



Baraza v Onyango & another (Sued as Legal Representatives of the Estate of Charles Onyango Gucha (Deceased)) (Environmental and Land Originating Summons 10 of 2019) [2025] KEELC 746 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2019
M SILA, J
FEBRUARY 20, 2025**

BETWEEN

JOHN SISO BARAZA PLAINTIFF

AND

OSCAR KAMBONA ONYANGO 1ST DEFENDANT

ISAIAH CHELUGET ONYANGO 2ND DEFENDANT

**SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES
ONYANGO GUCHA (DECEASED)**

JUDGMENT

(Applicant claiming the suit lands by way of adverse possession; applicant contending that he has houses on the suit lands and a school; respondents contesting this and asserting that the houses are on a different parcel of land and the school is owned by a third party; applicant's case only based on oral evidence and some photographs; photographs not able to show in which parcel the houses are; in face of denial by the respondents applicant needed to provide an expert report to show exactly in which land parcel the houses are located; school shown to be owned by a third party; applicant thus not proving to the required standard possession of the suit lands; suit dismissed with costs)

1. This suit was commenced through an Originating Summons filed on 21 February 2019. The Originating Summons was amended a couple of times resting with the "Amended Amended Originating Summons" dated 28 February 2022 and filed on 3 March 2022. In a nutshell, what the applicant wants is an order that he has acquired, by way of adverse possession, title to the land parcels Suna West/Wasimbete/1080 and 1081 (the suit lands), formerly comprised in the land parcel Suna West/Wasimbete/1079 measuring 7.06 Ha.



2. In his pleadings, the applicant claimed that he has been in possession since 1958, when he was born, and has lived on the suit lands openly and without interruption together with his family members. He averred that the suit lands are developed with a school, an orphanage and his home together with that of his siblings. In the supporting affidavit to the Amended Amended Originating Summons, he deposed that the school and orphanage are being run by his assign. He annexed some photographs to support his claim to possession of the land.
3. Before I go to the reply, I think it is worth mentioning the entries in the register of the suit lands at this early stage. The land parcel Suna West/Wasimbete/1079 came about as a result of a partition of the land parcel Suna West/Wasimbete/36. I see that the register of the land parcel Suna West/Wasimbete/1079 measuring 7.06 Ha was opened on 21 September 1988 in name of Ondoche Lango. On the same day, the title was closed on subdivision into the parcels No. 1080 and 1081 which are the suit lands.
4. The register of the parcel No. 1080 was opened on 21 September 1988 in name of Ondoche Lango. On 28 September 1988, there was transfer to Charles Onyango Gucha. On 1 September 1994, the title was transferred to Joseph Otieno Olendo. On 4 December 2012, there is registered a caution in favour of the plaintiff claiming a beneficiary interest. In the encumbrance section, there is a charge registered on 24 November 1992 in favour of Thabiti Finance Company Limited.
5. The register of the parcel No.1081 was opened on 21 September 1988 in name of Ondoche Lango as entry No.1. On 28 September 1988 the title was transferred to Charles Onyango Gucha and title was issued to him, being entries No.2 and No. 3. On 24 January 2012 the title got registered in name of Robert Jaoko Masaga Zoa being entry No. 4 and title was issued to him on the same day, being entry No. 5. On 16 October 2018, it is recorded that entries No. 4 and 5 are removed under Section 79 and Entry No. 2 reinstated. That would mean that the title is still in name of Charles Onyango Gucha.
6. The 1st respondent is Joseph Otieno Olendo, the registered proprietor of the parcel No. 1080. The 2nd and 3rd defendants are the legal representatives of Charles Onyango Gucha, the now deceased proprietor of the parcel No. 1081. They opposed the Summons through the replying affidavit of Isaiah Cheluguet Onyango, the 3rd respondent, and son of Charles Onyango Gucha. He deposed inter alia that the original parcel No. 36 was in name of the applicant and Ondoche Lango. That this land was subsequently subdivided between the two families so that the applicant kept the parcel No. 1078 and Ondoche Lango kept the parcel No. 1079. It is averred that Ondoche Lango intended to sell part of his land parcel No. 1079 and therefore subdivided it into the two land parcels No. 1080 and 1081. He however ended up selling both parcels to Charles Onyango Gucha. He averred that the applicant is in occupation of his land parcel No. 1078 which is where his semi-permanent house, which he exhibited a photograph of, is located. He denied that his house is within the parcels No. 1080 and 1081. As to the school, he deposed that it is called Ogada Progressive Academy and it is owned by a third party, one Robert Masaga. He annexed a copy of the registration certificate of the school. He added that the said Robert Masaga has separately engaged them as owners of the suit lands. He thought that it was in fact Robert Masaga who is using the applicant to file suit.
7. The case was heard through viva voce evidence. The applicant relied on his supporting affidavit as his evidence in chief. He testified that he has a homestead on the suit land and a private school belonging to his brother. He added that he cultivates the land and has planted blue gum trees. Cross-examined, he could see that the land parcel No. 36 was registered in his name and Ondoche Lango. He stated that he inherited this land parcel No. 36 from his father and his father never informed him about the said Lango. He stated that he is not related to the said Lango. He did not know that the land was later subdivided into the parcels No. 1078 and 1079. He did not have any surveyor's report to support his occupation of the suit lands. He agreed that the school belongs to his brother called Robert Jaoko



- Masaga. He also agreed that of the photographs he exhibited in his affidavit, only two are of his houses and the rest depict the school. He had no document to show that Robert is his tenant and he stated in re-examination that he does not receive any payment for his use of the land.
8. With that evidence, the applicant closed his case.
 9. The 3rd respondent testified on behalf of all the other respondents. He also adopted the contents of his replying affidavit as his evidence. He testified that the applicant owns the land that is next, which is the parcel No. 1078. He pointed at the two photographs exhibited by the applicant and stated that they are residential houses situated within the land parcel No. 1078 and not the suit lands. Regarding the school he asserted that it is owned by Robert Masaga and that Robert purchased the land where the school is located for Kshs. 1, 625,000/=. He denied that the applicant has ever occupied the suit lands.
 10. Cross-examined, he stated that he sold the land to Robert Masaga on 16 September 2019 though he had not exhibited the sale agreement. He stated that his father purchased the land in 1988 and it is them who have been in occupation since. Regarding the school, he stated that it was built in 2011 but the land was fraudulently acquired (by Masaga) hence the reversal of the title.
 11. With that evidence, the respondents closed their case.
 12. Counsel were invited to file submissions and I have taken note of the submissions filed.
 13. This is a suit for adverse possession and it is trite that for one to succeed in such a case, he needs to demonstrate open, peaceful, continuous possession, for an uninterrupted period of 12 years without permission of the registered land owner. The burden of proof lay on the applicant who needed to prove the elements on a balance of probabilities. That would mean that where there was oral evidence that contradicts his, he needed something more to tilt the balance into his favour. I am afraid to inform the applicant that I am not persuaded that he has proved his case to the required standard.
 14. To begin, all that the applicant presented was his own oral evidence, and some photographs which he claimed showed his possession of the suit land. It has been said time without number that mere photographs without anything more cannot speak to say the parcel number depicted in the photograph therein. As it stands, the applicant insists that the photographs of the houses that he exhibited fall on the suit lands; the respondents contend that they fall within his parcel No. 1078. Now given that denial, you would have expected the applicant to come with a surveyor's report or such other expert to demonstrate exactly in which parcel the two houses are. The applicant did not present any such report. It is that report which would have tilted the scales in his favour given the denial of the respondents and without it I am sorry to tell the applicant that I have nothing tangible before me that would persuade me that the two houses are actually on the suit lands and not the land parcel No. 1078 as asserted by the respondents. Essentially, the applicant has not proved to the required standard that he lives and occupies the suit lands.
 15. What is not disputed by the respondents is that there is a school on the suit lands. The respondents however say that the applicant cannot claim adverse possession based on the occupation of the school since this is not his school but is a school owned by one Robert Masaga. The fact that the school is owned by Robert Masaga is proved by the certificate of registration of schools exhibited by the respondents. The applicant himself admitted that Robert Masaga is not his tenant and again there is nothing tangible before me which informs me that Robert Masaga is a licensee of the applicant. The applicant did not call Robert Masaga for him to support his contention that he is in occupation of the land courtesy of the applicant. It would in fact appear, from the history shown in the register, that Robert Masaga has his own individual interest, not in any way tied to the applicant, in at least one of the suit lands, i.e the parcel No.1081, since at some point he was registered as proprietor, though that



registration was reversed. Given that position, I do not see how the applicant can base his claim for adverse possession on the occupation of the suit land by Robert Masaga.

16. From the foregoing, I am not persuaded that the case of the applicant has been proved to the required standard and his case is hereby dismissed with costs.

17. Judgment accordingly.

DATED AND DELIVERED THIS 20 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MIGORI

Delivered in the presence of :

Mr. Otieno h/b for Mr. Jura for the applicant

No appearance on the part of Mr. Kisera for the respondent

Court Assistant : Tom Maurice

