REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. E002 OF 2025

HAYER BISHAN SINGH & SONS LTD .....APPELLANT

VERSUS

ENOSH AGWENA (Suing as legal representative of

NGESO OMUGA (deceased) ..... RESPONDENT

J U D G E M E N T

A brief background of the appeal, the subject matter of this judgment, is that HAYER BISHAN SINGH & SONS LIMITED, the Appellant herein, was the Defendant in Kisumu MC EL CASE NO. E017 OF 2023 (herein called the suit) and the Respondent herein, the Plaintiff.

From the copy of the plaint, which is on pages 37 to 40 of the record of appeal, it is clear that the Respondent had sued the Appellant over a parcel of land described in the plaint as the Respondent's "father's land."

The Respondent complained that the Defendant had illegally encroached upon the suit land, obtained valuable products in the name of marram, ballast, and coarse stones from the suit land, and

sold them to third parties. The Respondent therefore sought the following relief against the Appellant;

(a) Special damages and mesne profits,

(b) General, aggravated, and exemplary damages for illegally interfering with the land,

(c) An order of permanent injunction and

(d) Costs of the suit and interests.

The Appellant filed a statement of defence dated 9th March, 2023, vide which it denied the Respondent's claim and averred that its occupation of land known as KISUMU/KADONGO/1171 was with the permission of the beneficial owners.

The record shows that the suit was heard by the trial court which vide the judgement dated 13th January, 2025 found that the Respondent had proved his case against the Appellant on a balance of probabilities and entered judgement in favour of the Respondent and against the Appellant for Kshs.12,800,000/-, special damages of Kshs.70,000/- an order stopping the Appellant from interfering with the suit land, costs of the suit and interest from the date of the judgment till payment in full.

The appeal

Aggrieved by the judgment, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 16th January, 2025 and sought that the appeal be allowed with costs, the findings, conclusions, orders, and the entire judgment of the trial court be set aside, and in its place, the Respondent's suit be dismissed with costs.

Submissions and issues for determination

The appeal was heard by way of written submissions.

Written submissions dated 4th June, 2025, were filed by Onsongo & Company Advocates on behalf of the Appellant, while written submissions dated 18th November 2025 were filed by Cheloti & Company Advocates on behalf of the Respondent. From the record of appeal generally, the grounds of appeal raised and the submissions filed, the following emerge as the issues for determination in this appeal: -

(i) Whether the suit before the trial court was time-barred or incompetent pursuant to the provisions of the Limitation of Actions Act.

(ii) Whether the Respondent proved his claims against the Appellant

(iii) Whether the Respondent proved his claim of special damages.

(iv) Whether the trial court properly evaluated the evidence or whether the findings of the court were against the weight of the evidence.

(v) Who should bear the costs of the appeal and the suit?

Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence/material placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123,* it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below that;

> "An appeal to this 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 conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect."

The first issue for determination is whether the suit before the trial court was time-barred or incompetent under the provisions of the Limitation of Actions Act, Cap 22, Laws of Kenya.

It was submitted on behalf of the Appellant that there was no dispute that the Respondent was an administrator of the estate of the late Ngeso Omuga who died on 16th December, 1996 which was about 27 years ago, that Grant of Letters of Administration Ad Litem was obtained on 20th February, 2023 and that as at the time of passing on, the late Ngeso Omuga was in actual possession and occupation of L.R. No. KISUMU/KADONGO/1171 (the suit land).

Counsel relied on the provisions of sections 16, 7 and 9(2) of the Limitation of Actions Act and the case of *Rawal -vs- Rawal [1990]KLR 275 Dhanesvar V. Mehta -vs- Manilal M. Shah [1965] EA 62.*

Counsel submitted that the suit in the lower court was brought as a substantive suit as a claim of ownership/proprietorship to land. That the claim stemmed from the rights of the deceased over the said parcel of land. That hence, the Respondent could not seek refuge in the Law of Succession Act. Counsel relied on the case of *Re Estate of Josephine Magadalena Muton (Deceased) (2016)eKLR* where it was held that the Limitation of Actions Act sets limitations for the

bringing of administration suits – which are suits filed by administrators or beneficiaries in respect of the estate property seeking various reliefs.

Counsel submitted further that section 7 of the Limitation of Actions Act computes time from the date the cause of action accrued. That under section 9(2), a claim by an administrator under either intestacy or where the deceased was the last person to be in actual possession of the land at the time of his death, the right of action accrues on the date of death.

Counsel submitted that the suit was bad in law, was statutorily time-barred, and incompetent, and urged the court to dismiss it.

On behalf of the Respondent, it was submitted that the evidence, including uncontroverted affidavit evidence and oral testimony, demonstrated that the trespass and illegal mining by the Appellant commenced in December, 2022. That it is settled law that each act of continuing trespass or continuing tort constitutes a fresh cause of action. Counsel relied, *inter alia,* on the case of *Kenya Power and Lighting Company Ltd -vs- Kimitei (2014)* for these submissions.

That the Respondent who had taken out a Grant of Letters of Administration Ad Litem, had locus standi under the provisions of

section 82 of the Law of Succession Act Cap 160, to bring the suit, and that therefore the suit was both competent and not statute – barred.

I have considered these submissions in the light of the pleadings filed and the evidence placed before the trial court.

The plaint filed before the trial court is on pages 37 to 39 of the record of appeal. In paragraph 3 thereof, the Respondent had pleaded that it was in December 2022 that he received information that strangers had descended on the suit land and commenced mining of ballast, marram, and coarse stones and related materials.

The proceedings, which are on pages 226 to 247 of the record of appeal, show that the Respondent testified as PW1 and adopted his witness statement as his evidence in chief. He had stated in the witness statement that it was in December 2022 when he received the report of the trespass. On cross-examination, the proceedings show that the Respondent maintained that the trespass took place in 2022. He stated that the stranger had been excavating the land from November 2022 until the court stopped them.

The record shows that the Appellant had raised the issue of limitation as a preliminary issue and vide its ruling delivered on 11th

May, 2025, the trial court dismissed the Application. There is no evidence that any appeal was preferred against the said ruling.

The Respondent's case was that the trespass started in 2022. The suit was filed in 2023. And as correctly submitted on behalf of the Respondent, the trespass complained of could not be time-barred as it was continuous. The respondent's case was that since the appellant unlawfully entered the suit land, it remained thereon conducting the acts complained of.

From the pleadings and evidence placed before the court, I find no evidence that the claim was time-barred.

I find that the suit was not time-barred and that the trial court did not err in not finding that the suit was incompetent, misconceived, and an abuse of the court process.

The second issue for determination is whether the Respondent proved his claim against the Appellant.

It was submitted on behalf of the Appellant that the Respondent did not establish by way of evidence that the excavation/mining complained of was being carried out within land parcel No. KISUMU/KADONGO/1171. That the valuation and the survey report

showed that there was excavation/mining in a certain place, but there was no evidence identifying the place as the suit land.

Further, there was no evidence that connected the excavation/mining activity to the Appellant.

On behalf of the Respondent, it was submitted that ownership and entitlement to land parcel No. KISUMU/KADONGO/1171 was established via a certificate of official search. That the Respondent discharged the burden of proof on a balance of probabilities as provided in sections 107 – 109 of the Evidence Act, Cap 80 Laws of Kenya. That the appellant's activities on the suit land were proved through photographic evidence, witness testimony, and corroborating exhibits. That the Appellant failed to adduce credible evidence rebutting the Respondent's case.

The record of appeal shows that in the plaint dated 6th March, 2023, the parcel number of the suit land was not mentioned. The same applies to the Respondent's witness statement of the same date, which was adopted as the Respondent's evidence in chief.

The proceedings taken before the trial court also show that even on cross-examination, the Respondent did not mention the parcel number of the land, the subject of his complaint.

The Respondent, however, produced a certificate of official search in respect of land parcel No. KISUMU/KADONGO/1171 showing that the said parcel of land measuring 0.9 Ha was registered in the name of Ngeso Omuga on 28th March, 1979. The respondent had brought the suit as legal representative of the estate of Ngeso Omuga, deceased.

The Respondent also produced a ground report in respect of land parcel No. KISUMU/KADONGO/1171, prepared by one Harry Ochieng, showing that 0.54 of the land was being excavated, leaving only 0.36 Ha intact. The valuation was done on land parcel No. KISUMU/KADONGO/1171.

Regarding the trespassers, the Respondent described the trespasser as strangers (in paragraph 3 of the plaint) but in paragraph 7 attributed the unlawful acts on the grounds to the Defendant.

The Appellant had vide the statement of defence dated 9th March, 2023, denied the Respondent's claim.

The evidence of DW1 was that indeed the Appellant had leased land parcel No.1171 but the same was being used for parking purposes. He denied that the photographs produced depicted the site

complained of. He also denied that the machinery shown in the photographs belonged to the Appellant.

The standard of proof in a civil case is on a balance of probabilities as opposed to the proof beyond a reasonable doubt required in criminal cases. The question of what amounts to proof on a balance of probabilities was discussed in *William Kabogo Gitau vs George Thuo & 2 others [2010] 1 KLR,* thus;

> "In ordinary civil cases, a case may be determined in favour of a part who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In terms of percentage, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

In *Miller vs Minister of Pensions [1947] 2 ALL ER 372*, Denning J, discussing the burden of proof in civil cases, said

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say, 'we think it is

more probable than not', the burden is discharged, but if the probabilities are equal, it is not. This proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other, which evidence to accept where both parties' explanations are equally (un) convincing, the party bearing the burden will lose, because the requisite standard will not have been attained."

The Respondent pleaded that he contacted a surveyor to identify the land. He called the surveyor as a witness. The surveyor produced a report in which the subject land was identified as the suit land herein, and the same confirmed that there were excavations of 0.54 of the land.

While the Appellant had vide the statement of defence denied excavating the suit land or having any dealings with it, DW1 testified as to how the land was leased by the Defendant for the purpose of using it as a parking. No evidence was brought of the existence of the parking.

I find that the Respondent proved the trespass onto the suit land as complained in the plaint and that the same was committed by the Appellant.

The third issue is whether the Respondent proved that he was entitled to damages.

The Respondent had pleaded special damages of Kshs.12,800,000 arising from the excavation and a valuation fee of Kshs.70,000/-. Among the documents produced in evidence by the Respondent was photographs, a valuer's report, and official receipts. The valuer's report assessed the damage arising from the excavation at Kshs. 12,800,000/.

There was no other valuation report produced by the Appellant to discount the valuation by the Respondent.

I find that the Respondent proved that he was entitled to damages as awarded by the court.

Regarding the costs of the case below and of the appeal, under the provisions of section 27 Civil Procedure Act, costs follow the event.

The result is that the issues raised for determination herein have been determined in favour of the Respondent.

I find no reason to interfere with the decision of the trial court. For the foregoing reasons,

i. The appeal is dismissed.
ii. Cost of the appeal are awarded to the Respondent.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 5th day of March, 2026.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Kirabo for the Appellant.

Orengo for the Respondent.