



**Magondu v Hunja & another (Sued as Legal Representatives and Administrators of the Estate of Isaac J. Hunja) (Environment and Land Miscellaneous Application E016 of 2022) [2025] KEELC 216 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 216 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E016 OF 2022**

**JO OLOLA, J**

**JANUARY 30, 2025**

**IN THE MATTER OF: LAND PARCEL OTHAYA/KIHUGIRU/570  
REGISTERED IN THE NAME OF ISAAC J. HUNJA**

**AND**

**IN THE MATTER OF: APPLICATION BY MICHAEL NDERITU MAGONDU  
TO BE REGISTERED AS HAVING ACQUIRED TITLE TO LAND PARCEL  
OTHAYA/KIHUGIRU/570 BY VIRTUE OF ADVERSE POSSESSION**

**BETWEEN**

**MICHAEL NDERITU MAGONDU ..... APPLICANT**

**AND**

**JANE NJERI HUNJA ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL NDEGWA HUNJA ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE  
ESTATE OF ISAAC J. HUNJA**

**JUDGMENT**

**Background**

1. By an Originating Summons dated 31<sup>st</sup> August, 2022, Michael Nderitu Magondu (the Applicant) prays for a determination of the following:
  - a. Whether the Applicant has become entitled to land parcel No. Othaya/Kihugiru/570 by virtue of adverse possession;



- b. Whether the deceased's title to the land parcel No. Othaya/Kihugiru/570 has been extinguished by the Applicant's adverse possession thereof for a period of over 12 years;
  - c. Whether an order should be issued to the effect that the Registrar does cancel the name in the register for land parcel No. Othaya/Kihugiru/570 and in the substitution thereof register the Applicant as the proprietor; and
  - d. Whether the Plaintiff should be granted the costs of these summons
2. The Originating Summons is supported by an Affidavit sworn by the Applicant. The Applicant depones that he has been in an open, quiet and uninterrupted occupation and possession of the suit property since the 1960s and that he has extensively developed the land by planting crops thereon.
  3. The Applicant avers that in the year 1995, the registered proprietor of the land – Isaac Hunja (deceased) instituted Nairobi HCCC No. 3607 of 1995 against the Applicant and his father seeking to restrain them from entering or using the land. Despite the said suit, the Applicant depones that they continued utilizing and occupying the land until the suit was dismissed for want of prosecution.
  4. Jane Njeri Hunja (the 1<sup>st</sup> Respondent) sued together with Daniel Ndegwa Hunja as the Legal Representative and Administrator of the Estate of Isaac J. Hunja (deceased) is opposed to the grant of the orders sought. In her Replying Affidavit sworn on 18<sup>th</sup> September, 2022, the 1<sup>st</sup> Respondent avers that the Applicant is being cunning by identifying himself differently in different suits he has filed against the Respondents. The 1<sup>st</sup> Respondent avers that the Applicant herein has also instituted Nyeri ELC. Case No. 272 of 2015 as Michael Ndiritu Gachuru.
  5. The 1<sup>st</sup> Respondent avers that in light of the said Nairobi HCCC No. 3607 of 1995 and Nyeri ELC. Case No. 272 of 2015, the suit herein is Res Judicata. The 1<sup>st</sup> Respondent asserts that the said Nairobi HCCC No. 3607 of 1995 was dismissed after the Plaintiff's death and that if the Applicant had any claim on the suit land, nothing had stopped him from raising a counterclaim.

### **The Applicant's Case**

6. The Applicant called three (3) witnesses who testified in support of his case at the trial.
7. PW1- Michael Nderitu Magundu is the Applicant herein. Relying on his statement dated 26<sup>th</sup> January, 2023 he told the court he had been in an open, quiet and uninterrupted occupation and possession of the suit property for a period in excess of 12 years. PW1 testified that his parents entered and occupied the suit property in the 1960s and that he grew up thereon and has since extensively developed the same.
8. PW1 further testified that in December, 1995, the Respondent instituted Nairobi HCCC No. 3607 of 1995 against himself and his father seeking a declaration that PW1 and his father were not entitled to enter upon or use the suit land. Despite the suit, PW1 and his family confirmed their suit was dismissed for want of prosecution on 25<sup>th</sup> February, 2015.
9. PW2- Joseph Mugo Ndiritu is a son of the Applicant. Relying on his statement dated 26<sup>th</sup> January, 2023, PW2 told the court that ever since he was born, he has always known that the suit property belongs to his family as they are the ones who utilize and cultivate the same.
10. PW3- Gerald Karuga Wambugu is a neighbor and village mate of the Applicant. He told the court he has always known the Applicant to own and use the suit land. PW3 further told the court he does not know Isaac Hunja and that he had never seen his family on the suit land.



## The Respondent's Case

11. The 1<sup>st</sup> Respondent testified as the sole witness at the trial.
12. DW1- Jane Njeri Hunja is the 1<sup>st</sup> Respondent. She told the court that she got to know of Nyeri ELC. No. 272 of 2015 after she did the succession case for her husband but she had been aware of the case between her husband and the Applicant's family instituted in the 1990s.
13. DW1 testified on cross examination that her husband informed her that he had purchased the suit property in the year 1969 but she had not cultivated the land and none of her children had cultivated the same.

## Analysis and Determination

14. I have carefully perused and considered the pleadings filed by the parties, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before the court by the Learned Counsels representing the parties.
15. By the Originating Summons filed herein, the Applicant urges the court to determine whether or not he has become entitled to all that parcel of land known as Othaya/Kihugiru/570 under the doctrine of adverse possession. It is the Applicant's case that together with his family they have been in an open, quiet uninterrupted occupation and possession of the suit land since the 1960s and that they have since extensively developed the same and thereby acquired prescriptive rights thereon.
16. The Respondent is opposed to the Applicant's claim. It is the Respondent's firm position that in light of the suits earlier on filed herein being Nairobi HCCC No. 3607 of 1995 and Nyeri ELC Case No. 272 of 2015 (OS), the suit herein is Res Judicata and that the same ought to be struck out.
17. The doctrine of Res Judicata is captured under the provisions of Section 7 of the [Civil Procedure Act](#) as follows:

“No Court shall try any suit or issues in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

18. From the material placed before the court, it is apparent that Nairobi HCCC. No. 3607 of 1995 was filed by the Respondent's husband Isaac J. Hunja against the Applicant herein and his father Joseph Gachuru Magondu accusing them of trespass to the suit property. That suit was dismissed on 25<sup>th</sup> February, 2015 for want of prosecution.
19. As was stated in Tee Gee Electric and Plastics Company Ltd. –vs- Kenya Industrial Estates Ltd. (2005) KLR 97:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res-judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper



or even for want of prosecution does not give rise to Judgment on the merits and therefore do not trigger the plea of re judicata.”

20. Arising from the forgoing, I was not persuaded that the dismissal of the 1995 suit for want of prosecution could be used as a bar against the Applicant when it came to the filing of future suits. That suit was not heard and determined on its merit.
21. In respect of Nyeri ELC. Case No. 272 of 2015, it was apparent again from the material placed before the court that the suit was instituted by the Applicant herein against the 1<sup>st</sup> Respondent’s husband, the said Isaac J. Hunja. As it turned out that suit was instituted by the Applicant on 11<sup>th</sup> November, 2015 while the 1<sup>st</sup> Respondent’s husband who was sued as the sole Defendant therein had long passed away on 14<sup>th</sup> October, 2013. That suit was consequently struck out for being a non-starter.
22. That being the case, it was clear to me that the second suit had equally not been heard and determined on merit and the same could therefore not be cited as a bar to any future suit.
23. By his suit as filed herein, the Applicant has urged the court to determine that he has acquired the suit property under the doctrine of adverse possession. In that respect, Section 38 (1) and (2) of the [Limitation of Actions Act](#), Cap 22, Laws of Kenya provides as follows:

“ 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, 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.
- (2) An order made under subsection (1) of this section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”

24. As the Court of Appeal did hold in *Mtana Lewa –vs- Kahindi Mwamgandi* (2015) eKLR:

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 is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisite being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

25. In support of his case, the Applicant has asserted that he and his family have been in an open, quiet uninterrupted occupation and possession of the suit property since the 1960s and that they have extensively developed the same by planting crops thereon.
26. On the other hand, the 1<sup>st</sup> Respondent asserted that the Applicant has been trespassing on the land on and off from the time her husband purchased the land.
27. From a perusal of the Green Card of the suit property produced by the Applicant, it is evident that the property was first registered in the name of one Gachuru S/o Magondu on 24<sup>th</sup> September 1958. The second entry on the land indicates that the property was registered in the name of the 1<sup>st</sup> Respondent’s



husband Isaac J. Hunja on 2<sup>nd</sup> April, 1969. That being the case, it was apparent that the property was initially registered in the name of the Applicant's family before the title was transferred to the name of the 1<sup>st</sup> Respondent's husband.

28. At the trial herein, the Applicant told the court that they have been in possession of the land ever since he was born. He asserted that the Respondents have never used the land ever since he was young.
29. On her part, the 1<sup>st</sup> Respondent testified that her husband the late Isaac Hunja had purchased the suit property from the Applicant's family in 1969. She told the court that she was married by Isaac in 1992 and that she was aware of the case filed in Nairobi in 1995. While asserting that her husband had been using the land to cultivate tea, the 1<sup>st</sup> Respondent conceded that her children and herself have never utilized the land for any purpose and that the Applicant and his family have been illegally utilizing the same since 1995 when they trespassed thereon.
30. In support of his claim that they are in exclusive possession of the land, the Applicant produced a copy of a verification certificate issued in the name of his son Joseph Mugo Ndiritu as well as copies of receipts and payment issued by the Kenya Tea Development Authority (KTDA) for the years 2015, 2019, 2020 and 2022. He also produced a Tea Growers Card issued to the son for that purpose.
31. From the material placed before me, it was evident that the Respondents had had notice of the Applicant's entry into the suit property from as early as the year 1995 when the 1<sup>st</sup> Respondent's husband instituted Nairobi HCCC No. 3607 of 1995 seeking their eviction. Some 18 years later when Isaac passed away on 14<sup>th</sup> October, 2013, the suit remained unprosecuted and was dismissed two years later for want of prosecution. The reason the suit had remained unprosecuted for so long was not explained by the Respondents.
32. According to the 1<sup>st</sup> Respondent, the Applicant had been asked severally to leave the land but he had not heeded to the calls. Whether or not the Applicant and his family were told to leave the land, it was clear to me that a registered proprietor of land does not assert rights over it by merely informing a trespasser thereon to leave. As was stated in *Benson Mukuna Wachira –vs- Assumption Sisters of Nairobi Registered Trustee* (2016) eKLR:

“It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on the land that counts... As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespassers, time in adverse possession will run...”
33. In the circumstances herein and from a consideration of the evidence placed before the court, I am persuaded that the Applicant has proved on a balance of probabilities that he has been in an exclusive, open and uninterrupted occupation and possession of the suit property for a period in excess of 12 years. By such occupation and possession, the Applicant has acquired prescriptive rights thereto and the Respondents interests thereon have been extinguished by operation of the law.
34. Accordingly, I hereby enter judgment for the Applicant as against the Respondents and make the following orders:
  - a. The Applicant has become entitled to all that parcel of land known as Othaya/Kihugiru/570 by virtue of adverse possession
  - b. The deceased's title to the land parcel No. Othaya/Kihugiru/570 has been extinguished by the Applicant's adverse possession thereof for a period in excess of 12 years.



- c. The Registrar of Lands Nyeri County is hereby directed to cancel the name in the Register for the parcel of land known as Othaya/Kihugiru/570 and in the substitution thereof register the Applicant as the proprietor thereof.
- d. Each party shall bear their own costs.

**JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS  
SIGNED AND DATED AT MOMBASA THIS.....30<sup>TH</sup> ..... DAY OF.....JANUARY.....2025.**

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**J.O. OLOLA**

**JUDGE**

Judgement delivered in the presence of:

- a. Firdaus, the Court Assistant.
- b. No appearance for the Applicants
- c. No appearance for the Respondents

