



**Oyando v Ashiachi (Suing as a Legal Representative of the Estate of James Albert Ashiachi) (Environment and Land Appeal E059 of 2022) [2025] KEELC 6056 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6056 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E059 OF 2022  
DO OHUNGO, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**DAMARY OYANDO ..... APPELLANT**

**AND**

**FLORENCE MWANISA ASHIACHI (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES ALBERT ASHIACHI) ..... RESPONDENT**

*(Being an appeal from the judgment of the Senior Principal Magistrate's Court at Mumias (Hon. T A Obutu, Senior Principal Magistrate) delivered on 10th November 2022 in Mumias MCELC No. 26 of 2020)*

**JUDGMENT**

1. Litigation leading to this appeal commenced in the Subordinate Court on 25<sup>th</sup> August 2020 when the Respondent filed Mumias MCELC No. 26 of 2020 through an undated Plaintiff in which she averred that she was the legal representative of the estate of James Albert Ashiachi Kusimba (deceased) who was her husband. That in 1995, the deceased purchased a parcel of land known as L.R. No. South Wanga/Buchifi/1127 (the suit property) from one Joseph Wesonga Mukoya, paid the purchase price and took possession with his family. The Respondent further averred that the Appellant trespassed into the suit property and that on 4<sup>th</sup> August 2020, persons claiming to be the Appellant's servants and agents started fencing and subdividing the suit property.
2. The Respondent therefore sought judgment against the Appellant as follows:
  - a. A declaration that the Plaintiff is the lawfully registered owner of the land parcel known as LR NO. SOUTH WANGA/BUCHIFI/112 situate within Kakamega County.



- b. A declaration that the Defendant's entry and development of the land parcel known as LR NO. SOUTH WANGA/BUCHIFI/1127 situate within Kakamega County is unlawful, illegal and a trespass.
  - c. An order of Permanent Injunction in favor the Plaintiff do issue against the Defendant, its hirelings, servants, employees and or agents or any persons claiming and acting on its behalf from entering, trespassing and/or continuing with the impugned developments on the suit property.
  - d. Costs of the suit.
  - e. Any other relief that this Honorable Court may deem.
3. The Appellant filed Statement of Defence dated 12<sup>th</sup> September 2020 in which she denied the Respondent's allegations and averred that the suit property belonged to Nicholas Mayabi Wakhulunya (also deceased). That she purchased 4.5 acres of the suit property from Mercyline Adhiambo Makokha who was the legal representative of the estate of Nicholas Mayabi Wakhulunya and that she acquired vacant possession. She further averred that the Respondent trespassed on the suit property and destroyed property. She urged the Subordinate Court to dismiss the Respondent's case with costs.
  4. Separately, on 23<sup>rd</sup> October 2020, the Appellant together with Mercyline Adhiambo Makokha who sued as legal representative of the estate of Nicholas Mayabi Wakhulunya (deceased), filed Mumias MCELC No. 36 of 2020 through Plaint dated 19<sup>th</sup> October 2020. They averred that the Appellant had purchased a 4.5 acre portion of the suit property and that the Respondent entered the suit property in April 2020 without permission and constructed structures on one acre thereof. They therefore prayed for judgment against the Respondent for her eviction and for costs of the suit.
  5. The Respondent filed statement of defence through which she denied the averments in the plaint and urged the Subordinate Court to dismiss the suit with costs.
  6. The two cases were consolidated pursuant to an order made by the Subordinate Court on 4<sup>th</sup> November 2021. The Plaint in Mumias MCELC No. 36 of 2020 was deemed a counterclaim.
  7. Upon hearing the matter, the Subordinate Court Hon. (T A Obutu, Senior Principal Magistrate) delivered judgment on 10<sup>th</sup> November 2022. The learned Magistrate found merit in the Respondent's case and ordered as follows:

The upshot is that I do enter judgement for the plaintiff against the defendant as follows;

- a) A declaration that the Plaintiff is the lawfully registered owner of the land parcel known as LR NO. SOUTH WANGA/BUCHIFI/1127 situated within Kakamega County is hereby issued.
- b) A declaration is issued that the Defendant's entry and development of the land parcel known as LR NO. SOUTH WANGA/BUCHIFI/1127 situated within Kakamega County is unlawful, illegal and trespass;
- c) An order of permanent injunction in favour of the plaintiff do issue against the Defendant, his hirelings, servants, employees and or agents or any person claiming and acting on its behalf from entering, trespassing and/or continuing with the impugned development on the suit property.
- d) Costs to the Plaintiff.



8. Dissatisfied with the outcome, the Appellant filed this appeal on 8<sup>th</sup> December 2022, through Memorandum of Appeal dated 7<sup>th</sup> December 2022. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:
  1. That the learned trial Magistrate erred both in law and in fact in finding the appellant liable in trespass when no trespass was proved.
  2. That the learned trial Magistrate erred both in law and in fact in holding that the Respondent had proved his (sic) case on a balance of probability.
  3. That the learned trial Magistrate erred both in law and in fact as he was unjust against the weight of evidence adduced by the Appellant and dismissed the appellant's claim thereby occasioning a miscarriage of justice upon the appellant.
  4. That the learned trial Magistrate erred in law and in fact in awarding costs and issuing an order of permanent injunction against the Appellant.
  5. That the learned trial Magistrate erred in law and in fact in disregarding the Appellant's defence.
  6. That the learned trial Magistrate erred in dismissing the appellant's case, failed to apply the principles applicable in determining that the appellant had proved his (sic) case on a balance of probabilities.
  7. That the learned trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsuitable in law.
9. Flowing from those grounds, the Appellant prayed that this appeal be allowed, the judgment of the Subordinate Court be set aside and that she be awarded costs of this appeal and of the proceedings before the Subordinate Court.
10. The appeal was canvassed through written submissions. The Appellant filed submissions dated 25<sup>th</sup> July 2023 in which she identified two substantive issues for determination: who was the rightful owner of the suit property and whether Mercyline Adhiambo Makokha had the capacity to sell the suit property to her.
11. On the issue of ownership of the suit property, the Appellant argued that she was the lawful owner and that she purchased the suit property from Mercyline Adhiambo Makokha who was the legal representative of the estate of Nicholas Mayabi Wakhulunya pursuant to the Certificate of Confirmation of Grant at page 36 of the Record of Appeal. That although the Respondent claims that her husband purchased the suit property from one Joseph Wesonga Mukoya in the year 1995, the Respondent conceded during cross examination that she did not have a sale agreement and did not produce any evidence that she was in occupation and use of the suit property.
12. The Appellant went on to argue that as at 1995, the suit property belonged to Nicholas Mayabi as is shown in certificate of search dated 7<sup>th</sup> June 2000 at page 98 of the Record of Appeal and that Joseph Wesonga Mukoya lacked capacity to sell the suit property to James Albert Kusimba. That on the other hand, Mercyline Adhiambo Makokha had capacity to sell to the Appellant since she was the administrator of the estate of Nicholas Mayabi. Relying on Sections 45, 79 and 82 of the *Law of Succession Act* and the case of *In re Estate of Barasa Kanenje Manya (Deceased) [2020] eKLR*, the Appellant contended that the transaction between Joseph Wesonga Mukoya and James Albert Kusimba was unlawful. The Appellant therefore urged the court to allow the appeal.



13. On her part, the Respondent filed submissions dated 24<sup>th</sup> September 2024. She identified four issues for determination: whether the appeal is fatally defective for offending the provisions of Order 42 Rule 12, whether the Appellant had any valid claim over the suit property, whether the Appellant was guilty of trespass and whether the appeal is merited.
14. On whether the appeal is fatally defective for offending the provisions of Order 42 Rule 12, the Respondent argued that directions on the appeal having been given by the court in July 2023, the Appellant was obligated to serve her with the Memorandum of Appeal within seven days of notification by the Registrar that the appeal had been admitted pursuant to Section 79B of the *Civil Procedure Act*. Relying on the case of *Municipal Council of Nyeri v John Wachira Kairebi* [2018] eKLR, she argued that the Appellant had attempted to ambush her and urged the court to dismiss the appeal on that account.
15. On the second issue for determination, as to whether the Appellant had any valid claim over the suit property, she referred to clause J (a) of the sale agreement between the Appellant and Mercyline Adhiambo Makokha dated 22<sup>nd</sup> February 2020 and argued that pursuant to the said clause, the sale stood terminated in view of the suit before the Subordinate Court wherein ownership of the suit property was disputed. Further, that Mercyline Adhiambo Makokha inherited the suit property from her husband Francis Makokha Oduori who passed way in 2007 and petitioned for letters of administration on 29<sup>th</sup> June 2020. That on 22<sup>nd</sup> February 2020 when Mercyline entered into the sale agreement, she had no valid title to pass, and the transaction violated Sections 45 and 82 (b) (ii) of the *Law of Succession Act*. She relied on the case of *In re Estate of Francis Kimani Muchiri (Deceased)* [2018] eKLR and contended that the Appellant had no valid claim over the suit property.
16. The Respondent went on to argue that she was the registered proprietor of the suit property and that the Appellant had trespassed thereon. She therefore urged the court to dismiss the appeal for want of merit.
17. This being a first appeal, the remit of this Court is to re-evaluate the evidence in the trial court both on points of law and facts and to come up with its own findings and conclusions. As the Court of Appeal held in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
18. I have carefully considered the entire record, the grounds of the appeal and the parties' submissions. The issues that arise for determination are whether the appeal is fatally defective for offending the provisions of Order 42 Rule 12, who between the parties is the proprietor of the suit property, whether trespass was established and whether the reliefs sought were available.
19. The Respondent has contended that the appeal is fatally defective for offending Order 42 Rule 12 of the Civil Procedure Rules which deals with service of memorandum of appeal. The said rule provides:

Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.



20. A perusal of the record herein shows that the appeal was admitted for hearing pursuant to Section 79B of the Civil Procedure Act on 14<sup>th</sup> March 2024. By then, the appeal had come up for mention severally and there is evidence on record indicating that the Respondent had been served with mention notices as well as several notices by the Deputy Registrar from as early as 17<sup>th</sup> February 2023. On 13<sup>th</sup> May 2024, the Respondent was represented in court by counsel who sought more time to file submissions. Counsel did not complain of any ambush. As noted earlier, the Respondent filed submissions dated 24<sup>th</sup> September 2024.
21. The appeal having been filed on 8<sup>th</sup> December 2022 and admitted on 14<sup>th</sup> March 2024, and further considering the notices issued as well as the court attendance on 13<sup>th</sup> May 2024, I am not persuaded that there was any ambush. The appeal is not defective.
22. The case before the Subordinate Court revolved around ownership of the parcel of land known as South Wanga/Buchifi/1127 (the suit property). Among other reliefs, the Respondent sought a declaration that she was the registered owner of the suit property. On the other hand, the Appellant sought eviction of the Respondent from the suit property on the ground that she had purchased a 4.5 acre portion of the suit property.
23. Registered proprietorship of land is both a question of law and of fact. It is a question of law to the extent that the Land Registration Act makes elaborate provisions on the issue.
24. Section 24 of the Land Registration Act provides:  
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; and
  - (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 or expressed agreements, liabilities or incidents of the lease.
25. Additionally, Section 25 of the Land Registration Act provides:
- (1) The rights of a proprietor, whether acquired on first registration or 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) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
  - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
26. Registered proprietorship of land is a question of fact since it has to be established through evidence. To that extent, and in line with the provisions of Sections 107 to 109 of the Evidence Act, the parties bore the burden of proving existence of the suit property and its registered proprietorship.



27. The importance of proving the legal existence of a registered parcel of land is further underscored by Order 21 rule 6 of the Civil Procedure Rules which requires that the Court be satisfied as to registration details of land before making orders affecting the title. The rule provides thus:

Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.

28. In testimony to the need for certainty when dealing with registered land, other provisions requiring proof of title are found at Order 22 rule 10 which empowers the Court to require litigants to produce a certified extract from the land registry whenever an application is made for the attachment of registered land. Similarly, pursuant to Order 37 rule 7, a claim for adverse possession must be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. Simply put, registered proprietorship of land is something that must be established without any room for ambiguity. A party seeking title to registered land must succeed on the strength of her case and not on perceived weakness or even absence of defence. See *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR.

29. Despite their claims to title, none of the parties produced either a title document or certificate of official search in respect of the suit property. They did not even include such documents in their respective lists of documents.

30. The Respondent was contented with her testimony that her deceased husband purchased a 1 acre portion of the suit property. Despite conceding that the purchase price was yet to be paid in full and notwithstanding that according to her only a 1 acre portion of the suit property was purchased by her husband, she sought a declaration that she was the owner of the whole of the suit property. I also note that she testified that she did not have title in her name and that Joseph Wesonga who sold to her husband did not have title since succession had not been conducted in respect of the estate of the then registered proprietor.

31. As for the Appellant, I note that her claim was that she purchased 4.5 acres of the suit property. In the absence of evidence of registered proprietorship, there is no telling whether she dealt with a valid proprietor. Even though she produced a copy of a sale agreement between her and Mercyline Adhiambo Makokha, the Court cannot establish Mercyline's capacity to transact. A certificate of confirmation of grant is not proof of proprietorship of registered land. In the absence of proof of proprietorship, it is impossible to tell whether the registered proprietor was given a hearing and whether the parties before the Subordinate Court were the proper parties.

32. I have carefully read the judgment of the Subordinate Court. The learned Magistrate did not consider either the issue of registered proprietorship or the discrepancy between the sizes of the portions allegedly purchased versus the Respondent's claim for the whole of the suit property. In the absence of proof of proprietorship, all the reliefs claimed by the parties could not issue.

33. I find that the learned Magistrate erred in entering judgment in favour of the Respondent. None of the parties proved her case. Parties have a duty to plead a case that actually resolves the dispute at hand. If they fail to, the Court's hands remain tied since both the parties and even the Court are bound by the pleadings. See *Raila Amolo Odinga & Another vs. IEBC & 2 others* [2017] eKLR.



34. In the result, this appeal succeeds in part. I set aside the judgment of the Subordinate Court and replace it with an order dismissing both the Respondent's case and the Appellant's counterclaim. Each party shall bear own costs of both this appeal and the proceedings before the Subordinate Court.

**DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**D. O. OHUNGO**

**JUDGE**

Delivered in the presence of:

No appearance for the Appellant

Ms Sheunda for the Respondent

Court Assistant: B Kerubo

