Ogutu v Budaha (Environment and Land Appeal E008 of 2023)
[2025] KEELC 3086 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3086 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL E008 OF 2023

BN OLAO, J

APRIL 3, 2025

BETWEEN

CHARLES ODHIAMBO OGUTU ..... APPELLANT

AND

PRAXIDIS AUMA BUDAHA ..... RESPONDENT

(Being an appeal arising from the Judgment and decree of HON. EDNA NYALOTI CHIEF MAGISTRATE delivered on 30th May 2023 in BUSIA CMC ELC CASE NO E126 of 2021)

JUDGMENT

1. Charles Odhiambo Ogutu (the Appellant herein) was the Plaintiff in Busia CMC ELC Case No E126 of 2021 where he had impleaded Praxidis Auma Budaha (the Respondent herein) seeking judgment against her in the following terms with respect to the land parcel No Samia/Butabona/1266 (the suit land):

    i. A declaration that the Appellant is the lawful owner of all that parcel of land No Samia/ Butabona/1266.

    ii. An order of permanent injunction restraining the Respondent, her servants, agents, heirs, employees, dependants or any other person acting under her authority from further trespassing unto the Appellant's parcel of land No Samia/Butabona/1266.

    iii. An order of immediate eviction of the Respondent, her servants, agents, heirs, employees, dependants or any other person acting under her authority from the Appellant's parcel of land No Samia/Butabona/1266.

    iv. General and exemplary damages for trespass to be assessed by the Court.

    v. Costs and interest of the suit.

2. The basis of the Appellant's suit was that while he is the registered proprietor of the suit land, the Respondent had without any legal justification or right trespassed thereon and started cultivating the same for her own gains without the Appellant's consent. The Appellant has therefore suffered damage as a result of the trespass by the Respondent and there was therefore need for the Court to intervene and prevent the illegal acts of trespass.

3. In her defence, the Respondent denied that the Appellant is the registered proprietor of the suit land. In the alternative, she pleaded but entirely without prejudice, that if the Appellant is the registered proprietor of the suit land as alleged, then his registration is subject to the overriding interest of adverse possession on the part of the Respondent. The Respondent pleaded further that at the time when the Appellant purchased the suit land, the initial owner had no registrable title to pass to the Appellant as the same had passed on to the Respondent and her late husband by operation of the law. The Respondent denied that she had entered the suit land without any legal justification or rights and put the Appellants to strict proof thereof. She added that she was married by her late husband FRANCIS WANYAMA BUDAHA in 1973 and found him living on the suit land where she still lives to-date. She denied that her actions amount to trespass which needs the intervention of the Court through orders of injunction or eviction or that the Appellant was entitled to any damages.

4. The Respondent pleaded further that the Appellants suit was statute barred and also res judicata and/or subjudice as there had been other suits involving the suit land namely:

    1. Busia H.C.C.C. No 42 of 1980.

    2. Busia ELC Case No 44 of 2010 (OS)

    3. Busia ELC Case No 99 of 2014

    She therefore urged the Court to strike out the Appellant's suit with costs.

5. The plenary hearing commenced before Hon Lucy Ambasi Chief Magistrate on 28th November 2022 who heard the evidence of the Appellant and his witnesses. Following her transfer, the Respondent's case was heard by Hon Ednah Nyaloti Chief Magistrate on 16th February 20233 who subsequently delivered the impugned judgment on 30th May 2023 dismissing the Appellant's suit with costs.

6. Aggrieved by that judgment, the Appellants lodged this appeal. He sought that the judgment and decree of the trial Court be set aside and substituted with a judgment in his favour per the plaint together with costs.

7. The following seven (7) grounds of appeal were raised:

    1. The learned trial magistrate failed to sufficiently or at all to understand the nature of the Appellant's claim and considered irrelevant matters and thereby arrived at a wrong decision.

    2. The learned trial magistrate erred in law and in fact in finding and holding that the Appellant's suit was res judicata without assigning any reasons for such holding.

    3. The learned trial magistrate erred in law and in fact in disregarding and/or failing to consider the evidence tendered by the Appellant and thereby arrived at a wrong decision when she found and held that the Appellant had failed to prove his case against the Respondent.

    4. The learned trial magistrate erred in law and in fact in failing to appreciate that the registration of the Appellant as the proprietor of the suit land had vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto and the

Court occasioned an injustice to the Appellant by failing to grant a permanent injunction to protect the Appellant's rights over the suit property.

5. The learned trial magistrate erred in law and in fact by failing to appreciate that there was no challenge against the validity of the Appellant's title to the suit property and the Court was by law mandated to protect the Appellant's title and ownership of the suit property.

6. The learned trial magistrate erred in law and in fact by finding and holding that the Appellant had failed to prove that the Respondent had trespassed on his land yet the fact of trespass was admitted by the Respondent.

7. The learned trial magistrate erred in law and in fact by misconstruing the evidence on record and further erred in finding and holding that the Respondent resided on the suit land since the year 1973 when the evidence on record was that the Respondent entered the suit land in or about the year 2009.

8. Directions having been taken that the appeal be canvassed by way of written submissions, the same were filed both by Ms Wekesa instructed by the firm of S. O. Madialo Advocates for the Appellant and by Mr Onsongo instructed by the firm of Obwoge Onsongo & Company Advocates for the Respondent.

9. I have considered the record of appeal and the submissions by counsel.

10. This being a first appeal, this Court must be guided by the principles laid down in the case of Okeno -V- R 1972 EA 32 where the then East African Court of appeal stated at page 36 thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -V- R 1957 EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw it's conclusions – Shantilala M. Ruwala -V- R 1957 EA 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make it's own findings and draw it's own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses – see Peters -v- Sunday Post 1958 EA 424."

The above has been reiterated in subsequent cases. See for example Selle & Another -v- Associates Motor Boat Company Ltd 1968 EA 123 and Kiruga –v- Kiruga & Another 1988 KLR 348. Guided by the above and the record herein, I shall consider the appeal as follows:

11. In ground NO 2, the trial magistrate is faulted for holding that the Appellant's suit was res judicata without assigning any reasons for doing so. The Respondent had pleaded in paragraph 12 of her defence that the Appellant's suit was time barred, res judicata and/or sub judice. She gave notice that a preliminary point of law would be raised to have it struck out.

12. The trial magistrate considered the issue of res judicata in paragraphs 28, 29, 30 and 31 of the impugned judgment. All that she did was to cite the provisions of Section 7 of the *Civil Procedure Act* (paragraphs 28 and 29), cite the definition of res judicata in Black's Law Dictionary 10th Edition (paragraphs 30 and 31). Then at paragraph 32, the trial magistrate made the following findings:

> 32: I am satisfied that the Plaintiff's case is res judicata"

> Having made the finding that the Appellant's suit was res judicata, that should really have been the end of the Appellant's claim. That is because, Section 7 of the *Civil Procedure Act* which deals with the doctrine of res judicata starts with the words "No Court shall try any suit or issue ...". The principle of res judicata is therefore a complete bar to any subsequent proceedings involving the same parties or their privies over the same subject matter. And for it to be properly invoked, it must be demonstrated in what previous suit or suits the matter or issue which has been brought before the Court had been previously "heard and finally decided by such Court." Such a finding cannot therefore be made unless the Court in which res judicata is pleaded re-examines those previous suits.

13. It is clear from paragraphs 28 to 32 of the impugned judgment that the trial magistrate made no reference to any previous suits in which the Appellant and the Respondent or their privies had litigated over the suit land. Yet, in paragraph 10 of her defence the Respondent had identified those previous suits as follows:

    1.. Busia HCC No 42 of 98 (O.S)

    2. Busia ELC CASE No 44 of 2010 (O.S)

    3. Busia ELC 99 of 2014

    However, and notwithstanding the fact that in her defence the Respondent annexed pleadings of those previous suits, the trial magistrate proceeded to up-hold the plea of res judicata without assigning any reasons or making reference to those previous cases. This Court must therefore consider whether the plea of res judicata was properly considered because that plea goes to the jurisdiction of a Court to handle the dispute before it.

14. With regard to Busia HC.C.C No 42 of 1998, it involved Francis Wanyama Budaha the Respondents' late husband and who was the Plaintiff as against Onjoro Ojiambo, Alfred Ojiambo, Oluoch Ojiambo, Nageri Mang'eni Ojiambo, Obingo Ojiambo and Anerius Maiga. That suit involved the suit land as well as other parcels of land. It was however struck out by Mitei J on 14th June 2003.

15. And with regard to Busia ELC CASE NO 99 of 2014, it also involved the Respondent's late husband Francis Wanyama Budaha as the Plaintiff against the Appellant herein as the Defendant. That suit was also never heard because the Respondent's husband died before it was heard.

16. Finally, with regard to Busia H.C.C.C. No 44 of 2010 (O.S), Counsel for the Respondent has submitted that it was consolidated with Busia ELC No 37 of 2013 to become Busia ELC Case No 99 of 2014. Counsel for the Appellant has pleaded that the parties in Busia ELC Case No 27 of 2013 are not the same as the parties in this case.

17. From my perusal of the available pleadings and rulings filed by the parties, while it is clear that the Respondent's late husband was involved in previous litigation with the Appellant, the only judgment delivered was that by Mitei J in Busia ELC No 42 of 1998 which was struck out on 4th June 2003. For res judicata to apply and as was held in the case of Tee Gee Electrical & Plastic Company -v- Kenya Indusrial Estates Ltd C.A. Civil Apepal No 333 of 2001 [2005 2 KLR 97], the previous suit ought

to have been heard and determined on it's merits. See also the case of Michael Bett Siror -V- Jackson Koech C.A. Civil Appeal No 83 of 2016 [2019 eKLR] where the Court held that:

> " We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however such a judgment does not satisfy the requirements of Section 7 of the *Civil Procedure Act* as the issues raised in the suit have not been addressed and finally determined by the Court but the judgment is the result of what may be described as a technical knock out."
>
> Taking all the above into account, it is clear that the trial magistrate erred both in fact and in law when she up-held the plea of res judicata. This is because of two reasons; Firstly, the trial magistrate did not make any reference to the cases which had been cited to support the plea of res judicata. She up-held the plea of res judicata in vacuo. Secondly, from the pleadings, judgments and rulings filed, none of the cases cited to support the pela of res judicata was "heard and finally decided."

18. Ground NO 2 of the Memorandum of Appeal is therefore well merited. However, it is really of no consequences because having up-held the plea of res judicata, the trial magistrate proceeded to determine the dispute on its merits.

19. In grounds NO 1 and 3 the trial magistrate is faulted for failing to sufficiently or at all to understand the nature of the Appellants claim thereby arriving at the wrong decision. There is merit in that claim. the Appellant's second prayer as per his plaint was an order of "permanent injunction" restraining the Respondent, her servants, agents, heirs employees and others from trespassing onto the suit land. The Appellant was therefore not seeking an order of temporary injunction. However, in paragraphs 33, 34 and 35 the impugned judgment, the trial magistrate makes reference to the cases of Giella -v- Cassman Brown 1973 EA 358, Mrao Ltd -v- First American Bank of Kenya Ltd 2003 Eklr And The Case of Nguruman Ltd -v- Jan Bonde Nielsen & Others C.A. Civil Appeal No 77 of 2012 [2014 eKLR]. The trial magistrate in making reference to those cases was infact considering whether the Applicant had met the threshold for the grant of a temporary injunction and not of the grant of a permanent injunction which is what the Appellant was seeking. Then in paragraph 36 of the impugned judgment she said:

36.

> I am satisfied that the Plaintiff has not met the threshold for the grant of an injunction."

That was not the case which the trial magistrate had been called upon to consider and the cases she cited were not relevant to the grant of an order of permanent injunction. Essentially, the trial magistrate went on a frolic of her own by determining issues which were outside the pleadings of the Appellant. That complaint is well merited but as will also shortly become clear, it is of no significance to the final finding of the trial magistrate.

20. Finally, grounds No 4, 5, 6 and 7 of the Memorandum of Appeal can be considered together. In those grounds the Appellant takes issue with trial magistrate for failing to appreciate that the Appellant as the registered owner of the suit land was entitled to an order of permanent injunction, by failing to appreciate that there was no challenge against the Appellant's title to the suit property which should have been protected, by failing to find that the Respondent had trespassed and by finding that the Respondent had resided on the suit land since 1973. Read together, these grounds are basically faulting the trial magistrate for having up-held, although not in very clear terms, the Respondent's averment in paragraph 12 of her defence that the Appellant's suit was, inter alia, time barred. This was really

the fulcrum of the dispute because in paragraph 11 (1) of his plaint, the Appellant had sought a declaration that he is the lawful owner of all the suit land while in paragraph *11*(2), he sought an order for the eviction of the Respondent therefrom and thereafter, an order permanently injuncting him, his servants, agents, heirs and dependants from trespassing on the same. The trial magistrate could only determine those issues vis-à-vis the Respondent's pleading that the Appellant's claim to the suit land was statute barred.

21. The trial magistrate addressed that issue briefly in paragraph 37 of the impugned judgment as follows:

> 37: On the issue of whether the Defendant trespassed on the Plaintiff's land, I am satisfied that the Plaintiff has not proved that the Defendant trespassed on his land. The evidence on record is that the Defendant resided on the land since 1973. The Plaintiff has never resided on the land."
>
> It is clear from that brief finding that the trial magistrate did not consider the evidence by both parties before arriving at the decision which she did. As a first Appellate Court, I am obliged to re-consider and re-evaluate the evidence on record and make a decision on whether or not to support the trial magistrate's finding in paragraph 38 of the impugned judgment that:
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> 38: I am satisfied that the Plaintiff failed to prove his case against the Defendant on a balance of probability. The Plaintiff's case against the Defendant is dismissed with costs."
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> In support of his case, the Appellant had filed a statement dated 22nd August 2022. The same was adopted as his testimony. In paragraphs 2 and 3 thereof, he said:
>
> > 2: That I am the duly registered owner of all that parcel of land title No Samia/Butabona/1266 measuring approximately 2.0Hectares."
> >
> > 3: That I purchased the said parcel of land from one Mr Anjerus Maiga Okena through a sale agreement dated 17th May 2004 for the purchase price of Kshs.110,000 and fully paid the consideration thereof."
>
> When he was cross-examined during the trial by Mr Onsongo on 28th November 2022, he said at page 216 of the record thus:
>
> > " The Plaintiff (sic) is silent when the Defendant entered my land I found her husband in occupation after I bought the land. I have never used the land. When I bought, the family was not there. I don't know FRANCIS sued the owner in High Court demanding title by adverse possession. Defendant is in possession. There are trees which I did not plant."
>
> When he was cross-examined by Mr Onsongo, the Appellant's witness Joseph Sikuku a village elder said:
>
> > " The Defendant was married to Francis in 1973. Plaintiff does not reside nor has he ever resided in my jurisdiction. Defendant's

husband moved into the land not in 1968. I do not know of the suit in 1998. The Defendant lives on the land. There are big trees not planted by the Plaintiff."

When she was cross-examined by Mr Madialo counsel for the Appellant on 18th April 2023, the Respondent said:

"I was the 2nd wife of the deceased. I lived with the deceased in the first wife's home. My home was established in 2009. I know the history of the land where I stay. I used to farm the land. When I was married, the first wife and my late husband was farming on the land. I was married in 1973. I was never informed that there was a land dispute. My late husband is the one who had the land dispute. I do not have the land title deed of the land where I am staying. I do not know if my late husband had a title deed to the land."

That the Appellant is the registered proprietor of the suit land is not in doubt. He has been so registered since 2nd December 2005 as per the Green Card. He also produced as part of his documentary evidence a copy of the title deed to the suit land issued on 5th December 2005. As the Appellants counsel has rightly submitted in paragraphs 15 and 16 of his submissions, the Appellant is entitled to the rights enshrined in Article 40(1) of the *Constitution* and Section 24 of the *Land Registration Act*. Those provisions protect the right to property and confer absolute ownership of land together with all the privileges and rights appurtenant thereto. Those rights and privileges include the right to evict trespassers from the suit land and to injunct them therefrom. Those are among the prayers which the Appellant seek.

22. However, apart from the above provisions, there is also Section 7 of the *Limitation of Actions Act*. It reads:

7: 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."

The Appellant having admitted during the plenary hearing that he found the Defendant's husband in occupation of the suit land when he purchased it in 2004 and that he has never used it, it is obvious that the Appellant ought to have filed this suit on or before 2016. The suit in the trial Court was filed in 2021. By that time, the Appellant's title to the suit land had been extinguished by effuxion of time. Section 17 of the *Limitation of Actions Act* provides that:

17: Subject to Section 18, 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."

The evidence on record shows that the Appellant purchased the suit land when the Defendant and her deceased husband were already in occupation and possession of the same. Therefore, at the expiation of twelve (12) years from the time when the Respondent's deceased husband took possession of the suit

land, the Appellant became a mere trustee holding the title thereto in favour of the Respondent. In Titus Kigoro Munyi -v- Peter Mburu Kimani 2015 eKLR, the Court of Appeal held that:

> " It is stated that any man who buys land without knowing who is in possession risks his title just as he does if he fails to inspect his land for twelve years after having acquired it."

Since the evidence shows that the Respondent's deceased husband had been on the suit land even long before 1973 when he married the Respondent, it is obvious that even long before 1998 when the deceased moved to the High Court in BUSIA vide High Court Civil Case NO 42 of 1998, the title of the first registered proprietor Mageri Mangene Ojiambo who acquired it on 29th May 1958 had long been extinguished.

23. Although the trial magistrate did not interrogate all the above issues, I am satisfied that nonetheless, she arrived at the right decision by finding that the Appellant was not entitled to the orders which he sought and subsequently dismissing his claim. The Appellants' title to the suit land having long been extinguished, he only holds a paper title thereto. He was not entitled to the declaratory orders which he sought nor the order of eviction of the Respondent therefrom or permanently injuncting him from the same.

24. Ultimately therefore other than the failure to properly address the issue of res judicata and determining the suit before her as a claim for a temporary injunction which it was not, I am satisfied from my own re-evaluation of the evidence which was before the trial magistrate that the Appellant was not entitled to the remedies which he sought and that his suit was properly dismissed on account of limitation.

25. The up-shot of all the above is that having considered this appeal, I make the following disposal orders:

    1. The Appellant's appeal is dismissed.

    2. The Respondent shall meet the costs of the appeal and the Court below.

BOAZ N. OLAO

JUDGE

3RD APRIL 2025

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 3RD DAY OF APRIL 2025 WITH NOTICE TO THE PARTIES.

Right of Appeal

BOAZ N. OLAO

JUDGE

3RD APRIL 2025