

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**  
**ELCA NO. E043 OF 2025**

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**LUKAS ANDUGA** - **APPELLANT**  
**VS -**  
**JOEL OPIAYO [suing as the personal**  
**Representative of ROMONAH AWINJA**  
**OPIAYO, deceased ]** - **RESPONDENT**

**JUDGMENT**

1. This appeal originates from the judgment of Hon. Lucy Njora, delivered on December 3, 2024, at the Chief Magistrate's Court in Milimani, CMELC No. E191 of 2023. In the lower court suit, the Respondent was the Plaintiff, and the Appellant was the Defendant.
2. The Plaintiff filed suit vide the plaint dated 15/5/2023 against the Defendant and sought the following orders;
  - a. A permanent injunction restraining the defendant, whether by himself, his servants or agents, or otherwise, from accessing and/or managing the suit property, six (6) structures in the Makina Makongeni area, [suit premises] nor collecting rent from the rental houses on the said land, or interfering with the quiet possession and use of the property by the Plaintiff.
  - b. General damages for trespass
  - c. The defendant to surrender the rent collected from the premises from the date of entry until possession is delivered.
  - d. Costs of the suit.
3. The Plaintiff averred that he is the personal representative of the estate of Romonah Opiayo, the lawful owner of six structures in the Makina Makongeni area. Following the death of Romonah Opiayo [deceased], the

defendant, without prior authorisation from the Plaintiff, unlawfully entered the subject property, demanded rent from the tenants in a disorderly manner, and forced some tenants to vacate the premises. Subsequently, the defendant assumed control of the suit premises, leased them out, and is currently collecting rent, actions that constitute trespass.

4. That the actions of the Defendant have deprived the Plaintiff of the use and enjoyment of the suit land and premises, thereby causing loss and damage. Particulars of the damage were set out in para 8 of the Plaintiff, including preventing the Plaintiff from accessing the suit premises, a source of his livelihood, and from paying school fees.
5. Although the impugned judgment on page 2 refers to a statement of defence, I have reviewed the online CTS platform and the trial court record before me, and I find no such statement of defence.
6. At the hearing, the Plaintiff called three witnesses. He presented evidence and stated that the deceased was his aunt, who passed away in 2014. She resided alone with a caretaker on the disputed premises. She was a divorcee with no children of her own, and all her parents and siblings had died. When asked about BPRT Case No. 1235 of 2020, he responded negatively, indicating that he neither attended the case nor served as a witness. He further stated that the deceased collected rent from the premises and that he had not been collecting rent since her death in 2014. He explained that the delay in filing the case was due to threats from the Defendant. The land on which the premises are constructed is not officially titled and is considered an informal settlement. He also stated that the deceased never sold the premises to the Defendant in 1987 or at any other time.
7. Duncan Opiayo Ochanda stated that he recently inspected the premises and identified a total of seven houses, the most recent of which was constructed after Romonah's death. The structures are classified as semi-permanent. He was not aware of the exact construction dates, describing

the buildings as aged. He also noted that some houses were built between 2016 and 2017 after Romonah's death. He clarified that these houses were maintained under the Plaintiff's oversight. Mr Ochanda was not present during the reconstruction of the houses. He stated that the deceased did not sell the houses to the Defendant. Additionally, in 1987, he was seven years old and residing in the upcountry while the deceased was based in Nairobi.

8. Queen Abscondita stated that the deceased was her employer from 1992 to 2014, when she passed away. She resided with the deceased, and upon her death, the deceased was interred at her upcountry home. She was unfamiliar with her siblings or other relatives, as they had met in Nairobi. In 2002, she filed a BPRT case as a tenant against the Defendant, who was the landlord, following her eviction from the premises. She does not know Fredrick, nor was the Plaintiff her witness in the tribunal case. The lawsuit was dismissed, and she was ordered to pay rent. She was present when the houses were burned down after the death of Romonah. Following Romonah's death, the Defendant demanded rent from her, and upon her refusal to pay, she was subsequently evicted.
9. The Defendant testified that a certain Mr Cheruiyot, now deceased, introduced him to Romonah, who was a teacher. He purchased the suit premises from the deceased in 1987, with the sale agreement witnessed by Cheruiyot. Subsequently, he commenced construction with the permission of the chief. He and Awinja sought the chief's approval for the construction. In 1988, the houses were destroyed by floods; however, they were later reconstructed. The deceased was a well-known figure in the area, which is why she was appointed as his caretaker. She collected rent and forwarded it to him. In 2016, a fire devastated his houses, destroying his documents. When the deceased became ill, she sold all her properties, some of which were acquired by neighbours. In 2016, he obtained authorization to rebuild the houses following the fire that

reduced them to ruins. The deceased retained his documents, and her house functioned as his office. After Romonah's death, he engaged Fredrick to collect rent on his behalf. He constructed the current seven structures. The land on which these structures are situated is government property. Abscondita filed a suit against him at the BPRT tribunal as the landlord, but the case was dismissed.

10. Godfrey Madegwa Rimuma stated that his residence is in Makina Makongeni. Having previously lived in the area, he is familiar with Lucas, the Landlord of the adjacent premises. He affirmed that the land is owned by the Government and emphasised that any transactions, including the sale of houses, construction activities, or leasing agreements, require a letter of authorisation from the local chief. He knew Romonah, who lived in one of the houses. She was a retired teacher who died in 2014. He is a water vendor, and because she was elderly, he arranged for his people to provide her with water. As far as he was aware, the Defendant and the deceased had no dispute regarding the suit premises.
11. Fredrick Lihango Musibochi stated that he has been a tenant of the defendant since 2016 and pays rent accordingly. He was acquainted with the deceased, a former teacher. He undertook construction and repair work for the defendant, including building a toilet, with the local chief's authorisation. Abscondita was also a tenant of the same premises.
12. Upon hearing the suit, the Hon Learned Magistrate entered judgment in favour of the plaintiff. This decision has triggered the current appeal on the following grounds.
  - a. THAT the learned Magistrate erred in law and fact in granting a permanent injunction restraining the Appellant whether by himself or his servants or agents from managing or accessing the suit property when in fact the Respondent does not have possession of the property which the Appellant has been in possession since 1987 after purchasing it from the Deceased.

- b. THAT the learned Magistrate erred in law and fact when the Magistrate totally relied on the Chief's Letter dated 9th December 2022 to come to the conclusion that the Appellant did not purchase the suit property from the Deceased.
- c. THAT the Learned Trial Magistrate erred in Law and fact by relying on the Chief's Letter dated 9th December 2022 despite the Respondent having not produced any title deed to the suit property as proof of ownership.
- d. THAT the learned trial Magistrate erred in law and in fact by disregarding the fact that the Appellant has always been in occupation of the suit property and constructed rental houses where he has been collecting rent since 1987.
- e. THAT the learned trial Magistrate erred in Law and fact and ended up misdirecting herself in awarding exorbitant general damages of Kshs. 800,000/= without any justifiable cause/reason.
- f. THAT the learned trial Magistrate erred in law and fact for holding that a Chief's letter conferred ownership to property and proceeded to give the land to the Respondent herein using the Chief's letter as title or proof of ownership.
- g. THAT the learned trial Magistrate erred in law and fact when the Magistrate did not apply her mind to the fact that the land in issue does not have the title and the matter.
- h. THAT the learned trial Magistrate erred in law and fact when the Magistrate dismissed the entire evidence of the Appellant herein and further demanding that the Appellant should produce the deceased's witness who was not actually a witness in the lower court matter
- i. THAT the learned Magistrate erred in law and in fact by misapplying the Respondent's evidence on record and entering a Judgement of a Plaint devoid of evidence, without outright addressing the issues pleaded in the Defence.

- j. THAT the learned Magistrate erred in law and in fact by failing to pay attention to the Appellant's Defence and refer to pleadings, evidence and submissions adduced in lower court.;
  - k. THAT the learned Magistrate erred in land and in fact in holding that the Respondent had proven a prima facie case when in fact the Respondent did not meet the threshold necessary for grant of permanent injunctive orders.
  - l. THAT the learned trial Magistrate erred in law by failing to comprehend the extensive damage her orders have on the Appellant's universal right to property, the need of preservation of the property from degradation and squatters and the right to enjoy profits from their own property.
  - m. THAT the learned trial Magistrate erred in fact and in law in failing to consider that no suit was filed prior to the demise of the deceased.
  - n. THAT the learned Magistrate did not exercise her discretion judiciously.
13. The Appellant prays for:
- a. THAT this Honourable Court allows the Appeal
  - b. THAT the Lower Court's decision in MCELC NO. E191 OF 2023 contained in the Judgement dated 9th December 2024 be set aside.
  - c. THAT the costs of this Appeal and for the Application in the Environment and Land Court be awarded to the Appellant
  - d. THAT this Honourable Court be pleased to grant any other relief as it may deem fit in the circumstances.
14. Parties have filed written submissions which I have read and considered.

### **Analysis and determination**

15. I have considered the Appeal, the record of appeal and the rival submissions. I am of the view that the only issue for determination is whether there is a competent appeal before the court; whether the appeal is merited; and who meets the costs of the appeal.
16. On the question of whether there is a competent appeal before me, I have perused the record of Appeal as filed in the CTS System. It would appear that there are a number of documents, as the court can glean from the trial court's Judgement, which were filed and relied on by the parties, particularly the statement of defence. Interestingly, these are documents filed by the appellant.
17. Order 42 Rule 13 of the Civil Procedure Rules requires the appellant to file a record of appeal, which must include the pleadings. In the absence of the complete pleadings in this appeal, a party's right to be heard will be significantly compromised. The right to be heard, as enshrined in the Constitution, is not subject to derogation. However, the appellant has not explained why he failed to annex the said documents to the Record of Appeal. I wish to say no more on this.
18. For the above reasons, I find that the appeal is incompetent and that there is no need to determine its merits. I therefore strike it out with costs payable to the Respondent.
19. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY  
OF FEBRUARY 2026 VIA MICROSOFT TEAMS.**

**J. G. KEMEI  
JUDGE**

**Delivered Online in the presence of:**

1. Mr Onkangi present for the Appellant
2. N/A for the Respondent
3. CA- Ms Yvette Njoroge

ORIGINAL FILE COPY