



**Anyona v Oduor & another (Environment and Land Appeal
E010 of 2022) [2023] KEELC 15828 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15828 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

AY KOROSS, J

MARCH 2, 2023

BETWEEN

JANE AWUOR ANYONA APPELLANT

AND

MICHEAL ODUOR 1ST RESPONDENT

MAUREEN ATIENO 2ND RESPONDENT

*(Being an appeal from the judgment of Principal Magistrate Honourable J.P.
Nandi delivered on 8/03/2022 in Bondo PM ELC Case Number E11 of 2019)*

JUDGMENT

Introduction

1. This appeal raised two converging issues; between the African culture of responsibility to society and family vis a vis limitation of actions in claims over land where a family member with permission of entry extends permission to other extended family members.
2. The appellant is the registered proprietor of land parcel no East Asembo/Ramba 4247(hereinafter referred to as 'suit property') while the respondents, who are in occupation of the suit property and are in-laws to her sister Grace Akoth ('Grace').
3. Grace became estranged from her husband Francis Otieno ('Francis') in 2018 and vacated the suit property.
4. By a plaint dated February 18, 2021, the appellant instituted a suit against the respondents for the tortious action of trespass. She sought orders inter alia, a declaration she was the rightful registered owner of the suit property; eviction; permanent injunction; general damages for trespass and costs and interests.



5. It was her case she permitted Grace to settle on the suit property. Despite the sole permission, Grace entered it together with her in laws. Though the appellant pleaded Francis was deceased, it later emerged in the pleadings he was alive; he moved onto the suit property with Grace and other family members. She contended that Grace having vacated the suit property, it was incumbent upon the respondents to similarly vacate it and hand over it over to her. According to her, the respondents had declined to vacate hence they were trespassers.
6. In response, the 2nd respondent who was acting in person, entered appearance and filed a defence dated April 14, 2021 in which she made several averments. She denied the statements made in the plaint. She asserted Francis purchased the suit property in 1993. Her matrimonial home was constructed on it in 1996. Several relatives had already been buried thereupon. The suit was statutory barred. The appellant fraudulently acquired the suit property.
7. After hearing the parties, the trial magistrate in his judgment framed three issues for determination ; (i) whether the respondents were trespassers (ii) whether the appellant was entitled to orders sought and (iii) who bears the costs of the suit.
8. On the issues, the trial magistrate found the respondents were not trespassers, the suit was statutory barred by the Limitation of Actions Act because one could not recover land after an expiry of 12 years, the previous proprietor of the suit property Asha Atieno Monyi who testified as PW3 ('Asha') did not have good title to pass to the appellant and the appellant did not prove her case to the required standards. The trial magistrate proceeded to revoke the appellant's title to the suit property and reverted it to Asha. The appellant's suit was dismissed with costs to the 2nd respondent.

Appeal to this court

9. Dissatisfied with the above judgment, the appellant preferred an appeal to this court. Although the memorandum of appeal dated April 4, 2022 raised 5 grounds of appeal, the appellant condensed them into 4 grounds;
 - a. The learned trial magistrate erred in law in allowing a stranger to participate in the proceedings;
 - b. The learned trial magistrate erred in law in failing to appreciate the suit was not time barred;
 - c. The learned trial magistrate erred in law and fact by granting orders that were not pleaded by the parties; and
 - d. The learned trial magistrate erred in the law of evidence in deciding the case against the weight evidence.
10. The appellant prayed for this court to vary and set aside the impugned judgment, award the appellant reliefs sought in the trial court and, costs of the lower court suit and of the appeal.

Appellant's submissions

11. Mr Rakewa, the appellant's counsel, filed written submissions dated January 12, 2023. Mr Rakewa argued on the condensed grounds of appeal enumerated earlier.
12. On the 1st ground, counsel submitted the trial magistrate misdirected himself in allowing the 1st respondent to cross examine the appellant yet he had neither entered appearance nor filed a defence.
13. On the 2nd ground, counsel contended limitation of actions could not suffice because the appellant had on several occasions including in 2003, 2011 and 2014 beseeched the respondents to vacate the suit property to no avail. Counsel submitted there was no subsisting dispute between the appellant and



Asha concerning the purchase of the suit property and it did not matter how long it took for the suit property to be transferred to the appellant by Asha. Counsel contended it was erroneous for the trial magistrate to cancel the appellant's title to the suit property.

14. On the 3rd and 4th grounds, it was counsel's submission that despite the adduced evidence proving the appellant purchased the suit property from Asha's husband Justus Otieno Ogweyo ('Justus'), the trial magistrate erred in revoking the appellant's title to the suit property. Counsel submitted the failure by the appellant to produce the agreement of sale was not sufficient ground to warrant a cancellation of title.
15. Although counsel cited authorities in support of his case, they were of no assistance to this court since they were improperly cited and none of their copies were tendered to this court.

Respondents' Submissions

16. The respondents did write a letter to this court dated December 23, 2022 contending they became alive of an appeal to this court after they had made attempts to file a bill of costs before the trial court. In the letter, they admitted they were privy the appeal was slated for directions in January 2022. It appears they meant the year 2023. They contended they had not been served with pleadings and notices pertaining to this appeal. Notwithstanding being aware of the mention date of January 17, 2023, they were a no show and the appeal was reserved for judgment.

Analysis and determination

17. As a first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyse it, evaluate it and arrive at my own independent conclusion, but always bearing in mind the trial magistrate had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See of *Selle v Associated Motor Boat Company Ltd*, [1968] EA 123.
18. I have thoroughly considered the records, grounds of appeal and appellant's submissions. Taking them into account, I will adopt the consolidated grounds of appeal as the issues falling for determination. Grounds 3 and 4 will be dealt with together.

I. Ground (a)

19. The stranger the appellant was referring to was the 1st respondent. He cross examined the appellant and her witnesses yet he had never entered appearance in accordance with Order 6 Rule 1 of the [Civil Procedure Rules](#) or filed a defence as required by Order 7 Rule 1 of the Civil Procedure Rules.
20. It is trite law if a party fails to enter appearance and file defence, he does not have a right of audience in the course of proceedings including cross-examining the plaintiff and her witnesses. However, during the hearing of the suit, the appellant who was represented by counsel, never raised an objection to such participation in order to enable the trial magistrate court decide on it hence form a basis for an appeal. This ground of appeal was a non-issue before the trial magistrate. It is being raised late in the day and I cannot usurp the power of the trial court. This ground of appeal fails.

II. Ground (b)

21. Considering Section 7 of the Limitation of Actions Act, in the impugned judgment, the trial magistrate stated:

‘The above provision clearly states that one cannot recover land after the expiry of 12 years. In our instant case, the suit was filed in 2021 without leave of the court. Further by the time



the suit land was being transferred to the Plaintiff by PW3, the title to the suit land had already been extinguished and she had no good title to transfer to the Plaintiff.’

22. The appellant’s claim was on the act of continuing trespass. In her defence, the 2nd respondent admitted her home stood on the suit property. In acts of continuing trespass, the cause of action continues running anew each time an intruder without permission continued invading or occupying a property. In this case, the respondents were occupying the suit property which was registered in the appellant’s name. It appears the trial magistrate misapprehended the law. It is my finding the trial magistrate erred when he found the appellant’s suit was statutory barred. I place reliance on the case of [Gladys Koskey v Benjamin Mutai \[2017\] eKLR](#) where the court expressed itself as follows;

‘On the first issue, the suit is founded on trespass which is a tort. Under section 4 of the Limitation of Actions Act, an action founded on a tort must be instituted within three years. However, as the Plaintiff indicates, the trespass is continuous and the Limitation of Actions Act does not come into play. This is supported by the case of Nguruman Limited V Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004 reported in 2007 KLR. Citing Clerk and Lindsell on Torts 16th Edition, paragraphs 23-01 the Court of Appeal stated that:

‘ Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues.’

23. Albeit having addressed the issue of limitation, it is paramount I deal with when the appellant’s cause of action accrued and continued to accrue each time the respondents were on the suit property.
24. The appellant alleged Grace entered the suit property with her permission and Grace extended such permission to her husband Francis and her in laws. In essence, the respondents who were Grace’s in laws derived their permissive rights through her. Grace testified as PW2 and corroborated the appellant’s averments. It was common ground, Grace and Francis, had parted ways. The appellant’s assertions Grace left the suit property in 2018 was uncontroverted.
25. The head licensee’s permission having coming to an end, the respondents had no business being in occupation from 2018 and each time they occupied the suit property without a new licence being issued directly to them by the appellant, deemed them trespassers. I place reliance on persuasive decisions from India. In the Supreme Court of India Civil Appellate Jurisdiction [Civil Appeal No 2789 of 2005 Laxmi Ram Pawar \(Appellant\) v Sitabai Balu Dhotre & anr \(Respondents\)](#) which cited with approval an extract of Salmond on the Law of Torts stated as follows;

‘14. In Salmond on the Law of Torts, 17th Edition by RFV Heuston, 1977, page 41, the expression, ‘Trespass by remaining on land’ is explained in the following manner:

‘Even a person who has lawfully entered on land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff’s land or vehicle is as much a trespass as to enter originally without right. Thus, any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time he fails to leave the premises.’

26. The High Court of Calcutta in [Smt Kiran Arya & Anr V Ambalal Sarabhai Enterprises Ltd & Ors - Cs No 324 of 1989 \[2013\] Inwbkoc 12035](#) (August 12, 2013) had this to say concerning the relationship



between a landlord, a head licensee and sub-licensees where permission to occupy property ceased to exist;

‘Even if the argument based on clause 11 is accepted but that by itself would not justify the claim of the defendants to continue its occupation after the original tenant ceased to exist. They have no right to be in possession. These clauses 5 and 11 would continue so long the tenancy subsists. A person entering the premises on the basis of such a permissive clause cannot elevate his status to a contractual or statutory tenant. The agreement itself comes to an end with the dissolution of the original tenant.’

I need not say more. This ground of appeal succeeds.

III. Grounds (c) and (d)

27. By Sections 24 and 26 of the Land Registration Act, a certificate of title issued by the land registrar are taken by all courts as prima facie evidence the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the grounds of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
28. These provisions of law have been applied in a line of judicial decisions including *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another (2013) eKLR* and *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR*.
29. Within the provisions of Order 2 Rule 10(1) of the Civil Procedure Rules and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities but not beyond reasonable doubt. The Court of Appeal decision of *Elijah Kipng'eno Arap Bii v KCB & Another Civil Appeal Number 276 of 2018* stated that;

‘ It is trite that where fraud is alleged, it must be specifically pleaded, and it is not enough to deduce it from the facts. The standard of proof of an allegation of fraud is above a balance of probabilities and the onus is on the party alleging fraud to provide evidence and prove his case.’
30. The appellant produced a certificate of official search and a title document which showed she was the registered owner of the suit property. By such registration, she had a right to possession, occupation and use of the suit property including suing for trespass.
31. Notwithstanding fraud was not pleaded to the required standard, she explained the root of her title which was corroborated by Asha. It was both their testimonies that the appellant purchased the suit property from Justus. A gazette notice and grant of letters of administration evidenced Justus died on October 5, 1993 meaning any alleged agreement of sale between the appellant and Justus could only have taken place on or before his death. A transfer of the suit property by Asha to the appellant could only take place after July 3, 2018 which was when she obtained a confirmation of grant. The trial magistrate took issue with failure by the appellant to produce an agreement to prove she purchased the suit property from Justus.



32. Prior to Section 3 (3) of the Law of Contract Act amendments being operative from June 1, 2003 (See Statute Law (Misc Amendments] No 2 of 2002), the law gave allowance to contracts in land being made orally subject to certain conditions being met. This repealed Section 3 (3) stated thus:-

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

- (i) Has in part performance of the contract taken possession of the property or any part thereof or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.’

33. It is the honest opinion of this court, the trial magistrate ought to have satisfied himself on whether the agreement of sale was made orally or in writing. Additionally, it was not in doubt Grace, Francis and the respondents entered the suit property in 1993 which held credence the agreement had been partially fulfilled by the appellant and she was awaiting registration in her name.

34. On the other hand, although the 2nd respondent in her defence pleaded the appellant had acquired title to suit property illegally and fraudulently, she did not particularize or prove fraud to the required standards. See Order 2 Rule 10(1) of the Civil Procedure Rules and *Elijah Kipng’eno Arap Bii v KCB & Another* (Supra).

35. Although Francis, who testified as DW2, asserted the appellant had altered his documents to the suit property by substituting his name as purchaser with her name, he never tendered any documents to prove such an alteration. The green card which was produced did not demonstrate the suit property was ever registered in his name.

36. It is trite law parties are bound by their pleadings. Despite the 2nd respondent not counterclaiming and particularizing fraud or even proving fraud to the required standard, the trial magistrate without any prayer being sought by the 2nd respondent, cancelled the appellant’s title to the suit property. This was also notwithstanding the clear provisions of Section 26 of the Land Registration Act. It is the finding of this court the trial magistrate erred. I rely on the case of *Raila Amolo Odinga & Another v IEBC & 2 Others [2017] eKLR* where the Supreme Court of Kenya quoted with approval, the following excerpt from the decision of the Supreme Court of India in *Arikala Narasa Reddy vs Venkata Ram Reddy Reddygari & Another, Civil Appeal Nos 5710-5711 of 2012 [2014] 2 SCR* where the court held;

‘In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings’



The 3rd and 4th grounds of appeal succeed.

37. Upon considering all the foregoing reasons hereinabove, I am convinced it would be a proper exercise of my discretion to interfere with the impugned judgment.
38. Despite pleading general damages, the appellant did not lead evidence on the loss she suffered by the acts of the respondents. Trespass is actionable per se and having established the respondents were trespassers, I award her general damages of Kshs 100, 000/=.
39. In the end, the appeal is found to be meritorious. I hereby set aside the entire judgment of the lower court. It is trite law costs follow the event. I award the costs of this appeal and lower court suit to the appellant. I hereby issue the following disposal orders;
- a. A declaration be and is hereby made that the appellant is the rightful registered owner of Land Parcel No East Asembo/Ramba/4247.
 - b. The respondents are hereby granted 90 days from the date of service of the orders of this court to remove themselves and their developments from land parcel no East Asembo/Ramba 4247 and give the appellant vacant possession, and in default, the appellant shall forcefully evict the respondents together with their servants or agents.
 - c. A permanent injunction be and is hereby issued restraining the respondents, their servants, agents and workers from entering or occupying, constructing, destroying, damaging or dealing whatsoever with land parcel no East Asembo/Ramba 4247.
 - d. General damages for trespass are ordered in the sum of Kshs 100,000/- payable by the respondents to the appellant.
 - e. The costs of this appeal and lower court suit are payable by the respondents to the appellant.
40. For the avoidance of doubt herein, eviction of the respondents from the suit property shall be undertaken in accordance with Sections 152 B, 152E, 152F, 152G, 152H and 152 I of the Land Act.
41. Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

02/03/2023

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Misiga h/b for Mr. Okeyo for the appellant

1st respondent present

Court assistant: Ishmael Orwa

