



REPUBLIC OF KENYA



KENYA LAW
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Onganda v Juma & 2 others (Environmental and Land Originating Summons E019 of 2021) [2025] KEELC 876 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 876 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2021
BN OLAO, J
FEBRUARY 27, 2025

BETWEEN

JOSEPHAT CHARLES ONGANDA PLAINTIFF

AND

ALICE WANYAMA JUMA 1ST DEFENDANT

KAIFAS W. KAPERERA 2ND DEFENDANT

WS KAPERALONGO OJWANG 3RD DEFENDANT

JUDGMENT

1. Josephat Wanyama Juma (the Plaintiff) moved to this Court vide his Originating Summons dated 27th October 2021 and filed on 29th October 2021. He sought a determination of the following questions against Alice Wanyama Juma, Kaifas W. Kaperera and W. S. Kaperera (the Defendants) with respect to the ownership of the land parcel No Samia/Budongo/1325 (the suit land):
 1. Whether the Plaintiff be declared absolute owner of L.R NO Samia/Budongo/1325 having lived thereon peacefully, continuously and uninterrupted for over 30 years.
 2. Whether the Defendants be ordered to execute all documents of transfer in respect of L.R No Samia/budongo/1325 in favour of the Plaintiff failure to which the Deputy Registrar of this Honourable Court be empowered to execute the same on behalf of the Defendants.
 3. Whether the Defendants, their agents, servants or any other person claiming through them ought to be restrained permanently by an order of injunction from interfering with L.R No Samia/budongo/1325.
 4. Whether the Land Registrar be empowered to register the suit land herein in the name of the Plaintiff.



5. Whether the Defendants should be ordered to give vacant possession of any part of land they may be putting to use or occupying.
6. Whether this Honourable Court should grant such orders as it may deem fit and just to grant.
7. Whether costs of this Originating Summons should be awarded to the Plaintiff.

The Originating Summons is anchored on the grounds set out therein and supported by the Plaintiff's affidavit dated 28th October 2021.

2. The basis of the Plaintiff's claim is that he has been in actual, peaceful, quiet and uninterrupted possession and occupation of the suit land for over 30 years while the Defendants have never been in occupation of the same. He is therefore entitled to ownership of the same.
3. Annexed to the Originating Summons is a copy of the Green Card showing that the Defendants were gifted the suit land while minors on 25th March 1988 but the Plaintiff lodged a caution thereon on 19th June 2014.
4. In support of his case, the Plaintiff filed the affidavits of Walter Malingu Odipo (PW2) and Charles Odwori Okinyo (PW3) both dated 27th February 2024. In their affidavits, the two witnesses have deponed, inter alia, that the suit land belonged to the Plaintiff's father one Onganda Otema who, upon his demise, was buried thereon. That the Plaintiff has been in peaceful, quiet, continuous and uninterrupted occupation of the suit land for over 30 years and they have never seen the Defendants thereon.
5. The record shows that having been unable to serve the Defendants, the Plaintiff obtained an order on 16th February 2022 from Omollo J to serve them by way of advertisement in either the Standard or Daily Nation newspaper. That appears to have been done through the Daily Nation newspaper of 23rd August 2022. The Defendants did not however file any response to the Originating Summons. When the matter came up before me on 11th October 2023, I again directed that the Defendants be served by advertisement in the newspapers. The record shows that they were again served vide a notice in the Star newspaper on 28th February 2024. No response was filed.
6. The suit came up for hearing on 2nd May 2024 *ex parte* in the absence of the Defendants though duly served through the star newspaper as directed. The Plaintiff testified and called his two (2) witnesses Walter Malingu Odipo (PW2) and Charles Oduor Okingo (PW3). They all adopted as their testimonies the contents of their affidavits filed herein. The Plaintiff also produced as his documentary evidence the Green Card to the suit land showing that the Defendants were gifted the suit land as minors and were issued with the title deed thereto on 25th March 1988.
7. At the close of the trial, submissions were filed by MR Ashioya the Plaintiff's counsel.
8. I have considered the evidence by the Plaintiff and his two (2) witnesses as well as the submissions by his counsel MR ASHIOYA as instructed by the firm of Ashioya & Company Advocates.
9. Before I delve into the merits or otherwise of the Plaintiff's claim, I have agonized on whether the Defendants herein are infact minors. This is because, the copy of the Green Card shows that they were gifted the suit land as minors on 25th March 1988. It is not clear as to who gifted them the suit land but the copy of Green Card shows that the first registered proprietor of the suit land was KAPERAMUPEMBA on 27th March 1980 and on 29th August 1984 there was a change of name to read KAPERAMUPEMBA SHIJA before the same was registered in the names of the Defendants. It is not clear at what age the Defendants were when the suit land was registered in their names and the



title deed issued on 25th March 1988 before the Plaintiff placed a restriction thereon on 19th June 2014. However, the fact that the Defendants were issued with the title deed to the suit land on 25th March 1988 is proof that they were not minors on that date and neither were they minors on 29th October 2021 when this suit was filed.

10. Having dispensed with the issue of the Defendants' age, it is the Plaintiff's claim that he is entitled to an order that he has acquired the suit land by way of adverse possession. Section 38(1) of the [Limitation of Actions Act](#) provides that:

38 (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."

In *Kasuve -v- Mwaani Investments Ltd & Others* 2004 I KLR 184, the Court of Appeal set down what a party seeking an order that he has acquired land by way of adverse possession must prove. It said:

"And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition".

Such possession must be without force, stealth and the permission of the owner – *Kimani Ruchine -v- Swift Rutherford Company Ltd* 1980 KLR 10. It must be open, continuous, peaceful, notorious and with the knowledge of the owner – *Robert Shume & Others -v- Samson Kazungu Kalama* 2015 eKLR.

11. In the case of *Mtana Lewa -v- Kahindi Ngala Mwangandi C.a.* Civil Appeal No 56 of 2014 [2015 eKLR], the Court described the doctrine of adverse possession in the following terms:

"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 it 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. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#) ..."

12. Since the Plaintiff's Originating Summons has not been opposed nor the averments in his supporting affidavit rebutted, this Court is entitled to conclude, which I hereby do, that all the allegations by the Plaintiff are correct. Essentially therefore, and for purposes of this judgment, this Court must make a finding that the Plaintiff has been in open, continuous, peaceful and un-interrupted occupation of the suit land for over 30 years and with the knowledge but without the consent of the Defendants who are the registered proprietor of the same. The registration of the suit land in the joint names of the Defendants is not in doubt as is clear from the copy of the Green Card produced herein. Taking all the above into account, I have no doubt that the Plaintiff has proved his case and is entitled to the orders sought in his Originating Summons.
13. Ultimately therefore, there shall be entered for the Plaintiff against the Defendants judgment in the following terms:
 1. The Plaintiff has acquired by way of adverse possession the land parcel NO Samia/budongo/1325.



2. The Land Registrar Busia shall within 90 days from the date of service of this judgment upon him and with notice to the Defendants' cancel the registration of the Defendants of the land parcel No Samia/budongo/1325 and issue a new title deed thereto in the name of the Plaintiff at his cost.
3. The Defendants, their families, agents, servants or any other persons acting through them shall thereafter be permanently enjoined from interfering with the Plaintiff's occupation and possession of the land parcel No Samia/budongo/1325.
4. NO orders as to costs.

BOAZ N. OLAO

JUDGE

27TH FEBRUARY 2025

Judgment dated, signed and delivered by way of electronic mail on this 27th day of February 2025 with notice to the Plaintiff as the Defendants' address is unknown.

Right of Appeal

BOAZ N. OLAO

JUDGE

27TH FEBRUARY 2025

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