



REPUBLIC OF KENYA



**Otwala & 4 others v Abonyo (Environment and Land Appeal  
E016 of 2023) [2025] KEELC 237 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 237 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E016 OF 2023  
AY KOROSS, J  
JANUARY 24, 2025**

**BETWEEN**

**NICHOLAS OCHIENG OTWALA ..... 1<sup>ST</sup> APPELLANT  
EVANS JUMA OTWALA ..... 2<sup>ND</sup> APPELLANT  
JOSEPHINE ANYANGO OTWALA ..... 3<sup>RD</sup> APPELLANT  
POLYCAP OMOLO OTWALA ..... 4<sup>TH</sup> APPELLANT  
EMMANUEL OMONDI OTWALA ..... 5<sup>TH</sup> APPELLANT**

**AND**

**JACOB ACHWANYO ABONYO ..... RESPONDENT**

*(This is an appeal from the judgment of SPM Hon. J.P. Nandi, which  
was delivered on 9/11/2023 in Bondo PM ELC Case No. E43 of 2022)*

**JUDGMENT**

**Background of the appeal**

1. To contextualise the appeal, before the trial court, the appellants were the plaintiffs whereas the respondent was the defendant.
2. At the heart of the dispute were land parcels no. South Sakwa Barkowino 11245, 11246, 11247, 11248 and 11249 (suit properties) which are separately registered in the names of the appellants.
3. According to Bondo PM SC No. E108 of 2020 (probate proceedings), the appellants were beneficiaries of the estate of their father Mourice Otwala Omwami alias Morris Otwalo Omwami (Omwami).
4. As can be seen from the probate proceedings, the suit properties were subdivisions of land parcel no. South Sakwa Barkowino/1744 (mother parcel).



5. In a plaint dated 26/09/2022 and without particularization, the appellants contended the respondent had wrongfully trespassed and taken possession of the suit properties and continued to so trespass.
6. They averred these acts had led to numerous confrontations between them. They described the respondent's occupation as not enjoyable, unpeaceful, interrupted, and not exclusive and asserted the respondent had no right to occupation.
7. According to them, the respondent had failed to heed their persistent call for him to vacate the suit properties and thus, had caused them loss and damage which they particularised.
8. Some of the particularizations were that the respondent had misused the suit properties by felling trees, cultivating, digging fencing holes, denying them access, and threatening them with physical harm which had led them to report to the area Assistant Chief. They stated the suit properties had been defaced and devalued and sought the following reliefs from the court: -
  - a. A declaration they were entitled to exclusive and impeded right to possession and occupation of the suit properties.
  - b. A declaration the respondent, his servants or agents or otherwise were wrongfully in occupation of the suit properties and accordingly, were trespassers.
  - c. A declaration the respondent, his servants, agents or otherwise were not entitled to remain on the suit properties and be evicted.
  - d. A permanent injunction restraining the respondent, his servants, agents or otherwise from remaining and continuing in occupation of the suit properties.
  - e. Vacant possession.
  - f. General damages for trespass and mesne profits together with interests until payment in full.
  - g. The orders be enforced by the Assistant Chief of Bar-Kowino sublocation and the OCS Bondo police station.
  - h. Costs of the suit.
  - i. Any such other or further relief as this court may deem appropriate.
9. In response, the respondent vehemently denied the averments contained in the plaint, and by defence and counterclaim dated 16/01/2022, he denied the averments contained in the plaint. He also asserted he was a stranger to some of the averments therein.
10. It is noteworthy in the counterclaim, that the respondent acted as the attorney of his father James Abonyo Rasugu (Rasugu) having been so appointed by a specific power of attorney dated 18/09/2022.
11. In the counterclaim, he stated by an agreement for sale, he purchased the mother parcel from Omwami on 9/07/1985 at a consideration of kshs. 6250/=, he immediately took possession, established a home therein and cultivated it.
12. He asserted in an unfortunate turn of events, Omwami died before he could transfer the mother parcel to him. Thus, as a bona fide purchaser, the appellants could not legitimately be registered as the proprietors of the mother parcel before subdividing it without his consent.
13. Hence, the appellants' actions of subdivision, transfer and registration of the mother parcel were illegal and he particularised illegality, loss and damage.



14. The acts of illegality included stealing Omwami's title deed and dealing with the suit properties without his consent while on loss and damage, he stated he had been deprived of beneficial rights to occupy and use the suit properties, been rendered destitute and, consequently he had suffered damages and trauma.
15. In the end, he sought the following reliefs from the trial court: -
  - a. The plaintiff's suit be dismissed with costs.
  - b. A declaration the subdivision, transfer and registration of the mother parcel in the appellants' name was illegal, null and void.
  - c. A declaration he was the beneficial owner of the mother parcel.
  - d. Permanent injunction restraining the appellants, their servants or agents from interfering with the suit properties.
  - e. An order for the appellants to surrender the title deeds of the mother parcel and of the suit properties, their cancellation and that the mother parcel's registration be reverted to Omwami.
  - f. Costs of the suit and interests thereon.
  - g. Any other or further remedy that his honourable court may deem fit and just to grant.
16. In reply, the appellant filed a reply to the defence and defence to counterclaim dated 27/01/2023.
17. In summary, the appellants denied the respondent's assertions. He attacked matters of evidence and stated no agreement for sale existed and that the declaration had been doctored. That in any case, it had been caught up by the effluxion of time.
18. According to him, no house stood on the suit properties and the probate proceedings and their subsequent registration and subdivision followed due process and, further, the respondent encroached on the suit properties in 2022. They denied the respondent's claim of illegality.
19. The matter proceeded for hearing and the appellants respectively testified as PW1, PW2, PW3, PW4 and PW5. They adopted a joint witness statement as their evidence in chief and in support of their case, PW1 produced documents as Pex.1-7.
20. As for the respondents, he testified as DW1 and his evidence was led by Samuel Okado Abonyo, John Agony Abonyo and Isaac Billo Abonyo who respectively testified as DW2-4. It appears all these witnesses were his siblings. The respondent produced documents as Dex.1-3.
21. After hearing the parties, the matter was reserved for judgment. In the impugned judgment that the learned trial magistrate rendered, he framed 3 issues for resolution; whether the respondent was a trespasser, whether the respondent bought the mother parcel and, whether the respondent was in occupation of the suit properties.
22. In his conclusions on these issues, the learned trial magistrate found the respondent was not a trespasser and found the respondent had proved his case and granted some of the reliefs sought by the respondent.
23. Additionally, he declared the appellants' titles to the suit properties were extinguished and that Rasugu had acquired the mother parcel and suit properties by adverse possession.

### **Appeal to this court**

24. Dissatisfied by the impugned judgment, the appellant filed their memorandum of appeal dated 17/11/2023 which faulted the learned trial magistrate on 16 grounds.



25. Being aware of the shortcomings of the grounds as they were not concise and repetitive, in submissions dated 29/05/2024 filed by their law firm on record M/s. Mulinge Ochieng & Co. Advocates abandoned some of the grounds and consolidated others.
26. The residual grounds faulted the learned trial magistrate for:
  - a. Finding there was an agreement for sale.
  - b. Failing to find the counterclaim was statute-barred.
  - c. Dealing with the claim of adverse possession yet it had not been pleaded.
  - d. Finding the appellants had not proved their claim of trespass.
27. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment, costs of the appeal and the lower court suit, and lastly, any other relief that may appear just to be granted.

### **Submissions.**

28. As directed by the court, the appeal was canvassed by written submissions. The appellants' submissions were highlighted earlier herein and they argued the appeal on the summarised grounds.
29. In adopting the abridged grounds as the issues for determination, the respondent who was acting in person filed written submissions dated 17/06/2024.
30. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the parties' arguments 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**

31. Being a 1<sup>st</sup> appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected himself thus arrived at an erroneous decision, undoubtedly exercised his discretion wrongly and occasioned injustice by such erroneous exercise.
32. 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 condensed grounds of appeal as contained in the appellants' submissions.

### **Analysis and Determination**

33. These summarized grounds shall be addressed consecutively, however, because of interrelations between issues (b) and (c), these 2 issues shall be handled together.

#### **a. Whether the learned trial magistrate erred in finding there was an agreement for sale.**

34. It must be borne in mind before Section 3 (3) of the *Law of Contract Act* amendments became operative from 1/06/2003 (See Statute Law (Misc. Amendments] No.2 of 2002), contracts over land could be made orally or in writing.



35. Regardless of the nature of the agreements, certain requirements had to be met. A written agreement had to be executed whereas for oral agreements, part performance had to be exhibited. This repealed Section 3 (3) stated thus: -

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

(i) Has in part performance of the contract taken possession of the property or any part thereof or

(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” Emphasis added.

36. To prove the existence of an agreement for sale, the respondent produced as Dex. 2 a declaration of sale which was executed before the District Magistrate on 9/07/1985.

37. The contents are explicit that parcel no “1744” had been sold to Rasugu by Omwami, consideration of kshs. 6250/- was fully settled, the land had been surrendered to him and Omwami would never lay any claim to it in the future.

38. The term “declaration” was defined by the Supreme Court of Kenya decision of *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR) as follows: -

“94. Black’s Law Dictionary, 9<sup>th</sup> Ed., p 467 defines “declaration” as “a formal statement, a proclamation, or announcement, especially one embodied in an instrument.” It defines “publication” (p 1347) as “generally, the act of declaring or announcing to the public.” It then defines “announce” (p 106) as “to make publicly known; to proclaim formally” ...

95. Declaration, from a legal perspective, requires the use of an instrument. Black’s Law Dictionary (p 869) defines “an instrument” as “a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note or share certificate.” From the above definitions, it is clear that an instrument bears legal force particularly because of its content, and its formal face of authority and validity. The process of election culminates in the issuance of a certificate which squarely falls within the said definition of the instrument.”

39. In the impugned judgment, the learned trial magistrate found the declaration met the ingredients of a contract as envisaged by Section 3 (3) of the *Law of Contract Act*. The respondent concurred with this finding.

40. On the contrary and relying on Section 76 (1) of the *Evidence Act*, the appellants’ counsel stated the burden of proving the authenticity of the declaration lay with the respondent particularly as to Omwami’s signature. He also questioned the absence of the court’s seal on the said instrument.



41. It seems the appellants' counsel misapprehended the import of Section 76 (1) which deals with comparison by court of signatures, writings, seals and finger impressions.
42. Since the reply to the defence and defence to counterclaim stated the signatures contained in the declaration were forgeries, the burden of proof rested with the appellants. This position is anchored in Section 107 of the *Evidence Act* which states: -
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
43. From the record, the appellants did not take any steps to prove that the signature appended on the document was not of Omwami by bringing a document examiner or other expert to prove that the signature appended in the declaration was a forgery.
44. On the other hand, the respondent discharged his evidential burden by placing before the court the declaration which was duly executed by Omwami who was the vendor and Rasugu the purchaser and considering provisions of the repealed Section 3 (3) of the *Law of Contract Act* and *Joho & another v Shahbal* (Supra), one cannot fault the finding of the learned trial magistrate. This ground of appeal fails.

**b. Whether the learned trial magistrate erred in failing to find the counterclaim was statute-barred and erred in dealing with the claim of adverse possession yet it had not been pleaded.**

45. It is a general principle of law that parties are bound by their pleadings and this was resonated in the Court of Appeal decision of *David Sironga Ole Tukai v Francis Arap Muge, Kiprotich Arap Kirui & Johannah Kiprono Arap Mosonik* (Sued as Chairman, Secretary & Treasurer of Kapkween Farmers Co-operative Society Ltd) [2014] KECA 155 (KLR) that has been relied upon by the appellants.
46. In their submissions, the appellants contend the claim of adverse possession was never pleaded by the respondent in his counterclaim and faults the learned trial magistrate for delving into an unpleaded issue.
47. The respondent concedes in his submissions that indeed he did not plead adverse possession but in seeking recourse in the Court of Appeal decision of *Odd Jobs vs Mubia* (1974) EA 476, he argues there are exceptions to the general rule in instances where in the course of the trial, an unpleaded issue has been dealt with.
48. Both parties' arguments are valid and when dealing with a similar issue, the Apex Court had this to say in *Muthuuri & 4 others v Attorney General & 2 others* [2023] KESC 52 (KLR):-
- “The general rule is that parties are bound by their pleadings. However, a court may make a determination on an unpleaded issue where in the course of the hearing, parties have canvassed the issue and left it to the court to determine. See *Odd Jobs v Mubia* [1970] EA 476.”
49. It is indubitable the respondent did not plead adverse possession nonetheless, the learned magistrate made a positive finding on this in Rasugu's favour.



50. The question this court will be asking itself is whether the respondent's case met the exception test as held in *Odd Jobs* (Supra). To answer this, this court has to revisit the evidence that was canvassed before the trial court.
51. A scrutiny of the record demonstrates some of the elements of adverse possession were pleaded in paragraph 6 of the plaint and the claim of adverse possession was canvassed before the trial court by both parties and made an issue in the suit through adduced evidence.
52. Nevertheless, the learned trial magistrate fell in grave error when he entertained this issue of adverse possession yet the respondents had pleaded and particularised illegality.
53. These 2 claims could not be dealt with together because, in a claim of adverse possession, the claimant must first concede to the legality of the registered owners' title. As held in the persuasive decision of *Njue v Matiabe & 3 others* (Environment & Land Case E050 & E010 of 2021 (Consolidated)) [2023] KEELC 17361 (KLR) (11 May 2023) (Judgment), when one challenges the validity of the owners' title, the claim for adverse possession is defeated and thus becomes legally untenable.
54. In any case the learned trial magistrate stated the suit properties' titles were lawfully acquired and in light of the probate proceedings, he cannot be faulted. On this limb, I find the claim of adverse possession should not have been entertained by the trial court.
55. On the limb of the respondents' claim of adverse possession being time-barred, the court has already found that the claim of adverse possession should not have been entertained.
56. But I must mention the appellants' argument that such a claim is time-barred is misplaced and as held in the decision of *Abraham Adams Gina* (Suing on behalf of his Geoffrey Adams Ogwa) v *Geofrey Ogaba Namadoa* [2022] KEELC 572 (KLR) that has been relied upon by the respondent, adverse possession claims do not suffer time bars.

**c. Whether the learned trial magistrate erred in finding the appellants had not proved their claim of trespass.**

57. 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.
58. Section 152A of the *Land Act* 2016 states as follows: -
 

“A person shall not unlawfully occupy Private, Community or Public Land.”
59. 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.”
60. In the context of land, Blackstone, William. *Commentaries on the Laws of England: Book III: of Private Wrongs*, edited by Thomas P. Gallanis, Oxford University Press, 2016, pg 142 defined trespass in the following words: -
 

“...it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of



meum [mine] and tuum [thine], or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression." Emphasis added.

61. In claims of trespass, the land owner must also be in possession by entry. In expounding on this, Blackstone pg 141-142 stated as follows: -
  - “One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.”
62. In claims of trespass, an alleged trespasser can lodge several defenses including justifying his actions, claiming he has a title, or that he has a right of entry.
63. In the circumstances of this case, when the appellants lodged their claim of trespass, Raburu and by extent the respondent properly contested this by contending that they were not trespassers but purchasers who had a right of entry.
64. Although the learned trial magistrate wrongly dealt with the issue of adverse possession, as earlier stated, the respondent proved the existence of an agreement for sale. Additionally, had they not pleaded illegality, I would have without a doubt found he was an adverse possessor.
65. On application on the definition of trespass and from evidence, the appellants who were registered as the owners of the suit properties sometime on 17/06/2022 have never made an effective re-entry to the suit properties and they found the respondent in occupation thereof and has always done so.
66. In other words, they have never had possession. For these reasons which albeit differ with the learned trial magistrate's reasoning, I concur with the findings of the learned trial magistrate that the appellants did not prove their claim of trespass.
67. Consequently, for the reasons and findings stated herein above, I find the appeal is partly merited. I hereby partly set aside the judgment and decree of the learned trial magistrate rendered on 9/11/2023 which allowed the respondent's claim and hereby substitute it with an order dismissing the respondent's claim.
68. It is trite law costs follow the event and since all parties were unsuccessful in the claims before the trial court, each party shall bear their respective costs of the appeal and lower court suit.
69. At last, I substitute the trial court judgment by issuing the following final disposal orders: -
  - a. That appellants' suit before the trial court is hereby dismissed.
  - b. That the respondent's counterclaim before the trial court is hereby dismissed.
  - c. Each party shall bear their respective costs of this appeal and the lower court's claims.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 24<sup>TH</sup> 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. Ochieng for the appellants

Respondent

Court assistant: Ishmael Orwa

