

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT SIAYA
ELC APPEAL NO. E031 OF 2024

JOHN OWITI OGOLA

.....**APPELLANT**

VERSUS

JARED ODONGO

ALILA.....RESPONDENT

(Being an Appeal from the Judgement and Decree of the Honorable Limo, SRM delivered in Siaya PM ELC No. 40 OF 2020).

JUDGEMENT

1. The Appellant John Owiti Ogola being aggrieved by the judgement of Honourable Limo, SRM delivered in Siaya PM ELC No. 40 OF 2020 has brought this appeal vide the Memorandum of Appeal dated 17th September 2024 on the following verbatim grounds; -

- 1) THAT the learned trial Magistrate erred in both points of law and fact in entertaining SIAYA MAGISTRATES COURT ELC NO. 40 OF 2022 when there was a similar case with same parties and touching the same subject matter in SIAYA HIGH COURT ELC NO. E025 OF 2022.
- 2) THAT the learned trial Magistrate proceeded on wrong principles and disregarded the fair

administration of justice as provided in article 159 of the Constitution when he allowed the matter to proceed without full participation or any representation of the Applicant as the Applicant's counsel on record was absent during the hearing of the case.

3) THAT the learned trial Magistrate's decision was against the weight of evidence.

2. On the basis of the above the appellant prays that; -
- 1) That Appeal be allowed
 - 2) The judgment and decree of Hon. B. Limo delivered on 20th August, 2024 be set aside.
 - 3) An order of stay of execution of the judgment of Hon. B. LIMO delivered on 20th August, 2024 pending the full hearing and determination of this appeal.
 - 4) Any other relief this Honourable court deems fit and just to grant in the circumstances.
3. Upon admission of the Appeal the court directed that the Appeal proceeds by way of written submissions. Both parties complied and the same are summarised as follows

Appellant's submissions

4. The Appellant submissions are dated 25/07/2025 filed on 14/8/2025 narrowed his grounds of appeal herein to one issue for determination being- Whether the learned trial magistrate erred in both law and facts in entertaining Siaya Magistrates Court ELC NO, 40 of 2022, when there

was a similar case with same parties and touching the same subject matter in Siaya ELC NO. 025 OF 2022.

5. In this regard the appellant submitted that there exists KISUMU ELC OS 170 OF 2016;KISUMU ELC OS 31 OF 2020 now SIAYA OS NO. 28 OF 2021 and SIAYA ELC OS NO. E025 OF 2022 and MASENO SUCC 42 OF 2019 all between the same parties, with the same subject matter EAST GEM/ANYIKO/496 (suit property).
6. That the judgement herein was obtained based on a false verifying affidavit sworn by the plaintiff confirming there were no previous or existing suits between the parties touching on the suit property. That the same is for striking out and consequently the judgement and decree should suffer the same fate as the suit lacked legs to stand on.
7. The appellant further urges that the suit was subjudice and the trial court was barred by the provisions section 6 of the Civil Procedure Act. The court was referred to Republic vs Paul Kihara Kariuki , Attorney General & 2 Others ex parte Law Society Of Kenya [2020] eKLR and Supreme Court in Kenya National Commission on Human Rights vs Attorney General,Independent Electoral and Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR.
8. It was further submitted that in his defence dated 13/06/2022 the appellant questioned the jurisdiction of the trial court. That this based on section 7 of the Limitation of Actions Act as well as section 13 thereof. It is urged that

by then the appellant had been in occupation of the suit land for more than 12 years. That by the time of filing the suit was statute barred yet no leave had been obtained to file the same out of time. Reference is made to the case of Bosire Ongero Vs. Royal Media Services (2015) eKIR. The trial court thus lacked jurisdiction. It is also urged that the suit ought to have been consolidated with the ELC 28 of 2021 pending in the High Court.

Respondents Submissions

9. The respondents submissions are dated 9/10/2025 filed by the respondent in person. The respondent submitted on Whether the suit is re judicata and therefore whether the court lack jurisdiction; Whether the verifying affidavit for the suit is improper and whether the suit can be struck out on the basis of a verifying affidavit deemed improper and constructively and by implication the ONLY issue for determination is whether an Appeal can be raised on empty pleadings or rather without any defence.
10. On subjudice it is submitted that there has been several matters touching on the same parties and subject matter where judgement has been in favor of the respondent. The Appellant has always been mischievous because upon losing the case and to avoid paying costs, he rushes to file another similar suit as a delaying tactic. This is only natural since the Defendants would like to derail the cause of action and have it perish where the status quo

favourable to them prevails. Copies of the judgement were annexed.

11. On whether the matter is resjudicata the respondent refers to the provisions Section 7 of the Civil Procedure Act Cap 21 as well as the ingredients of a suit to be deemed resjudicata as laid out in the case of Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001 and submits that a judgment of the Court passed after a hearing on the merits must bind the parties till set aside in appeal and cannot be permitted to be circumvented by a filing another suit.
12. On whether the suit should be strike out on the basis of the alleged false verifying affidavit it is submitted that the Appellant has failed to demonstrate nor attached the verifying affidavit that he claims to have been sworn by the respondent. Further striking out a suit should be a matter the court must exercise with caution. Reliance is placed in the Court of Appeal decision in The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 and the case of Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000.
13. On the last issue it is submitted that the appeal is a clear abuse of the court process ambiguously conceals the issues for determination in the entire suit. All the preconditions to make an appeal have failed as the Appellant filed their notice of appeal after the timeline

permitted in law had elapsed. Further, this Honourable Court directed that the Appellant to attach documents as evidence of his claims which he has refused and or ignored. Where there is clear abuse of process of court, the Court has to view such conduct seriously and the same is to be halted to save precious time of the public and the court being wasted.

ANALYSIS AND DETERMINATION

14. I have considered the record herein and the submissions filed. In recognition of its duties as a first Appellate court as stated in **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, the court will re-evaluate the evidence, reanalyse the same so as to reach its own conclusion.
15. In the case of **Peters -v- Sunday Post Ltd 1958 E.A. 424** the court set out principles to be considered as follows:

“Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it shown that the trial judge has failed to appreciate the weight or bearing circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate to so decide.”

16. The Plaintiff filed the suit vide a plaint dated 3/6/2020 seeking to evict the defendant who is the appellant herein as well as orders of permanent injunction against the defendant and his agents or anyone claiming under him from trespassing into, and disposing the suit property. It was the plaintiffs claim that suit belonged to his late father who had granted the defendant permission to utilize the land while he was away at work and who upon his return advised the defendant to vacate the land. The plaintiffs case is that the defendant gave vacant possession whereupon the plaintiff father resumed utilizing the same. However, upon the demise of the plaintiffs father and mother in succession leaving the plaintiff and his siblings orphaned the defendant in the year 2003 unlawfully and illegally re-entered the suit property and started utilizing it.
17. Further that in the year 2005 the plaintiffs elder brother (deceased) reported the matter to the assistant chief and the defendant stopped utilizing but re-entered the land in the year 2007 after the said brother died. He then placed a caution against the title when the plaintiff demanded he vacates. He the plaintiff later petitioned the court for grant of letters of administration in respect of Richard Alila Ojee which was issued on 23/03/2018. The Plaintiff terms the defendant a trespasser who continues to use the suit property to the detriment of the plaintiff.

18. The defendants in response to the suit filed a Defence dated 13/06/2022 stating he had been in peaceful, quiet, continuous and interrupted possession and occupation of the suit property and qualified to be registered owner as adverse possessor. He also challenged the jurisdiction of the court to determine the suit on the basis that there existed a suit with similar parties and subject matter being the same -Siaya ELC No. 28 of 2021. He also sought for an order directing the plaintiff to transfer the suit to the defendant.
19. The trial court found that the plaintiff had proved his case on a balance of probabilities against the defendant. The trial court further observed that the defendant did not testify or call any witness. The trial court also citing the provisions of section 26 of the Land Registration Act treated the title produced as prima facie evidence that the person registered therein as proprietor was the owner of the suit property unless it is successfully proved that the same was obtained by fraud or illegalities. The trial court noted that the plaintiff had pleaded his father was the first registered owner of the suit property. The court further found that from the evidence before him it was clear that the plaintiff and his father were in occupation and which was consistent with his statement that the defendant had encroached and which had not been controverted.
20. I have perused the record of appeal and the proceedings of 21/5/2024 at page 74 where the matter is shown to

have proceeded for hearing in the presence of the defendant in person and Ms. Akinyi for the Plaintiff. The defendant informed the court he was ready to proceed and actually proceeded with cross examination of PW1. He then informed the court that his case in the High court was dismissed and he would appeal and that he will not prosecute his defence. Therefore, it is true the defendant did not testify or call any witness in support of his case.

21. Be that as it may it is trite that the burden of proof still would lie with the plaintiff to prove his case even with the absence of any evidence on the part of the defendant. This court associates with the dictum in the case of ***Susan Mumbi Versus Kefala Grebedhin; (Nairobi HCC NO. 332 OF 1993)*** where ***Justice J. V Juma*** stated: -

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial.” (Emphasis is mine)

22. The plaintiff produced in evidence the grant of letters of administration (see page 11 of the ROA) issued on 23/3/2018 in Senior Principal Magistrates Court Siaya in Succession Cause No. 25/2018; Certificate of Official

Search 25/2018; Land Certificate for East Gem/Anyiko/496 showing Alila Ojee as the absolute registered proprietor dated 5/01/1977. He also produced a Certificate of Official Search dated 23/4/2018 (page 26 of the ROA) which corroborated the title except for cautions lodged in 2016 by the appellant. This therefore proved the title was registered in the name of the plaintiff father and that the plaintiff was properly before court claiming as administrator.

23. Further there were no allegations of fraud raised against the title of the deceased plaintiffs father and in any case no evidence was adduced in this regard and therefore there was no basis upon which the title could be impeached. Moreover, while the defendant pleaded that he was in open occupation of the same and as an adverse possessor these remained mere statement in the absence of evidence to prove the same. PW1 reiterated in cross examination that his father tilled the land until his death.
24. Consequently it is the finding of this court that the plaintiff indeed proved his case on a balance of probabilities as correctly held by the trial court.
25. The above analysis and finding therefore also speaks to whether the learned trial Magistrate's decision was against the weight of evidence.
26. The appellants contend that the learned trial magistrate erred in both law and facts in entertaining Siaya Magistrates Court ELC NO, 40 of 2022, when there was a

similar case with same parties and touching the same subject matter in Siaya ELC OS NO. 025 OF 2022. This issue was actually pleaded by the defendant in his defence.

27. The record of proceedings show that both counsels appearing in the matter were aware there was a related matter pending in the High Court. Indeed on 11/4/2023 (see page 72 of initial ROA) both Mr. Ashioya appearing for the defendant and Ms. Akinyi agreed by consent that the proceedings were to be stayed for a period of 60 days to allow the High Court make a determination on the proceedings before it. Ms. Akinyi later informed the court that the matter had been determined (see page 74 initial ROA). On 21/5/2024 when the defendant brought up the issue again as mentioned elsewhere in this judgement, he confirmed that the said case was dismissed.
28. Further the trial court noting that the High Court case was determined and the defendants case dismissed, proceeded for hearing. There was therefore no case pending in a higher court that stopped the trial court to proceed with the matter. The bar under subjudice as provided under the provisions of Section 6 of the Civil procedure Act did not apply at this point. There was no fault in my view with proceeding with the hearing. Further it is on record (see page 66 of initial ROA) that the ruling on succession cause 25/2018 had been delivered on 24/3/2021. This is where the defendant had sought

revocation of the grant the same was clearly no longer subjudice.

29. The court must also pronounce itself on the issue of the courts jurisdiction based on section 7 of the Limitation of Actions Act. It is important to note that the defendant never called any evidence to prove this point. Moreover the plaintiffs evidence was that there were several interruptions of the defendants stay in the suit property which was not controverted with the last re- entry being the year 2013. This suit was filed in the year 2020 seven years after the said re-entry. The suit was not barred by limitation.
30. On whether the suit should be struck out on the basis of a false verifying affidavit. I think for me there are numerous decisions where the courts have held that the absence of a verifying affidavit would not be fatal to a suit. Borrowing a que from case law, in the present case it is noteworthy that it is the contents of the verifying affidavit that were said to be false but there was compliance. I'm emboldened by the following dictum of the Court of Appeal;-
31. In **Luke Cheruiyot and 37 Others v National Oil Corporation NRB CA Civil Appeal No. 91 of 2019 [2015] eKLR** favourably cited the case of **Microsoft Corporation v Mitsumi Computer Garage Ltd. & Another [2001] KLR 470** and stated thus:

“Rules of procedure are the hand maidens and not mistresses of justice. They should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair, orderly and predicable manner, not to fetter or choke it. In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.’

32. The Court further stated thus;-

“As recently as 11th July, 2014 the position taken by the Court in Research International East Africa Ltd v Julius Arisi & 213 Others (supra), was reiterated in the case of Kenya Oil Company Limited v Javantilal Dharamshi Gosrami [Nairobi Civil Appeal No. 324 of 2005] (UR). There, we said: “The provisions of Rule 1 (6) of Order 4 (formerly rule 1 (3) of Order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars. The power to strike out the plaint or [counterclaim] under the Rule is not mandatory but permissive. The phrase “the court

may....' in Order 1 (3) and in the new Order 1 (6) gives the court discretion whether or not to strike out a plaint as the court held in Arisi case (supra)" In the end the court dismissed the appeal which was against an order of the High Court refusing an application to strike out the plaint and instead giving leave to the respondent to file a compliant verifying affidavit. In dismissing the appeal, the Court reiterated the principle stated in D.T. Dobie & Company (K) Ltd v Muchina [1982] KLR 1 that the discretion of the court to strike out pleadings for various reasons such as failure to disclose a reasonable cause of action should be used very sparingly and that a plaintiff should not be driven from the judgment seat unless the case is hopeless."

33. Arising from the above I decline the invitation to make a finding that the suit was and or is for striking out
34. I think I have said enough to show that this appeal lacks merit and it must fail on all grounds of appeal.
35. The appeal is hereby dismissed with costs to the respondents.

Orders accordingly

Dated, signed and delivered at Siaya this 23RD day of MARCH 2026

HON. A. E. DENA

JUDGE
23/3/2026

**Judgement delivered virtually through Microsoft
Teams Video Conferencing Platform in the Presence
of:**

Mr. Agina for the Appellant

N/A for respondent

Court assistant: Ishmael Orwa

ORIGINAL