



**Nabule & another v Tamu & another (Environment and Land Appeal
E003 of 2024) [2025] KEELC 7101 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E003 OF 2024**

E ASATI, J

OCTOBER 16, 2025

BETWEEN

SIMEON NDAKALU NABULE 1ST APPELLANT

RHODA ANDEYO SIMEON 2ND APPELLANT

AND

LUKE AMUKHALE TAMU 1ST RESPONDENT

IBRAHIM KUNDU TAMU 2ND RESPONDENT

(Being an appeal from the judgement and decree of Honourable Rose Ndombi (Principal Magistrate) delivered on the 18th day of January 2024) in VIHIGA PMC ELC NO 69 OF 2021)

JUDGMENT

Introduction

1. A brief background of the appeal herein as can be gathered from the record of appeal filed by the Appellants herein is that the Appellants as the Plaintiffs in Vihiga PMC ELC case No. 69 of 2021, the suit herein, had sued the Respondents vide the plaint dated 29th December 2021. The subject matter of the suit was a parcel of land known as W. Bunyore /Embali/2264, the suit land, which the Appellants claimed to be the legal owners and entitled to possession of.
2. The Appellants' complaint was that the Respondents had hired goons to demolish the structures erected by the Appellants on the land and to destroy crops. The Appellants therefore sought for a declaration that they were entitled to unimpeded right of possession and occupation of the suit property, an order of permanent injunction, general damages for trespass and costs of the suit.
3. The record shows that in response to the claim, the Respondents filed Notices of Preliminary Objection which were heard and dismissed and an appeal in respect of the dismissal was also dismissed. The record further shows that the suit was subsequently heard before the trial court which vide the



judgment dated 18th January 2024 found that the Appellants' suit lacked merit and dismissed it with costs to the Respondents.

The Appeal

4. Aggrieved by the judgment, the Appellants preferred the present appeal vide the Memorandum of Appeal dated 16th February 2024 and sought for orders that:
 - a. The appeal be allowed.
 - b. The Honorable Magistrate's orders of 18th January 2024 and consequential orders be set aside.
 - c. The Honorable Court be pleased to grant the prayers sought in the plaint
 - d. The Appellant be awarded costs of the appeal.

Submissions

5. Vide directions given on 14/5/2025 the appeal was heard by way of written submissions.
6. Written submissions dated 3rd July 2025 were filed by the firm of Wasonga Wamalwa & Kariuki Associates Advocates on behalf of the Appellants. Counsel compressed the 13 grounds of appeal presented in the Memorandum of Appeal into 5 grounds of appeal as follows;
 - a. The learned trial Magistrate erred in law and in fact in failing to have due regard and take into account/consideration the pleadings filed, the totality of the evidence adduced and the written submissions and authorities filed by the Appellant in arriving at the impugned judgment and decree.
 - b. The learned trial Magistrate erred in law in failing to seek to be supplied with all the evidence and submissions filed by the Appellant before proceeding to make its judgment.
 - c. The learned trial Magistrate erred in law and in fact in proceeding to dismiss the Appellant's suit even after correctly finding that the same was undefended.
 - d. The learned trial Magistrate erred in law and in fact in proceeding to award costs to the Defendants when she had already correctly found that they never filed a defence, never participated in the main suit was undefended.
 - e. The learned trial Magistrate erred in law in not exercising her discretion judiciously and relying on wrong principles and provision of the law and hence arriving at the wrong determination.
7. Counsel submitted that where a Defendant is served with summons to enter appearance and a plaint and he fails to enter appearance and file defence, then under the provisions of Order 10 Rule 8 of the Civil Procedure Rules the court shall on Application made by the Plaintiff enter judgment in default against the Defendant. That in the present case the Appellants choose to proceed with the hearing since the Defendant had entered appearance. That as long as the Plaintiff can, during the hearing, adduce evidence to support the arguments and discharge the burden of proof on a balance of probabilities, the issue and facts averred to in the plaint are uncontested. Counsel relied on the provisions of sections 107, 109 and 112 of the [evidence Act](#) and submitted that the Appellant discharged the burden of proof.
8. Counsel submitted that the trial court erred in not relying on other provisions of the law other than sections 26 and 24 of the [Land Registration Act](#) as regards proof of ownership of land.
9. Counsel relied on the provisions of section 25 of the [Land Registration Act](#) which he submitted, recognizes that ownership to land is not derived through registration only. Counsel also relied on the



provisions of section 7(i) of the Land Act No. 6 of 2012 which Counsel submitted, recognized that title to land may be acquired through any manner prescribed by statute and section 28 of the Land Registration Act and submitted that a right to land may be acquired by virtue of any written law relating to limitation of actions or other right acquired by any written law.

10. That the Plaintiffs having already the existence of adverse possession, are entitled pursuant to the provisions of section 38 of the Limitation of Actions Act to apply to the High Court for an order that they be registered as properties of the land or lease in place of the Defendant who is not the registered proprietor of the suit land.
11. That the trial court acknowledged that evidence in the form of a sale agreement dated the 10th day of January 1965 was tendered by the Appellants. That the Appellants and their family have been in occupation of the suit land to date. That the Appellants acquired proprietary rights in the suit property in the year 1965 through purchase for valuable consideration which right is well recognized by section 25(1) of the Land Registration Act. Counsel submitted that whereas the certificate of title is the primary and crucial document proving land ownership in Kenya, it is not the only proof of ownership. That other documents like sale agreement and trust documents along with evidence of payment of land rates and rent can also support ownership claims.
12. That the trial Court ought to have found that the Appellants' proprietary rights ought to be protected from any third parties.
13. Regarding the award of costs to the Respondents, Counsel submitted that courts will generally award costs to the successful party. That the Respondents were not successful in the suit to warrant the costs awarded. That in awarding the costs, the trial court exercised discretion injudiciously and relied on the wrong principles hence the award should be set aside.
14. Counsel urged the court to allow the appeal and grant the orders sought.
No submissions were filed by the Respondents.

Issues of determination

15. From the grounds of appeal presented and the submissions made, the issues that emerge for determination are;
 - a. Whether or not the Appellants proved their claim before the trial court.
 - b. Whether or not the trial court erred in dismissing the Appellants' suit.
 - c. Whether or not the Appellants are entitled to the relief sought herein.
 - d. Costs of the appeal.

Analysis and determination

16. This is a first appeal hence the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of *Gitobu Imanyara & 2 others –vs-*



Attorney General [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

“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”.

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123.

17. The first issue for determination is whether or not the appellants proved their case before the trial Court.
18. The Appellants’ case before the trial court was based on the tort of trespass. They had pleaded in the plaint dated 29th December 2021 that they were the legal owners and entitled to possession of property known as W. BUNYORE/EMBALI/2264 which they claimed to have bought on 10th January 1965 from one Tamu Tete Ayiela, deceased. They further pleaded that they had had possession of the land for a period of 56 years and that they had acquired prescriptive rights over the land.
19. The record shows that a total of 5 witnesses testified on behalf of the appellants. The central point in their testimonies was that the Appellants bought the suit land and that they have had occupation and use thereof since the time of purchase. PW1 who was the 2nd appellant adopted the contents of her witness statement dated 29/12/2021 as her evidence in chief. She narrated how her husband the 1st appellant bought the suit land at Kshs. 800 from one Tamu Tete Ayiela vide sale agreement dated 10th January 1965. She also stated that they had lived on the land in peace till 2021 when the 1st respondent through hired goons trespassed onto the parcel of land and fenced it off, damaged crops and denied the Appellants access there onto.
20. It is clear from the evidence that the Appellant produced no documents of ownership of the suit land. The agreement produced by the Appellant did not confer ownership rights upon the Appellants. No evidence was tendered that the transaction commenced by way of the sale agreement was ever completed by obtaining the relevant consent of the Land Control Board for transfer under section 6 of the *Land Control Act*, executing the appropriate transfer forms and obtaining title certificate in favour of the Appellants.
21. It was pleaded and submitted on behalf of the Appellants that they had acquired prescriptive rights over the suit land. However, there was no evidence that the Appellants had ever filed an application to the High Court under the provisions of section 38 of the *Limitation of Actions Act* to have themselves declared as having acquired title to the suit land by adverse possession. The suit in the trial court was based on the land sale agreement and not adverse possession. Further the trial court had no jurisdiction to entertain a claim of adverse possession under section 38 of the *Limitation of Actions Act*.
22. The trial court found that the Plaintiffs (appellants herein) had not proved that they were the owners of the suit land. The trial court further found that having failed to prove ownership of the suit land the Plaintiffs were not entitled to the relief sought.
23. The burden of proof remains with the Plaintiff to prove his/her claim even if the Defendant files no defence like in the present case. Although the suit was undefended, the Plaintiff still had a duty to prove



his case on a balance of probabilities as required by the law. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 noted that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

24. Similarly, in the case of *Gichinga Kibutha v Caroline Nduku*, (2018) eKLR, the court held that: -

“It is not automatic that instances where the evidence is not controverted the claimant shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

25. Without documents of ownership of the land the Plaintiff/appellants did not discharge the burden of proof.

26. This court finds that trial court did not error in its findings and decisions save for the issue of costs.

27. The trial Court awarded costs to the Defendants (the Respondents herein). The proceedings show that the Respondents failed to not only file defence but also to attend court for the hearing of the case. Having not participated in the prosecution of the case, I find that the Respondents were not entitled to costs of the suit.

28. The appeal succeeds partly as follows;

- i. The order awarding costs to the Respondents is hereby set aside. The rest of the judgment of the trial court is upheld.
- ii. Each party to bear own costs of the appeal.

Orders accordingly.

JUDGMENT DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 16TH DAY OF OCTOBER, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

James: Court Assistant.

Choge h/b for Wasonga for the Appellants.

No appearance for the Respondents.

