



**Ondieki (Suing as an Administrator of the Estate of Samuel Ondieki
Motanya - Deceased) v Okioma (Environment and Land Appeal
E011 of 2024) [2025] KEELC 4837 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E011 OF 2024**

**DO OHUNGO, J
JUNE 30, 2025**

BETWEEN

**TURUBOSA KERUBO ONDIEKI (SUING AS AN ADMINISTRATOR OF THE
ESTATE OF SAMUEL ONDIEKI MOTANYA - DECEASED) APPELLANT**

AND

NELSON MOREMA OKIOMA RESPONDENT

*(Being an appeal from the judgment and decree of the Chief Magistrate's
Court at Nyamira (W.K. Chepseba, Chief Magistrate) delivered
on 29th October 2024 in Nyamira MCELC No. E050 of 2021)*

JUDGMENT

1. The background of this appeal is that the Appellant moved the Subordinate Court through Plaintiff dated 16th August 2021 in which she averred that she was an administrator of the estate of Samuel Ondieki Motanya [deceased] and that the parcel of land known as East Kitutu/Botabori II/868 [the suit property] was a property of the deceased's estate. That sometime in July 2021, the Respondent by himself and his agents entered the suit property without her permission and started erecting a permanent structure thereon. That despite demands, the Respondent refused to desist.
2. The Appellant therefore prayed for judgment against the Respondent for his eviction from the suit property together with his agents, servants, and family members. She also sought a permanent injunction to restrain the Respondent, his agents, servants, and family members from entering, cultivating, tilling, erecting any structures and/or in any manner interfering with the suit property. Additionally, she sought costs of the suit and any other relief that the Subordinate Court deemed fit to grant.



3. The Respondent filed Defence and Counterclaim through which he averred that his correct names were Nelson Nyaigoti Okioga and denied the allegations of wrongful entry. He averred that on 27th June 2001, he purchased a 50 feet by 94 feet portion of the suit property from Alfred Ondieki Ongati who had earlier purchased it from the deceased during the deceased's lifetime. He added that he was in possession and prayed that the Appellant's suit be dismissed with costs and that judgment be entered in his favour for a declaration that he was entitled to be given by the Appellant a 50 feet by 94 feet portion of the suit property. He further sought an order directing the Appellant to execute transfer documents in respect of the portion so that he be issued with a title deed and that in default, the Executive Officer of the Subordinate Court to execute on the Appellant's behalf. He also prayed for costs of the counterclaim.
4. Upon hearing the matter, the Subordinate Court [W.K. Chepseba, Chief Magistrate] delivered judgment on 29th October 2024 in which it held that the Appellant's case was not proved and proceeded to dismiss it with costs. It further held that the Respondent had proven his counterclaim and therefore entered judgment for the Respondent as prayed in the counterclaim with costs.
5. Dissatisfied with the outcome, the Appellant filed this appeal on 13th November 2024, through Memorandum of Appeal dated 11th November 2024. She prayed that the appeal be allowed, the judgment of the Subordinate Court be set aside and a finding be made that she had proved her case.
6. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
 1. That the Learned Magistrate erred in law and in fact in not finding that the Appellant had proved her claim on the required standard of proof.
 2. That the Learned Magistrate erred in law and in fact in making a finding that the Respondent is entitled to a portion of land measuring 50ft by 94ft out of the estate of the deceased, yet there was no proof of the Respondent's purchase of the same from the deceased.
 3. That the Learned Magistrate erred in law and in fact in making a finding that the Respondent was entitled to the portion having purchased the same from an original buyer one Alfred Ondieki Ongati, yet there was no proof that the said Alfred Ondieki Ongati had originally purchased from the deceased.
 4. That the Learned Magistrate erred in law and in fact in making a finding that the Respondent had proved a claim of adverse possession yet the said entry was purportedly through a sale and thus an entry by consent which is not an ingredient of adverse possession.
 5. That the Learned Trial Magistrate erred in law and in fact in failing to make a finding that the Respondent has entered into a portion of the deceased's parcel of land without consent, which is trespass and acts which amount to intermeddling with the deceased's estate.
 6. That the Learned Trial Magistrate misdirected himself both in law and on fact in deliberately failing to properly analyze the evidence as presented before him by the parties, scrutinize the documents produced as evidence and apply the same to the relevant applicable laws.
 7. That the Learned Trial Magistrate abdicated his judicial duty to consider, appreciate, and where necessary, apply the relevant case laws presented to him and proceeding to apply relevant and distinguishable case laws, contrary to the well-established doctrine of stare-decisis.
 8. That the judgement by the Learned Trial Magistrate contains apparent errors and inaccurate acts, which were never presented by the parties herein.



9. That the Learned Trial Magistrate erred in law and in fact in not considering the Appellant's submissions.
 10. That the Learned Trial Magistrate erred in law in failing to consider the submissions filed by the appellant and proceeding to selectively analyze a portion of evidence that was geared towards supporting the arguments put forth by the respondent.
 11. That the judgement and decision by the learned trial magistrate is against the weight of evidence on record.
7. The appeal was canvassed through written submissions. The Appellant filed submissions dated 15th April 2025 in which she identified three issues for determination. Firstly, whether she proved her case to the required standard. Secondly, whether the Respondent was entitled to the portion measuring 50ft by 94ft out of the deceased's estate without proof of purchase. Lastly, whether she is entitled to the reliefs sought in the Appeal.
 8. In respect of the first issue for determination, she submitted that she tendered evidence and proof through a copy of the green card that the suit property is currently registered in the name of the deceased who was her husband. That on the other hand, the Respondent did not prove that the deceased sold the suit property to Alfred Ondieki Ongati who later sold it to him. That the Respondent only tendered hearsay evidence on the issue. She further contended that she produced a copy of a certificate of death confirming that the deceased passed away on 16th July 2010 and that in the absence of succession proceedings in respect of the suit property, it remains part of the free estate of the deceased and any encroachment on it constitutes intermeddling with the free estate of the deceased pursuant to the provisions of Section 45 of the *Law of Succession Act*.
 9. Relying on Sections 107, 109 and 112 of the *Evidence Act* as well as the case of Ngugi v Kimunio [Environment & Land Case E006 of 2023] [2024]KEELC 1518 [KLR] [20 March 2024] [Judgment], she submitted that the Respondent did not tender any evidence to disapprove her averments. That in the absence of a sale agreement between Alfred Ondieki Ongati and the deceased, her case was proved on a balance of probabilities.
 10. In respect of the second issue for determination, she submitted that based on his claims of a sale transaction, the Respondent's possession of the suit property was by consent and that in those circumstances, adverse possession cannot lie. She relied on the cases of Nicholas Ogelo Jabuya v. Syprianus Awino & Anor. Homabay ELC Case No. 49 of 2021 [OS] [unreported] and Gabriel Mbui v Mukindia Maranya [1993] eKLR in support of that contention.
 11. Relying on the case of Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR where the Court of Appeal cited the case of M'Mukanya v M'Mbijiwe [1984] KLR 761, the Appellant argued that the Respondent's entry into the suit property was without her consent and therefore amounted to trespass. She also relied on the case of Duncan Nderitu Ndegwa v. KP& LC Limited & Another [2013] eKLR where the Court held that once a trespass to land is established it is actionable per se and urged the Court to award her KShs 500,000 as general damages for trespass. In conclusion, she submitted that she proved her case and that her appeal should be allowed with costs.
 12. In reply, the Respondent filed submissions dated 6th May 2025 in which he argued that he testified before the Subordinate Court and produced a land sale agreement showing that he purchased the portion of the suit property on 27th June 2001 from Alfred Ondieki Ongati who had initially purchased the portion from the deceased. He further submitted that he called many witnesses to buttress his testimony and that the deceased having sold the portion, it no longer formed part of his estate.



13. The Respondent went on to submit that the deceased passed away before he could transfer the portion to Alfred Ondieki Ongati and that it was only because of that reason that the suit property had not been registered in Alfred Ondieki Ongati's name as of the time of the deceased's demise. That since the intention of the parties was clear, failure to complete the transfer cannot be used to frustrate the parties' intention. He further submitted that he has been in possession of the portion since the year 2001 and that it would be improper to argue that he had encroached.
14. The Respondent also submitted that his counterclaim is well grounded both in law and facts and should be affirmed by the Court. That he and his witnesses tendered overwhelming evidence that he purchased the portion from Alfred Ondieki Ongati and he has been in occupation since the purchase. In response to the Appellant's contention that no spousal consent had been sought in respect of the sale, he contended that the transaction took place on 27th June 2001 under the now repealed Registered Land Act which did not require spousal consent. The Respondent further argued that Learned Trial Magistrate did not err and that the Appellant is not entitled to the reliefs sought in this appeal. He urged the Court to dismiss the appeal with costs.
15. This is a first appeal. The remit of a first appellate court was restated by the Court of Appeal in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR thus:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of *Kenya Ports Authority v Kuston [Kenya] Limited* [2009] 2EA 212 wherein the Court of Appeal held inter alia 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”

16. I have carefully considered the grounds of appeal, the entire record and the parties' submissions. The issues that arise for determination are whether the parties proved their respective cases and whether the parties were entitled to the reliefs that they sought.
17. From the material on record, the Appellant is an administrator of the estate of Samuel Ondieki Motanya [deceased], pursuant to Limited Grant of Letters of Administration Ad Litem issued to her on 29th July 2021. The deceased passed away on 16th July 2010. It is not in dispute that as of the date of his death and even now, the deceased remains the registered proprietor of the suit property. A perusal of the certified copy of the register in respect of the suit property that was produced in evidence shows that the deceased was registered as proprietor on 8th March 1989.
18. The rights of rights of a registered proprietor of land clear enough. Such a proprietor's right to property is jealously guarded and guaranteed primarily through Article 40 of the Constitution as well as Section 24 of the Land Registration Act which provides as follows:

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.
19. Further entrenchment of the registered proprietor's rights is obtained through Section 26 of the [Land Registration Act](#) which obligates the Court to accept his certificate of title as prima facie evidence of proprietorship unless the provisos under Section 26 [1] [a] or [b] are established. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party and where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
20. The Respondent did not dispute that he entered the suit property and conducted activities therein. Whereas the Appellant's case was that the Respondent entered the suit property in July 2021, the Respondent testified that he did so in the year 2001, after purchasing a 50 feet by 94 feet portion of the suit property from Alfred Ondieki Ongati who had earlier purchased the portion from the deceased. In his testimony, the Respondent stated thus:
- The [suit property] is registered in the name of Samuel Ondieki Motanya. ... I can see the green card – Pexh 3. I bought from Alfred Ondieki. His name does not appear in the said green card. I can see the agreement - Dexh 1. It is an agreement with Alfred. Samuel and Truphosa did not sign. Alfred did not give me an Agreement between Alfred and Samuel [Deceased]. Truphosa did not sign or give consent. The Plaintiff did not show me the land/portion. They were not involved.
21. Thus, it is clear that neither the deceased nor the Appellant participated in the transaction between the Respondent and Alfred Ondieki. I have perused the agreement dated 27th June 2001. It is indeed true that both the deceased and the Appellant were not party to it despite the fact that it purported to be a sale of a portion of the suit property. As of the date of the agreement, the deceased who was the registered proprietor was still alive. If indeed he had earlier on sold the portion to Alfred Ondieki as alleged by the Respondent, nothing would have been easier than to make the deceased a party to the agreement.
22. I have perused the exhibits that were produced by the Respondent. He did not produce any agreement between the deceased and Alfred Ondieki. One of his exhibits, letter dated 25th August 2021 from Chief Gesima Location, stated that Alfred Ondieki was also deceased as of the date of the letter.
23. The Respondent was acutely aware that his claim to the portion of the suit property was under challenge. The Appellant had boldly and emphatically branded him a trespasser. His claim or title could only hold if Alfred had the capacity to validly sell the portion to him. That is the effect of the maxim of *nemo dat quod non habet* which the Court of Appeal discussed in the case of *Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] KECA 717 [KLR] thus:
- Firstly, section 26 [1] and [2] are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. [*Nemo dat quod non habet*]. These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning



famously referred to in *Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd* [1949] 1 Kb 322, at pp. 336-337 when he stated:

“In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

In *Pacific Motor Auctions Pty. Ltd v Motor Credits [hire Finance] Ltd* [1965] Ac 867 At P 886 the Privy Council explained that the purpose of that provisions is:

“to protect an innocent purchaser who is deceived by the vendor’s physical possession of goods or documents and who is inevitable unaware of legal rights which fetter the apparent power to dispose.”

24. The Respondent had the burden of defending his claim to the suit property. Since no person can ever pass a better title than the one he has, Alfred Ondieki could validly sell to the Respondent only if he [Alfred] had validly purchased from the deceased. The alleged sale between the deceased and Alfred Ondieki was a matter particularly within the Respondent’s knowledge. Consequently, he bore the burden of proof on the issue, in line with Sections 107, 108, 109 and 112 of the [Evidence Act](#). By failing to produce any sale agreement between the deceased and Alfred Ondieki, the Respondent did not discharge the burden of proof on the issue. Such an agreement was a fundamental part of the due diligence that the Respondent was expected to do prior to transacting with Alfred Ondieki. Failure to produce the agreement or even to explain its whereabouts is an alarming gaping hole in the Respondent’s case.
25. The Respondent relied on his own testimony and that of his four witnesses to support his claim that the deceased had sold the portion to Alfred. The Learned Magistrate was persuaded due to the number of witnesses that supported the Respondent’s assertion. The alleged contract between the deceased and Alfred Ondieki would have been entered into prior to the agreement of 27th June 2001 between Alfred Ondieki and the Respondent. I am aware that Ezekiel Motanya Joel Maroko [DW5] testified that the deceased sold the portion to Alfred in the year 1992. He did not give any specific date of the sale, the consideration or even its other terms. His mention of the sale was cursory compared to the sale between Alfred and Respondent which he discussed in detail.
26. Section 3[3] of the [Law of Contract Act](#) makes provisions regarding suits founded on contracts for disposition of interest in land. It provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is written, executed by the parties and attested. I am aware that Section 3[7] of the [Law of Contract Act](#) excludes the application of Section 3[3] of the said Act to contracts made before the commencement of the subsection. I also bear in mind that the current Section 3[3] of the [Law of Contract Act](#), commenced on 1st June 2003, which date falls after the agreement of 27th June 2001 between Alfred Ondieki.
27. Prior to the current version of Section 3[3] of the [Law of Contract Act](#), the subsection read as follows:
 - [3] No suit shall be brought upon a contract for 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 authorized 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-

[1] has in part performance of the contract taken possession of the property or any part thereof; or

[11] being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. [Emphasis supplied]

28. When faced with an oral agreement which was made in 1989 prior to commencement of the current version Section 3[3] of the *Law of Contract Act*, the Court of Appeal held in *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others* [2013] KECA 29 [KLR] thus:

Notwithstanding the fact that the sale agreement was not in writing, the appellant has to prove that she comes within the proviso to Section 3 [7] of the Act. This is done by adducing evidence that she either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property; she continued in possession in part performance of the oral contract.

29. In the absence of the alleged agreement between the deceased and Alfred Ondieki so that its terms can be verified, further in the absence of evidence whether Alfred Ondieki performed his part of any such contract and whether Alfred Ondieki took possession of the suit property pursuant to any specific term of such contract, the provisions of Section 3 [3] of the *Law of Contract Act* prior to 1st June 2003 precluded the Respondent from relying on oral evidence, however large the number of witnesses who supported his case, to prove the existence of an alleged contract between the deceased and Alfred Ondieki for the disposition of an interest in the suit property.
30. In view of the foregoing discourse, I hold that the Appellant proved her case. She established that the suit property is an asset belonging to the deceased's estate and that the Respondent had trespassed thereon. The Respondent conceded that he entered the suit property in the year 2001 and remains therein. He has not demonstrated any valid acquisition of the portion of the suit property. In the circumstances, the Respondent did not prove his counterclaim and was not entitled to the reliefs that he sought.
31. The Appellant sought judgment against the Respondent for his eviction from the suit property together with his agents, servants, and family members. She also sought a permanent injunction to restrain the Respondent, his agents, servants, and family members from entering, cultivating, tilling, erecting any structures and/or in any manner interfering with the suit property. Having established her case, she is entitled to these reliefs. The estate of the deceased is entitled to the full rights, benefits and privileges of its registered proprietorship of the suit property.
32. The Appellant submitted in this appeal that trespass to land is established it is actionable per se and urged the Court to award her KShs 500,000 as general damages for trespass. A perusal of her plaint does not however reveal a prayer for general damages for trespass. As has been severally held by the Courts, parties are bound by their pleadings. The Court too is in a sense bound by the parties' pleadings since pleadings circumscribe the issues for determination and reliefs sought. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. While it is true that trespass to land is actionable per se once established, a right to general damages for trespass can only be validly established if pleaded. I will in the circumstances not award any general damages for trespass.



33. Arising from the foregoing, the Learned Magistrate misdirected himself and made erroneous findings in the matter before him. In the premises, this Court is empowered to interfere with the decision. I find merit in this appeal, and I allow it. I set aside the judgment and replace it with the following orders:
- a. The Respondent's counterclaim is dismissed.
 - b. The Respondent, his agents, servants and family members to vacate the parcel of land known as East Kitutu/Botabori II/868 within 90 [ninety] days from the date of delivery of this judgment. In default, an eviction order to issue against them.
 - c. A permanent injunction is hereby issued restraining the Respondent, his agents, servants and family members from entering, cultivating, tilling, erecting any structures and/or in any manner interfering with the parcel of land known as East Kitutu/Botabori II/868.
 - d. The Appellant shall have costs of both this appeal and of the proceedings before the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 30TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Ms Chepkorir holding brief for Mr Ochoki for the Appellant

Mr Omwega for the Respondent

Court Assistant: B Kerubo

