



REPUBLIC OF KENYA



KENYA LAW
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**Ojijo (Being the Legal Representative of the Estate of the Original Appellant,
Dan Ojijo Hayanga -Deceased) v Ogoda (Suing as the Administrator of the
Estate of Nicanor Ogoda Nyakwaka - Deceased) (Environment and Land
Appeal E33 of 2021) [2023] KEELC 19047 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19047 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E33 OF 2021**

GMA ONGONDO, J

JULY 24, 2023

(FORMERLY ELC APPEAL NO. 4 OF 2021)

BETWEEN

**SIPRINA AKINYI OJIGO (BEING THE LEGAL REPRESENTATIVE OF
THE ESTATE OF THE ORIGINAL APPELLANT, DAN OJIGO HAYANGA -
DECEASED) APPELLANT**

AND

**ROBERT OGAM OGODA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF NICANOR OGODA NYAKWAKA - DECEASED) RESPONDENT**

*(Being an appeal from the entire judgment dated 30th December
2020 of Hon. B.O Omwansa, Senior Principal Magistrate Court
in Oyugis SPMC Environment and Land Case No. 89 of 2018)*

JUDGMENT

1. This appeal was ignited by the trial court's judgment rendered on 30th December 2020 where the learned magistrate opined that the plaintiff who is the respondent herein had proved his case to the requisite standards. Thus, judgment was entered for him against the defendant who is the original appellant, Dan Ojijo Hayanga (Deceased) in terms of prayers (a) (b) and (d) in the plaint.
2. The original appellant through the firm of Nyauke and Company Advocates, originated this appeal by way of a memorandum of appeal dated 14th January 2021 and lodged on 18th January 2021 on the following three grounds;
 - a. The learned trial magistrate erred in law and fact by failing to appreciate that the land in question is a lease hold/trust land whose title is not absolute and, in any event, without having



the County Government enjoined as a defendant, then there was no sustainable cause of action against the defendant.

- b. The learned trial magistrate thus grossly misdirected himself to hold that the defendant was a trespasser.
 - c. The learned trial magistrate misdirected himself in failing to appreciate the tenants of the Law of Contract Act and the [Limitation of Actions Act](#).
3. So, the appellant has sought thus;
- a. The appeal be allowed and the orders of B. Omwansa (SPM) issued on 3rd December 2020 with regards of security of costs be set aside.
 - b. Costs of this appeal and the costs in the court below be awarded to the appellant.
4. The appellant's supplementary record of appeal dated 25th January 2023 entails;
- a. A supplementary certificate
 - b. Pleadings from Oyugis PMC Civil No. 89 of 2018, plaint and statement of defence and Decree therein.
5. On 27th October 2022, the court adopted a consent dated 26th October 2022 by counsel for the respective parties herein. Accordingly, an application dated 18th October 2022 for substitution of the original appellant, was allowed.
6. The appeal was heard by written submissions further to this court's orders rendered on 1st March 2023.
7. By the submissions dated 4th April 2023, learned counsel for the appellant analyzed the grounds of appeal to the effect that the suit was lodged out of time and without the County Government on board. That the land in dispute herein was public land which did not form part of the estate of Nicanor Ogoda Nyakwaka (the deceased herein) and concluded that the appeal is meritorious hence, it be allowed with costs to the appellant. Counsel relied on section 12 of the [Land Act](#), 2016 (2012), section 45 of the [Law of Succession Act](#) Chapter 160 Laws of Kenya, section 7 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya and Order 1 of the [Civil Procedure Rules](#), 2010
8. Ms Odera Aluoch learned counsel for the appellant served the record of appeal, the supplementary record of appeal and submissions on the respondent as per her affidavits of service sworn on 8th February 2022, 30th January 2023, 11th April 2023 respectively.
9. It is therefore, clear that the respondent was made aware of the appeal as noted in [Ogada v Mollin](#) (2009) KLR 620. However, he failed to argue it.
10. At the trial court, the respondent, sued the original appellant by a plaint dated 10th October 2018. Briefly, he stated that by 15th March 1994, deceased had developed half of the land in dispute in this appeal by erecting permanent and semi-permanent buildings thereon. That on diverse dates between 7th May 2018 and June 2018, the original appellant entered into the semi-permanent building and erected a posho mill claiming half of the land in dispute and continues to trespass thereon. So, the respondent sought an order of eviction, among other orders, against the appellant.
11. In a statement of defence dated 28th November 2018, the original appellant denied the respondent's claim and stated in part that that he legally purchased half of the land in dispute from the deceased in 2007. He maintained that he is rightly in occupation of the land in dispute hence, not a trespasser thereon. He therefore, urged the court to dismiss the suit with costs.



12. The respondent (PW1) and his witness, PW2 relied on their respective statements dated October 10, 2018 at the trial court. They stated that they were not aware of allocation of the land to deceased nor purchase of the same from the deceased.
13. DW1 was the original appellant who relied on his statement dated 28th November 2018 and his list of documents. He stated that he bought ¼ of the land in dispute from the deceased on 2nd October 1992 and built a house for a posho mill and pit latrine thereon.
14. The trial court analyzed the entire record of the case and arrived at a finding that the original appellant's action amounted to intermeddling of the estate of the deceased. That the purported oral agreement was not witnessed and was an illegal transaction of allotment of the land in dispute to the original appellant.
15. In that regard, it is trite law that appellate court has to reconsider the evidence on record, assess it and come to its own conclusions and inferences with caution; see *Watt v Thomas* (1947) 1 ALL ER 482 and *Kamau v Mungai and another* (2006) 1 KLR 150.
16. The issues arising for determination in this appeal are as contained in the triple grounds of appeal. Simply put, are the grounds of appeal sound at law?
17. Pertaining to ground one, I take into account the meaning of the term "lease" alongside the term "proprietor" under section 2 of the *Land Registration Act*, 2016 (2012). General provisions on leases are captured in Part VI of the *Land Act*, 2016 (2012) and in particular, the power to lease land and leases under sections 54 and 55 of the latter *Act*.
18. Concise *Oxford English Dictionary 12th Edition at page 766*, defines the term "Joinder" as follows;

"The action of bringing parties together"
19. Notably, Order 1 Rule 9 of the *Civil Procedure Rule*, 2010 is to the effect that misjoinder or non-joinder of parties does not to defeat the suit and every suit to be dealt with bearing in mind the rights and interests of the parties before the court. Therefore, non-joinder of the County Government of Homa Bay as a defendant herein, is in consonant with the said legal provision and Article 159 (2) (d) of the *Constitution* of Kenya, 2010.
20. As regards ground two, *Clerk and Lindsell on Torts (18th Edition) paragraph 18-01* defines the term "Trespass" as follows;

...."An unjustifiable entry by one person upon the land in possession of another....."
21. In the case of *James Njeru v Erickson Kenya Ltd* (2015) KLR, trenches dug across the plaintiff's land amounted to trespass. It must be noted that the said tort is actionable per se.
22. In the present situation, the land in dispute was in the name of the deceased. The purported sale agreement of the land in 2007 was made after the demise of the deceased, there was not grant of representation over his estate and the minutes of the council had issues as stated in paragraphs 24 and 25 infra. In the circumstances, the original appellant was a trespasser on the land in dispute.
23. Concerning ground three, I am guided by section 3 of the Law of Contract Act (Cap 23) as well as sections 7, 13, 18 and 37 of the *Limitation of Actions Act* (Cap 22). Adverse possession is an overriding interest under section 28 (h) of the *Land Registration Act*, 2016 (2012) and view of the observations in paragraphs 22, 24 and 25 herein, the learned trial magistrate did not misdirect himself thereof as alleged on ground three of this appeal.



24. During cross examination, DW1 referred to the minutes of the defunct council in 2007 which allegedly accorded the original appellant ownership of the land in dispute. He stated that the minutes were;
- “.....not stamped and or certified.....not sought for summons.....and explain.
- I am not aware.....wrong.”
25. In further cross examination, DW1 stated, *inter alia*;
- “I am not aware.....I am not aware whether succession has been done or not.”
26. Section 2 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya defines the term “Legal Representative” and the same is borne in mind in this case.
27. It is trite law that the estate of the deceased person is vested in the legal representative; see [Touistik Union International and another v Jane Mbeyu and another](#) (1993) eKLR.
28. In the premises, I find that the purported allocation of the land in dispute of the deceased to the original appellant in 2007 was faulty at law and amounted to intermeddling of the estate of the deceased. As such, I approve the finding of the learned trial magistrate without any reservation.
29. Thus, this appeal is devoid of merit. The same is hereby dismissed with costs to the respondent.
30. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 24TH DAY OF JULY 2023

G. M. A ONG'ONDO

JUDGE

Present;

1. Odhiambo learned counsel for the respondent
2. Okello, court assistant

