



REPUBLIC OF KENYA



**Kute v Oyieyo (Environment and Land Appeal E026 of 2023)  
[2025] KEELC 126 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 126 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E026 OF 2023  
SO OKONG'O, J  
JANUARY 23, 2025**

**BETWEEN**

**ZADOCK ARCHIBALD OCHIENG KUTE ..... APPELLANT**

**AND**

**WILLIAM ODONGO OYIEYO ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. S.O.Temu (SPM)  
delivered on 15th June 2023 in Nyando PMC ELC No. 41 of 2018)*

**JUDGMENT**

**Background**

1. The Respondent filed a suit against the Appellant and 5 others in the Principal Magistrate's Court at Nyando namely, Nyando PMC ELC No. 41 of 2018 (hereinafter referred to only as "the lower court") seeking; a permanent injunction restraining the Appellant and five others who are not parties to this appeal, their servants, agents and those working directly under them from committing acts of trespass, encroachment and tilling of all those parcels of land known as Kisumu/Agoro West/500 and Kisumu/Agoro West/503 (hereinafter referred to jointly as "the suit properties" and separately as "Plot No. 500" and "Plot No. 503" respectively), and the costs of the suit. The Respondent who brought the lower court suit as a legal representative of Lazaro Oyieyo, deceased (hereinafter referred to only as "the deceased") averred that the suit properties were at all material times registered in the name of the deceased. The Respondent averred that Appellant, and the five others aforesaid (hereinafter referred to only as "the co-defendants) had jointly and severally trespassed on the suit properties and were carrying out cultivation thereon. The Respondent averred that the Appellant and the co-defendants entered the suit properties without the Respondent's consent or lawful excuse.
2. The Appellant filed a defence in the lower court on 20<sup>th</sup> April 2018. The Appellant admitted that the suit properties were registered in the name of the deceased. The Appellant averred that he had an



interest in Plot No. 503 as a buyer thereof. The Appellant averred that he purchased Plot No. 503 from the deceased during his lifetime and that the deceased died before he could transfer Plot No. 503 to the Appellant. The Appellant averred that he purchased Plot No. 503 in 1989 and had used the property since then. The Appellant averred that the delay in the transfer of Plot No. 503 to him was occasioned by the delay on the part of the deceased's family to do succession in respect of the deceased's estate. The Appellant denied that he was a trespasser on the suit properties. The Appellant urged the court to dismiss the Respondent's suit and compel the Respondent to transfer Plot No. 503 to him.

3. At the trial, the Respondent adopted as his evidence in chief his two witness statements, one filed together with the plaint and the other filed on 1<sup>st</sup> August 2019. The Respondent stated that he discovered in 2012 that the Appellant and the co-defendants had trespassed on the suit properties and planted maize and other crops thereon. He stated that he met the Appellant in 2013 and the Appellant claimed that he bought Plot No. 503 from the deceased who died in 1991. He stated that the Appellant promised to furnish him with a copy of the agreement of sale which he never did. The Respondent stated that when he tried to stop the trespass, the Appellant and the co-defendants threatened him with harm. The Respondent stated that apart from Plot No. 503 which the Appellant caused to be registered in his name fraudulently which registration was revoked by the Land Registrar, the Appellant had fraudulently transferred other parcels of land belonging to the Respondent's other relatives to his name.
4. In his defence at the trial, the Appellant also adopted as his evidence in chief his witness statement filed together with his defence on 20<sup>th</sup> April 2018 in which he had reiterated the contents of his defence. He also adopted as part of his evidence in chief his replying affidavit dated 17<sup>th</sup> October 2018. The Appellant stated that he purchased Plot No. 503 from the deceased on a willing buyer willing seller basis in 1989. He stated that he entered into a written agreement with the deceased in the presence of several witnesses. He stated that he had used Plot No. 503 from the time he purchased the same without any objection from anyone. He stated that he had been using Plot No. 503 for growing cash crops and food crops.
5. In a judgment delivered on 15<sup>th</sup> June 2023, the lower court found that the Respondent had proved his case against the Appellant and the co-defendants and issued an injunction restraining them from trespassing on or remaining on the suit properties. The lower court also condemned the Appellant and the co-defendants to pay the costs of the suit. The lower court found that the agreement of sale between the Appellant and the deceased required consent of the Land Control Board(LCB) and since none was obtained, the agreement was void and unenforceable. The lower court found that the Appellant had entered into Plot No. 503 on the strength of the said agreement which became void after 6 months when the parties did not obtain the consent of the LCB. The lower court stated that the Appellant was supposed to vacate Plot No. 503 after the agreement became void. The lower court noted however that the Respondent was all along aware of the Appellant's occupation of the suit property over the years and did not raise any objection. The lower court held that the Respondent was estopped from claiming that the Appellant was a trespasser on Plot No. 503. The lower court found in what appears to be a contradiction that the trespass claim against the Appellant was not proved. The court stated that: "The claim of trespass thus fails." Despite this finding by the lower court, the lower court still held in its conclusion that the Respondent had proved his trespass claim against the Appellant and his co-defendants in the lower court suit.

### **The appeal**

6. The Appellant and one of the co-defendants in the lower court were aggrieved with the decision of the lower court and the Appellant filed this appeal on 26<sup>th</sup> October 2023 with leave of the court while his



said co-defendant filed ELC Appeal No. E027 of 2023 on the same date also with leave of the court. ELC Appeal No. E027 of 2023 is the subject of a separate judgment since the two appeals were never consolidated. In his Memorandum of Appeal, the Appellant challenged the lower court's judgment on several grounds. In summary, the Appellant contended that the lower court erred in its failure to find that the Appellant was entitled to a share of the deceased's estate the deceased having sold to him Plot No. 503. The Appellant contended that the lower court erred in its failure to evaluate and analyse correctly the evidence and submissions that were placed before it by the Appellant. The Appellant contended further that the lower court erred by not considering that the Appellant had occupied Plot No. 503 for a long time. The Appellant prayed that the appeal be allowed and an order be made setting aside the judgment and decree of the lower court delivered on 15<sup>th</sup> June 2023. The Appellant also prayed for the costs of the appeal and of the lower court suit.

### Analysis and Determination

7. The Appeal was argued by way of written submissions. The Appellant filed undated submissions while the Respondent filed submissions dated 9<sup>th</sup> September 2024. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the parties. This being a first appeal, the court must consider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. The court has to bear in mind however that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal held among others that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

8. The appellate court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] EA 424 and *Makube v. Nyamuro* [1983] KLR 403.

9. The issue that was before the lower court for determination was whether the Appellant had trespassed on Plot No. 503 and should be restrained by an order of a permanent injunction from committing further acts of trespass. Trespass is both a criminal offence and a civil wrong. Section 3 (1) of the *Trespass Act*, Cap 294 Laws of Kenya defines the offence of trespass as follows:

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

10. *Halsbury's Laws of England* 3<sup>rd</sup> edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades



the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land."

11. In *Clerk & Lindsell on Torts*, 18<sup>th</sup> Edition at paragraph 18-01, trespass to land is defined as consisting of  
"any unjustifiable intrusion by one person upon land in the possession of another."

It is common ground that Plot No. 503 was registered in the name of the deceased, Lazaro Oyieyo as at the date of his death on 19<sup>th</sup> March 1991. It is also common ground that upon the deceased's death, Plot No. 503 devolved to his estate. The lower court made a finding that the Appellant had entered into an agreement of sale of the suit property with the deceased. The lower court however did not determine the validity of the said agreement that was said to have been made on 9<sup>th</sup> March 1989. If the Appellant had made a lawful and enforceable agreement of sale of Plot No. 503 with the deceased, the agreement would bind the deceased's estate. I have looked at the agreement of sale dated 9<sup>th</sup> March 1989. The agreement has the particulars of the buyer and the seller of Plot No. 503 and the witnesses. The deceased is indicated in the agreement as the seller of Plot No. 503 and the Appellant as the buyer. On the face of it, the agreement bears only the signature and the identity card number of the Appellant. The agreement is not signed by the deceased and does not bear his identity card number. It follows from the foregoing that this was not a valid agreement for the sale of land. The agreement was not binding upon the deceased and his estate. The agreement could not therefore be a lawful excuse for the Appellant's occupation of Plot No. 503. The Appellant was said to have taken possession of Plot No. 503 pursuant to the purported agreement of sale that was disowned by the estate of the deceased. The Appellant contended that he entered the suit property in 1989. That means that as of 2018 when the Respondent filed the lower court suit, he would have been in possession of Plot No. 503 for 29 years. Could this create any interest in Plot No.503 in his favour?

12. Under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, a suit for the recovery of land cannot be brought after the expiry of 12 years from the date when the cause of action accrued. It follows therefore that if the Appellant had established that he had been in occupation of Plot No. 503 for over 12 years, he would have been entitled to remain in occupation of the land as his right to acquire the same by adverse possession would have accrued and the Respondent's title in the property would have become extinguished under Section 17 of the *Limitation of Actions Act*. The Appellant's claim that he had been in occupation of Plot No. 503 since 1989 was denied by the Respondent. The Respondent claimed that the Appellant entered the property in 2012. The Appellant had a duty to prove that fact. Apart from producing some photographs showing eucalyptus trees said to have been planted by him on the suit property, there was nothing else placed before the court as proof of his claim that he had occupied the property since 1989. In any event, the Appellant did not plead that the Respondent's suit was time-barred and that the Respondent's title to the suit property had become extinguished.
13. Due to the foregoing, there was no basis upon which the lower court could hold that the Appellant was not a trespasser on the suit property. The Appellant having failed to establish any lawful excuse for occupying Plot No. 503, the only conclusion that the court could arrive at was that the Appellant was a trespasser on the suit property.

## Conclusion

14. In the final analysis and for the foregoing reasons, I find no reason to disturb the judgment of the lower court. Although the court made a conflicting finding in the judgment when it said in its analysis of the parties' cases that trespass had not been proved by the Respondent, and in its conclusion that the Respondent had proved his case against the Appellant, this conclusion as I have demonstrated above



was supported by the pleadings and evidence on record while the said finding had no basis. I therefore find no merit in the Appellant's appeal. The appeal is dismissed with costs to the Respondent.

**DELIVERED AND DATED AT KISUMU ON THIS 23<sup>RD</sup> DAY OF JANUARY 2025**

**S. OKONG'O**

**JUDGE**

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Anyumba h/b for Ms. Otieno for the Appellant

The Respondent in person

Ms. J. Omondi-Court Assistant

