo. He heard Richard had a sister though he had never met her. According to him the registered owner was the deceased. Richard presented letters of administration. He did not see a gazette notice. He didn't know about certificate of confirmation of grant. He confirmed only one widow signed the agreement though he was aware the other two were alive.
29. With the above the defence case was marked as closed.

Submissions

Plaintiff submissions

30. The plaintiff submissions are dated 24/07/2026 which identified five issues for identification summarised as follows:-
31. Who is the registered owner and proprietor of the suit property? It was submitted that the suit property was allocated to the late Erasto Otieno Opondo vide a letter of allotment dated 19th February 1973, who was issued with a 33 year lease from 1st March 1975, which was extended for a further term of 66 years from 1st July 2011. The plaintiffs then became the administrators of the deceased estate in the Grant of Letters of Administration dated 11th November 2008 and confirmed on 5th December 2019.
32. Whether the Defendant's occupation of the suit property was non-permissive, non-consensual. It was submitted that the Defendant's entry into the suit property was permissive and consensual contrary to the latin maxim of nec vi ne clam nec precario. That DW1 agreed he entered the suit property with the consent and authority of the deceased's family members. The court was referred to the Court of Appeal Case of Mwalimu & 6 others v Halal & another [2025] KECA 1186 (KLR) where it was emphasised that "If one is in possession as a result of permission given to him by the owner, or if he is in possession as a licensee, he cannot claim to be in adverse possession.
33. Whether the Defendant's occupation of the suit property was peaceful and or without use of force, fraud or threats. It was submitted that the Defendant's claim for adverse possession is extinguished by his attempts to illegally and unlawfully acquire title of the deceased's estate. He was an inter-meddler. The Defendant's denial of the Plaintiffs' title negates his claim for adverse possession as was held in the case of Haro Yonda Juaje v Sadaka Dzengo Mbauro & another [2014] KEHC 6665 (KLR). Reference is also made to the case of Mwalimu & 6 others v Halal & another [2025] KECA 1186 (KLR) where the Court of Appeal held a claim in adverse possession is incompatible with a claim in fraud.
34. Whether the Defendant's occupation and possession of the suit property was continuous and uninterrupted and or amounts to continuing trespass. It was posited that the Defendant's occupation amounts to trespass as it was not continuous and was interrupted.
35. Should the Defendant pay the Plaintiffs general damages for continuing trespass, and mesne profits and conversion of property. The plaintiff urged that the court should be guided by the defendant's admission in paragraph 15 of the Defendant's amended Defence and Counterclaim, confirming a monthly rent of Ksh.79,000/= in awarding the mesne profits. An award of Ksh.20,000,000/= was proposed on account of general damages for continuing trespass and conversion.



36. The Defendant urges this Honourable court to condemn the Defendant to pay the costs of this suit in view of the fact that this suit has taken almost 16 years to conclude.

Defendants' submissions

37. The Defendants' written submissions are dated 6/10/2025 and identified one sole issue for determination, whether the defendant is a trespasser and/or adverse possessor of the suit land.
38. Referring to the provisions of Section 3(1) of the *Trespass Act* Cap. 403 of the Laws of Kenya, and section 107 of the *Evidence Act* it is submitted that the plaintiffs did not produce any corroborative evidence of the alleged verbal agreement of 1984 between the defendant and deceased's widow and son such as an independent witness who heard the said agreement being made or who could confirm the terms of the alleged agreement. It is contended that PW1 admitted that he was born in 1970 meaning he was a child of 14 years old in 1984. Referring to PEX1 showing the 2nd plaintiff was born in 1987, meaning he had not been born in 1984 and was only one-year-old in 1988.
39. It was further urged that there is no evidence that a grant was ever issued in favour of Richard. Instead, a grant was later issued to the 1st plaintiff on 4/11/2008 in Kisumu High Court Succession Cause No. 460 of 2008 and confirmed on 2/12/2019. Consequently, the 1st plaintiff transmitted the suit land into his name on 6/11/2024. Thus, the said widow and son of the deceased did not have any legal capacity to either lawfully give permission to the defendant to take possession of the suit land in 1984 or to lawfully sell the suit land to him in 1984 or 1997.
40. However, it is urged the defendant transformed to an adverse possessor of the suit land following his continued possession of the suit land from 1984 to date. That from 1984 to 2004 (about 20 years), there had not been any documented complaint from the estate of the deceased against the defendant relating to the suit land. The 1st plaintiff lodged a formal complaint at the Siaya Municipal Council on 20/10/2004 (see PEX-26, PEX-27 and DEX-9), Siaya District Land Registry around 2008 (DEX-31) and Siaya Directorate of Criminal Investigations around 2008 (see PEX-29, DEX-30, DEX-10 and DEX-12). However, these efforts by the 1st plaintiff did not interrupt the defendant's solid possession of the suit land at all.
41. It is further urged that the defendant's first entry into the suit land in 1984 may have been legally questionable for lack of legal capacity on the part of the deceased's said widow and son. However, the defendant's current 41 years of open, peaceful and continuous possession and use of the suit land makes him an adverse possessor of the suit land.
42. That therefore, the deceased's rights to the suit land were extinguished at three possible periods: a) 1996, that is, 12 years from 1984 when the deceased's widow and son permitted the defendant to take possession of the suit land. Yet they had no legal authority to give such permission as they did not hold any grant of letters of administration in respect of the estate of the deceased. b) 2000, that is, 12 years from 1988 when the plaintiffs claimed the defendant should have given back possession of the suit land to the estate of the deceased under the said 1984 oral agreement with the said widow and son of the deceased. Yet he has reportedly not complied with the said agreement to date (37 years later). c) 2009, that is, 12 years from 1997 when the deceased's said widow and son sold the suit land to the defendant. Yet they did not have any legal capacity to do so.
43. It is urged that in view of the above circumstances, it is immaterial that the said grant issued to the 1st plaintiff was confirmed in 2019 and the title to the suit land was registered in the name of the 1st defendant on 6/11/2024 since by 2019 and/or 2024, the deceased's rights over the suit land had been long extinguished in favour of the defendant.



44. The court is invited to dismiss the plaintiff suit for failure to prove on a balance of probabilities their case of trespass against the defendant to the requisite standard of balance of probabilities. However, it is also invited to allow the counterclaim.

Analysis And Determination

45. I have carefully considered the pleadings, examined the evidence together with the submissions of the rival parties and analysed the law applicable. The main issue for determination is who between the Plaintiffs and the defendant have proved their claim to the required standard of a balance of probabilities to warrant the grant of the orders sought in their respective cases. This is for the reason that the Plaintiffs claim ownership as administrators of the estate of the late Erasto Opondo Otieno while on the other hand the defendant claims as purchaser from the family of the said Erasto Opondo Otieno and or alternatively under the doctrine of adverse possession by way counterclaim. The question whether the doctrine of adverse possession would apply in the circumstances of this case becomes pertinent. I will for ease of reference refer to Erasto Opondo Otieno as the patriarch.
46. My understanding of the Plaintiffs case based on the pleadings is that, the 1st Plaintiff is the son of the patriarch, while the 2nd plaintiff is the grandson of the patriarch born of Richard Okumu Opondo (herein Richard) a stepbrother of the Plaintiff and eldest son of the patriarch who went missing since the year 1999 and is now presumed dead. It is their case that the defendant who was a tenant of the patriarch has reneged on a verbal agreement entered between the defendant, Richard and Magdalena Ahenda Apondo who is Richards mother and one of the patriarchs wives.
47. That the arrangement under the said verbal agreement was for the defendant to complete the construction on the suit property in dispute commenced by the patriarch but which he was unable to complete in consideration of him collecting rent therefrom upon completion to recoup his investment and once recouped he would hand over possession back to the patriarch family. That during the intervening period he would remit 30% of the proceeds from rent to the patriarchs three widows. That the construction was completed in the year 1987 and thereafter from the year 1988 the defendant has collected rent to-date and has refused to handover the property to the patriarchs family in breach of the said agreement and has held out himself as the owner. According to the plaintiffs the defendant is a trespasser on the property and continues to trespass thereon.
48. The defendant on the other hand pleads and deny there was such a verbal agreement. According to the defendant he entered the suit property on the invitation of the Richard and Magdalene on behalf of patriarch family when the same was vacant but was under threat of repossession by the Council for rates/rent default by the patriarch. He then took up the responsibility of payment of the land rates. He developed the same and in 1997 he formalised the agreement with the said Richard and Magdalene by paying a purchase price of Kshs 100,000/-. He seeks to be declared owner by way of adverse possession.
49. 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.
50. The burden of proof in civil matters is on a balance of probabilities. Justice Luka Kimaru (as he then was) answered the question of what amounts to proof on a balance of probabilities in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took



place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

51. It is not in dispute that the property in dispute LR number 12045/61 now known as Siaya Municipality/Block 1/252 was allotted to the patriarch as pleaded by both parties to this dispute. The allotment was produced in evidence. It is admitted at paragraph 4 of the defendants Amended Statement of Defence and Counterclaim that the said property was allotted to the patriarch. A grant No. L.R.N 3412 issued in the name of Erasto Opondo pursuant to the Registration of Titles Act was also produced by PW1 (see page 21 – 23 of the plaintiffs bundle) registered on 23/3/1976. Upon expiry the lease was extended for a further term of 66 years as evidenced by the letters dated 20/5/2010, 27/5/2010, 4/6/2010,17/6/2010 culminating to a letter dated 23/6/2011 from the Commissioner of Land confirming the extension of lease.
52. The Plaintiffs have adduced in evidence a copy of a Grant of Letters of Administration dated 11/11/2008 and confirmation of grant dated 2/12/2019 in Kisumu High Court Succession Cause No. 460 of 2008.
53. It is further not in dispute that the defendant is in occupation of the property.
54. It was incumbent upon the plaintiff to prove the existence of a legally binding verbal or oral agreement between the father of the 2nd plaintiff, his step mother Magdaline and the defendant that was the basis of the possession by the defendant and the alleged terms thereof as mentioned elsewhere in this judgement.
55. While PW1 testified to the existence of the above oral agreement, his evidence was not corroborated. He testified in cross examination that he heard about the agreement from Richard Opondo since he himself then resided in Webuye. He conceded he had no evidence to support what he heard from Richard. No evidence was led from individuals who witnessed and or heard the conversation to prove that it occurred. In my view the existence of the oral agreement was not proved.
56. Assuming that there were witnesses to the same and the same actually happened the capacity of the parties to enter into the said agreement is material. It is not in dispute that the patriarch died on 29th May 1981. Therefore, only the administrators of his estate had the capacity to enter into any agreement written or oral on behalf of the patriarchs estate. It is not enough that one is a widow and or a son of the deceased. Did Richard and Magdalina have the legal capacity to enter into such an agreement with regard to an immovable asset belonging to the estate of the deceased?
57. The court was not led to any evidence that a grant was issued to Richard and Magdaline or either one of them. The defendant produced only a petition in Resident Magistrates Court Siaya Succession Cause No. 22 of 1997 which is not a grant. I think no such grant was issued and this matter was laid to rest by Justice Majanja (may his soul rest in peace) in Kisumu Succession Cause 460 of 2008 in the matter of Erasto Opondo Otieno (Deceased) in a ruling delivered on 24/04/2017. Addressing itself to a grant issued to Richard Okumu in Siaya RMC Succession Cause No. 22 of 1997 the court noted there was no grant that had been annexed but a copy of the petition and that the applicant therein had failed to prove that a grant of representation had been issued. No grant has been produced either before this court. I also did not see any grant issued to Magdalina. I will find that it is more probable that no grant was issued to Richard.
58. Having come to the above conclusion then I must find that Richard and Magdalina had no capacity to enter into the alleged verbal agreement with the defendant if at all it existed.



59. It is the finding of this court that the plaintiff has failed to prove to the required standard the existence of the oral agreement and its terms. There is therefore no basis to find there was breach on the part of the defendant. Moreover, even if the same were proved the agreement would have no force in law as it would be rendered illegal for want of capacity on the part of Richard and Magdalena and the court cannot uphold it.

But is the plaintiff a trespasser on the suit property?

60. The plaintiff further claim that the defendant is a trespasser on the suit property and continues to be a trespasser to date.

61. The legal framework on the law on trespass is the *Trespass Act* Cap 34 of the Laws of Kenya. Section 3 provides

Trespass upon private land

1. Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

62. The Act defines an ‘occupier’ as the owner or the person lawfully in occupation of private land, any manager or agent of such person and, in respect of forest areas and railway land, the Chief Conservator of Forests and the Managing Director of Kenya Railways respectively.

63. As to “private land” the Act states it means land which is owned or occupied by any person by virtue of a freehold title, a certificate of ownership or a lease; or land in respect of which a claim to an estate in fee, or to a lease, has been made but disallowed or refused; or cultivated land or enclosed land; or any forest area; or railway land.

64. According to the 10th Edition of Black’s Law Dictionary trespass is defined as follows;

“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.

65. It is not in dispute that the defendant is in possession of the suit property. The burden of proof was still upon the plaintiff to prove that the defendant entry into the suit property amounts to trespass. PW1 testified that despite the completion of the construction works pursuant to the oral agreement the defendant refused and or failed to hand over the property back to the deceased family and continued to trespass on the property. I have already made a finding that there was no proof that the arrangements that I will equate to a build operate transfer ‘contract’ were in place.

66. But the above notwithstanding was there a justifiable reason upon which the defendant entered the premises. It is the defendants case that he is not a trespasser in the suit property. DW1 admits that he entered the suit property firstly on verbal arrangement to rescue the property from repossession due to rates default. He thereafter formalised the arrangements through a purchase agreement dated 7/8/1997. This agreement was produced (see item 15 of the defendants list).

67. I have considered the above agreement. Firstly, in view of the fact that the vendors therein had no legal capacity to enter into the agreement for the reasons already stated by this court it cannot be



valid. Counsel for the defendant seems to take this position though sceptically at paragraph 13 of the submissions filed on behalf of the defendants.

68. Did the above make the defendant a trespasser? Based on the amended plaint I would not make a finding that the defendant is a trespasser for the reason that the entry of the defendants into the suit property was permitted by Richard and Magdalena as pleaded by the plaintiff. I also do not see how the defendant became a trespasser after failing to hand over the property subsequently on the basis of the agreement which was not proved.
69. The upshot of the foregoing then is that the plaintiffs have failed to prove their case on a balance of probabilities.
70. The above brings me to the question whether the doctrine of adverse possession would apply in the circumstances of this case and if the same has been proved by the defendant
71. It is submitted on behalf of the defendant that he transformed into an adverse possessor of the suit land following his continued possession of the suit land from 1984 to date. At this juncture the burden of proof shifted to the defendant to prove that he was not a trespasser but an adverse possessor as pleaded in his defence and counterclaim.
72. The doctrine of adverse possession in Kenya is founded under the *Limitation of Actions Act* CAP 22 Laws of Kenya (herein the Act. It is anchored on Sections 7, 13, 17 and 38 of the Act which provide 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.”
73. Section 7 therefore places a bar on actions to recover land after 12 years from the date on which the right accrued.
74. 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 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 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.
75. 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



76. 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.”

77. 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 inaction 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.”

78. The Court of Appeal in *Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR 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.

79. It has been submitted on behalf of the defendants that the patriachs right to the suit property was extinguished at three possible intervals as follows;-

1. The 1996 being 12 years from 1984 when he was permitted by Richard and Magdaline to take possession of the suit land when they did not have authority to do so. I hear counsel urging that since they did not have authority this entry was adverse to the deceased estate as there was no permission.
2. The year 2000 being 12 years from 1988 when the plaintiffs claimed the defendant should have given back possession of the property to the estate of the deceased yet he has reportedly not complied for 37 years.
3. 2009 that is 12 years from 1997 when Richard and Magdalina sold the suit land when they did not have capacity.

80. From the foregoing arguments I hear counsel urging that since Richard and Magdaline had no capacity to permit or even sell the property then the entry was adverse to the deceased estate as there was no permission.

81. Therefore, the question to ask is whether the respondents’ entry was permissive or whether the claim of adverse possession is applicable in that the sale agreement entered into was null and void ab initio.

82. The Court of Appeal in the case of *Gichuhi & 2 others v Kiago & another* (Civil Appeal 66 of 2019) [2025] KECA 182 (KLR) (6 February 2025) (Judgment) which I found of great guidance since the facts largely echoed the facts in the present case in as far as the plea for adverse possession is concerned affirmed the decision of the High Court thus;-



26. We have said enough about the doctrine of adverse possession. Closer home, the agreement purportedly allowing the respondent permission to take possession was void, a fact known to all the beneficiaries. There was no question of repudiation or failed terms of agreement. Having found no valid sale agreement and that the estate's beneficiaries knew or ought to have known but were indolent, the respondent remained in occupation uninterrupted for 19 years; the only logical conclusion is that the respondents' entry into the suit property was illegal, not permissive, and adverse to the owner's title.
83. Applying the above reasoning to the present case and my earlier finding that the agreement both oral and the written were null void then the issue of permission does not arise. I would thus find that the defendants entry was therefore illegal and not permissive and was adverse to the owners title who was the deceased patriarch.
84. I would then consider the limitation of 12 years required that bars the owner from claiming his interest on the land. The court has been given three instances as from when to compute time.
85. The defendant entered the premises in 1984 and by 1996 he had the period of 12 years whereupon the deceased and or his estate would be barred from laying a claim on the suit property. The defendant however did not file a suit for adverse possession. The question is did the plaintiff take any action against the defendant during this period? The plaintiff nor any beneficiary of the deceased did not take action against the defendant. The plaintiff was away in Webuye and only stepped in 1999 when he took responsibility over the deceased estate and went to the suit property. By that time he was already time barred by limitation from claiming the property which was in exclusive possession of the defendant.
86. Was the occupation peaceful and open during the said period. Based on the above it was open and known to the family of the deceased that the defendant had built the premises and was in occupation with the blessing of the eldest son and the widow. The tenants must also have been in the knowledge of who their landlord was and that is the defendant. The hostility came in after the plaintiff came into the picture in the year 1999.
87. I have noted the submission that the defendants denial of the Plaintiffs title negates his claim for adverse possession. I think in respect of this the plaintiffs title is not the one in issue but the deceased title. There was no denial that the land belonged to the patriarch who was the rightful owner of the parcel abinitio. I have already noted that adverse possession can run on the title of the deceased. The deceased title was extinguished in 1996 and the title was being held in trust for the defendant. Even all the petitions for grant of letters of administration and grants issued thereof were of no consequence as they did not interrupt the defendants adverse possession.
88. In arriving at the above the court is persuaded by the decision of Regina Wanjiru Mwago & Another Vs. Lucy Wairimu Gichuhi & 2 Others (2019) eKLR which cited the Court of Appeal decision in Samwel Nyakenogo Vs Samwel Orucho Onyaru (2010) eKLR.
89. It is further stated that the defendants claim for adverse possession is extinguished by his actions of trying to acquire the deceased property fraudulently. This is not a criterion for adverse possession. Adverse possession runs with the land. I think it is has now been settled that fraud and adverse possession do not mix. They are like water and oil and the plaintiff's submission cannot sail through for purposes of adverse possession.
90. The upshot of the foregoing is that the Plaintiffs have failed to prove their case on a balance of probabilities against the defendant and their suit against the defendant is must be dismissed.



91. On the counterclaim it is the finding of this court that the defendant has succeeded in their counterclaim against the plaintiffs on the basis of adverse possession of the suit property as discussed herein above.
92. This court therefore enters judgement for the Defendant against the Plaintiffs in the following terms; -
1. The Plaintiffs suit against the Defendant is hereby dismissed.
 2. A declaration that the Defendant became entitled through adverse possession to the land parcel L.R No. 12045/61 alias Siaya Municipality/Block 1/252 from the year 1996.
 3. An order that the defendant's name be registered as the proprietor of land parcel L. R. NO. 12045/61 alias Siaya Municipality/Block 1/252 in place of the name of the late Erasto Opondo alias Erasto Opondo Otieno or any beneficiary of the estate of the said deceased person including the plaintiff's herein.
 4. An order of permanent injunction restraining the plaintiffs personally and/or through their agents or heirs or representatives or defendants or any member of the estate of the late Erasto Opondo alias Erasto Opondo Otieno from whatsoever interfering with the defendant's propriety rights in the Land parcel L. R. NO. 12045/61 alias Siaya Municipality/Block 1/252 including exclusive possession, use and enjoyment.
 5. The subject property being the property of a deceased person abinitio I will invoke my discretion by making an order that each party shall bear their own costs of both the suit and counterclaim.

Orders accordingly

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF MARCH 2026

HON. A. E. DENA

JUDGE

23/3/2026

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

Mr. Maube for the Plaintiff

Mr. Okello for the Defendant

Court assistant: Ishmael Orwa

