



**Abayo v Randa ((Suing as the legal representative of Andrea Okulu Oulo alias Okulo Oulu)) (Civil Appeal 303 of 2019) [2025] KECA 223 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 223 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 303 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**JORAM ODHIAMBO ABAYO ..... APPELLANT**

**AND**

**SABINA ONYACHI RANDA ..... RESPONDENT**

**(SUING AS THE LEGAL REPRESENTATIVE OF ANDREA OKULU OULO  
ALIAS OKULO OULU)**

*(Being an appeal from a portion of the Judgment and Decree of the  
Environment and Land Court at Kisumu (S.M Kibunja, J.) dated 20th  
February 2019 in ELC No. 784 (B) of 2015 formerly Ksm. HCCC 173 of 2010)*

**JUDGMENT**

1. The respondent Sabina Onyach Randa as the legal representative of Andrea Okulu Oulo, sued Joram Odhiambo Abayo, the appellant claiming:
  - i. Kshs.171, 700 being value of crops damaged.
  - ii. Cancellation of the appellant's title to Kisumu/Kadongo/3225 and registering the same in the respondent's name.
  - iii. A permanent injunction against the appellant from entering, claiming or interfering with the respondent's use and enjoyment of said land.
  - iv. Costs.
2. The respondent who described herself as the legal representative of Andrea Okulu Oulo (Andrea), the brother to her late husband, who was the registered owner of the suit property at the time of adjudication. She established her home; lived and tilled (planting bananas, cassava and maize) the land,



alongside Andrea from the year 1958 until Andrea's death in the year 2003. Andrea had no wife nor child; and after Andrea's death, she obtained a Limited Grant in Succession Cause No. 54 of 2010; Andrea was buried on the suit property as was her late husband's father one Oulu, his sons Oulu Randa, Okulo Oulu, and Ndege Oulu as well as her co-wife Joyce Oundo Achieng.

3. In the year 2009, she realized that the appellant, whom she used to see visiting Andrea during his lifetime, conspired with land officials and tampered with the suit property's register; and fraudulently got registered as owner of the suit property. The appellant went on to threaten the respondent who has been in actual possession of the suit property for over 30 years, with dire consequences unless she vacated the property. Further, that in October 2010 the appellant destroyed the respondent's crops valued at Kshs.171, 000/-, although he left the mango trees intact.
4. On cross examination, the respondent stated that the appellant never objected to the family members who were buried on the land, nor did he ever mention to her that he had had a transaction with the appellant over the suit land. She also confirmed that she moved out of her initial homestead, where she left Andrea; and set up her home on the same parcel, but on a different location; and that the dispute revolves around the portion where the old homestead stood; and which was occupied by Andrea during his lifetime.
5. The respondent's contention was that after adjudication, the suit property was registered in the name of the deceased, her husband's late brother who died survived with no widow or child; that she and the deceased were living and farming on the suit property from 1958; and that she had obtained limited grant of his estate in succession No. 54 of 2010, and that in 2009 she got to know that the appellant had been registered as the owner of the suit land.
6. Richard Obote Randa, PW2, the son to the respondent confirmed that although his father Cornel Randa Oulu had lived on the suit land, he left the parcel in the year 1990 and established his home elsewhere, but Andrea remained on the suit land, and was the one who was registered as the owner of the parcel; and that the parcel is currently registered in the name of the appellant, although he did not know the circumstances that led to the registration.
7. 73-year-old Amolo Awiti alias Leonard Amolo Awiti, who testified as PW3, confirmed that parcel No. Kisumu/Kadongo/325 was registered in the name of Andrea, that the late Andrea was the one who had planted the crops on that portion, but after his death, the respondent inherited the crops; that he had never seen the appellant use the land, but got to learn that he had sent some youth to destroy the crops.
8. The appellant's case is that the suit property was transferred to him during the lifetime of Andrea Okulu Oulu; and he thereafter obtained title, which he produced as exhibit along with the greencard; that the respondent and her son trespassed onto the land resulting in two criminal cases, Maseno Law Courts Criminal Case No. 3 and 1137 of 2010. The appellant further pointed out that he objected to the suit land being registered with the late Andrea's name, which was allowed and his name was inserted in the adjudication record, a copy of which was produced.
9. The appellant further stated that he left Andrea to look after the land and went to Tanzania, and later on, the said Andrea called him to report that the respondent's son had caused damage to the fence and crops therein, and that the respondent's son was arrested and charged with trespass, and that on the date of the alleged damage the appellant was in Tanzania.
10. The trial Judge formulated 4 issues for determination:
  - i. Whether Andrea Okulu Oulu was registered with the suit property after adjudication.
  - ii. whether the registration of the appellant was obtained fraudulently.



- iii. Whether the respondent has led evidence to show that the appellant damaged her crops.
  - iv. Costs.
11. The trial court having carefully considered the parties pleadings, testimony, and evidence on record came to the conclusion that the suit property after adjudication was first registered with Okulu Oulo who passed away on 13<sup>th</sup> July 2003, that the appellant had availed copies of the adjudication record, and objection proceedings which showed that the appellant's objection was allowed on 22<sup>nd</sup> December 1994 and his name entered into the adjudication record in place of Okulu Oulo and that the copy of the green card confirmed that the appellant was registered as proprietor on 27<sup>th</sup> October 2008 and title issued on 6<sup>th</sup> April 2009.
  12. The learned Judge also went on to find that although the respondent alleged that the appellant had obtained registration fraudulently and in collusion with land officials, no evidence had been tendered to prove fraud on the appellant's part to the standard required by law.
  13. The court on the issue of damage to the crops, noted that neither the respondent, nor her son witnessed the damage being done, nor did they see the appellant occasioning the damage. The court however was of the view that although the appellant stated that he was in Tanzania at the time of the damage, he did not provide the court with his passport in support of the same, and since there was no party contesting with the respondent over the suit land, the respondent had on a balance of probability proved that the appellant caused said damage to the crops.
  14. The trial court entered judgment for the respondent for Kshs.171, 700/= being the value of the damaged crops. The rest of the respondent's claims failed. The appellant aggrieved by the decision of the trial court filed its memorandum of appeal challenging the judgment of the Superior Court on 3 grounds of appeal that the learned trial judge erred: in ordering the appellant to pay the respondent the sum of Kshs.171,700/= when the property was proved to belong to the appellant; in failing to properly analyze the evidence that clearly showed that the appellant was not in Kenya at the time of the alleged destruction of the respondents crops, hence arrived at a wrong decision that the appellant was liable for such damage; and in denying the appellant costs when there was no justification for such denial. The appellant thus prays that; we do set aside part of the judgment that orders him to pay the respondent Kshs. 171,700/-; and also denying him the costs; and instead grant costs to the appellant in both High Court and costs of this appeal.
  15. Basically, the appeal challenges the award of damages for the destroyed crops. As regards whether the trial judge erred in making an order that the appellant pay the respondent damages assessed at Kshs.171, 700/-, the appellant questions why, having made a finding that he was the lawful proprietor of the suit, the trial court then went ahead to find that he was liable for destroying crops on his own property, even after the respondent's own witness testified that it was not the appellant, but rather deviant youth who destroyed the crops. The appellant contends that the nature of damages were akin to special damages which needed to be specifically pleaded and proved, which the respondent did not do.  
  
As to whether the court erred in denying the appellant costs, it is the appellant's case that costs follow the event and that since the appellant had proved ownership of the suit property, the respondent had trespassed and as such appellant should have been awarded costs.
  16. The respondent did not file any submissions.
  17. This being a first appeal; and as has been reiterated in several decisions of this Court, our primary duty is to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per Rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated



in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

18. The main issue in this appeal is whether the trial court was wrong in awarding the respondent damages. The crux of the appellant's case is that after finding that the appellant was the registered proprietor of the suit property, and the failure on the part of the respondent to prove fraud with regards to the appellant's ownership of the suit property, it then follows that the respondent was a trespasser on the suit property and that the appellant could not be liable for damages to crops on his property.
19. From the record it is clear that the appellant produced the title deed and the green card with regard to the suit property confirming the appellant was the registered proprietor of the suit property, and in line with the title being issued to the appellant under the provisions of section 26(1) of the [Land Registration Act](#) the same operates as prima facie evidence that the respondent is the absolute and indefeasible owner of the suit property.
20. On the element of fraud, this Court agrees with the trial court that from the evidence on record, it is clear that the respondent only makes allegations of fraud and has been unable to substantiate the same, and as such the respondent's evidence falls far short of proving any fraud and as such the respondent has failed to discharge the burden of proof and standard of proof required of the respondent.
21. This Court in *Ardhi Highway Developers Limited vs. West End Butchery Limited & 6 Others* [2015] eKLR in considering the issue of fraud observed as follows; 'it is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. (See *Ratilal Gordhanbhai Patel vs. Lalji Makanji* [1975] EA 314,317.)
22. On the issue of damages, it is trite law that special damages must be pleaded and strictly proved. Chesoni J, in quoting Bowen L.J.'s judgment at pages 532-533 in *Ratcliff vs. Evans* [1892] QB 524, an English leading case of pleading and proof of damage,

the character of the acts themselves which produce the damage and the circumstances under which those acts are done, must regulate the need of certainty and particularity with which the damage ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principle. To insist upon more would be vainest pedantry.'

From the afore going it is this Court's view that the nature of the damage and the acts that caused the damage are very capable of being specifically pleaded and proved, something the appellant neglected to do.

23. On the totality of the evidence before this Court as a whole, it is indeed curious how the trial court after finding that the appellant was the registered proprietor of the suit property, would then turn around and award damages for crops destroyed on the appellant's property, with no proof led as to who did the actual damage and basing its finding on the reasoning that since it was only the appellant and respondent contesting over the land, then it must be the appellant who destroyed crops on his own land. He who alleges must prove and it is this Court's view that the respondent did not discharge that burden.
24. The upshot is that this Court finds merit in the appellant's arguments and allows the appeal. Cost in the High court and this court are awarded to the appellant.



DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

