



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OMOLO, BOSIRE & O'KUBASU, JJ.A.)

CIVIL APPEAL NO. 262 OF 1998

BETWEEN

PATRICK A. ODAKO

MESHACK O. ODAKO..... APPELLANTS

AND

WILLIAM N. KIREW..... RESPONDENT

**(An appeal from the judgment & decree of the High Court of Kenya at Kisii (Mbaluto J) dated
23rd October,1997**

in

H.C.C.C. NO. 281 OF 1992)

JUDGMENT OF THE COURT

Order IV rule 1 of the Civil Procedure Rules provides that:

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”

That means that the usual way of starting suits is by way of a plaint but there are also other ways which can be prescribed for starting suits.

Order 36 rule 3D of the same rules prescribes the manner for starting a suit for adverse possession under section 38 of the Limitation of Actions Act, cap 22 Laws of Kenya. Such a claim is to be started by way of an originating summons supported by an affidavit and a copy of the title to the land adversely claimed has to be annexed to the affidavit.

Order 36 rule 3D (1) is mandatory in that it is to the effect that:

“.....shall be made by originating summons.”

Various decisions of this Court, among them *Bwana v Said* [1991] 2 KAR 262 to which we have been referred, specifically lays it down that a claim for adverse possession must be started by an originating summons. The point is really settled and Mr Ondieki for the respondent did not, rightly in our view, seek to challenge this position.

As this was a question of jurisdiction, the judge could not shove it aside as he did by simply saying that it ought to have been raised at the beginning. We accordingly allow the appeal and set aside the orders made by the trial judge. We substitute them with an order dismissing the respondent's claim. We are, however, not inclined to give the appellants either their costs in the superior court or the costs of this appeal. There was really no intrinsic merit in their defence and they succeed merely because the respondent was not correctly advised. We make no order as to costs either in the superior court or in this Court. Those shall be our orders.

Dated and delivered at Kisumu this 24th day of March, 2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR