



**Anyona v Oduor & another (Environment and Land Appeal
E010 of 2022) [2024] KEELC 1211 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

AY KOROSS, J

MARCH 7, 2024

BETWEEN

JANE AWUOR ANYONA APPELLANT

AND

MICHEAL ODUOR 1ST RESPONDENT

MAUREEN ATIENO 2ND RESPONDENT

*(Being an appeal from the judgment of Principal Magistrate Honourable J.P.
Nandi delivered on 8/03/2022 in Bondo PM ELC Case Number E11 of 2019)*

JUDGMENT

Introduction and Background

1. After I had rendered judgment on this matter on 2/03/2023, the respondents filed a notice of motion dated 8/03/2023 in which they sought several reliefs from this court. Upon hearing both parties, this court vacated its earlier judgment of 2/03/2023 together with its consequential orders and heard the appeal de novo. I will now proceed to contextualise the background of this appeal.
2. The appellant is the registered proprietor of land parcel no. East Asembo/Ramba 4247 (hereinafter referred to as “suit property”) while the respondents who are in occupation of the suit property are in-laws to the appellant’s sister one Grace Akoth (‘Grace’).
3. During trial, it emerged that though the appellant had pleaded that Grace’s husband one Francis Otieno (‘Francis’) was deceased, he was actually alive and well and even testified as a witness. It arose that Grace had become estranged from Francis and had vacated the suit property.
4. By a plaint dated 18/02/2021, the appellant instituted suit against the respondents for the tortious action of trespass. She sought several reliefs including a declaration she was the rightful registered owner



of the suit property, eviction against the respondents, permanent injunction against them, general damages for trespass and costs and interests.

5. It was her case she permitted Grace to exclusively settle on the suit property nonetheless, Grace entered it together with Francis and her in laws. She testified that since Grace had vacated the suit property, it was incumbent upon the respondents to similarly vacate it and hand it over to her. According to her, since the respondents had failed to heed to her plea to vacate, they should be described as nothing more than trespassers.
6. In response, the 2nd respondent who was acting in person, entered appearance and filed a defence dated 14/04/2021 in which she made several averments including denying the statements made in the plaint. It was her position that Francis purchased the suit property in 1993 and shortly thereafter in 1996, her matrimonial home was constructed upon it.
7. In addition, it was her case several relatives had been buried on the suit property and the appellant's claim was statutory barred. Further, she alleged the appellant had fraudulently acquired the suit property because according to her, it had been purchased by Francis and not the appellant.
8. After hearing the parties, the trial magistrate in his judgment framed several issues for determination which were whether the respondents were trespassers, whether the appellant was entitled to orders sought and who should bear the costs of the suit.
9. On these issues, the trial magistrate found the respondents were not trespassers and that the suit was statutory barred because one could not recover land after an expiry of 12 years. In addition, he found the previous proprietor of the suit property one Asha Atieno Monyi who testified as PW3 ('Asha') did not have good title to pass to the appellant and that the appellant had not proved her case to the required standards.
10. The trial magistrate proceeded to revoke the appellant's title to the suit property and reverted it to Asha and dismissed the suit with costs to the 2nd respondent.

Appeal to this court

11. Dissatisfied with the above judgment, the appellant preferred an appeal to this court. Although the memorandum of appeal dated 04/04/2022 raised 5 grounds of appeal, the appellant condensed them into 4 grounds;
 - a. The learned trial magistrate erred in law in allowing a stranger to participate in the proceedings;
 - b. The learned trial magistrate erred in law in failing to appreciate the suit was not time barred;
 - c. The learned trial magistrate erred in law and fact by granting orders that were not pleaded by the parties; and
 - d. The learned trial magistrate erred in the law of evidence in deciding the case against the weight evidence.
12. The appellant prayed for this court to vary and set aside the impugned judgment, award the appellant reliefs sought in the trial court and, costs of the lower court suit and of the appeal.
13. Ostensibly in opposition to the appeal, the 2nd respondent Maureen Atieno filed a replying affidavit deposed on 17/10/2023 in which she introduced new evidence. Upon hearing both parties including Mr. Ochanyo who is on record for the respondents, this affidavit was expunged from the court record on 15/11/2023.



Appellant's submissions

14. The firm of M/s Rakewa Otieno & Co. Advocates who are on record for the appellant filed written submissions dated 12/01/2023. Mr Rakewa argued on the condensed grounds of appeal which were enumerated earlier in this judgment.
15. On the 1st ground, counsel submitted the trial magistrate misdirected himself in allowing the 1st respondent to cross examine the appellant yet he had neither entered appearance nor filed a defence.
16. On the 2nd ground, counsel contended limitation of actions could not suffice because the appellant had on several occasions including in 2003, 2011 and 2014 beseeched the respondents to vacate the suit property to no avail.
17. Counsel submitted there was no subsisting dispute between the appellant and Asha concerning the purchase of the suit property and it did not matter how long it took for the suit property to be transferred by Asha to the appellant.
18. Counsel submitted it was erroneous for the trial magistrate to cancel the appellant's title to the suit property and to buttress his position, counsel relied on the case of *Maliamu Ncurubi M'ibiri v Francis M'imanyara M'ringera* [2011] eKLR which cited with approval *Mbira v Gachubi* [2002] 1 EA.
19. On the 3rd and 4th grounds, it was counsel's Submission that despite the adduced evidence proving the appellant purchased the suit property from Asha's husband Justus Otieno Ogweyo ('Justus'), the trial magistrate erred in revoking the appellant's title to the suit property. Counsel submitted that failure by the appellant to produce the agreement of sale was not sufficient ground to warrant a cancellation of title.

Respondents' Submissions

20. The firm of M/s Jesse David, Ochanyo & Kurgat Advocates LLP who are on record for the respondents filed written submissions dated 26/11/2023. Counsel identified one issue for determination which was whether the appeal was merited.
21. Before I proceed, I noted the bulk of these submissions were anchored on the expunged affidavit and for that reason, portions of the submissions touching on issues or averments advanced in the affidavit will be disregarded.
22. Counsel raised a point of law that the appeal was not properly on record because it was filed out of time without leave of court being filed. Counsel submitted the appeal was filed on 26/07/2022 which was 3 months after the trial court's judgment.
23. Counsel rehashed the testimonies of the parties and those of their respective witnesses and averred the appellant's claim before the trial court was by virtue of Section 7 of the *Limitation of Actions Act*, statutory barred and therefore, the learned trial magistrate did not err in arriving at his decision that the suit was time barred and the respondents were not trespassers.
24. Counsel urged this court to dismiss the appeal with costs. I must hasten to add that counsel did not remit the authorities he relied upon to this court.

Issues for Determination

25. As a first appeal, I am enjoined to revisit the evidence that was before the lower court afresh, analyse it, evaluate it and arrive at my own independent conclusion but always bearing in mind the trial



magistrate had the benefit of seeing the witnesses, hearing them and observing their demeanour and giving allowance for that. See *Selle v Associated Motor Boat Company Ltd*, [1968] EA 123.

26. I have thoroughly considered the records, grounds of appeal and parties' rival submissions. Taking them into account, I will address the issue of whether the appeal is competently before me and in addition, I will adopt the consolidated grounds of appeal as the issues falling for determination.

Analysis and Determination

I. Whether the appeal is competently before this court

27. On a two-fold argument, it was Mr. Ochanyo's argument the appeal was incompetent because by the provisions of Order 43 Rules (2) and (3) of the *Civil Procedure Rules*, the appellant needed to seek leave of the court before he could appeal and further, the appellant lodged his appeal on 26/07/2022 which was outside the statutory timelines.
28. Having interrogated the relevant provisions of law and the record, nothing turns on this. I say so because by the provisions of Section 16A (2) of the *Environment and Land Court Act* which is a mirror of Section 79G of the *Civil Procedure Act*, the appellant needed to file his appeal within 30 days from the date of the impugned judgment which he did since judgement was rendered on 8/03/2022 and the memorandum of appeal filed on 4/04/2022 and not 26/07/2022 as alluded to by counsel.
29. Further, a reading of Order 43 Rule 3 of the *Civil Procedure Rules* elucidates that the entire provision of Order 43 does not apply to decisions which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in a suit. Put another way, when the court renders a final determination in a dispute, the appellant can appeal as of right but of course, he must appeal within the statutory period or seek extension of time. I find and hold the appeal is competently before me.

II. Ground (a)

30. The stranger the appellant was referring to was the 1st respondent. He cross examined the appellant and her witnesses yet he had never entered appearance in accordance with Order 6 Rule 1 of the *Civil Procedure Rules* or filed a defence as required by Order 7 Rule 1 of the *Civil Procedure Rules*.
31. It is trite law if a party fails to enter appearance and file a defence, he does not have a right of audience in the course of proceedings including cross-examining the appellant and her witnesses.
32. However, during the hearing of the suit, the appellant who was represented by counsel, never raised an objection to such participation by the 1st respondent in order for the trial magistrate court to decide on it and thus form a basis of an appeal. This ground of appeal was a non-issue before the trial magistrate and is being raised late in the day and I cannot usurp the power of the trial court. I find and hold this ground of appeal fails.

III. Ground (b)

33. In considering Section 7 of the *Limitation of Actions Act*, the trial magistrate in the impugned judgment stated:

“...the above provision clearly states that one cannot recover land after the expiry of 12 years.
In our instant case, the suit was filed in 2021 without leave of the court. Further by the time



the suit land was being transferred to the Plaintiff by PW3, the title to the suit land had already been extinguished and she had no good title to transfer to the Plaintiff.”

34. The appellant’s claim was on the act of continuing trespass and she had allegedly given notices to the respondents for them to vacate the suit property. In acts of continuing trespass, the cause of action continues running anew each time an intruder without permission continued invading or occupying a property. On this, I place reliance on the case of [Gladys Koskey v Benjamin Mutai](#) [2017] eKLR where the court expressed itself as follows;

“On the first issue, the suit is founded on trespass which is a tort. Under section 4 of the *Limitation of Actions Act*, an action founded on a tort must be instituted within three years. However, as the Plaintiff indicates, the trespass is continuous and the *Limitation of Actions Act* does not come into play. This is supported by the case of *Nguruman Limited V Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004* reported in 2007 KLR. Citing Clerk and Lindsell on Torts 16th Edition, paragraphs 23-01 the Court of Appeal stated that:

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

35. In her defence, the 2nd respondent admitted her home stood on the suit property which is registered in the appellant’s name.
36. The appellant alleged Grace entered the suit property with her permission and Grace extended such permission to her husband Francis and her in laws. In essence, the respondents who were Grace’s in laws derived their permissive rights through her. Grace testified as PW2 and corroborated the appellant’s averments. It was common ground Grace and Francis had parted ways. The appellant’s assertion that Grace left the suit property in 2018 was uncontroverted.
37. The head licensee’s permission having come to an end, the respondents had no business being in occupation from 2018 and each time they occupied the suit property without a new licence being issued directly to them by the appellant, they were deemed as trespassers. I place reliance on persuasive decisions from India. In the Supreme Court of India Civil Appellate Jurisdiction Civil Appeal No. 2789 of 2005 [Laxmi Ram Pawar \(Appellant\) v Sitabai Balu Dhotre & anr \(Respondents\)](#) which cited with approval an extract of [Salmond on the Law of Torts](#) stated as follows;

“ 14. In *Salmond on the Law of Torts*, 17th Edition by R.F.V.

Heuston, 1977, page 41, the expression, ‘Trespass by remaining on land’ is explained in the following manner:

“Even a person who has lawfully entered on land in the possession of another commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff’s land or vehicle is as much a trespass as to enter originally without right. Thus, any person who is present by the leave and licence of the occupier may, as a general rule, when the licence has been properly terminated, be sued or ejected as a trespasser, if after request and after the lapse of a reasonable time he fails to leave the premises.” “ Emphasis added.

38. The High Court of Calcutta in [Smt Kiran Arya & Anr. v. Ambalal Sarabhai Enterprises Ltd. & Ors.](#) - Cs No. 324 of 1989 [2013] Inwbkoc 12035 (12 August 2013) had this to say concerning the



relationship between a landlord, a head licensee and sub-licensees where permission to occupy property ceased to exist;

“ Even if the argument based on clause 11 is accepted but that by itself would not justify the claim of the defendants to continue its occupation after the original tenant ceased to exist. They have no right to be in possession. These clauses 5 and 11 would continue so long the tenancy subsists. A person entering the premises on the basis of such a permissive clause cannot elevate his status to a contractual or statutory tenant. The agreement itself comes to an end with the dissolution of the original tenant.”

39. It appears the trial magistrate misapprehended the law. It is my finding the trial magistrate erred when he found the appellant’s suit was statutory barred. This ground of appeal succeeds.

IV. Grounds (c) and (d)

40. By Sections 24 and 26 of the [Land Registration Act](#), a certificate of title issued by the land registrar is taken by all courts as prima facie evidence the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. In addition, the title of that proprietor shall not be subject to challenge, except on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

41. These provisions of law have been applied in a line of judicial decisions including [Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another](#) (2013) eKLR and [Alice Chemutai Too v Nickson Kipkurui Korir & 2 others](#) [2015] eKLR.

42. Within the provisions of Order 2 Rule 10(1) of the [Civil Procedure Rules](#) and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities but not beyond reasonable doubt. The Court of Appeal decision of [Elijah Kipng’eno Arap Bii v KCB & Another](#) Civil Appeal Number 276 of 2018 stated that;

“...it is trite that where fraud is alleged, it must be specifically pleaded, and it is not enough to deduce it from the facts. The standard of proof of an allegation of fraud is above a balance of probabilities and the onus is on the party alleging fraud to provide evidence and prove his case...”

43. The appellant produced a certificate of official search and a title document which showed she was the registered owner of the suit property. By such registration, she had a right to possession, occupation and use of the suit property including suing for trespass.

44. She explained the root of her title which was corroborated by Asha. It was both their testimonies that the appellant purchased the suit property from Justus.

45. A gazette notice and grant of letters of administration evidenced Justus died on 5/10/1993 meaning any alleged agreement for sale between the appellant and Justus could only have taken place on or before his death.

46. A transfer of the suit property by Asha to the appellant could only take place after 3/07/2018 which was when she obtained a confirmation of grant. The trial magistrate took issue with failure by the appellant to produce an agreement for sale to prove she purchased the suit property from Justus.

47. It must be borne in mind that prior to Section 3 (3) of the [Law of Contract Act](#) amendments being operative from 1/06/2003 (See [Statute Law \(Misc. Amendments\]](#) No.2 of 2002), the law gave



allowance to contracts in land being made orally subject to certain conditions being met. This repealed Section 3 (3) stated thus: -

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract –

- (i) Has in part performance of the contract taken possession of the property or any part thereof or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.” Emphasis added.

48. It is the honest opinion of this court the trial magistrate ought to have satisfied himself whether the agreement for sale was made orally or in writing. Additionally, it was not in doubt Grace, Francis and the respondents entered the suit property in 1993 which held credence the agreement had been partially fulfilled by the appellant and she was awaiting registration in her name.
49. On the other hand, although the 2nd respondent in her defence pleaded the appellant had acquired title to suit property illegally and fraudulently, she did not particularize or prove fraud to the required standards. See Order 2 Rule 10(1) of the [Civil Procedure Rules](#) and *Elijah Kipng'eno Arap Bii v KCB & Another* (Supra).
50. Although Francis who testified as DW2 asserted the appellant had altered his documents to the suit property by substituting his name as purchaser with her name, he never tendered any documents to prove such an alteration. The green card which was produced did not demonstrate the suit property was ever registered in his name.
51. I must hasten to add that it was suspect the appellant who all along knew Francis was alive, pleaded he was deceased. Further, knowing it was allegedly through Grace that Francis and the respondents entered the suit property, she never joined him to the proceedings. Be that as it may and subject to Francis circumventing legal hurdles, he can pursue any claim he has against the appellant or any other party.
52. It is trite law parties are bound by their pleadings. Despite the 2nd respondent not counterclaiming and particularizing fraud or even proving fraud to the required standard, the trial magistrate without any prayer being sought by the 2nd respondent, cancelled the appellant's title to the suit property.
53. This was also notwithstanding the clear provision of Section 26 of the [Land Registration Act](#). It is the finding of this court the trial magistrate erred. I rely on the case of *Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR where the Supreme Court of Kenya quoted with approval the following excerpt from the decision of the Supreme Court of India in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Another*, Civil Appeal Nos. 5710-5711 of 2012 [2014] 2 S.C.R. where the court held;

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its



pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

I find and hold the 3rd and 4th grounds of appeal succeed.

54. Upon considering the foregoing reasons, I am convinced it would be a proper exercise of my discretion to interfere with the impugned judgment.
55. Despite pleading general damages, the appellant did not lead evidence on the loss she suffered by the acts of the respondents. Trespass is actionable per se and having established the respondents were trespassers, I award her general damages of Kshs.100, 000/=.
56. In the end, the appeal is found to be meritorious. I hereby set aside the entire judgment of the lower court. It is trite law costs follow the event. I have considered the relationship between the parties and in my considered view, each party shall bear their respective costs of this appeal and of the lower court suit. I hereby issue the following disposal orders;
 - a. A declaration be and is hereby made that the appellant is the rightful registered owner of Land Parcel No. East Asembo/Ramba/4247.
 - b. The respondents are hereby granted 180 days from the date of service of the orders of this court to remove themselves and their developments from land parcel no. East Asembo/Ramba 4247 and give the appellant vacant possession, and in default, the appellant shall forcefully evict the respondents together with their servants or agents.
 - c. A permanent injunction be and is hereby issued restraining the respondents, their servants, agents and workers from entering or occupying, constructing, destroying, damaging or dealing whatsoever with land parcel no. East Asembo/Ramba 4247.
 - d. General damages for trespass are ordered in the sum of Kshs. 100,000/- payable by the respondents to the appellant.
 - e. Each party shall bear their respective costs of this appeal and lower court suit.

57 Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF MARCH 2024.

HON. A. Y. KOROSS

JUDGE

07/3/2024

Ruling delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

Mr. Rakewa for appellant.

Mr. Ochanyo for respondents

Court assistant: Ishmael Orwa

