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County Government of Migori & another v Ogada & another (Environment and Land Appeal E045 of 2021) [2025] KEELC 7382 (KLR) (21 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7382 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E045 OF 2021

FO NYAGAKA, J

OCTOBER 21, 2025

BETWEEN

COUNTY GOVERNMENT OF MIGORI .... 1ST APPELLANT

CHIEF OFFICER HEALTH .... 2ND APPELLANT

AND

GEORGE OUMA OGADA .... 1ST RESPONDENT

TOBIAS OBILO ANDURU .... 2ND RESPONDENT

(Being an appeal from the judgment/decree of the Senior Principal Magistrate Hon. Obiero (SPM) delivered on the 9th November, 2021 in Migori ELC No. 69 of 2019)

JUDGMENT

Introduction

1. This is an appeal arising from the judgment of Honourable Obiero Senior Principal Magistrate delivered on 9th November, 2021 in Migori ELC No. 69 of 2019.

2. The Appellants filed a Memorandum of Appeal dated 7th December, 2021 appealing against the said judgment on the following grounds: -

    1. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Court lacked jurisdiction to entertain the entire suit pursuant to Section 18(2) of the *Land Registration Act* as the Land Registrar never dealt with the matter before.

    2. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the suit was statute barred by dint of the provisions of Limitations of Actions Act.

3. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the Plaintiff had illegally obtained the transfer of Title of the suit land in his name having done no succession in his Deceased father's Estate thereby making his claim tainted with fatal illegalities as he lacked locus standi.

4. The Learned Trial Magistrate erred in and fact in failing to appreciate that the valuation report was illegal and incompetent having been prepared by unqualified person.

5. The Learned Trial Magistrate erred in law and fact in arriving at an erroneous decision against the weight of evidence on record.

6. The Learned Trial Magistrate made drastic conclusions utter disregard of the Law.

7. The Learned Trial Magistrate erred in law and fact in failing to find that the claim was not proved on a balance of probabilities.

8. The Learned Trial Magistrate failed to appreciate that the appellants could not be liable for acts and omissions of the Defunct Local Authorities unless and until compliance with the Transitional authority Act was proved.

3. The Appellants seek orders of setting aside the trial magistrate's judgment and an order dismissing and/or striking out the 1st Respondent's claim.

Brief Facts

4. The 1st Respondent had filed a suit against the Appellants vide an Amended Plaint dated 21st July, 2020 alleging that the Appellants had trespassed onto his suit parcel Suna East/Wasweta 1/604 and constructed a health center. He sought for an eviction order against the Appellants and in the alternative be compensated.

5. The Appellants, in response, filed their Amended Statement of Defence dated 10th August, 2020. By it they denied the Respondents allegations and prayed that the suit be dismissed.

6. The suit was heard on merits. The trial magistrate, in his judgment dated 19th April, 2023, allowed the then Plaintiff's/Respondent's case as prayed.

7. The Appellants being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

Submissions

8. Counsel for the Appellant filed his submissions dated 27th May, 2025 where he identified two issues for determination. The first issue was whether the award of Kshs. 9,200,000 to the 1st Respondent was justifiable and supported by evidence.

9. It was his submission that the Respondent obtained judgment for compensation for the value of the suit parcel being Kshs. 9,200,000 together with costs and interests. He submits that the value of the suit property was never an issue in dispute and thus there was no need to have filed a contrary valuation report.

10. He submitted that the trial court merely relied on the valuation report since the Appellant had failed to avail any other expert report to challenge the one produced by the 1st Respondent. He added that the trial court in doing so abdicated its solemn duty to weigh the evidence presented against the existing facts before making a determination that would affect the rights of either party.

11. He submits that the valuation report as drawn did not offer sufficient particulars necessary for an award of compensation. He also submits that the report was inconclusive in so far as it failed to sever the value of the suit property from the value of the developments thereon. It was his submission that the trial court erred in grounding its decision solely on the valuation report in total disregard of the factual issues presented before it.

12. Learned counsel relied on the case of Stephen Kinini Wang'ondu v The Ark Limited [2016] eKLR. He submits that the award of Kshs. 9,200,000 did not take cognizance of the fact that the Appellants had expended resources in developing the suit parcel for its public use thus arriving at a wrong finding.

13. He submitted that the award issued to the Respondent by the trial court as compensation was punitive and amounted to unjust enrichment of the 1st Respondent hence the need to have it set aside.

14. It was counsel's submission that the 1st Respondent could only recover costs of the suit property at its market value. He submits that the trial magistrate correctly noted that the development was for the benefit of the community but gave a contradictory judgment for compensation for a sum inclusive of the value of the said development.

15. He relied on Section 109 of the *Evidence Act* and submits that the duty to avail the requisite proof as a condition for issuance of the orders lay with the 1st Respondent who failed to discharge it.

16. The second issue was whether the trial court erred in awarding interest of Kshs. 9,200,000. While submitting in the affirmative, he argues that the trial magistrate awarded interest and costs on a contested decretal sum of Kshs. 9,200,000

17. Learned counsel for the Respondent filed his submissions dated 12th June, 2025 where he submits that the prayer for compensation was an alternative prayer to the eviction order sought.

18. He further submitted that the Respondent had obtained the title to the suit land and thus the Appellant could not freely benefit from the land that belonged to a private person. He adds that the Appellant's actions amounted to compulsory acquisition hence the compensation sought.

19. It was counsel's submission that the Appellant never attempted to offer alternative valuation of the suit land hence the trial court had no option but to rely on the report available. He relied on the case of Thomas Kimagut Sambu V National Land Commission & 2 Others (2018) eKLR.

20. In conclusion, he argued that in the instant case, it would be difficult to separate land and any other structure from the suit land. He urged the court to dismiss the appeal with costs.

Analysis and Determination

21. This Court considered the appeal and the law. Further, upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:

    1. Whether the appeal is merited

    2. Who should bear the costs of the appeal

22. Being a first appeal, the court relies on a number of principles as set out in Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123:

> " ...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 allowance in this respect. In particular this court is not bound necessarily

to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

23. Further, in the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR) the court held that:

> "This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect."

24. Section 4(2) of the Limitations of Actions Act provides as follows:

> "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: provided that an action for libel or slander may not be brought after the end of twelve months from such date."

25. I have carefully perused and analyzed the Record of Appeal. I have, further, deeply read the judgment of the trial court. It is not in dispute that the trial magistrate held that the claim for eviction was not time barred. Further, it is not in dispute that the 1st Respondent became the owner of the suit parcel in June, 2014. This was two years after the alleged trespass started. He filed the suit in 2019. This resulted to a period of 5 years which was well within the 12-year statutory period for recovery of land, if at all.

26. It is this court's view that in so far as a claim for recovery of land may be made, the trial magistrate was right in his finding as 12 years had not lapsed from the time the right of action accrued to the time the suit was filed. However, before the appellant happily sings about succeeding in this appeal it is worth of note that the claim herein is one hinged on trespass. A number of other legal considerations or parameters ought then to be made.

27. I have also perused the 1st Respondent's Amended Plaint dated 21st July, 2020, specifically paragraphs 5 and 6. It is clear from these paragraphs that the 1st Respondent's claim for loss and damage was as a result of trespass and not compensation of land or recovery of the land.

28. It is not in dispute that in line with paragraph 5 of the Amended Plaint, the alleged trespass occurred sometimes in the year 2012. It is also not in dispute that the 1st Respondent became the proprietor of the suit property on 12th June, 2014, which was after the alleged trespass. The question that outstands then is, can a person who is not the owner of a property claim compensation for trespass onto it? How about when a person knowingly acquires a property whose owner did not raise such a claim before parting with ownership? In essence, the question is, is the subsequent owner an owner without notice of the 'encumbrance'?

29. In the case of John Mungai Murango & another V Jeremiah Kiarie Mukoma [2015] KECA 374 (KLR) the court held as follows:

> "In our view, parties are bound by their pleadings. The court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment. Each party knows the case he has to meet and cannot be taken by surprise.

The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs."

30. In the circumstances, it is a fact that the 1st Respondent only inherited the 'problem', which was that the hospital was built, in 2012, while the suit land was registered in the name of the deceased who never complained about the trespass. To be clear, he never challenged the putting of the hospital on the land at the time or moved to stop it when it was began. Instead, he or his representatives or executors of the will, as the case may be, permitted the hospital facility to be built. The deceased or his personal representatives or executors of his will as the case may be, acquiesced to the act of putting up the hospital. When a trespass begins the owner of the land should move the legal processes immediately to stop or redress it. He cannot permit the act be completed and complain, or hand the problem over it to another person through a change of ownership. The subsequent owner has adequate notice of the issue and he takes over ownership with the 'problem'. It may be likened to the sale of goods where a second-hand owner must confront the legal principle, "buyer beware". That is why there is, in property law, a great emphasis on the need for one to carry out due diligence before they own a property. By their conduct, the deceased, gave the permission of the appellants to put up the hospital on the suit land. What is clear to this court is that the hospital is a facility anyone can see: it is visible to the whole world. It is not a hidden development that one may argue that they did not know it existed or was being put up on the suit land hence could discover the trespass much later. The current owner out to have even carried out a survey of the land before ascertaining that the property being transferred to him was not 'encumbered'.

31. Moreover, it is this court's view that at the time the alleged trespass occurred, the 1st Respondent did not have the locus standi to complain about it. He only possessed or owned the land in 2014 when he acquired the title and later filed the suit in 2019. The ownership of the suit land could not act retrospectively as to found a complaint about the alleged trespass. Regarding change of ownership and acts of trespass ownership can only be prospective in the sense that one can only complain about a trespass onto his property. Which means that he must first own the property in order for him to complain about it. Thus, if the Respondents' claims were to hold water, the question would be, when did the trespass arise? When does the compensation begin and why severe the act of trespass to begin from the time when the new owner because the legal proprietor of the same. In my humble view to do would be to stretch the law too much as to accommodate an undeserving party.

32. Black's Law Dictionary 10th Edition defines trespass as follows: -

" an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."

33. Thus, on locus standi in trespass claims, the claimant must be the legal owner of the property a stranger commits an unlawful act on or to. It is my humble opinion that since by the time the 1st Respondent owned the suit parcel, the hospital had already been built and therefore trespass did not apply in the instant case. Notably, the 1st Respondent in his testimony admitted that he uses the said facility and that his claim was that of compensation. This was a strange contention. The 1st Respondent did not challenge the existence of the hospital on the suit land. What compensation did he then want? Did he not acquire the land excluding the portion that the hospital was built on? If so, what compensation can he claim over that which did not belong to him?

34. It is trite law that parties are bound by their pleadings and this court is of the view that by virtue of the alleged trespass by the Appellants in 2012 and in line with Section 4(2) (supra), the same provides that

a tort of trespass should be brought within 3 years. In the instant case, from 2012 when the alleged trespass occurred to the time the 1st Respondent filed the suit in 2019 is 5 years. I find that the same was beyond the statutory limit of 3 years and therefore statute barred.

35. In the case of IGA V Makerere University [1972] E.A 65 Mustafa, J.A held as follows:-

> " A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court "shall reject" his claim. The appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief sought." [Emphasis mine]

36. Further, in Mehta V Shah [1965] E.A 321, Grabbie J.A in his judgment stated as follows:-

> " The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."[Emphasis mine]

37. Guided by the above authorities, it is this court's view that the prayers as sought in the 1st Respondent's amended plaint dated 21st July, 2020 could not issue since the suit was statute barred. I thus find that the trial magistrate misdirected himself in awarding the Kshs. 9,200,000 as compensation.

38. The upshot of the foregoing is that the appeal is merited. I proceed to set aside the learned trial magistrate's judgment delivered on 9th November, 2021. I substitute it with an order dismissing the 1st Respondent's claim, in the trial Court, with no orders as to costs both in the lower court and this appeal.

39. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 21ST DAY OF OCTOBER, 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of

Mr. Jura Advocate for the Appellants

E. Awino Advocate for the Respondents