



**Derry v Lwango & another (Environment and Land Appeal
7 of 2020) [2022] KEELC 2886 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 7 OF 2020**

**A OMBWAYO, J
MAY 13, 2022**

BETWEEN

**MARGARET ATIENO DERRY ALIAS MARGARET ATIENO MUTUKU
KASYOKI APPELLANT**

AND

ANGESO ODITO LWANGO 1ST RESPONDENT

TOBIAS OCHIENG LWANGO 2ND RESPONDENT

*(Appeal from Judgment BY Honourable F. Rashid Senior Resident Magistrate
delivered on 14.01.2020 in the Chief Magistrates ELC No. 97 of 2018)*

JUDGMENT

1. Margaret Atieno Derry alias Margaret Atieno Mutuku Kasyok (hereinafter referred to as the appellant) by way of a further amended Plaintiff filed a suit against the Respondents herein where she averred that at all material times she was the bonafide and registered proprietor of land parcel number Kisumu/ Pandpieri/1833 and that sometimes in the year 2018, the Appellant went to her land and was shocked to find out that the Respondents had without any consent , authority, lawful excuse and or justification trespassed upon the disputed land erected their homes on the land .The Appellant further averred that the Respondents’ actions were tantamount to criminal offence of trespass to land as well as civil wrong which is actionable and gives rise to a claim of damages. The Appellant therefore prayed for orders that the Respondents be evicted from the suit property Kisumu/Pandpieri/1833. And that the Respondents demolish and remove the illegal structures on the suit property at their own costs and in default the Appellant removes the illegal structures on the suit property at the expense of the Respondents.That an order of permanent injunction be issued restraining the Respondents, whether by themselves, their agents, servants, representatives or any of them from entering into, remaining in, trespassing upon or in any other manner interfering with the Appellant’s peaceful use and occupation of the land parcel number Kisumu/Pandpieri/1833 in any manner inconsistent with the rights or



interests of the Appellant. Moreover the appellant prayed for General damages for trespass and Costs of the suit with interest thereon at court rates.

2. The suit was defended vide the 2nd Respondent's amended Defence and Counterclaim where the 2nd Respondent sought for dismissal of the Appellant's suit and Judgment be entered for the 2nd Respondent on the counterclaim for cancellation of the 1st and 2nd entries in the land registry as relates to land parcel number Kisumu/Pandpieri /1833 entered on 22/2/1993. Declaration that land parcel number Kisumu/Pandpieri /1833 belongs to the 2nd Respondent's family. In the alternative, A declaration that the title to land parcel number Kisumu/Pandpieri /1833 has been obtained by the 2nd Respondents' family by limitation of action act and by the doctrine of adverse possession. Costs of the suit and any other relief the court may deem fit to grant.

Grounds of Appeal

3. Aggrieved by the decision of the lower court, the Appellant herein filed a Memorandum of Appeal which was based on the grounds that the Learned Trial Magistrate erred in both fact and law by:
 1. Failing to analyze the evidence tendered by the parties, the pleadings and the law in a judicious manner before arriving in her judgment.
 2. Deciding on issues of trust in land whereas those issues were never pleaded nor proved during the hearing.
 3. Failing to appreciate and apply legal principles relating to the dispute before here in a judicious manner while arriving at her Judgement.
 4. Failing to evaluate the credibility of the Defendants witness before arriving at her judgement.
 5. Failing to appreciate the gravity of legal issues raised by the parties in their pleadings and evidence while making findings in her judgment.
 6. Analyzing and making finding on issues outside her jurisdiction, which greatly influenced her finding to the detriment of the Appellant.
 7. Relying on the Defendant's witness whose evidence was not corroborated by independent witness thereby arriving at the wrong findings in her judgment.
 8. Making adverse findings against the Appellant on the sale agreement for her property whereas that issue was not raised by the parties in their pleadings and evidence.
 9. Ignoring the evidence tendered by the Appellant before arriving at her judgment.
 10. Granting orders to the Respondents which were not proved to the required standard of proof during the hearing of the case thereby exceeding her jurisdiction.
 11. Granting orders which could not be granted in the circumstances of the matter before her due to uncertainty.
3. The Appellant prayed for the following orders:
 - a) The Appeal be allowed with costs.
 - b) That Judgment of the lower court dated 14th January 2020 be set aside.
 - c) That judgment granted in favour of the Appellant as prayed in the lower court.
 - d) Costs of the Appeal.



4. The Appeal was canvassed by way of written submissions as directed by the court.

Respondents' Submissions

5. The Respondents filed their submissions on 8th December 2020 where it was stated that the duty of the first appellate court and the role of counsel are well highlighted in the case of *Alex Mwanja Muema & Another vs Republic* (2018) eKLR.

6. The Respondents raised the following issues for determination:

a) Whether the Appellant's suit at trial was time barred

7. The Respondents stated in their submissions that the Appellant produced a certificate of official search and green card which revealed that the Appellant became the first registered owner of the suit parcel on 22nd February 1993 the same day where one Benson Were Siandha became the registered owner of the suit parcel being originally owned by one Patrick Okunga Odundo.

8. It was stated that the Respondents have lived in the suit parcel for over 25 years before this matter was brought to court and no actions were taken by the Appellant to evict the Respondents from the suit land until 2018. The Respondents therefore submitted that the Appellant's suit was time barred as provided for under section 7 of the Limitations of Actions Act. Reliance was placed in the case of *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR.

b) Who is the legal owner of the suit parcel?

9. The Respondents relied on the provisions on section 3 of the *Law of Contract Act* and stated that no contract of sale was produced before the trial court to at least show the acquisition of ownership by the Appellant, no witness to the agreement was called to testify at trial as to such agreement. That the Appellant had a title deed acquired through fraud, illegality and unprocedural means. It was the Respondent's submission that the Appellant failed to prove her case on a balance of probabilities.

10. The Respondents relied on the provisions of section 24, 25 and 26 of the *Land Registration Act* and submitted that the acquisition of the suit property by the Appellant was marred by the elements outlined under section 26 of the *Land Registration Act*. That the Appellant did not produce her title deed in relation to the land and the court should take notice that no sale agreement was produced nor witnesses called to testify.

11. The 2nd Respondent relied in the case of *Munyua Maina v Hiram Gathia Maina* (2013) in the Court of Appeal at Nyeri Civil Appeal No. 239 of 2009 and submitted that the process which the Appellant acquired the title was marred with illegality, corruption and lacked procedure.

12. It was stated that the Appellant never conducted due diligence as required by the law before the alleged purchase of the suit land. That the 2nd Respondent was living on the suit property for over 30 years and even when the Appellant was allegedly purchasing the land, she never physically visited the suit property and she never realized that someone was living in the suit property until 2017. That no search was produced by the Appellant to show that she conducted due diligence before buying the suit property. The Respondents cited the case of *Esther Ndegi Njiru & Another v Leonard Gatei* (2014) eKLR where the court emphasized on the importance of conducting due diligence.

13. It was the Respondent's submission that the Appellant has failed to prove to this court to the required standard how she came to own the suit property.



14. The Respondents further stated that the 2nd Respondent testified that the suit property was first registered in the names of his uncle, the late Patrick Okunga Odundo who was buried on the suit parcel after his passing and DW1 testified that his father, the late John Lwango is buried on the land and that he has been living on the land since he was born. That even though DW1 testified that he did not know how Patrick acquired the land, it appears to be ancestral land that was passed down from the 2nd Respondent's grandfather to his sons and that is why the said Patrick and the 2nd Respondent's father lived in it. It was therefore the Respondent's submission that the suit property is ancestral land and therefore forms part of the equitable doctrine of intergenerational equity as was held in the case of *Daniel K. Cheraiisi & 2 Others vs Kipkoech Kangogo & Another* (2018) eKLR.
15. On the issue of adverse possession, it was stated that according to the green card produced in court, the Appellant became the registered proprietor of the suit parcel in 1993 and from the evidence on record, DW1 was born in 1996 and has been living on the suit parcel peacefully until 2017 when the Appellant came to claim the suit property. That DW1's testimony was corroborated by the evidence of PW2 who testified that the 2nd Respondent's family has been living in the suit property for over 20 years and even the Appellant confirmed to the trial court that she only realized that someone was in her land in 2017,
16. The Appellant produced photos clearly confirming that indeed the Respondents have built on the land and have been living there for a long period of time and this shows that their possession of the suit property was open and peaceful for over 20 years. The Respondents also pointed out the fact that the Appellant cannot claim she was in constructive possession of the suit property since payment of rates has been held time and again not to amount to possession in adverse possession claims.
17. The Respondents relied in the case of *Charles Murage Njogo v Jane Wairimu Kimani (as the administrator of the estate of Daniel Kimani Muiruri)* (2018) eKLR and also the case of *John Waweru v Augustine Musau Mutua & Another* (2017) eKLR. It was therefore submitted that the 2nd Respondent has to the required standard proved the claim for adverse possession.
18. On the issue of which party is entitled to the reliefs sought, it was submitted that the 2nd Respondent is entitled to the reliefs sought as the Appellant has failed to prove how she came to own the land and that the 2nd Respondent has proven to the required standard, his entitlement to this land through the doctrine of intergenerational equity, adverse possession and has successfully challenged the Appellant's title.
19. On the issue of who is entitled to the costs of this suit, it was submitted that costs follow event and that the 2nd Respondent is entitled to the costs of this Appeal. Reliance was placed in the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR.
20. The Respondents therefore prayed that the Appeal be dismissed with costs to the Respondents.

Appellant's Submissions

21. The Appellant filed his submissions on 2nd November 2021 where she gave a brief outline of the case and raised a number of issues for determination as discussed below:

i. Whether the trial court properly applied the law in arriving at its decision.

22. It was stated that the Judgment of the trial court failed to properly apply legal principles to the dispute before her as it allowed prayed (a) of the 2nd Respondent's counterclaim even when it was absolutely clear that the 2nd Respondent had no locus standi to urge and prosecute that prayer. That at paragraph 15 and 17 of his Counterclaim, the 2nd Respondent pleaded the basis of prayer (b) and the counterclaim



was to the effect that the suit property was registered in the name of one Patrick Odundo, the 2nd Respondent's deceased uncle and further stated that the suit property was transferred to Benson Were Siandha and subsequently to her name was illegal and fraudulent.

23. It was stated that the 2nd Respondent had not obtained Grant of Letters of Administration for the estate of the late Patrick Okunga Odundo and this meant that the Respondent had no locus standi to plead paragraph 15 and 17 of his Counterclaim as well as to request the court to grant payer (a) in the counterclaim. The Appellant relied in the case of *Beatrice Wambui Kiarie vs Beatrice Wambui & 9 Others* (2018) eKLR and submitted that the 2nd Respondent could not agitate prayer (a) of his Counterclaim as it was in the pleadings as set out in paragraph 15 and 17 of the same Counterclaim since he had not taken out grant of letter of administration intestate. The Appellant further relied in the case of *Euton Njuki Makungo v Republic & 2 Others* (2014) eKLR.
24. The Appellant further stated that even if the 2nd Respondent had obtained grant of letters of administration for the late Patrick Okunga Odundo, the same would still not have clothed him with the necessary locus standi to urge prayer (a) of his counterclaim as the suit property had never been registered in the name of the alleged Patrick Okunga Odundo. Entry number 1 in the green card for the suit property made in 1992 is clear that registration of the suit property was made in favour of Patrick Okungu Odundo and not Patrick Okunga Odundo.
25. It was further noted that payer (a) in the counterclaim by the Respondent was filed outside the 12 year limitation period such that the trial court had no jurisdiction to award the same. The 2nd Respondent filed the counterclaim 26 years after the Appellant was registered as the proprietor of the suit property way back in 1993.

ii. Whether the trial court adhered to the legal principle on binding nature of pleadings before arriving at its decision.

26. It was submitted that the trial court went beyond the pleadings in arriving at its decision and that the importance of pleadings has been reiterated in the case of *Global Vehicles Kenya Limited vs Lenanan Road Motors* (2015) eKLR.
27. The Appellant submitted that the trial court failed to heed to the four fundamental roles of pleadings when rendering its decision as it erroneously introduced the issue of sale and purchase into the case which was never an issue in the pleadings and only came up when the Appellant was being cross examined which position is captured in the judgment at the trial court. That the trial court's impermissible departure from the pleadings is also evident from her mistaken conclusion that Patrick Okunga Odundo the alleged uncle to the 2nd Respondent is the same person as Patrick Okungu Odundo whose name appears in the green card, the trial court purported to cancel an entry in favour of Benson Were Siandha when the said Siandha had never even a party to the proceedings and that had the trial court stuck to the dispute disclosed by the pleadings, it would have arrived at the correct decision.

iii. Whether the trial court properly evaluated the evidence before it before arriving at its decision.

28. It was stated that the trial court rejected the evidence before the lower court tendered by the Appellant who gave evidence on the process of registration of the suit property in her name and it was completely impermissible for the trial court to accept the uncorroborated hearsay evidence given by the 2nd Respondent who did not witness any of the matters he purported to testify on the events in dispute having taken place 4 years before he was born. The Appellant therefore urged the court to reevaluate the evidence tendered at the trial court.
29. The Appellant therefore prayed that the Appeal be allowed.



Respondent's further Submissions

30. The Respondents filed further submissions on 4th November 2021 in response to the Appellant's submissions pursuant to leave granted by the Deputy Registrar.
31. On the issue of locus standi, the Respondents stated that it was the Appellant who dragged the Respondents in court as per the pleadings in the trial court and therefore the argument that the Respondents do not have locus standi is self-defeating and this Appeal should be dismissed for having been instituted against the parties with no locus standi and the Respondents relied in the case of *Melickzedeck Shem Kamau v Beatrice Waitthera & 2 Others* (2020) eKLR.
32. It was further stated that the Respondents were sued in their capacity as the occupants of the suit property and therefore the issue of locus standi does not suffice. That the Respondents clearly stated in the Counterclaim that the suit property was ancestral land and had sought reliefs of a declaration that the suit property belongs to the family of the Respondents, cancellation of the first and second entries in the lands register, an alternative prayer of adverse possession and costs of the suit together with interest.
33. It was submitted that the doctrine of intergenerational equity gives locus to the family members of a registered proprietor to institute and defend any action arising from ancestral land as was held in the case of *Jessica Kavulani Jumba & 2 Others v Hassan Odari Jumba & 2 Others* (2012) eKLR and also the case of *Mukangu vs Mbui C.A. Nyeri No. 281 of 2000*.
34. The Respondent stated that the Counterclaim was not filed on behalf of the estate of DW1's uncle but in DW1's proprietary rights over his ancestral land as was clearly pleaded under paragraph 12,13 and 14 of the Counterclaim. It was the Respondents' submission that the issue of locus standi fails.
35. On the issue of limitation of actions, it was submitted that the suit is time barred and should not have been entertained by the trial court.
36. The Respondents further submitted on the question of whether the trial court clearly adhered to the issue of binding nature of pleadings; it was stated that the Appellant sought eviction orders and those relating to trespass which require a litigant first to prove to any court that he or she has a clean title that is not tainted by the provisions highlighted under section 26 of the *Land Registration Act*. The Respondents relied in the case of *Paul Mulela vs Vincent Wambua Muli* (2006) eKLR.
37. The Respondents submitted that the trial court was correct in arriving at its final decision and therefore prayed that the Appeal be dismissed with costs.

Analysis and Determination

38. This court has looked into the Pleadings, the evidence on record and the submissions filed by the parties and is of the view that the following issues need to be determined:
 - a) Whether the suit is time barred.
 - b) Whether the Respondents are entitled to the suit property by way of Adverse Possession.
 - c) Whether the trial court adhered to the legal principles on binding nature of pleadings.
 - d) Whether the Respondents had locus standi to be sued.
 - e) Who is the legal owner of the suit property?
 - f) Whether the trial court evaluated the evidence before it before arriving at its decision.



Whether the Appellant's case is time barred.

38. Section 7 of the *Limitation of Actions Act* provides as follows;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

39. In the case of *Edward Moonge Lengusuranga v James Lanaiyara & Another* [2019] eKLR, it was held as follows;

Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaintiff) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

40. In the case of *Gathoni –vs- Kenya co-operative Creameries Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows: -

The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

41. Further in the case of *Rawal –vs- Rawal* (1990) KLR 275 the court held as follows: -

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his Defence from being disturbed after a long lapse of time. See also the case of *Melita –vs- Shah* (1965) EA 321 cited with approval by Bosire, J in the above case.”

42. The Appellant herein bought the suit property in 1993 from one Benson Were Siandha but did not take possession of the suit property. It is in 2017 when the Appellant visited the suit property and found at that the same is being occupied by the 2nd Respondent and his family. The Appellant failed to explain to the trial court or give evidence why she took so long to take possession of the suit property. I am of the view that the Appellant is not entitled to the suit property as the same is time barred.

Whether the Respondents are entitled to the suit property by way of Adverse Possession.

43. The 2nd Respondent at paragraph 15 and 17 of the Counterclaim, pleaded that all his life which began in 1996, no one has ever claimed the suit property until 2017 when the Appellant came into the picture and that any transfer of the suit property from the name of his uncle, the late Patrick Okunga Odundo to the name of a third party Benson Were Siandha and finally to the Appellant is illegal and fraudulent.

44. The 2nd Respondent in his counterclaim sought for an order of declaration that land parcel number Kisumu/Pandpieri/1833 belongs to his family and in the alternative, a declaration that the title to land parcel number Kisumu/ Pandpieri/ 1833 has been obtained by the 2nd Respondent 's family by Limitations of Actions Act and by the doctrine of adverse possession and therefore the Appellant holds the said title in trust for the 2nd Respondent's family.

45. The Appellant herein averred that she bought the suit property in 1993 and in 2018, the 2nd Respondent trespassed into her land by building homes and taking possession of the suit property



without any consent or any lawful excuse or justification. During hearing the Appellant produced a green card, an official search and a title deed. The Appellant did not produce any agreement for sale to show that she bought the suit property from the 2nd Respondent's uncle.

46. The doctrine of Adverse Possession is guided by the Limitations of Actions Act which provides as follows:

Section 13;

- (1) A right of action to recover land does not accrue unless the land is in the possession of some persons in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
- (3) For purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land.”

Section 17;

Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 37: -

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

Section 38(1) and (2);

- (1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of these Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2) An order made under sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

47. The 2nd Respondent was born in 1996 and has been living in the suit property since then until 2017 when the Appellant came to claim the same and his evidence was corroborated by the evidence of PW2



who testified that the 2nd Respondent and his family have been living in the suit property for over 20 years. In as much as the Appellant purchased the suit property and has been paying land rates, she has never taken possession of the suit property.

48. The Court of Appeal in the case of *Mtana Lewa -v- Kabindi Ngala Mwangandi* (2005) eKLR held that:

Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.’

49. In the case of *Gabriel Mbui Vs Mukindia Maranya* [1993] eKLR, the doctrine of Adverse Possession was defined as follows:

...It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.’

50. Based on the evidence on record, it is clear that the 2nd Respondent and his family have been in occupation of the suit property for 24 years and have used the said property openly and without any interruption until 2017 when the Appellant came to claim that she is the owner of the suit property. I do find that the 2nd Respondent has proved his claim on adverse possession on a balance of probabilities and is therefore entitled to be registered as the owner of the suit property. However, the learned magistrate properly found that she had no jurisdiction and therefore the said prayer cannot be granted on appeal.

Whether the Respondents had locus standi to be sued.

51. The Appellant stated in her submissions stated that the trial court allowed prayer(a) of the 2nd Respondent’s counter-claim even when it was absolutely clear that the 2nd Respondent had no locus standi to urge and prosecute that prayer.
52. During hearing of this suit at the trial court, DW1 testified that the suit property belonged to his grandfather Mathews Lango who had two children, Patrick Okunga and John Omungi Lwango. That Patrick Okunga died without a wife and children and John Omungi Lwango is the father to the 2nd Respondent. He further stated that the suit property was registered in the name of one Patrick Okunga who held it in trust for the whole family and that his father’s homestead is located in the homestead and his father was buried in the suit property. He testified that since he was born, no one has ever claimed the suit property or threatened to evict his family.
53. The Respondents in their further submissions submitted that it is the Appellant who dragged them to court and the Appellant’s Appeal should be dismissed for instituting a suit against parties who do not have locus standi.
54. The 2nd Respondent in prayer(a) of the Counter-claim sought for an order of cancellation of the 1st and 2nd entries in the land registry as relates to land parcel number KISUMU/PANDPIERI/1833 entered on 22/2/1993. From the evidence on record, it is clear that as per the copy of the green card, the suit property was registered in the name of the late Patrick Okunga Odundo then later on transferred to



Benson Were Siandha and finally to the Appellant. It is also evident that the 2nd Respondent's uncle the late Patrick Okunga Odundo died and no grant of letters of administration had been taken out.

55. In the case of *Law Society of Kenya ...Vs... Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that; -

Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of *Alfred Njau and Others ..Vs.. City Council of Nairobi* (1982) KAR 229, the Court also held that; -

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

56. Although the Respondents had not taken out Grant of Letters of Administration Intestate, they could not have failed to file their Defence as the Appellant had sued them. The Appellant ought to have been carefully before instituting this suit in order to ensure that he is suing the right parties. This court is of the view that the Respondents had locus standi to be sued as they have been living in the suit property with their family.

Who is the legal owner of the suit property?

57. The Appellant herein during trial produced a title deed which showed that the suit property is registered in her name. A copy of the official search dated 8th June 2017 also indicates that the suit property was registered in her name and that the suit property is subject to a subdivision done from plot number 1420. The search also indicated that a title deed was issued to her on 22nd February 1993. A copy of the green card was also produced which showed that the Appellant bought the suit property from Benson Were Siandha.
58. The 2nd Respondent at paragraph 17 of the Counterclaim averred that any transfer that was made from his uncle the late Patrick Okunga Odundo to Benson Were Siandha and to the appellant was illegal and fraudulent. He enumerated the particulars of fraud on the part of the Appellant where he stated that there was fraud by the Appellant concealing all the sale transactions from his family when they all knew that his family lived on the suit property. That they unlawfully transferred land belong to his family without his family's knowledge or consent, that the Appellant illegally obtained the title deed to the suit property without any sale agreement or document to show how she obtained the suit property from Benson Were Siandha and finally transferring the suit property to herself without following due process.
59. Section 26 of the *Land Registration Act*, Act No.3 of 2012 provide as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
60. In the case of *Urmilla w/o Mabendra Shab vs Barclays Bank International Limited & Another* [1979] KLR 76; [1976-80] 1KLR 116B it was held that: of fraud must be strictly proven and that although “allegations the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned”.
61. In the case of *Benson Wandera Okuku vs Israel Were Wakho* (2020) eKLR the court stated as follows: -
- And what about the standard of proof? The plaintiff said he has proved the case on a balance of probability. Is that the standard required in law. Certainly NOT. The law has been clear along. In *RG Patel vs Lalji Makanji* (1957) EA 314 the court expressed itself as follows: -
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”.
62. In *Jennifer Nyambura Kamau vs Hampherey Nandi* (2013) eKLR, the court of appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that standard of proof is beyond a balance of probabilities. This is the same position found in *Koinange & 13 Others vs Nyati* (1984) EA 425, *Gudka vs Dodhia* CA No 21 of 1980 and *Richard Ekwesera Onditi vs Kenya Commercial Finance Co. Ltd*: CA No 329 of 2009, Nairobi”.
63. Although the Appellant herein claimed that she bought the suit property from Benson Were Siandha, there was no Agreement for Sale to prove the same. The Appellant failed to produce any transfer documents to show that the said Benson Were Siandha transferred the suit property to her. During hearing at the trial court, the Appellant failed to call the said Benson to adduce evidence that indeed he sold the property to her.
64. As per the trial court’s Judgment the green card produced as PExh 5, the late Patrick Okunga Odundo became the registered owner on 22nd February 1993 and it is in this same day that the suit property was transferred to Benson Were Siandha and to the Appellant on the same day. The Appellant was unable to explain how the title of the suit property was transferred to the three parties mentioned on the same day.
65. DW1 testified and stated that the land belonged to his grandfather who had two children that is Patrick Okunga Lwango and John Omungi Lwango and that Patrick Okunga Lwango had no children nor wife. He stated that the property was registered in the names of Patrick Okunga Lwango who held the property in trust for the family. It is evident that the suit property was ancestral land as his father was buried in the suit property. It is this court’s finding that the 2nd Respondents and his family are entitled to the suit property.

Whether the trial court adhered to the legal principles on binding nature of pleadings.

66. The Appellant submitted that the trial court went beyond the pleadings in arriving at its decision as it failed to heed the four fundamental roles of pleadings. That the trial court erroneously introduced the issue of sale and purchase into the case yet the same was never an issue in the pleadings and it only came up when the Appellant was being cross-examined which position is captured in the Judgment of the trial court. The Appellant further stated in her submissions that the late Patrick Okunga Odundo the



alleged uncle to the 2nd Respondent is not the same person as Patrick Okungu Odundo whose name appears in the green card. That the trial court purported to cancel an entry in favour of Benson Were Siandha when the said Siandha had never been a party to the proceedings.

67. The Respondents on the other hand in their further submissions submitted that the issue of acquisition of property was directly in issue in this matter and this prompted the Appellant to produce a copy of the search, green card, title deed and rates payment receipt.
68. It is this court's view that the trial court was not erroneous as the Appellant herein filed this suit on allegations that she is the registered owner of the suit property and that the Respondents had trespassed into the suit property. The Respondents on the other hand denied the said allegations and put the Appellant to strict proof and filed a Counterclaim where the 2nd Respondent pleaded illegality and fraud on the part of the Appellant the pleadings, it is clear on paragraph 17 that the 2nd Respondent enumerated the particulars of fraud how the Appellant herein acquired the suit property illegally and fraudulently as discussed above. This court is of the view that the trial court adhered to the binding nature of the pleadings filed by the parties herein.

Whether the trial court evaluated the evidence before it before arriving at its decision.

69. Based on the issues above, it is the finding of this court that the trial court evaluated the evidence before it before arriving at its decision. The trial court considered the documents filed by both parties, the witness statement and the evidence given by all the parties together with the submissions before arriving at its decision. In the upshot this court upholds the Judgment of the trial court as this Appeal lacks merit and is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

