



REPUBLIC OF KENYA



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**Ligati v Kedemi (Environment and Land Appeal E029 of 2022)
[2025] KEELC 6460 (KLR) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E029 OF 2022
FO NYAGAKA, J
SEPTEMBER 30, 2025**

BETWEEN

MICHAEL CHAMA LIGATI APPELLANT

AND

CROMWEL KAYERE KEDEMI RESPONDENT

*(Being an Appeal from the Judgment of Hon P.N. Areri dated and delivered on
18th October 2022 in Migori Chief Magistrate's ELC Suit No. 1848 of 2015)*

JUDGMENT

1. By way of Plaintiff dated 21st July 2015, the Plaintiff sought the following orders;
 1. A permanent injunction to issue restraining the defendant from trespassing, occupying, cultivating, grazing and/or carrying out any dealings on LR No. Suna west/Wasimbete/718 and an eviction to issue therefrom.
 2. He pleaded that he was the sole registered owner of the suit land and further, that the defendant trespassed on the suit land sometime in May 2014. He set down the particulars of the trespass and sought the relief of an eviction order from the Court.
 3. The Defendant entered Appearance and filed a Defence Statement dated 24th August 2015. He denied the contents of the Plaintiff. Further, he averred that the Plaintiff was a purchaser who registered in his name, a matter pending before Kisii law courts against the purported vendors. Further he denied paragraphs 6, 7, 8, and 10 of the Plaintiff. He reiterated that there was a pending suit over the suit land to wit Kisii High Court ELC No. 56 of 2014.
 4. The matter proceeded to hearing. The Plaintiff testified and called one (1) witness in support of his case while the Defendant testified sole witness.



Hearing at the trial court

5. PW1 was Cromwel Kayere Kedemi who stated that he had a parcel of land within Migori County, namely, Land Registration Suna west/ Wasimbete/718 also added that it was registered in his name and measured 8.8Ha. It was registered on 27/2/2014. He produced a Certificate of official search as Exh 1. He stated that he purchased the land from William Omwanda Odhiambo and Samson Okinyi Omwanda for the agreed price of Kenya Shillings two million two hundred (Kshs. 2.2 million shillings) only which he fully paid. He stated that they entered into an agreement before a lawyer. He produced the sale agreement dated 20/1/2014. As Exhibit 2. He stated that a title deed was issued to him on 27/2/2014. The original title was held by National Bank as it was charged to it as a tender. He produced a copy of title deed LR Suna west/ WASWETA/718 as P. Exhibit 3.
6. He testified that he had taken possession of the land but the Defendant occupied a portion thereof. He spoke to the sub-chief who confirmed that he had settled on the wrong parcel. He had declined to move from it. He, however, gave him time to move out but the Defendant refused to move, prompting the filing of the suit.
7. During cross examination, he stated that he was not aware of a case in Kisii. He reiterated that he was issued with title deed on 27/2/2014. He stated that he had a sale agreement dated 20/1/2014. Further, the case at Kisii was filed on 13/2/2014 which took place after the sale agreement hence he could not have known about it.
8. PW2 was Sylvanus Okinyi Nyarube, the Assistant chief Nyamaraga sub -Location. He stated that he had seen the sale Agreement dated 26/7/2012 (MF1 4) and that the Defendant had bought land from one Benter Achieng. It was L.R. Suna west/ Wasimbete/163. He stated that he witnessed the said agreement. He was shown Plaintiff's Exhibit 4, a sale agreement dated 26/7/2012, which he stated was another agreement in which Defendant and one Selemina came to him over the parcel Suna west/ Wasimbete/163. He added that by it the Defendant bought $4\frac{3}{4}$ acres at a price of 57,500/= in total. He stated that he requested the Defendant to ensure the seller was accompanied by all her family members. Later, the family members appeared before him and agreed that Defendant be given $2\frac{1}{2}$ acres instead. The agreement was to be between defendant and a certain widow.
9. He stated that the Defendant currently resided on parcel No. 718 Suna west/Wasimbete which initially belonged to one Omwanda Matunga. It was registered in names of plaintiff. The Defendant had never bought parcel 718.
10. During cross examination, he stated that the defendant bought some parcel of land in the area. He agreed that the Sale Agreement dated 28/8/2009 was the first one before the one for 26/7/2012. He stated that he retained the initial agreement which paved way for the second one. He couldn't tell if Defendant was literate. He reiterated that he witnessed both agreements. He was aware of the suit in Kisii over parcel 718. He confirmed that originally parcel 718 belonged to Omwanda Matunga whose whereabouts were unknown and further that Omwanda Matunga's sons were parties in the Kisii case.
11. That closed the Plaintiff's case.
12. DW1 was Michael Chama Ligati who stated that he knew the plaintiff. That the suit land was ancestral land. That it belonged to one Pius Kasuku Chama, his paternal cousin. Further, that he lived on the suit land. At one time he was once summoned by the area Chief who told him that the land he stayed on had been sold by two Tanzanians Samwel Okinyi and William Omwanda to one Cromwel Kayere. He denied being a trespasser. He urged that he had been on that land since 2007. He had built a home thereon. He urged the court dismiss the suit.



13. During cross examination, he stated that he was suing on behalf of Semina Adhiambo. Further, everything he had said was on her behalf. He reiterated that he occupied the whole parcel of land.
14. He closed his case at that point.
15. Upon considering the testimonies of the witnesses, the law, the pleadings and the evidence tendered on court the trial court issued a permanent injunction against the defendant and ordered the defendant to vacate the suit land.
16. Being aggrieved with the decision of the trial court, the appellant filed this appeal vide a Memorandum of Appeal dated 5th December 2022 premised on the following grounds;
 1. The Learned Principal Magistrate erred in law and in fact by introducing new issue of Suna west/Wasimbete/163 which was not part of the pleadings nor a rebuttal at the hearing with no documentary evidence in support thereof.
 2. The Learned principal Magistrate erred in law and in fact, by ignoring the fact that the Appellant was not a trespasser but been on adverse possession viz Suna west/Wasimbete/ 718, a matter that came early during the hearing.
 3. The Learned Principal Magistrate erred in Law and in fact that the Respondent was a purchaser for value who failed to adhere to the principal of “purchaser be aware”, further failed due to diligence before purchase thereof, indeed the respondents are the trespassers in real sense of the word.
 4. The plaintiff’s title is extinguished by way of Adverse Possession thereof.
17. The parties were directed to file submissions on the appeal.

Appellants Submissions

18. Learned counsel for the Appellant laid out the background of the case and proceeded to submit on the issues for determination. Counsel submitted that the trial court failed to take cognizance of the Kisii matter which raised the issue of Succession despite the High Court being superior. He urged that pertinent issues of law were raised, especially on expert opinion, and on succession and therefore, the court couldn't simply rely on section 26 of Land Act alone.
19. Learned counsel cited section 107 of the Evidence Act on burden of proof. He proceeded to cite sections 29 and 71 of the Law of Succession Act. Additionally, he urged that he relied on section 18 and 19 of the Land Act and Section 35 of the Evidence act, reproducing the provisions therein. He concluded aptly submitted that this was a clear case where the court kept a blind eye on issues that were very critical. Further, the court failed to consider that there were two matters touching on the same cause of action, and the court ignored the one filed earlier before the High failed court.
20. Further, that the court to consider that in the High court matter the issue of succession, touching of grant was raised, since the title was attained in spite of parties not obtaining letters of grant. Additionally, that the Court further failed to consider that there was no expert opinion of a Surveyor’s Report which was critical to determine the extent of trespass.
21. He prayed the court allow the appeal.



Respondent's submissions

22. Learned counsel for the Respondent filed submissions dated 30th April 2025. He set down the role of this court as an appellate court and proceeded to submit on the issues for determination. He urged that the issue of adverse possession was foreign in these proceedings. Further, the trial court was never invited to determine the issue vide a counterclaim or any kind of mention in pleadings and/or proceeding and thus could be raised on appeal. He urged that the Appellant in his own admission stated that he was in occupation of the Respondent's parcel of land without permission. That the Appellant had acknowledged that he had never had title to the said parcel of land as it belonged to the Respondent. He alleged that he had filed a suit challenging title to some Tanzanians who he believed were the proprietors of the said land but he did not produce any documentary evidence to this effect. He had not challenged the Respondent's title.
23. Counsel submitted that in any event, it was the Appellant's testimony that he was giving his testimony on behalf of another person, one Semina Adhiambo. He had had an unregistered Power of Attorney that was not effective thus that bit of evidence was irrelevant. The Appellant was sued in his personal capacity as a trespasser onto the Respondent's land. The third party mentioned was therefore irrelevant in the circumstances. Therefore, the Appellant was found to be in trespass based on the evidence of the Respondent, the Chief (PW2) and in the Appellants' own testimony.
24. Counsel urged that Section 26 of the *Land Registration Act* provides for conclusiveness of title and urged that the title was never challenged by the Appellant. That the allegation that the Appellant had filed a suit against some Tanzanians remained as unproved claims as no evidence was tabled in court to support it. Therefore the Respondent remains the bona fide proprietor to land parcel LR.NO. SUN A WEST/Wasimbete/718.
25. Counsel urged that trespass is defined in the Black's Law Dictionary 11th Edition as the wrongful entry into another's real property. Further, that the Appellant is in occupation of the Respondent's land without consent of the Respondent. He cited the case of *Mwanja & 3 others vs Kitenye [2025] KEELC 1417 (KLR)* and prayed that the Appeal be dismissed with costs to the Respondent.
26. Learned counsel for the Respondent filed a reply to the Appellants submissions. He submitted that they were served with the submissions dated 16th June 2025 after they had filed submissions already, then filed this reply to the submissions.
27. Counsel submitted that the Appellant has raised new matters and new grounds in his argument which were not canvassed in the pleadings in the Lower Court. That the Appellant has stated in paragraph 2, 3 and 8 of a suit, namely KISII HIGH COURT ELC NO. 56 OF 2014. He urged that the Respondent was not party to that suit and it was not brought to the attention of the Respondent or the Court. He stated that it was incumbent upon the Appellant to invoke the principle of Res Judicata or Sub Judice. He stated that it is too late in the day to urge the same at the appellate level.
28. Learned counsel urged that in paragraphs 8, 9, 10 and 11, the Appellant's Counsel has spewed evidence which is not in the proceedings. He stated that Order 42 Rule 27(1) prohibits parties from adduction of new evidence on appeal and additionally, that the Appellant's paragraphs 8,9,10 and 11 cannot be a basis for overturning the decree of the Lower Court and should be disregarded.
29. Further, counsel pointed out that the Appellant has submitted that this Court should take Judicial Notice that the Plaintiff did not produce a Surveyor's Report, urging that under Section 70 of the *Evidence Act*, Survey Reports are not matters Courts should take judicial notice of. Further, that the



Appellant admitted that he is on the Respondent's land and a party need not prove that which is admitted.

30. Counsel stated that there's a very curious submission on paragraph 7 of the submission. That it is the Appellant's business to extract a proper decree, have it engrossed before signing and sealing by the Court. It is not the business of the Respondent. Under Order 21 Rule 7 the decree must agree with the judgment. The Appellant bears responsibility for extracting a proper one. He urged that the Appellant cannot appeal against an erroneous decree and prayed that this Appeal be dismissed with costs.

Analysis and Determination

31. The duty of an appellate court was set out in *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR where the Court held as follows;

“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.”

32. The role of the Appellate Court was additionally stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must 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 allowances in this respect.”

33. Upon considering the record of appeal, pleadings and submissions, the following issue arises for determination;

Whether the trial court erred in issuing a permanent injunction against the Appellant

34. It was the Plaintiff's case that he purchased the suit land from William Odhiambo Omwanda and Samson Okinyi. He produced a sale agreement dated 20th January 2014. He also produced a title for the suit land to wit; Suna west/Wasimbete/718 which was registered in his name on 27th February 2014. The legal process on defeasibility or indefeasibility of title is governed by Section 26 of the [Land Registration Act](#). It provides as follows;

26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that 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—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- c. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.



35. Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya states that:-

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he assents must prove that those facts exist.”

36. This Court has very carefully evaluated the evidence of both parties at the trial Court. The Respondent provided evidence, which this Court finds to be cogent, that he was the registered owner of the suit land at all times. There was no evidence tendered to the contrary by the Appellant. Additionally, the Appellant failed to produce any evidence of his alleged occupation of the suit land.

37. This Court notes further from the record that during the trial, the Appellant stated that he had filed this suit on behalf of one Semina Adhiambo. However, he never presented any proof that he had the authority to plead in that behalf and never stated in what capacity he represented the said Semina Adhiambo in the suit. His pleadings are bereft of any registered Power of Attorney in that behalf.

38. Order 4 Rule 4 of the Civil Procedure Rules provides that,

“Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.”

39. Thus, if the appellant’s evidence, at the trial Court, is anything to go by, this court wonders aloud the Defendant’s/ Appellant’s business regarding the suit land. It is my considered view that the same was just an afterthought. Whichever way though, it is of no avail to his case.

40. Additionally, the Appellant has introduced the issue of adverse possession, arguing that the trial court ignored that he was not a trespasser but that he had acquired the suit land by way of adverse possession. I have looked at the pleadings. This issue was not in contention in the trial court: it was not pleaded. Therefore, it cannot be up for determination during the appeal as it is a fresh issue. Additionally, the appellant never raised the issue of adverse possession even by way of counterclaim in the trial court. A party is bound by his pleadings. He cannot be permitted to trudge in evidence or even submit outside of his case as pleaded. In *Nuh Nassir Abdi v Ali Wario & 2 others*, Mombasa High Court Petition No. 6 of 2013, [2013] eKLR, Odunga J (as he then was) stated,

“However, the petitioner is put on notice that he should avoid the temptation to enlarge his case outside the scope of his pleadings since it is trite that a party is bound by his pleadings despite the evidence.”

41. Also, in *Philip Mungu Ndolo v. Omar Mwinyi Shimbwa & 2 Others* Mombasa Election Petition Number 1 of 2013, which was noted by the Supreme Court in *Munya v The Independent Electoral and Boundaries Commission & 2 others* (Petition 2B of 2014) [2014] KESC 38 (KLR) (30 May 2014) (Judgment) at paragraph 136, the learned judge stated as follows:

“As general principle in law, a party is bound by its pleadings. As such, any evidence which goes outside of the pleadings on record must be disregarded.”



42. In *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] KECA 700 (KLR) the Court of Appeal stated,
- “Parties are bound by their pleadings and the learned judge would have been justifiably accused of committing errors if she had granted orders that none of the parties had applied for. This ground of appeal has no merit and must fail.”
43. In *Postal Corporation of Kenya v Andrew K. Tanui* [2019] KECA 489 (KLR), the same Court (of Appeal) held,
- “But from the very beginning when filing its defence in January 2010, the appellant admitted paragraph 3 of the claim. Needless to say, parties are bound by their pleadings. It would therefore be idle to raise the issue at this stage, when in reality it was always a non-issue. It is our finding that the issue was raised without any factual or legal basis, and we reject it.”
44. And there is no dearth of decisions that have held as much. I need to rehash all the decisions, right from the Supreme Court to the superior Courts which emphasize this legal principle that a party shall always be bound by his pleadings. As becomes clear from the above decisions, pleadings are very important. Before a party files his or her pleadings it is of fundamental importance that he/she ensures that they are clear, precise and addressing all the issues and facts he/she wishes to include in his case or defence. While there is room for amendments of pleadings, it is not a matter of course to allow such applications when made. Again, it is against the principle of fair trial that parties keep amending or mutating their cases or defences as the trial proceeds so as to evade the adverse party’s side.
45. In the case of *Kenya Hotels Limited Vs Oriental Commercial Bank Limited* (2018) eKLR the court held;-
- ‘Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In *Openda v. Ahn*, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea (Emphasis mine).
46. The upshot of the foregoing is the issue of adverse possession, as a ground of appeal, is another afterthought which is demonstrative of a drowning party who is grasping onto any reed within his vicinity. That ground of appeal fails completely.
47. Having considered the pleadings, record of appeal, attendant submissions and legislation, it is my considered view that the appeal fails in its entirety. The same is dismissed with costs to the Respondents.
48. Orders accordingly.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 30TH DAY OF SEPTEMBER 2025.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistant: Ms. Lola

Agure Advocate for the Appellant

Owino Advocate holding brief for the Respondent

