



**Nyangore v Omolo (Environment and Land Appeal E030 of 2024)
[2025] KEELC 7355 (KLR) (28 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E030 OF 2024
AE DENA, J
OCTOBER 28, 2025**

BETWEEN

SAMUEL OMOLLO NYANGORE APPELLANT

AND

PAMELA AMOLO OMOLO RESPONDENT

*(Appeal Against the judgement and orders of Hon. E.Tsimonjero SRM in
Ukwala Magistrates Court, ELC Case No. 3 of 2020 delivered on 28/08/2024)*

JUDGMENT

1. The subject of this appeal is the judgement and orders of Hon. E.Tsimonjero SRM in Ukwala Magistrates Court, ELC Case No. 3 of 2020 delivered on 28/08/2024.
2. The Memorandum of Appeal sets out the following verbatim grounds:-
 - a. That the Learned Magistrate erred in law and fact by failing to consider and analyse the entire and the defendant's evidence on record as had been taken down by Hon.L.N. Sarapai and as such occasioning an injustice to the defendant's case.
 - b. That the Learned Magistrate erred in law and fact by failing to nullify the process leading to the acquisition and subsequent registration of the plaintiff as the proprietor of land parcel South Ugenya/Simenya/597 whence the court cited and noted the illegalities and procedural impropriety and further the same supported by the evidence on record and admission by the plaintiff.
 - c. That the Learned Magistrate erred in law and fact by failing to consider the equitable interest by the defendant among other beneficiaries regarding land parcel South Ugenya/Simenya/189 and constructive trust therein thus arriving at an improper and an erroneous decision and thus the prejudicial finding.



- d. That the Learned Magistrate erred in law and fact by disregarding the defendant's written submissions and judicial authorities on record and duly served upon the plaintiff and this occasioning a miscarriage of justice to the defendant/defendant's case.
 - e. That the Learned Magistrate erred in law and fact by failing to consider national values and principles of good governance in his entire decision and thus rendering the defendant landless.
 - f. That the Learned Magistrate erred in law and fact by failing to consider in totality the plaintiff's and the defendant's evidence on record regarding disputed land parcel South Ugenya/Simenya/597 and the process leading to its acquisition.
 - g. That the Learned Magistrate's analysis of the facts and the law regarding the disputed land parcel South Ugenya/Simenya/597 was against the evidence adduced by the plaintiff and disregarded the evidence adduced by the defendant.
 - h. That the Learned Magistrate's decision and finding in totality and the evaluation of the facts and evidence on record as adduced by the defendant was biased, unfair and thus occasioning the defendant a miscarriage of justice.
 - i. The Learned Magistrate erred in law and fact by descending to determine issues not before the court.
 - j. The Learned Magistrate in all the circumstances of the facts of the case, the evidence adduced, and the court's finding was in support of the defendant's case and there was no basis of departing from the same.
 - k. The learned Magistrate failed to appreciate that the facts as deposed and the evidence as adduced by the defendant in support of his case were not controverted nor challenged at all and that the suit ought not to have succeeded.
 - l. The Learned Magistrate erred in law and fact by proceeding to descend, frame and determine issues that were not canvassed during trial and to the contrary departing from the real issues of determination and thus occasioning an injustice to the defendant.
 - m. The Learned Magistrate erred in law by proceeding to award costs to the plaintiff in the suit as against the court's finding.
3. Upon the above grounds the appellant prays that;-
1. The appeal be allowed and the lower court judgment and subsequent orders be set aside and as such substituted by the orders of this honourable court.
 2. The judgment and orders of Hon. E. Tsimonjero S.R.M. at Ukwala Magistrate's Court, in ELC Case NO. 3 of 2020, at Ukwala Resident Magistrate's Court, delivered on the 28th day of August, 2024 be set aside.
 3. The appellant be awarded the costs of this appeal and in the lower court.

Submissions

4. Upon admission of the Appeal, the court directed the Appeal to proceed by way of written submissions, both parties complied. The submissions are summarized as follows; -



Appellants Submissions

5. The appellant submissions are dated 28/01/2025. They did not frame issues but submitted generally on the grounds of appeal as follows; -
6. In respect of Ground 1, 2,3,4,5, 7 and 8, it is submitted while the initial judicial officer Hon. L.Sarapai had taken down the proceedings in totality, Hon.E. Tsimonjero the later trial court failed to analyse the entire evidence and had he done so would not have arrived at the decision it made regarding the respondent's processes leading to the acquisition of the suit land.
7. That the issue of the will said to have been made in contemplation of death was never addressed. That it did not specifically or identify the size/portion and the land parcel South Ugenya/Simenya/597. Moreover, the same was invalid.
8. The submission on the invalidity of the will are premised on the failure to meet the requirement of dominion to be identified in fulfilment of a valid gift in contemplation of death as well as Section 5 and 11 of The *Law of Succession Act*. The court is referred to the case of the Estate of Humphrey Edmond Gituru Karunyū Nairobi Succession Cause No. 2322 of 1995 where the court held that a will is valid if it fully complies with Section 11 of the law of Succession with respect to execution and attestation.
9. It is asserted that the issue of transferring the land parcel without first conducting succession was never addressed. That there was intermeddling with a deceased property as contemplated under Section 45 of the *Law of Succession Act*. That any alienation and sub division of land by a person lacking such capacity is null and void as held in *Njoki Gicheru Ndiuni vs Dadson Githenji Wahome & 3 others* (2016) eKLR and *Said Mabruk Abed vs Margaret Mumbua Muli* (2022) eKLR.
10. That not all the beneficiaries were identified and legal beneficiaries were left out deliberately by the plaintiff.
11. It is contended that that no immovable property shall be sold or distributed before confirmation of grant and therefore the property having been illegally acquired does not enjoy the protection of property rights under article 40(6) of *the Constitution*.
12. it is pointed that the evidence adduced in support of the illegalities relating to the subdivision of the mother parcel without following the due process of the law, the transfer of land at the land's office without first conducting succession and the registration by the land registrar without following the due process and translating to a corrupt scheme were all sufficient evidence laid bare by the appellant herein to support his claim and there was no reason whatsoever to depart from the same. The court is referred to the provisions of Section 23(1) of the Registration of Titles Act (now repealed) and Section 26(1)(a)&(b) of the *Land Registration Act* 2012 as well as the case of *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No 239 of 2009 [2013] eKLR to buttress impeachment of the plaintiffs title.
13. The appellant asserts that the trial court decision to consider the plaintiffs submissions out of time, ignore the appellant's submissions on record that had been filed and served demonstrated bias on the part of the trial court and ultimately occasioning a miscarriage of justice and a further blatant violation of Article 10 of *the Constitution* of Kenya, 2010.
14. On costs the appellant submits that the issue of award of costs is not a mathematical precision but rather discretionary power and that courts are to determine the same on a case to case basis. That all the parties to this suit were relatives and the appellant and the respondent are first cousins. The judicious outcome on the issue of cost would have been that each party to bear their costs and we submit and implore the court to find so. Reliance is placed on *Republic v. Rosemary Wairimu Munene* (Ex parte



Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004; Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR and Morgan Air Cargo Limited v Evrest Enterprises Limited [2014] eKLR.

Respondents Submissions

15. The respondents' submissions are dated 15th day of April, 2025. Rehashing the plaintiffs case, the evidence tendered by both sides and referring to the burden of proof as set out in section 107 of the [Evidence Act](#) it is submitted as follows; -
16. The Respondent particularly through her witnesses clearly demonstrated on a balance of probability that she was bequeathed the suit land by her father. All her witnesses stated that she is the daughter to the late William Omolo Achany and Meresiah Obongo Omolo.
17. It is asserted that the Respondent produced a will drafted by PW4 who was the area chief. He asserted that the Respondent's father, the late William Omolo Achany called him and indicated to him that he wanted him to note that the Respondent should inherit the suit land upon her mother's, Meresia Obongos passing. That the appellant did not tender sufficient evidence on when and how he was bequeathed the said portion.
18. That while the Appellant's witnesses DW2 and DW3 alleged that William Omolo Achany bequeathed the Appellant's mother the suit land in presence of James Ogumo Ojwang', Amollo Ojwang' and Isaac Pedha, but only Isaac Pedha was called as a witness. It is unclear why James Ogumo Ojwang' and Amollo Ojwang' were never called as witnesses. The court is urged to draw an adverse inference against the Appellant due to such failure. The Appellant only called Isaac Pedha who in fact the Respondent took issue with since it is him who allocated to the Appellant a portion the suit land without William Omolo Achany's widow's consent yet the land technically vested on her upon her husband's passing before it passed to the Respondent.
19. The court is urged to note that William who is said to have bequeathed a portion of the suit land to the Appellant is the same person who bequeathed his daughter the same land. That if indeed he meant to bequeath the Appellant as he alleges, he ought to have done so by way of a will as he did to his daughter, the Respondent. That it can only be inferred that the Appellant's alleged bequeath was a scheme by the Respondent's step mother Consolata Owiti Omolo and uncle Isaac Pedha to disinherit her.
20. It is posited that the legal burden is discharged by way of evidence as the Respondent did. The Appellant, had a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. The Appellant failed to sufficiently discharge the duty to adduce sufficient evidence in rebuttal to prove that indeed the deceased William Omolo Achany bequeathed him and his mother a portion of the suit land. That it is unclear from the evidence who exactly was bequeathed, whether the Appellant's mother or himself. While the Appellant and his witnesses on the one side the Appellant was bequeathed by William, they on the other hand say his mother was the one who was bequeathed. A pointer of untruthfulness.
21. That it is unclear and unexplained why the Appellant's mother and/or his mother waited until the passing of William Omolo Achany and his wife, Meresia Obongo for them to construct houses on the portion of the suit land. It is however clear as stated by PW3 that Isaac Pedha was misguided that since William Omolo Achany had no sons his female child could not inherit his land and decided to allocate the Appellant the suit land.



22. It is urged that a certificate of title such as the one held by the Respondent can only be challenged on the ground of fraud or misrepresentation. The Appellant has not proved fraud and or misrepresentation on the part of the Respondent in acquiring the said title.
23. In conclusion it is submitted that the respondent tendered sufficient evidence on a balance of probability to warrant the trial court to arrive at its decision as it did. In the end. The court is urged to dismiss this appeal with costs to the Respondent.

Analysis And Determination

24. Following my analysis of the Record of Appeal, the rival submissions of the parties and having keenly looked at the judgement it is imperative that I frame the issues noting that the trial court did not.

25. The duty of an appellate court is stipulated under Section 78 of the *Civil Procedure Act* which reads; -

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

1.

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

26. The following issues commend determination in my view; -

1. Whether the plaintiff proved her case to the required standard
2. Whether the defendant is a trespasser on the suit property South Ugenya/Simenya/597.
3. Whether the trial court erred in failing to nullify the process leading to the acquisition and registration of the plaintiff as proprietor of South Ugenya/Simenya/597.
4. What orders should issue as to the appeal and costs.

27. In addition to the section 78 above I will also be guided by the case of *Selle Vs. Associated Motor Boat Co. (EA.123)* where the court stated thus; -

‘.....Briefly put 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.’

28. The trial court at page 4 of the judgement correctly set out the plaintiffs’ case based on the pleadings as claiming to be the registered owner of the suit property South Ugenya/Simenya/597 which she inherited from her deceased father. She wants the defendant out of the suit property whom she terms a trespasser.



29. On the other hand the defendant pleads in his defence dated 10/8/2020 that the plaintiff deceased father was his uncle. The deceased had taken him in as his son before his death and providing for his needs. He pleads that the plaintiff is estopped from stopping him from inheriting from the estate of the deceased uncle. I hear the defendant to be denying that he is not a trespassor but is entitled to be on the suit property by dint of having been ‘fostered’ by the plaintiff’s father meaning he alleges he is a dependant.
30. The defendant further questions the legality of the title South Ugenya/Simenya/597 as seen at paragraphs 4 and 5 of the defence in terms of the process of its acquisition for want of succession proceedings.

Whether the plaintiff proved her case to the required standard

Whether defendant is a trespasser on the parcel South Ugenya/Simenya/597 and therefore should be evicted from the land.

31. The above issues will be considered concurrently as they are related. This will also avoid repetitiveness.
32. The plaintiff testified in the trial court that she was the registered owner of the parcel South Ugenya/Simenya/597 and produced a copy of the title issued on 20/4/2015. It is also not in dispute that this title was hived from plot South Ugenya/Simenya/189 which was initially registered in the names of Isaack Pedha, Bernard Rakula, Jared Ogutu and William Omolo Achany who is the plaintiff’s father. A copy of this title was also produced as part of the plaintiff’s exhibits.
33. The burden of proof lay on the plaintiff to prove to the required standard of proof set out under Section 107(2) of the *Evidence Act* that the defendant is a trespasser on the property South Ugenya/Simenya/597
34. What then constitutes trespass? Section 3(1) of the *Trespass Act* Chapter 294 of the Laws of Kenya reads:-

Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

35. Justice A. Omollo in *Aula Ali Aula & 2 others v Katana Shungu & 2 others* [2018] KEELC 4380 (KLR) observed that trespass is defined by concise oxford dictionary as

“make unlawful or unwarranted intrusion especially on land or property, a wrongful voluntary wrongful act against the person or property of another especially unlawful entry to a person’s property or land.”

36. Based on the above definitions it was incumbent upon the Plaintiff to prove that not only was she the owner of the suit property but that the defendant entered the same unlawfully or without authority. From the evidence on record, there is no dispute that the suit property is registered in the name of the plaintiff.
37. Is the defendant a trespasser on the suit land and therefore should be evicted from the land? According to the plaintiff’s witness statement filed on 20/01/2020 she avers that she become owner of the suit property around January 2000 following a will written by her father on his death bed. It was her evidence that a few months after her father’s death in 2001 on directions of the plaintiff’s uncle the



defendant entered the suit property and constructed thereon. I hear the plaintiff to be stating that she did not authorise this entry as the owner of the property at that time.

38. The question that emerges is if the plaintiffs evidence is that the entry was in the year 2001 what was the status of the suit land South Ugenya/Simenya/597 at the time. Based on the proceedings as at 2001 the land had not yet been subdivided and was held by Isaack Pedha, Bernard Rakula, Jared Ogutu and William Omolo Achany (each with 1/3 share) under one title South Ugenya/Simenya/189. The parcel 597 did not exist then. It is only in the year 2015 that plot 189 was partitioned giving rise to 597, 598 & 599 and title closed pursuant thereto.
39. Was the plaintiff the owner of the suit property then noting that she was registered as proprietor in the year 2015. Based on the title for South Ugenya/Simenya/597 the plaintiff was not the proprietor of the suit property as at the year 2001 and had no locus to brand anyone a trespasser.
40. As at the year 2001 only the surviving spouse being the plaintiffs mother could give permission with regard to the deceased 1/3 share in parcel 189. PW1 evidence was that her mother was not happy with the fact that the defendant was shown a place to live in the property. It is noteworthy that the deceased wife could only give consent as an administrator of the estate of the deceased for his share of the plot 189. I had no evidence that the Plaintiffs mother took out such grant and or its confirmation thereof.
41. Based on the foregoing this court makes a finding that the plaintiff did not prove her case to the required standard that the defendant is a trespasser on the suit property.
42. But what about the will? The plaintiff evidence is that as the time of the entry into the property she had already been bequeathed the land and produced a copy of a will written by the chief. I think for me at this point the dispute mutated into an inheritance dispute and which is also supported by the defence raised by the defendant that he was fostered by the plaintiffs father and the plaintiff cannot deny him part of the estate.
43. From the above the defendant is claiming part of the deceased share of the land. The courts hands on this issue are tied for want of jurisdiction to determine matters of inheritance of the deceased estate and distribution thereof. I can also not make a determination on whether the defendant is a dependant or not. Moreover, the will can only be dealt with under probate. I will therefore keep off a review of the legality of the alleged will produced by the plaintiff.

Whether the trial court erred in failing to nullify the process leading to the acquisition and registration of the plaintiff as proprietor of South Ugenya/Simenya/597.

44. It has been submitted that the appellant proved that the manner in which the respondent acquired title was outside the law and that the trial court ought to have made a finding in this regard. At paragraph 5 of the defence the defendant indeed depones that the registration of the plaintiff to land parcel 597 was irregular having not been preceded by succession proceedings.
45. In the judgement the trial court pointed that the defendant neither pleaded nor proved any particulars of fraud (see page 17 of the record) and that there was no counterclaim. The trial court posed;- “The question then, was it sufficient for the defendant to only pray for dismissal of the plaintiffs suit without him laying cogent evidence before court to support his continued being on the suit property.....if the plaintiff is guilty of fraud or illegality, then a majority of the defence witnesses are no exception since the land on which they reside is a product of the same illegality as their names are squarely on the green card’. The trial court then made a finding that the plaintiff was the registered owner was entitled to the protection of the law under sections 24 and 25 of the [Land Registration Act](#).



46. But I will be quick to add that I have already noted that the defence clearly pointed the illegality to be the want of succession proceedings. To me this is as clear as night from day and did not require to be particularised. A title may also be impeached on grounds of illegality and not fraud alone. This is the import of section 26(1)(b) of the *Land Registration Act*.
47. However I think the answer to this issue first rests with the pleadings. As earlier noted this was a suit for trespass and eviction of the defendant. It was incumbent upon the plaintiff to prove that the defendant was a trespasser in the plaintiff land. I have already noted that the plaintiff had no capacity in the year 2001 to give or deny consent. The land did not belong to her then. I agree with the trial court that there was no counterclaim filed by the defendant seeking cancellation of the said title. The defendant merely asked for the plaintiffs suit to be dismissed for failure to disclose a course of action against him. I will therefore not fault the trial court to the extent that the court failed to make a finding on the process of the acquisition of the title.
48. It is trite that a party is bound by its pleadings. See the Court of Appeal decision in David Sironga Ole Tukai Vs Francis Arap Muge and Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR. If the defendant wants to nullify the title then that is for another forum.
49. The upshot of my analysis is that the plaintiff has not proved her case against the defendant appellant in this appeal and the suit at the trial court should be dismissed.
50. The following orders issue to dispose of this appeal;-
1. The judgment and orders of Hon. E. Tsimonjero S.R.M. at Ukwala Magistrate's Court, in ELC Case NO. 3 of 2020, delivered on the 28th day of August, 2024 be set aside.
 2. The orders granted by the trial Magistrate vide the judgement read on 28th August 2024 shall be substituted with orders dismissing the Plaintiffs suit.
 3. The parties being relatives I will make an order that each party should bear its costs of both the trial court proceedings and this appeal.
 4. Orders accordingly

DELIVERED AND DATED AT SIAYA THIS 28TH DAY OF OCTOBER 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

28TH DAY OF OCTOBER 2025

**JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Samuel Nyangore Appellant

No appearance for the Respondent

Court Assistant: Ishmael Orwa

