

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND COURT LAND APPEAL NO. E045**  
**OF 2024**

**BENARD OTIENO OYOMO**

**JAMES OMOLLO OYOMO**

**THOMAS OCHIENG OYOMO**

**(Suing as the Administrators of the estate of**

**MOHAMED OMOLLO OYOMO.....**

**APPELLANTS**

**VERSUS**

**HEZRON OTIENO OKUMU (Sued as Administrator of**

**CHRISANTUS AYOMA OYOMO alias**

**AYOMO OYOMO.....**

**RESPONDENT**

***(Being an Appeal from the Judgment and Decree of Hon. J.  
Orwa (CM) in Homa Bay ELCC No. E064 of 2023 delivered  
on 30<sup>th</sup> September 2024)***

**JUDGMENT**

**1.** By way of an Amended Plaintiff dated 14<sup>th</sup> December 2023, the Respondent herein, then the Plaintiff, sought the following orders;

**a) An order of specific performance be and hereby issued compelling the defendant to transfer land Parcel No. KANYADA/KOTIENO KATUMA 'A'/973 to the Plaintiffs.**

**b)An order compelling specific performance be and is hereby issued compelling the defendants to transfer land parcel no. KANYADA/KOTIENO KATUMA 'A'/973 to the plaintiffs.**

**c) In the alternative, the land registrar, Homa Bay Land Registry be and is hereby directed to transfer and register land parcel no. KANYADA/KOTIENO KATUMA 'A'/973 in the names of the plaintiffs.**

**d)Costs of this suit and interest thereon as from the date of filing this suit until payment in full.**

2. The Plaintiff pleaded that their deceased father bought the suit land from Ayoma Oyoma in the year 1980 who put his father in actual possession of the suit land. That the defendant embarked on succession of the estate of the deceased Ayoma Oyoma without recognizing the interests of the plaintiff. As a result, the plaintiffs had a right that could be properly addressed.
3. The defendants filed a statement of defence dated 16<sup>th</sup> January 2024 denying the contents of the plaint. They urged that the deceased Ayomo became the registered owner of the suit land in 1994 whereas the sale agreement was executed in 1994 in the absence of the defendants witness and therefore the plaintiffs purport to enforce the agreement is null and void. He stated that the plaintiff attempted to illegally cause the court to issue them with letters of administration of the Estate in Homa Bay Succession Cause no. 73 of 2017 which was dismissed.

That the Grant in no. E037 of 2022 which the court revoked the grant to allow the defendant continue with the administration of the estate. He prayed that the suit be dismissed.

4. The matter then proceeded for hearing.
5. **PW1** was **James Oyomo Omollo** who testified that he knew the parties and that the suit land was bought by their father in the 1980s after which he took possession of the land to date. That they have been doing farming on the same. They attempted to register the land in his fathers' name but were unsuccessful. When he died the land had not been registered in his name and they cited the citees to obtain a grant but they were not allowed. He adopted the statement of Bernard as evidence in chief.
6. During cross examination he stated that the agreement was executed in the 1980s. He produced a certificate of search and stated that he was not aware that the land was registered in the name of Ayoma son of Ayoma in 1994. He confirmed that they cited Hezron but the same was thrown out. Additionally, that the cited him after the lapse of twelve (12) years. He conceded that the Grant issued was flawed, based on the death certificate.
7. **PW2** was **Harrison Nyariere Okello**. He adopted his witness statement as evidence in chief.
8. During cross examination, he stated that he had no official search to prove the ownership of the parcels in his statement. Further, that he did not witness or sign the sale agreement.

That he did not know if the land belonged to Mohammed Omollo Oyomo and confirmed that the land was registered in the name of Chrisantus Ayoma.

**9.** The trial court delivered the judgment and found that the Plaintiff had failed to prove his case on a balance of probabilities and dismissed the suit with costs to the defendant.

**10.** Being aggrieved by the decision of the trial court, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 3<sup>rd</sup> April 2025 premised on the following grounds;

**1) The subordinate court misdirected itself on the issue of lapse of time and ended up with the wrong judgement.**

**2) The court below failed to appreciate that in any event the respondent held the title to the suit parcel of land on trust for the estate of MOHAMMED OMOLLO OYOMO.**

**3) The court below failed to appreciate that there was evidence of other pervious files before the very court in which the issue of representation of the two estates had been alluded to wherefore it could have appraised itself of the records thereon independently.**

**4) The court below failed to implore the provisions of Article 159 of the Constitution and failed to consider the actual evidence on continuous occupation of the suit parcel of land.**

**5)The court below thus arrived at a bad judgement especially in the light of the evidence adduced.**

**11.** The parties prosecuted the appeal by way of written submissions. The Appellant filed submissions dated 26<sup>th</sup> September 2025 through the firm of Aluoch Odera & Nyauke Advocates whereas the Respondent filed submissions dated 29<sup>th</sup> August 2025 through the firm of L. K Obwanda & Associates.

**Appellants Submissions**

**12.** Counsel cited section 28 of the Land Registration Act on overriding interests and section 161(2) of the Land Act, urging that a person put in possession by the proprietor and claiming an equitable interest cannot be in occupation of land illegally pending the determination of the nature and extent of equitable rights by a court.

**13.** Counsel reproduced the definition of equity as per the Black's Law Dictionary, 9<sup>th</sup> Edition, and further, urged that by virtue of article 102(b) the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede statutory provisions where a transaction relating to an interest in land is void and unenforceable for lack of compliance to statutory doctrines. He urged that on application of equity, the court may award damages if the equitable remedy of specific performance.

**14.** Counsel submitted that by the time Chrisantus Ayoma Oyomo (deceased) received the purchase price from

Mohammed Omollo Oyomo (deceased) and caused him to gain possession of the suit land and it follows that it would be unjust and inequitable to allow the Respondent to retain the suit parcel that had been sold to Mohammed Omollo Oyomo.

15. Counsel cited the case of *Yaxley v Gotts & Another* (2000) Ch 122 and the case of *Macharia Mwangi Maina & 87 Others vs Davidson Mwangi Kagiri* (2014) eKLR on the creation of a constructive trust upon putting of a purchaser in possession by the vendor. Counsel placed reliance on the case of *Chase International Investment Corporation and Another vs Laxman Keshra & Others* (1978) KLR 143 on the application of equity and urged the court to quash the decision of the trial court.

#### **Respondents Submissions**

16. Counsel for the respondent cited the case of **Risper Owenga Ogunde v Joakim Okesa Mwandale & another [2017] KEHC 2340 (KLR)** and urged that the trial judge did not err in any way when she held that the suit is statutory barred.
17. Counsel urged that it was clear on record that the Appellants failed to letters of administration giving them authority to institute these proceedings on behalf of their late father. Further, that the trial court herein was not the sitting court in other proceedings and consequently the court cannot on its own motion proceed and request for files which have not been requested by the counsel on record. If the court were to proceed and seek evidence to fill the gaps in the appellants

case the same would amount to an injustice since counsel herein was very much aware of the documents to be filed to prove that they have they have the locus standi to defend the suit on behalf of their late father. Counsel urged that the failure to produce the said documents, the court should not be blamed for intentionally failing to do the same. Consequently ground 3 of the Memorandum of Appeal should at no point be entertained.

**18.** Counsel urged that although the appellants aver that they had been in active possession of the suit land from 1980, this did not come out clearly as their witness-PW6 did not inform the court for how long they were in possession of the suit land. Furthermore, the chief, PW5 testified that he did not know who was in occupation of the suit land. Notably at no point have the appellants herein ever claimed adverse possession in any court of law. Counsel cited the decisions in Bema vs. Said (1991) KLR 454 and the case of Florence Dean Karimi vs. Sanga & 3 others (2022) KEELC 3180 (KLR) in this regard.

**19.** On whether the Respondent held in trust the suit land for the estate of Mohamed Oyomo, Counsel urged that the Estate of Mohamed Oyomo was neither beneficiary nor liability in the suit land hence the respondent never held the suit land in their trust This is by virtue of the fact that there was no valid contract for sale of land between the respondent and the appellant herein in 1980. As affirmed by the evidence on record, it is not even clear when the said agreement was

drafted. Section 3(3) of the Law of Contract Act requires that all contracts pertaining to an interest in land shall be in writing. At the pinnacle of all contract is the capacity to sale which can only be attributed to a registered owner of the suit parcel. Indeed, the appellants' own witnesses affirmed that they were not sure when the appellant's father acquired the said land and as such being that there is no sale agreement the appellants herein cannot claim that that on account of failure to transfer has culminated to a trust.

**20.** Counsel submitted that constructive trust does arise by operation of the law. That a court of law uses and/or deploys the evidence and the obtaining circumstances to discern whether constructive trust arises or otherwise. In the said circumstances the said agreement allegedly relied on was in dispute and further even the witnesses that they called could not clarify the issues before this court. Counsel urged that the Appellant did not lay plausible, cogent and credible evidence to warrant the inference of constructive trust taking into account the obtaining circumstances as intimated in the case of **Mwirebua v Mutonga (Environment and Land Appeal E023 of 2024) [2025] KEELC 2965 (KLR) (28 March 2025) (Judgment)**. Therefore, on this limb the same fails.

**21.** Counsel submitted that the appellants have not shown any reasonable circumstances that would force him to seek reprieve under Article 159 of the Constitution. Furthermore, that the matter was heard expeditiously which facts settles the

tenets or article 159(2) (a, b, e) the only tenet remaining is based on procedural technicalities. He urged that there is no iota of evidence showing that the appellant herein have ever been in occupation of the land at any point. Counsel disputed the claim of continuous occupation of the said land, urging that his entry would have been known by all parties whom he called as witnesses. He cited section 107(1) and urged that the appellant cannot seek to invoke the provision of article 159 of the constitution of Kenya and yet they did not prove the same on balance of probability. He urged the court to dismiss the appeal with costs.

### **Analysis and Determination**

**22.** Before delving into the issue for determination, I must first state the duty of this court as an appellate court. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

**“An appeal to this Court from a trial by the High 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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”**

**23.** In **Abok James Odera T/A A.J. Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013]** eKLR the Court held as follows;

**“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

**24.** The following issues arise for determination;

**i) Whether the trial court erred in dismissing the Appellants’ suit**

**25.** The Appellants’ claim was premised on specific performance of a sale agreement between his deceased father and the respondents’ deceased father which was entered into in the year 1987 for the sale of the suit land.

**26.** The relevant part of Section 4 of the Limitation of Actions Act provides as follows;

**“(1) the following actions may not be brought after the end period of six years from the date on which the cause of action arose -**

**a) Actions founded on contract”**

**27.** It is therefore my considered view that the trial court interpreted correctly the law regarding specific performance. I find no reason to disagree with the decision given that the sale agreement sought to be enforced was entered into in the year

1987, and the suit having been filed in 2023 which is a period of 36 years, it is crystal clear that the period of six years had lapsed a long time ago.

**28.** Again, I note, based on the evidence on record, that the Appellant has been in occupation of the suit land for a long period of time. Therefore, his possession of the land may be adverse to that of the Respondents. However, it is trite law that parties are bound by their pleadings. It was held in the case of **Tolksdorf v Mwangi & 3 others (2025) KEELC 848 (KLR)**, the court restated this principle by holding that;

**‘Additionally, this is an issue that was not pleaded in them Plaintiff dated 8<sup>th</sup> April 2022. It is trite that parties are bound by their pleadings and cannot be allowed to depart from the same.’**

**29.** The Appellants’ pleadings clearly reveal that he had sought for specific performance and therefore, the court is inclined to determine the suit based on the pleadings of the appellant.

**30.** Additionally, new issues cannot be introduced at the appeal stage as the court is limited to reviewing the issues that were before the trial court. In **Yaa & 3 others v Kithi & another (2025) KEELC 7835 (KLR)**, it was held that;

**‘The jurisdiction of an appellate court is limited to reviewing issues presented adequately before the trial court. A court cannot be deemed to have erred on an issue that was never argued. This precisely**

**reflects the position the appellants are attempting to establish with this ground of appeal.'**

- 31.** From the judgement of the trial court, it is evident that even the court sought to understand the appellant's claim and therefore asked questions on what exact relief the Appellant sought. However, as per the pleadings, it is clear that the claim was premised on specific performance which, as aforesaid, was time barred. Since the basis upon which the Appellant sought the third relief of transfer of the suit land to him was based on his claim of specific performance, which claim was stale, the 3<sup>rd</sup> relief could not be granted.
- 32.** The upshot of the foregoing is that the appeal is dismissed with costs to the Respondent.

Judgment **dated, signed** and **delivered virtually** via the **Teams Platform this 22<sup>nd</sup> day of January 2026.**

**HON. DR. IUR NYAGAKA**  
**JUDGE**

**In the presence of,**

Ms. Odera Advocate for the Appellants

Ms. Kimberly Advocate for the Respondent