

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMABAY

ENVIRONMENT AND LAND COURT APPEAL NO. E050 OF

2024

BERNARD ODHIAMBO OKELO.....1ST

APPELLANT

ERICK OCHIENG PANYAKO.....2ND

APPELLANT

JABES NYANGWESO.....3RD

APPELLANT

COLLINS OTIENO ODHIAMBO.....4TH

APPELLANT

VERSUS

MICHAEL OOKO ABIGA

(Suing as a legal representative

of the estate of WILLIAM ABIGA (DECEASED)

.....1ST RESPONDENT

JOHN OUMA OLITH.....2ND

RESPONDENT

(Being an Appeal from the Judgement and decree by

Hon. Nichodemus N. Mosei in Mbita Senior Principal

***Magistrates ELC Land Case No. E004 of 2023 delivered
on 25th September 2024)***

JUDGEMENT

1. By way of Amended Plaint dated 20th March 2023, the Respondent sought the following orders in the trial court;

1) An order of declaration that the plaintiffs is are beneficial and registered and/or lawful owners of L.R. Rusinga/Kamasengere/571.

2) An order of eviction do issue against the defendants the agents and/or servants from for their removal from entry into Land Parcel No Rusinga/Kamasengre/571 above, subsequent demolition of any structures built thereon.

3) Permanent injunction restraining the defendant either by himself, agents, servants and/or the defendants, from claiming, entering into, doing any fishing activities, cultivating on, further constructing, developing or in any other manner whatsoever with the plaintiff's land parcel no Rusinga/Kamasengre 571 or any portion thereof.

4) General damages for trespass together with interest thereon @ 12% p.a from the date of judgment until payment in full.

5) Cost of this suit and interests at court rates.

6) Any other or further relief that the Court deems fit to grant.

2. The Plaintiffs pleaded that both the father to the 1st Plaintiff and the 2nd Plaintiff were jointly registered as proprietors of the suit land. Further, that in 1999, the defendants trespassed into the suit land and began conducting fishing activities. This prompted William Abiga to write to them to cease their activities, which they did. After his demise, they re-entered the land and continued with their fishing activities. The matter was reported to the authorities and consequently, the County surveyor conducted a survey, determining that there was no boundary dispute. He advised them to seek legal redress.

3. The defendant filed an Amended Statement of Defence dated 25th April 2023. They denied the contents of the Amended Plaint. They pleaded that the defendants were **unsuited** for more than 20 years. Further, that UTA beach was never their own creation but was formed by the late

William Abiga and others and the same commands huge membership to date. That they were never served with the notice alleged in paragraphs 6A and 6B of the amended plaint and further that if there were reentry by the association in 2001 it had nothing to do with them.

4. The defendants stated that the UTA beach management unit had been in existence since they were minors and that the late William Abiga was a registered member who also benefited from the unit. They stated that they denied the alleged trespass and the particulars thereunder. Further, that the suit is barred by the Limitation of Actions Act and that the plaintiffs do not have a legal basis for the eviction and permanent injunction. They maintained that they had been wrongly sued and prayed the court dismiss the suit.

Response to Amended Statement of Defence

5. The Plaintiffs filed a response to the Statement of Defence dated 2nd June 2023. In reply to paragraph 2B of the amended statement of defence, the plaintiffs averred that the defendants have constructed on, and are in possession of a portion of the suit parcel of land, together with others as members of UTA Beach Management Unit (UTABMU), while the defendants are the duly elected officials of the said

Beach Management Unit which was duly registered as such with the fisheries vide Certificate of Registration issued on the 26th May 2011 and thus they are capable of being sued in their representative capacities. In reply to paragraph 3A of the amended statement of defence, the plaintiffs averred that the registration as indicated in paragraph 4A of the Amended plaint can easily be confirmed from the search which is duly attached to the plaint and supplied to the defendants.

- 6.** In reply to paragraphs 3, 3B and 5 of the amended statement of defence, the plaintiffs, stated that there have not been any disputes in regards to the boundaries of the suit parcel, which remain intact and additionally, that the only interference is from the defendants who have illegally occupied the same. Further, that the land is registered in the name of the 1st plaintiff's father and they have exclusive rights to the suit parcel.
- 7.** Further, that the deceased William Abiga did not create UTA Beach as alleged and additionally, that at the time it was registered he was already dead. They stated that, in reply to paragraph 5B, UTA Beach Management Unit trespassed way

before the same was registered and even upon registration, they continue to trespass on the suit land.

8. They additionally stated that the suit is not statutorily time barred as they are entitled to orders of eviction and permanent injunction against the defendants herein. Additionally, that several notices, both oral and written had been issued to the defendants but they refused to heed any' of the plaintiffs demands necessitating the filing of this claim. They urged the court to dismiss the statement of defence with costs and enter judgment as prayed.

Hearing of the suit

9. **PW1** was **Michael Ooko Abiga** who adopted his witness statement dated 20th March 2023 as evidence in chief. In it, he stated that his father, William Abiga, was the registered proprietor of Land Parcel No Rusinga/Kamasengre/571 (the suit property) alongside John Ouma Olith, the 2nd plaintiff measuring approximately 0.33 hectares in the Registry Map Sheet Number 19. That they were registered as proprietors thereof sometime on the 28th day of March 1990 and the title deed was subsequently issued but yet to be collected from the Ministry of Lands. He urged that the suit property has clear boundaries on the ground which remain intact and they

have therefore been peacefully co-existing with owners of the neighboring parcels.

10. He further stated that he was aware that his father had been cultivating a portion of the suit parcel until sometime in the year 2001 while the 2nd plaintiff had been cultivating his portion of the suit parcel of land until sometime in the year 1990. Sometime in April 1999 before the demise of William Abiga, the defendants then referring to themselves as UTA and before their registration of the said association trespassed into the suit parcel of land prompting William Abiga to write a letter to them. In the letter, he demanded that they stop their activities of fishing in his land. He further demanded that they remove their boats from his land which letter was copied to the then assistant chief, Peter Otieno who duly responded by the letter dated 8th April 1999 wherein the representatives of the said organization were summoned to discuss the complaint.

11. He stated that the association heeded the request and stopped activities in the property until his death. They then slowly reentered the property, and he made a report complaining about the defendant's activities sometime in the year 2005. The defendants agreed to migrate to other areas

but did not follow through. He reported yet again to the area chief vide letter dated 2nd June 2006 but they continued with their operations and went on ahead to register their association sometime in 2011. Sometime in the year 2019, the defendants yet again constructed other structures extending the one that they had already built. That they remained defiant of the decision of having them vacate the suit premises until sometime on the 17th January 2023 when the defendants filed a land dispute through the Assistant Chief. The Chief summoned them on the 23rd January 2023 but they failed to give any statement in regards to the matter, denying any complaint in respect to the suit property. The defendant's claim was thus dismissed.

- 12.** On the same date, they received summons from Lands department informing them that there would be a scene visit to the suit property to confirm the boundary between the suit parcel and the surrounding parcels on the 31st January 2023. They attended the said scene visit and it was observed by the Land surveyor that the boundaries were not contested. The Land Surveyor's findings were that the UTA BMU were in the suit parcel of land and if they had any issue with their occupation therein they could pursue legal redress

in court to have them evicted. They then filed the instant suit.

13. During cross examination he stated that his father and John Ouma Olith were jointly registered and upon his fathers' death the land was to devolve to John Ouma Olith. That there is currently a landing site on the land and there is Uta beach on the land. He stated that he was not aware of when the election of officials took place and that he knew that UTA beach is under the ministry of fisheries. He knew there are boat owners in the beach, businessmen and women and he was not aware whether the groups of people have representatives. He denied knowing who the officials of ministry of Fisheries were and that the current office bearers were not in office in 1999. He stated that he did not have proof on whether the letters were served upon the defendants and he was not aware when the UTA beach was registered. According to the certificate of registration was on 28.9.2007 and he confirmed that the registration was not on 2011 as he stated in his statement.

14. PW2 was John Ouma Olith. He testified that he is the registered proprietor of Land Parcel No. Rusinga/Kamasengre/571 alongside William Abiga, deceased

measuring approximately 0.33 hectares in the Registry Map Sheet Number 19. That they became registered as proprietors sometime on 28th March 1990 and a title deed was subsequently issued but is yet to be collected from the Ministry of Lands. That the suit property has clear boundaries on the ground which remain intact with no dispute with the neighboring parcels of land. That together with his family members, they had been cultivating a portion of the suit parcel of land until sometime in the year 1990 while William Abiga and his family also cultivated the remaining portion until his demise in the year 2001. Sometime in April 1999 before the demise of William Abiga, the defendants then referring to themselves as UTA and before their registration of the said association, trespassed into the suit parcel of land prompting William Abiga to write a letter to them demanding that they stop their various activities of fishing in his land as the same would interfere with his ploughing the said suit property; he further demanded that they remove their boats from his land which letter was copied to the then assistant chief, Peter Otieno who duly responded by letter dated 8 April 1999 wherein the representatives of the said organization were summoned.

15. He stated that it is therefore clear that the defendants took advantage of their absence and trespassed into the land. That despite the notice being given to the said UTA by William Abiga, the association heeded the request by William Abiga and temporarily stopped their activities in suit property until his demise. They slowly re-entered the suit property and continued with their activities. That sometime in the year 2019, the defendants yet again constructed other structures extending the one that they had already built on the suit property without first seeking permission.

16. That they remained defiant of the decision having them and their organization vacate the suit premises until sometime on the 17th January 2023, when the defendants filed a land dispute through the Assistant Chief, complaining that their fishing activities were being disrupted by the family of William Abiga and thus a survey of the land was required. The Chief summoned them on 23rd January 2023 in his office concerning the complaint but the defendants failed to give any statement in regards to the matter denying having any complaint in respect to the suit property. The defendant's claim was thus dismissed. On the same date, they received summons from Lands department informing

them that there would be a scene visit to the suit property to confirm the boundary between the suit parcel and the surrounding parcels on the 31st January 2023. They attended the said scene visit and it observed by the Land surveyor that the boundaries were not contested. The Land Surveyor's findings were that the UTA BMU were in the suit parcel of land and if they had any issue with their occupation therein we could pursue legal redress in court to have them evicted. Thus they filed the instant case.

- 17.** During cross examination he stated that he was not aware of the exact acreage he was claiming. Further, that he was given some money for the defendants to use the land and they unfortunately built structures without his knowledge. He stated that the defendants began using the land in 2006 and that it is true that the trespass began in 1999. Additionally, that the defendants are fishing in his land because fishing is done on both the lake and land. He urged that the defendants have trespassed on his land for the last 18 years. He denied having seen the defendants trespass in 1999 and further, that there is cliff that borders the lake and there is one that extends to the lake from their land and is approximately 5 meters tall.

18. PW3 was **Alex Okoth Okunya** who stated that the suit land was settled on by his grandfather named Adoyo and the 2nd plaintiff's grandfather named Ombaka. The land passed to William Abiga by Adoyo and Ombaka transferred to Olith who finally transferred the same to the 2nd plaintiff herein. That is how the land was registered in the names of William Abiga and John Ouma Olith. He was aware that the defendants entered into the suit parcel of land and commenced their fishing activities and further put up structures on the same. That he has been aware that the plaintiffs were not happy with the activities which have been done by the defendants and the structures they have built thereon. Further, that the matter has been reported severally as the plaintiffs have categorically indicated that they never gave the defendants permission to proceed with the said activities thereon. He wished that the court do adjudicate over the matter and give back the land to the rightful owners who are William Abiga and John Ouma Olith.

19. During cross examination he stated that fishing is usually done in the lake and further that it is not false that the defendants are fishing in land parcel No. 571. He could not remember when the defendants began trespassing on the

suit land. He stated that he has been to the suit land and the defendants are the ones he saw fishing in the lake. He denied being aware of the organizations of other groups of people apart from the defendants.

20. PW4 was **Peter Odhiambo Olith** who adopted his witness statement as evidence in chief. He stated that he was aware that the defendants entered into the suit parcel and commenced their fishing, activities and further put up structures on the land. That he has been aware that the plaintiffs were unhappy with the activities which have been done by the defendants and the structures they have built thereon and the matter has been reported severally as the plaintiffs have categorically indicated that they never gave the defendants permission to proceed with the said activities thereon. He wished that the court do adjudicate over the matter and give back the land to the rightful owners who are William Abiga and John Ouma Olith.

21. During cross examination he stated that Ouma Olith is his brother. That on 20.7.2018 he witnessed his brother Olith receive some cash from the defendants and he witnessed an agreement.

22. PW5 was **Jimmy Oketch Lango** who adopted his witness statement dated 20th March 2023 as evidence in chief. He stated that he was a fisherman who does fishing activities on the said parcel. That it was initially ancestral land that was passed on to the family of William Abiga. He stated that he did not know how BMU settled on the land.

23. During cross examination he stated that he had been doing fishing on the suit land and that fishing is done on the lake. That they have a landing site and he has been a member of UTA. The BMU has been in operation between 3 to 4 years. He denied that the BMU was in place in 1989. Further, that he began fishing as a family member and thereafter he became a member of UTA BMU. That the officials (current) ones are young men who must have been in school when the structures were put up. He stated that he confirmed that the defendants were not given permission to conduct fishing activities on the suit land. He additionally stated that John Ooko & William Abiga were first registered owner of the land.

Defence Case

24. DW1 was **Collins Otieno Odhiambo** who adopted his witness statement as evidence in chief. He stated that in

2001 he was elected as an official of UTA beach management. That they were elected in 2020 and were not party to the registration of UTA beach management. It was registered in 28th September 2007.

25. During cross examination he stated that UTA BMU came into being in 1990. That over the years the BMU has elected officials to manage the beach and he and the 2nd 3rd and 4th defendants are the current officials. Further, that the 2nd certificate indicates that the UTA BMU is at UTA. That UTA is the landing site and the certificate for 2011 is for Litare. He stated that he had seen a surveyors report dated 28.2.2023. Further that there is no indication in the certificate of registration to show that the land was set aside for the beach. He urged that the owner of the adjacent land to the riparian land is John Ouma Olith and Tambasa PAG Church. Further, that the land belongs to William Abiga and John Ouma.

26. He stated that they bought land from John Ouma and they conducted a search of the land. They noticed that the same was jointly owned by John Ouma Olith and Michael Olith and that the parcel of land was not partitioned. They were aware that William Abiga was deceased and that they did not

involve the family of William. He further testified that they usually conduct minutes on activities they wish to carry' out and members have to consent to purchase of land. That they bought the land on 20th July 2019 but he had no minutes sanctioning the purchase of land. That they have no indication on the portion of land that was sold. According to the agreement the last installment was to be on 30th August 2019 and they bought the land beyond riparian land. He was not aware that they were supposed to go to the land control board to have the land transferred. He maintained that they were not on the parcel of land illegally and they paid John Ouma Olith and Peter Odhiambo.

27. DW2 was Omondi Alfred Ajuoga, a fisheries officer who testified that he knew UTA management and that it was registered by law and certificates were issued. Further, that he did reports on the UTA management dated 7th February 2023 and 18th April 2023 which he produced as evidence.

28. During cross examination, he stated that he visited the site and that the lands are riparian. That he did not engage a government surveyor to confirm whether the area is riparian land.

29. Upon considering the evidence tendered in court, the pleadings and submissions, vide a judgment delivered on 25th September 2024, the trial court found in favor of the Plaintiff. The court allowed the plaint in the terms pleaded, to the effect that the plaintiffs were declared the registered beneficial owners of the suit land and the defendants were evicted.

30. Being aggrieved with the decision of the trial court, the appellants instituted the present appeal vide a Memorandum of Appeal dated 7th September of 2024 premised on the following grounds

1) the learned magistrate erred in law and fact when he wrote a judgement which is per incuriam.

2) the learned magistrate disregarded the appellant's pertinent and apt pleadings, evidence and submissions.

3) the learned magistrate disregarded the principle/rule stare decisis.

4) the learned magistrate failed to consider and / or analyze the entire issues raised in the pleadings.

5) the learned magistrate erroneously picked a few issues on which he made conjectures.

6) the learned magistrate found for the plaintiffs on no evidence presented before court.

7) the learned magistrate's interpretation of the various relevant principles of law was erroneous.

31. The parties were directed to file submissions on the Appeal.

Appellant's submissions

32. Learned counsel for the appellant submitted that the appellants are respectively the chairman, secretary, treasurer and vice chairman of UTA BREACH MANAGEMENT UNIT which is established by the County Executive Committee Member, Homa Bay County, under Regulation 3 (1} of the Fisheries Management and Development (Beach Management Units} Regulations, 2024. They are part of the 15 member Executive Committee which form part of the administrative structure of the Beach Management Unit, Others in the structure are the Assembly and other Sub-Committee and are all answerable to the County Executive Committee Member. That the Appellants are therefore not an association as contended by the Respondents in their amended plaint at paragraphs 6A, 6B, 6C. The Appellants are likewise not at all representatives of UTA BMU as alluded in

paragraph 3A of the Amended Plaintiff. The holding of the learned magistrate to the contrary is per incuriam.

33. Furthermore, he urged that the Ministry of Fisheries and Livestock Development was a necessary party in this suit as the judgement and decree, if executed will affect the ministry which established the UTA BMU after due gazzement. Counsel submitted that the 1st respondent is simply a legal representative of the estate of the late William Abiga for the purpose of the suit and upon the death of William Abiga his interests in the suit land ceased and his name is for deletion from the register under section 60 of Land Registration Act. The 1st respondent was therefore never a beneficial owner of the suit land.

34. He urged that it is a common concept that there is no water body without riparian land. That it is not disputed that L.R Rusinga/ Kamasengre / 571 borders Lake Victoria and that on the land there is UTA BMU established under the Fisheries and Livestock Development Act. The court too is bound to take judicial notice of the same.

35. Counsel submitted that the Respondents never complied with the basic provisions of Order 11 of the Civil Procedure Rules. That it was obligatory on the Respondents to comply

with procedural imperatives as they seek justice from courts of justice. Instead of filing case Management requests and Case Management Checklist under Order 11, the respondents filed the Obsolete Pre-Trial Questionnaires and answers.

36. Counsel submitted that based on no pleadings, the learned magistrate awarded Kshs. 1,500,000 to the Respondents as general damages for trespass. He stated that he relied on View Park Towers Limited v John Mithamo & 7 others [2014] eKLR which decision had been overturned in Peter Mwangi Mbuthia & another Vs Sarmon Edwin Osman [2014] eKLR. He ignored the doctrine of stare decisis. Further, he urged that the Respondents had pleaded and proved that the proprietorship of the disputed land was joint and that William Abiga had died. Ridiculously the learned Magistrate held that it was upon the Appellants to prove that the ownership was joint and on this basis dismissed the defence.

37. Counsel urged that the Appellants did not trespass on the suit land and that they are occupying (alongside others) a riparian land established and registered by the Ministry of Fisheries and Livestock Development and the same is judicially noticed. That DW2, Omondi Alfred George Ajuoga

testified to that effect and D. Exhibits 2a and 2b were produced.

38. Counsel urged that the surveyor misled the trial magistrate in his report and further, that he did not come out clear as to whether the area occupied by UTA BMU is within the 30M riparian land. His naivety on the acquisition by the Ministry does not mean the same has never been acquired. The magistrate used the uncertain report to conject that the defendants trespassed, yet the surveyor was detailed to make report on encroachment in vain. He prayed that the appeal be allowed with costs.

Respondents' submissions

39. Learned counsel submitted that in consideration of all the circumstances of the original suit the learned trial Magistrate did not err in law and fact during the trial and determination of the suit hence the appellants' appeal lacks merit and sufficient grounds to warrant the orders sought in the Appellants' Memorandum of Appeal and as such it should be dismissed with costs to the respondent.

40. Counsel urged that the decision of the trial Magistrate in the original case was sound, rational, legally binding and was on a balance of probability taking into account the weight of

evidence both oral and documentary presented by both parties and the applicable laws in regards to the issues raised in the suit.

41. The respondent cited Sections 24, 25 and 26 of the Land Registration Act and submitted that a Certificate of Official Search was produced as PExh14 in respect of the suit parcel. That the Summons from the ministry of lands dated 23rd January 2023, Survey report dated 17th February 2023 and the Surveyor's Report dated the 24th February 2023 that was produced by the Respondents, in respect to Band Parcel No. Rusinga/Kamasengre/571, clearly indicates the name of the registered owners as William Abiga and John Ouma Olith. That no contrary evidence of ownership was presented by the appellants and thus the evidence of ownership presented by the respondents remains unchallenged. He stated that it was upon the appellants to prove that the 1st respondents' father ceased to be the owner of the land and thus the respondent who had obtained Limited grant in respect of the deceased estate, for purposes of prosecuting the case, was non-suited. Based on the evidence presented in court, the appellants clearly failed to prove that the 1st respondent was

non-suited. He cited the case of Keiyian Group Ranch v Samwel Oruta & 9 others (2021) eKLR in this regard.

42. Counsel submitted that the respondents are the registered owners of the suit property and therefore the Learned Magistrate was right in holding that the Respondents are beneficial and registered owners of the suit property.

43. Counsel urged that the trial magistrate carefully considered the evidence on record and further, that the Surveyors Report dated 28th February 2023 presented by the respondents confirmed that the Appellants together with their members, had indeed trespassed into the Respondent's suit parcel, and constructed structures evidenced in the photographs presented as PExh.22. The appellants also confirmed to have been in occupation though they purported to have purchased a portion occupied from the 2nd respondent. He maintained that the respondent proved his case on a balance of probabilities.

44. He submitted that trespass is defined in Black's Law Dictionary 10th Edition as an unlawful act committed against the person or property' of another especially wrongful entry on another s real property'. He cited Section 3 (1) of the Trespass Act, Cap 294 and cited the case of Jennifer

Ng'endo Waweru v Margaret Beatrice Murigi (2020) eKLR in this regard.

45. He urged that the claim that the appellants purchased the land failed miserably as the appellant failed to prove that the purported sale, if any, was made with the blessings for the members. He cited Sections 109 and 112 of the Evidence Act and urged that it is clear that the appellants defence was full of unsubstantiated claims which were never backed up by evidence. The only proper evidence presented by the appellants was a certificate confirming that Uta BMU had been registered and a list of its members which comprised of the Appellants and the officials. From the foregoing it's established that the Claim of riparian land and purchase cannot be relied upon by the appellants since the same was neither proven by evidence nor backed by the law.

46. On the issue that the claim for trespass is statutorily time barred, counsel relied on the case of Eliud Njoroge Gachiri vs. Stephen Kamau Nganga [2018] eKLR and reiterated that the trial magistrate properly analysed the evidence and therefore the appeal should be dismissed. He urged the court to uphold the judgement of the trial court.

Analysis and Determination

47. The role of the Appellate Court was 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.”

48. In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** 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.”

49. The following issue arises for determination; **Whether the trial court erred in declaring that the Respondents were the beneficial and registered owners of the suit land.**

50. The basis of the claim was that the 1st Plaintiff's father was registered as a proprietor and that the defendants trespassed onto the suit land initially in 1999 and after his demise in 2001. The certificates of search was produced and it contained the names of William Abiga and Ouma Okoth as registered owners. There were two (2) survey reports tendered in court and it emerged that the UTA Beach Offices were within the suit parcel. It was also revealed that the suit land bordered Lake Victoria to the South West.

51. An analysis of the evidence tendered and the testimonies given reveals that the suit land borders the lake and there is a fish landing strip on the premises. The surveyor stated that the suit land extended all the way to the water and there was no riparian land demarcated or distinguished. This was the position which was also taken by the trial court in determining the suit. In my humble view the Court ought to have considered as riparian: his position which is erroneous in law.

52. Riparian land is not definitively defined in statute. However, in an Article titled **“Riparian Areas: Functions and Strategies for Management,”** the Committee on Riparian Zone Functioning and Strategies for Management, National Research Council, National Academy Press, Washington DC, wrote as follows:

“As one might expect, the simple dictionary definition has been expanded or altered innumerable times by scientists and others, frequently for specific purposes or to reflect certain disciplinary preferences. Hydrology is the primary emphasis of most definitions of wetlands and is also used to define riparian areas. The lack of a consistent definition for “riparian” has been identified as a major problem of federal and state programs that might manage and protect these areas (Steiner et al., 1994). Riparian areas generally do not satisfy regulatory and other definitions of “wetland,” and thus are not encompassed by regulatory programs for wetland protection.”

53. The Article attempted to define a riparian area as follows:

“Riparian areas are transitional between terrestrial and aquatic ecosystems and are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect water bodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., a zone of influence). Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine-marine shorelines.”

54. The Water Act does not expressly define riparian land but Part IX of the Water Resources Management Rules, 2006 provide for the conservation of Riparian and Catchment areas. Rule 116 of the said Part provides as follows:

“116. Determination of the Riparian Land

116.(1) “Riparian Land”, as defined in Part 1 of these rules does not imply a change of ownership but imposes management controls on land use for water resource quality as defined in these rules.

116.(2) Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse is defined as a minimum of six (6) meters or equal to the full width of the watercourse up to a maximum of thirty meters on either side of the bank.

116. (3) the width of the watercourse shall be equal to the distance between the top edges of its banks.

116. (4) the riparian land shall be measured from the top edge of the bank of the watercourse and this will apply to seasonal and perennial watercourses.”

55. Article 62 of the Constitution provides as follows;

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

- (d) land in respect of which no individual or community ownership can be established by any legal process;**
- (e) land in respect of which no heir can be identified by any legal process;**
- (f) all minerals and mineral oils as defined by law;**
- (g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;**
- (h) all roads and thoroughfares provided for by an Act of Parliament;**
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;**
- (j) the territorial sea, the exclusive economic zone and the sea bed;**
- (k) the continental shelf;**
- (l) all land between the high and low water marks;**
- (m) any land not classified as private or community land under this Constitution; and**

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

(a) clause (1)(a), (c), (d) or (e); and

(b) clause (1)(b), other than land held, used or occupied by a national State organ.

(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

56. The existence of the riparian land did not need proof by way of evidence. The riparian land is a maximum of 30 meters from the bank. The defendants are in occupation of this said strip which is used as a beach and for fishing activities. The finding by the surveyor, that there was no riparian land demarcated alongside the trial courts' finding on the same was erroneous. Bordered the lake.

57. Additionally, it was established that the landing site was established with the help of the late William Abiga. The Chief Fisheries Officer of the County filed a report and explained the origin and purpose of Beach Management Units and particularly, that the UTA Beach Management Unit was registered in 1990 at first with certificates being issued in the years 2007 and 2011. Having established that the disputed occupied parcel of land is riparian land, which is public land, it follows that the trial court erred in its decision to restrain the appellants from utilizing the suit land.

58. It is common knowledge, and a long time practice in Kenya, which this Court takes judicial notice of, under Section 60 of the Evidence Act, that a fact of notoriety is that most of the parcels of land that border or are adjacent to rivers, lakes, estuaries, marine areas and seas or oceans within the

country, more often than not have titles whose ground extents are not demarcated to reflect on maps as being distinct and or separate from riparian land. This situation sad situation is such that a land owner whose land is so adjacent may possess a title whose size is specified and indeed is as it was when survey was carried out and took measurements that stretched only to what was considered private and excluding the riparian part, but with receding waters or water bodies especially along rivers and the drying of rivers due to climate change, the registered owner claims the dry or more drier land that is 'created' than before hence getting a great disparity between the acreage of the title and the actual ground size. In the alternative, where lakes and seas are expanding and 'reclaiming' land which was at one time dry then the sizes of land for individual owners whose dry lands have been 'taken away' or flooded, and change of the specific and ordinary sizes and boundaries there is a contention as to where an owner's land reached in relation to riparian land. But where the lakes, seas and rivers recede it is not open for one to claim that which was riparian and as private. To the extent that the suit land was riparian land the Respondents could not claim it.

59. Thus, to the extent that the land was set aside as a fishing beach land, UTA Beach, which by virtue of its situation as land bordering a water body which is a public resource and which serves the public, it remains riparian land and stretches all the way inland to the level or line which public authorities have and shall determine to be riparian land.

Whether the trial court erred in awarding damages for trespass

60. According to Black's Law Dictionary 8th Edition, Trespass is defined, in the strictest sense, as;

“An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property”

61. Having established that the dispute pertains to riparian land, which is public land, the trial court therefore erred in its award of damages for trespass. The upshot of the foregoing is that the award of damages for trespass is hereby set aside as well.

62. In the premises, I allow the appeal in the following terms;

- i) The judgement and decree delivered by Hon. Nicodemus Moseti in Mbita Senior Principal Magistrates ELC Land Case No. E004 of 2023**

delivered on 25th September 2024 is hereby set aside in its entirety. Costs to the successful parties now.

ii) The Appellants are awarded costs of the appeal Judgment dated, signed and delivered virtually via the Teams Platform this 25th day of September 2025.

HON. DR. IUR FRED NYAGAKA

JUDGE

From **2:30 PM** onwards, **in the presence of,**

Court Assistant: Fiona

H. Oduor Advocate for the Appellants

1st Appellant, Benard

4th Appellant Collins

Ms. Nyarige Advocate for the Respondents