



**Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1048 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 111 OF 2018  
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA  
AUGUST 16, 2024**

**BETWEEN**

**THE CHURCH COMMISSIONERS FOR KENYA OF THE ANGLICAN  
CHURCH OF KENYA ..... APPELLANT**

**AND**

**SAMWEL ORWA WAYUGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Environment and Land Court at Kisii (S. O. Okongo, J.) delivered on 27th June 2016 In ELC Cause No. 4 of 2004)*

**JUDGMENT**

**Judgment of Jamila Mohammed, J.A.**

**Background**

1. This appeal revolves around a dispute between the Church Commissioners for Kenya of the Anglican Church of Kenya (the appellant) and Samwel Orwa Wayuga (the respondent) concerning the location of a church which the appellant put up on a parcel of land. The parcel of land was within KasunguKamreri Adjudication Section. At the time of the suit the parcel was within an adjudication section as defined in the *Land Adjudication Act*.
2. The respondent sued the appellant before the trial court seeking:
  - a. An order of declaration that the plaintiff is the sole registered proprietor of all that piece of land known as KasunguKamreri3699 (the suit property) and that the church building stands thereon and not on land parcel No. KasunguKamreri1202 (plot No. 1202);
  - b. An order of eviction to remove the church building therefrom together with all the faithfuls occupying, praying in, and or working thereon;



- c. An order of injunction to restrain the defendant, their agents, servants, followers and or anybody deriving title from them from erecting a building thereon, entering, alienating or in any other way interfering with the plaintiff's rights thereon;
  - d. Costs of the suit;
  - e. Interests thereon at court rates;
  - f. Such further or alternative relief as this court may deem fit to grant.
3. The appellant filed an amended statement of defence denying inter alia that the respondent is the registered proprietor of the suit property; that the respondent had granted it a license to continue conducting its church services on the suit property; and that the respondent had obtained the consent of the Land Adjudication Officer to file the suit in the trial court.
  4. The appellant contended inter alia that the suit property is non-existent and if at all the respondent is the proprietor thereof, the title was obtained fraudulently, the said title having been nullified on 27<sup>th</sup> September, 1991; that the church building in dispute is built on an unsurveyed parcel of land within Mbita Division which is registered in the name of the appellant; that the respondent had no capacity to grant a licence to the appellant as the area that the appellant occupied had been acquired by the Government and the original proprietors compensated accordingly; and that the respondent's suit was time barred and legally untenable. The appellant admitted that the suit property was at the time situated in an adjudication section.
  5. The appellant called three (3) witnesses in support of its claim. Rev. John Olango Odanga (DW1) testified that in 1991, the appellant applied to the District Commissioner, South Nyanza District for allocation of a parcel of land at Mbita. That the application was successful and the appellant was issued with an allotment letter. That upon issuance of the letter of allotment, the appellant erected a temporary structure on the said parcel of land where they conducted church services. In cross-examination, DW1 stated that:
 

“I am not sure whether the church is standing on Plot No. 2102 or 3699”.
  6. Rev. Charles Victor Orodí (DW2) gave evidence in chief but was not available for cross-examination. The trial court held that in the circumstances, his evidence had no probative value.
  7. Christopher Kagori Kibisu (DW3) testified that the church in dispute is situated on Plot No. 2102. That the parcel of land on which the disputed church building is situated was allocated to the appellant by the Commissioner of Lands vide a letter of allotment dated 27<sup>th</sup> September, 1991. In cross-examination, DW3 testified that:
 

“I am not sure whether the plot that was allocated to us is situated on Plot No. 2102 or on another parcel of land... if the church is not on Plot No. 2102, the church would surrender it to the plaintiff.”
  8. The respondent gave evidence as PW2 and called one witness, Evans Orumi (PW1), who was the Deputy Land Adjudication and Settlement Officer, Suba District. It was his evidence that the suit property was recorded in the respondent's name and that it was adjacent to Plot No. 2102 which belongs to the Government. He produced a sketch map for the area indicating the location of the suit property and its proximity to Plot No. 2102. It was his further evidence that the suit property is separated from Plot NO. 2102 by a road and that the church subject of the dispute is built on the suit property. It was his further evidence that the appellant did not object to the suit property being



registered in the name of the respondent. Further, that his office issued the respondent with consent to file suit in the ELC. He produced a copy of the consent and a letter dated 10<sup>th</sup> September, 1992 which confirmed that the respondent is the owner of the suit property.

9. The respondent testified as PW2 and stated that the suit property was recorded in his name; that the appellant entered into the suit property in 1991 while he was away and put up a temporary structure; that upon his return, he met with the church leader and allowed the respondent to temporarily occupy the suit property. That he warned the respondent not to erect a permanent church building on the suit property. That in 2003, the appellant started digging trenches for the purposes of putting up a foundation for a permanent church building on the suit property whereupon his erstwhile advocates wrote to the appellant on 22<sup>nd</sup> August, 2003 to stop the construction. It was his further evidence that the appellant responded to the letter contending that the church building under construction was on Plot No. 2102. The respondent testified that upon receipt of the appellant's response, he obtained consent from the Land Adjudication Officer to file suit.
10. On 23<sup>rd</sup> June 2016, the ELC (S. Okongo, J.) entered judgment for the respondent against the appellant in the following terms:
  - a) I hereby declare that the defendant's church building at Mbita Township has been put up on plot No 3699 KasgungaKamreri Adjudication Section;
  - b. A permanent injunction is granted restraining the defendant by itself, its agents, servants, followers, andor anybody deriving title from the defendant from erecting, entering, alienating or in any other way interfering with the plaintiff's rights over plot No.3699 KasgungaKamreri Adjudication Section and not on Plot No. 2102 KasgungaKamreri Adjudication Section;
  - c. The injunction granted in (b) above shall be suspended andor stayed for a period of twelve (12) months from the date hereof to enable the defendant to look for alternative premises for its members to worship and;
  - d. the plaintiff shall have the costs of the suit."
11. It is against this decision that the appellant has brought this appeal.

The memorandum of appeal raises four (4) grounds of appeal which are that:

- “1) The learned trial Judge after correctly finding that he had no jurisdiction to determine the rights and interests of the parties herein in land within an adjudication section in his analysis and determination of the case, but erred in law and in fact by thereafter proceeding to hold that the suit did not require the ascertainment of the rights and interests of the parties over the suit property. As a result the learned trial Judge erred in fact and law to determine the suit herein as he did without the jurisdiction to do so;
2. The learned trial Judge erred in law and in fact by misinterpreting the law and holding as he did that where the institution of a suit is barred by statute, time for purposes of limitation of actions does not run until the prohibition is lifted in total disregard to the fact that it was the respondent's duty in this case to seek the requisite consent to file the suit within the timelines allowed by the *Limitation of Actions Act*. As a result the learned trial Judge's foregoing error of fact and law, he failed to appreciate that the suit before him was filed long after the permitted limitation period had lapsed and further, the learned trial Judge consequently erred in fact and law by dismissing the appellant's clear defence of limitation and by failing to hold that the suit before the court was in fact and in law time barred.



3. The learned trial Judge erred in law and in fact, in failing to appreciate and give the required weight to the appellant's evidence that the parcels of land that each of the parties contended to be theirs were different, and proceeded in this misapprehension of the facts to arrive at a wrong determination in total disregard to the evidence tendered by the appellant and without the benefit of calling for and or seeing the adjudication records of the area wherein the dispute arose.
  4. The learned trial judge's decision was arrived at and made without sufficient regard to the totality of the evidence that was presented before him and in total disregard to the appellant's evidence.”
12. The appellant sought orders that:
- i. The appeal be allowed by setting aside the findings of liability against the appellant, and in its place, that the respondent's suit in the ELC be dismissed; and
  - ii. The costs of this appeal be awarded to the appellant, together with the costs of the suit in the ELC.

### **Submissions by Counsel**

13. At the plenary hearing of the appeal, learned counsel, Mr. Jude. T. Ragot appeared for the appellant while G.S. Okoth Advocates appeared for the respondent. Both counsel relied on their written submissions with brief oral highlights.
14. Counsel began by stating that the appellant's case was that the church building is erected on Plot No. 2102 and not on the suit property as alleged by the respondent. Counsel further submitted that both parcels of land fall within the Adjudication Section of MbitaSuba area and as such the respondent ought to have filed a petition with the area adjudication officer for determination in terms of Section 11 as read with Section 15 of the *Land Adjudication Act* (the Act).
15. Counsel reiterated that in the appellant's amended statement of defence the appellant disputed that the church building was and has always been constructed and/or built on an un-surveyed site within Mbita Division registered in the name of the appellant who are the appellant's duly registered trustees. Counsel submitted that Rev. John Olang'o Odanga (DW1) produced a letter dated 23<sup>rd</sup> July, 1993 from the Commissioner of Lands confirming that the plot identified as Plot No. 2102 was properly allocated to the appellant vide the letter dated 27<sup>th</sup> September, 1991. Counsel asserted that this was further corroborated by the letters produced confirming that the Commissioner of Lands and the District Commissioner, Homa Bay District had confirmed that the Plot No. 2102 was properly allocated to the appellant which position was reiterated by Christopher Kagori Kibisu (DW3).
16. It was counsel's further submission that the testimonies in the trial court highlighted that all the parties are in agreement that KasunguKamreri is an adjudication section and the area was still under adjudication when the suit was being heard. That neither party to the suit had title to their respective parcels nor is there any form of a map definitively indicating the respective interest of each party in relation to the two parcels of land. That the trial court acknowledged as much in the opening sentence of its judgment.
17. Counsel asserted that having established that there are two separate parcels of land claimed by the parties herein nothing could have been easier for the respondent than to simply produce at the very least either adjudication records for KasunguKamreri Adjudication Section or a duly commissioned survey report indicating the demarcations Of Each and/or details of the developments on each parcel.



Counsel asserted that, alternatively, the trial court could have conducted a site visit to the suit property and Plot No. 2102 under the provisions of Order 18 Rule 11 of the Civil Procedure Rules to inspect the exact location of the church.

18. In counsel's opinion, it is trite that whoever desires any court to give Judgment as to any legal right dependant on the existence Of Facts which he asserts must prove that those facts exist as per Section 107(1) and Section 109 of the *Evidence Act*. Counsel further asserted that it was, therefore, for the respondent to provide substantive evidence to the effect that there is a clear demarcation of the boundaries between plot No. 2102 and the suit property. Further, that the appellant's church building has been erected on the suit property.
19. Counsel submitted that taking into consideration the weight of the evidence by both parties the respondent's assertion that the disputed church building stood on the suit property ought to have been considered not proved and any findings by the trial court on the contrary was based on a misapprehension of the facts and evidence tabled before it. Counsel submitted that the finding of the trial court was made without sufficient regard to the totality of evidence that was presented to the trial court in total disregard of the appellant's evidence.
20. On the jurisdiction of the trial court, counsel posited that the trial court correctly found that it had no jurisdiction to determine the rights and interests of the parties in land within an adjudication section in its analysis and determination of the case. That the trial court erred in law and in fact by thereafter proceeding to hold that the suit did not require the ascertainment of the rights and interests of the parties over the suit property. That it was the appellant's submission before the trial court that the Act grants the Adjudication officer the mandate to supervise and control adjudication and further that Section 9(2) of the Act grants the adjudication officer the powers to hear and determine any petition or objections relating to a specific parcel of land falling within an adjudication area.
21. It was counsel's further submission that the trial court acknowledged that the key issue in dispute between the parties at trial was the location of the church building within KasgungaKamreri adjudication section.

The trial court further acknowledged that what was left for determination was whether the issue in dispute between the parties was one reserved for prior determination by the adjudication officer before reference to a committee and subsequently to a court of law.

22. Counsel emphasized that Section 10 of the Act states, in relation to the general powers of the Adjudication Officer, that the said officer shall have jurisdiction in all claims made under the Act relating to interests in land in the adjudication area with power to determine any question that needs to be determined in connection with such claims. Further, that the question of whether the appellant trespassed on the respondent's land by construction of their church building thereon and whether the said building is situated on the suit property or plot No. 2102 both being in an undisputed adjudication area, are such questions relating to interest in land. That all connected issues arising therefrom ought to be determined by the Adjudication Officer within the adjudication section. Counsel further emphasized that the Adjudication Officer could thereafter refer the matter to the alternative dispute resolution mechanisms as established under the Act.
23. Counsel contended that the learned trial court made a declaration that it had jurisdiction to handle any dispute in an adjudication section is so far as the same did not relate to ownership of the suit property.
24. Counsel, thus, submitted that once the trial court reached the conclusion that it is not the duty of the court to ascertain the rights and interests in land within an adjudication section, it ought to have



downed its tools as any pronouncement made after that finding was a mere nullity ab initio, one that is amenable to being set aside ex debito justitiae.

25. As regards limitation of actions, counsel postulated that the trial court erred in law and in fact by misinterpreting the law and holding that where the institution of a suit is barred by statute, time for purposes of limitation of actions does not run until the prohibition is lifted. Counsel asserted that in making the said finding the trial court totally disregarded the fact that it was the respondent's duty to seek the requisite statutory consent to file the application within the prescribed timelines allowed by the Act and the fact that he took so long to obtain the requisite consents to institute the suit does not make the said timelines run in his favour.
26. According to counsel, nothing was presented before the trial court in evidence to prove the allegation that while the respondent became aware of the appellant's presence on the suit property in 1991, he reached an agreement with the appellant not to erect a permanent building on the suit property. That it was not until the year 1993 that the respondent realized that the appellant had put up a permanent structure on the land. Counsel submitted that the respondent's brief submission on this point before the trial court was that the suit property was still under an adjudication section as at the date of filing the suit and as such he had to obtain a consent letter before filing the suit. The consent letter is dated 24<sup>th</sup> August, 2003 while the suit was instituted on 19<sup>th</sup> January 2004.
27. Finally, as per counsel, the trial court proceeded to find that under normal circumstances time would have started running against the respondent from the year 1993 when the appellant is said to have breached the licence agreement it had with the respondent. Counsel urged this Court to allow the appeal.
28. In opposing the appeal, counsel submitted that it is clear that the trial court was not called upon to declare which party owns which parcel of land. That at paragraph 43 of the defence it is stated that the disputed church building was and has always been constructed and/or is built on an unsurveyed site within Mbita division registered in the name of the Church Commissioners of Kenya who are the appellant's duly registered trustees is clearly vague and meant to mislead the court. Counsel submitted that the suit property and Plot No. 2102 are specific parcels of land within one adjudication section and that Mbita division is a vast area covering the location Lambwe West, Gembe East and Gembe West and Rusinga West among others and contains several adjudication sections including KasunguKamreri Adjudication Section.
29. Counsel submitted that the ELC relied rightly on the evidence adduced by Evans Orumi (PW1) the Deputy Land Adjudication officer since KasunguKamreri was an adjudication section. Counsel submitted that the effort by counsel for the appellant to widen the scope of the term "an interest in land in an adjudication area" is clearly meant to mislead the court. Further, that there is no adjudication section called MbitaSuba Adjudication Section. Counsel asserted that the trial court was very clear that its judgment is restricted to deciding whether the church building is built on the suit property or on Plot No. 2102 and not on deciding the ownership of the two parcels of land.
30. Counsel asserted that it is worth noting that although the appellant accepts that the area was under land adjudication it never summoned a witness from the land adjudication department to challenge the evidence of PW1. Further, that the defence did not call the District Officer that they allege confirmed that the church was built on Plot No. 2102.
31. Regarding compliance with Section 107, 108 and 109 of the *Evidence Act*, counsel submitted that the respondent called PW1, the Deputy Land Adjudication Officer as a witness. That he had the special knowledge of the names of persons recorded as owners of particular parcels of land within KasunguKamreri Adjudication sections.



Further, that PW1 informed the court and confirmed from his records that the church building was on the suit property and that having proved so it was incumbent upon the appellant to prove that the church was on Plot No. 2102 as the defence alleged.

32. Counsel further submitted that all that the appellant's witnesses proved was that they received an allocation of land within Government land to build a church and that the said letter of allotment did not mention that the said church should be built on the suit property.

Counsel further submitted that the letter of allotment did not also mention Land Parcel No 2102 or any land at all and that the appellants have to date not controverted the evidence adduced by the respondent that he allowed the church to conduct prayers in a semi-permanent church within the suit property and that the impugned judgment was sound and should not be disturbed.

33. On the question of jurisdiction, counsel posited that for the issue of jurisdiction to arise, the civil proceedings must concern an interest in land in an adjudication section. That if a consent in writing is obtained from the Land Adjudication officer the same consent gives a court of law jurisdiction to hear a suit concerning an interest in land in an adjudication section. Counsel further submitted that in this case, PW1 the Deputy Land Adjudication and Settlement Officer gave evidence that he issued the respondent with the requisite consent to file the suit in the ELC.

34. In counsel's opinion Section 2 of the Act defines the word "interest".

That in the instant case in accordance with the oral amendment made on 6<sup>th</sup> June, 2014 the instant appeal does not concern an interest in the suit property but only concerns the issue regarding where the church building owned by the appellant is situate and that the same only calls for a declaratory judgment and not an executory decree. Counsel asserted that from the church building owned by the appellant is on the suit property recorded in the respondent's name in the Land Adjudication Register. Further, that on the other hand the appellant alleges that the church building is on Plot No. 2102. Counsel submitted that the court's assistance was therefore sought by the respondent to resolve the uncertainty in the locus of the church building. Counsel asserted that the ELC therefore had jurisdiction to resolve the uncertainty and hence this ground must fail.

35. As regards limitation of actions, counsel asserted that the respondent duly obtained a consent in writing from the Land Adjudication Officer as required by Section 30(1) of the Act. Counsel further submitted that Kasungu-Kamreri Adjudication Section was still under land adjudication and that the rights of the respondent over the suit property were therefore in the process of ascertainment and recording before the same were registered under the now repealed Registered *Land Act* as replaced by the *Land Registration Act, 2012*. Counsel asserted that the right of action had not accrued to the respondent as at the date of filing the suit in the ELC and therefore the issue of the suit being time barred could not arise under section 7 of the Limitation of Actions Act. Counsel urged this Court to dismiss the appeal.

#### **Determination.**

36. This is a first appeal from the decision of the ELC. Our mandate as the first appellate court is succinctly set out in Rule 31 of the Court of Appeal Rules. In a nutshell, our role which is similar to a retrial entails reconsideration or re-evaluation of the evidence on record and ultimately drawing our own independent conclusion(s).



37. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 as follows

“...this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

38. I shall therefore proceed to consider the issues raised in this appeal by re-evaluating the evidence adduced in the trial court, and arrive at my own conclusions of fact and law. In this regard, I will only depart from the findings by the said Court if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law.

39. I discern the following issues for determination:

- a. Whether the ELC had the requisite jurisdiction to hear and determine the suit giving rise to the instant appeal;
- b. Whether the ELC erred in finding that the suit giving rise to the instant appeal was not barred by the Law of Limitations Act;
- c. Whether the ELC properly considered the weight of evidence adduced by the appellant to reach its conclusion.

40. In this respect, I will first consider the issue of the jurisdiction of the trial court. Section 30 of the Act provides as follows as regards institution of suits over land that is the subject of an adjudication process:

- “(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.
2. Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
3. Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty- eight days after the refusal, appeal in writing to the Minister whose decision shall be final.
4. The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land



the order or decision is not the subject of an appeal and the time for appeal has expired.

5. A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.
6. Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown.”

41. This Court in *Julia Kaburia vs. Kabeera & 5 Others* [2007] eKLR commenting on Section 30 of the Act held as follows:

“The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...

In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication. This protection was availed to the parties herein by the appellate process which culminates with Section 29 of the Act;

- “(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-
- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
  - b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.” [Emphasis supplied].

42. Further, in the persuasive authority of *Tobias Achola Ogundi & 13 Others vs. Cyprian Otieno Ogalo & 6 Others* [2013] eKLR the ELC (Okongo, J.) commented as follows regarding the role of the court vis- a-vis that of the adjudicating bodies under the Act.

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...

The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine



interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land...” [Emphasis supplied].

43. Section 30 of the Act therefore requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The said consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically requires the suits to be discontinued if started without consent. The section therefore clearly affects the power and jurisdiction of courts to hear and determine such disputes.

44. In the instant appeal, the trial court held as follows on the issue of consent to institute the proceedings:

“In his submissions the plaintiff submitted that at all material times the area where the suit property is situated was under adjudication and pursuant to the provisions of Section 30(1) of the *Land Adjudication Act*, Chapter 284 Laws of Kenya no suit could be filed in relation hereto, save with leave of the land adjudication officer. The Plaintiff submitted that time could not start running against him until he obtained the said consent which in this case was not issued until 24<sup>th</sup> August 2003. The Plaintiff submitted that he filed the suit herein on 19<sup>th</sup> January 2004 within the limitation period provided for under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The defendant did not respond to this novel argument that was advanced by the Plaintiff. On my part I would agree with the plaintiff that where the institution of a suit is prohibited by a statute, time for the purposes of limitation of actions does not run until the prohibition is lifted.”

45. There was on record, a letter dated 24<sup>th</sup> August, 2003 among the respondent’s documents on record by one A. M. Chimaliti, the Land Adjudication Officer, Suba Adjudication Area, Suba District, addressed to the Senior Resident Magistrate, Homa Bay Law Court”, and the reference is shown as “Consent for the Institution of Civil Proceedings PNo. 3699, 37000, 3714, 3715, 3744, 2869 Kasungu- Kamreri ADJ Section Suba District”. It read as follows:

“I write in reference to a letter Ref.No.DL3Vol.12003 of 22<sup>nd</sup> August 2003 from G.S. Okoth & Company Advocates acting for Samwel Orwa Wayuga requesting for the consent quoted above. Under the provisions of Section 30(1) of the *Land Adjudication Act* Cap 284 Laws of Kenya, I, the Land Adjudication Officer, Suba Adjudication Area, Suba District do hereby give consent for the institution of civil proceedings against encroachment of the above quoted parcels by the ACK (Anglican Church of Kenya) Mbita. The said consent is given to Samwel Orwa Wayuga who is the recorded owner of Pno.3699 and who subdivided the other parcels to several other parties. After making the orders, please submit your findings to this office”.

46. Section 30 of the Act requires an adjudication officer appointed under Section 4 of the *Land Adjudication Act* to give the consent to institute civil proceedings Therefore, the letter dated 24<sup>th</sup> August, 2003 was properly construed to be the consent envisaged under Section 30, having emanated from the adjudication officer.



47. The letter which was addressed to the Senior Resident Magistrate, Homa Bay Law Court which gave consent to the institution of civil proceedings involving the suit property between the parties was valid for thirty days from the date of the consent. The suit by the respondent was instituted by a plaint lodged with the trial court after the consent in the letter dated August 24, 2003 was granted. Therefore, at the time of inception of the suit, a consent had been granted by an adjudication officer, and the trial Judge did not therefore err in finding that such consent existed and hence the trial court's decision to proceed with the suit was valid.
48. The appellant takes issue with the reliefs sought by the respondent in the trial court. On this issue the trial court found that:
- “The defendant has taken issue with the reliefs which have been sought by the plaintiff. The defendant has contended that it is not the duty of the court to ascertain the rights and interests in land within an adjudication section. I am in agreement with this submission. It is however not correct to say however what the plaintiff has sought in these proceedings is the ascertainment of his rights and interests on the suit property. It is clear from the evidence on record that there is no dispute between the plaintiff and the defendant over the ownership or title of the suit property. The only dispute before me is whether or not the defendant has trespassed on the suit property. Since the dispute between the parties is not over the ownership of the suit property or of such nature that could be determined by the adjudication officer or other bodies set up under the Adjudication Act, Chapter 284 this court has power to adjudicate on the matter and grant appropriate reliefs. I am in not in agreement with the defendant that the plaintiff should have waited until the conclusion of the adjudication process to take action against a person who had trespassed on land which has been recorded in his name and who has no claim over the land...”
49. In the persuasive authority of *Martha Kigen vs. Johana Tibino* [2014] eKLR the ELC (Sila Munyao, J.) stated as follows:
- “In my view, Section 30 is to be applied when the rights of the parties are still the subject of determination in the adjudication process. The reasoning behind Section 30 is so that the process of determining rights of parties in an adjudication area is left to the mechanism set out in the *Land Adjudication Act* and not to the courts. It is the people on the ground who best know who is entitled to what area of land that is the subject of an adjudication process. The effect of Section 30 is to remove that determination from the jurisdiction of the court, so that the court does not determine any conflicts touching on interest over the land without the party aggrieved first seeking permission of the Adjudication Officer.”
50. Accordingly, for the issue of jurisdiction to arise, the civil proceedings must concern an interest in land in an adjudication section. In the instant case, it is on record that Evans Orumi (PW1), the Deputy Land Adjudication and Settlement Officer gave evidence that he issued the respondent the requisite consent to file suit in August 2003.
51. The Act defines the word ‘interest’ in Section 2 as:
- “Interest, in relation to land, includes absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered *Land Act*, cap 300 (now repealed and replaced by The *Land Registration Act*, 2012).



52. From the record, in accordance with the oral amendment made on 6<sup>th</sup> June, 2014 by the parties by consent, the further amended plaint dated 30<sup>th</sup> November, 2010 was amended to read as follows:
- “ a. An order of declaration that the church building owned by the defendant is erected on land parcel No. KasgungaKamreri3699 currently registered in the names of the plaintiff and not on land parcel No. KasgungaKamreri2102 in the name of Mbita Town Council.”
53. In the circumstances, the parties sought a declaratory judgment and not an executory decree. Black’s Law Dictionary, 9<sup>th</sup> Edition at page 469 defines the term declaration of rights in the following terms:
- “ 1. An action which a litigant requests a court’s assistance not because any rights have been violated but because those rights are uncertain. Examples include suits for a declaration of legitimacy, for a declaration of a nullity of marriage and for the authoritative interpretation of a will.
2. See declaratory judgment under Judgment-Often shortened to declaration.”
54. Black’s Law Dictionary, 9<sup>th</sup> Edition at page 918 defines ‘declaratory judgment’ in the following terms:
- “A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement. Declaratory judgments are often sought, for example, by insurance companies in determining whether a policy covers a given insured or peril. Also termed declaratory decree; declaration.”
55. It is notable that at the hearing of the appeal, learned counsel for the appellant conceded that the granting of the consent by the Adjudication Officer for any person to institute suit in a court of law does not oust the jurisdiction of the Adjudication Officer. Counsel for the respondent conceded that the consent obtained from the Adjudication Officer in this case was not necessary in view of the fact that the dispute between the parties did not relate to a determination of ownership of property in an adjudication section but concerned whether the church building was located on the suit property or on Plot No. 2102.
56. In the circumstances, I find that the trial court had the requisite jurisdiction to hear and determine the suit giving rise to the instant appeal.
57. With regard to the issue on Limitation of Actions, I have carefully perused the certified copy of the proceedings before the trial court as well as the submissions filed. The trial court addressed the issue in its judgment as follows:
- “The Plaintiff submitted that he filed the suit herein on 19<sup>th</sup> January, 2004 within the limitation period provided for under Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya. The defendant did not respond to this novel argument that was advanced by the Plaintiff.
- On my part I would agree with the plaintiff that where the institution of a suit is prohibited by a statute, time for the purposes of limitation of actions does not run until the prohibition is lifted.” [Emphasis supplied].
58. Counsel for the appellant asserted that the trial court erred in law and in fact by misinterpreting the law and holding that where the institution of a suit is barred by statute, time for the purpose of limitation



of actions does not run until the prohibition is lifted. Supporting the holding of the trial Judge, counsel for the respondent asserted that the suit property was still under an adjudication section as at the date of filing the suit and the respondent had to obtain a consent letter before filing suit. Was the suit against the appellant statutorily barred in the circumstances?

59. From the record, the respondent obtained consent to sue in 2003 and filed the suit which is the subject of this appeal in 2004. At the hearing of the appeal, counsel for the appellant conceded that as the church building was erected in 1991 the trespass was therefore of a continuing nature. Counsel conceded that the question of Limitation of Actions would therefore not arise and this grievance is now moot. And the appellant had to cede ground on the basis of the concept of a continued tort which this Court alludes to in *Muthiora v Marion Muthama Kiara* (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) (4 February 2022) (Judgment). This Court stated that:

“52. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one-time trespass. The term “accrue” in the context of a cause of action means to arrive, to commence, to come into existence or to become a present enforceable demand or right. The time of accrual of a cause of action is a question of fact (see *Black’s Law dictionary* at Page 23). However, in a case of a continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.

53. Trespass is described under the *Trespass Act Cap 294* to mean “any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof”. On the other hand, a continuing trespass is defined in *Jowitt’s Dictionary of English Law 2nd Edition* (page or paragraph?) as follows:-

“A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”.

In *Black’s Law Dictionary 8th Edition* (page or paragraph?), a continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.”

Finally, in *Clerk & Lindsell on Torts 16th Edition*, paragraph 23 - 01, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

53. From the above definitions of the term “trespass” by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant’s continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent’s claim for trespass being a continued tort is, therefore, not time barred. We find no fault with that finding by the trial court.”



60. By parity of reasoning, in the instant case, I find that the trial court did not err in finding that the suit filed by the respondent was not time- barred under the *Limitation of Actions Act*.
61. On the ground of appeal regarding the weight of evidence adduced, counsel for the appellant contended that the trial court failed to appreciate and give the required weight to the appellant's evidence that the suit property and Plot No. 2102 were different and proceeded on this misapprehension of the facts to arrive at a wrong determination. On the other hand, counsel for the respondent contended that the ELC diligently analyzed the evidence adduced by the parties and their witnesses.
62. It is common ground that the trial court was not being urged to determine which party owns which parcel of land (the suit property or Plot No. 2102). The trial court in the impugned judgment stated as follows:
- “I am in agreement with the defendant that the plaintiff is yet to be registered as the owner of the suit property. The registration of land is undertaken after the completion of the adjudication process. The adjudication process of KasunguKamreri Adjudication Section has not reached that stage. What is clear from the evidence on record is that the suit property has been demarcated and recorded in the name of the plaintiff as the owner thereof. The defendant did not adduce any evidence in proof of its allegation that the suit property was demarcated and recorded in the name of the plaintiff fraudulently.”
63. From the record, the trial court relied on the evidence adduced by PW1, the Deputy Land Adjudication Officer since the two parcels of land were in an adjudication section. The trial court was categorical that the impugned judgment was restricted to deciding on which land the church was built and not on deciding the ownership of the 2 parcels of land (the suit property or Plot No. 2102).
64. From the record, the appellant's counsel did not summon a witness from the Land Adjudication Department to challenge PW1's evidence. Further, counsel for the appellant did not summon as a witness the District Officer who DW1 alleged had confirmed that the church was built on Plot No. 2102. The appellant therefore failed to prove its case to the required standard.
65. Section 109 of the *Evidence Act* provides as follows:
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
66. From the record, PW1, the Deputy Land Adjudication Officer who had the special knowledge regarding the persons recorded as owners of the particular parcels of land within KasunguKamreri Adjudication Section confirmed that the respondent is recorded as the owner of the suit property. He also produced a sketch map which confirmed that the church building was on the suit property. It therefore became incumbent upon the appellant to prove that the church building was on Plot No. 2102 as alleged.
67. From the record, the appellant did not controvert the evidence of PW2.
- Further, the letter of allotment issued to the appellant did not mention Parcel No. 2102 or any land at all. It is notable that the appellant's witnesses DW1 and DW3 submitted that they were not certain whether the church building was on the suit property or on Plot No. 2102.



68. I find that the trial court properly analyzed the evidence before it and considered the weight of evidence adduced by both parties. The trial court did not therefore err in finding as it did.
69. The upshot is that I find no merit in this appeal and I would dismiss it with costs to the respondent.
70. As Tuiyott and Joel Ngugi, JJA. are of the same opinion, it is so ordered.
71. The delay in delivery of this judgment is regretted and was occasioned by exigencies of work.

**Judgment of F. Tuiyott, JA**

72. I have had the benefit of reading, in draft, the opinion of J. Mohammed, JA. I am in full agreement with the reasoning and the conclusion arrived at by the learned judge.

**Judgment of Joel Ngugi, JA**

73. I have read in draft the judgment of my learned sister, Jamila Mohammed, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2024.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

