



**Okuom v Onyango & another (Environmental and Land Originating Summons
486 of 2015) [2020] KEELC 54 (KLR) (29 January 2020) (Judgment)**

John Odero Okuom v George Onyango Onyango & another [2020] eKLR

Neutral citation: [2020] KEELC 54 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 486 OF 2015

A OMBWAYO, J

JANUARY 29, 2020

BETWEEN

JOHN ODERO OKUOM PLAINTIFF

AND

GEORGE ONYANGO ONYANGO 1ST DEFENDANT

LAMECK ONYANGO ONYANGO 2ND DEFENDANT

JUDGMENT

1. John Odero Okuom (hereinafter referred to as the Plaintiff) has come to this court by way of originating summons under Order 37 rule 1 and 7 of the Civil Procedure Rules 2010 and Section 38 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya against George Onyango Onyango and Lameck Onyango Onyango (hereinafter referred to as the defendants) in respect of parcel No. God Abuoro/709.(hereinafter referred to as the suit property) The Plaintiff claims to have stayed in the land parcel number God Abuoro/709 measuring 8.9 Ha or thereabout since 1975 and claims to be entitled to the same by virtue of adverse possession.
2. The Applicant prays that the court determines the following issues:
 1. That the Applicant/Plaintiff be declared the owner of the said parcel of land Kisumu/God Abuoro/709 measuring approximately 8.9 Ha which he has occupied and cultivated openly exclusively, continuously and without interruption from 1975 to-date, a period of over 36 years.
 2. That the applicant has acquired a bona fide title to the land Kisumu/God Abuoro/709 by adverse possession.



3. That the Applicant is entitled to be registered as proprietor of the land Kisumu/God Abuoro/709.
 4. That the defendants be ordered to vacate the said parcel no. Kisumu/God Abuoro/709 since the land parcel is registered on names of one George Onyango Onyango And Lameck Onyango Konyagno of which the applicant acquires this piece of land by adverse possession.
 5. That in default of the Defendants failing to vacate the said parcel of land, the Deputy Registrar to execute the necessary documents to effect the transfer.
 6. That the costs of the suit be awarded to the plaintiff.
2. The grounds of the Originating Summons are that the defendants are registered proprietors of the suit land. The plaintiff has been in quiet exclusive possession and occupation of the suit land for a period exceeding 36 years and has therefore acquired title by adverse possession. The occupation has been continuous uninterrupted within the defendants knowledge. The Applicant has a house on the land since 1975 and buried his first wife on the land in 1997. He has never sought permission from the defendants or deceased father to utilize the land.
 3. In the replying affidavit of George Onyango Onyango he states that the defendants are the proprietor of the suit parcel of land. They became registered in 1997. They have been cultivating cane on the land. The plaintiff has never occupied the land. The defendants have annexed a surveyors report showing that there are no structures on the land save sugarcane.
 4. When the matter came up for hearing, the plaintiff stated that he entered into the land in 1973 but left in 2000 when his home was destroyed by the 1st Defendant. He was staying in 4 acres. On cross examination, he admitted that he was allowed to stay on the land by the Defendant's father.
 5. PW2 David Obari Magadi Luaala stated that the plaintiff is in occupation of five acres. On cross-examination by Mr. Onsongo he states that he was allowed to stay on the land by the defendants' father.
 6. PW3, Ezekiel Mwoya Opare also stated on cross examination that the plaintiff was allowed to stay on the parcel of land by the defendant's father.
 7. I have considered the originating summons, supporting affidavit and evidence on record and do find that the plaintiff was in occupation of approximately 4 acres of the suit property from the year 1973 to the year 2010 when he was evicted. PW2, PW3, all stated that it was with the permission of the defendants' father. The plaintiff himself states that the owner of the land allowed him to stay on the land. The fact that the plaintiff was allowed to stay on the land diminishes claim on adverse possession.
 8. The law on adverse possession is properly handled in Section 7 of the Limitation of Action Act thus:
 7. Actions to recover land. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."
 9. Adverse Possession requires at a minimum five basic conditions being met perfecting the title of the adverse party.
 10. These are namely (a) open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.



11. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
- (b) b) Continuous use of the property – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fails the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
 - (c) Exclusive use of the property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
 - (d) Actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. If the property is residential, such actions may include mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner.
 - (e) Non-permissive, hostile or adverse use of the property – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile.
12. In this case, the plaintiff was permitted to live on the land and therefore adverse possession does not apply. The originating summons is dismissed with costs. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF JANUARY, 2020.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

