Juneja (Suing as the Legal Representative of the Estate of Hamida Amin Juneja) & another v Meja & another (Civil Appeal 35 of 2018) [2023] KECA 1241 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1241 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 35 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

OCTOBER 6, 2023

BETWEEN

AMIN AHMED JUNEJA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HAMIDA AMIN JUNEJA) .... 1ST APPELLANT

ROSHAN IQSBAL JUNEJA .... 2ND APPELLANT

AND

WILLIAM ASUDA MEJA .... 1ST RESPONDENT

SAMUEL MEJA .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Kisumu (Kibunja, J.) dated 17th January, 2018 in ELC Case No. 46 of 2013)

JUDGMENT

Judgment of Joel Ngugi, JA

1. This appeal arises from the judgment of the Environment and Land Court (ELC) (Kibunja, J.) dated 17th January, 2018. The judgment relates to a suit filed by the appellants herein. In the said suit before the superior court, the appellants were the 1st and 2nd plaintiffs respectively. They sought for the following prayers:

    a. An order of eviction and delivery of vacant possession of land parcel no. Kisumu/Kirando/1837.

    b. An of order permanent injunction barring the defendants, their servants or agents from trespassing and or encroaching onto land parcel no. Kisumu/Kirando/1837.

    c. Costs and interests of the suit.

2. In their plaint dated 18th February, 2013, the appellants averred that they were at all material times the joint registered proprietors of land Parcel No. Kisumu/Kirando/1837 (suit land), measuring 0.25ha. While the 1st appellant is the joint owner of the suit land, the 2nd appellant is the legal administrator of the estate of Hamida Amin Juneja (deceased), and is also a joint registered proprietor of the suit land.

3. The appellants alleged that in 2011, the respondents encroached onto the suit land and constructed houses which they are now residing in without their consent, authority and knowledge.

4. The appellants alleged that the respondents: trespassed onto the suit land thus barring the appellants from developing it; interfered with the appellants peaceful enjoyment of the suit land; and failed to vacate the suit land upon being given notice by the appellants.

5. The respondents opposed the appellants suit through their statements of defence, all dated 14th March, 2013, and denied the allegations by the appellants. The 1st respondent stated that the suit land was given to him by his father in 1960 and he has been farming thereon. He further claimed that he had been residing on the suit land since 1989. The 1st respondent further stated that he sold half of the suit land to one Shantilal Patel (Patel) in 1984 and they agreed that the first registration was to be done in the name of the 1st respondent, after which subdivision was to take place and half the suit land transferred to the said Shantilal Patel.

6. Consequently, the respondents stated that they were strangers to the appellants' allegations and denied that they had encroached onto the suit land without the consent, authority and knowledge of the appellants. They further stated that the appellants claim was time barred and in the circumstances, the court had no jurisdiction to hear the same. Additionally, the 2nd appellant stated that the suit was bad for non-joinder and applied that the same be struck out.

7. In a reply to the respondents defence, the appellants objected that the suit land was given to the 1st respondent by his father in 1960 or that he had been farming the same ever since. The appellants also denied that the respondents had been residing on the suit land since 1989. It was their case that the suit land was purchased from Shantilal Patel in the name of the deceased and the 2nd appellant.

8. During trial, the appellants testified as PW2 and PW1 respectively; and called George Olwalo Nyangweso, the Land Registrar, Kisumu, who testified as PW3.

9. PW1 (the 2nd appellant) reiterated the contents of the plaint and testified that he bought the suit land in 1984 from Patel, in the name of his wife, the deceased, and his sister-in-law, the 1st appellant (PW2). He stated that Patel signed the transfer form on 15th February, 1986 and took it to the lands office on 17th April,1989. To this end, PW1 produced a copy of a green card which showed Patel as the first registered owner on 17th April, 1989 and a transfer done on the same day to the deceased and the 1st appellant. PW1 testified that he went to view the suit land in 2010 and found some structures (semi-permanent houses) which had been built by the respondents, and the 1st respondent informed him that the suit land belonged to him.

10. During cross-examination, PW1 stated that he fenced the suit land and visited it many times in the years 1989 and 1991, during which time, he claimed, no one resided on it. PW1 also stated that he had a sale agreement with Patel, in which he paid Kshs. 25,000 for the suit land and was issued with a title deed on 17th April, 1989, although they did not get consent from the Land Control Board (LCB). He further denied receiving Kshs. 6000 from the 2nd respondent as payment for purposes of subdivision of the suit land.

11. PW2 (the 1st appellant) testified that sometimes in 1984, she bought the suit land jointly with the deceased. She testified that they bought it from Patel and fenced it with sisal plants. Later, in 1986, they transferred the suit land in their names and were issued with the title deed on 17th April, 1989. PW2 testified that she moved to Mombasa and left PW1 to keep check of the suit land. However, in 2010 when she went to view the suit land, she saw two houses which looked new and told PW1 to take action. She reiterated the prayers sought in the plaint and stated that no one resided on the suit land when they bought it. She further denied that the suit land belonged to the 1st respondent and that he has was in possession thereof since 1960.

12. During cross examination, PW2 stated that there was no sale agreement between themselves and Patel. However, Patel transferred the suit land to them, but she could not recall whether he showed them a title deed. She also stated that the green card showed that Patel was registered as the owner of the suit land on 17th April, 1989, and on the same day, herself and the deceased were also registered as owners of the suit land. PW2 added that there were trees on the suit land which could be an indication that somebody had resided thereon for quite some time. However, during re-examination, she said that she could not tell whether the trees on the suit land were planted or they grew on their own.

13. PW3 (the registrar of lands) testified that the land transfer form showed that Patel transferred the suit land to the deceased and PW2, all of whom signed the same. The transfer form was received for registration on 17th April, 1989, and it was for the entire suit land.

14. During cross examination, PW3 stated that the green card showed Patel as the first registered owner and he could not tell who owned the land before him; however, that information was available at the adjudication department. In this regard, he stated that before the first registration, there exists a demarcation map showing the parcel of land. He also stated that they did not have the original transfer form in their office file and neither did he have the demarcation register; and so the transfer form produced in court was the one that was used to transfer the suit land. Lastly, PW3 added that there are two entries in the green card which were cancelled when they suspected forgery; and there was also an entry which showed that the title deed to the suit land was re-issued as the first one either got lost or was destroyed.

15. On their part, the respondents testified as DW1 and DW3 respectively; and called Wilkister Amolo Asundi (sister to DW1) and Simon Osege Orwa (chief of Kisumu Central location) who testified as DW2 and DW4 respectively.

16. DW1 (the 1st respondent) testified in support of his defence and stated that he got the suit land from his father in 1960. He said that he planted trees in 1970. He stated that the suit land was adjudicated in 1976 and registered as land parcel no. Kisumu/Korando/1837. DW1 stated that later, in 1984, he sold half the suit land to Patel for Kshs. 15,000 and they agreed that Patel would assist in registering the same in the name of DW1; and thereafter, they would subdivide it so that each one could have his portion. Patel was to get the upper portion of the suit land. But DW1 never saw Patel again from that time.

17. DW1 stated that he had resided on the suit land since 1989 and that his wife who died in 2000, was buried thereon. However, in 2010, one Samuel Otieno Okello (Samuel), showed up on the suit land with a copy of a title deed and sale agreement and informed DW1 that he had bought it from one Faruk Okoth (Faruk), who bought it from Patel. Samuel informed DW1 that he wanted to fence the suit land, and he did fence the portion that DW1 had sold to Patel.

18. Later, in 2011, PW1 showed up at the suit land and inquired who had fenced the same and DW1 informed him that Samuel did. PW1 told DW1 that he knew the said Samuel as they had met in Mombasa. However, PW1 informed DW1 that the suit land belonged him. DW1 then called his son,

DW3, and briefed him about his agreement with Patel. DW1 testified that thereafter, PW1 said he would process the title deed and then come with a surveyor and evict Samuel. Afterwards, PW1 asked DW3 for Kshs. 6000 to get a surveyor to subdivide the land, which money he was given to him; but two months later, DW1 received court summons which showed that PW1 had filed a suit against him.

19. During cross examination, DW1 conceded that he did not have documentation to show that the land was registered in his father's name since at that time, the suit land was not demarcated and adjudication took place in 1976. However, DW1 said that he had documentation that showed that the suit land had been registered in his name. He further stated that he had a sale agreement with Patel which unfortunately got burnt in 1989 when his house caught fire, but he did not report the incident to the police, therefore he did not have a police abstract. DW1 also stated that he did not sign transfer forms in favour of Patel.

20. In any event, DW1 stated that after selling half of the suit land to Patel, he visited the lands office in 2000 and the records at the land adjudication office indicated that the suit land was still registered in his name, but he did not obtain any document to confirm it. DW1 stated that later, in 2011, he returned to the lands office and found out that his name had been removed from the title and replaced with that of PW2 and the deceased. He consequently filed a caution against the title but did not file a suit against PW1 and PW2 or Patel. He also stated that he wrote a letter to the land registrar, Kisumu but never got a response.

21. DW2 (DW1's sister) testified that the suit land belonged to DW1 as it was given to him by their father in 1960; and they had been tilling the same until 1989 when DW1 built a house thereon. She stated that DW1 planted trees on the suit land which were still there. She also stated that DW1's wife died "in 1974" and was buried on the suit land. Additionally, DW2 stated that DW1 lost two children, both of whom were also buried on the suit land.

22. During cross examination, DW2 stated that DW1's house got burned in 1989 but was rebuilt the same year. She stated that she did not have any documentary evidence to confirm whether DW1's wife and children were buried on the suit land. During re- examination, DW2 clarified that DW1's wife and children died after he started residing on the suit land.

23. DW3, the 1st respondent's son, testified in support of his defence and stated that the suit land belonged to his father (DW1) who sold half of it to Patel in 1984. But later, in 2011, PW1 showed up at the suit land and claimed that it belonged to him as he had bought it from Patel. Thereafter, DW1 told DW3 that PW1 wanted Kshs. 6000 for subdivision of the suit land. DW3 met with PW1 who told him that he wanted Kshs. 10,000 for subdivision.

    However, DW3 gave PW1 Kshs. 6000 on 25th May, 2011, and PW1 acknowledged receipt of the same, which document was produced in court.

24. During cross examination, DW3 stated that the receipt with regard to the Kshs. 6000 did not specify the purpose of the money paid or the suit land. He stated that he built his house on the suit land in 2001 and rebuilt it in 2010. He also conceded that they filed a defence without a counter claim.

25. During re-examination, DW3 stated that PW1 claimed to be the owner of the suit land in 2011 when he visited the land; although DW1 claimed a portion of it. In any event, DW3 stated that PW1 filed the suit before them as they (DW1 and DW3) were waiting for other documents that they had applied to get from the adjudication office, these included, objection proceedings which they have not received to date.

26. DW4 testified that he was the chief of Kisumu Central location since 1993 – a period of more than 23 years. He stated that he wrote the letter dated 15th July, 2011 addressed to the land registrar, in which

DW1 claimed ownership of a portion of the suit land which he had resided on since before DW4 was employed in 1993. DW4's testimony, therefore, was that the 1st respondent had been in possession of, and resided on the suit land since before 1993.

27. In its decision, the trial court coined four (4) issues of determination, namely: -

a. Whether the plaintiffs were the legally and procedurally registered proprietors of the suit property.

b. Whether the defendants had any legal claim over the suit property or portion thereof.

c. Whether the plaintiffs claim over the portion of the suit land occupied by the defendants was time barred.

d. Who pays the costs.

28. The trial court made the following conclusions after a careful consideration of the pleadings, documentary and oral evidence and submissions of the parties:

a. The copy of the green card produced showed that the suit land was first registered on 17th April, 1989, in the name of Dilipkumar Shantilal Patel and title deed issued.

b. That the said Dilipkumar Shantilal Patel is the same Shantilal Patel that the 1st defendant sold half of the suit land to at Kshs. 15,000 in 1984.

c. While the 1st defendant waited for Shantilal Patel to assist him have the suit land registered in his name before it was subdivided into two equal portions between them, the said Shantilal instead had the suit land registered in his name on 17th April, 1989; and on the same day transferred the suit land to Hamida Amin Juneja and Roshan Iqbal Juneja, the plaintiffs, without applying for and obtaining the requisite land control board consent required under Section 6 and 8 of the *Land Control Act*.

d. Although the plaintiffs claimed the suit land was vacant when they bought it in 1984, the defendants availed evidence that DW2 had been farming on it by then and the 1st defendant built his first house there in 1989 and has lived on half of the suit land since 1989.

e. Further to the finding in (d) above, the court found that by the time the plaintiffs filed their claim vide the plaint dated 18th February, 2013, the 1st defendant had resided on half of the suit land (lower part) for about 24 years. Therefore, it followed that the plaintiffs claim over half of the suit land was statute time barred under Section 7 of the *Limitation of Actions Act* and their title over that portion has been extinguished pursuant to section 17 of the said *Act*.

f. The 1st defendant conceded to having sold half of the suit land comprising of the upper part to Shantilal Patel and that was why he raised no objection when one Samuel Otieno Okello fenced that particular portion claiming that he had bought it from Faruk Okoth. That the land that Shantilal Patel was entitled to and could have transferred to the plaintiffs was half portion of the suit land and not the whole of it.

g. That although the defendants did not raise a counter claim to the plaintiffs claim over the suit land, they raised a defence that the plaintiffs claim in respect of half the suit land was statute barred and successfully established evidence over half the suit land. Thus, the prayers of eviction and injunction by the plaintiffs cannot issue in respect of the half portion of the suit land (lower part) as the same was occupied by the 1st defendant since 1989.

h. That although the 1st defendant found out that the suit land was registered in the name of Shantilal Patel and subsequently transferred to others in the year 2010 and visited the lands registry, he has not commenced any court proceedings against the Land Registrar and Shantilal Patel to contest or challenge the said registration and transfers. Further, Shantilal Patel was not a party in the proceedings and a copy of the adjudication register in respect of the suit land was not availed to help the court determine conclusively whether the said Shantilal Patel had been entered as the proprietor of the suit land in the register legally and procedurally.

i. That as there was no evidence adduced to prove that the defendants occupied the half portion of the suit land that is on the upper part, and as the 1st defendant clarified that he sold that portion to Shantilal Patel, there would be no need to issue eviction and injunction orders against the defendants in respect of that portion.

29. Flowing from the above conclusions, the trial court found that the appellants failed to prove their case against the respondents to the required standard, thus, dismissed their case.

30. Aggrieved by the decision of the trial court, the appellants filed a Notice of Appeal dated 30th January, 2018, and a Memorandum of Appeal dated 26th March, 2018, in which they raised five (5) grounds of appeal. These are that the learned trial judge erred in law and fact in:

1. Finding that the plaintiffs claim over half the suit land, that is the lower part, is time barred.
2. Completely ignoring the evidence of the plaintiff and buying wholesale the evidence of the defendants without testing its truthfulness.
3. Offering to the defendants a portion of land when the defendant had not filed a counter claim thereby occasioning injustice to the plaintiff.
4. Dismissing the plaintiffs case against the overwhelming evidence tendered by the plaintiffs.
5. The learned trial judge's finding is not supported by evidence tendered.

31. Consequently, the appellants prayed that the appeal be allowed with costs and that this Court issues eviction and injunction orders against the defendants in respect of the suit land.

32. On the other hand, the respondents filed a Notice of Cross- Appeal dated 10th October, 2021 in which they raised five (5) grounds of appeal. These are that the learned trial judge erred in law and fact:

1. When he made a finding that the 1st and 2nd respondents have acquired an overriding interest on only half of the suit property having lived on suit property for a period of 24 years, when in fact the 1st and 2nd defendants had lived on and used the whole of the suit property LR. Number Kisumu/Korando/1837 which has been their home for the entire duration of the 24 years and had acquired the whole property by adverse possession.
2. By misdirecting himself and ignoring the evidence of the 1st and 2nd respondents as well as the testimony of the appellants that the respondents had acquired the whole of the suit property and even planted trees thereon and made a finding that the respondents had only acquired a portion by way of adverse possession and the case was in reference to the whole of LR. Number Kisumu/Korando/1837.
3. By making a finding that one Shatilal Patel had bought half the suit property from the 1st respondent whereas there is no evidence of the same as the 1st respondent only testified that he had sold a portion of the land to the said Shantilal Patel, who disappeared before the

subdivision was done to establish the potion he had bought, and which did not amount to half the suit property.

4. By misdirecting himself and making a finding that the same Shantilal Patel whom the 1st respondent had sold a portion of the land to, who also transferred to the 1st and 2nd appellants when there was a glaring inconsistency of names on the transfer filed by the 1st and 2nd respondents.

5. By failing to make an express finding that the 1st and 2nd respondents had acquired their title deed fraudulently and irregularly and to order revocation of the said title deed having found that they did not comply with the requirements of sections 6 and 8 of the L*and Control Act*.

33. Consequently, the respondents prayed for orders that:

1. The appeal be dismissed with costs to the respondents.

2. The 1st and 2nd respondents have acquired the whole suit property LR. Number Kisumu/Korando/1837 by way of adverse possession.

3. An order to the registrar of lands to rectify and register LR. Number Kisumu/Korando/1837 in the names of the 1st and 2nd respondents.

4. A declaration that the title deed held by the 1st and 2nd appellants is null and void for all purposes having been obtained without the requisite land control board consent under sections 6 and 8 of the *Land Control Act*.

5. A revocation of the title deed held by the 1st and 2nd appellants.

6. A permanent injunction against the 1st and 2nd appellants, their servants, agents, employees, or anybody acting under their authority from interfering with the 1st and 2nd respondents peaceful occupation of the suit property.

34. During the virtual hearing of the appeal, learned counsel, Mr. Nyamweya appeared for the appellants and learned counsel, Mrs. Ashioya appeared for the respondents. Both parties filed written submissions and relied entirely on them.

35. The appellants collapsed their grounds of appeal into two points of argument as follows:

a. That the evidence of the title deed of the suit land by the appellants proves prima facie possession and is verifiable and truthful.

b. That there was a continuous trespass on the suit land by the respondents, which tort was not time barred.

36. On the first point, the appellants argued that all the documents produced by the appellants were consistent with the documents held by the registry of lands, Kisumu. Therefore, in the absence of any documents of ownership in the respondent's names or the 1st respondent's father, the court could not verify and should not have believed the evidence of the respondents or that given on their behalf by other witnesses. For this proposition, the appellants cited Section 26 of the *Registered Land Act* (RLA) and contended that the respondents did not challenge their title by way of counter claim and neither did they claim adverse possession or an order for declaration of extinguished title, as provided for under Section 17 of the *Limitations of Actions Act*. Additionally, the appellants argued that no evidence was led by the respondents to demonstrate and prove their allegation that the appellants claim was fraudulent and premised on manufactured evidence, and neither did they plead any particulars of fraud or attempted to prove the same.

37. In the same breath, the appellants argued that since the registration and proprietorship of the suit land was not in dispute, they remain the rightful, absolute and indefeasible owners of the same with all the rights and privileges accruing therefrom, including the right of possession, a quiet and peaceful occupation and use of the suit land; thus, they are entitled to protection of the law.

38. On the second point, the appellants contended that the respondents' actions amounted to trespass that was continuous in nature, due to their continued residence thereon, which called for orders of eviction and vacant possession. Therefore, the respondents claim that the appellants suit was time barred was misconceived and did not apply, as this was not a tort of one- time trespass which has a limitation period of three (3) years as provided for under Section 4(2) of the *Limitations of Actions Act*, that is, from the year 2010 when the houses on the suit land were built to the year 2013 when the appellants filed the suit. In this context, the appellants submitted that in a case of continuous trespass, the same consists of a series of acts done on consecutive days that are of the same nature and are renewed or continued from day to day so that the aggregate acts form one indivisible harm.

39. Regarding occupation of the suit land, the appellants argued that the evidence on record showed that the houses were built in 2010 whereas the instant suit was filed in 2013. The appellants contended that no evidence was produced by the respondents to demonstrate that any structure was built before 2010. Consequently, the appellants argued, even assuming that the trespass by the respondents was a one-time trespass, the pleading of limitation failed as the unauthorized entry and occupation was less than three years old at the time of filing the suit.

40. The appellants cited the definition of a continuing trespass as captured in: Jowitt's Dictionary of English Law 2nd Edition which states 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 neighbour's land";

Black's Law Dictionary 8th Edition which states as follows:-

> " A continuing trespass is a trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property";

and *Clerk & Lindsel on Torts* 16th Edition, paragraph 23-01 which states as follows:' "

> " 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".

41. The appellants argued that in totality, the learned trial judge erred both in fact and in law in: framing the issues for determination; the examination and consideration of the evidence that was adduced by both parties; the application of the provisions of law to the facts and evidence of the case; and the decision he arrived at. The net result, the appellants argue, is that the learned trial judge unfairly and unjustly dismissed the appellants suit without giving any direction of what becomes of the appellants title deed and the rights flowing therefrom.

42. During the plenary hearing of the appeal, the Court asked Mr. Nyamweya to explain the curious case facts that the appellants claimed that they bought the suit land in 1984; signed the transfer forms in 1986; but were only registered as second owners of the suit land in 1989 seemingly without consent from the Land Control Board. Counsel's answer was that during the time of purchase of the suit land, the same was going through adjudication process and that Patel, who sold the suit land to the

appellants, was the original owner of the suit land upon adjudication. Counsel insisted that there was no documentary evidence that the 1st respondent sold the suit land to Patel.

43. Opposing the appeal, the respondents coined two (2) issues of determination as follows:

    a. Whether the learned trial judge erred in finding that the appellants suit was time barred.

    b. Whether the appellants have a valid title deed to the suit land.

44. Regarding the first issue, the respondents concurred with the finding of the trial court that the appellants suit against the respondents was time barred since the respondents had been in occupation of the suit land for a period of 24 years from the year 1989 thus surpassing the 12-year limitation period provided for under Section 7 of the Limitation of Actions Act, within which the appellants could have taken action. Therefore, the respondents argue, the appellants' suit was filed out of time.

45. The respondents reiterated their whole evidence at the trial court and argued that after the 1st respondent's agreement with Patel to register him (1st respondent) as the owner of the suit land, Patel never returned and the 1st respondent moved from his father's homestead in 1989 and built his house on the suit land. This evidence, the respondents insist, was corroborated by the respondents' witnesses. The respondents further argued that the 1st appellant testified that after they bought the suit land and got registered as its proprietors, they moved to Mombasa and only came back in 2010 and found the respondents in occupation and possession thereof; and even admitted that she found mature trees planted on the suit land which indicated that the person who planted them had lived there for a long time. On this premise, the respondents argued that the trial court correctly found that appellants' suit against the respondents was time barred, as provided for under section 7 of the *Limitations of Actions Act*, since it was filed 24 years after the 1st respondent occupied the suit land.

46. However, the respondents contended that in finding that the suit was time barred, the learned trial judge erred in finding that the same was only applicable to only half the suit land, hence their cross-appeal. The respondents argued that the appellants' claim against the respondents constituted the entire suit land and not a portion of it; and the respondents too, during defence, stated that they had been in occupation of the entire suit land and used it as their residence and also tilled it. On this premise, the respondents contended that the learned trial judge misdirected himself when he held that the 1st respondent conceded to selling half the suit land and that was why he allowed Samuel to fence a portion of it. The respondents rejected the trial court's finding and argued that the said Samuel was not a party to the trial court proceedings and there was no evidence to show that the suit land was vacant when he fenced it or if at all he was the one who fenced it. It was further argued that the 1st respondent testified that he never saw Samuel again since 2010; and he continued with his peaceful occupation of the suit land until 2011 when the 1st appellant showed up claiming that he too owned the suit land.

47. The respondents further rejected the trial court's finding that the 1st respondent did not take any action against the said Samuel and the appellants when he discovered they were registered as proprietors of the suit land, on the ground that it was not founded on evidence on record. On the contrary, they argued that the 1st respondent registered a caution dated 8th June, 2011, and there was also a letter from the chief dated 15th July, 2011, all of which were produced as exhibits before the trial court. On this premise, they argued that the 1st respondent took steps towards recovering his land and the fact that the appellants instituted a suit before him did not in itself mean that he had no interest in the suit land and did not do anything about it. Additionally, the respondents argued that the registration of Samuel and the appellants as proprietors was in reference to the entire suit land and not just a portion of it; and defending this suit also amounts to taking a step to defend the 1st respondent's rights over the suit land.

48. On the foregoing premise, the respondents submitted that the appellants suit was time barred and the trial court did not have jurisdiction to hear it. According to the respondents, the trial court instead impermissibly delved into extraneous matters and findings that were not pleaded by the appellants nor prayed for in their plaint. The respondents further submitted that they acquired overriding interest in the suit land against the title of the appellants, thus, this Court could not aid the appellants in getting the same back as equity aids the vigilant and not the indolent. Since the appellants slept on their rights, the respondents argue, they could not now turn back and unsettle the lives of those who have peacefully made the suit land their home for a period of almost three (3) decades now. For this proposition, the respondents relied on *Matana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR.

49. Regarding the second issue, the respondents argued that the evidence on record showed that the appellants were registered as proprietors of the suit land through a process that was marred by fraud, irregularities, and corruption which made their title void. That, argue the respondents, was a ground to revoke the title. In this regard, the respondents concurred with the trial court's finding that the appellants acquired the suit land irregularly by failure to comply with the provisions of section 6 and 8 of the *Land Control Act* (LCA). They argued that failure to get the consent of the Land Control Board (LCB) rendered all the procedures that were undertaken by Patel and the appellants in regard to the suit land illegal, and these included the sale agreement in 1984, transfer of the suit land and the execution thereof made in the year 1986, the registration of Patel as the first proprietor of the suit land on 17th March, 1989, and the subsequent registration of the appellants as the proprietors thereof on the same day.

50. However, whilst the respondents concurred with the said trial court finding, they faulted it to the extent that the learned trial judge fell short of declaring the title deed of the appellants null and void, and relied on *Re Estate of Gichuhi Wakano alias Wilfred Wakano Gichuhi (deceased)* [2022] eKLR, whereby the case of Re the Matter of the Estate of M'Ajogi (deceased), was cited approvingly. In the latter case, the court held that the sale of a deceased estate property before confirmation of grant was null and void. In this regard, the respondents argued that Section 22 of the *LCA* criminalizes transactions of any dealings in land situated in controlled areas without consent of the LCB. Thus, payment of Kshs. 25,000 made by the appellants to Patel in exchange for the suit land, amounted to an illegality and they could therefore not benefit from their own illegality.

51. The respondents also argued that the transfer of the suit land to the appellants and the execution thereof in 1986 was illegal since at that time, ownership of the same had not passed to Patel. Further, the respondents complained that registration was done on the strength of a copy of the transfer form, and not the original, contrary to the provisions of section 20 of the *Land Control Act*. That section states that:

> "The registrar shall refuse to register an instrument affecting a controlled transaction unless he is satisfied that any instrument require by this Act to be obtained in respect of the transaction has been given, or the consent is not required.";

section 109 of the (*RLA*) which states that:

> "Every instrument evidencing a disposition in land shall be executed by all persons shown by the register to be the proprietors of the interest affected and by all other parties.";

and Section 11(2A) of the *Land Adjudication Act* (LAA) which states that:

> "Upon receiving the adjudication register from the land adjudication director under section 27 of the *Land Adjudication Act* 1968, the chief land registrar shall forward it to the land registrar of the district concerned, who shall prepare a register for each person shown in the adjudication record as owner of the land.".

Therefore, the transfer form was invalid and could not form the basis of a valid transfer.

52. As a result, the respondents argued that the net effect of the foregoing two transactions, that is, the sale agreement and transfer form, invalidated the subsequent registration of the transferor and the transferee dated 17th April, 1989. They relied on *Purple Rose Trading Company Ltd v Bhano Shaashikant Jai* [2014] eKLR, in which the court held that no action can be maintained on a contract which is prohibited by statute. *Reliance was also placed on Fasal Viaram Muman v M. R. Lalani Kampala* HCCC No. 256 of 1993 (HCU) 1963 EA.425 where the court held that a subsequent consent cannot validate one that was made earlier outside the law. On this premise, the respondents urged that the transfer form could not qualify as a basis upon which the appellants could get good title to the suit land.

53. The respondents rejected the appellants contention that they did not plead the particulars of fraud. To disapprove this contention, the respondents stated that all the documents which resulted to the appellants registration as proprietors of the suit land were manufactured. They relied on *Purple Rose Trading Company Ltd v Bhano Shaashikant Jai* (*supra*), in which the court held that once an allegation of an illegality has been raised, the court has a duty to investigate the issues raised, whether they have been pleaded or not. To buttress the appellants contention, the respondents argued that the fact that the registration of Patel as the proprietor of the suit land was done on 17th April, 1989, and the title deed issued; and thereafter on the same day the appellants were also registered and the title deed issued without consent from the Land Control Board, showed that the said registration was done through a corrupt scheme and in blatant violation of the law. Thus, the respondents submitted that this was the standard proof required, on a balance of probabilities, that indeed the appellants manufactured evidence to take possession of the 1st respondent's land.

54. Based on the foregoing, the respondents submitted that Article 40(6) of *Constitution* allows for revocation of a first registration and with regard to the instant case, the appellants title ought to have been declared null and void since the 1st respondent did not sign the transfer form nor participated in the process in any way. The respondents also added that the fact that Patel was not a party to the suit did not in itself prevent the trial court from revoking the said title as the evidence showed that it was acquired illegally.

55. The respondents urged this Court to give a purposive interpretation of Article 40(6) of the *Constitution* and find the entries giving the appellants title to the suit land illegal as the same was acquired unlawfully. For this proposition, they relied on *Kipkobel Arap Misoi v Proscilla Chepkoris* [2016] eKLR,in which the court held that registration of a title without following due process under the *Land Adjudication Act* is a nullity. They argued that although the adjudication register was not produced, the appellants evidence before the trial court showed that the provisions of the *Land Adjudication Act* were not followed, hence Patel did not have good title capable of being transferred to the appellants.

56. The respondents also relied on *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others* [2015] eKLR and *Zacharia Wambugu Gathimu & Another v John Ndungu Maina* [2019] eKLR, with regard to the impeachability of a title under Section 26 of the *RLA*.

57. This being a first appeal, we are required to re-evaluate and re- analyze the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co. Limited* (1968) EA 123) In addition, we must be cognizant of the fact that we should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1968) KLR 661).

58. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellants grounds of appeal, the respondents cross-appeal and the rival submissions of the parties, two substantive issues present themselves for determination in this appeal:

    a. First, whether the appellants proved their case to the required standard that they had obtained good title for the entire suit land from Patel and were, therefore, entitled to the orders they sought in the trial court.

    b. Second, whether the respondents were, on the strength of the pleadings and evidence, entitled to orders for nullification and revocation of the title to the whole suit land as held by the appellants and an order for permanent injunction against the appellants for the entire suit land.

59. Turning to the first issue, it is not in doubt that the suit land was undergoing adjudication by 1984. This was the year the 1st respondent stated that he sold half of it to Patel. It is also the year the appellants say they bought the entire suit land from Patel. Thereafter Patel signed transfer forms with respect to the entire suit land in favour of the appellants in 1986. Subsequently, on 17th April, 1989, Patel had himself registered as the first proprietor of the suit land and on the same day, transferred the title thereof to the appellants. The appellants concede that the transfer was done without consent from the Land Control Board. However, to counter the reasoning of the trial court that this infirmity invalidated the purported transfer, the appellants claim that what they purchased from Patel was "unadjudicated land" that, therefore, did not require consent from Land Control Board.

60. Unfortunately, this latter-day argument by the appellants, like pictures in a thaumatrope, do little to rescue their case. In order to succeed on their claim, the appellants needed to demonstrate two elements on a balance of probabilities:

    a. First, they needed to demonstrate that their title was legally and procedurally acquired and was, therefore, indefeasible and unimpeachable under Section 26 of the *Registered Lands Act* and Article 40(6) of the *Constitution*.

    b. Second, the appellants needed to overcome the defence that their claim to the entire suit land was debarred by the statute of limitations.

61. By making the argument that they bought unadjudicated land from Patel and that, therefore, they did not require Land Control Board consent, the appellants only jump from the frying pan into the fire. This is so for three reasons.

62. First, the procedure for claiming interests in unadjudicated land is laid out in the statute. Section 13(1) of the *Land Adjudication Act* provides as follows:

    > "(1) Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out

his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this *Act*."

63. If the appellants bought interests in an unadjudicated parcel of land from Patel, then, they would have recorded their claim with the recording officer as provided for in the *Land Adjudication Act*. They did not do this. Indeed, by their very own admission, what they allegedly attempted to do was to follow the procedures in the *Registration of Land Act*: as per the documents they presented to the trial court, the appellants signed transfer forms – which is an instrument only applicable to land registered under the *Registration of Land Act* – to effect the purported transaction between themselves and Patel. This is the first chink in the appellants' armour.

64. Second, it was incumbent upon the appellants to marshal sufficient evidence to prove, on a balance of probabilities, that they bought unadjudicated land from Patel. They provided no evidence whatsoever in this regard. In fact, their own witness, PW3, the Land Registrar was candid that evidence of adjudication and demarcation map which would be necessary to determine who had been adjudged the original owner during adjudication process had not been presented to the trial court. Such evidence, he freely admitted, was available at the Land Adjudication office but had not been sought or produced. Under our adjudicatory design, it was the appellants who, by dint of Section 107 of the *Evidence Act*, as the ones who had alleged this fact, needed to marshal evidence to prove it. There was no reverse obligation on the respondents to disprove the facts: the onus remained on the appellants to prove the facts on a balance of probabilities. Without the evidence of adjudication and demarcation process, they cannot have been said to have succeeded in discharging that onus.

65. Third, the entries in the Green Card produced in court as evidence (as well as the testimony of the Land Registrar) belie the argument that the appellants purchased interests in unadjudicated land. The evidence showed that the land was first registered on 17th April, 1989, in the name of Dilipkumar Shantilal Patel and title deed issued in his name. On that same day, the Green Card shows that a transfer happened between the said Patel and the appellants. Even if one were to ignore the curiosity of the super-sonic speed of registration and re-transfer to a third party all within twenty-four hours, the crucial fact remains that the alleged transfer to the appellants was done under the *Registration of Lands Act*.

66. Beyond these three factors which effete the appellants' claim that they bought unadjudicated land from Patel and that they had, consequently, established a case on a balance of probabilities, three other aspects of the case further undermine their claim: First, there is a material contradiction between the testimony of PW1 and PW2 respecting a purported Sale Agreement between the appellants and Patel. PW1 was categorical that there was a Sale Agreement between them; and that he did not have it because he took it to the Lands office (see page 23 of the Record). PW2, on the other hand, was more straightforward that they did not have a Sale Agreement (see page 29 of the Record). This contradiction on such a material aspect of the case goes to the credibility of the appellants as witnesses.

67. Second, while the case crucially revolved on the question whether the respondents had been in occupation and possession of the suit property for a long period, PW2 rather candidly conceded that when she visited the land in 2010, she found mature trees planted in a row (straight line) and that "it would appear that somebody had been living on the land for quite sometime." This completely undermines the appellants' central precept that the respondents were latter-day invaders on the land.

68. Third, there is an important question of non-joinder that has haunted the appellants' case from the beginning: if, indeed, they purchased the whole of the suit property from Patel but that when they went to the locus in quo they found people claiming half of the property, should they not have enjoined Patel to the suit for his failure to deliver vacant possession of the entire suit? While this non-joinder on

its own would not be dispositive, when viewed against all the other factors in the case, it assumes some importance, adverse to the appellants' case.

69. In my view, the sum total of all these evidentiary vulnerabilities of the appellants' case demonstrate the mathematical impossibility that it can be said in any objective sense that the appellants established their claim on a preponderance of evidence. In my view, the Learned Trial Judge's finding that there was lack of Land Control Board Consent, does, in the particular circumstances of this case, provide an additional ground confirming that the appellant did not establish their claim on a balance of probabilities.

70. An additional ground for affirming the Learned Judge's ultimate decision is provided by the statute of limitations. The Learned Judge concluded that the evidence showed that the respondents had been on half the suit property since at least 1989 and that this debarred the appellants from bringing suit over that half of the suit property. The appellants attack that finding by arguing that the respondents were, actually, continuous trespassers; and that each act of trespass gave rise to a new cause of action. Consequently, the appellants argue, the time period for bringing an action in trespass had not expired.

71. The appellants' argument, while attractive, must ultimately fail: its kernel seeks to destroy the doctrine of adverse possession as a method of acquisition of land in Kenya. If a land owner allows another person to continue trespassing on her property – openly, notoriously, exclusively, and in a mode adverse to the ownership rights of the owner for an uninterrupted period of more than 12 years – the trespasser acquires legal title to the complacent owner's land. Thus, it may be accurately said that adverse possession is, in reality, both a statute of limitation for bringing a trespass action and a bar to an action for recovery of land: After 12 years of trespassing, the trespasser gains a right to claim title to that property. For purposes of this analysis, therefore, the respondents' alleged trespass cannot be viewed as a continuing one – but hypothetically as a single tortious action that occurred when they first gained possession of the suit property.

72. The only question in this regard, therefore, is whether the respondents were entitled to the factual finding that they had been in occupation for at least twelve years by the time the appellants brought their claim. From an analysis of the rival testimonies by the parties, I easily conclude that the respondents were entitled to that finding. This is because, first, the appellants' case is mired in the evidentiary weaknesses analyzed above. Secondly, the testimonies by the respondents and their witnesses established this factual claim. They were aided by PW2's admission as pointed out above. The testimony by DW1 was that he started living on the suit property in 1989. He testified that on that year, he planted trees which were now mature. Further, in 2000, his wife died and he buried her on the suit property. This evidence was corroborated by the other witnesses for the respondents (except for the minor discrepancy in the evidence of DW2 who stated in examination-in-chief that DW1's wife died in 1974). This evidence was not seriously controverted by the appellants – and, indeed, PW2 appeared to support it. Consequently, the Learned Trial Judge cannot be faulted for reaching the conclusion that the respondents had factually established on a preponderance of evidence that they had been in occupation of half of the suit property since at least 1989; and that this debarred the appellants from bringing a suit with respect to that half of the suit property.

73. In my view, this entirely disposes the appellants' case without the necessity to do an analysis whether their title is defeasible and impeachable under Section 26 of the *Registered Lands Act* and Article 40(6) of the *Constitution*. Upon re-evaluation, the appellants' case fails on both the evidentiary threshold and on Statute of Limitations grounds.

74. I will now turn to the much less-knotted cross-appeal by the Respondents. In essence, the Respondents fault the Trial Court for not nullifying the title to the whole suit property and, in consequence thereof,

declare that they had acquired the title to the whole parcel adversely. The response to the cross-appeal is self-evident in the Respondents' counsel's response to the Court during the plenary hearing. She conceded that the Respondents did not file any counter-claim in the Trial Court. She argues, nonetheless, that the remedies she now wants for her clients before this Court are "implicated" in the Respondents' defence. The Respondents are simply caught up by the fact that they failed to file any counter-claim or state any claim for adverse possession.

75. The failure to file a counter-claim or state a claim for adverse possession is fatal. It cannot be cured by "implication" as the Respondents hope. For sure, litigants are not expected to plead their cases with mathematical precision and mere inelegance in pleading is not to be harshly punished by the striking out of claims. However, as an incident of the constitutional right to fair hearing in Article 50 of the *Constitution of Kenya*, 2010, a party who hopes to get a remedy from the court must give sufficient notice to the other party. The party cannot, by subterfuge or otherwise, hope that her pleadings raise sufficient "implication" for the other party to respond. As this Court has variously said, parties are bound by their pleadings. This Court, in *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR, has stridently stated the rule thus:

> "If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

76. Most recently, this Court stated the justification for the rule in *Ayiera v Kimwomi & 3 others* (Election Petition Appeal E001 of 2023) [2023] KECA 1021 (KLR) in the following words:

> "This is not just a technical rule which fetishizes procedural narcissism; it is a substantive rule of law that plays the functional role of ensuring every litigant is informed in advance of the case he has to meet, so that he may effectively prepare and challenge the same. It is a substantive rule of law that ensures fairness and upholding of the principles of natural justice in the proceedings by ensuring that parties have proper notice of each other's cases. It is a fundamental facet of fair trial that banishes trial by ambush."

77. The result is that the cross-appeal is unmeritorious: the Respondents could not be granted a relief they neither pleaded nor claimed in their pleadings.

78. In the end, I have found that both the appeal and cross-appeal lack merit. I would propose that they both be dismissed. Since each party's appeal has failed, I would further propose that each party bears its own costs.

Judgment of Kiage, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA with which I agree, and have nothing useful to add.

2. As Tuiyott, JA also agrees, the appeal shall be disposed of as proposed by Joel Ngugi, JA.

Judgment of Tuiyott, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER,2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

…………………………………………

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR