



**Odhiambo v Ochieng (Environment and Land Appeal E003 of 2022)
[2023] KEELC 17276 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

AY KOROSS, J

MAY 11, 2023

BETWEEN

FRANCIS OMONDI ODHIAMBO APPELLANT

AND

HIPPOLITUS OMONDI OCHIENG RESPONDENT

*(Being an Appeal from the judgment of the Principal Magistrate Hon.
L. Simiyu delivered on 22/12/2021 in Siaya ELC Case No. 41 of 2018)*

JUDGMENT

Introduction

1. As expressed from the record, by a plaint dated July 1, 2013, the respondent instituted suit against the appellant contending he was the registered proprietor of land parcel no Siaya/Mulaha/2141 (hereinafter referred to as ‘the suit property’). The appellant had allegedly trespassed on it and he sought orders for eviction, permanent injunction and costs.
2. By the firm of JD Owuor & Company Advocates, the appellant filed a defence and counterclaim dated March 8, 2021. He denied the claims made in the plaint. In his counterclaim, he pleaded and particularised fraud against the respondent on several grounds. Further, the respondent and his father Laurence Ochieng Amaunda (‘Laurence’) held the suit property in trust for his family or his kin Vitalis Wanyande Odhiambo (Vitalis). He sought several reliefs: respondent’s suit be dismissed; the suit property’s title document be revoked and be registered in Vitalis’s name and costs.
3. By his counsel on record, Otieno, Yogo, Ojuro & Co Advocates, the respondent filed a reply to defence and defence to counterclaim dated April 24, 2019. He denied the claims in the defence and counterclaim and reiterated the averments made in the plaint.



4. After parties had testified and closed their respective cases, the Trial Magistrate in her judgment identified 3 issues for determination inter alia, whether the respondent was the legal proprietor of the suit property and if his title was impeachable; whether the appellant was in lawful occupation and what orders should she issue.
5. The Trial Magistrate found the respondent had proved his case, he was legally registered as the proprietor of the suit property and the counterclaim had not been proved. The Trial Magistrate granted the orders sought in the plaint, ordered the appellant to remove all structures he had illegally erected on the suit property and dismissed the counterclaim.

Appeal to this court

6. Dissatisfied with the above judgment, the appellant preferred an appeal to this court. In his memorandum of appeal dated January 20, 2022, he raised 11 grounds of appeal:-
 - a. That the Learned Magistrate erred in law and fact by treating the appellant's evidence and submissions superficially and thereby grossly misdirected herself and arrived at an erroneous decision.
 - b. That the Learned Magistrate erred in law and fact by failing to appreciate the main issue for determination was whether the title document exhibited by the respondent was procured in an unlawful manner.
 - c. That the Learned Magistrate erred law and fact by failing to appreciate there was uncontroverted evidence the respondent procured the suit property's title document after the demise of Laurence without conducting succession proceedings.
 - d. That the Learned Magistrate erred in law and fact by failing to properly analyse the evidence on record thereby arriving at a wrong decision.
 - e. That the Learned Magistrate erred in law and fact by failing to appreciate that the law could not aid an illegality.
 - f. That the Learned Magistrate erred in law and fact when she turned the rules of evidence by requiring the appellant to disprove the respondent's case instead of requiring the respondent to prove his case.
 - g. That the Learned Magistrate erred in law and fact by relying on extraneous factors and issues not before court and the impugned judgment was based on wrong considerations.
 - h. That the Learned Magistrate erred in law and fact when she failed to appreciate the appellant's counterclaim which was uncontroverted and ought to have allowed it.
 - i. That the Learned Magistrate failed to appreciate the appellant's submissions.
 - j. That the Learned Magistrate proceeded on the wrong legal principles and disregarded the generally acceptable principles of law.
 - k. That the findings of the Learned Magistrate were unsupported by law and evidence.



7. The appellant sought for the appeal to be allowed, the impugned judgment be set aside and substituted with an order dismissing the respondent's suit with costs and for the court to allow the appellant's counterclaim. He sought costs of the appeal and of the lower court suit.
8. The appeal was canvassed by written submissions.

Appellant's submissions

9. The appellant's counsel, Mr Ooro E, filed written submissions dated February 16, 2023. He consolidated his grounds of appeal into 3 and identified 3 issues for determination: - (a) whether the respondent's title was legally and lawfully procured and protected by law, (b) whether the counterclaim ought to have been allowed on the basis the appellant had stayed on the suit property for over 12 years and the respondent's suit was statutory barred and, (c) whether the findings of the Trial Magistrate was supported by law.
10. On the 1st issue, counsel submitted that by virtue of Section 26 (1) of the *Land Registration Act*, a proprietor's title could be challenged if it had been acquired illegally, unprocedurally or through a corrupt scheme. Counsel submitted that despite the respondent admitting he transferred the suit property without conducting probate proceedings on Laurence's estate, the Trial Magistrate found it was inconsequential. Counsel relied on the well cited case of *Alice Chemutai Too v Nickson Kipkirui Korir & 2 others* [2015] eKLR.
11. On the 2nd issue, counsel submitted the appellant and his family had owned and occupied the suit property for over 50 years and the respondent and his father had neither possessed nor occupied the suit property. Therefore, by virtue of Section 7 of the *Limitation of Actions Act*, the respondent's rights over the suit property had long lapsed.
12. On the 3rd issue, counsel submitted the impugned decision was unsupported by law.

Respondent's submissions

13. Despite the respondent's counsel M/s Anyango participating in these proceedings and the court extending time for her to file written submissions, she did not comply. If at all they will be filed after this court has penned its judgment, this court will not consider them.

Analysis and determination

14. As a 1st appellate court, this court will be guided by the evidence from the lower court record. It is called upon to re-examine, re-evaluate and reassess the lower court record before arriving at its own conclusions while giving allowance that it never heard or saw the witnesses. See the Court of Appeal decision of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212.
15. I have carefully scrutinised the records, appellant's submissions together with judicial precedents and provisions of law that were cited. Although the appellant's counsel submitted he had addressed all his grounds of appeal in the various consolidations, it is apparent he abandoned grounds 1, 6, 7 and 9 of his appeal and this court will not consider them.
16. Most of the grounds were repetitive in nature and in my considered view the singular consolidated ground for determination was; the Trial Magistrate erred in law and fact by failing to consider and find that the appellant had proved his counterclaim and the respondent had not proved his case. On this



singular ground, this court will address 2 issues (a)trespass and limitation of actions and, (b)fraud and illegality.

- a. The Trial Magistrate erred in law and fact by failing to consider and find that the appellant had proved his counterclaim and the respondent had not proved his case

i.Trespass and limitation of actions

17. The meaning of trespass is found within our statutory provisions. Section 152A of the [Land Act 2016](#) states: -

‘A person shall not unlawfully occupy Private, Community or Public Land.’

While Section 3 (1) of the [Trespass Act](#) defines trespass as: -

‘any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.’

18. The case of [John K Koech v Peter Chepkwony](#) [2019] eKLR cited with approval Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defined trespass as follows:

‘Any unjustifiable intrusion by one person upon land in possession of another’...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.’

19. In [Eliud Njoroge Gachiri v Stephen Kamau Ng’ang’a](#) [2018] eKLR, continuing trespass was defined as being permanent in nature and constitutes invasion of another’s land. On whether a cause of action on continuous trespass can be statutory barred, this decision referenced Clerk & Lindsell On Torts 16th Edition, paragraph 23 – 01 which stated: -

‘Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.’

20. In the impugned judgment, the Trial Magistrate, when referring to the appellant’s pleadings and evidence stated; ‘His allegations of prolonged stay are not proved by evidence. Secondly ...adverse possession is not claimed or pleaded in the defence and counterclaim.’

21. I disagree with the appellant’s counsel that by Section 7 of the [Limitations of Actions Act](#), the respondent’s suit was statutory barred. The respondent’s claim was on the act of continuing trespass. In acts of continuing trespass, the cause of action continues running anew each time an intruder without permission continued invading or occupying a property. In acts of continuing trespass, the limitation of actions does not suffice and I place reliance on [Gladys Koskey v Benjamin Mutai](#) [2017] eKLR where the court expressed itself as follows: -

‘...the suit is founded on trespass which is a tort. Under section 4 of the [Limitation of Actions Act](#), an action founded on a tort must be instituted within three years...the trespass is continuous and the [Limitation of Actions Act](#) does not come into play.’

22. From the evidence on record, the respondent’s testimony that he had always cleared and maintained the suit property prior to the appellant’s trespass in 2011 was not controverted. In other words, he had been in possession prior to 2011.

23. The appellant admitted he had constructed his home and rental units on the suit property. From evidence, neither the appellant nor his family had ever been the registered proprietors of the suit



property. He did not have permission from the registered proprietor or that of the respondent who was the possessor. He had continued invading or occupying the suit property. In essence he was in unlawful occupation.

24. The appellant never led evidence that the respondent or Laurence had never possessed or occupied the suit property. I respectfully disagree with the appellant's counsel. This is new evidence that is being introduced on appeal without leave. In his testimony, the appellant merely testified they were strangers to him.
25. Despite testifying he and his siblings had always lived on the suit property, he had been born there and his siblings had been buried on it, he never proved this by photographs or even called a relative or a neighbor to corroborate this position. By his own testimony, it was only his nuclear family and his tenants who were on the suit property.
26. I agree with the Trial Magistrate's conclusions that the appellant did not prove his claims of extended occupation. Similarly, from the record, the appellant never pleaded or proved adverse possession. The Trial Magistrate's reasoning on this issue was anchored on settled law. See *Independent Electoral and Boundaries Commission and Another v Stephen Mutinda Mule & 3 others* [2014] eKLR. It is my finding on this issue that the Trial Magistrate did not err.

ii Fraud and illegality

27. Section 26 of the *Land Registration Act* states that courts shall prima facie deem the registered owner as the proprietor. However, this right is not absolute and a title can be challenged on grounds of fraud, misrepresentation or where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.
28. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval on an illegal or irregularly obtained title. In a recent decision of the Supreme Court of Kenya, Petition no 8 (E010) of 2021 *Dina Management Limited v County Government of Mombasa & 5 Others*, the apex court in dealing with irregularly allocated public land stated: -

‘...we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land.’
29. On this issue, the Trial Magistrate, stated; ‘I have considered the evidence on record, pleadings together with written submissions... am not able to find that the Plaintiff required succession in the absence of documents depicting the instrument of transfer. The allegation by the Defendant that the Plaintiff needed a transfer falls by the wayside.’
30. From the appellant's submissions, it was evident the appellant was disgruntled with only one finding of the Trial Magistrate; the respondent had transferred the suit property to himself without 1st conducting probate proceedings on Laurence's estate.
31. By his own testimony, the respondent admitted probate proceedings had never been conducted on Laurence's estate. This was further lent credence by the green card of the suit property. The process of transferring land from Laurence to the respondent was stipulated as ‘transfer’ rather than ‘RL19 and RL7’ as it were prior to the enactment of the subsisting land laws. This was obviously irregular.
32. Although I concur with the findings of the Trial Magistrate that the appellant did not prove that Laurence who was the 1st registered owner acquired the suit property by fraud or corrupt scheme, I respectfully disagree with the Trial Magistrate's reasoning that the absence of probate proceedings prior to the transfer was inconsequential.



33. The respondent's actions amounted to intermeddling with the estate of Laurence contrary to the provisions of Section 45(1) of the Law of Succession Act. I find the respondent obtained the suit property's title irregularly.
34. Section 80 of the Land Act empowers this court to order the rectification of a register of a suit property by directing it be cancelled. It would only be proper that the suit property be reverted to Laurence's names for purposes of probate proceedings to be conducted on his estate.
35. As earlier stated, the respondent's testimony that he was in possession prior to the trespass was not shaken. A cancellation of the title and its reversion to Laurence's names would not interfere with his claim. See John K Koech v Peter Chepkwony (Supra), *Charles Ogejo Ochieng v Geoffrey Okumu* [1995] eKLR and *Samuel Mwangi v Jeremiah M'itobu* [2012] eKLR. In the latter, the Court of Appeal cited with approval Winfield and Jolowicz's book "Tort" (12th Edition @ p 361) which stated: -
- 'Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person's right to possess (the "jus tertii") unless he can prove that he acted with that person's authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.' Emphasis added.
36. I find the appellant was partly successful in his appeal. It is trite law costs follow the event. Each party shall bear their respective costs of this appeal and that of the trial court.
37. For the reasons stated above, the end result is that the appeal shall be allowed in part and the trial court's judgment is substituted in terms of the following disposal orders: -
- a. A declaration be and is hereby made that the transactions and/or entries entered and/or endorsed in the register of land parcel no Siaya/Mulaha/2141 were irregular and ineffectual to confer any right, interest and title upon Hippolitus Omondi Ochieng.
 - b. The Land Registrar, Siaya, is hereby ordered to rectify the register of land parcel no Siaya/Mulaha/2141 and to have the entries made thereon on August 5, 2011 and August 8, 2011 cancelled and the proprietorship section of the said parcel of land to revert back to the names of Laurence Ochieng' Amaunda pending probate proceedings on his estate.
 - c. A permanent injunction be and is hereby issued restraining the appellant either by himself, agents, servants, employees or any other person acting under his instructions from trespassing upon, building any structure upon or in any way interfering and or dealing with land parcel no Siaya/Mulaha/2141.
 - d. The appellant shall vacate land parcel no Siaya/Mulaha/2141 within 60 days from the date of service of the orders of this court and at his cost, shall remove all structures that he had illegally erected thereupon or be evicted therefrom in accordance with the relevant provisions of Section 152 of the Land Act.
 - e. Each party shall bear their respective costs of the appeal and of the lower court suit.
- 38 It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 11TH DAY OF MAY 2023.

HON. A. Y. KOROSS

JUDGE



11/05/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

N/A for the appellant

N/A for the respondent

Court assistant: Ishmael Orwa

