



REPUBLIC OF KENYA



KENYA LAW
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**Okuku v Oyieyo (Environment and Land Appeal E027 of 2023)
[2025] KEELC 97 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 97 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E027 OF 2023
SO OKONG'O, J
JANUARY 23, 2025**

BETWEEN

DICK OMONDI OKUKU 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 other persons who are not parties to this appeal (hereinafter referred to as "the co-defendants"), 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 the Appellant and 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 Appellant's consent or lawful excuse.
2. The Appellant filed a defence in the lower court dated 29th May 2018. The Appellant denied the Respondent's claim in its entirety. The Appellant averred that he was a purchaser for value of Plot No.



500 from the registered owner. The Appellant averred that he was the lawful bona fide owner of Plot No. 500. The Appellant averred that the Respondent had no locus standi to file the suit. The Appellant urged the court to dismiss the Respondent's suit with costs.

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 1st August 2019. The Respondent stated that he discovered that the Appellant and his son Jared Omondi laid a claim to Plot No. 500 immediately after the deceased died in 1991 although the agreement which the Appellant alleged to have had with Julius Odoyo Oyieyo on the strength of which he took possession was made in 1998, 7 years later. The Respondent averred that the Appellant's homestead on Plot No. 500 had been abandoned with no activity taking place until when the lower court suit was filed. The Respondent averred that the Appellant had abandoned his homestead on Plot No. 500 for several years and was living elsewhere. The Respondent averred that the alleged agreement of sale between the Appellant and Julius Odoyo Oyieyo, deceased was not signed by the deceased. The Respondent denied that he witnessed the execution of the said agreement. The Respondent contended that Julius Odoyo Oyieyo who allegedly sold Plot No. 500 to the Appellant did not own the property.
4. The Appellant did not give evidence at the trial. The witness who testified was the Appellant's son, Jared Omondi who was also the 5th Defendant in the lower court suit. The Appellant's son adopted as his evidence in chief his witness statement dated 24th April 2018 and his replying affidavit dated 17th October 2018. He stated that the Appellant told him that he purchased Plot No. 500 from the Respondent's brother Julius Odoyo Oyieyo in 1998. He stated that the Appellant built his homestead on Plot No. 500 soon after the death of the deceased in 1991 without objection from anyone. He stated that the Appellant was in occupation of the land. He stated that he had not trespassed on Plot No. 500 and that he was wrongly sued. He stated that the Appellant and he had lived on Plot No. 500 since 1991. He stated that the Respondent was one of those who witnessed the execution of the agreement between the Appellant and Julius Odoyo Oyieyo.
5. In a judgment delivered on 15th 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 his co-defendants in the lower court to pay the costs of the 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 26th October 2023 with leave of the court while his said co-defendant filed ELC Appeal No. E026 of 2023 on the same date also with leave of the court. ELC Appeal No. E026 of 2023 is the subject of a separate judgment since the two appeals were never consolidated. In his Memorandum of Appeal dated 24th October 2023, 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 that belonged to Julius Odoyo Oyieyo who sold to the Appellant Plot No. 500. 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 that the lower court erred by failing to find that the Respondent had not proved his case against the Appellant. The Appellant contended that the lower court failed to consider that the Appellant had occupied the suit property 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 15th 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 9th 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] E.A 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. 500 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 3rd 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*, 18th 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. 500 was registered in the name of the deceased, Lazaro Oyieyo as at the date of his death on 19th March 1991. It is also common ground that upon the deceased’s death, Plot No. 500 devolved to his estate. In his witness statement, the Appellant claimed that he was occupying Plot No. 500 on the strength of an agreement of sale dated 13th February 1998 that he made with the Respondent’s brother Julius Odoyo Oyieyo, deceased. The lower court did not consider the validity of this agreement and whether it could justify the Appellant’s occupation of Plot No. 500. I believe this



was because the Appellant did not give evidence at the trial in his defence. There is no indication that his son Jared Omondi who gave evidence did so on his own behalf and on behalf of the Appellant. In his evidence, Jared Omondi who was also a defendant in the lower court talked mostly of things that were not within his knowledge. What he told the court was what he was told by his father, the Appellant. As correctly observed by the Respondent in his submissions there were a lot of inconsistencies in the evidence and pleadings. It is not clear how the Appellant could have entered and settled on Plot No. 500 in 1991 based on an agreement of sale that was made in 1998. I have also noted that the agreement between the Appellant and Julius Odoyo Oyieyo does not bear the signatures of the Appellant and the said Julius Odoyo Oyieyo. It could not therefore be a valid agreement for sale of land. Furthermore, when the purported agreement was made, Plot No. 500 was registered in the name of the deceased Lazaro Oyieyo. There was no evidence that the deceased had transferred Plot No. 500 to Julius Odoyo Oyieyo. Julius Odoyo Oyieyo could not lawfully sell Plot No. 500 which was registered at the time in the name of his deceased father Lazaro Oyieyo. The purported agreement of sale between the Appellant and Julius Odoyo Oyieyo was therefore not binding upon the estate of the deceased. The agreement could not therefore be a lawful excuse for the Appellant's entry and occupation of Plot No. 500. The Appellant was said to have taken possession of Plot No. 500 pursuant to the purported agreement in 1991 a fact which appears not to have been disputed by the Respondent. That means that as at 2018 when the Respondent filed the lower court suit, the Appellant would have had possession of Plot No. 500 for 27 years. Could this long occupation confer upon the Appellant an interest in Plot No.500?

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 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. 500 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. 500 continuously since 1991 was denied by the Respondent. The Respondent claimed that the Appellant entered the property in 1991, put up his homestead thereon and abandoned the home. The photographs on record said to have been taken at the Appellant's homestead on Plot No. 500 showed houses that looked abandoned. The Appellant had a duty to prove that he had been in continuous and uninterrupted occupation of Plot No. 500. As mentioned earlier, the Appellant did not give evidence at the trial in his defence. 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, it is my finding that the Appellant failed to establish that he had a lawful excuse for occupying Plot No. 500. The Appellant was therefore a trespasser on the property.

Conclusion

14. For the foregoing reasons, I find no reason to disturb the judgment of the lower court. The appeal before me has no merit. The same is dismissed with costs to the Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 23RD DAY OF JANUARY 2025.

S. OKONG'O

JUDGE

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

Mr. Anyumba for the Appellant



The Respondent in person
Ms. J. Omondi-Court Assistant

