



**Owuor & 2 others v Oyoo (Sued as the Personal Representative of the Estate of Paul Odhiambo Otieno - Deceased) (Environmental and Land Originating Summons E004 of 2020) [2024] KEELC 13962 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13962 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2020  
BO ODHIAMBO, J  
DECEMBER 19, 2024**

**BETWEEN**

**SCOVIA ADHIAMBO OWUOR ..... 1<sup>ST</sup> PLAINTIFF  
PHOEBE AKOTH ODHIAMBO ..... 2<sup>ND</sup> PLAINTIFF  
PETER OUMA OWUOR ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**VIVIAN ADHIAMBO OYOO ..... DEFENDANT  
SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL  
ODHIAMBO OTIENO - DECEASED**

**JUDGMENT**

1. The Plaintiffs instituted this suit by way of Originating Summons dated 7<sup>th</sup> October 2020. The Plaintiffs claimed to have acquired all that parcel of land known as Kisumu/Kasule/476 (hereinafter referred to as “the suit property”) by adverse possession. The Plaintiffs sought the following orders;
  1. A declaration that the Plaintiffs had acquired the suit property by adverse possession the Defendant’s right to recover the same having been barred under Section 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and her title extinguished by effluxion of time the Plaintiffs having occupied the property peacefully for a period of over 30 years.
  2. An order for the registration of the Plaintiffs as the proprietors of the suit property in place of the Defendant.
  3. An injunction restraining the Defendant from interfering with the Plaintiffs’ peaceful possession and occupation of the suit property.



4. Costs of the suit.
2. The Originating Summons was supported by the affidavit of the 1<sup>st</sup> Plaintiff, Scovia Adhiambo Owuor. The Plaintiffs' case was that: They were the children of Paul Owuor Okulo, deceased (hereinafter referred to only as "Owuor" where the context so permits). Owuor lived on, died in 2006 and was buried on the suit property. In 2019, the Defendant approached them claiming that the suit property belonged to her deceased father and threatened to evict them from the property. They were born and brought up on the suit property. They had lived on the suit property for over 30 years. The Defendant's right to recover the suit property from them was time barred and her title to the property stood extinguished by operation of law. They occupied the suit property peacefully without any interruption and had buried seven members of the family on the property including their mother and father.
3. At the trial, the 2<sup>nd</sup> Plaintiff (PW1) who gave evidence on behalf of the other Plaintiffs adopted her witness statement filed in court on 27<sup>th</sup> April 2022 as part of her evidence in chief and produced the documents attached to the Plaintiffs' list of documents filed on the same date as exhibits. PW1 told the court that she was born in 1977 on the suit property which was owned by her father. She stated that the suit property was occupied by two families, that is, the family of his deceased father, Paul Owuor Okulo and the family of Stephen Ayieta Okore. PW1 stated that the suit property had not been subdivided and that the two families occupied the whole land. PW1 stated that his father settled on the land from Kanyakwar. She stated that the land was sold to her father by one, Pilister Odeyo who was a sister-in-law of the then registered owner, Ombwayo Awili. She stated that Ombwayo Awili had disappeared and his whereabouts were unknown. She stated that they buried their father and mother on the suit property. PW1 stated that she was married and was not staying on the suit property. PW1 stated that she had her own home. She stated that her father entered the land in 1977 and died in 2006. She stated that it was her brothers who were in occupation of the suit property and that she was giving evidence on their behalf.
4. The Plaintiffs' second witness was Stephen Ayieta (PW2). PW2 adopted his witness statement filed on 27<sup>th</sup> April 2022 as part of his evidence in chief. PW2 stated that she was also in occupation of the suit property. PW2 stated that the Defendant had sued him in Kisumu CMC ELC No. E037 of 2022 seeking to recover the suit property from him. PW2 stated that he purchased his portion of the suit property from Obonyo Omala in 1983. He stated that Obonyo Omala was the caretaker of the property on behalf of the then registered owner Ombwayo Awili who was his relative and who had left home in 1950s. He stated that he never met the then registered owner of the suit property. He stated that when he purchased a portion of the suit property in 1983, the Plaintiffs' father, Paul Owuor Okulo deceased was already in occupation of a portion of the land. He stated that they had lived peacefully on the land with the deceased's family over the years until 2019 when the Defendant came up to claim the land.
5. The Plaintiffs' third witness was Leonida Odongo Genga(PW3). PW3 adopted her witness statement filed on 26<sup>th</sup> April 2022 as part of her evidence in chief. PW3 stated that the suit property was owned by Michael Obonyo Omalla who was her father-in-law. She stated that she was married in 1967 and the registered owner of the land had already disappeared. She stated that she never saw him. She stated that the Plaintiffs were known to her. She stated that the Plaintiffs' father Paul Owuor bought a portion of the suit property from her father-in-law Michael Obonyo Omalla and that they had been occupying the land since then. PW3 stated that the Defendant was not known to her. She stated that James Onyango Obonyo was known to her. She stated that James Onyango Obonyo was her youngest brother-in-law. She stated that he was the son of Michael Obonyo and that he was still alive.
6. The Plaintiffs next witness was Samson Nyandere Odeyo(PW4). PW4 adopted his witness statement filed on 26<sup>th</sup> April 2022 as part of his evidence in chief. He told the court that the Plaintiffs were known



- to him. He stated that his mother Pilister Opisa Odeyo sold to the Plaintiffs a portion of their land which was registered in the name of Awili Ombwayo. He stated that Awili Ombwayo was his brother and the son of Pilister Opisa Odeyo. He stated that Awili Ombwayo disappeared before he was born. He stated that he had never heard from him. He stated that James Onyango Obonyo was his cousin being a son of his paternal uncle, Michael Obonyo. He stated that he could not recall the funeral of Awili Ombwayo which took place around April 2002 at Kasule Sub-location. He stated that Awili Ombwayo was his brother and he did not attend his alleged funeral. He stated that he never saw Awili Ombwayo because he disappeared before he was born in 1960.
7. On cross-examination, PW4 stated that Ombwayo Awili was his cousin and not a brother. He stated that he was the son of Ezekiel Odeyo while Ombwayo Awili was the son of Awili. He stated that his mother and Michael Obonyo shared the suit property amongst them. He stated that the succession proceedings that were undertaken by James Onyango Obonyo in respect of the estate of Ombwayo Awili were undertaken secretly as they as relatives of Ombwayo Awili were not aware of his death and burial. On re-examination, PW4 stated that his mother's portion of the suit property was sold to the Plaintiffs' father, Paul Owuor. The Plaintiffs next and last witness was Meshack Otieno (PW5). PW5 adopted his witness statement filed on 26<sup>th</sup> April 2022 as part of his evidence in chief. He stated that the Plaintiffs were his aunts and that the suit property was well known to him.
  8. After the close of the Plaintiffs' case, the Defendant Vivian Adhiambo Oyoo(DW1) gave evidence. DW1 adopted her witness statement filed on 13<sup>th</sup> July 2021 as part of her evidence in chief and produced the documents referred to in her statement as a bundle as D.EXH.1. She produced the documents in her supplementary list of documents as D.EXH.2. On cross-examination, DW1 stated that she knew the suit property and was aware that there were buildings on the same. She stated that the Plaintiffs and Mr. Ayieta (PW2) were staying on the suit property. She stated that she was not aware of when they entered the property. DW1 stated that when her uncle and mother purchased the land in 1991 from Obwayo Awili, the same was vacant and it was left under the care of a caretaker. She stated that she was born in 1978 and was about 13 years in 1991. She stated that she had not occupied the suit property. On re-examination, DW1 stated that her mother and uncle who were the registered owners of the suit property died in 1992 and 1995 respectively. She stated that at the time of their death, the suit property was not occupied by the Plaintiffs. On examination by the court, DW1 stated that she accompanied her mother to the suit property in 1991 when she put up a temporary structure on the property for a caretaker. She stated that the next time she visited the property was in 2018 when she found it occupied by the Plaintiffs and others. She stated that on this visit, she did not find their temporary structure in place.
  9. The Defendant called the Court Assistant, Evon Awuor Odero(DW2) as her witness. DW2 produced in court as an exhibit the court file for the Chief Magistrate's Court at Kisumu Succession Cause No. 330 of 2018, In the matter of the estate of Ombwayo Awili.

### **The Plaintiffs' submissions**

10. The Plaintiffs filed submissions dated 8<sup>th</sup> April 2024. The Plaintiffs framed two main issues for determination by the court namely; whether they had acquired the suit property by adverse possession, and whether they should be registered as the owners of the portion thereof in their possession. The Plaintiffs submitted that they had been occupying and living on the suit property since 1977. The Plaintiffs submitted that their deceased father settled on the suit property, built houses for his wives and mother, and buried several relatives on the land. The Plaintiffs submitted that they had occupied the suit property peacefully from 1977 until 2019 when the Defendant came up to lay a claim on the suit property. The Plaintiffs cited several authorities and submitted that they had established the



ingredients of an adverse possession claim in relation to the suit property. The Plaintiffs submitted that they had acquired the suit property by adverse possession and should be registered as the owners of a half portion thereof. On costs, the Plaintiffs submitted that the same is at the discretion of the court. The Plaintiffs urged the court to grant them the costs of the suit since the Defendant had interfered with their quiet possession of the suit property. The Plaintiffs prayed that the reliefs sought in the Originating Summons be granted.

### **The Defendant's submissions**

11. The Defendant filed submissions dated 30<sup>th</sup> April 2024. The Defendant framed four issues for determination namely; whether the issues raised could be determined in a suit brought by way of an Originating Summons, whether the reliefs sought by the Plaintiffs should be granted, who is the registered proprietor of the suit property and who was in occupation and how did he get into possession? On the first issue, the Defendant submitted that Originating Summons as a procedure for bringing claims is meant for simple matters which do not involve serious questions to be investigated. The Defendant submitted that when complex and contentious matters are raised for determination in an Originating Summons, the Summons should be dismissed. The Defendant submitted that the issues such as the locus standi of the Plaintiffs to sue and whether the Plaintiffs were squatters on the suit property were complex and contentious issues which were not ideal for determination in an Originating Summons. The Defendant cited several decisions in which the conditions to be met by an applicant seeking registration as a proprietor of land by adverse possession were settled some of which I will refer to later in the judgment, and submitted that the Plaintiffs had failed to satisfy the said conditions. The Defendant submitted that the Plaintiffs were claiming the suit property as of right. The Defendant submitted that the Plaintiffs claimed that the suit property belonged to their deceased father. The Defendant submitted that the Plaintiffs' claim to the suit property as of right was inconsistent with their adverse possession claim.
12. The Defendant submitted further that the Defendant acquired the suit property on 5<sup>th</sup> November 2019 as a beneficiary of the estate of Paul Odhaimabo Otieno and Herine Akinyi. The Defendant submitted that for the purposes of adverse possession, time could only run against the Defendant with effect from 5<sup>th</sup> November 2019. The Defendant submitted that it was barely 1 year since the Defendant was registered as the owner of the suit property when the Plaintiffs brought this suit in 2020. The Defendant submitted that the Plaintiffs had not occupied the suit property for 12 years from the time the Defendant became the owner thereof and as such, their adverse possession claim had not met the statutory threshold. The Defendant submitted that the Plaintiffs were trespassers on the suit property and urged the court to dismiss their Originating Summons with costs.

### **Analysis and determination**

13. I have considered the Originating Summons together with the supporting affidavit, the replying affidavit, the evidence tendered and the submissions filed by the advocates for the parties. The only issue arising for determination in the Originating Summons is whether the Plaintiffs have acquired a portion of the suit property by adverse possession and as such should be registered as the owner thereof. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR cited by the Defendant in her submissions the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following elements;
  - a. Must make physical entry and be in actual possession or occupancy of the land for the statutory period.



- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
  - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
  - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
  - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
  - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
  - g. The possession must be continuous uninterrupted, and unbroken for the necessary statutory period.
  - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
  - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
  - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification.
  - k. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
14. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 also cited by the Defendant, Kneller J. stated as follows at page 16:
- “The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necplecario (no force, no secrecy, no evasion)...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration.”
15. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:
- “First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder



has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

16. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

“18. 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 12years 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?...”

17. In *Githu v. Ndeete* [1984] KLR 776 it was held that:

- “1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.
2. Time ceases to run under the [\*Limitation of Actions Act\*](#) either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the [\*Limitation of Actions Act\*](#).
3. A title by adverse possession can be acquired under the [\*Limitation of Actions Act\*](#) to a part of the parcel of land which the owner holds title.”

18. In *Kairu v. Gacheru* [1988]2 KAR 111, it was held that,

“The law relating to prescription affects not only present holders of the title but their predecessor (57, [\*Limitation of Actions Act\*](#)).”

19. The land in Kisumu Kasule Adjudication Section was adjudicated in 1982. According to the Adjudication Record that was produced in evidence by the Defendant, the suit property was adjudicated and recorded in the name of Ombwayo Awili in 1982. The Adjudication Record was signed on behalf of Ombwayo Awili by “his father”. This shows that he was not available when the land adjudication exercise was taking place. The suit property was registered in the name of Ombwayo Awili on 20<sup>th</sup> March 1991. The suit property is said to have been registered in the names of Paul Odhiambo Otieno and Herine Akinyi on 21<sup>st</sup> March 1991. Paul Odhiambo Otieno and Herine Akinyi are said to have acquired the suit property from Ombwayo Awili at a consideration of Kshs. 10,000/-. Paul Odhiambo Otieno and Herine Akinyi died on 24<sup>th</sup> January 1995 and 14<sup>th</sup> June 1992 respectively. The Defendant was registered as the proprietor of the suit property on 5<sup>th</sup> November 2019 by transmission as a beneficiary of the estate of Paul Odhiambo Otieno and Herine Akinyi, deceased.



20. The Plaintiffs are the children Paul Owuor Okulo, deceased with his two wives, Risper Owuor and Pamela Owuor both deceased. Paul Owuor Okulo is said to have died in April 2006. According to the Plaintiffs, their father, Paul Owuor Okulo deceased settled on a portion of the suit property in 1977. Paul Owuor Okulo is said have acquired the said portion of the suit property from one Plista Obisa Odeyo who was a relative of Ombwayo Awili who was said to have disappeared without trace in the 1950s. The Plaintiffs have contended that after acquiring the said portion of the suit property, the deceased, Paul Owuor Okulo settled his family of three wives and their children on the land. In addition to the houses for his three wives, Paul Owuor Okulo is said also to have put up a house for his mother on the said portion of the suit property. The Plaintiffs led evidence that the three wives of Paul Owuor Okulo died and were buried on the suit property. One of Paul Owuor Okulo's sons and his wife also died and were buried on the suit property. Paul Owuor Okulo also died in 2006 and was buried on the suit property. The Plaintiffs led evidence that the suit property is their family home. The Plaintiffs produced several photographs in evidence showing the buildings that they have on the suit property. The photographs also show several graves of deceased persons said to be their relatives. The Plaintiffs contended that they were born and brought up on the suit property and lived peacefully on the said portion of the suit property from 1977 until 2019 when the Defendant who was unknown to them showed up claiming to be the owner of the suit property.
21. The Defendant did not deny that the Plaintiffs and one Steven Ayieta were in occupation of the suit property. On cross-examination, the Defendant stated that she did not know when the Plaintiffs entered the suit property. The Defendant stated that when her mother and uncle purchased the suit property in 1991, it was vacant. The Defendant claimed that the Plaintiffs took advantage of the death of her mother and uncle who were registered as the owners of the suit property to settle on the same. The Defendant claimed that the Plaintiffs settled on the suit property after the death of her said mother and uncle. The Defendant stated that she had never occupied the suit property. She stated that her deceased mother and uncle had a caretaker living on the suit property. The court was however not told when the said caretaker vacated the suit property. The Defendant told the court that she went to the suit property with her mother in 1991 when the same was acquired and she did not go back to the property until 2018; 27 years later. It was in 2018 that she found the suit property occupied by the Plaintiffs and Steven Ayieta. As stated earlier, the Defendant's mother and uncle who were the registered owners of the suit property died in 1992 and 1995 respectively. The Defendant was a minor at the time. The Defendant obtained a Grant of Letters of Administration in respect of the estate of her said mother and uncle in 2018 and 2019 respectively.
22. I find the evidence adduced by close relatives of Ombwayo Awili to the effect that he disappeared in 1950s and was never traced overwhelming. As I mentioned earlier, the Adjudication Record was signed on his behalf by his father as he was not around at the time. PW3 and PW4 were close relatives of Ombwayo Awili. They were categorical that Ombwayo Awili disappeared in 1950s and was never traced. PW4 who was Ombwayo's first cousin was surprised about his alleged death on 10<sup>th</sup> April 2002 and burial in Kasule Sub-location. I have perused the court file for Succession Cause No. 330 of 2018, In the matter of the Estate of Ombwayo Awili. I find no conclusive proof that Ombwayo Awili died on 10<sup>th</sup> April 2002. What is in the file is a Death Certificate which is a product of late registration of the alleged death of Ombwayo Awili. From the many discrepancies which I have noted in the file, I formed the opinion that the petitioner simply "prepared papers" to enable him to inherit the parcel of land, Kisumu/Kasule/ 832 which remained registered in the name of Ombwayo Awili. I do not wish to say more on that succession matter. From the evidence before me, I am persuaded that the Plaintiffs' deceased father entered the suit property in 1977 before land adjudication. During the land adjudication in the area in 1982, the suit property was recorded in the name of Ombwayo Awili on



the advice of his “father” whom I would guess was Michael Obonyo Omala who later sold a portion of the land to Steven Ayieta.

23. It is not clear why the Defendant’s deceased mother and uncle purchased land which was occupied by the Plaintiffs and Steven Ayieta. Although the Defendant contended that the land was vacant in 1991 when her mother and uncle purchased it, I find the evidence adduced by the Plaintiffs that they occupied the suit property in 1977 very strong compared to the Defendant’s claim which is based on an alleged visit to the property with her mother in 1991 while she was still a minor of 13 years to put up a structure for a caretaker. There was no evidence of the alleged structure nor were the particulars of the said caretaker given.
24. There is however undisputed evidence that the Defendant’s said deceased mother and uncle were registered as the owners of the suit property on 21<sup>st</sup> March 1991. After being registered as the owners of the suit property, there is no evidence that they took possession of the land before they died in 1992 and 1995 respectively. The administrator of their estates (the Defendant) was not appointed until 23 years later in 2018. For the entire period, the land was abandoned and left to those who were in occupation. I am satisfied from the evidence before me that the Plaintiffs have established their claim to the suit property by adverse possession. When the Defendant obtained Grants of Letters of Administration in respect of the estates of her deceased mother and uncle and caused herself to be registered as the owner of the suit property by transmission on 5<sup>th</sup> November 2019, the interest that Paul Odhiambo Otieno and Herine Akinyi (both deceased) had in the suit property had become extinguished by operation of law. Paul Odhiambo Otieno and Herine Akinyi deceased had no interest left in the suit property that could devolve to their estates.

## Conclusion

25. In conclusion, I find merit in the Originating Summons dated 7<sup>th</sup> October 2020. I allow the same as follows;
  1. I declare that the Defendant’s right to recover the portion of Title No. Kisumu/Kasule/476 (the suit property) occupied by the Plaintiffs is time-barred under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and the Defendant’s title to that portion of the suit property has been extinguished under Section 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
  2. The Plaintiffs shall be registered as the proprietors of the portion of Title No. Kisumu/Kasule/476 (the suit property) occupied by them in place of the Defendant after subdivision has been carried out and the said portion transferred to them by the Defendant.
  3. The Defendant shall carry out the said subdivision of the suit property through a Government Surveyor and shall transfer to the Plaintiffs the portion thereof under their occupation with the Plaintiffs meeting all the expenses. If the Defendant fails to undertake the subdivision and transfer as ordered, the Plaintiffs shall be at liberty to do so and in that regard, the Deputy Registrar of this court is authorised to execute any document or instrument necessary to effect the subdivision and transfer of the said portion of the suit property to the Plaintiffs. The Land Registrar shall also dispense with the production of the original title deed for the suit property should the Defendant fail to surrender the same.
  4. A permanent injunction is issued restraining the Defendant from interfering with the Plaintiffs’ peaceful occupation and possession of the portion of the suit property in their possession.



5. Each party shall bear its costs of the suit.

**DELIVERED AND DATED AT KISUMU ON THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**S. OKONG'O**

**JUDGE**

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

Mr. Nyanga for the Plaintiffs

Mr. Anyul for the Defendant

Ms. J.Omondi-Court Assistant

