



**Oyando & 2 others v Kenya Muslim Charitable Trust (Environment and Land Case Civil Suit 305 of 2019) [2025] KEELC 796 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 796 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 305 OF 2019  
AY KOROSS, J  
FEBRUARY 25, 2025**

**BETWEEN**

**ALI OMARI OYANDO ..... 1<sup>ST</sup> PLAINTIFF  
MOHAMED GULAM ..... 2<sup>ND</sup> PLAINTIFF  
KHADIJA JUMA KAIM & ASHA KHALID JUMA (SUING AS LEGAL  
ADMINISTRATORS OF THE ESTATE OF AMINA JUMA KAIM -  
DECEASED) ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA MUSLIM CHARITABLE TRUST ..... DEFENDANT**

**JUDGMENT**

**Background**

1. This suit was instituted by an originating summons (OS) dated 19/09/2019 in which the plaintiffs contended they had acquired land parcel no. I.R. No. 5159 (suit property) by adverse possession.
2. During the proceedings, the 3<sup>rd</sup> plaintiff passed away, and upon her death, her representatives, who obtained a limited grant dated 18/08/2023, substituted her. These representatives were given leave to amend the OS to reflect such substitution, but I have not come across such an amendment in the record.
3. The suit property is registered in the names of Omar Kassim Abikar, Dabar Abdi Maalim and Hassan Isaak Ali as trustees of Kenya Muslim Charitable Society (KMCS).
4. It is noteworthy that the name KMCS came to be on 8/05/2002 after the name Kenya Muslim Charitable Society of Kenya in which Omar Kassim Abikar, Dabar Abdi Maalim and Hassan Isaak Ali were trustees was changed to KMCS.



5. Having laid the context of this suit, I will now turn to address the parties' cases as presented in their pleadings.

### **Parties' cases**

6. The OS was supported by the grounds on the face thereon and by the affidavits that were deposed by the 1<sup>st</sup> plaintiff, Ali Omari Oyando, on diverse dates of 19/09/2019 and 24/01/2020.
7. In grounds in support of the OS, it was stated the suit property was, on 13/10/1999, fraudulently transferred to the names of Omar Kassim Abikar, Dabar Abdi Maalim and Hassan Isaak Ali as trustees of KMCS, allegedly as a gift from Mohamed Ahmed (Ahmed)- a trustee of Arab Association of Nairobi.
8. It was asserted the suit property was currently registered in the defendant's name, and it measured 1.555 acres. It was stated that Ahmed abandoned the property in 1975, and thereafter, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' parents moved in and were later joined by the 1<sup>st</sup> plaintiff in 1990 further, that they (plaintiffs) were 2<sup>nd</sup> generation occupants.
9. The grounds further averred the defendant had never been put in possession or paid land rates, and the plaintiffs had met the ingredients of adverse possession. Consequently, the plaintiffs sought the following orders: -
  - a. The rights over the suit property be declared extinguished by the doctrine of adverse possession in the plaintiffs' favour.
  - b. The plaintiffs be registered as the suit property's proprietors.
  - c. The land registrar- Nairobi be directed to register the plaintiffs as tenants in common.
  - d. Costs be provided for.
10. By a replying affidavit deposed on 15/10/2019, one of the defendant's trustees, Omar Kassim Abikar, strenuously opposed the OS.
11. He asserted the suit property was previously registered in Ahmed's name as a trustee of the Arab Association, but sometime in 1999, Ahmed gifted the suit property to the defendant after following due process. In his view, both organizations conducted charity.
12. He contended Ahmed informed him he had housed less privileged persons in the suit property. Furthermore, he asserted the defendant's officials and Ahmed met the occupants, including the 2<sup>nd</sup> plaintiff's father, in December 1999 and discussed their occupancy and rent, but they (occupants) pleaded that it be waived, which was acceded to.
13. He asserted the defendant's officials have had several engagements with the plaintiffs, which bore no fruit, and this culminated in the issuance of a demand notice dated 3/07/2019. He stated it was this letter that triggered the institution of these proceedings.

### **Issues for determination**

14. Having heard the evidence of the parties during the hearing, the following issues commend themselves for determination: -
  - I. Whether the plaintiffs proved their claim of adverse possession.
  - II. What appropriate orders should be granted, including an order as to costs?



15. Having framed the issues for determination, I shall summarise the parties' evidence as led on these issues.

### **Plaintiffs' evidence**

16. The matter proceeded for hearing by viva voce evidence, and all the plaintiffs or their legal representatives, as the case may be, testified. The 1<sup>st</sup> plaintiff (PW1), Mohamed Babu Abdallah (PW2), and Khadijah Juma Kaim (PW3) gave their evidence.
17. Their evidence was composed of oral testimonies, adopted witness statements and documents that were produced in support of the plaintiffs' case, and they were marked as Pex.1- 35.
18. It was PW1's testimony the suit property was acquired fraudulently by the defendant and that he moved into it in 1990. Additionally, he stated Ahmed was a stranger to him, but he knew he (Ahmed) vacated the suit property in 1974.
19. He admitted he received the defendant's demand letter, and it was only after the letter was issued that the plaintiffs filed suit. He alleged the occupants of the suit property had always been paying land rates and maintained the suit property.
20. Further, he stated it was not as a result of the defendant's letter dated 17/10/2008 that caused the plaintiffs to start paying the land rates, and according to him, the plaintiffs were not in occupation with the defendant's permission.
21. When he was pressed to explain how he entered the suit property, he merely stated he was informed that housing was available, and thereafter, he entered a portion of the suit property.
22. He stated the suit property had 6 apartments, which were occupied by several families, some of whom were not parties to the suit. He argued that these other families were the plaintiffs' tenants. He later clarified it was a friend who gave him an apartment in the suit property.
23. It was PW2's testimony that he was born on the suit property in 1979, and he reiterated some of PW1's testimony. Additionally, he stated there was nothing to show the defendant had acquired the suit property fraudulently.
24. He stated they started making payments for land rates for fear the county government would repossess the suit property.
25. PW3 stated she was a sister to the deceased Amina Juma Kaim (Amina), who had lived on the suit property from 1975 until her death. She reiterated PW1's testimony that Amina never occupied the suit property with permission but clarified that the defendant had a good title.

### **Defendant's evidence**

26. Abikar Omar Kassim, who was the defendant's executive director, testified as DW1, and his evidence was composed of oral testimonies, a witness statement and a replying affidavit. In support of the defendant's case, DW1 produced documents which were marked as Dex. 1-12.
27. He testified that he did not have a trust deed showing the suit property was gifted to the defendant and did not recall if the transfer process required copies of their passports but explained the suit property was gifted in 1999. He stated since registration; the defendant had never been in occupation.
28. He asserted the letter of 17/10/2008 was delivered to the 2<sup>nd</sup> defendant's father but did not have evidence of such remission. He stated when the suit property was transferred to the defendant by the



previous owner, they had a meeting with the occupants together with the officials of the transferee. He asserted that because of the dire circumstances of the occupants, they allowed them to occupy the suit property.

29. He confirmed he had not availed to the court evidence to show how the suit property was acquired. In his view, the occupants of the suit property had always lived rent-free, and he had never paid the suit property's land rents.

### **Parties' submissions**

30. Upon closing the parties' cases, this court directed them to canvass it by written submissions, and their counsels duly complied.
31. The plaintiffs' law firm on record Ms. Ayora Magaty & Company Advocate, filed written submissions dated 11/12/2024 and identified 2 issues for determination: a) whether the plaintiffs had met the threshold for grant of orders of adverse possession? b) who shall bear the costs of this suit?
32. These issues were adopted by the defendant's law firm on record, Ms. Sheikh & Shariff Advocates, who filed written submissions dated 17/01/2024.
33. The issues for determination were earlier identified. Therefore, this court will, in its analysis and determination, consider the respective parties' arguments on the particular issue and also consider provisions of the law and judicial precedents they relied upon to advance their respective arguments.

### **Analysis and Determination**

34. Since the 2 issues that were earlier identified for resolution are related, they shall be handled together.
35. The doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act*, and the relevant provisions are found in Sections 7, 13 and 38 thereof.

Section 7 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.”

Section 13 states that: -

- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.



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

Lastly, Section 38 (1) elucidates that: -

- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

36. The principles of law on adverse possession are settled in Kenya and the burden is usually on the plaintiff to strictly prove all the elements of adverse possession to the required standards.
37. In their submissions, both counsels thrashed these issues to the pulp with the plaintiffs’ counsel contending that the plaintiffs had met the threshold of adverse possession while the defendant’s counsel asserted they had not particularly because the claim of adverse possession could not be made together with a claim of fraud. Also, the defence counsel argued the plaintiffs were not in exclusive occupation.
38. As pointed out, the principles of adverse possession are settled, and this court concurs with the Court of Appeal decision of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] KECA 402 (KLR) that was relied upon by the plaintiffs’ counsel, which summarized the principles of adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of 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?”

39. Having laid the law, I now revert to the facts of this case. In claims of adverse possession, the plaintiffs must first of all sue the registered owner of the suit property and also acknowledge the registered owners’ title.
40. Once this threshold is met, the court then proceeds to consider the other principles of adverse possession as outlined in the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited* (Supra).
41. In the circumstances of this case, the 1<sup>st</sup> plaintiff produced a copy of the suit property’s title and entry no. 4 thereof shows on 13/10/1999, the persons who were registered as the owners thereof were Omar Kassim Abikar, Dabar Abdi Maalim and Hassan Isaak Ali as trustees of Kenya Muslim Charitable Society of Kenya.



42. Nevertheless, the name of Kenya Muslim Charitable Society of Kenya was changed to KMSC, and as a result, a deed of rectification of the name was registered against the suit property's title on 8/05/2002 as entry no. 5.
43. In other words, the registered owners now became Omar Kassim Abikar, Dabar Abdi Maalim and Hassan Isaak Ali as trustees of KMSC. Yet, despite availing the title document, which reflected so and acknowledged in their evidence that, indeed, these were the registered owners, the plaintiffs only sued KMSC and not the registered trustees of KMSC.
44. In my humble view, having failed to properly sue the registered owner, the claim of adverse possession was bound to collapse. Moreover, as rightfully pointed out by the defendant's counsel, claims of fraud and adverse possession cannot be dealt with together.
45. This position was held in the Court of Appeal decision of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR, which cited with approval the persuasive decision of Haro Yonda Juaje –v- Sadaka Dzengo Mbauro & Kenya Commercial Bank (2014) eKLR. It stated: -
- “In Haro Yonda Juaje –v- Sadaka Dzengo Mbauro & Kenya Commercial Bank (2014) eKLR it was stated:
- (29) 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. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”
46. Even if this court proceeds to analyze whether the claimants had met the other conditions, it would be an academic exercise, but in my considered view, it is prudent I deal with one particular issue that emerged during the trial, which, even if the plaintiffs had properly sued the registered owner or not pleaded fraud, would have made their claim unsuccessful.
47. The particular issue was the plaintiffs had failed to tender evidence showing they occupied identifiable portion(s) of the suit property to the exclusion of all other persons.
48. This principle of adverse possession was elaborated in the Court of Appeal decision of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] KECA 728 (KLR), which emphasized thus: -
- “The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776.”
49. In their pleadings and evidence in chief, the plaintiffs advanced their claim and evidence that they were the only ones in occupation of the suit property to the exclusion of all others.



50. Nonetheless, when they were put to task by the defence counsel to prove so, it arose that 3 or 4 other persons and or families were in the occupation of the suit property; they were Baba Mohamed, Mwanaidi, Ali and Hamisi Mashallah.
51. The reasons they presented as to why these 3- 4 people were not joined to the proceedings were that the plaintiffs were the ones who put them in occupation, and they only paid maintenance costs and rates or that they were tenants.
52. Significantly, there was nothing proffered to show these other families and or persons were tenants, such as by displaying tenancy agreements and proof of rental payments. It can only be concluded they occupied the suit property on the same terms as the plaintiffs.
53. The onus was on the plaintiffs to discharge the burden of proving and specifically identifying or even describing the apartment no (s), the sizes thereof and locations of the respective apartments they each occupied from the larger apartment block that was in the suit property which they sought to have decreed to them as tenants in common and in absence, their claim was bound to fail.
54. In the end, and for the reasons stated above, I agree with the defence counsel that the plaintiffs did not meet the test of adverse possession.
55. Consequently, I conclude and find the plaintiffs did not prove their claim of adverse possession to the required standards, and I hereby dismiss their case. Since it is trite law, costs follow the event; I award costs to the defendant.

Orders accordingly.

**DATED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2025**

**HON A.Y. KOROSS**

**JUDGE**

**25.02.2025**

Delivered virtually through Microsoft Teams Video conferencing Platform.

In the presence of;

Mr. Ayora for Plaintiffs

Miss Amuka holding brief for Miss Mohammed for 2<sup>nd</sup> Respondent

MS Kanja – Court Assistant

