



REPUBLIC OF KENYA



KENYA LAW
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**Abonyo v Onyango (Environment and Land Appeal E006 of 2025)
[2026] KEELC 678 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E006 OF 2025
FO NYAGAKA, J
FEBRUARY 5, 2026**

BETWEEN

BEN OTIENO ABONYO APPELLANT

AND

JOHN OMOLLO ONYANGO RESPONDENT

*(Being an appeal against the Judgment of Hon. Christine Kemuma Auka
delivered on 23rd January 2025 at in Homa Bay MCELC E056 of 2023)*

JUDGMENT

1. By way of a plaint dated 1st November 2023, the Respondent sought the following orders in the trial court;
 1. An order of permanent injunction do issue restraining the Defendant either by himself, his relatives, servants, employees, agents, assignees or anybody claiming under or in his name from entering and/or accessing, trespassing, encroaching or in any way whatsoever interfering with the Plaintiffs'/Applicants' quiet occupation, use and possession of all that parcel of land known as Land Parcel No. 8/Karach/kamenya/2091 Partition No. 1359 (two and a quarter acres (2.25 Acres of the subdivided portion) situated in the North Kamenya, South Kanyaluo area of Karachuonyo, Homabay County.
 2. An order directing the Defendant to transfer two and a quarter acres (2.25 Acres) of the parcel of land known as Land Parcel No. 8/Karach/kamenya/2091 Partition No. 1359 situated in the North Kamenya, South Kanyaluo area of Karachuonyo, Homabay County to the Plaintiff in accordance with the Agreement of Sale and Purchase dated 18th May, 2005.
 3. An Order directed to the OCS, Homabay Police Station or any other Police Station within the jurisdiction of the suit property to ensure compliance with order number 1 above and to provide any necessary security required to enforce compliance with order 1 herein.



4. Any other order that this Honourable Court may deem just and fair to grant.
5. Costs of this suit.
2. The appellant pleaded that vide an agreement for Sale and Purchase of Land dated 18th February 2005 he purchased two and a quarter acres of Land Parcel No. 8/Karach/kamenya/2091 Partition No. 1359 from the Defendant at a consideration of Kshs.70,000.00/= as at that time. He immediately took actual possession of the land and has lived in the land parcel to date. Further, that the Defendant was the beneficial registered owner/proprietor of Land Parcel No. 8/Karach/kamenya/2091 Partition No. 1359.
3. He averred that the suit property is currently housing his family home and he has prevailed upon the Defendant to execute his part of the agreement for Sale and Purchase of the said parcel, after receiving full payment but the defendant failed to do the same. That the Defendant, despite having failed to perform his obligations in the contract of Sale, devised illegal ways through which he has intimidated the Plaintiff into interfering with the boundaries thus denying the Plaintiff his constitutional rights.
4. He urged the court to allow his claim as prayed.
5. The defendant filed a statement of defence dated 19th February 2024. He stated that on 18th May, 2005 when the agreement for sale is alleged to have been entered between the Plaintiff herein and himself, the suit land was in the name of his grandfather Paulus Ogeta Onim (deceased) who died on 10th December, 1994, and whose estate had not been succeeded. He averred that his grandfather was survived by his mother (who is now also deceased) and himself as the surviving dependants. Since both of the survivors had not done succession of the estate of the deceased grandfather, they did not have the required legal capacity to enter into any agreement with anyone to dispose of the property and/or deal with it whatsoever.
6. He urged that he did succession only much later and had the property transmitted to his name, vide Succession Cause No. 220 of 2016. He stated that if the plaintiff is purporting to have bought a property of a deceased person without having the property first transmitted to its rightful and legal beneficiaries, then he has been intermeddling which is an offence punishable under the Law of Succession Act. He stated that after succession be distributed land parcel number Kamenya/1359 to the 2 dependants of the Deceased, that is Bernard Otieno Obong'o, Daniel Otieno Ogeta and Jackline Atieno.
7. He denied entering into the sale agreement and urged the court to dismiss the whole suit and agreement.
8. The matter then proceeded for hearing.
9. PW1 was John Omollo Onyango who adopted his witness statement as evidence in chief. He stated that vide an agreement for sale and purchase dated 18th May 2005 he purchased two and a quarter acres of Land Parcel No. 8/Karach/kamenya/2091 Partition No. 1359 from the Defendant at a consideration of Kshs.70,000.00/=. Immediately after making full payment of the agreed amount which was done by the 18/05/2005, he took actual possession of the land and has since lived in the land parcel to date. It was his testimony that the defendant failed to perform his obligations in the contract of Sale and Purchase has devised illegal ways to deprive him of his property.
10. During cross examination, he stated that he bought the land in 2005 knowing it belonged to the defendant. He did not do any investigation and did not conduct a search when referred to an exhibit he stated that the search was in respect to parcel 2091 and that a title deed was issued to the defendant



on 6th April 2022. He was shown another search which he stated was in respect to 1359 registered to Paul Ogata who had already died when he bought the land.

11. PW2 was John Ounda who adopted his witness statement as evidence in chief. His witness statement was a replication of the plaintiffs' statement. During cross examination, he stated that he wrote the sale agreement but did not ascertain ownership of the land. That Paul was the owner of the land but the defendant was a beneficiary. Further, that the defendant did not have a certificate of confirmation of grant.
12. PW3 was Patrick Odongo Onyango who adopted his witness statement as evidence in chief. His statement was a regurgitation of the PW1 and PW2s statements.
13. During cross examination he stated that the sold land belonged to the defendant and he did not know anyone called Paul Ogata.
14. PW4 was Omuthe Kennedy Okeyo who stated that he was present during the agreement for the sale of parcel no. 1359. That the land was being sold at a consideration of Kshs. 70,000/- which was paid in full to the seller. He stated that to date, the defendant has not transferred the land to the plaintiff as per the agreement.
15. The plaintiff closed his case and the defendant called his witnesses.
16. DW1 was Bernard Otieno who testified that the plaintiff was his neighbour. He denied ever selling him land and further that as at 2005 parcel no. 2091 did not exist. That the mother title was Kamenya 1359 registered in the name of Paulus Ogata, his grandfather. He stated that at the time of sale he did not have the authority to sell the land and that they conducted succession and obtained a grant in 2017.
17. During cross examination he stated that he could not confirm John Omuthe Onyango as a purchaser and that the parcel number in the agreement was 1359 which was not under his name. Additionally, that his fathers' name did not appear in the agreement. He also stated that he was not the author of the agreement or his defence.
18. The defendant closed his case and the parties filed submissions. Upon considering the pleadings, testimonies and submissions, the trial court entered judgement in favour of the plaintiff.
19. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide a Memorandum of Appeal dated 5th January 2025 premised on the following grounds;
 1. That the Honourable Court erred in law and in fact in holding and finding that there was a valid land sale agreement despite the fact the Appellant had no capacity to sell the land as at the time of the alleged sale.
 2. The Honourable court erred in law and fact in failing to address and consider the mandatory provisions of Section 45 of the *Law of Succession Act* despite counsel for the Appellant having pleaded and submitted on the same
 3. The Honourable court erred in law and fact in failing to find that the alleged sale agreement is an illegality hence unenforceable both in law and in fact.
 4. The Honourable court erred in law and fact in enforcing an illegality and rewarding the crime of intermeddling with the estate of the deceased.
 5. The Honourable court erred in law and fact in failing to address and consider the mandatory provisions of Sections 4, 6, 7 and 8 of the *Land Control Act* despite counsel for the Appellant having pleaded and submitted on the same.



6. That the Honourable Court erred in law and fact by unjustly awarding the Respondent the Appellant's land despite the weight of evidence.
20. The parties prosecuted the appeal vide written submissions.

Appellants' submissions

21. Counsel for the Appellant submitted that the basis of the Respondent's claim was a land sale agreement dated 18th May, 2005 and the suit was filed on 1st November, 2023, almost 18 years later. He contended that the suit was bad in law for it was barred by the statute of limitations. Consequently, the assertion that there was a valid land sale agreement was defeated by operation of the law. He cited Section 7 of the *Limitation of Actions Act*, placing reliance on the Judgment of the Court of Appeal at Nakuru in the case of *Wandaka & 2 others v Mwangi (Civil Appeal 36 of 2019) [2025] KECA 83 (KLR)*.
22. He urged that since the Respondent's claim is not based on Certificate of Title but on the sale agreement, it is only fair to interrogate the same. The time in between creation of the alleged sale agreement and institution of the suit is about 18 years. The Respondent had the first 12 years to institute the suit but chose not to. Furthermore, he let an additional 6 years lapse before coming to the perceived realization that he had a right to the suit property. He submitted that the trial Court gravely erred in upholding the alleged sale agreement because that essentially defeated the spirit and purpose of Section 7 of the Limitations of Actions Act.
23. Counsel submitted that the Maxims of Equity stand against the Respondent vis-à-vis this issue because first, Equity follows the law and; secondly, Delay defeats equity. He further submitted that the Appellant had no capacity to enter into the alleged sale agreement with the Respondent. Consequently, the Appellant had no transferrable legal interest in the suit property at the time of the creation of the impugned sale agreement.
24. Counsel urged that even if the court were to look at the agreement as a contract to be enforced, its enforcement was being sought numerous years after the contractual limitation period of 6 years.
25. Counsel submitted that the alleged transaction is defective therefore it could not possibly result in the transfer of a legal interest in the suit property as alleged by the Respondent. He urged that the purported transaction offends Section 6(1) and 8(1) of the *Land Control Act*. He submitted that the Respondent did not submit a single exhibit that proves he obtained consent from the concerned land board for the purported transaction. There is no trace of evidence that he sought and/or obtained an extension of time to apply for consent.
26. The appellant contended that the Respondent is purporting to have bought property of a deceased person before it was transmitted to the rightful beneficiaries which was simply intermeddling. He cited the case of *In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] KEHC 1930 (KLR)* in this regard. He prayed the court allow the appeal as prayed.

Respondents' submissions

27. Counsel urged that Memorandum of Appeal captured at the first two pages of the Record of Appeal is dated 5th January, 2025. The same from the record was prepared and presented before the Judgment which was delivered on 23rd January, 2025. He urged that the document as filed is incurably defective and a nullity as an appeal can only be lodged against a decision that has already been made and delivered. The Memorandum of Appeal dated 5th January, 2025 as captured in the record of appeal cannot be argued to be the document challenging the judgment delivered on 23rd January, 2025. He submitted that it has been established and has become part of our good law that a Memorandum of Appeal drawn



- before the Judgment date equally suffers the fate of appeals filed out of time and/or without leave of court and are therefore a nullity and premature as was observed in the case of Nicholas Kiptoo Arap Korir Salat Vs IEBC (2013) KECA 113 (KLR).
28. Counsel submitted that the operating section of the Law is Section 79G of the *Civil Procedure Act* where the operating term in Section 79 of the CPA is SHALL. By the very operation of the term shall, a mandatory timeline is imposed on the Appellant to file an appeal within time. By imposing a specific time limit for filing appeals in Section 79G, the law ensures that there is an endpoint to litigation. He urged that in Josephine Wambui Mwangi v Michael Mukundi Ngugi [2021] eKLR this court held that provided an appeal has been filed out of time in the absence of an order to enlarge such time, then the appeal must be struck out. He also cited the decision in Edith Wairimu Njoroge v Brooks Holdings Co. Ltd [2018] eKLR.
 29. Counsel urged that the Memorandum of Appeal dated 5th January, 2025 was filed out of time and without the leave of court. The same cannot be argued as a technical issue as the Court enlarged time for the Appellant to file a proper record and memorandum of appeal, the mistake was thus not an inadvertent one and cannot be argued to be the same. He urged the court to strike out the appeal.
 30. Counsel submitted that the Record of Appeal is incomplete, urging that Order 42 Rule 13 of the Civil Procedure Rules provides the following documents are obligatory when compiling and/or preparing of a Record of Appeal:- a) The Memorandum of Appeal; b) The Pleadings; c) The notes of the trial magistrate at the hearing; d) The transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing; e) All the affidavits, maps and other documents whatsoever put in evidence before the Magistrate; and f) Judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.
 31. He urged that Under Order 42 rule 13(4)(ii) of the Civil Procedure Rules, this court may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f). That then means that the documents in (a), (b) and (f) must mandatorily form part of the Record of Appeal. He pointed that the record of appeal dated 11th September, 2025 has no decree and/or order from the judgment which the Appellant is challenging. The absence of the same is fatal as the provisions of the act indicate such as a mandatory document forming part of the record of appeal. He cited the case of Lucas Otieno Masaye v Lucia Olewe Kidi [2022] eKLR in this regard.
 32. Counsel urged that the Learned Magistrate arrived at a sound and well-reasoned determination deeply rooted on the provisions of the law. Further, that since the defendant has failed to demonstrate that he engaged with the plaintiff in any other business save for the sale of land as demonstrated by the plaintiff, it is no doubt that indeed the defendant agreed to sell the suit property to the plaintiff even when he knew that he had not taken out letters of administration in respect to the said suit property. He cited the case of Katende vs Haridas & Co. Ltd (2008) 2 EA 173 and the case of Mwangi James Njehia vs Jannetta Wanjiku Mwangi & Another (2021) eKLR.
 33. He submitted that the issue of capacity by the defendant is an afterthought and only meant to defeat the intention of the contract was signed by the parties herein. He submitted that they associate themselves to the decision of the trial court. Further, that the Respondent has been in possession of the suit property since 2005 to date, that essentially translates to 20 years in possession and uninterrupted occupation of the suit property. He placed reliance on the cases of Samuel Miki Vs Jane Njeri Richu CA No. 122 of 2001 and Christopher Kioi and Another Vs Winnie Mukolwe & 4 Others (2018) eKLR in this regard.
 34. The respondent urged the court to dismiss the appeal with costs.



Analysis and Determination

35. This being an appeal, I must state the duty of the appellate court. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

36. Further, in *PIL Kenya Limited v Oppong* [2009] KLR 442, it was held that:

“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

37. The issue that arises for determination is; Whether the trial court erred in issuing orders in favour of the respondent

38. The Respondents’ claim was premised on the sale agreement dated 18th May 2005 which was produced as evidence. It is apparent that the Respondent paid Kshs. 70,000/- to the Appellant as consideration for 2.25 acres of 8/Karach/Kamenya/2091 partition no. 1359. The appellant, apart from merely denying having entered into the agreement, failed to lead any cogent evidence to prove that he did not enter into the sale agreement. The Respondent, on his part, called two witnesses who corroborated his evidence on the purchase of the land.

39. Section 3(3) of the *Land Act* provides;

No suit shall be brought upon a contract for the disposition of an interest in land unless—

- a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

40. Upon the illegal agreement, the Appellant put the respondent in possession of the suit land in the year 2005. He was then issued with a title in the year 2022 after conducting the administration of his grandfathers’ estate, 13 years after the agreement.

41. Section 7 of the *Limitation of Actions Act* provides as follows;

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

42. Additionally, Section 13 of the *Limitation of Actions Act* provides as follows;

1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date,



a right of action does not accrue unless and until some person takes adverse possession of the land.

2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.
43. The provisions of section 17 of the *Limitation of Actions Act* are also relevant;
Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.
44. The upshot of the foregoing is that the Appellants' claim to title of the land was time barred and his title had been extinguished by the time the suit was filed.
45. Additionally, the sale agreement was illegal as it was made when the appellant did not have a legal interest to transfer to the respondent. His grandfather had died in the year 1994 and at the time of the sale, the estate of the deceased had not been administered. Section 45 of the *Law of Succession Act* provides;
1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
46. However, by virtue of the appellant having known that he had no transferrable interest at the time of the sale, and still proceeding to enter into the sale agreement with the Respondent, leading him to believe that he was selling him title to his detriment, he cannot then turn around and seek refuge in the same provisions he violated. The trial court considered this issue and the fact that the appellant was the only beneficiary of the estate after the succession of the estate, the doctrines of proprietary estoppel and constructive trust come into play.
47. In the case of *Willy Kimutai Kitilit vs Michael Kibet* [2018] KECA 573 (KLR) the Court of Appeal authoritatively opined that the doctrine of proprietary estoppel overlaps with that of constructive trust, and both are concerned with equity's intervention to provide relief against unconscionable conduct.
48. In *William Kipsoi Sigei v Kipkoech Arusei & John Tunge* [2019] KECA 446 (KLR) it was held as follows:

“20. Taking into account the *Macharia Mwangi Maina* decision and the *Willy Kimutai Kitilit* decision alongside the circumstances of this case, we are of the view that the fact that the appellant herein, received the full purchase price for the property, allowed the 1st respondent to take possession, and for a period of at least fourteen years, let him remain on the property undisturbed, a constructive trust had been created.

We agree with the English decision *Yaxley v Gotts & Another*, (2000) Ch. 162, where it was held that an oral agreement for sale of property, created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. This was also the approach taken in



Macharia Mwangi Maina decision where the court observed that the appellant had put the respondent into possession of the suit property with the intention that he was to transfer the properties purchased to them and as such, a constructive trust had been created and the appellant could not renege.”

49. The upshot of the matter is that the appellant was estopped from renegeing on the contract of sale of land. I find no reason to interfere with the trial courts’ decision to enter judgment in favour of the respondent.

50. In the premises, the appeal is dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 5TH DAY OF FEBRUARY 2026.**

HON. DR. IUR FRED NYAGAKA

JUDGE

From 2: 38 PM, in the presence of,

Mr. Oriwa Advocate for the Respondent

Mr. Ngani Advocate holding brief for Ms. Adoyo for the Appellant

