Chege & 2 others v Malombe & 2 others (As Treasurer, Secretary and Vice Chairman (devt) of Believe Deliverance Ministries) (Environment and Land Appeal E049 of 2022) [2025] KEELC 1157 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1157 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E049 OF 2022

YM ANGIMA, J

MARCH 6, 2025

BETWEEN

PETER MUKORA CHEGE ..... 1ST APPELLANT

DANIEL CHEGE KARANJA ALIAS AMANI ..... 2ND APPELLANT

NICHOLA NYORO GIOGO ..... 3RD APPELLANT

AND

PATRICK MUTIA MALOMBE ..... 1ST RESPONDENT

POLYCAP MAITHYA NGAU ..... 2ND RESPONDENT

TITUS KALAMBA MASUMBA ..... 3RD RESPONDENT

AS TREASURER, SECRETARY AND VICE CHAIRMAN (DEVT) OF BELIEVE DELIVERANCE MINISTRIES

(Being an appeal against the judgment and decree of Hon. J. B. Kalo (CM) delivered electronically on the 3rd day of November 2022 in Mombasa CM ELC No.36 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. J. B. Kalo (CM) dated 03.11.2022 in Mombasa CM ELC No. 36 of 2018 – Patrick Mutia Malombe & 2 Others (Suing as treasurer, secretary and vice chairman of Believers Deliverance Ministries -vs- Peter Mukora Chege. By the said judgment, the trial court partially allowed the respondent's suit and dismissed the appellants' counterclaim.

B. Background

2. The record shows that vide a plaint dated 08.07.2016 and amended on a date which is not clear from the record, the respondents who were officials of Believers Deliverance Church (the Church) sued the appellants seeking the following reliefs:

    a. An injunction to restrain the defendants by themselves or their servants or agents from entering, evicting or demolishing or in any other manner whatsoever interfering with the plaintiffs' and other ministry members' occupation and use of Plot No. Msa/West/2557.

    b. A declaration that the defendants' action unlawful hence the defendants should pay compensation for the partly damaged suit premises Kshs.4,670,989.63.

    c. Costs of this suit.

3. The respondents pleaded that on 31.10.2011 the church bought a portion of Plot No. Mombasa/West/2557 (the suit property) from the late Salome Gathoni Chege (the deceased) for valuable consideration. They pleaded that they constructed a large church on the suit property for worship where they were conducting church services without interference from any quarters until 06.07.2016 when the appellants unlawfully invaded the suit property, demolished part of the church and destroyed property thereon. It was pleaded that some of the appellants were charged with a criminal offence in criminal case No.1485 of 2016.

4. It was the respondents' case that as a result of the appellants' said action the church had suffered loss and damage to the tune of Kshs.4,679,989.63 for which the appellants were liable. It was their case that despite issuance of a demand and notice of intention to sue, the appellants had failed to make good their claim thus necessitating the filing of the suit.

5. The record shows that the appellants filed a defence and counter-claim dated 11.05.2017. By their defence, they denied liability for the respondents' claim and put them to strict proof thereof. The 1st respondent pleaded that he was one of the administrators of the state of the deceased and a co-owner of the suit property.

6. The appellants denied that the church ever bought the suit property from the deceased and pleaded, in the alternative, that if there was any such sale then the transaction was null and void because the deceased did not have the power or legal capacity to sell without the consent of the 1st respondent. As a result, the appellants pleaded that the church was illegally erected on the suit property pursuant an invalid sale agreement hence the respondents were trespassers thereon.

7. The appellant denied having invaded the suit property and or having caused damage thereon and pleaded that on the material date they made a peaceful entry thereon with a view to recovering the suit property which was illegally in the possession of the church.

8. The appellants denied that the church had suffered any loss and damage and denied that they were liable to compensate the church. They denied service of a demand and notice of intention to sue and put the respondents to strict proof thereof.

9. By their counter-claim the appellant pleaded that the suit property was at all material times the property of the late Daniel Chege Karanja (late Chege) which was at the material time jointly registered jointly in the name of the 1st appellant and the deceased. It was pleaded that sometime in 2009 the respondents illegally entered the suit property and erected a church building thereon without their knowledge and consent. They further pleaded that the purported sale agreement dated 31.10.2011 between the

deceased and the church was null and void and did not confer any legal interest upon the church since the deceased had no legal capacity to solely sell the property without involving a co-administrator.

10. The appellants further pleaded that as a result of the respondents' continued trespass they had suffered loss and damage for which the respondents were liable. As a result, they sought the following reliefs in the counter-claim;

    a. The plaint be dismissed.

    b. A declaration that the sale agreement dated 31st October 2011 in respect of the property known as subdivision number 2557(Original Number 10994) Section VI Mainland North is invalid and null.

    c. The plaintiff is the rightful and/or bona fide registered owner of the suit property on behalf of the estate of the late Daniel Chege Karanja Karari.

    d. A mandatory injunction against the defendants requiring them to deliver up vacant possession of the property known as sub-division number 2557 (original number 10994) Section VI Mainland North to the plaintiff failing which the defendants be evicted therefrom at the defendants' expense.

    e. General damages for trespass.

    f. Costs of the suit and counter-claim with interest at court's rates.

11. The record shows that the respondents filed a reply to the defence and defence to counter-claim dated 12.06.2017. By their reply to defence they joined issue upon the appellants' defence and reiterated the contents of the plaint. They denied that the sale transaction was null and void and that they were trespassers on the suit property and put the appellants to strict proof thereof.

12. By their defence to counter-claim they denied the appellants' counter-claim in its entirety and put them to strict proof thereof. They pleaded that all material times the appellants were aware of the sale transaction but they did not raise any objection thereto during the lifetime of the deceased. As a consequence, they prayed for dismissal of the appellants' defence and counter-claim.

C. Trial Court's Decision

13. Upon a full hearing of the suit, the trial court found that although the sale agreement between the deceased and the church was null and void, the appellants had acted unlawfully by invading the suit property and causing damage to property. The trial court further found that the respondents had proved their claim for compensation for the partial demolition of the church and proceeded to award them Kshs.4,670,987.63 as compensation. Regarding the appellants' counter-claim, the trial court was of the view that the appellants' omission to join the co-administrator of the estate of the deceased was fatal to the counter-claim. As a result, the court struck out the appellants' counter-claim with costs to the respondents.

D. Grounds of Appeal

14. Being aggrieved by the said judgment the appellants filed a memorandum of appeal dated 02.12.2022 raising the following 7 grounds of appeal:

    a. The learned Magistrate erred in fact and in law in finding and holding that the counter-claim by the 1st Defendant was null, void and invalid.

b. The learned Magistrate erred in law by considering and rendering a decision on facts and issues that were not pleaded by the plaintiffs/defendants in the counter-claim.

c. The learned Magistrate erred in fact and in law in failing to consider and render a decision on the counter-claim as pleaded by the 1st defendant.

d. The learned Magistrate erred in fact and in law in failing to accord the 1st defendant an opportunity to be heard on the purported failure to include Hellen Njeri as co-plaintiff in contravention of the right to a fair hearing.

e. The learned Magistrate erred in fact and in law in awarding the plaintiffs compensation in the sum of Kshs.4,670,989.63 against the defendants.

f. The learned Magistrate erred in fact and in law in arriving at a decision against the weight of law and evidence.

g. The learned Magistrate erred in awarding costs and interest on the plaintiffs'' claim or at all.

15. As a result, the appellants sought the following reliefs in the appeal:

a. That the appeal be allowed.

b. That the judgment of the trial court dated 03.11.2022 be set aside.

c. The claim by the plaintiffs be dismissed with costs to the defendants.

d. The 1st defendant's counter-claim against the plaintiffs be allowed with costs to the 1st defendant.

e. An appropriate order for costs be made in respect of this appeal and

f. Any other or further order that this Honourable Court may deed fit to grant.

E. Directions on Submissions

16. It would appear that when the appeal came up for directions the parties agreed to canvass it through written submissions. As a result, the parties were directed to file and exchange their respective submissions on the appeal. The record shows that the appellants filed submissions dated 24.10.2024 whereas the respondents' submissions were dated 17.02.2025.

F. Issues for Determination

17. Although the Appellants raised 7 grounds in their memorandum of appeal, the court is of the view that the key issues in the appeal may be summarized as follows;

a. Whether the trial court erred in law and fact in allowing the respondents' suit.

b. Whether the trial court erred in law and fact in striking out the appellants' counter-claim.

c. Whether the appellants are entitled to the reliefs sought in the appeal.

d. Who shall bear costs of the appeal.

A. Applicable legal principles

1. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The

principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 as follows;

> " ...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

19. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows;

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

20. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows;

> " My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

21. In the case of Kapsiran Clan -vs- Kasagur Clan [2018] eKLR Obwayo J summarized the applicable principles as follows;

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law and fact in allowing the respondents' suit

22. The court has considered the material and submissions on record. Even though the appellants had contended in their memorandum of appeal that the trial court had decided the suit against the weight of evidence they did not pursue the issue further in their written submissions. In fact, they canvassed grounds (b), (e) and (f) together and concentrated on the award of compensation of the Kshs.4,670,989.63 for the partial demolition of the church. It was their submission that the respondents' claim for compensation was not pleaded with sufficient particularity and that in any event the respondent had merely sought a declaration of rights and not actual compensation for alleged damage to the church.

23. The appellants cited the cases of Joseph Ochieng & 2 Others trading as Aquiline Agencies vs First National Bank of Chicago [1995] eKLR and World Explorers Safaris Limited vs Cosmopolitan Travel Limited & Another [2021] eKLR in support of their submissions on damages. It was thus the appellants' contention that the respondents were not entitled to the special damages of Kshs.4,767,989.63 awarded by the trial court.

24. On their part, the respondents submitted that their claim for compensation was properly pleaded and particularized in the amended plaint. It was their submission that detailed particulars were even made available in the bills of quantities and valuation report served upon the appellants and the amount of compensation was not challenged by any other valuation report. It was thus the respondents' case that their claim for compensation was properly pleaded and proved to the required standard.

25. There is no doubt that a claim for special damages ought to be pleaded before it can become available. There is also no doubt that such claim ought to be pleaded with particularity. The manner of pleading such a claim was considered in the case of Ouma vs Nairobi City Council [1976]eKLR as follows;

> " Thus for a plaintiff to succeed on a claim for special damages, he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, Ratcliffe V Evans (1892) 2 QB 524 where Bowen LJ said at pages 532 & 532:
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> > The character of the act themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

26. The court has perused the amended plaint which was before the trial court. The respondents had pleaded in the body of the plaint that the appellants had invaded the suit property and demolished part of the church building in consequence whereof they had suffered loss and damage. However, the amount of money sought as compensation was only contained in the prayers and worded thus;

> "A declaration that the defendants' action was unlawful hence the defendant should pay compensation for the partly damaged suit premises (Kshs.4,670,989.63)."

27. The purpose of pleading special damages with particularity is so that the adverse party may be fully aware of the nature and extent thereof because unlike general damages, they are not usually a natural consequence of the actions complained of. In this particular case, the nature and character of the actions complained of were well known to the appellants. In fact, they were pleaded in the amended plaint. The respondents had specifically pleaded that the appellants and their agents had invaded the suit property and partly demolished part of the church. They pleaded that as result they had suffered loss and the value of the demolished part was pleaded at Kshs.4,670,989.63. The appellants were also supplied with a copy of the relevant bills of quantities prepared by a quantity surveyor whose opinion was that the cost of restoration was kshs. 4,670,989.63

28. One wonders what else the appellants wanted to know about the nature and extent of the damage they had caused and the expense of restoration. In the opinion of the court, the appellants had sufficient information on the nature, extent and particulars of special damages and it was not necessary for the respondents to reproduce the full quantity surveyor's report in the plaint. There is no indication on record to show that he appellants were unable to appreciate the nature, extent and particulars of special damages before the trial court.

29. It may well be that the respondents' claim could have been drafted more diligently and with greater precision. Although it is usual for advocates to plead the figures both in the body of the plaint and the reliefs section, any omission to do so is not necessarily fatal to a claim for special damages. Similarly, the inelegant pleading combining a declaration and a claim for compensation in the same prayer is not fatal to a claim for compensation. This court is obligated both under Article 159(2)(d) of *the Constitution* and Section 19(1) of the *Environment and Land Court Act* to dispense substantive justice without undue regard to procedural technicalities. As a result, the court is satisfied that the respondents' claim for compensation in the sum of Khss.4,670,989.63 was adequately pleaded and that it was proved to the required standard.

30. The court finds absolutely no merit in the appellants' submission that the trial court ought to have awarded interest from the date of judgment and not the date of filing suit. The court is aware that under Section 26 of the *Civil Procedure Act* a trial court has absolute discretion to award interest for any period before judgment and from the date of judgment. It is usual for courts in our country to award interest on general damages from the date of the judgment and interest on special damages from the date of filing suit. The court is not persuaded that the trial court committed any error of principle in awarding damages from the date of filing suit until payment in full.

b. Whether the trial court erred in law and fact in striking out the appellants' counter claim

31. The court has considered the material and submissions on record on this issue. The appellants canvassed grounds (a) (c) and (d) of the memorandum of appeal together. It was the appellants' submission that the trial court erred in law in striking out their counter-claim on the basis that the 1st appellant had not joined his co-administrator or her representative.

32. The court readily agrees with the appellants that there was no valid reason to strike out the counter-claim on account of the said omission, although it may have impacted certain prayers the appellants were seeking in the counter-claim. The trial court should have considered the counter-claim on merit and granted only those remedies which were awardable in the circumstances. For instance, the prayer for the 1st appellant to be declared the rightful owner of the suit property to the exclusion of the deceased was not tenable and awardable.

33. The court has re-evaluated the evidence on record on the 1st appellants' counter-claim. There is no doubt that the trial court found and held that the sale transaction between the church and the deceased was null and void because the latter had no capacity to sell the suit property. The 1st appellant was thus entitled to a declaration to that effect as sought in the counter-claim.

34. Following that finding the 1st appellant was also entitled to an order of delivery of vacant possession of the suit property since there was no legal basis upon which the respondents could continue with its occupation. Such a remedy would not require the participation of the 1st appellant's con-administrator or her representative hence it should have been granted in the circumstances.

35. The court is, however, of the view that the 1st appellant was not entitled to a declaration that he was the rightful owner of the suit property since he was holding it on behalf of the estate of his late father and he was not the sole administrator of the estate. The court is further of the view that he was also not entitled to general damages for trespass since the trial court found that the respondents were not trespassers on the suit property.

36. The circumstances of the respondents' entry into the suit property were not contested before the trial court. They had initially leased the land from the deceased but later on entered into a sale agreement with her on 31.10.2011. The evidence on record shows that the church paid the purchase price and developed the property during the lifetime of the deceased who was said to be a member of the church. The 1st appellant who was a son the deceased did not raise any objection or sue the church during the lifetime of the deceased even though the church was openly in possession. In those circumstances, the church could not be termed as a trespasser.

c. Whether the appellants are entitled to the reliefs sought in the appeal

37. The court has found that the trial court erred in law in striking out the 1st appellant's counter-claim on a technicality. The court has also found that the 1st appellant was entitled to a declaration that the sale agreement dated 31.10.2011 was null and void and that the appellants were entitled to possession of the suit property. However, given the circumstances under which the church entered and developed the property they shall be given a grace period of 6 months to hand over vacant possession.

38. The court is thus of the opinion that the appellants are only entitled to those two reliefs and not all the reliefs sought in the counter-claim and the memorandum of appeal. The court is further inclined to vary the order on costs made by the trial court so that each side bears its own costs.

d. Who shall bear costs of the appeal

39. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. Owing to the fact that the appellants have partly succeeded and the respondents have also partly succeeded, the court is of the opinion that each side should bear its own costs of the appeal.

I. Conclusion and Disposal Orders

40. The upshot of the foregoing is that the court finds that there is merit in the Appellant's appeal only to the extent shown in the judgment. The appellants' appeal shall succeed in part. As a result, the court makes the following orders for disposal of the appeal:

    a. The judgment and decree of the trial court on the counter-claim is hereby varied in the following terms;

        i. The order striking out the appellants' counter-claim with costs is hereby set aside.

        ii. A declaration is hereby made that the sale agreement dated 31.10.2011 for sale of the suit property was null and void.

        iii. An order is hereby made for the respondents to deliver vacant possession of the suit property i.e. sub-division No.2557 Section VI/MN within 6 months from the date hereof in default of which they shall be forcibly evicted.

    b. The judgment of the trial court on the respondents' claim is hereby affirmed.

    c. Each party shall bear his own costs of both the appeal and the trial which was concluded before the trial court.

    It is so decided.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 6TH DAY OF MARCH, 2025.

In the presence of:

Court Assistant Kalekye

Mr. Mrima for the appellants

Mr. Mutisya for the respondents

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Y. M. ANGIMA

JUDGE