



**Omollo v Keya & another (Environment and Land Appeal
E006 of 2024) [2025] KEELC 6914 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E006 OF 2024
SO OKONG'O, J
OCTOBER 9, 2025**

BETWEEN

LUKE OMULLO OMOLLO APPELLANT

AND

SAMUEL JUMA KEYA 1ST RESPONDENT

LAND REGISTRAR 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. E.A. Obina, SPM
delivered on 13th February 2024 in Kisumu CMCELC NO. 62 OF 2018)*

JUDGMENT

1. This appeal challenges the judgment and decree of the Hon. E.A. Obina, SPM, delivered on 13th February 2024, in Kisumu CMCELC No. 62 of 2018 (hereinafter referred to as “the lower court”). The 1st Respondent sued the Appellant before this court on his own behalf and on behalf of his brother Naftali Akeyo Keya, on 31st August 2012. The suit was subsequently transferred to the lower court. The 1st Respondent averred that at all material times to the suit, his brother Naftali Akeyo Keya and he were the registered proprietors of all that parcel of land known as Tile No. Kisumu/Border/3412 (hereinafter referred to as “the suit property”).
2. The 1st Respondent averred that on or about 7th October 2005, the Appellant unlawfully and without his consent, encroached and settled on the suit property. The 1st Respondent averred that he was unsuccessful in his attempts to have the Appellant stop the said encroachment. The 1st Respondent averred that on or about 2nd October 2007, the Appellant filed a suit against him in the High Court (Kisumu High Court Civil Suit No.134 of 2007 (O.S)) seeking to be declared to have acquired the suit property by adverse possession. The 1st Respondent averred that the Appellant’s adverse possession claim was dismissed with costs. The 1st Respondent averred that despite numerous efforts to have the Appellant vacate the suit property, the Appellant has persisted with his encroachment on the property.



The 1st Respondent averred that the conduct of the Appellant amounted to a violation of his rights enshrined in the Constitution. The 1st Respondent prayed for judgment against the Appellant for:

1. A permanent injunction restraining the Appellant by himself, his agents, employees, and/or any other persons purporting to or deriving authority from him from entering upon, encroaching, wasting, alienating, and/or in any other way whatsoever interfering with the suit property.
 2. A mandatory order against the Appellant by himself, his agents, employees, and/or any other persons purporting to or deriving authority from him to vacate the suit property.
 3. General damages for trespass and mesne profits.
 4. Costs of the suit.
 5. Any other relief the court may deem fit to grant.
3. The Appellant filed a statement of defence on 15th November 2012, which the Appellant amended on 1st July 2019 to add the Land Registrar to the suit and plead a counterclaim against the 1st Respondent. The Appellant averred that the suit property belonged to his father, Vincent Omollo Andega, who purchased it between 1978 and 1984 from the 1st Respondent's father, Keya Owaga. The Appellant averred that he had lived on the suit property since his father acquired the same.
4. The Appellant averred that on 1st September 1996, the 1st Respondent trespassed on the suit property claiming ownership. The Appellant averred that the 1st Respondent was charged at Nyando Law Court with the offence of trespass. The Appellant averred that the 1st Respondent's right in the suit property, if any, had been extinguished by operation of law and the suit was misconceived. The Appellant averred that the 1st Respondent's claim was barred under Section 34 of the Civil Procedure Act and the suit amounted to an abuse of the court process. The Appellant averred that the orders sought by the 1st Respondent in the lower court should have been sought in the previous suit between the parties, namely, Kisumu High Court Civil Suit Number 134 of 2007 (Originating Summons). The Appellant averred that the 1st Respondent's suit was res judicata. The Appellant averred that the suit was bad in law for opening litigation on a concluded matter.
5. In his counterclaim against the 1st Respondent, the Appellant averred that he was the administrator of the estate of his deceased father, Vincent Omollo Andega. The Appellant averred that the 1st Respondent was the son of Keya Owaga, also deceased. The Appellant averred that the 1st Respondent's father sold the suit property to the Appellant's deceased father, Vincent Omollo Andega, between 1978 and 1984, at a consideration of Kshs. 9,800/-.
6. The Appellant averred that the suit property was adjudicated in the name of his deceased father, Vincent Omollo Andega. The Appellant averred that on 1st September 1996, the 1st Respondent trespassed on the suit property claiming ownership. The Appellant averred that the 1st Respondent was arrested and charged at Nyando Law Court with the offence of trespass. The Appellant averred that the 1st Respondent was convicted and sentenced to serve a jail term. The Appellant averred that the court ruled in his favour in that case. The Appellant averred that the 2nd Respondent ignored the adjudication records on the suit property and the Nyando Law Court decision made on 10th February 1998, and opened a new register for the property in the name of the 1st Respondent. The Appellant prayed for judgment against the 1st Respondent for;
1. The 1st Respondent's case to be dismissed with costs.



2. The suit property to be registered in the name of the Appellant, and a title issued to him.
 3. A permanent injunction against the 1st Respondent from dealing with the suit property.
 4. General damages.
 5. Costs and interest therein.
7. The 1st Respondent filed a reply to the Appellant's amended defence and a defence to the counterclaim on 19th September 2019. The 1st Respondent reiterated that the suit property was registered in his name and the name of his brother. The 1st Respondent averred that the sale of the suit property by his deceased father to the Appellant's deceased father was not completed. The 1st Respondent averred that the purchase price paid was refunded and receipt thereof acknowledged. The 1st Respondent admitted that he was convicted for trespass at Nyando Law Court, but contended that his conviction was erroneous.
8. Before the suit was transferred to the lower court, the Appellant filed an application seeking to strike out the 1st Respondent's suit on the grounds, among others, that the suit was res judicata. The application, which was brought by a Notice Motion dated 7th October 2012, was heard and dismissed by Kaniaru J. on 7th May 2015.
9. The lower court heard the 1st Respondent's claim and the Appellant's counterclaim. In a judgment delivered on 13th February 2024, the court dismissed the Appellant's counterclaim and entered judgment for the 1st Respondent against the Appellant for a permanent injunction restraining the Appellant from entering the suit property, alienating or in any manner interfering with the property, and a mandatory injunction compelling the Appellant to vacate the suit property. The 1st Respondent was also awarded the costs of the suit and the counterclaim.
10. The lower court framed five issues for determination, namely: whether the suit was res judicata and, as such, an abuse of the court process; who was the owner of the suit property? whether the 1st Respondent had proved his case on a balance of probabilities; whether the Appellant had proved his counterclaim on a balance of probabilities; and who should bear the costs of the suit? The lower court held that the 1st Respondent had proved his case against the Appellant on a balance of probabilities. The court found that the 1st Respondent was the lawful owner of the suit property and that the Appellant had failed to prove his counterclaim against the 1st Respondent. The lower court held that the issue of whether the 1st Respondent's suit was res judicata and, as such, an abuse of the court process was conclusively determined by Kaniaru J. in a ruling dated 7th May 2015, which was binding upon the court. On the issue of whether the 1st Respondent was the owner of the suit property, the lower court held that the Appellant's suit to be declared the owner of the suit property by adverse possession having been dismissed on 13th July 2012, the 1st Respondent remained the lawful owner of the suit property. The lower court found that the criminal proceedings at Nyando Law Court had no relevance to the Appellant's claim over the suit property. On the Appellant's contention that the suit property was irregularly registered in the name of the 1st Respondent by the 2nd Respondent, the lower court held that the Appellant should have raised the issue through Judicial Review. On the Appellant's contention that his deceased father had purchased the suit property from the 1st Respondent's father, the lower court found that the sale transaction was not completed and that the purchase price paid by the Appellant's father was refunded. On the Appellant's complaint that the 1st Respondent conducted succession proceedings in respect of the 1st Respondent's deceased father's estate without regard to the Appellant's interest in the suit property, the lower court held that the issue should have been raised by the Appellant through an objection in the succession proceedings.



11. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 7th March 2024, the Appellant challenged the lower court's judgment on the following grounds;

1. That the learned trial magistrate erred in law and fact by deviating from the principle of law that civil cases are to be proved on a balance of probabilities and not beyond a reasonable doubt.
2. That the learned trial magistrate erred in law and in fact by failing to appreciate the Appellant's evidence, the testimony offered, and the submissions filed.
3. That the learned trial magistrate erred in law and fact when he failed to consider the evidence and pleadings, thereby reaching a wrong conclusion.
4. That the judgment was against the weight of evidence tendered by the Appellant.

The Appellant prayed that the appeal be allowed with costs and the judgment of the lower court be set aside. The Appeal was heard by way of written submissions.

The Appellant's submissions

12. The Appellant filed submissions dated 10th March 2025. The Appellant submitted that the suit property was purchased by his deceased father, Vincent Omollo Andega, from the 1st Respondent's deceased father, Keya Owaga, and that his father paid the full purchase price. The Appellant submitted that his father took possession of the suit property, which was subsequently adjudicated in favour of his father. The Appellant submitted that the letter dated 29th August 1996 from the Adjudication Officer confirmed his deceased father as the sole proprietor of the suit property. The Appellant submitted that the 1st Respondent's father was registered as the owner of the suit property on 7th June 2006, 10 years after the Appellant's father had already been registered as the owner of the said land. The Appellant submitted that the 1st Respondent based his case on a title whose validity was contested. The Appellant cited Embakasi Properties Limited & Another v. Commissioner of Lands & Another [2019] eKLR, Munyu Maina v. Hiram Gathiha Maina [2013] eKLR and Benja Properties Limited v. Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR in support of his submissions on the issue. The Appellant submitted that he had been in possession of the suit property for more than 12 years and his possession had not been disputed by the 1st Respondent.

The 1st Respondent's submissions

13. The 1st Respondent filed his submissions on 24th March 2025. The 1st Respondent submitted that the title deed for the suit property showed that his brother, Naphtali Akeyo Keya, and he were the absolute proprietors of the suit property. The 1st Respondent cited Section 107 (1) of the *Evidence Act*, Section 26 of the *Land Registration Act*, and the cases of Dr. Joseph Arap Ngok v. Justice Moijo Ole Keiwa & 5 Others, Civil Appeal No. CA 60 of 1997 and General Properties Limited v. Saika Two Estate Dev. Limited [2021] eKLR and submitted that the Appellant failed to prove fraud, irregularity, or illegality by the 1st Respondent in the manner in which he was registered as the owner of the suit property. The 1st Respondent invited the court to note that the Appellant had brought an adverse possession claim against the 1st Respondent, which was dismissed for lack of merit. The 1st Respondent urged the court to dismiss the appeal with costs.



Analysis and Determination

14. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant, and the submissions by the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.
15. In *Gitobu Imanyara & 2 Others v. Attorney General* [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

“...this Court is not bound necessarily to accept the findings of fact by the court below and that 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. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. V. Brown* [1970] E.A.L.
16. As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”
17. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212, the Court of Appeal stated 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.”
18. I am of the view that the Appellant’s four grounds of appeal raise only one issue for determination, namely, whether the lower court erred in its finding that the 1st Respondent had proved his case against the Appellant, and that the Appellant’s counter-claim was not proved.
19. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”



20 In Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

21. The 1st Respondent's case against the Appellant was based on trespass, while the Appellant's counterclaim was based on the agreement of sale of the suit property, which the Appellant's father had entered into with the 1st Respondent's deceased father between 1978 and 1984. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. Halsbury's Laws of England 3rd edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“ A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.”

22. In the Court of Appeal, Fourth District, Division 1, California, in *Ralphs Grocery Co. v. Victory Consultants Inc.* (2017) 17Cal. App.5th 245, 261; CACI No. 2000, the court stated that:

“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (*Staples v. Hoefke* (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was substantial factor in causing the harm. (See CACI No. 2000).”

23. The 1st Respondent produced evidence before the lower court showing that the suit property was adjudicated in the name of his deceased father, Keya Owaga, in 1976 (see the adjudication record). There was no evidence that the adjudication record was amended at any time to change the ownership of the suit property. The 1st Respondent also produced evidence showing that his deceased father was the first registered owner of the suit property on 7th June 2006. The 1st Respondent further produced evidence showing that his brother, Naftali Akeyo Keya, and he were registered as the owners of the suit property on 15th October 2008 as the administrators of the estate of their deceased father, and subsequently as the beneficiaries of the estate. The 1st Respondent and his brother were issued with a



title deed for the suit property on 29th October 2008. I am satisfied from the evidence on record that the 1st Respondent proved that he and his brother were the registered owners of the suit property.

24. The Appellant did not dispute his entry into the suit property. As the registered owner of the suit property, the 1st Respondent was entitled to possession thereof. The burden was on the Appellant to prove that his entry and occupation of the suit property was justifiable. Before the lower court, the Appellant attempted unsuccessfully to justify his entry and occupation of the suit property. The Appellant claimed that he had been declared the owner of the suit property by Nyando Law Court. This argument has no merit and was rightly rejected by the lower court. If indeed the said court had declared the Appellant as the owner of the suit property on 15th December 1997, there would have been no need for the Appellant to file a suit in 2007 to be declared the owner of the suit property by adverse possession. The Appellant had also contended that the suit property was purchased by his deceased father from the 1st Respondent's father between 1978 and 1984. The 1st Respondent produced evidence in the form of a letter dated 4th June 1996 from the Appellant's advocates to the 1st Respondent in which the Appellant admitted that the agreement of sale between the Appellant's father and the 1st Respondent's father was rescinded and that the purchase price paid by the Appellant's father was to be refunded. In the adverse possession case, the court stated as follows in part in the judgment, "Equally although the agreements were not produced it would appear that the purchase consideration was returned by the defendant." The sale agreement between the Appellant's father and the 1st Respondent's father having been rescinded, the Appellant could not use the same as a basis for his claim over the suit property. In any event, I wonder how an agreement made between 1978 and 1984 could be lawfully enforced in 2012.
25. The Appellant had also claimed that the suit property was adjudicated in favour of his father and, as such, it was wrongly registered in the name of the 1st Respondent's father. The Adjudication Record dated 2nd July 1976 produced in evidence showed that the suit property was adjudicated in favour of the 1st Respondent's father as the owner thereof. There is no evidence that there was any successful objection to this adjudication by the Appellant's father; on the strength of which the adjudication record could have been amended to indicate the Appellant's father as the owner of the suit property. Neither the proceedings of such an objection nor the amended adjudication record was produced in evidence. The letter dated 29th August 1996 from the District Adjudication and Settlement Officer, produced in evidence by the Appellant, confirming that the Appellant's father was the owner of the suit property, had no basis as it was not anchored on any adjudication record or objection proceedings. Since the adjudication record showed the 1st Respondent's father as the owner of the suit property, and in the absence of any objection to the adjudication, the 2nd Respondent was required by law to register the 1st Respondent's father as the first owner of the suit property. There was therefore no illegality or irregularity in the registration of the suit property in the name of the 1st Respondent's father as the first registered owner thereof. It follows, therefore, that there was no satisfactory evidence placed before the lower court showing that the Appellant's father was the owner of the suit property. I agree with the lower court that the 1st Respondent proved his case against the Appellant on a balance of probabilities, while the Appellant's case was not proved. The 1st Respondent proved that together with his brother, they acquired the suit property lawfully, were the registered owners thereof, and that the Appellant entered and occupied the same wrongfully. The Appellant, on the other hand, failed to establish any interest recognised by law in the suit property and as such occupied the property without any justifiable cause, thus a trespasser thereon.



Conclusion

26. In conclusion, I find no merit in the appeal before the court. The appeal is dismissed with costs to the 1st Respondent.

DELIVERED AND SIGNED AT KISUMU ON THIS 9TH DAY OF OCTOBER 2025

S. OKONG'O

JUDGE

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

Ms. Onyango for the Appellant

Ms. Nyambeki for the 1st Respondent

Ms. J.Omondi-Court Assistant

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