



REPUBLIC OF KENYA



**KENYA LAW**  
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**Barasa v Otunga & 2 others (Environment and Land Appeal 15 of 2018)  
[2023] KEELC 19989 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19989 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL 15 OF 2018  
DO OHUNGO, J  
SEPTEMBER 25, 2023**

**BETWEEN**

**WYCLIFFE OTAWA BARASA ..... APPELLANT**

**AND**

**ANTHONY OTUNGA ..... 1<sup>ST</sup> RESPONDENT**

**PIUS OTUNGA ..... 2<sup>ND</sup> RESPONDENT**

**WEST KENYA LTD ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal  
Magistrate's Court at Butali (Hon. T.K. Kwambai, Senior Resident  
Magistrate) delivered on 6th December 2018 in Butali SPMCC No. 8 of 2017)*

**JUDGMENT**

1. The background of this appeal is that the appellant moved the Subordinate Court through plaint dated 24<sup>th</sup> January 2017 in which he averred that he was the owner of a portion of land measuring 2 acres hived from land parcel number Bunyala/Namirama/887. That the first and second respondents cultivated sugar cane on his said portion, harvested it and delivered it to the third respondent. He prayed for a permanent injunction to restrain the second respondent from harvesting the sugar cane and to restrain the third respondent from paying the proceeds of the cane to the first respondent.
2. The first and second respondents filed a joint statement of defence in which they denied the appellant's averments and stated that the appellant had no claim to their sugarcane.
3. Upon hearing the matter, the Subordinate Court (Hon. T.K. Kwambai, Senior Resident Magistrate) delivered judgment on 6<sup>th</sup> December 2018 and dismissed the suit with costs to the respondents. Aggrieved, the appellant promptly filed this appeal through Memorandum of Appeal dated 7<sup>th</sup> December 2018.



4. The Memorandum of Appeal is as brief as the period it took to file it in court following delivery of the judgment. It simply states as follows:

Take Notice that Wycliffe Otawa Barasa the appellant herein being decertified (sic) with the judgment of the Honourable T.K. Kwambai (SRM) given on the 6<sup>th</sup> of December, 2018 at Butali Court vide Butali SRMCC No, 8 of 2017 intends to appeal against the part of the said judgment on the grounds that the presiding court misdirected itself as to the facts of the case and on the points of Law.

5. The appeal was canvassed through written submissions, which both the appellant and the first and second respondents duly filed. Although the third respondent was represented by counsel on several occasions when directions were given that the appeal be canvassed through written submissions, it did not file any submissions.
6. The appellant attempted to set forth new grounds of appeal in his submissions, without leave of the court, contrary to Order 42 Rule 4 of the *Civil Procedure Rules*, 2010. In sum, the appellant argued that evidence was adduced before the Subordinate Court showing that he purchased the two acres. He wondered why the first and second respondents would claim proceeds of the portion without his authority. He therefore urged this court to allow the appeal.
7. In reply, the first and second respondents argued that they leased the portion and that the Subordinate Court properly dismissed the appellant's suit. They urged this court to dismiss the appeal.
8. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
9. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issue that arises for determination in this appeal is whether the appellant was entitled to the reliefs he sought.
10. The appellant sought permanent injunctions against the respondents. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal had occasion to restate the prerequisites for granting injunctive relief, including a permanent injunction. The court stated as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to



surmount sequentially. ... If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”

11. At the core of the appellant’s case was his contention that he was the owner of a portion of land measuring 2 acres hived from land parcel number Bunyala/Namirama/887 which he claimed to have purchased from one Elisha Mukole. In support of his case, he produced only one exhibit; a sale agreement dated 3<sup>rd</sup> August 2011. A perusal of the agreement shows that the appellant was the purchaser while Elisha J. Mukole was the seller. The property sold was stated as “A portion (2 acres) out of Land Parcel Number Bunyala/Namirama/887 registered in the names of Laban Wafuwa Mukole – the administrator.” The said registered proprietor did not sign the agreement. The appellant neither produced a copy of the title nor a certificate of official search in respect of the property. He did not even call the registered proprietor to testify in support of his case.
12. Simply put, the appellant did not prove his claims of ownership. In the absence of proof of ownership, there would be no basis for the appellant to claim that the first and second respondents cultivated sugar cane on his land, or that he was entitled to the proceeds of the harvested cane. I find that the appellant did not establish a prima facie case and was not therefore entitled to the permanent injunctions sought. The learned trial magistrate did not err in dismissing the appellant’s case.
13. In view of the foregoing discourse, I find no merit in this appeal, and I dismiss it with costs to the first and second respondents. I do not award any costs to the third respondent since it did not file any submissions in opposition to this appeal.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Appellant

The first Respondent present in person

The second Respondent present in person

Mr Andiwo for the third Respondent

Court Assistant: E. Juma

