



REPUBLIC OF KENYA



**KENYA LAW**  
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**Manyala v Ouko & another (Environmental and Land Originating Summons  
25 of 2021) [2022] KEELC 14470 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14470 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 25 OF 2021  
GMA ONGONDO, J  
OCTOBER 25, 2022  
FORMERLY MIGORI ELC OS NO. E017 OF 2021**

**BETWEEN**

**JABES OBUNGA MANYALA ..... APPLICANT**

**AND**

**GRACE ODENY OUKO ..... 1<sup>ST</sup> RESPONDENT**

**KENNEDY ODHIAMBO ODEK ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. The central property in this suit is land reference number Central Kasipul/Kamuma/1555 measuring approximately one decimal four three hectares (1.43 Ha) in area (the suit property herein). It is located within Homa Bay County.
2. Initially, the suit was filed at Migori Environment and Land Court but it was transferred to this court for hearing and determination with effect from October 7, 2021.
3. On December 1, 2021, the court gave directions, *inter alia*, that the originating summons dated April 20, 2021 duly filed on April 22, 2021 herein, be treated as a plaint and the replying affidavit sworn on November 30, 2021 be treated as a statement of defence in light of order 37 rule 19 of the [Civil Procedure Rules, 2010](#)

**B. The Plaintiff's Case**

4. By an originating summons dated April 20, 2021 lodged on April 22, 2021, the plaintiff through the firm of OH Bunde and Company Advocates, is claiming to have acquired the suit property by way of adverse possession for determination of the issues *infra*;



- a. A declaration that the defendants' rights to recover the suit property is barred under the *Limitations of Actions Act*, chapter 22 of law of Kenya, and his title thereto extinguished on the grounds that the plaintiff/applicant herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 22 years.
  - b. There be an order that the plaintiff be registered as the proprietor of the suit property in place of the 2<sup>nd</sup> defendant/respondent who currently holds the title to the suit land.
  - c. There be an order restraining the 2<sup>nd</sup> defendant/respondent either by himself, agents, servants and/or employees from interfering with the plaintiff's peaceful possession and occupation of the suit property in any manner whatsoever and /or howsoever.
  - d. The Deputy Registrar and/or the Executive Officer of the honourable court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the suit property in favour of the plaintiff, in the event of default by the 2<sup>nd</sup> defendant/respondent to execute the necessary transfer instruments.
  - e. Costs of this originating summons be borne by the defendants/respondents.
  - f. Such further and/or other be made as the court may deem fit and expedient, in the circumstances of this case.
5. The plaintiff's claim is premised upon his eighteen paragraphs of even date alongside documents marked as "JOM 1 to JOM 4" including Pexhibits 1 to 4 as stated at paragraph 6 (*infra*) and grounds (a) to (xi) stated on the face of the originating summons. Briefly, he claims that he has openly, peacefully and continuously occupied and possessed the suit property since the year 1978 in an adverse manner to it's registered owner. That thus, he has acquired title thereto by way of adverse possession.
  6. The evidence of the plaintiff (PW1) is anchored on his statement dated January 10, 2022 and a certificate of official search dated April 20, 2021, Land Registrar's report dated April 15, 2021, chief's letter dated April 20, 2021 and a bundle of photographs (Pexhibits 1, 2, 3, 4a and 4b respectively). He testified in part that the family of Ogot Mimbi and Ogalo Mimbi (both deceased) gave him the suit property as a gift for being a good neighbor. During cross examination, he stated that he is occupation of the suit property through their permission.
  7. PW2, Robert Omondi Koyi relied on his statement dated January 10, 2022 as part of his evidence. He stated that his (PW2) brother, Ogalo Mimbi (deceased) gave the suit property to PW1, among other things.
  8. PW3 was Monica Auma Ogot who relied upon her statement dated January 10, 2022 as part of her testimony. She testified that her late husband, Ogot Mimbi together with Ogalo Mimbi (both deceased) permitted PW1 to possess and occupy the suit property in 1978. Also, that the 2<sup>nd</sup> defendant is in use of the suit property.
  9. The plaintiff's submissions dated June 29, 2022 and duly filed on July 5, 2022 contain the background of the matter and the evidence on record, among others. I note the entire submissions including all the authorities relied thereupon.

### **C. The Defendants' Case**

10. In a replying affidavit of seventeen paragraphs sworn on November 30, 2011 and filed in court on December 1, 2021 through the firm of Bana and Company Advocates, the 2<sup>nd</sup> defendant for and on



behalf of the 1<sup>st</sup> defendant and himself, deposed, *inter alia*, that he is the proprietor of the suit property by purchase and transfer. That this claim is a boundary dispute disguised as an adverse possession claim.

11. In support of the replying affidavit, the defendants relied on the annexed documents marked as “KOO1 to KOO4 which are included in Dexhibits 1 to 9 as pointed out at paragraph 12 (*infra*). The defendants assert that there are contentious questions herein which can’t be ventilated through adverse possession.
12. The 2<sup>nd</sup> defendant (DW1) testified and relied on his replying affidavit as part of his evidence. Further, he relied on his list of documents dated February 15, 2022 serial numbers 1 to 9 (Dexhibits 1 to 9 respectively). he stated that he bought the suit property from the 1<sup>st</sup> defendant as per Pexhibit 1 and that he is the registered proprietor thereof with effect from December 18, 2020
13. In the submissions dated July 18, 2022 and filed on July 19, 2022, the defendant’s counsel referred to the parties’ respective pleadings, the evidence on record, framed and analysed issues for determination in the submissions. I bear in mind the entire submissions inclusive of all the authorities cited therein.

#### **D. Issues for Determination**

14. It is well settled that the 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 \(U\) Company Ltd-vs-Kenya Revenue Authority\*](#) (2009) KLR 720.
15. Order 15 of the [\*Civil Procedure Rules, 2010\*](#) makes provision for framing of issues and materials from which issues may be framed in a suit.
16. In the foregone, the issues for determination herein are as captured in the case of [\*Wilson Kazungu Katana and 101 others-vs-Salim Abdallah Bakshwein and another\*](#) 2015 eKLR where the Court of Appeal noted adverse possession dictates thus-
  - a. The land be registered in the name other than the applicant,
  - b. The claimant be in open exclusive possession in adverse manner to the title of the owner and
  - c. The claimant’s occupation for a period in excess of twelve years having dispossessed the owner or discontinued the possession of owner.

#### **E. Analysis and Determination**

17. On the first dictate, it is essential that adverse possession should be for the whole or a defined portion of land; see [\*Gatimu Kinguru-vs-Muya Gatabngi\*](#) 1976-80 1KLR 317.
18. In light of the parties’ respective pleadings, evidence and the submissions, the plaintiff’s claim is on a definite portion of land as identified in paragraph 1 hereinabove.
19. The suit property is currently registered in the name of the 2<sup>nd</sup> defendant on December 18, 2020. This is disclosed in Pexhibit 1 as well as Dexhibit 2.
20. Notably, registration of the suit property was carried out under the [\*Land Registration Act, 2012\*](#). The 2<sup>nd</sup> defendant has rights and interests as stated in sections 24, 25, 26 and 30 of the said Act.
21. Since the suit property is registered in the name of the 2<sup>nd</sup> defendant who is not the plaintiff, the first dictate is resolved thereby.
22. Concerning the second dictate, PW1 stated that he has been in possession and occupation of the suit property since 1978.

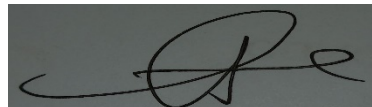


23. PW3 stated that the DW1 is also in use of the suit property. DW1 did affirm that position accordingly.
24. It is crystal clear that DW1 who is the owner of the suit property has not ceased to possess it; see Halsbury's Laws of England 4<sup>th</sup> edition volume 28
25. Furthermore, in the case of Ruth Wangari Kinyagia-vs-Josephine Muthoni Kinyanjui 2017 KLR, the Court of Appeal noted that in adverse possession claim, the entry of the claimant into the property in question should have been as follows;

“Nec vi, nec clam, nec plecario (No force, no secrecy, no evasion)”
26. It is established law that where the claimant has been given permission by the owner to be in possession, adverse possession does not arise; see Virginia Wanjiku Mwangi-vs-David Mwangi Jotham Kamau 2013 KLR
27. Similarly, in Ramco Investment Ltd-vs-Uni-Drive Theatre Ltd 2018 KLR, Nyamweya J (now, JA) held-

“The appellant’s occupation of the disputed portion was open and continuous but it was not adverse to the respondent’s title as it was not exclusive and was also consensual ....”
28. To that extent, PW1 entered the suit property with the permission of it’s previous owner and he is not in exclusive possession of the suit property; see Kinguru case (supra) and Salim case (infra).
29. On the third dictate, it is common ground that both PW1 and DW1 are in possession and occupation of the suit property. So, adverse possession can not arise because DW1 has not been dispossessed thereby as noted in Katana case and Halsbury’s Laws of England (supra).
30. The procedure for asserting adverse possession claim, for instance, the instant suit, is by an originating summons generally as stated under sections 37 and 38 of the Limitation of Actions Act (cap 22 laws of Kenya); see also Salim-vs-Boyd 1971 EA 550
31. Be that as it may, taking into account the entire matter, the plaintiff has to meet the requirements of sections 107 to 110 of the Evidence Act (cap 80 laws of Kenya) on burden of proof. It is the finding of this court that the plaintiff has failed to prove adverse possession dictates against the defendants on a balance of probabilities. The defendants’ firm case prevails.
32. In the premises, this suit be and is hereby dismissed with costs to the defendants.

**DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 25<sup>TH</sup> DAY OF OCTOBER 2022.**



**G.M.A ONGONDO**

**JUDGE**

**PRESENT**

Mr Omuthe holding brief for O.H Bunde, counsel for the plaintiff

Mr Brian Mboya holding brief for Bana, counsel for the defendants

Okello, court asistant

