



**Onyango v Asiago (Environmental and Land Originating Summons
9 of 2022) [2023] KEELC 21235 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2022
GMA ONGONDO, J
OCTOBER 31, 2023**

BETWEEN

JOHN ONYANGO PLAINTIFF

AND

ORINDA ASIAGO DEFENDANT

JUDGMENT

1. The suit property in the present matter is land parcel number Central Karachuonyo/Kamser/3013 measuring approximately Zero Decimal One Six hectares (0.16 Ha) in area. It is located in Karachuonyo within Homa Bay County.
2. On 17th June 2022, the plaintiff/applicant, John Onyango through the firm of C. Obiero and Associates Advocates, mounted the instant suit by way of an originating summons dated 9th June 2022 pursuant to Article 10 of *the Constitution* of Kenya, 2010 and section 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya for the determination of the questions 1 to 8 set out on the face of the it. Thus, he is seeking the following orders;
 - a. A declaration that the plaintiff has acquired the right to recover all the suit property, land reference number CENTRAL KARACHUONYO/KAMSER/3013
 - b. By virtue of adverse possession.
 - c. There is an order directing the Land Registrar Homabay Land Registry to enter names of the plaintiff(s) in the parcel register subject to adverse possession as the sole and absolute proprietor and forthwith issue a title deed to the plaintiff.



- d. Cost of the originating summons be determined.
3. The originating summons is anchored on the plaintiff's supporting affidavit sworn on even as well as certificate of official search and photographs together with a certificate of electronic evidence pursuant to section 106 of the *Evidence Act* Chapter 80 Laws of Kenya marked as "A1" and "A3" respectively annexed thereto. In a nutshell, the plaintiff's case is that the suit property is currently registered in the name of the respondent/defendant as shown in the certificate (A1). That the defendant entered into the suit property and remained thereon without the consent or permission of the plaintiff. That he has been in actual, peaceful, uninterrupted physical and outright occupation of the same to the exclusion of the defendant for a period in excess of eighteen years hence, provoking this suit.
 4. The defendant was made aware of the existence of the suit as he was duly served as discerned in an affidavit of service sworn on 29th September 2022 by the plaintiff's counsel, Clifford Otieno Obiero. However, the defendant opted not to respond to the originating summons; see Festus Ogada-vs-Hans Mollin (2009) eKLR.
 5. On 14th June 2023, the court directed, inter alia; the originating summons dated 9th June 2022, be treated as a plaint and that the suit be heard by way of affidavit evidence and written submissions.
 6. By the plaintiff's submissions dated 18th July 2023, reference is made to the orders sought in the originating summons and the definition of adverse possession as per the Court of Appeal decision in Mtana Lewa-vs-Kahindi Ngala Mwangandi (2015) KLR, Wambugu-vs-Njuguna (1983) KLR 173 and Ruth Wangari Kanyagia-vs-Josephine Muthoni Kinyanjui (2017) KLR, among other authorities. His counsel submitted that the threshold for adverse possession has been attained in this suit.
 7. Notably, the defendant did not file submissions herein.
 8. It is trite law that issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see Great Lakes Transport Co. (U) Ltd-vs-Kenya Revenue Authority (2009) eKLR.
 9. In the foregone, the issues for determination herein boil down to whether the plaintiff has established his claim against the defendant within the ambit of the decision in the case of Wilson Kazungu Katana-vs-Salim Abdalla Bakshwein and another (2015) eKLR on adverse possession requirements namely;
 - a. The property in dispute must be registered in the name of a person other than the applicant,
 - b. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
 - c. The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
 10. Concerning the first dictate, the suit property is registered in the name of the defendant with effect from 18th February 2004 as shown in the certificate of official search (A1) and as already stated in paragraph 3 hereinabove. Also, it shows that title deed was issued to the defendant on 12th January, 2015.



11. It is therefore, crystal clear that the suit property is registered in the name of the defendant and not the plaintiff. In *Wainaina-vs-Murai and others* (1976-80) 1KLR 283 at 289/90, it was observed;

“The land in question is registered under the Registered under the Registered Land cited in section 37.....”
12. As regards the second dictate, the plaintiff stated that he has been living on the suit property as per the photographs (A3) peacefully, uninterruptedly and since the year 2000. It must be noted that in *Ruth Kinyagia case* (supra), the doctrine of adverse possession was expounded as *Nec Vi, nec Clam, nec plecario* (No force, no secrecy, no evasion).
13. It is trite law that possession can take different forms such as fencing and cultivation of the land in dispute; see *Kimani Ruchine and another-vs-Swift Rutherford Company Ltd and another* (1976-80) 1 KLR 1500.
14. The photograph (A3) shows permanent structures and trees growing on the suit property. This reveals that the plaintiff is in open and exclusive possession of the property in an adverse manner to the title of the proprietor namely the defendant.
15. On the third dictate, it is evident from A3 that the plaintiff has ousted the defendant from the suit property followed by adverse possession, occupation, development; see also *Gatimu Kinguru-vs-Muya Gatangi* (1976-80) 1 KLR 317.
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-vs-Kabiya and 3 others* (1983) eKLR.
17. In the present case, the defendant duly served, filed no response or at all to the originating summons. He did not appear to defend this suit. The plaintiff's claim is well presented, steadfast, cogent and has been proved against the defendant on a balance of probabilities.
18. A fortiori, judgment be and is hereby entered for the plaintiff against the defendant for orders 1, 2, 3 and 4 sought in the originating summons dated 9th June 2022 and as set out at paragraph 2 (a) (b) (c) and (d) hereinabove.
19. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 31ST OCTOBER 2023.

GEORGE M.A ONGONDO

JUDGE

