



**Odhiambo v Chuma (Environmental and Land Originating Summons
E002 of 2021) [2023] KEELC 19042 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 19042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021
GMA ONGONDO, J
APRIL 17, 2023**

BETWEEN

CLEMENT LAWRENCE ODHIAMBO APPLICANT

AND

OMOL CHUMA RESPONDENT

JUDGMENT

1. By an originating summons dated 26th October 2021 and filed herein on even date pursuant to, *inter alia*, Section 38 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenta and Order 37 Rule 7 of the [Civil Procedure Rules](#), 2010, the plaintiff, Clement, Lawrence Odhiambo through the firm of Nyauke and Company Advocates, sued the defendant, Omol Chuma for the orders *infra*;
 - a. That the Honourable court be pleased to make a finding and final judgment that the Plaintiff has acquired a portion containing by measurement 0.42 Ha of Land Parcel No. Kanyada/Kalanya/Kanyango/881 (the suit land herein) adversely.
 - b. That the Honorable court thus be pleased to order that the suit land currently occupied and cultivated by the plaintiff be registered into the names of applicant.
 - c. That the costs of this Originating Summons be provided for in favour of the plaintiff.
2. The anchorage of the originating summons is the plaintiff's supporting affidavit of eight paragraphs sworn on even date and annexed thereto alongside grounds I to IV set out on it's face. In summary, the plaintiff's lamentation is that he has been in continuous and uninterrupted occupation of the suit land for over twenty-five years. That it is his only known home for the said period. That therefore, he is entitled to the suit land by way of prescription.
3. The defendant was duly served by way of substituted service as per an affidavit of service sworn on 26th April 2022 and as noted in this court's proceedings of 4th October 2022 in this suit.



4. By the said service, the defendant was made aware of the existence of this matter. He had the right to appear or decline to do so but opted not to appear to defend the suit; see also *Ogada v Mollin* (2009) KLR 620.
5. This court gave directions of 4th October 2022 further to Order 37 Rule 19 of the *Civil Procedure Rules*, 2010
6. The plaintiff (PW1) told the court that the suit land is registered in the name of the defendant. That he has stayed thereon since 1986, among other things.
7. PW2, Patrick Amala testified that he has known PW1 from the time he (PW1) was born. That PW1 has a home on the suit land.
8. According to Siprosa Awino Awino (PW3), PW1 is her brother-in-law. That PW1 has a home on the suit land and lived thereon since 1986. That the defendant has never asked PW1 to leave the same.
9. Learned counsel for the plaintiff filed submissions dated 20th March 2023 and referred to the testimonies of PW1 and his witnesses. Counsel submitted that there have been no proceedings of any nature between the plaintiff and the defendant. That the former has proved his claim against the defendant hence he is entitled to the orders sought in the originating summons.
10. In that regard, the issues that emerge for determination are whether the plaintiff's claim has attained adverse possession dictates over the suit land as held in the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Baksbwein and another* (2015) eKLR. For clarity, the dictates are as follows;
 - i. The suit land must be registered in the name of a person other than the plaintiff/applicant,
 - ii. The applicant must be in open and exclusive possession of the suit land in an adverse manner to the title of the owner, and
 - iii. The applicant must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuation of possession of the owner.
11. Concerning the first dictate, PW1 testified that the suit land is registered in the name of the defendant. PExhibit 1 speaks to registration to that effect hence, the first dictate is satisfied herein.
12. As regards the second dictate, it is trite that possession can take different forms such as fencing or cultivation of the land in dispute; see *Titus Ong'ang'a Nyachieo v Martin Okioma Nyauma and 3 others* (2017) eKLR.
13. The evidence of PW1 was that PW1 has lived on the suit land since 1986 and that it is his only known home. This position was reinforced by PW2 and PW3.
14. PW1 and PW3 told the court that the defendant has never asked PW1 to vacate the suit land. Therefore, PW1 has proved open and exclusive uninterrupted possession of the suit land for more than twelve years as noted in the case of *Salim v Boyd* (1971) EA 550 and *Katana case* (supra).
15. On the third dictate, PW1 has shown that he is in exclusive use of the suit land. So, the defendant has been dispossessed thereby; see *Halsbury's Laws of England* 3rd Edition Volume 24 paragraphs 481 and 482 On pages 251 and 252.
16. It is established law that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof; see *Kirugi and another v Kabiya and 3 others* (1987) KLR 3471987



17. In the foregone, the plaintiff's claim is unopposed. He has satisfied the ingredients of adverse possession hence proved this suit against the defendant on a balance of probabilities.
18. *A fortiori*, judgment be and is hereby entered for the plaintiff against the defendant in the manner sought in the originating summons and as set out at paragraph 1 hereinabove.
19. It is so ordered

DATED AND DELIVERED AT HOMA BAY THIS 17TH DAY OF APRIL, 2023.

G.M.A ONG'ONDO

JUDGE

PRESENT

- a) Aluoch Odera learned counsel for the plaintiff
- b) Edith, court assistant

