



Onyango v Makanyanga & another (Environment & Land Case 178 of 2016 & E006 of 2021 (Consolidated)) [2025] KEELC 2923 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 178 OF 2016 & E006 OF 2021 (CONSOLIDATED)**

DO OHUNGO, J

MARCH 27, 2025

BETWEEN

BONIFACE ONYANGO PLAINTIFF

AND

WANJALA MAKANYANGA 1ST DEFENDANT

JOSEPH SIMIYU 2ND DEFENDANT

JUDGMENT

1. This judgment is in respect of two consolidated cases: ELCC No. 178 of 2016 and with ELCC No. E006 of 2021. Proceedings in ELCC No. 178 of 2016 commenced on 16th September 2016 when Boniface Onyango (Boniface) filed Plaintiff dated 14th September 2016 against Wanjala Makanyanga (Wanjala) and Joseph Simiyu (Joseph). He averred that he was the registered proprietor of the parcel of land known as Kakamega/Chekalini/29 (suit property) and that Wanjala and Joseph had trespassed into the suit property. Boniface therefore prayed for judgment against Wanjala and Joseph jointly for:
 - a. A declaration that the Plaintiff is the absolute owner that the Plaintiff is the absolute owner of the whole of that parcel of land known as Kakamega/Chekalini/29 and the Defendants actions amount to an interference with the Plaintiff's proprietary interest over the suit land.
 - b. An order of eviction directing that the Defendants, their servants and or agents be evicted forthwith from the land parcel number Kakamega/Chekalini/29.
 - c. An order of permanent injunction to permanently restrain the Defendants either acting jointly or severally from trespassing into, wasting, transferring, subletting, interfering with and/or any other way or manner whatsoever on howsoever dealing with land parcel number Kakamega/Chekalini/29.
 - d. Mesne profits.



- e. Costs of this suit.
 - f. Any other relief as the court may be pleased to grant.
2. Wanjala filed Statement of Defence dated 4th June 2018 through which he denied Boniface's averments and averred that he had acquired the suit property through adverse possession. He prayed that the suit be dismissed with costs.
 3. On his part, Joseph filed Statement of Defence and Counterclaim dated 26th July 2018. He denied Boniface's averments and stated that he purchased the suit property from one Edward Barasa Matumbei and that having been in occupation for over 20 years, he had acquired the suit property by prescription. Joseph joined the Land Registrar Kakamega as the Second Defendant in the Counterclaim. He averred that the registration of one Wanyonyi Wechuli as proprietor of the suit property and subsequently Boniface were obtained fraudulently through collusion with the Land Registrar Kakamega. Joseph therefore prayed for dismissal of Boniface's case and sought judgment against Boniface and the Land Registrar Kakamega jointly and severally for:
 - a. A declaration that the registration of the suit property first in the names of Wanyonyi Wechuli and subsequently cancellation and issuance of title to the 1st defendant is fraudulent, null and void.
 - b. A declaration that the plaintiff be registered as the proprietor of all that parcel of land comprised in Kakamega/Chekalini/29 and the 2nd defendant be and is hereby ordered to accordingly rectify the registration and cancel the names of the 1st defendant as proprietor in favour of the plaintiff.
 4. Proceedings in ELCC No. E006 of 2021 started on 27th April 2021 when Wanjala filed Originating Summons (OS) dated 21st April 2021, against Boniface. The OS was supported by an affidavit sworn by Wanjala. He averred in the OS that he had become entitled to the suit property by adverse possession and sought the following orders:
 - a. A declaration that the Respondent's right and that of his late father Orasi Onyango Makucha over land title No. Kakamega/Chekalini/29 got extinguished by operation of law/adverse possession upon expiry of 12 years when the applicant was in possession.
 - b. A declaration that upon expiry of 12 years from the date of the said registration, the whole of Land Parcel No. Kakamega/Chekalini/29 was held and is currently held in trust for the applicant.
 - c. An order that the whole of Land Parcel No. Kakamega/Chekalini/29 vests in the applicant and under section 38 of the *Limitation of Actions Act* Cap 22 Laws.
 - d. A declaration that the registration of Respondent as the owner of Land Parcel No. Kakamega/Chekalini/29 is unlawful.
 - e. An order that the Respondent do sign all relevant documents to facilitate transfer of the whole of Land Parcel No. Kakamega/Chekalini/29 to the applicant and that in default the Deputy Registrar of this Honourable Court to sign the same.
 - f. An order that the Respondent be condemned to pay costs of this suit.
 - g. Such other orders or reliefs as this Honourable Court may deem just and reasonable to grant.



5. The two suits were consolidated through an order made on 14th December 2021. ELCC No. 178 of 2016 was selected as the lead file.
6. At the hearing, Boniface testified as PW1 and adopted his witness statement dated 19th February 2019. He also produced copies of the documents listed as item numbers 1 to 6 in his list of documents dated 14th February 2019 and copies of the documents listed as item numbers 14 to 18 in his supplementary list of documents dated 9th August 2018.
7. Boniface testified that he was not in occupation of the suit property as of the date of his testimony and that neither he nor his father from whom he inherited the suit property had ever occupied it. He further stated that his deceased father was not buried on the suit property and that the Defendants were in occupation before 1978. That when his deceased father attempted to fence the suit property in 1980, his workers were beaten and arrested since there were other people already in occupation.
8. Gilbert Wayongo (PW2), the Court Administrator at Kakamega Law Courts produced copies of court files in Kakamega ELC 155 of 2013 (formerly Kakamega CMCC 97 of 2004), Kakamega HCC 144 of 1988 (OS), Kakamega HCC 24 of 1996, and Kakamega HC Succession No. 798 of 2011. He stated that HCC 144 of 1988 was marked as withdrawn with no order on costs on 27th June 1995 following filing of a Notice of Withdrawal of Suit and that HCC 24 of 1996 was dismissed for want of prosecution with no order on costs on 30th October 2002. That HC Succession No. 798 of 2011 was closed on 23rd July 2015 under Rule 73 of Probate and Administration Rules due to non-action by parties and that ELC 155 of 2013 was last in court on 5th March 2018 after which no other step was taken in the matter. He also stated that Wanjala was not a party in any of the four files that he had produced.
9. The Plaintiff's case was then closed.
10. Wanjala testified next as DW1. He adopted his affidavit which he swore in support of the OS and produced copies of annexures WM1(a) to WM8 thereto as his exhibits. He stated that he was born in 1947 and had been in occupation of the suit property from 1964 to the date of his testimony. He added that he had houses on the suit property and was growing sugarcane, maize and bananas on it. That neither Boniface nor Boniface's father had been in occupation and that Joseph was his nephew and was not in occupation of the suit property. Wanjala further testified that his father passed away in 1978 and was buried in the suit property and that the consideration his father paid for the suit property was not cash but cattle. Wanjala's case was then closed.
11. Next on the stand was Joseph who testified as DW2. He adopted his two witness statements dated 26th July 2018 and 12th April 2019 as his evidence in chief. He produced copies of the documents listed as item numbers 1 to 3 in his list of documents dated 26th July 2018. Joseph further testified that he was occupying and farming four acres of the suit property as of the date his testimony while Wanjala was occupying the remaining nine acres. Joseph's case was then closed.
12. Nelson Otieno Odhiambo (DW3), the Land Registrar Kakamega, stated that the suit property has two registers with different entries on proprietors as well as cautions after 20th May 1996 and that it is not normal for one parcel to have two registers. He also stated that the first registered proprietor of the suit property was Settlement Fund Trustees (SFT) followed by Oras Onyango Makucha and that they did not have any records at the land registry showing how the land was transferred from SFT to Oras Onyango Makucha. DW3 further testified that he could not tell which of the two registers was the correct one. He added that as of the date of his testimony, the register that the Land Registry at Kakamega had in its records was the one showing Boniface as the proprietor. That from his records, no



- other person besides Oras Onyango Makucha was issued with a title deed in respect of the suit property and that the next title after Oras was that of Boniface.
13. Lastly, Selpher Imbili (DW4), a Court Administrator at Kakamega Law Courts, produced the court file in respect of Kakamega HCC 24 of 1996 and stated that the said suit was dismissed on 30th October 2002 under Order 16 Rule 2 of the Civil Procedure Rules.
 14. Thereafter, directions for filing and exchange of written submissions were given. Boniface filed submissions dated 28th May 2024, Wanjala filed submissions dated 7th August 2024 while Joseph filed submissions dated 30th October 2024. The Land Registrar did not file any submissions.
 15. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether fraud has been established, whether adverse possession has been established and whether the reliefs sought should issue.
 16. There is no dispute that Boniface is the registered proprietor of the suit property. His proprietorship was affirmed by the Land Registrar and by both Joseph and Wanjala who variously seek cancellation of his title and declaration of acquisition of the suit property through adverse possession. One of the prerequisites of adverse possession is that the claimant acknowledges the title of the proprietor.
 17. In his capacity as registered proprietor, Boniface is entitled to the rights, privileges, and benefits spelt out by the law, ranging from Article 40 of *the Constitution* to Section 24 of the *Land Registration Act*. Further, Section 26 of the *Land Registration Act* obligates the Court to accept the proprietor's certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) are established. The only grounds upon which the title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title was acquired illegally, un-procedurally or through a corrupt scheme. Unless Wanjala and Joseph succeed in defeating Boniface's title either through cancellation or declaration of title through adverse possession, Boniface will inevitably be allowed to enjoy the full rights and benefits accruing from his proprietorship.
 18. In his counterclaim, Joseph challenged Boniface's title on the ground of fraud. To succeed in that regard, he must not only prove fraud but must also show that Boniface was party to the fraud.
 19. The law relating to fraud in civil cases is settled. The starting point is that fraud is a serious allegation and that the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
 20. In his counterclaim, Joseph averred that the registration of Wanyonyi Wechuli as proprietor of the suit property and then Boniface was fraudulent. In the particulars of fraud, he stated that Wanyonyi Wechuli was not the administrator of the estate of Oras Onyango Makucha and that cancellation of title issued to Wanyonyi Wechuli and issuance of a title to Boniface without a court order and in the face of a caution was unlawful.
 21. Joseph did not produce anything to show that Boniface obtained title from the estate of Wanyonyi Wechuli. Instead, Boniface's testimony was that he obtained title pursuant to a grant issued to him in HC Succession Cause No 102 of 2011 (Eldoret), in respect of the estate of Oras Onyango Makucha who was his father. That position is corroborated by the testimony of the Land Registrar who



produced a copy of the register in respect of the suit property. A perusal of the register shows that SFT was registered as proprietor on 26th January 1979, pursuant to entry number 1 in Part B of Proprietorship Section of the register. Entry number 2 dated 16th May 1996 is a transfer to Oras Onyango Makucha, to whom title deed was issued on 20th May 1996, pursuant to entry number 3. Subsequently, Boniface whose National Identification Card Number is stated in the register as 14435735, became registered proprietor on 27th February 2013, pursuant to grant issued in HC Succession Cause No 102 of 2011 (Eldoret). Joseph did not produce any evidence that any title was issued to Wanyonyi Wechuli or that such a title was cancelled.

22. I bear in kind that the Land Registrar testified that there were two registers in respect of the suit property. I have perused the copies of the said registers. There is one common thread running through them: that SFT was registered as proprietor on 26th January 1979 and on 16th May 1996 there was a transfer to Oras Onyango Makucha, to whom title deed was issued on 20th May 1996. Boniface demonstrated how he obtained title from the estate of Oras Onyango Makucha. On the other hand, Joseph did not demonstrate any acquisition from Oras Onyango Makucha or his estate. As for Wanjala, he did not challenge validity of Boniface's title. He simply sought a declaration of title to the suit property through adverse possession.
23. It has been emphasised severally by the courts that fraud cannot simply be inferred. In view of the foregoing, Joseph has neither proven fraud nor connected Boniface to any fraud. I find that fraud has not been established.
24. The next issue for determination is whether adverse possession has been established. The prerequisites of establishing adverse possession are found at Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR where it stated that a party claiming adverse possession must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.
25. The Court of Appeal recently discussed these ingredients in *Munyanya v Keya* [2024] KECA 1831 (KLR), with a specific focus on the nature of possession. The Court stated that the possession must be:
 - a. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;
 - b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;
 - c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;
 - d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;



- e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;
 - f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years. (See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of 2022).
26. In addition to the above principles, another important consideration is that pursuant to Section 41 of the *Limitation of Actions Act*, “Government land or land otherwise enjoyed by the Government” is precluded from acquisition by adverse possession. Land charged in favour of or owned by SFT is in the category of precluded land. The Court of Appeal affirmed that position in Kennedy Nyamumbo Sese v Settlement Fund Trustees & 2 others [2017] eKLR where it held as follows:
- ... the disputed portion belonged to SFT, until it was transferred to Daniel in May 1995. In Gitu v Ndungu & 2 others [2001] eKLR, this Court in a 5 Bench decision, departed from its decision in Eliud Nyongesa Lusenaka and Another vs Nathan Wekesa Omocha Civil Appeal No 134 of 1993 in which the Court had decided that the plaintiff after 12 years of exclusive possession of the suit property in regard to which the Settlement Fund Trustees had title, acquired title to it and the SFT became his trustee. The 5 Judge Bench reiterated its earlier holding in Boniface Oredo vs Wabomba Mukile Civil Appeal No 170 of 1989 (unreported) delivered in 1992, that the interest of SFT in the suit property is not extinguishable under the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya in view of section 175 of the Agriculture Act Cap 318 that provides that a suit by SFT cannot be defeated by the defence of limitation.
27. The Court of Appeal reiterated the above position in Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR) where it stated:
- 21. On the evidence on record, both plots were part of the larger Kinangop Settlement Scheme which commenced in 1963. The available evidence also shows that plot 586 was registered in the name of the first owner, Sarah, on 8th August, 1991. Before then it was public land under the SFT and therefore no claim could lie under the doctrine of adverse possession. That much is clear from sections 37 and 41 of the LAA as read with section 175 of the Agriculture Act, Cap 381. It is also clear from a five-bench decision of this Court in Gitu vs Ndungu [2001] EA 149 which approved an earlier decision of the Court in Boniface Oredo vs Wabomba Mukile, *CA No. 170 of 1989* (UR) holding that the interest of SFT is not extinguishable under the *Limitation of Actions Act*. The period between 1963 and 1991 was therefore for exclusion in the computation of time.
28. As stated earlier in this judgment, SFT was registered as proprietor of the suit property on 26th January 1979 and remained proprietor until 16th May 1996 when Oras Onyango Makucha became proprietor. Boniface became registered proprietor later, on 27th February 2013. In view of Section 41 of the *Limitation of Actions Act* and the above authorities, the period between 26th January 1979 and 16th May 1996 must be excluded in the computation of time for purposes of adverse possession. The earliest that any person could establish a claim for adverse possession in respect of the suit property was after 16th May 2008.



29. Wanjala introduced his claim for adverse possession initially through his Statement of Defence dated 4th June 2018 and subsequently through his Originating Summons which he filed on 27th April 2021. On the other hand, Joseph's claim for adverse possession was initiated through his Statement of Defence and Counterclaim dated 26th July 2018.
30. There is no dispute that Boniface is not in possession of the suit property. That is why he has sought eviction against both Wanjala and Joseph. Further, it is not in dispute that Boniface's father never had possession of the suit property. Nevertheless, a registered proprietor need not occupy his property throughout or at all. It is the claimant in an adverse possession case who must establish his claim failing which he must yield possession to the registered proprietor.
31. Even while claiming title through adverse possession, there is a dispute between Wanjala and Joseph as to who between them is in possession. Joseph testified that he was occupying and farming four acres of the suit property while Wanjala was occupying the remaining nine acres. On the other hand, Wanjala was emphatic in his testimony that Joseph is not in occupation of the suit property and has no structure thereon.
32. It is important to emphasise that the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. See *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR. Such identification is not limited to just providing an extract of title. In a case where only a portion of the suit property is claimed or where there are multiple claimants, the portions, sizes and locations of portions in possession of respective claimants must be clearly identified. Such identification should be detailed, and a survey map should be produced since after all, the claimant is seeking to obtain title to land. Survey is an elementary step in the process of identification and titling of land. The claimants in this case have not offered any survey map or sketch map to identify the areas or portions they occupy.
33. Further, I note that in his witness statement dated 12th April 2019, Joseph stated that an eviction decree was issued against him in Kakamega CMCC 97 of 2004 and that after he obtained setting aside of the decree, the said case abated in the year 2016. Pursuant to the testimony of Gilbert Wayongo (PW2), the said matter was still in court as of 5th March 2018. I have also perused the file and I have not seen any formal order marking the suit as abated.
34. It is trite that the filing of a recovery suit stops the running of time for purposes of adverse possession. See *Kuria Kiarie & 2 others v Sammy Magera* (supra). Kakamega CMCC 97 of 2004 having been filed against Joseph in 2004, time for purposes of adverse possession stopped running from 2004 such that by 26th July 2018 when Joseph introduced his claim for adverse possession, he had not met the requisite 12 years of possession.
35. Both Wanjala and Joseph attribute their entry into the suit premises to a sale transaction. By its very nature, adverse possession presupposes a hostile possession by clearly asserting hostile title in denial of the title of the true owner. See *Munyanya v Keya* above. It follows that for a claim of adverse possession to succeed, the claimant must demonstrate that his occupation was without the proprietor's permission. Entry and possession pursuant to a sale agreement is by the proprietor's permission. Time for purposes of adverse possession does not run in favour of such a person for as long as her presence on the land is by permission of the proprietor. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the purchased property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.



36. According to both Wanjala and Joseph, the sale transaction through which they obtained possession was comprised in an agreement dated 8th April 1964 between Edward Barasa and Wechuli Njengu. I have looked at the document. It is a letter written by Malaha Farm to “Settlement Scheme, Chekalini F. Co Society Ltd.” It is not an agreement. It is written in past tense and does not bear any signature on the part of Edward Barasa. It talks of consideration being KShs 7,000 which is said to have been paid in the form of cattle, but I haven’t seen acknowledgement of receipt by Edward Barasa. In the absence of proof of payment of purchase price, time for purposes of adverse possession did not start to run in favour of the alleged purchaser or his successors. In view of the foregoing, I find that adverse possession has not been established.
37. To the extent that his title remains unimpeached, Boniface is entitled to the benefits of proprietorship. He is entitled to the reliefs of eviction and permanent injunction.
38. Regarding Boniface’s claim for mesne profits, I note that mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves. The law is that mesne profits must be pleaded and proved. See Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR. To the extent that Boniface did not plead the quantum of mesne profits that he sought and neither tendered evidence on it nor made submissions to form a basis for both liability and quantum of mesne profits, I find no merit in the prayer for mesne profits.
39. In the result, I find no merit in Wanjala’s and Joseph’s claims. On the other hand, Boniface’s claim is meritorious, save on the aspect of mesne profits. I therefore make the following orders:
- a. Wanjala Makanyanga’s claim comprised in his Statement of Defence dated 4th June 2018 and his Originating Summons dated 21st April 2021 are dismissed.
 - b. Joseph Simiyu’s claim comprised in his Counterclaim dated 26th July 2018 is dismissed.
 - c. A declaration is hereby made that Boniface Onyango of National Identification Card Number 14435735 is the registered proprietor of the parcel of land known as Kakamega/Chekalini/29.
 - d. Wanjala Makanyanga and Joseph Simiyu, their servants and or agents to vacate the parcel of land known as Kakamega/Chekalini/29 within 120 (One Hundred Twenty) days from the date of delivery of this judgment. In default, Boniface Onyango shall be at liberty to evict them.
 - e. A permanent injunction is hereby issued restraining Wanjala Makanyanga and Joseph Simiyu either acting jointly or severally from trespassing into, wasting, transferring, subletting, interfering with and/or any other way or manner whatsoever dealing with the parcel of land known as Kakamega/Chekalini/29.
 - f. Boniface Onyango shall have costs of this suit. The costs shall be borne by Wanjala Makanyanga and Joseph Simiyu jointly.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 27TH DAY OF MARCH 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Oduor for the Plaintiff (Boniface)



Mr Ligare holding brief for Mr Nandwa for the First Defendant (Wanjala)

Ms Adeya for the Second Defendant (Joseph)

No appearance for the Third Defendant (Land Registrar Kakamega)

Court Assistant: B Kerubo

