



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Okoth v Odie (Environment and Land Appeal E001 of 2021)  
[2022] KEELC 2961 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2961 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA  
ENVIRONMENT AND LAND APPEAL E001 OF 2021**

**AY KOROSS, J**

**MAY 19, 2022**

**BETWEEN**

**GLADYS ONG’UDI OKOTH ..... APPELLANT**

**AND**

**RICHARD OUMA ODIE ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Principal Magistrate  
Hon. J.P. Nandi delivered on 2/07/2021 in Bondo PM ELC Case Number 22 of 2018)*

**JUDGMENT**

**Introduction**

1. The background of this appeal can be traced to a plaint that was filed in the lower court by the appellant and was amended severally resting with a further amended plaint. She asserted that she was the registered owner of L.R. No. Oyuma/katwenga/1381 (“the original property”) which she had subdivided severally and sold to 3<sup>rd</sup> parties and that the portion that was currently registered in her name was L.R. No. Oyuma/katwenga/3420 (“the suit property”). According to her, the respondent and his then co-defendant who died in the course of the proceedings trespassed on the original property in the year 2010. To buttress ownership, she waved a copy of the title deed, “greencard” and an official search of L.R. No. Oyuma/katwenga/3163.
2. The respondent disputed the appellant’s assertions and contended that his late father Kodie Owade, together with one Koluoch and Charles Okoth [husband of the appellant and now deceased] settled on the original property in 1941 and that he had been born there in 1961. He urged the trial court to dismiss the suit.
3. After the parties had testified and closed their respective cases, the court framed two issues for determination; 1<sup>st</sup> was whether the appellant was the registered owner of the original property and the suit property. It found that she was the registered proprietor of the suit land. The exact suit land was



not disclosed. The 2<sup>nd</sup> issue was whether the appellant was entitled to exclusive occupation. On this one, the trial court found that the appellant had not proved that she was in exclusive occupation and that the respondent had proved that he and his family had lived on the suit property. Her suit was dismissed and each party was ordered to bear their respective costs.

### Appeal to this court

4. Aggrieved and dissatisfied with the decision of the court, the appellant filed a memorandum of appeal dated 29/03/2021 which set down 11 grounds of appeal. From the submissions, it is obvious that the appellant abandoned most of the grounds of appeal and only left two grounds for this court's determination;
  - I. The Trial Court erred in law and fact by finding that the respondent had a valid, lawful or legitimate claim to possession and/or ownership of all that parcel of land known as Oyuma/katwenga/1381 and the suit property yet he had not counterclaimed.
  - II. The Trial Court erred in upholding the respondent's claim without invoking the proper procedure of adverse possession.

### Submissions

5. Through her counsel Achola Jaoko & Co. Advocates, the appellant canvassed the appeal by way of written submissions dated 8/03/2022. She contended that though the respondent had claimed the suit property as of right, he did not file a counterclaim. She asserted that Charles, whom she succeeded her title to the suit property from, was registered as the owner of the original property during land adjudication process and that the respondent only trespassed on it in 2010 after he had given out some parcel of land that belonged to his family to 3<sup>rd</sup> parties. That his family's land was distinct from the suit property. She relied on the case of *Linus Ogayi Hassan v John Ogoti Luondi* [2013] eKLR which stated that the doctrine of adverse possession should be used as a sword and not a shield.
6. Despite service, the respondent did not file any response to the appeal including written submissions. However, this court is called upon to determine the appeal on its own merits.

### Analysis and determination

7. Having considered the condensed grounds of appeal, the appellant's submissions and authorities cited, this court has identified one issue for determination; whether the trial court erred in not finding that the respondent was a trespasser.
8. As was stated in the case of *Abok James Odera t/a A. J Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, this court is alive that its role as a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned Trial Magistrate stand or not and give reasons either way.
9. As a 1<sup>st</sup> appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the Judicial Officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion. An appellate Court has to also bear in mind that it did not have an opportunity of hearing the parties when they adduced their evidence.
10. In the trial court, the appellant waved the title deed of the suit property as proof of ownership. Is title to land indefeasible? My answer to this is in the negative. Section 26 of the *Land Registration Act* has



been tested in a line court decisions and this section of law defeats titles to land that have acquired by; fraud, misrepresentation, illegality, in an unprocedural manner or corrupt scheme. Further, Section 28 of the same Act recognises customary trusts and prescription as overriding rights over land.

11. As I have elaborated above, the trial rightly reasoned that there were circumstances where a registered proprietor could be denied exclusive possession. The court trial found thus;

“I find that the defendant is not a trespasser as he and his family have been in occupation of the suit land since 1940. This is confirmed through the letter dated 16/6/1976 showing they had the land since then. I find that the plaintiff is not entitled exclusive possession of the suit land” [Emphasis added]

12. Trespass is a tortious action and a violation of the right to possession. Therefore, the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. However, the owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of trespass See *Halsbury's Laws of England*, Volume 97 at p. 472-473, and the *Court of Appeal decision of Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR.
13. From the trial court record, the appellant's witness statement stated that she was the registered owner of the suit property and that the respondent had trespassed on it and the respondent was her relative. In her exam in chief, she denied the familial relationship and stated the respondent trespassed on the suit property in 2011. In cross exam, she testified that the respondent entered the land with his parents. Interestingly, she did not sue the respondent's mother Helida Akumu Odie who testified and asserted that she resides on the suit property.
14. The respondent testified that he was born in the original property and he had lived there since 1961 which was the year he was born and he started cultivating it in 1979. In cross examination, he testified that the appellant's husband was his relative and the original property had been registered in the names of 3 people; Samwel Odie Owade [his father], appellant's husband and Jorim Oluoch Owuol. However, Charles had secretly registered himself as the owner. That there had been a land dispute in 1976. He testified that though his father had another parcel of land, his father had bequeathed it to a relative called Ogogo. He had always resided on the original property.
15. His mother testified and stated she had lived on the original property since 1940 and that the original property was hers and her husband had been buried there. During cross examination, she corroborated the respondent's testimony on her relationship with the appellant and that the original property had been registered in the names of three people.
16. The respondent produced a demarcation map that is usually prepared by a surveyor in accordance with Section 16 of the *Land Adjudication Act*. Though the record is not clear what date it was issued, from the letters of complaint by one Oluoch Ooro and Samwel to various government offices dealing with land, the map must have been prepared prior to 1976 and the map shows that the occupiers of the original property were the appellant's husband, respondent's father and one Ooro. They produced a letter from the chief dated 16/6/1976 which confirmed this occupancy. This map and letter held credence that the respondent and his family had long occupied the original property together with the appellant's husband.
17. The purpose of the *Land Adjudication Act* was to ascertain customary rights over land. Samwel had taken the first steps under the *Land Adjudication Act* by undertaking demarcation and survey so to establish his right over original property. From the evidence on record, when he encountered challenges



in the registration of the suit property, he did not take it lying down and wrote several letters to various government offices which advised him on how to assert his rights over the original property.

18. From the documentary evidence that was adduced by the respondent, his father and Ooro on June 14, 1976 raised several complaints questioning how the original property was registered in Charles's name to their exclusion. This complaint rested with a letter dated 4/12/1985.
19. The history of original property went into slumber for 26 years before it resurfaced with the appellant waving a title for Oyuma/katwenga/3163 in 2011 which was apparently a subdivision of the original property. Armed with this title, the appellant filed suit in 2012.
20. In the trial court, the appellant was silent on how she came to be the registered owner of the suit property or how the original property was acquired. The first glimpse of her claim to ownership was from the "greencard", certificate of official search and a copy of the title deed of Uyoma/katwenga/3163 and its subsequent subdivision; the suit property. The manner in which it came to the appellant's hands is shrouded with mystery.
21. It is only in her appellate submissions that she asserted that she inherited the original property. Whom she inherited it from has not been disclosed. In the case of *Daudi Kiptugen v Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the court stated thus on the root of a title document to land;

“The acquisition of title cannot be construed only in the end result, the process of acquisition is material”.
22. The appellant did not shed light on the root of the original property from which she purportedly derived her ownership from. The jury is out there whether Samwel and his counterpart Ooro were successful in asserting their rights over it. In the trial court, the respondent proved that he had lived on it prior to the appellant being registered as the owner; if at all she was registered as one.
23. This brings us to the question whether the Trial Magistrate fell in error by not finding that the respondent was a trespasser. Trespass is described under the *Trespass ACT* to mean any person who without reasonable 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.
24. The respondent satisfactorily adduced evidence in the trial court on how he came into occupation and possession of the suit property and I am satisfied that his ancestors' entry into the suit property was not without reasonable excuse and I agree with the finding of the trial court that he was not a trespasser.
25. A defence of adverse possession in a claim of trespass without necessarily filing a counterclaim was upheld by the Court of Appeal in the case of *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No 26 of 2015,

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim”
26. In the interest of justice, the court in this particular case of Gulam went further and entered judgment for the respondent on a defence of adverse possession.
27. In the instant case and as has been observed by this court, the title documents of the original property or even a "greencard" were never produced before the trial court and at this point I am uncertain if the respondent was an adverse possessor or not. The trial court was careful in its wording when it merely stated that the respondent had occupied the suit property and its subsequent subdivisions. I find that in the absence of documents to prove the date of registration of the original property the trial court was



bereft of evidence to make a finding that the appellant's suit was statutory barred. Save for this finding, I agree with other findings of the trial court. I am satisfied that the respondent proved that he and his family had long occupied the parcel of land from on before or 1976 together with the appellant's family and that the appellant was not in exclusive possession and he was not a trespasser.

28. The respondent is at liberty to approach the court in an appropriate manner to protect his rights over the suit property or its subsequent subdivisions, if at all he has any.
29. The upshot is I hereby affirm and uphold the judgment of the trial court dated 2/02/2021 that entered judgment in favour of the respondent. The appeal fails. It is trite law that costs follow the event and because the appeal was unopposed, I make no orders as to costs.
30. It is so ordered.

**Judgment delivered virtually and in open court.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 19<sup>TH</sup> DAY OF MAY 2022.**

**In the Presence of**

Mr. Jaoko for the appellant

N/A for the respondent

Court assistant: Olivia Nyumba

**HON. A. Y. KOROSS**

**ELC JUDGE**

**19/5/2022**

