



**Ondiek & another v Ojwang’Kombudo & another (Environment and Land Appeal
E038 of 2023) [2025] KEELC 6152 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E038 OF 2023
E ASATI, J
SEPTEMBER 18, 2025**

BETWEEN

CLEMENT OTIENO ONDIEK 1ST APPELLANT

PATRICK OGADA ODIK 2ND APPELLANT

AND

OJWANG’KOMBUDO 1ST RESPONDENT

OJENGE KOMBUDO 2ND RESPONDENT

JUDGMENT

1. The Appellants herein were the Defendants in Kisumu CMEL Case No.18 of 2018 (the suit herein). The record of appeal shows that the suit was first filed in the Environment and Land Court at Kisumu as Kisumu ELC Case No.105 of 2016 vide the plaint dated 13th May, 2016.
2. The Appellants had been sued by the Respondents herein who claimed to be the registered owners of land known as East Kisumu/Dago/670.
3. The Respondents’ case was that in or about the month of March 2016, the Appellants in the company of their agents unlawfully entered onto the suit land and destroyed the Respondents’ property valued at Kshs.300,000/-. They therefore sought against the Appellants for an order of permanent injunction restraining the Appellant from trespassing onto the suit land special damages in the sum of Kshs.363,460/- and interest.
4. In response to the Respondents’ claim, the Appellants filed a Statement of Defence and Counterclaim dated 20th June, 2016.
5. The Appellants’ case was that the Respondents were fraudulent trespassers and hence could not be entitled to the remedy they sought. The Appellants claimed that the suit land was first adjudicated in the year 1971 and registered in the names of Okongo Randa and Ondiek Randa both of whom are



deceased and no Letters of Administration had been taken out in respect of their estates. That Ondiek Randa was the father of the Appellants.

6. That the Respondent in collusion with the District Registrar of Land Kisumu fraudulently connived to transfer the suit land to the Respondents. The Appellants therefore counter-claimed for orders against the Respondents that:-
 - a. All entries in the Register of Land parcel number Kisumu/Dago/670 subsequent to the adjudication and registration of the 21st January, 1977, that registered Ondiek Randa and Okongo Randa as equal owners in common were made unprocedurally unlawfully, illegally and fraudulently and are void ab initio.
 - b. The entries in the register dealing with registration of Ojwang K'ombudo were made unprocedurally, unlawfully, illegally and fraudulently and are void ab initio.
 - c. The District Land Registrar, Kisumu be ordered to cancel all the entries appearing after the first entry from the register of land parcel number Kisumu/Dago/670.
 - d. The Plaintiff to pay to the Defendant costs and mesne profits.
7. The record shows that the suit was later transferred to the Magistrate's Court, assigned the current case number, heard and determined. Vide the judgement delivered on 25th August, 2023, the trial court found that the Respondents had proved their case on a balance of probabilities and entered judgement in their favour for an order of permanent injunction, costs of the suit and interest thereon.
8. The trial court found further that the Defendants'/Appellants' counterclaim was not merited.

The appeal

9. Aggrieved by the judgement, the Appellants preferred the present appeal vide the Memorandum of Appeal dated 6th December, 2023 and sought for orders that;
 - a. The appeal be allowed with costs.
 - b. The judgement of the Learned Magistrate Honourable W. K. Onkunya (PM) delivered on 25th August, 2023 in Kisumu CMC ELC No.18 of 2018 be set aside in its entirety and be substituted with one dismissing the Plaintiffs' suit and allowing the Defendants' counterclaim.

The appeal was heard by way of written submissions.

Appellant's submissions

10. Written submissions dated 28th January, 2025 were filed on behalf of the Appellant by the firm of Bruce Odeny & Company Advocates. Counsel submitted that the Respondents acquired the suit land irregularly being that the original registered owners were Ondiek Randa and Okong'o Randa, as proved by copy of adjudication record produced as exhibit, both of whom had died.
11. That the Appellants had been staying on the suit land since birth. And that the remains of the deceased were interred on the suit land.
12. Relying on the provisions of section 26 of the *Land Registration Act*, Counsel submitted that the Respondents' title cannot stand as it was obtained fraudulently. Counsel also relied on the case of Alice Chemutai Too -vs- Nickson Kipkurui Korir & 2 Others (2015)eKLR where it was held that title to land can be impeached where it is established that the same was obtained fraudulently.



13. Counsel submitted further that it is trite that when a person's title is called into question, the proprietor has to show the root of ownership. For this submissions, Counsel relied on the case of *Herbert L. Martin & 2 Others -vs- Margaret I. Kamar & 5 Others* [2016]eKLR.
 14. That the Respondents have not demonstrated the root of their title as they only produced a copy of transfer form, copy of Land Control Board consent and application form.
 15. Counsel submitted that the title in the Respondents' name ought to be cancelled pursuant to the provisions of sections 26 and 80(1) of the *Land Registration Act* and case of *Munyu Maina -vs- Hiram Gathiha Maina* (2013) eKLR.
- Counsel urged the court to find in favour of the Appellants.

Respondents' submissions

16. Written submissions dated 28th April, 2025 were filed by the firm of Ohayo & Company Advocates on behalf of the Respondents.
17. Counsel submitted that it was not disputed that Okong'o Randa and Ondiek Randa were the first registered owners of the suit land. That PW1 testified that he bought the land from the previous owner and on 17th March, 1976 a transfer of land was executed and registered in favour of the Plaintiff herein in the presence of the Land Registrar.
18. Counsel relied on the provisions of article 40 of *the Constitution* of Kenya and Section 25 of the *Land Registration Act* and submitted that the 1st and 2nd Respondents had proved on a balance of probability that they acquired the suit property lawfully and are deserving of the protection of article 40 of *the Constitution* of Kenya 2010.
19. That the registration of the 1st and 2nd Respondents as proprietors of the suit land vested in them absolute ownership of the land together with all rights, privileges belonging or appurtenant thereto.
20. That the registration of the suit land in the names of the Respondents remained unchallenged.
21. Relying on the provisions of section 80 of the *Evidence Act*, Counsel submitted that the burden of proof lay with Appellants to prove that the transfer form dated 17th March, 1976 was a forgery. That although during the trial the Appellants relied on the doctrine of adverse possession, they failed to produce evidence to prove the same.

Issues for determination

22. The grounds of appeal raised in the Memorandum of Appeal are that;
 - a. The learned trial Magistrate erred in both law and fact in allowing the Plaintiff's suit against the Defendants.
 - b. The learned Magistrate erred in law and fact by making a finding that the Plaintiffs were the absolute registered owners of the suit property despite the Plaintiffs having acquired the same fraudulently.
 - c. The learned trial Magistrate erred in law and in fact in dismissing the Defendants' counterclaim that the Plaintiffs in collusion with the District Registrar of Land – Kisumu fraudulently connived to transfer the suit parcel to the Plaintiffs.
 - d. The learned Magistrate erred in law and fact in failing to take into consideration the submissions made by the Defendant



- e. The judgement herein is against the weight of the evidence on record and the law.

Analysis

23. This is a first appeal hence the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs- Attorney General* [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

“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 allowances in this respect.”

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123.

The 1st and 2nd grounds of appeal raise the issue of whether or not the Respondents proved their case before the trial court.

24. The Respondents’ claim before the trial court was based on the tort of trespass. Trespass to land is constituted by an unjustified interference with the possession of land. In *Black’s Law Dictionary* 11th Edition, it is defined as;

“a person’s unlawful entry on another’s land that is visibly enclosed. This tort consists of doing any of the following without lawful justification:

- (1) entering on to land in possession of another,
- (2) remaining on the land, or
- (3) placing or projecting any object on it.”

section 3 of the *Trespass Act*, Cap 294 Laws of Kenya provides;

“any person who without reasonable excuse enters or remains upon or erects any structure on or cultivates, tills or grazes or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.

25. The ingredients or elements of the tort of trespass therefore include; unauthorized entry onto another’s land, remaining on another’s land without permission, carrying out activities such as cultivating, tilling or even grazing animals, or construction on another’s land without permission or placing projecting an object over someone’s land without permission.

26. The burden to prove the existence of these elements lay with the Respondents in accordance with the provisions of section 107 to 109 of the *Evidence Act* Cap 80 Laws of Kenya which provide that:

Section 107(1)

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



Section 108

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

27. The record shows that the evidence placed before the trial court by the respondents comprised of the testimonies of PW1, PW2 and PW3 and the documents they produced as exhibits.
28. PW1 was the 1st Respondent herein. He testified that the suit land was his because he bought it from the previous owners namely Alex Randa and his two sons namely; Okongo Randa and Ondiek Randa. Among the documents PW1 produced as exhibits was a certificate of official search dated April, 2016 that showed that the owners of the suit land were the Respondents herein.
29. On cross-examination, PW1 stated that he bought the land in the year 1976. That he constructed a house in 2016 but that the house was demolished the following day. That he saw the four people who demolished the house of whom he identified 2 sons of Randa, one of them being Lameck. That he had been tilling the land since 1976 to 2016 when he decided to construct the house.
30. PW2 one Eric Omondi Mesa, narrated how he was hired by PW1 to construct a semi-permanent house on the suit land and how the house was demolished.
31. The Appellants challenged the Respondents' case on grounds firstly that registration of the suit land in the names of Respondents was fraudulent. The Appellants pleaded in paragraph 3 of the Defence and counterclaim that if there is any registration of the suit land in the names of the Respondents as alleged, then the said registration is fraudulent and inconsequential. In paragraph 5 of the Defence and counterclaim, the Appellants pleaded that the Respondents being fraudulent trespassers cannot be entitled to the remedy sought. The record shows that to support their case, the Appellant called 3 witnesses.
32. DW1, one Damans Ondiek testified that the land was hers because it belonged to her husband by the name Alex Ondiek Randa. That the Respondents begun claiming the land in the year 2006. That before that she used to cultivate the land and cut trees to make charcoal.
33. That there has never been a homestead or grave on the suit land. That she has 11 sons and wants the court to assist her to get a place where her sons can build.
34. DW2 stated that to the best of her knowledge, the owner of the suit property is Alex Onchele and Okongo as they were given the parcel by their father. That the Plaintiff/Respondent herein constructed a house on the suit property which house has been there for a long time.
35. DW3 was the 1st Appellant. He testified that the land is currently registered in the names of Ojwang Kombundo and Ojenge Kombundo. That initially it was in the name of Ondieki Randa and Okong'o Randa.
36. DW3 produced a copy of adjudication register to show that the land belonged to Ondiek Randa and Okong'o Randa.



37. The record shows that the trial court after considering this evidence, relied on the provisions of section 26 of the *Land Registration Act* and found that since as at the time of filing suit, the Respondents' title had not been revoked, the Respondents were the absolute registered owners of the suit land. The court further found that the Appellants had not proved the allegations of fraud and further that the Respondents as registered owners, were entitled to an order of permanent injunction.
- The appellants fault the trial court for these findings.
38. I have keenly re-examined the evidence placed before the trial court and the submissions made herein. I find that the only document of ownership of the suit land that was placed before the suit land was the title held by the Respondents. The copy of the adjudication record produced by DW3 shows that the land was adjudicated in the name of Ondiek Randa and Okong'o Randa. However, the certificate of official search produced by the Respondents show that the suit land was registered in the names of the Respondents on 17th May, 1976 vide entry number 3 in the register. As at the time the land was transferred to the respondents, the said Ondiek Rand and Okongo Randa were still alive. This was demonstrated by the certificates of death exhibited which showed that Okong'o Randa (Karilus Okongo Randa) died on 1st September, 2008 while Ondiek Randa (Alex Ondiek Randa) died on 18th February, 1995.
39. There is no evidence that the deceased persons ever complained during their life time about the land being registered in the names of the Respondents.
40. I find that on the basis of the evidence placed before her, the trial court was right to find that the suit land belonged to the Respondents and that the Respondents' rights to land were entitled to protection of the law and hence was right to issue an order of permanent injunction.
41. The 3rd and 4th grounds of appeal raise the issue of whether or not the trial court erred in dismissing the Appellant's counter-claim.
42. The counterclaim was based firstly on the tort of fraud and secondly on the doctrine of adverse possession. The Appellants pleaded in paragraph 10 of the Defence and counterclaim that the Respondents fraudulently procured the registration of the suit land in their names. They pleaded the particulars of fraud as;
- a. Colluding to transfer land parcel No.Kisumu/Dago/670 from the names of Okong'o Randa and Ondiek Randa without their knowledge.
 - b. Colluding to transfer land parcel No. Kisumu/Dago/670 from the names of Okong'o Randa and Ondiek Randa without a valid transfer, Land Control Board consent and a sale agreement.
 - c. Colluding to transfer land parcel number Kisumu/Dago/670 from the names of Okongo Randa and Ondiek Randa without confirmed Grant of Letters of Administration.
 - d. Forging of official certificate of search in respect of the land parcel number Kisumu/Dago/670.
 - e. Colluding to fraudulently transfer matrimonial property without the consent of the spouses of the registered proprietors.
43. I have carefully re-examined the evidence placed before the trial court also bearing in mind that it is the Appellants who had the burden to prove the allegations of fraud and secondly, that the standard of proof for claims based on the tort of fraud is higher than the ordinary standard of proof of a balance of



probabilities in civil cases. For instance in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000]eKLR that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

44. I find no evidence of forgery, collusion or any element of fraud placed before the trial court. The particulars of fraud pleaded were not proved.
45. Regarding Letters of Administration to the estate of the deceased persons, I have noted that the property lands were transferred from the names of Ondiek Randa and Okongo Randa in their lifetime. The suit land did not form part of the estate of the deceased persons, hence the need for Letters of Administration did not arise.
46. I find that the trial court did not err in finding that the Appellant had not discharged the burden of proof in respect of the claim based on fraud.
47. Regarding the claim based on the doctrine of adverse possession, the Appellant pleaded in paragraphs 20 and 21 of the defence and counterclaim that since both Ondiek and Okongo Randa were buried on the suit land and that since the family of the Appellants had been living on the land from 1976 when the Respondent procured their registration without any claim or interference from the Plaintiffs until 2013, the Appellants were in the alternative, entitled to the suit land by adverse possession.
48. This pleading was however not supported by the evidence. DW1 claimed that the land was hers because it belonged to her late husband. If that be the case, then her claim based on adverse possession is not sustainable. A party cannot be an adverse possessor of her own land. In any event DW1 also stated that there has never been any homestead or grave on the suit land.
49. As held by the Court of Appeal in the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] eKLR :

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
50. The ingredients of adverse possession as outlined in above-cited authority were not proved before the trial court. Hence, there was no basis for the trial court to allow the counterclaim.
51. The evidence on record supported the findings and decision of the trial court.

Conclusion

52. Having analyzed and re-examined the entire evidence placed before the trial court, the court finds no reason to interfere with the findings and decision of the trial court. The court further finds that the appeal lacks merit. The appeal is hereby dismissed. Costs to the Respondents.



Orders accordingly.

JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 18TH DAY OF SEPTEMBER 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Appellants.

Ohayo for the Respondents.

