

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**KISUMU ELCLA NO. E053 OF 2025**

ELIZABETH ATIENO ONYANGO ..... APPELLANT

VERSUS

ANDREW GEORFFREY ONGUKA ..... RESPONDENT

*(Being an Appeal against the Judgement and Orders of Honourable  
Gloria Nasimiyu Barasa issued on the 29<sup>th</sup> of May 2025 in*

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT

AT KISUMU COMMERCIAL COURTS

MCECL NO. E055 OF 2024

ELIZABETH ATIENO ONYANGO ..... PLAINTIFF

VERSUS

ANDREW GEORFFREY ONGUKA ..... DEFENDANT

TITLE BY WAY OF COUNTERCLAIM

ANDREW GEORFFREY ONGUKA ..... 1<sup>ST</sup> PLAINTIFF

ONE LIFE AFRICA ..... 2<sup>ND</sup> PLAINTIFF

VERSUS

ELIZABETH ATIENO ONYANGO ..... DEFENDANT

**JUDGEMENT**

Introduction

ELIZABETH ATIENO ONYANGO, the Appellant herein was the Plaintiff in KISUMU CMC ELC NO.E055 OF 2024. Vide the amended plaint dated 23<sup>rd</sup> August, 2024, she claimed to be the registered owner of a land parcel known as KISUMU/KADIANGA WEST/505 (herein referred

to as the suit land) having inherited it through succession process from one OWUOR JAWUO, deceased.

The Appellant's complaint against the Respondent herein who was the Defendant in the suit was that sometimes in 2023 the Defendant begun interfering with the suit land by claiming that he had purchased it, instructed someone to till the land, erected a semi-permanent structure thereon and continued to till the same.

The Appellant pleaded that he would suffer loss, harm and damage should the prayers sought not be granted as she will lose her property and income. She therefore sought for a declaration that she was the bona fide proprietor of the suit land, an order of eviction of the Respondent from the suit land, permanent injunction, damages for mental and psychological anguish and costs of the suit.

In response to the Appellant's claim, the Respondent filed a statement of defence and counterclaim dated 30<sup>th</sup> July, 2024 vide which the Respondent denied the Appellant's claim. Vide the counterclaim, the Respondent joined another party known as Online Africa to the suit.

The Respondent claimed that he entered into an agreement of sale of land with the Appellant in the year 2012 for purchase of one half ( $\frac{1}{2}$ ) of the suit land.

That the Appellant sold the remaining portion to the 2<sup>nd</sup> Plaintiff in the counterclaim namely Online Africa in which the Respondent is a director.

That the Respondent took occupation of the sold land in the year 2012. The Respondent therefore sought that the Appellant's suit be dismissed and judgement be entered in favour of the Respondent for an order of specific performance and costs of the suit.

The record shows that the suit was heard before the trial court which, vide the judgement dated 29<sup>th</sup> May, 2025, dismissed the Appellant's claim, allowed the counterclaim and made an order that each party bear own costs of the suit.

#### The appeal

Aggrieved by the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 24<sup>th</sup> June, 2025 seeking for orders that the appeal be allowed and the judgement made by the Honourable court dated 29<sup>th</sup> May, 2025 be set aside, judgement be entered in favour of the Appellant as prayed in the amended plaint dated 23<sup>rd</sup> August, 2024, the Respondent's counterclaim dated 30<sup>th</sup> July, 2024 be dismissed, costs of the appeal and costs of the lower court be awarded to her.

The grounds of the appeal as contained the Memorandum of Appeal are that the learned trial Magistrate erred in law and in fact: -

1. by totally refusing to address the legal issues as pleaded and argued by the Appellant and proceeded to deal with a totally different cause of action, being fraud and forgery which was unrelated to the Appellant's case.
2. in failing to appreciate and apply the provisions of the Law of Succession Act, in particular sections 45(1) and 82, in holding that the sale agreements dated 26<sup>th</sup> April, 2012 and 14<sup>th</sup> November, 2015 were valid and enforceable, notwithstanding that the Appellant lacked legal capacity to contract and deal with the suit property at the material time.
3. by holding that the impugned sale agreements were valid and enforceable despite their clear violation of statutory provisions, thereby giving effect to contracts that were illegal and void for offending mandatory legal requirements.
4. by dismissing the Appellant's Amended Plaint without appreciating that the Appellant was the lawful registered proprietor of the suit property under sections

24, 25 and 26 of the Land Registration Act, and thereby entitled to protection of her proprietary rights.

5. by failing to properly consider and analyze the Appellant's evidence and documents on record showing that the suit property was only transmitted to her after the confirmation of grant in 2021, making any prior dealings by the Appellant on the property or third parties were legally untenable and invalid.
6. by allowing the Respondents' counterclaim for specific performance, contrary to the express terms of Clause 5 of the 2015 agreement, which provided for refund plus damages as the sole remedy in the event of breach.
7. by relying on the Respondent's unsupported claims that the Appellant had received payments of Kshs. 950,000 for the sale of land. The Respondent did not adduce any evidence of any documentation, banking records or corroborated testimony.
8. by failing to address and determine all the issues raised by the Appellant, thereby abdicating her judicial duty as confirmed by the Supreme Court in various decisions including in Petition No. E039 of 2024, Jovet (Kenya)

Limited -v Bavari N.V. and in doing so, violated the principles in Article 10 and violated the rights of the Appellant under article 50 of the Constitution of Kenya.

9. by disregarding the Appellant's written submissions.

10. by failing to consider that the 2012 sale agreement was statute-barred under Section 7 of the Limitation of Actions Act, as the counterclaim was filed on 30<sup>th</sup> July, 2024, beyond the 12 years limitation period from 26<sup>th</sup> April, 2012.

11. in that in all the circumstances, the decision arrived at was wholly against the weight of the law and evidence.

### Submissions

Vide directions given on 2<sup>nd</sup> October, 2025, the appeal was heard by way of written submissions. Written submission dated 23<sup>rd</sup> November ,2025 were filed by Okoth & Kiplagat Advocates on behalf of the Appellant. Counsel submitted that it was undisputed that at the time of the alleged sale of the land to the Respondents, the Appellant was not the registered owner of the property and had not obtained Letters of Administration. That under the provisions of section 45 and 82(b)(ii) of the Law of Succession Act, the agreements were not

enforceable for lack of capacity between the parties and for contravention of the provisions of the Law of Succession Act. Counsel relied on the case of *Mwangi -vs- Mwangi & 9 Others [2022]KEELC 15553 (KLR)* where it was held that the sale contracts were invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act.

Counsel also relied on the authority of *Said Mabruk Abed -vs- Margaret Mumbua Muli [2022] KEELC 1597 (KLR)*, where it was held that as the property that was being sold was the property of a deceased person, the letter could not have had the capacity to sell the property as he held no grant of Letters of Administration.

That any sale by a person who is not the legal representative of the deceased person is null and void.

That the trial court committed a substantive error by holding that the sale agreements were valid and enforceable despite the parties' lack of legal capacity and statutory prohibitions.

Counsel submitted further that any contract that contravene statute is illegal and void ab initio and therefore unenforceable. That the court's role is not to sanitize illegality but to uphold statutory requirements. That the holding of the trial court was unsustainable in law and should be set aside.

Counsel submitted that the agreement entered into on 26<sup>th</sup> April, 2012, was the subject of the Respondent's counterclaim filed on 30<sup>th</sup> July, 2024. That this was 12 years and 3 months later, which was outside the limitation period provided for in Section 7 of the Limitation of Actions Act.

Relying on the case of Gichari & Another vs Muchiri [2024] KEELC 1519 (KLR), where it was held that the question of limitation of actions goes to the jurisdiction of the court, so that where a suit is time barred the court has no jurisdiction to hear it. Counsel submitted that the trial court was jurisdictionally barred from entertaining any claim of rights arising from the 2012 agreement as it was time barred.

Counsel submitted further that the trial court failed to address all the issues raised, contrary to constitutional and jurisprudential standard. Counsel relied on the Supreme Court decision in case of Joret (Kenya) Limited -vs- Bavarca NV (2025) KESC 27 (KLR). That the trial court failed to consider that the agreements were void for want of capacity, the agreement contravened the Law of Succession Act, the 2012 agreement was time barred under the doctrine of Limitation of Action, lack of proof of consideration and protection of the title under the Land Registration Act.

That these omissions amount to abdication of judicial duty and has left the Appellant with unresolved questions.

Counsel further submitted that the trial court erred in granting specific performance contrary to the terms of the agreement. That parties are bound by the terms of their contracts. That the only available remedy to the Respondent had the agreement been valid would have been a refund and damages.

Counsel submitted that the trial court relied on an unproven allegation of payment of Kshs.950,000/- when there was no evidence of such payment. Counsel submitted further that the Appellant as the registered owner, was entitled to the relief sought. That having established lawful ownership, the Appellant was entitled to protection of her proprietary rights. That the action of the Respondent amounted to trespass. That trespass is actionable *per se*, and once established, damages must follow whether or not actual loss is strictly quantified. Counsel submitted that damages of Kshs. 500,000/- is reasonable, appropriate, and justified.

Counsel urged the court to allow the appeal with costs of both the appeal and the suit.

Written submissions dated 19<sup>th</sup> January, 2026 were filed by Ben Aduol Nyanga & Company Advocates on behalf of the Respondents.

Counsel relied on the case of Willy Kimutai Kitilit -vs- Michael Kibet [2018]eKLR where it was held that lack of Land Control Board consent does not bar the court from giving effect to equitable principles where the conduct of the parties so demands, and the case of Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri [2014]eKLR where it was held that where a vendor later acquires title equity treats the title as held in trust for the purchaser. That the Appellant cannot sell land grant possession for over 12 years, receive money and later deny capacity after perfecting title. That the Appellant's conduct created a constructive trust in favour of the Respondents.

That in the case No. KISUMU ELC NO.171 OF 2015, where the Appellant and the 1<sup>st</sup> Respondent were co-defendants, the Appellant stated on oath that the suit property belonged to her and that she had sold it to the Respondent.

That the Appellant is estopped by her own pleadings, testimony, and conduct from now alleging that the sale was illegal, void, and non-existent.

Counsel urged the court to find that the Appellant's present position is not only legally untenable but also morally and equitably

indefensible and that the trial court correctly declined to aid such conduct.

On whether specific performance was properly granted by the court, Counsel submitted that specific performance is an equitable remedy granted at the discretion of the court. Counsel relied on the case of *Reliable Electrical Engineers Ltd -vs- Mantras Kenya Ltd (2006)eKLR* where it was held that specific performance will not be denied where a party has substantially performed.

That courts do not allow parties to rely on their own breach to escape obligation.

On whether consideration was proved, Counsel submitted that payment was proved on a balance of probabilities and not beyond a reasonable doubt. That the trial court relied on executed agreements, long possession, developments, corroborative testimony and absence of complaint for 12 years. That under section 120 of the Evidence Act, the Appellant is estopped from denying receipt after inducing reliance.

Counsel submitted that under section 24 - 26 of the Land Registration Act, the title is not absolute but subject to equitable interest, trusts and rights of person in possession.

Relying on the Supreme Court decision in Isaak M'Inanga Kieba -vs- Isaya Theuri M'lintari [2018], Counsel submitted that the Supreme Court affirmed that possession creates enforceable interests and that the Respondents were not trespassers.

Counsel urged the court to find that the trial court's judgement was sound and to dismiss the appeal in its entirety, uphold the trial court's judgment of 29<sup>th</sup> May, 2025 and award costs of the appeal to the Respondents.

#### Issues for determination

From the grounds of appeal presented and the submissions filed, the following emerge as the issues for determination herein;

- (i) whether or not the Respondents were trespassers on the suit land
- (ii) whether or not the trial court erred in dismissing the Appellant's suit
- (iii) whether or not the trial court erred in allowing the counterclaim
- (iv) whether the appeal herein has merit.
- (v) Costs.

#### Analysis and determination

This being a first appeal, this court is obligated to re-analyse the evidence 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. It stated 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 or not the Respondents were trespassers on the suit land.

The Appellant’s case before the trial court, as pleaded in the amended plaint, was that sometime in 2023, the 1<sup>st</sup> Respondent was seen around the suit land claiming to have purchased it. That the Respondent’s presence on the suit land became notorious and frequent from March 2024 and got worse when the 1<sup>st</sup> Respondent instructed someone to till the land, and in April 2024, when the

Respondent erected a semi-permanent structure and continued tilling the land and using threats of physical violence and intimidation to access the suit land.

The Appellant reiterated the contents of the amended plaint in her witness statement dated 23<sup>rd</sup> August, 2024.

On cross-examination, the Appellant stated that she stays at her father-in-law's place but that the suit land is hers and that she has been farming the land for a long. She denied ever selling the land to anyone or receiving any purchase price for it.

The Respondents' case, as contained in the statement of defence and counterclaim, was that they did not trespass onto the suit land as alleged in the amended plaint or at all. They pleaded that their presence of the basis of a purchase of the suit land pursuant to agreements between the Appellant and themselves. That the Appellant had pursuant to the purchase allowed the Respondent to take possession of the suit land in the year 2012 in the presence of the Chief and the Appellant's relatives as the Appellant was selling a property that belonged to a deceased relative and she was the closest beneficiary.

Vide his witness statement dated 30<sup>th</sup> July, 2024, the 1<sup>st</sup> Respondent stated that he had been in occupation of the suit property since 2012

and hence been waiting for transfer of the title. That he had a house built on the suit land and building material for further development. That the Appellant had never raised any complaints since the Respondent took occupation of the land in 2012.

On cross-examination, the 1<sup>st</sup> Respondent, who testified as DW1, stated that he had taken possession of the property and that the appellant had received Kshs 950,000/=. That the property was in the name of Owuor Jawuo, and that the appellant was to transfer the land to her name, then to DW1.

The tort of trespass to land is constituted by an unlawful entry onto a person's land without the owner's permission. Clerk and Lindsell on Tort 18<sup>th</sup> Edition at page 23 defines trespass as:

**“any unjustifiable intrusion by one person upon the land in possession of another.”**

According to Black's Law Dictionary 11<sup>th</sup> edition Bryan and Garner at page 667 trespass is:

**“an interference with or intrusion into another's property.”**

In the case of *Alex Waigara Mwaura -vs- China Power Company Limited and another [2020]eKLR* the court defined it as

**“an intrusion by a person into the land of another who is in possession or ownership.”**

The evidence presented to the trial court included two land sale agreements, which, according to the Respondent, were the basis for the Respondents' entry onto the suit land.

The Appellant denied knowledge of the agreements but stated that she was taken to the Respondents' Advocates' offices in the year 2015 for help in the cases that she had. She, however, acknowledged that the signature on the agreement was hers. That she was told that she was going to be helped as a widow.

I have read the two land sale agreements produced by the Respondents as exhibits. The agreement dated 26<sup>th</sup> September, 2012, is handwritten. The purchase price was indicated to be Kshs.400,000/-. The land being sold was described as the Appellant's **“part of land No.505, which she inherited from her grandfather's brother known as Owuor Jawuo who is deceased and that prior to his death, he was single, never married and handed her estate to Elizabeth Atieno Onyango”**.

It is clear that it was only part of the suit land that was being sold in the agreement dated 26<sup>th</sup> September, 2012.

Although the purchase price was stated to be Kshs.400,000/-, evidence of payment of the entire amount is not clear from the agreement.

Yet the agreement of sale dated 14<sup>th</sup> November, 2015, sells the whole of the suit land at Kshs.1,000,000/-. The agreement dated 14<sup>th</sup>

November, 2015, makes no mention of the earlier agreement date, 26<sup>th</sup> September, 2015. It is not clear whether the portion sold earlier was resold or whether the earlier agreement was cancelled to pave way for the agreement dated 14/11/2015 for the entire land.

The Respondents claim to have paid Kshs.950,000/- consideration. The Appellant denied receipt of the purchase price. It is not clear whether the Kshs.950,000/-, alleged to have been paid to the appellant under the agreement dated 14/11/2025, was inclusive of the Kshs.400,000/- indicated in the agreement dated 26<sup>th</sup> September, 2012.

None of the parties called the witnesses who were mentioned in the agreement to corroborate their evidence.

There is no evidence that the Respondents have been in occupation of the suit land since the year 2012, as claimed by the 1<sup>st</sup> Respondent.

The evidence adduced was that none of the parties lives on the land. The Respondents' evidence was that they put up a house and deposited building materials on the land, ready for other developments.

The Appellant claimed that it was only in the year 2023 that the Respondent forcefully entered the land, erected temporary structures and started doing other activities thereon.

It is clear from the evidence that the alleged sale agreements, the erection of a structure on the suit land, and the depositing of building materials on the suit land were happening while the suit land was the property of a deceased person, hence subject to the provisions of the Law of Succession Act.

Counsel relied on section 45 of the Law of Succession Act that makes such dealings with the property of a deceased person a criminal offence known as intermeddling. Section 2 of the Law of Succession Act makes the said Act the law governing the handling of the estates of deceased persons in Kenya, and under section 82, only persons appointed as personal representatives of deceased persons have legal capacity to transact in the property of deceased persons. No other person, regardless of the relationship the person may have had with the deceased, has the capacity in law to transact in property of the deceased.

Considering the lack of clarity as to what was being sold in the two agreements, and payment/receipt of the purchase price, and the fact that the suit land belonged to a deceased person as at the time of

the alleged sale(s), the Respondents' presence and activities on the suit land amounted to acts of intermeddling with the estate of the deceased and trespass.

The Respondents relied on the defence filed in Case Number KISUMU ELC 171 OF 2015 by the 1<sup>st</sup> Respondent and the Appellant to the effect that the suit land belonged to the Appellant and that she had sold it to the Respondents.

In paragraph 21 of the defence and counterclaim, the Respondents claimed that the Plaintiff in the case No.171 of 2015 (the appellant herein) finally agreed and confirmed that the land belonged to the Appellant herein and that they reconciled. However, the said defence was not produced as an exhibit in the suit before the trial court. It is only the plaint in the said case that was produced as exhibit D.4. The plaint showed that the parties herein, together with the Attorney General and the Land Registrar Nyando, had been sued by one Erastus Akach Oguta over the suit land herein on fraudulent transfer of the suit land from the deceased to the Appellant. No evidence was produced as to whether the case was ever determined and what the outcome thereof was.

Issue 1 is therefore determined in the affirmative that the respondents were trespassers on the suit land.

The second issue for determination is whether or not the trial court erred in dismissing the Appellant's suit.

As the Appellant produced documents of ownership of the suit land, and this court having already found that the actions of the Respondents on the suit land amounted to trespass, I find the Appellant was entitled to the relief sought. The trial court erred in dismissing the Appellant's claim.

On whether or not the trial court erred in dismissing the counterclaim, the counterclaim was based on the land sale agreement. The land sale agreements were for the sale of the property of a deceased person, which was contrary to the provisions of the Law of Succession Act. The Appellant had no capacity to sell the land.

And more importantly, there was no clear proof of payment of consideration. I find that the counterclaim ought to have failed.

For the foregoing reasons, I find that the appeal has merit and hereby allow it.

The result is that the judgment of the trial court is set aside and substituted with a judgment allowing the Appellant's claim as contained in the amended plaint in terms of prayers (a), (b), and (c) of the amended plaint.

Costs of the appeal are awarded to the Appellant.

Orders accordingly.

**Judgment dated and signed at Kisumu and delivered virtually  
this 26<sup>th</sup> day of February 2026.**

**E. ASATI,  
JUDGE.**

**In the presence of:**

Maureen- Court Assistant.

Omondi for the Appellant.

Mwilolo h/b for Nyanga for the Respondents.