



Otieno (Suing as the Legal Representative of the Estate of Isaya Otieno Omondi alias Othieno Omondi - Deceased) v Sinohydro & 3 others (Environment and Land Appeal E026 of 2023) [2025] KEELC 230 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELC 230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E026 OF 2023
AY KOROSS, J
JANUARY 24, 2025**

BETWEEN

**JOHN OCHIENG OTIENO APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ISAYA
OTIENO OMONDI ALIAS OTHIENO OMONDI - DECEASED**

AND

**POWERCHINA SINOHYDRO 1ST RESPONDENT
ROSE NALIAKA MURENGA 2ND RESPONDENT
WILLIAM OTIENO OGUTU 3RD RESPONDENT
STEPHEN ODUOR OKUMU 4TH RESPONDENT**

(This is an appeal from the judgment of PM Hon. L.B. Benjamin which was delivered on 8/12/2023 in Siaya CM ELC Case No. E030 of 2022)

JUDGMENT

Background of the appeal

1. Before the trial court, the appellant was the plaintiff whereas the respondents were the defendants.
2. John Ochieng Otieno (John) is the legal representative of the appellant having obtained a limited grant on the appellant's estate on 16/05/2022.
3. The subject land in dispute is parcel no. Siaya/Kalkada Uradi/718 (suit property) whose registered owner is unknown. This so as all documentary evidence that was tendered as evidence as proof of ownership particularly the certificate of official search references land parcel no. Siaya/Kalkada /718



- that is registered in the appellant's name. In other words, the suit property is different from the parcel of land that is registered in the appellant's name.
4. In the plaint dated 19/05/2022, the appellant contended he was the suit property's owner and the 3rd and 4th respondents had without his authority, conspired and permitted the 1st and 2nd respondents to excavate sand from the suit property which took place in November/December 2021.
 5. He pleaded and particularized conspiracy and trespass and sought the following reliefs from the court: -
 - a. General damages.
 - b. Costs of the suit.
 - c. Interest on (a) & (b) above at 14% from the date of filing suit until final payment.
 6. The 1st and 2nd respondents entered an appearance by the law firm of M/s. Otieno, Yogo, Ojuro & Co. Advocates and filed a defence dated 16/06/2022 in which they denied the averments contained in the plaint.
 7. They contended that all the sand harvesting that was conducted by them was carried out with the consent of the registered and/ or beneficial owner of the suit property, negotiations were done and consideration settled. They asserted the suit was extortionary and urged the trial court to dismiss the case with costs.
 8. By the law firm of M/s. Ooro & Co. Advocates, the 3rd respondent filed a defence dated 6/06/2022 and it was of the same tone as that of the 1st and 2nd respondents and I need not reiterate it. The 4th respondent did not file a defence.
 9. In reply to the defences, the appellant filed replies dated 1/11/2022 in which he joined issues with the defences in so far as they consisted of admissions and repeated the averments contained in the plaint. He urged the trial court to strike out the defences with costs.
 10. The matter proceeded to a hearing and John testified as PW1 and his evidence was led by the expert evidence of Francis Ochieng Oketch who testified as PW2.
 11. They adopted a joint witness statement as their evidence in chief and in support of the appellant's case, several documents were produced by them. Significantly, some were just marked for identification.
 12. The 2nd respondent who is an employee of the 1st respondent testified as DW1, 4th respondent (DW2) testified as the 1st respondent's witness, Collins Nyange (DW3) testified as an expert and the 3rd respondent testified as DW4. They produced several documents as evidence in support of their case.
 13. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he framed 2 issues for determination; whether the suit property is registered in the appellant's name and whether the respondents trespassed on the suit property.
 14. In his conclusions on these issues, the learned trial magistrate stated as of November 2021, John was not the appellant's administrator and as a result, dismissed the appellant's claim.

Appeal to this court

15. This decision did not go down well with the appellant and being aggrieved, he lodged a memorandum of appeal before this court dated 27/12/2023 in which he raised the following grounds of appeal which faulted the learned trial magistrate for: -
 - a. Determining the uncontested issue of ownership of the suit property.



- b. Failing to find that John, as the appellant's legal representative could institute the suit.
 - c. Disregarding the appellant's evidence.
 - d. Holding the appellant had failed to prove his case on a balance of probabilities.
 - e. Solely relying on the respondents' evidence without due regard to the appellant.
16. Accordingly, the appellant beseeched this court to allow the appeal, set aside the impugned judgment and allow the reliefs sought in the plaint, costs of the appeal, and lastly, any other relief that may appear just to be granted.

Submissions.

17. As directed by the court, the appeal was canvassed by written submissions. The appellant's law firm on record M/s.Rodi Orege & Co. Advocates filed written submissions dated 14/05/2024.
18. By them, they summarised the grounds of appeal into 2 issues for resolution: whether the appellant had locus standi to institute suit and whether the appellant proved his case on a balance of probability.
19. The 1st and 2nd respondent's law firm on record which was referenced earlier in this judgment filed written submissions dated 24/05/2024.
20. Although they did not frame any issues, nonetheless, they submitted on the appellant's summarised issues. The other respondents did not participate in the proceedings.
21. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the parties' arguments as contained in the submissions on the particular issue and also consider provisions of the law and judicial precedents that were relied upon to advance the arguments.

Issues for determination

22. 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.
23. Turning to the matter at hand, I have carefully considered the records, rival submissions, provisions of law relied upon, and judicial precedents cited and the issues for resolution are the issues as contained in the appellants' submissions and they are: -
 - a. Whether the appellant had locus standi to institute a suit.
 - b. Whether the appellant proved his case on a balance of probabilities.
 - c. What orders should this court grant including an order as to costs?

Analysis and Determination

24. These issues shall be addressed consecutively.



a. Whether the appellant had locus standi to institute a suit

25. Section 2 of the Civil Procedure Act has defined a 'legal representative' as:-

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

26. Section 82 of the Law of Succession Act (LSA) provides as follows: -

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b)

27. Section 2 (3) of The Law Reform Act states: -

“(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either _

- (a) proceedings against him in respect of that cause of action were pending at the date of his death; or
- (b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.”

28. The issue of locus standi is a primary point of law and a jurisdictional issue and in his decision the learned trial magistrate found that because John was not the registered owner of the suit property, he had no power as of November 2021 to administer the appellant's estate.

29. The appellant's counsel while relying on Section 82 of the LSA and Section 2 (1) of the Law Reform Act contends this reasoning is erroneous as by being a legal representative, the appellant could institute the suit.

30. With a contrarian argument, the 1st and 2nd respondents' counsel stated at the time of filing suit, the appellant did not have letters of administration. Nonetheless, he introduced a new ground that the appellant did not have locus standi to appeal.

31. From the evidence, it is undoubted that at the time of filing suit, the appellant was deceased having died on 27/12/1998. It is undisputed the cause of action allegedly took place sometime in November or December 2021 meaning at the time, John was not the administrator.

32. Nevertheless, and being aware of the legal requisites, he sought for limited grant of letters of administration as provided for under Section 54 of the LSA. This was granted on 16/05/2022 meaning he was a legal representative as defined by Section 2 of the Civil Procedure Act.

33. Being a tortious action that survived the appellant and as a legal administrator, John instituted the suit as empowered by Section 82 of the Law of Succession Act (LSA).



34. The suit was filed on 25/05/2022 which was just close to a week from when the limited grant was issued. This is significant because by this, John had complied with the provisions of Section 2 (3) of the Law Reform Act which required him to file suit within 6 months from when he obtained the limited grant. I therefore find he had locus standi.
35. John did not need letters of administration at the time the cause of action arose. He only needed to obtain them before he filed suit.
36. In my view, what was important was that such a cause of action survived the appellant's death and the legal administrator followed due legal process towards representation from when the cause of action arose.
37. Once he so competently filed the lower court suit, John could automatically maintain this appeal and the 1st and 2nd respondents' argument that a fresh limited grant ought to have been sought before the appeal could be lodged is misplaced and is not anchored in any law. I find this ground of appeal succeeds.

b. Whether the appellant proved his case on a balance of probabilities.

38. Article 40 of the Constitution recognizes every person has the right to acquire and own property of any description and in any part of Kenya. Protections and limitations to such rights over land are protected by Sections 24, 25, and 26 of the Land Registration Act which sets out land's rights, privileges, appurtenances, liabilities, and interests.
39. Section 152A of the Land Act 2016 states as follows: -

“A person shall not unlawfully occupy Private, Community or Public Land.”
40. Section 3 (1) of the Trespass Act defines trespass as: -

“any person who without unreasonable 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 thereof shall be guilty of an offence.”
41. The persuasive decision of *Mwangi v Njaria* [2022] KEELC 13564 (KLR) relied with approval *Winfield & Jolowicz on Tort, Sweet & Maxwell*, 19th Edition at page 428 which defined trespass thus:-

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”
42. The learned trial magistrate did not consider the ingredients of trespass. Nevertheless, as required by Section 107 of the Evidence Act, the onus was on the appellant to prove his case.
43. It was undisputed the 4th respondent was a possessor of the suit property and was a relative of the appellant. He claimed he had ancestral rights over the suit property but that is a claim for another court to determine.



44. The claim of trespass is a claim of possession. It was uncontested the 1st and 2nd respondents entered into a lease agreement dated 1/12/2021 with the 4th respondent over land parcel no. Kalkada/Uradi/718. In it, the 4th respondent was described as “owner”.
45. Having entered into a lease agreement over Kalkada/Uradi/718, it follows the 1st and 2nd respondents were not trespassers as they had permission over Kalkada/Uradi/718.
46. Even so, this Kalkada/Uradi/718 as described in the lease agreement is a different property from the suit property and land parcel no. Siaya/Kalkada /718.
67. As it is, the registered owners of Kalkada/Uradi/718 and the suit property were never proved during trial by way of producing their respective certificates of official searches or availing copies of their title documents. In the absence of proving ownership of the suit property, the appellant’s claim was bound to fail.
48. Noteworthy, Order 4 Rule 3 of the Civil Procedure Rules requires a plaintiff to sufficiently describe the subject matter of the suit if it is immovable property. It seems the appellant was unsure of misdescribed the suit property. He was the author of his misfortune and I find this ground of appeal fails.
49. Consequently, for the reasons and findings stated herein above, I find the appeal is partly merited. However, the successful ground of appeal does not interfere with the final orders of the trial court which dismissed the appellant’s case. I arrive at the same conclusion as trial court that the appellant’s suit was ripe for dismissal.
50. Ultimately, I uphold the judgment that dismissed the appellant’s case. It is trite law costs follow the event and since the appellant was partly successful, I award the 1st and 2nd respondents ½ of the costs of the appeal. Since the other respondents did not participate in the proceedings, costs are not awarded to them.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 24TH DAY OF JANUARY 2025

HON. A. Y. KOROSS

JUDGE

24/1/2025

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Rodi for the appellant

Miss. Anyango for the 1st respondent

N/A for the 2nd – 4th respondents

Court assistant: Ishmael Orwa

