



**Okumu v Odongo & 2 others (Environment & Land Case  
80 of 2017) [2025] KEELC 1179 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1179 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 80 OF 2017  
SO OKONG'O, J  
MARCH 10, 2025**

**BETWEEN**

**WILLIAM OPIYO OKUMU ..... PLAINTIFF**

**AND**

**JOSEPH OUMA ODONGO ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KISUMU ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The pleadings**

1. The Plaintiff brought this suit on 24<sup>th</sup> February 2017 through a plaint dated 17<sup>th</sup> February 2017. The Plaintiff amended the plaint on 19<sup>th</sup> October 2023. In his amended plaint, the Plaintiff averred that at all material times, he was the owner of all that parcel of land known as Title No. Kisumu/Border/4 (hereinafter referred to as “the suit property”). The Plaintiff averred that the 1<sup>st</sup> Defendant who was the son of one, Dominicus Odongo with whom he had a long standing dispute over the suit property was also claiming to be the owner of the suit property. The Plaintiff averred that Dominicus Odongo had agreed to surrender the suit property to the Plaintiff but did not fulfil the agreement. The Plaintiff averred that he had lodged a complaint against the 1<sup>st</sup> Defendant over the suit property at the Nyando Land Disputes Tribunal and Nyanza Province Land Appeal Committee, which confirmed in their decisions that the Plaintiff was the owner of the suit property. The Plaintiff averred that the said decisions were nevertheless quashed by the High Court, which held that the said tribunal and Appeal Committee had no jurisdiction to entertain the dispute between the Plaintiff and the 1<sup>st</sup> Defendant, which concerned ownership of the suit property.
2. The Plaintiff averred that the 1<sup>st</sup> Defendant purported to file a Succession Cause at the Magistrate’s Court at Nyando in respect of the estate of Dominicus Odongo under which he purported to



transfer the suit property to his name while this suit was pending. The Plaintiff averred that the 1<sup>st</sup> Defendant transferred the suit property to its name irregularly, fraudulently and in collusion with the 2<sup>nd</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> Defendant persuaded the Plaintiff to sign a sale agreement dated 5<sup>th</sup> May 2008, which he misrepresented as a medical help document. The Plaintiff averred that the 1<sup>st</sup> Defendant also took advantage of the Plaintiff's illiteracy to do succession over the suit property owned by the Plaintiff. The Plaintiff averred further that the 1<sup>st</sup> Defendant fraudulently removed the caution that the Plaintiff had put on the suit property without the Plaintiff's knowledge. The Plaintiff averred further that the 1<sup>st</sup> Defendant obtained documents relating to the suit property from the Plaintiff's filed fraudulently without his consent.

3. The Plaintiff averred that despite the earlier findings that the Plaintiff was the owner of the suit property, the 1<sup>st</sup> Defendant trespassed on the suit property. The Plaintiff averred that the 1<sup>st</sup> Defendant forcibly; fenced the suit property, cut down the Plaintiff's trees on the property, killed the Plaintiff's cows, sheep and goats, buried the remains of one, Caren Akeyo Odongo and the 1<sup>st</sup> Defendant's brother on the property and built a house on the property in 2023. The Plaintiff averred that as a result of the 1<sup>st</sup> Defendant's trespass and malicious damage to his property, the Plaintiff had suffered huge losses for which he held the 1<sup>st</sup> Defendant liable. The Plaintiff put the special damages that he suffered at a total of Kshs. 615,000/-. The Plaintiff averred that the 1<sup>st</sup> Defendant's acts of trespass and damage to the Plaintiff's property continued even after the court ordered the parties to maintain the status quo on 5<sup>th</sup> October 2023.
4. The Plaintiff averred that the 1<sup>st</sup> Defendant's father, Domnicus Odongo who was closely related to the Plaintiff was given the responsibility of holding the suit property in trust for the Plaintiff while the Plaintiff was living in Tanzania. The Plaintiff averred that the action by the 1<sup>st</sup> Defendant's father of registering the suit property in his name without the consent or permission of the Plaintiff amounted to breach of trust. The Plaintiff averred in the alternative that his father and he had consistently, notoriously and openly occupied and used the suit property for over 50 years and as such had acquired prescriptive rights over the property.
5. The Plaintiff prayed for judgment against the Defendants for;
  - a. A declaration that the suit property belonged to the Plaintiff and an order for vacant possession;
  - b. A declaration that the 1<sup>st</sup> Defendant and his father breached the constructive and beneficial trust on which they held the suit property;
  - c. A declaration that the Plaintiff and his family had acquired prescriptive rights over the suit property, having occupied the same for over 50 years;
  - d. An order that the property be registered in the name of the plaintiff;
  - e. General damages for trespass, breach of trust, fraud and malicious damage to property;
  - f. An order of a permanent injunction restraining the Defendant by himself, his agents and/or servants from interfering, encroaching and/or trespassing on the suit property; and
  - g. Costs and interests.
6. The 1<sup>st</sup> Defendant entered appearance and filed a statement of defence on 5<sup>th</sup> March 2020. The 1<sup>st</sup> Defendant amended his statement of defence on 15<sup>th</sup> January 2024. In his amended statement of defence, the 1<sup>st</sup> Defendant averred that he was a stranger to the Plaintiff's claim over the suit property.



- The 1<sup>st</sup> Defendant admitted that the High Court had quashed the decisions that had been made in the Plaintiff's favour by the Nyando Land Disputes Tribunal and the Nyanza Province Land Appeal Committee on the ground that they had no jurisdiction to determine a dispute over land ownership. The 1<sup>st</sup> Defendant denied paragraphs 8, 9, 10, 11, 12, 13, 13A, 14, 15, 16, 17, 18, 19, 20, 20A, 21, 21A, 22, 22A, 22B, 22C and 23 of the amended plaint. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiff's suit with costs.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a joint statement of defence on 25<sup>th</sup> April 2018. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied the Plaintiff's claim in its entirety, contending that they were strangers to the same. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that if there was any transfer of the suit property to the 1<sup>st</sup> Defendant, the same was done procedurally and in accordance with the law. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants urged the court to dismiss the Plaintiff's suit with costs.
  8. At the trial, the Plaintiff, William Opiyo Okumu(PW1) gave evidence and called one witness. The Plaintiff told the court that he was born in 1962. He adopted his witness statement dated 16<sup>th</sup> October 2023 as part of his evidence in chief. In his oral testimony in court, the Plaintiff stated as follows: The 1<sup>st</sup> Defendant was his cousin. His father, Okumu Agadi and the 1<sup>st</sup> Defendant's father were brothers. They were both sons of Agadi Ochola. Agadi Ochola had two wives. His first wife was Oloo d/o Ogola. Agadi Ochola settled at Awasi from Kajulu with his first wife Oloo d/o Ogola and his two sons, Okumu and Monye. Oloo d/o Ogola had another son, Gari who was born in Awasi. Agadi Ochola had a second wife, known as Kiseru Agadi who was married after Agadi Ochola had settled at Awasi.
  9. PW1's father Okumu was the son of Agadi Ochola's first wife, Oloo d/o Ogola, while the 1<sup>st</sup> Defendant's father, Domnicus Odongo was the son of Agadi Ochola's second wife Kiseru Agadi. Agadi Ochola moved his second wife, Kiseru Agadi, from his homestead at Awasi where he had settled her together with his first wife, Oloo d/o Ogola. Agadi Ochola gave his second wife Plot No. 3785 and Plot No. 5. While Kiseru Agadi was being moved, PW1's grandmother, Oloo d/o Ogola remained in her homestead at Awasi where she was settled by Agadi Ochola when they came from Kajulu.
  10. PW1 stated that the parcel of land on which his grandmother Oloo d/o Ogola lived was left for his father Charles Okumu Agadi. Okumu Agadi had six (6) children, the Plaintiff, William Opiyo Okumu, John Oloo, deceased, Elidah Atieno, Lucia Aoko deceased, Karen Gondi, and Caroline Atieno deceased. PW1 stated that, his father died in 1968 while he was 7 years old and was buried on the suit property. After the death of his father, his uncle Gari Agadi, who was living in Tanzania, asked PW1's mother to join him in Tanzania so that he (Gari Agadi ) could assist her in raising the children. PW1 moved to Tanzania with his mother, and they did not come back to Kenya until 1979. In 1980, his mother built her homestead at the spot on the suit property where her house was when they moved to Tanzania. PW1 also built a house. The 1<sup>st</sup> Defendant's father, who was still alive, did not object to them settling on the land.
  11. PW1 stated that in 1985, he wanted to build his homestead on the suit property, and the 1<sup>st</sup> Defendant's father stopped him from doing so. He was allowed to put up his homestead on the suit property following the intervention of the area chief and elders who, after hearing both parties, determined that the land belonged to him. PW1 stated that his mother died in 2019 and was buried on the suit property without any objection from the 1<sup>st</sup> Defendant. PW1 produced his bundle of documents dated 18<sup>th</sup> January 2024 as P.EXH.1. PW1 stated that the 1<sup>st</sup> Defendant's father died in 1995 and was buried on the suit property where he had built his homestead by force. PW1 stated that the 1<sup>st</sup> Defendant's father stayed in his home on the suit property for 2 years and died thereafter. He stated that the 1<sup>st</sup> Defendant's mother was also buried on the suit property. PW1 stated that the 1<sup>st</sup> Defendant built a house on the suit property in 2011. He stated that the 1<sup>st</sup> Defendant vacated the land after he lost the case at the



tribunal and came back in August 2023 and put up another homestead again by force after cutting his (PW1) sugarcane. The damage occasioned to the sugarcane was assessed at Kshs. 240,000/-. The 1<sup>st</sup> Defendant also damaged his fence and other things. He stated that he reported the 1<sup>st</sup> Defendant's destruction and other acts of disturbance to the police. PW1 stated that he was seeking damages for the loss that he suffered. He stated that the suit property should have been registered in his name. He stated that the suit property was stolen by the 1<sup>st</sup> Defendant's father as the land belonged to his (PW1) grandmother. He stated that his father used the suit property from the 1940s, and he had used it since 1979 when he came back from Tanzania. He stated that the 1<sup>st</sup> Defendant had not been born when the family land was distributed. He stated that the suit property was valued at Kshs. 25,000,000/-. He stated that he and his son had permanent houses on the suit property. He stated that the 1<sup>st</sup> Defendant had vacated the suit property when the valuation was conducted.

12. The Plaintiff's witness was EZEKIEL ONDIEK OMINDE (PW2). PW2 adopted his witness statement dated 13<sup>th</sup> October 2023 as his evidence in chief. PW2 told the court that he was 80 years old. He knew the Plaintiff. He corroborated the Plaintiff's evidence regarding his family lineage and the fact that the Plaintiff moved with his mother to Tanzania in 1969 after the death of his father. He stated that the Plaintiff's father lived with his family on the suit property where he died and was buried. He stated that the Plaintiff lived with his mother on the suit property before they left Kenya for Tanzania. He stated that when the Plaintiff and his mother came back from Tanzania, they settled on the suit property. He stated that the 1<sup>st</sup> Defendant's grandmother, Kiseru Agadi was initially settled on the suit property in the homestead of Agadi Ochola's first wife but was later moved to her own homestead on Plot No. 5. He stated that Kiseru Agadi moved to Plot No. 5 together with her children. He stated that it was the Plaintiff's grandmother, Oloo d/o Ogola and her children who remained on the suit property. He stated that the suit property belonged to Oloo d/o Ogola, and her children. He stated that during land adjudication, the 1<sup>st</sup> Defendant's father caused the suit property, which belonged to the Plaintiff's grandmother, to be registered in his name. He stated that at the time, the 1<sup>st</sup> Defendant's father was staying on Plot No. 5. He stated that when the Plaintiff and his mother came back from Tanzania, they settled back on the suit property. He stated that the registration of the suit property in the name of the 1<sup>st</sup> Defendant's father was wrong. He stated that Plot No. 5 where the 1<sup>st</sup> Defendant's grandmother, Kiseru Agadi was settled was sold by her descendants. He stated that the 1<sup>st</sup> Defendant had purchased land elsewhere and was initially not staying on the suit property. He stated that the 1<sup>st</sup> Defendant's father could not have been given the suit property as it belonged to the first wife of Agadi Ochola, Oloo d/o Ogola.
13. The 1<sup>st</sup> Defendant, Joseph Ouma Adongo (DW1), was the first to give evidence after the close of the Plaintiff's case. DW1 adopted his witness statement dated 15<sup>th</sup> January 2024 as part of his evidence in chief and produced his bundle of documents of the same date as D.EXH.1. DW1 stated that as at the time of his evidence, the suit property Kisumu/Boarder II/4 was registered in the name of his deceased father, Domnicus Odongo Agadi. He stated that he did succession in respect of his father's estate at Nyando Magistrate's Court in Succession Cause No. 303 of 2021 and was issued with a Grant of Letters of Administration in respect of the estate of his father on 8<sup>th</sup> February 2022. He stated that he was appointed as a co-administrator of the estate with his deceased brother, Samuel Otieno Odongo, who died in August 2023 and was buried on the suit property. He stated that the Grant was confirmed on 5<sup>th</sup> April 2023, and the suit property was shared amongst four (4) beneficiaries. He stated that the suit property was yet to be transmitted to his name. DW1 stated that the Plaintiff was his uncle being a step brother of his father. DW1 denied that the suit property was registered in the name of his father illegally. He stated that his father died in 1995 and it was not until 2017 that the Plaintiff came up with the claim over the suit property. He stated that the suit property was registered in the name of his father



during the land adjudication. He stated that his father had 5 brothers; James Obondo Agadi, John Odoyo Agadi, Alloys Owiti Agadi and Charles Okumu Agadi. He stated that during the distribution of the family land, James Obondo Agadi was given Plot No. 5, John Odoyo Agadi, Plot No. 72, Alloys Owiti Agadi, Plot No. 3785 and Charles Okumu Agadi, Plot No. 3978. He stated that there were two people in the family who shared the name Charles Okumu Agadi. He stated that there was Charles Okumu Agadi who was a brother to his father who was given Plot No. 3978, and Charles Okumu Agadi who was the Plaintiff's father who was given Plot No. 64. He stated that the Plaintiff's father had two brothers; Monye Agadi who died while still young and Raphael Gari. He stated that Raphael Gari was given Plot No. 75. He stated that it was only the Plaintiff who had come up to claim the suit property. He stated that the Plaintiff had a brother, Johannes Oloo, who was deceased and was not living on the suit property. He stated that Johannes Oloo left 2 sons and 3 daughters who were settled on another parcel of land. He stated that none of the Plaintiff's siblings was claiming the suit property.

14. DW1 stated that the Plaintiff entered the suit property forcefully in 1991 and DW1's father lodged a complaint against him with the Land Adjudication Department. He stated that the Land Adjudication Officer wrote to the Chief asking him to stop the Plaintiff from using the suit property. He stated that the Land Adjudication Officer came to the suit property and asked the Plaintiff to vacate the suit property. He stated that the Plaintiff vacated the property. He stated that the Plaintiff came to the suit property from Lambwe where he was living with his uncle, Gari Agadi. DW1 stated that apart from the suit that the Plaintiff filed against his father in 2009 after his death, the Plaintiff never filed any other suit against his father. He stated that he was born on the suit property, and that was where he buried his father and his two wives. He stated that he was initially living in his father's homestead. He stated that he thereafter built his own home on the same parcel of land. He stated that the Plaintiff's father was buried on Plot No. 1488, while the Plaintiff's mother was buried on the suit property.
15. The 1<sup>st</sup> Defendant's first witness was Joseph Ochele Ojango(DW2). DW2 adopted his witness statement dated 15<sup>th</sup> January 2024 as his evidence in chief. DW2 told the court that the Plaintiff and the 1<sup>st</sup> Defendant were known to him as they came from the same village. He stated that he knew the 1<sup>st</sup> Defendant's father, who was registered as the owner of the suit property. He stated that he was present during the land adjudication in the area where the suit property is situated in 1970s particularly when the property was registered in the name of the 1<sup>st</sup> Defendant's father. He stated that he was among the village elders who were assisting the land adjudication officers. He stated that the suit property was not registered in the name of the 1<sup>st</sup> Defendant's father to hold in trust. He stated that the Plaintiff's father was registered as the owner of Plot No. 64. He stated that the Plaintiff was born in Tanzania. He stated that the Plaintiff's mother went to Tanzania to live with her brother-in-law, Raphael Gari, after the death of her husband. He stated that the Plaintiff came back to Kenya in 1991 and lived on the suit property with his mother briefly before he left with his mother to a place known as Chepsweta and came back later. He stated that the 1<sup>st</sup> Defendant's father was living on the suit property. He stated that the 1<sup>st</sup> Defendant had no other land apart from the suit property.
16. The 1<sup>st</sup> Defendant's second witness was Charles Otieno Obondo (DW3). DW3 adopted his witness statement dated 15<sup>th</sup> January 2024 as part of his evidence in chief. DW3 stated that the Plaintiff was his uncle and the 1<sup>st</sup> Defendant was his cousin. He stated that the 1<sup>st</sup> Defendant's father was a follower of his father, James Obondo Agadi. He stated that during the distribution of family land, his father was given Plot No. 5 while the suit property was given to the 1<sup>st</sup> Defendant's father. On cross-examination by Mr. Mwamu, DW3 stated that Plot No. 5 was sold by his family to the Government. He stated that Plot No. 1488 used to belong to Okumu Agadi but at the time of his evidence the property was registered in the name of one, Ayuko Omenya who was not related to them. He stated that his grandmother who was also the grandmother of the 1<sup>st</sup> Defendant, Selina Ndalo Agadi was buried on Plot No. 3978 which



was sold after her death. He stated that the 1<sup>st</sup> Defendant's father had his house on the same parcel of land before he moved. He stated that the Plaintiff's grandmother had her house on the suit property. On examination by the court, he stated that the 1<sup>st</sup> Defendant was living on his mother's homestead on the suit property before he moved and set up his homestead on the same property in 2023.

17. The 1<sup>st</sup> Defendant's last witness was Carilus Juma Omenya (DW4). DW4 adopted his witness statement dated 15<sup>th</sup> January 2024 as part of his evidence in chief. DW4 stated that the Plaintiff and the 1<sup>st</sup> Defendant were known to him. He denied that the suit property was registered in the name of the 1<sup>st</sup> Defendant's father illegally and that the property should have been registered in the name of the Plaintiff. DW4 stated that the family of the Plaintiff was away during the land adjudication exercise in 1971 in the area where the suit property is situated. He stated that the family was informed of the exercise, and the Plaintiff's father came. He stated that it was the Plaintiff's father who registered the suit property in the name of the 1<sup>st</sup> Defendant's father. He stated that the Plaintiff was also given land. He stated that the Plaintiff's mother requested the 1<sup>st</sup> Defendant's father to give her a place to put up a house temporarily before they could move to their own land. He stated that the Plaintiff's mother had land at a place known as Nyaidho on which the Plaintiff had planted sugarcane. On cross-examination, DW4 stated that the 1<sup>st</sup> Defendant was a grandchild of his maternal aunt. He stated that Plot No. 1488 belonged to Ayuko Omenya and was not owned by the Plaintiff's father. He stated that there were two Charles Okumu's in Agadi Ochola's family. The younger Charles Okumu Agadi was a brother to the 1<sup>st</sup> Defendant's father, and the senior Charles Okumu Agadi was the Plaintiff's father. He stated that Selina Agadi, who was his maternal aunt, was buried on Plot No. 6. He stated that Plot No. 5 was sold to the Government to put up the District Headquarters at Awasi. He stated that the land was sold to the Government by Obondo Agadi, who was the son of Selina Agadi and a brother to the 1<sup>st</sup> Defendant's father. He stated that Plot No. 6 was owned by Okumu Agadi, who was the last born of Selina Agadi, and he was not aware if he was the one who sold it. DW4 stated that the 1<sup>st</sup> Defendant built his home on the suit property after moving from his father's homestead after the burial of his brother, Samuel Okumu. On examination by the court, DW4 stated that during the land adjudication, the Plaintiff's mother was living in Tanzania with her brother-in-law Gari Agadi. He stated that Gari Agadi was informed of the land adjudication and he came to Kenya. He stated that Gari Agadi was registered as the owner of two parcels of land at Nyaidho. He stated that the Plaintiff's father was deceased during land adjudication and Gari Agadi registered one parcel of land at Nyaidho in his name. He stated that it was on that parcel of land at Nyaidho that the Plaintiff was supposed to build his home. He stated that Nyaidho was about 3.2 Km from Awasi.
18. DW1 stated that it was the children of Oloo d/o Ogola who were given land at Nyaidho while the children of Selina Agadi were given land at Awasi. He stated that two of Selina Agadi's children were also given land at Nyaidho, together with the children of Oloo d/o Ogola. DW4 stated that Selina Agadi was Agadi Ochola's wife while Oloo d/o Ogola was a wife that Agadi Ochola inherited from his father, Ochola.
19. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not give evidence at the trial.

### **The submissions**

20. After the close of evidence, the court directed the parties to make closing submissions in writing. The Plaintiff filed submissions dated 9<sup>th</sup> August 2024, while the 1<sup>st</sup> Defendant filed submissions dated 9<sup>th</sup> November 2024. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not file submissions.



### **The Plaintiff's submissions**

21. The Plaintiff submitted that the 1<sup>st</sup> Defendant's father had a duty to convey the suit property to the Plaintiff as it was the Plaintiff's father's land before he died and the Plaintiff and his mother moved to Tanzania. The Plaintiff submitted that equity converted the 1<sup>st</sup> Defendant's father to a trustee of the suit property, and in that position, the 1<sup>st</sup> Defendant's father had an obligation to transfer the suit property to the Plaintiff when the Plaintiff came back from Tanzania. The Plaintiff submitted that the 1<sup>st</sup> Defendant and his father breached the said trust that was imposed upon them by law.
22. The Plaintiff submitted that he had established that he was the owner of the suit property and, as such, the acts of the 1<sup>st</sup> Defendant complained of in the plaint amounted to trespass. The Plaintiff submitted that having proved trespass, he was entitled to general damages. The Plaintiff submitted further that he had proved that the 1<sup>st</sup> Defendant maliciously damaged his property. He submitted that he established that the 1<sup>st</sup> Defendant damaged his trees and also killed his livestock. The Plaintiff submitted that he was entitled to the special damages claimed for malicious damage to property. The Plaintiff submitted further that he had proved that the 1<sup>st</sup> Defendant fraudulently got registered as the owner of the suit property. The 1<sup>st</sup> Defendant submitted that he was entitled to an order for the rectification of the register of the suit property by the cancellation of the registration of the suit property in the name of the 1<sup>st</sup> Defendant and the registration of the same in the name of the Plaintiff. The Plaintiff submitted further that from the evidence on record, he had proved that he had occupied the suit property for more than 50 years, and as such, he had acquired prescriptive rights over the same. Regarding costs, the Plaintiff cited Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and submitted that costs should follow the event unless the court orders otherwise for good reason. The Plaintiff cited several authorities in support of his submissions, which I have considered.

### **The 1<sup>st</sup> Defendant's submissions**

23. The 1<sup>st</sup> Defendant submitted that the suit property was registered in the name of Domnicus Odongo Agadi, deceased, who was the father of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred that although he and his deceased brother had been issued with a confirmed Grant of Letters of Administration in respect of the estate of Domnicus Odongo Agadi (Domnicus), deceased on 6<sup>th</sup> April 2023, they were yet to be registered as the owners of the suit property. The 1<sup>st</sup> Defendant averred that the Plaintiff had sued him in his personal capacity and not as the administrator of the estate of Domnicus. The 1<sup>st</sup> Defendant averred that the Plaintiff was aware that the registered proprietor of the suit property was deceased. The 1<sup>st</sup> Defendant submitted that the reliefs sought by the Plaintiff against him could not be granted. The 1<sup>st</sup> Defendant submitted that the doctrine of constructive trust can only apply to a registered owner of a property or his estate, who must be shown to have a legal title and to have conducted himself in such a manner as to deny the claimant a beneficial interest in the property. The 1<sup>st</sup> Defendant submitted that in this case, the administrators of the estate of the deceased registered owner of the suit property have not been sued. The 1<sup>st</sup> Defendant submitted that he could not be sued in his personal capacity as he had no legal title to the suit property. The 1<sup>st</sup> Defendant submitted that the defect in the Plaintiff's suit was incurable even under Article 159 of *the Constitution* of Kenya.
24. The 1<sup>st</sup> Defendant submitted further that even if it was assumed that the Plaintiff had a competent suit against the 1<sup>st</sup> Defendant, the Plaintiff had not proved his case to warrant the granting of the orders sought. The 1<sup>st</sup> Defendant submitted that constructive trust was different from customary trust. The 1<sup>st</sup> Defendant submitted that constructive trust must be specifically pleaded and proved. The 1<sup>st</sup> Defendant submitted that whereas customary trust can be established by taking into consideration the



relationship between the Plaintiff and the registered proprietor of the land, constructive trust focuses on unjust enrichment. The 1<sup>st</sup> Defendant submitted that the doctrine of constructive trust was pleaded and particularised in paragraph 10 of the amended plaint against his deceased father, Dominicus who was not a party to the suit. The 1<sup>st</sup> Defendant submitted that he could not respond to the particulars of breach of trust pleaded against his father because he was not sued as the administrator of the estate of his father. The 1<sup>st</sup> Defendant submitted further that the Plaintiff's suit was premised on the findings of the Nyando Land Disputes Tribunal and the Nyanza Land Appeal Committee, which were quashed by the High Court. The 1<sup>st</sup> Defendant submitted that this court cannot admit in evidence proceedings and decisions of the said tribunals, which were quashed on the ground that they lacked jurisdiction to entertain the dispute over the suit property.

25. In conclusion, the 1<sup>st</sup> Defendant submitted that the Plaintiff had failed to prove his case against the 1<sup>st</sup> Defendant on a balance of probabilities. The 1<sup>st</sup> Defendant submitted that unlike the Plaintiff who had another parcel of land at Nyaidho, the 1<sup>st</sup> Defendant had no other land as he was born and brought up on the suit property. The 1<sup>st</sup> Defendant submitted that equity would tilt in his favour rather than the Plaintiff who was ill bent on disinheriting him. The 1<sup>st</sup> Defendant submitted that there was no evidence produced by the Plaintiff showing that the suit property was reserved or given to his father. The 1<sup>st</sup> Defendant submitted further that the Plaintiff entered the suit property forcibly and as such could not claim prescriptive rights over the property. The 1<sup>st</sup> Defendant submitted further that the issue of the 1<sup>st</sup> Defendant having trespassed on the suit property could not arise because the Plaintiff found the 1<sup>st</sup> Defendant on the suit property. In support of his submissions, the 1<sup>st</sup> Defendant cited one case on constructive trust which I have considered.

### **Analysis and determination**

26. I have considered the pleadings, the evidence tendered, and the submissions by the advocates for the parties. The Plaintiff's case was not pleaded properly. The narration of the case was jumbled up. The case was not happily or elegantly pleaded as we normally say. It is very difficult to pick out the real causes of action from the amended plaint. The situation was not helped by the method of amendment of defence that was adopted by the 1<sup>st</sup> Defendant. Instead of amending the existing defence on record, the 1<sup>st</sup> Defendant came up with a completely new defence with a heading "AMMENDED DEFENCE". The purported amended defence had no amendment. It was a completely new defence to the amended plaint which had no reference to the defence on record that was purportedly being amended. Interestingly, in his submissions, the 1<sup>st</sup> Defendant relied heavily on his defence filed on 5<sup>th</sup> March 2020 which he appeared to have abandoned when he filed the purported amended defence dated 15<sup>th</sup> January 2024. Doing the best that I can as a court confronted with the kind of pleadings before me, I will frame the issues arising for determination broadly as follows;
1. Whether the Plaintiff has proved his case against the Defendants;
  2. Whether the Plaintiff is entitled to the reliefs sought in his amended plaint; and
  3. Who is liable for the costs of the suit?
27. I will consider these three issues together. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
- (16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.



28. The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:
13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
  14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues." (emphasis added)
29. The burden of proving the allegations on which the Plaintiff's claim was based was on the Plaintiff. As correctly submitted by the 1<sup>st</sup> Defendant, it is common ground that the suit property is registered in the name of Domnicus Odongo Agadi (Domnicus) who died on 8<sup>th</sup> April 1995 several years before this suit was filed in 2017. It is also common ground that the 1<sup>st</sup> Defendant and one, Samuel Otieno Odongo also deceased were appointed as the administrators of the estate of Dominicus in Nyando Senior Principal Magistrate's Court Succession Cause No. 303 of 2021 on 5<sup>th</sup> August 2021 and the Grant of Letters of Administration in their favour was confirmed on 6<sup>th</sup> April 2023. It is also common ground that the 1<sup>st</sup> Defendant and the said Samuel Otieno Odongo have not transferred the suit property to their names by transmission which means that the property remains in the name of the deceased, Domnicus Odongo Agadi(Domnicus). In paragraph 9 of the amended plaint, the Plaintiff acknowledged that the 1<sup>st</sup> Defendant was only a son of Domnicus with whom they had had a dispute over the suit property.
30. The Plaintiff claimed that he was the bona fide owner of the suit property. The Plaintiff's claim over the suit property was premised on two causes of action; first, the Plaintiff claimed that the 1<sup>st</sup> Defendant's father was registered as the owner of the suit property to hold in trust for the Plaintiff who was away in Tanzania, and secondly, and in the alternative, that the Plaintiff had acquired the suit property by adverse possession.
31. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:
- "27. Subject to this Act –
    - a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
    - b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
  28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held



by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

32. In *John Gitiba Buruna & Another v. Jackson Rioba Buruna*, Court of Appeal at Kisumu, Civil Appeal No. 89 of 2003, the court stated as follows:

“Although the rights of a registered proprietor of land are indefeasible under section 28 of the Registered *Land act*, such registration does not as the proviso to section 28 states relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

33. In *Isack M’inanga Kiebia v. Isaaya Theuri M’lintari & another* [2018] eKLR, the Supreme Court stated as follows on customary trusts:

“(37) Both exponents of colonial land policy and jurisprudence, either completely disregarded, or did not fully appreciate, the nature, scope, and complexity of African land relations. Land in a traditional African setting, is always the subject of many interests and derivative rights. The content of such interests and rights is often a complex area of inquiry. Such rights could be vested in individuals or group units. The rights and interests frequently co-exist with each other. For example, the rights of members of a family do not necessarily derive from the corporate rights of the family as such, but by operation of the applicable law and customs. Besides, the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit. Several rights of the members could be inferior to, or co-terminus with, or indeed superior to the sum total of the rights of a group. Hence, customary law does not vest “ownership”, in land in the English sense, in the family, but ascribes to the family the aggregate of the rights that could be described as “ownership.” (Bennett 1995:3 and Cocker 1966: 30-33).”

34. In the same case, the court stated further as follows:

“(52) Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered *Land Act*. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other



amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan or group land.
2. The claimant belongs to such family, clan, or group.
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.” (emphasis added)

35. In *Mwangi Mbothu & 9 others v. Gachira Waitimu & 9 others* [1986] eKLR, the court stated that:

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create trust must be clearly determined before a trust will be implied.”

36. I agree with the 1<sup>st</sup> Defendant that customary trust which is the basis of the Plaintiff’s claim can only be raised against a party who is registered as the owner of the land claimed to be the subject of trust. From the evidence on record, Dominicus was the first registered owner of the suit property. He was registered as such on 7<sup>th</sup> June 2006. As mentioned earlier, Domicus remains registered as the owner of the suit property. It is against Domicus that the Plaintiff’s claim to the suit property based on customary trust should have been raised. As the 1<sup>st</sup> Defendant submitted, and correctly so, on the death of Domicus, the claim would lie against his estate. Now that it is admitted that Dominicus is deceased, is this suit against his estate? Order 4 Rule 4 of the Civil Procedure Rules provides as follows:

“Capacity of parties.

4. Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.”



37. As mentioned earlier in the judgment, this suit was filed on 24<sup>th</sup> February 2017. As at that date, Dominicus who is registered as the owner of the suit property was deceased, and no legal representative had been appointed to administer his estate. There is no doubt, therefore, that the suit was brought against the 1<sup>st</sup> Defendant in his personal capacity and not as a legal representative of the estate of Dominicus, which he was not. He was described in the plaint as “a male adult of sound mind residing and working for gain in Awasi in Kisumu County within the Republic of Kenya.” The Plaintiff knew in March 2020 that the 1<sup>st</sup> Defendant had obtained a Grant of Letters of Administration in respect of the estate of Dominicus on 15<sup>th</sup> October 2008 in the High Court of Kenya at Kisumu in Succession Cause No. 403 of 2008 which formed the basis of the 1<sup>st</sup> Defendant’s application herein dated 3<sup>rd</sup> March 2020 to strike out the Plaintiff’s suit. Although the application failed, the Plaintiff did not see the need to amend his plaint to change the capacity in which he sued the 1<sup>st</sup> Defendant or add the 1<sup>st</sup> Defendant in the suit in his capacity as the legal representative of Dominicus.
38. On 15<sup>th</sup> December 2022, the 1<sup>st</sup> Defendant filed an application seeking leave to be added to the suit as the 2<sup>nd</sup> Defendant in his capacity as the legal representative of the estate of Dominicus pursuant to the said Grant of Letters of Administration that he had obtained in the High Court. The 1<sup>st</sup> Defendant never pursued the application for unknown reasons. It is also not clear from the record and the evidence that was adduced by the parties as to what happened to the said Grant of Letters of Administration that the 1<sup>st</sup> Defendant had obtained from the High Court on 15<sup>th</sup> October 2008. It has now emerged that the 1<sup>st</sup> Defendant and his brother, Samuel Otieno Odongo (now deceased) obtained another Grant of Letters of Administration at the Senior Principal Magistrate’s Court at Nyando on 5<sup>th</sup> August 2021 in Succession Cause No. 303 of 2021, which Grant as mentioned earlier, was confirmed on 6<sup>th</sup> April 2023. The Plaintiff was aware of this new Grant and its confirmation because the Plaintiff had applied for its revocation before the hearing of this suit commenced. The court was not told of the fate of the Plaintiff’s application to revoke the said Grant. Even with that information, the Plaintiff did not see the need to add the administrators of the estate of Dominicus to this suit. This need was not felt even when the Plaintiff was allowed on 5<sup>th</sup> October 2023 to amend the plaint before the commencement of the hearing of the suit.
39. The status of the Plaintiff’s claim as it stood at the conclusion of the hearing of this suit was that he had sued the 1<sup>st</sup> Defendant, who was not registered as the owner of the suit property. The doctrine of constructive trust could not, therefore, be invoked against the 1<sup>st</sup> Defendant upon whom the court could not impose a duty as a trustee even if the trust was constructive trust as wrongly argued by the Plaintiff. This court cannot therefore find that the Plaintiff is the owner of the suit property by virtue of customary trust in a suit against the 1<sup>st</sup> Defendant who is not registered as the owner of the suit property. The Plaintiff sought a declaration that the 1<sup>st</sup> Defendant and “his father” breached the constructive and beneficial trust placed upon them. As correctly submitted by the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant’s father, Dominicus is not a party to this suit, and as such, no order can be made against him or his estate. Secondly, the 1<sup>st</sup> Defendant is not registered as the owner of the suit property. He cannot, therefore, be said to have breached any duty as a trustee owed to the Plaintiff.
40. Concerning the Plaintiff’s claim over the suit property by adverse possession, again, it is elementary law that an adverse possession claim can only be maintained against a registered owner of land. As observed above, the 1<sup>st</sup> Defendant, who has been sued by the Plaintiff, is not the registered owner of the suit property. An adverse possession claim over the suit property cannot, therefore, be maintained against him. Such a claim could only be brought against the estate of Dominicus, who is the registered owner of the suit property. The court cannot therefore grant the declaration sought that the Plaintiff and his family have acquired prescriptive rights over the suit property. Such declaration can only be



made in a suit against the estate of Dominicus. The Plaintiff has also sought an order that the title of the suit property be “changed” to the name of the Plaintiff. The court cannot order the rectification of the register of the suit property by the cancellation of the name of Dominicus and registration of the Plaintiff as the owner of the suit property in a suit in which Dominicus or his estate has not been sued. The Plaintiff’s adverse possession claim is therefore not tenable.

41. The Plaintiff had also accused the 1<sup>st</sup> Defendant of trespass on the suit property. In the Court of Appeal, Fourth District, Division 1, California, in *Ralphs Grocery Co. v. Victory Consultants Inc.* (2017) 17Cal. App.5<sup>th</sup> 245, 261; CACI No. 2000, the court stated that:

“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (*Staples v. Hoefke* (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant’s conduct was substantial factor in causing the harm.(See CACI No. 2000).”

42. For the Plaintiff to maintain an action for trespass, the Plaintiff had to establish possession over the suit property. Trespass is a wrong against possession rather than ownership. Although the Plaintiff has not proved that he is the owner of the suit property, he has proved that he is in possession of a portion of the suit property. Since the Plaintiff is in possession of a portion of the suit property, he has a better right to the said portion of the suit property against all others save for those who have a better title to the land than him. The Plaintiff could, therefore maintain an action against the 1<sup>st</sup> Defendant, who has not demonstrated that he had a better title to the portion of the suit property occupied by the Plaintiff than the Plaintiff. The Plaintiff has pleaded several particulars of trespass against the 1<sup>st</sup> Defendant. The Plaintiff has his homestead on the suit property. He has been in possession of the said homestead and the surrounding areas that he has been using since he entered the suit property. Any interference with the Plaintiff’s homestead and any such surrounding area that has been in his possession by any person who does not have a better title to the same would constitute trespass.
43. The 1<sup>st</sup> Defendant, as the court has found, is not registered as the owner of the suit property. He therefore, has no right to interfere with the Plaintiff’s occupation of his homestead and any other area of the suit property the Plaintiff has been using. The Plaintiff has accused the 1<sup>st</sup> Defendant of fencing the suit property. From the evidence on record, the suit property measures approximately 4.8 Ha. (11.86 Acres) and is occupied by many other people apart from the Plaintiff and the 1<sup>st</sup> Defendant. This means that the Plaintiff has not been in possession of the whole of the suit property. He has only been in possession of his homestead and the surrounding areas that he has been using. The Plaintiff produced evidence showing that his fence was cut down. He led evidence that the same was cut by the 1<sup>st</sup> Defendant. I am satisfied that the Plaintiff proved that his fence was cut down by the 1<sup>st</sup> Defendant. This amounted to trespass. Cutting down the Plaintiff’s trees and sugarcane and injuring his cattle while grazing would also amount to trespass if proved. These activities complained of by the Plaintiff amounted to criminal offences. The 1<sup>st</sup> Defendant had denied the same. There is evidence that the Plaintiff reported the same to the police. The court was not told if any action was taken by the police. The Plaintiff, however, produced evidence showing injury to his cow and damage to his sugarcane and cassava. It is my finding that these acts by the 1<sup>st</sup> Defendant amounted to trespass. The Plaintiff had also claimed that the construction of the 1<sup>st</sup> Defendant’s house on the suit property amounted to trespass. The Plaintiff did not lead evidence showing that the 1<sup>st</sup> Defendant’s house was built on the Plaintiff’s homestead or on the portion of the suit property on which the Plaintiff had possession. I therefore, do not find the building of the said house an act of trespass. In conclusion, it is my finding that the



Plaintiff has proved some acts of trespass pleaded against the 1<sup>st</sup> Defendant. Although the Plaintiff pleaded special damages in the amended plaint, the Plaintiff did not claim the same in his final prayers to the court. I have also noted that no court fees were paid for the same. In addition to special damages, the Plaintiff also sought general damages for trespass. In *Park Towers Ltd. v. John Mithamo Njika and 7 Others* 2014 eKLR, the court stated as follows:

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case.”

44. In Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 45 para. 26, 1503 the authors have stated as follows on assessment of damages for trespass:

- a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss.
- b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c) Where the Defendant has made use of the Plaintiff’s land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use.
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased.”

45. The Plaintiff has proved that the 1<sup>st</sup> Defendant trespassed on the portion of the suit property that was in his possession. The Plaintiff is therefore entitled to general damages for trespass. I will award the Plaintiff a sum of Kshs. 200,000/- as general damages for trespass. The Plaintiff had also sought a permanent injunction to restrain the 1<sup>st</sup> Defendant from interfering, encroaching and/or trespassing on the suit property. I am of the view that the Plaintiff is entitled to an injunction limited to the portion of the suit property that is in his possession. The 1<sup>st</sup> Defendant has no right to interfere with the Plaintiff’s occupation of the portion of the suit property in his possession save as may be ordered or directed otherwise by a court of law with competent jurisdiction. Before concluding the judgment, I wish to point out that I found the Plaintiff’s case against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants not proved. No wrongdoing on their part was established by the Plaintiff.

## Conclusion

46. In conclusion, it is my finding that the Plaintiff’s failure to sue the estate of Domnicus Odongo Agadi, deceased, who is the registered owner of the suit property, is fatal to his claim to the suit property based on customary trust and adverse possession. The orders sought against the 1<sup>st</sup> Defendant for vacant possession, a declaration of breach of trust, a declaration that the Plaintiff has acquired the suit property by adverse possession and an order for the rectification of the register of the suit property cannot be granted. The Plaintiff has however established his trespass claim against the 1<sup>st</sup> Defendant. The Plaintiff



is therefore entitled to general damages for trespass and an injunction to restrain further trespass by the 1<sup>st</sup> Defendant.

47. I therefore make the following orders in the matter;

1. The Plaintiff's suit against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is dismissed.
2. Prayers (a), (a) (i), (a)ii and (b) in the amended plaint dated 19<sup>th</sup> October 2023 are dismissed for non-joinder of the estate of Domnicus Odongo Agadi.
3. The Plaintiff is awarded Kshs. 200,000/- against the 1<sup>st</sup> Defendant as general damages for trespass.
4. A permanent injunction is issued restraining the 1<sup>st</sup> Defendant from interfering with the Plaintiff's quiet possession and enjoyment of the portion of all that parcel of land known as Title No. Kisumu/Border/4 occupied and/or used by the Plaintiff as of the date hereof save as may be ordered otherwise by a court of law with competent jurisdiction in any other suit or proceedings that may be instituted over the suit property.
5. Each party shall bear its costs of the suit.

**DATED AND DELIVERED AT KISUMU ON THIS 10<sup>TH</sup> DAY OF MARCH 2025.**

**S. OKONG'O**

**JUDGE**

Judgment delivered in open court in the presence of;

The Plaintiff

The 1<sup>st</sup> Defendant

Mr. Mwamu for the Plaintiff

Mr. Munuang'o h/b for Mr. Abande for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Ms. J. Omondi-Court Assistant

