Njurukani & 2 others v Barasa (Sued as Personal Representative of Barasa Waswa) (Civil Appeal E149 of 2022) [2023] KECA 1250 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1250 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E149 OF 2022

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

OCTOBER 6, 2023

BETWEEN

JOSEPH NDAFU NJURUKANI ..... 1ST APPELLANT

SOSPETER JUMA NDAFU ..... 2ND APPELLANT

TOBIAS WANGILA NDAFU ..... 3RD APPELLANT

AND

EMILY NALIAKA BARASA (SUED AS PERSONAL REPRESENTATIVE OF BARASA WASWA) ..... RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Bungoma (Olao, J.) dated 20th September, 2021 in ELC CASE NO. 23 OF 2016 (O.S))

Circumstances in which which a court could grant reliefs on un-pleaded issues

The case involved a dispute over ownership of land, where the appellants claimed to have acquired the property through adverse possession. They argued that they had been in continuous, open, and exclusive possession of the land since 1993 after the respondent allegedly abandoned it. The respondent, however, maintained that she lived on the land with her late husband until his death and remained in possession until 2010. She further claimed that the appellants had forcefully evicted her and that her legal efforts to reclaim the land negated the appellants' claim of exclusive possession. The trial court dismissed the appellants' claim, finding that they had not satisfied the elements of adverse possession, especially exclusivity and continuity. The appellate court upheld this decision, agreeing that the respondent's active resistance and the appellants' use of force invalidated the claim of adverse possession. The land was awarded to the respondent.

Reported by John Ribia

Land Law *– adverse possession – elements of adverse possession - what were the elements of the claim for adverse possession - whether an admission that the subject of a claim of adverse possession lived on the suit land by the claimant negated the claim of adverse possession - whether in a claim of adverse possession, a claim of exclusive*

possession could be sustained when the land owner had remained active in resisting their occupation through legal and administrative means – Limitation of Actions Act (Cap 22) section 7, 9, 10, 11, 12, 13, 17, 18, 37, and 38.

Jurisdiction *– jurisdiction of the Environment and Land Court – jurisdiction to determine a question of ownership of land undergoing probate - whether the Environment and Land Court had the jurisdiction to granting order related to ownership of the suit land under probate – Constitution of Kenya, 2010 article 10(2)(b), 27, and 162(b); Environment and Land Court Act section 18(d).*

Civil Practice and Procedure *– pleadings – reliefs – principle that courts would not address unpleaded reliefs - whether the court erred in granting reliefs of ownership of land that were not expressly pleaded by the parties - under what circumstances would a court of law grant relief on an un-pleaded.*

Brief facts

The appellants had brought suit against the respondents before the Environment and Land Court. The appellants contended that they had acquired ownership of the suit land through adverse possession. They claimed to have been in actual, open, notorious, and exclusive possession of the land for more than 12 years, beginning in 1993 when the respondent allegedly abandoned the land. They further contended that the respondent had no legal right to the land, as her possession had ceased upon the death of her husband.

The respondent asserted that she had lived on the suit land with her deceased husband until his death and remained in possession until 2010. She maintained that the appellants' claim of adverse possession was invalid, as they had not exclusively possessed the land and had used force to eject her. She argued that her continued legal efforts to reclaim the land negated the appellants' claim of uninterrupted possession.

The trial court dismissed the appellants' claim, finding that they had failed to establish exclusive possession. The court held that the respondent's continued attempts to reclaim the land defeated the adverse possession claim. The trial court concluded that the appellants had failed to establish two of the six elements: that they obtained possession without force; and that they had possession for a period of at least twelve years. Aggrieved the appellants filed instant appeal on the same grounds as they did at the trial court.

They further contended that the trial court ought not to have issued the reliefs to the respondent because she did not file a counter-claim. They further contended that one was that the appropriate cause where the orders should have been issued should have been the succession cause and not the instant case. The objection was pivoted from the argument that the Environment and Land Court, whose jurisdiction had no jurisdiction to give orders of land under probate. The appellants argued that the orders given were in the nature of orders to transmit land by inheritance which was in the nature of succession, a subject matter outside the jurisdiction of the Environment and Land Court.

Issues

i. What were the elements of the claim for adverse possession?
ii. Whether an admission by the claimant that the subject of a claim of adverse possession lived on the suit land negated the claim of adverse possession.
iii. Whether in a claim of adverse possession, a claim of exclusive possession could be sustained when the land owner had remained active in resisting their occupation through legal and administrative means.
iv. Whether the Environment and Land Court had the jurisdiction of granting orders relating to ownership of the suit land under probate.
v. Whether the court erred in granting reliefs of ownership of land that were not expressly pleaded by the parties.
vi. Under what circumstances would a court of law grant relief on an un-pleaded?

Held

1. The role of the first appellate court was to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at independent conclusions of law and fact, bearing in mind that the trial court had the advantage of seeing and assessing the demeanor of witnesses.

2. In Kenya, ownership by adverse possession was given statutory underpinning in sections 7, 13, 17 and 38 of the Limitations of Actions Act. In order to establish a claim of adverse possession, the possession must be:
    1. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another.
    2. Actual - as opposed to constructive possession where the test was the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee.
    3. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community.
    4. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence.
    5. Exclusive - meaning that the possession must be of such exclusive character that it would operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period.
    6. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years.
3. The appellants had established that they had possession to the suit land which was adverse to that of the respondent; and that the possession was actual, open and notorious. The possession of the suit land by the appellants could not be said to be exclusive.
4. The trial court's reasoning was sound, Barasa Waswa and Jonathan Barasa Mbotiki was one and the same person. The appellants in their cross examination not only interchanged in their reference to him, but they also conceded that the respondent was his widow. The documentary evidence produced by the respondent variously described the deceased as Johathan Barasa Mbotiki alias Barasa Waswa. Two letters written by the Area Chief referred to the deceased as Jonathan Barasa Mbotiki alias Barasa Waswa. The two letters were written four years apart but contained the same information; and it was noteworthy that the former was written before the instant litigation was conceived. Its probative value and credibility was high. The respondent filed a succession cause with respect to the estate of the Deceased back in in Bungoma Succession Cause No. 46 of 2016. In that cause, she described herself as the sole heir to the estate of the Deceased. She also listed the suit land as the only asset available for transmission. She obtained Letters of Administration on April 29, 2016. However, the appellants did not file any protest in that cause though it would appear that they were aware of it because they were the ones who produced the documents related to the cause during the trial.
5. There was overwhelming evidence that "Barasa Waswa" and "Jonathan Barasa Mbotiki" was one and the same person. The evidence established that the respondent was his wife. That same evidence established that the deceased was, therefore, the registered proprietor of the suit land since November 1, 1972. It appeared that it was not a co-incidence that the appellants' father was registered as the proprietor of the adjoining land measuring 18.0 Ha on the same day. The Court of Appeal equally shared the incredulity of the Environment and Land Court to the allegation that the appellants' father allocated the appellants portions of the deceased's land between 1970 and 1986 when the deceased was still alive.
6. The lack of credence was compounded by the fact that the appellants, in perhaps flashes of momentary candour, conceded in cross-examination that the deceased lived on the suit land with the respondent until his demise; and that the respondent lived there with him. The respondent lived on the suit land at least until the deceased died in 1993.

7. The evidence by the appellants was clumsily curated to give the impression that the respondent abandoned the suit land in 1993; and that, therefore, they had been in peaceful but adverse possession since then. However, like the trial court, the Court of Appeal disbelieved that narrative. That was so for at least three reasons:
    1. the appellants' testimonies were contradictory, self-serving and, for the most part, incredible.
    2. the testimony of the respondent was straight- forward and remained unshaken on cross-examination. That was in contradistinction to the testimonies of the appellants which seemed to fall apart on cross-examination or perfunctory analysis.
    3. the respondent's narrative that she remained on the suit land until 2010 was backed up by documentary evidence.
    4. the respondent's narrative was further supported by contextual evidence: that she was now homeless only given sanctuary by the Redeemed Catholic Church. It was incredible that the respondent would abandon the land left to her by her husband only for her to go search for sanctuary in a church as an indigent person. Further contextual evidence was provided by the efforts she had put, detailed in her documentary evidence, to get the suit land to revert to her.
8. Even if the respondent was not in actual possession until 2010, the appellants would not have been able to prove that they were in exclusive possession of the suit land. That was because, throughout their period of supposed actual possession, the respondent remained active in attempting to oust their possession using administrative and legal means. A claimant could not be said to be in exclusive possession when the true owner was actively resisting the claimant's colour of right to occupy the suit property whilst asserting her own right to own and occupy the suit property.
9. The respondent's occupation and possession of the suit until 2010 were enough to defeat the claim of adverse possession. There was even a more fundamental reason to reject the claim, being that the occupation and possession was obtained by actual and threatened violence. The respondent was forcefully ejected from the suit land by the appellants. The appellants had failed to prove all the elements of adverse possession.
10. The jurisdiction of the Environment and Land Court is limited by the Constitution. The orders the Environment and Land Court gave respected ownership of the suit land – clear subjects reserved to the Environment and Land Court by dint of article 162(2) of the Constitution. The fact that the same parcel of land was identified as part of the estate of the deceased did not, *ipso facto*, bereave the Environment and Land Court of jurisdiction. The opposite position was the correct one: the fact that ownership of the parcel was contested made the Environment and Land Court the appropriate forum to determine the question. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.
11. The trial court did not delve into questions of collection or preservation of the estate; and neither did he deal with questions related to identification of survivors and beneficiaries or distribution of the estate. The Environment and Land Court within its jurisdictional limits to deal with the appropriate orders that needed to be made in the case.
12. A relief for which no prayer or pleading was made should not be granted. If a court considered or granted a relief for which no prayer or pleading was made, that would ordinarily amount to a miscarriage of justice.
13. It was only open for a court to base its decision and grant relief on an unpleaded issue where the following conditions were met:
    1. When the issue the court sought to frame for relief was prominently germane in the evidence adduced by both parties and all the relevant matters respecting the issue had litigated and all the potential evidence made available to the court and the only failure was the technical one of failing to request for the specific relief in the pleadings;

2. When the parties exhaustively addressed the issue for which the court sought to grant a relief;
3. When no useful purpose will be served by the matter being litigated in a different form except to unnecessarily prolong the litigation process;
4. When the dictates of substantive justice compel that relief be granted rather than requiring that a new matter be filed, for example, where the evidence before the court shows that a party was likely to continue suffering oppression by the other party or where the new matter may be time barred;
5. When the relief was incidental or logically consequential from the pleaded matters and the court comes to the conclusion that in spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue in question by producing evidence;
6. When the failure to plead the relief was not a product of bad faith, tactical maneuver to give an advantage to the unpleading party. In this regard, some of the factors the court considers was whether the party was acting in person as well as the circumstances in which the matter was filed. For example, some matters were filed in an emergency mode where drafting mistakes could be made due to the pressure of time. *Anne Nyathira v Samuel Mungai Mucheru & 3 others* [2016] eKLR for example, was a burial dispute which began as a request for a post-mortem exam to determine the cause of death; and
7. When neither party would suffer objective prejudice if the court granted the relief on the evidence adduced.

14. Those factors were conjunctive not disjunctive: All must be present before a party can benefit from the exception. All those factors were based on an overriding fairness criterion: the need to ensure that the parties went into trial knowing all the rival case and led all the evidence not only in support of their contentions but also in refutation of those of the other side.
15. The instant case satisfied the factors for the exception to apply. The issue that was litigated before him and over which both documentary evidence and oral testimony was adduced was the issue of ownership of the suit land. The parties addressed the issue comprehensively and each party specifically asked the trial court to "give them" the suit land. Furthermore, the respondent was acting in person, and no stench of bad faith tactical maneuver rises from both her pleadings and conduct in the matter. From the manner in which the litigation proceeded, it could be objectively said that the question of ownership of the suit land was prominently germane in the evidence adduced and was logically consequential from the pleaded facts despite the lack of a counterclaim. In spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue of ownership by producing evidence. Finally, the dictates of substantive justice militated in favour of the relief being granted in the specific circumstances of the case. That was due to the palpable oppression that the respondent had already suffered and would likely continue to suffer in the hands of the appellants.
16. The trial court was not in error in granting the relief of a declaration of ownership of the suit land by the respondent; and then in giving the further logically consequential orders of registration of the suit land in her name and ejectment of the appellants from the suit land.

Appeal dismissed with costs.

Citations

Cases

Kenya

1. *Caltex Oil (Kenya) Limited v Rono Limited* Civil Appeal 97 of 2008; [2016] KECA 457 (KLR) - (Applied)
2. *In re Estate of Alice Mumbua Mutua (Deceased)* Succession Cause 3142 of 2003; [2017] KEHC 8289 (KLR) - (Applied)
3. *Jabane, Mohamed Mahmoud v Highstone Butty Tongoi Olenja* Civil Appeal 2 of 1985; [1986] KECA 21 (KLR); [1986] KLR 661 - (Applied)

4. *Kasuve v Mwaani Investments Limited & 4 others* Civil Appeal 35 of 2002; [2004] KECA 161 (KLR); [2204] 1 KLR 184 - (Applied)
5. *Lewa, Mtana v Kahindi Ngala Mwagandi* Civil Appeal 56 of 2014; [2015] KECA 532 (KLR) - (Applied)
6. *Maina & 87 others v Kagiri* Civil Appeal 6, 26 & 27 of 2011; [2014] KECA 880 (KLR) - (Applied)
7. *Munyi, Titus Kigoro v Peter Mburu Kimani* Civil Appeal 28 of 2014; [2015] KECA 952 (KLR) - (Applied)
8. *Nyathira, Anne v Samuel Mungai Mucheru & others* Civil Appeal 68 of 2015; [2016] KECA 758 (KLR) - (Applied)
9. *Nyathira, Anne v Samuel Mungai Mucheru & 3 others* Civil Appeal 68 of 2015; [2016] KECA 758 (KLR) - (Explained)
10. *Raiji, Karuntimi v M'makinya M 'itunga* Civil Appeal 325 of 2009; [2013] KECA 514 (KLR) - (Applied)
11. *Republic v Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati* Petition 5 of 2015; [2017] KESC 15 (KLR) - (Applied)
12. *Ruchine, Kimani & another v Swift, Rutherford Co Ltd & another* Civil Case 1401 of 1971; [1977] KEHC 30 (KLR) - (Applied)
13. *Shume, Robert & others v Samson Kalama* Civil Appeal 32 of 2015; [2015] KECA 185 (KLR) - (Applied)
14. *Ticha, Ngugi v Kiritu Ticha, Waithira Ticha & Wanjiru Ticha* Civil Appeal 40 of 2004; [2014] KECA 154 (KLR) - (Applied)
15. *Vyas Industries v Diocese of Meru* Civil Appeal 23 of 1976; [1976] KECA 18 (KLR); [1982] KLR 114 - (Applied)
16. *Wambugu, Sisto v Kamau Njuguna* Civil Appeal 10 of 1982; [1983] KECA 69 (KLR) - (Applied)

Regional Court

1. *Odd Jobs v Mubia* [1970] EA 476 - (Applied)
2. *Selle v Associated Motor Boat Co. Limited* [1968] EA 123 - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 10(2)(b); 27; 162(b)- (Interpreted)
2. Environment and Land Court Act (cap 8D) section 18(d) - (Interpreted)
3. Land Registration Act (cap 300) section 61(1)(2)- (Interpreted)
4. Law of Succession Act (cap 160) In general- (Cited)
5. Limitation of Actions Act (cap 22) sections 7, 9, 10, 11, 12, 13, 17, 18, 37, 38 - (Interpreted)

Advocates

None mentioned

JUDGMENT

Judgement of Joel Ngugi, JA

1. Joseph Ndafu Njurukani; Sospeter Juma Ndafu; and Tobias Wangila Ndafu (the appellants) are nephews of Jonathan Barasa Mbotiki (Deceased). They freely admitted this in their pleadings as well as in their testimony in a suit they filed at Bungoma ELC Court being ELC Case No 23 of 2016 (OS). In both their pleadings and testimony, they admitted that the Deceased was a brother to their late father, Morris Ndafu Mbotiki. In the case, initiated by way of Originating Summons, the appellants sued Emily Naliaka Barasa in her capacity as the Personal Representative of the estate of Barasa Waswa. The

suit was an action for adverse possession respecting the parcel of land known as No West Bukusu/West Siboti/607 (hereinafter, "suit land") which was registered in the name of Barasa Waswa.

2. In suing the personal representative of "Barasa Waswa", the appellants certainly took the position that the said "Barasa Waswa" was deceased. However, the appellants also took the formal position that the "Barasa Waswa" whose estate's personal representative they had sued was a different person than their uncle, Jonathan Barasa Mbotiki. As aforesaid, they also conceded that their uncle, Jonathan Barasa Mbotiki, was also deceased. They, also, vacillated between denying and admitting that Emily Naliaka Barasa (the respondent) was the widow to their uncle. As it will become clear shortly, this refusal to acknowledge the respondent as the widow to their uncle – and that their uncle was variously known as both "John Barasa Mbotiki" and "Barasa Waswa" was tactical on the part of the appellants; and, ultimately, ill-fated.

3. At the Environment and Land Court, the appellants' Amended Originating Summons sought the following orders:

    1. That Joseph Ndafu Njurukani, Sospeter Juma Ndafu and Tobias Wangila Ndafu be declared the owners through adverse possession of land measuring 8.4Ha comprised in Land Parcel No West Bukusu/West Siboti/607 which they have occupied uninterrupted from 1953, 1962 respectively to date.

    2. That the honourable courtdo order that the applicants be registered as owners and the proprietors of the portion of the said Land Parcel No West Bukusu/West Siboti/607 and the respondent herein to facilitate the transfer failure to which the Executive Officer Bungoma Law Courts to effect the same.

    3. That in the alternative, the honourable courtto order that the 1st applicant be registered as the owner and proprietor of the said Land Parcel No West Bukusu/West Siboti/607 holding the same in trust for the 2nd and 3rd applicants and the respondent herein to facilitate the transfer failure to which the Executive Officer Bungoma Law Courts to effect the same.

    4. That such further relief this honourable courtdeems fit to grant be also granted.

    5. That the costs of this summons be borne by the respondent.

4. The amendedOriginating Summons dated July 28, 2016, was supported by each of the appellants' supporting affidavits dated March 3, 2016. The 1st appellant also filed a further affidavit dated July 28, 2016.

5. In the supporting affidavits dated March 3, 2016, the appellants stated that they moved from their ancestral land which was located in Kabuchai, after their father who is deceased, one Morris Ndafu Mbotiki, bought land parcel No West Bukusu/West Siboti/524 measuring about 66 acres, in the year 1953. The 1st appellant claimed that later, in 1970, after he was circumcised and got married, his father allocated him part of that land measuring about 7 acres, which he has fully developed and has been residing to date. Similarly, the 2nd appellant deposed that in 1976, after he was circumcised and got married, he too was allocated part of that land measuring about 7 acres, which he has fully developed and has been residing to date. The 3rd appellant, by his reckoning, was equally allocated part of that land measuring about 7 acres in the year 1986, which he has fully developed and has been residing to date.

6. It was the appellants' case that when their father died in January 2016, some people came onto the land and purported to buy the same. Their affidavits narrate that they followed up the matter at the lands office and discovered that the land in which they have been residing since 1960 to date, was registered in the name of one Barasa Waswa, under land title No West Bukusu/West Siboti/607 (suit land). They

say that they further made frantic efforts and visited the Area Chief who, they say, confirmed that they were the ones who have been in occupation of the suit land since the year 1960 to date and not the purported Barasa Waswa.

7. The appellants alleged that they have resided on the suit land peacefully since the year 1960 to date and that they never saw or heard someone by the name of Barasa Waswa. They further alleged that they acquired the suit land by way of adverse possession and the court should order the respondent to transfer the same to the 1st appellant to hold in trust for the 2nd and 3rd appellant.

8. In the further affidavit dated July 28, 2016, the 1st appellant alleged that he had only just discovered that the respondent purported to be the wife of their deceased uncle, one Jonathan Barasa Mbotiki; and further that, she had taken out letters of administration and cited that her late husband was the owner of land parcel No West Bukusu/West Siboti/607 (suit land). The appellants alleged that their uncle did not own any land and was only buried on their deceased father's land ie land parcel No West Bukusu/West Siboti/524, on humanitarian grounds.

9. The appellants also alleged that their deceased uncle sold his ancestral land at Kabuchai and went to Kitale where he stayed until their deceased father was called to go and help him as he (deceased uncle) was so sick. According to the appellants, neither the respondent nor their deceased uncle ever resided on the suit land. They further alleged that the respondent never resided with the uncle on the suit land, but only showed up for burial when their uncle died and claimed to be his wife.

10. Further, in a statement dated October 12, 2017, by the 1st appellant, and which was adopted by the 2nd and 3rd appellant and which the 1st appellant adopted in his evidence during the trial; it was alleged that the appellants have been in occupation of the suit land for more than twenty years, with the 1st, 2nd and 3rd appellants having resided therein since the years 1970, 1962 and 1978 respectively.

11. The appellants also alleged that when they discovered that the suit land was registered in the name of Barasa Waswa, they decided to institute a case for adverse possession on 3rd March, 2016, only to be threatened with eviction by the respondent who had obtained letters of administration in respect of the estate of their Deceased uncle, Jonathan Barasa Mbotiki. Afterwards, the respondent instituted a case against their late father at the Land Dispute Tribunal claiming a share in land parcel No West Bukusu/West Siboti/524.

12. According to the appellants, their deceased uncle was only a licensee on their father's land and had no ownership thereof. However, despite their father's protest that land parcel No West Bukusu/West Siboti/524 belonged to him, the tribunal awarded the respondent 14 acres of the same, which proceedings were never adopted. Thereafter, the appellants claim that the respondent fraudulently filed a "protest" in Succession Cause No 46 of 2016 and altered the Land Dispute Tribunal proceedings to read land parcel No West Bukusu/West Siboti/607 Instead Of Land Parcel No West Bukusu/West Siboti/524. Further, the appellants claim that the respondent conspired with the local area administration to create the impression that the respondent's late husband was also known as Barasa Waswa, which, in their view, was a calculated move to defeat justice.

13. At the trial, the appellants list of documentary evidence included: copies of green cards for land parcels No West Bukusu/West Siboti/524 And West Bukusu/West Siboti/607; copies of proceedings at the Bumula Land Disputes Tribunal; a copy of grant of letters of administration issued to the respondent on June 30, 2016, in respect of the estate of Jonathan Barasa Mbotiki; a copy of the Kenya Gazette dated April 29, 2016, application for grant, and the death certificate of Jonathan Barasa Mbotiki.

14. The respondent, acting in person, opposed the appellant's suit through her replying affidavit dated August 15, 2016. She denied the allegations in the appellant's filed documents and stated that they were "all lies and abuse of the court process."

15. The respondent averred that she got married to one Jonathan Mbotiki alias Barasa Waswa (Deceased) in 1977 and they resided in the suit land measuring 8.4Ha, as husband and wife till the year 1993 when the Deceased died. They were not blessed with any children during their marriage and she remained in the suit land alone until about 2008 when her house was burned down. Thereafter, she had no alternative but to look for somewhere else to stay. Consequently, she found refuge at the Reformed Catholic Church premises at Nakalila village.

16. The respondent alleged that despite moving from the suit land, she continued farming and leasing the same until the year 2010 when the appellant's father (respondent's brother-in-law) and the appellants threatened to kill her. It was her case that the appellants are malicious and want to apply "shortcuts" to acquire the suit land. She prayed that the suit be dismissed.

17. The respondent's list of documentary evidence included several letters from: the district officer of Bumula Division dated December 19, 2006; the Assistant Chief of Khasolo sub-location dated September 8, 2008; the District Officer, Siboti Division dated May 13, 2010; the Chief of Napara location dated December 1, 2003, April 16, 2010, 1February 3, 2012, September 26, 2014 and August 29, 2016; and the Deputy County commissioner of Bumula dated 4th and August 18, 2015.

18. During trial, the parties to the suit were the only witnesses and they testified in support of their respective cases. They all adopted the contents of their affidavits and statements and produced their documentary evidence as filed. At the conclusion of the hearing, neither the appellants nor the respondent elected to file any submissions and so the trial court considered the pleadings, documentary evidence and oral evidence of all the parties in coming up with its decision.

19. In its decision, the trial court framed three (3) main issues for determination, namely: -

    a. Whether the appellants were entitled to be registered as the proprietors of the suit land by way of adverse possession.

    b. Whether the respondent was entitled to a remedy even though she did not file or plead a counter claim.

    c. What orders to issue.

20. As regards the first issue, the trial court stated the appellants claimed to have been in a peaceful occupation of the suit land since 1962, 1970 and 1978 respectively and developed it; and it was not until 2016 that they discovered that the same was registered in the name of one Barasa Waswa. To determine this issue, the trial court broke it down to a number of factors as summarized below.

21. First, the trial court opined that although the appellants suggested that the suit land belonged to their late father, one Morris Ndafu Mbotiki, who allocated them portions thereof during his life time, evidence from the green cards and certificate of search produced by both parties showed that the suit land was registered in the name of Barasa Waswa since November 1, 1972, whereas land parcel No West Bukusu/West Siboti/524 was registered in the name of Morris Ndafu since November 1, 1972. Therefore, the trial courtopined, it was highly doubtful that the appellants' late father could have distributed the suit land among his sons when he had his own land and further, while the suit land was registered in the name of another person being, Barasa Waswa. The trial court held that the registration

of the suit land in the name of Barasa Waswa could not be disputed especially since it was the main reason the appellants filed the suit.

22. Second, the trial court expressly disbelieved the appellants in their stance that they did not know anyone by the name, "Barasa Waswa." The learned judgepointed out that the 1st appellant, in his oral testimony, said that:

> " The defendant is wife to Barasa Waswa who was my late father's brother. He is the current registered proprietor of the suit land but I don't know how he became the registered proprietor. The defendant has never lived on the land at all."

While the 2nd appellant said that:

> " I know the defendant. She is the wife of Jonathan Barasa Mbotiki"

And, the 3rd appellant said that:

> " I know the defendant. She is the wife to my uncle Jonathan Barasa Mbotiki"

23. The cumulative effect of these "strategic" responses by the three appellants, the learned judgeconcluded, was to firmly establish that the respondent was the wife to the appellants' uncle; and that the uncle was known both as "Barasa Waswa" and "Jonathan Barasa Mbotiki". Differently put, "Barasa Waswa" and "Jonathan Barasa Mbotiki" was one and the same person.

24. In affirming the correctness of his analysis, the learned judgealso pointed out that the responded had filed an affidavit in Bungoma Succession Cause No 46 of 2016, in support of her application for grant of letters of administration in respect to the estate of Jonathan Barasa Mbotiki. Therein, the Learned Judge noted, the respondent described herself as "wife" to the Deceased and his only heir. Additionally, she listed the suit land as the only property of the Deceased. Yet, despite the succession cause being known to them, the appellants did not file any protest in those proceedings.

25. The learned judgefound further support for the proposition that "John Barasa Mbotiki" and "Barasa Waswa" was the same person in the proceedings before the Bumula Land Dispute Tribunal. While the proceedings involved land parcel No West Bukusu/West Siboti/524, not the suit land, the Learned Judge noted that the appellants' late father acknowledged in his testimony at the Tribunal that the respondent was the wife of his late brother Jonathan Barasa Mbotiki and the Tribunal resolved that the respondent was to be given a piece of land thereof, as part of a share of her late husband namely, "Jonathan Barasa Mbotiki alias Barasa Waswa". That resolution, the Learned Judge noted, was signed by the appellants' late father and the respondent. The Learned Judge, therefore, reached the considered conclusion that the names "Jonathan Barasa Mbotiki" and "Barasa Waswa", the registered proprietor of the suit land, refer to one and the same person. This, as will emerge shortly, was crucial because it bore on the factual finding respecting occupation of the suit land – a necessary element in a claim for adverse possession.

26. Third, regarding the appellants' allegation that they have been in a peaceful occupation of the suit land since the years 1970, 1976 and 1986 as stated in their supporting affidavits, the Learned Judge held that those averments could not be true for the following reasons:

    a. First, having concluded that "Barasa Waswa" and "Joseph Ndafu Mbotiki" was the same person, the learned judgenoted that that person was the registered owner of the suit land from November 1, 1972and only passed away in September 1993. Therefore, the learned judgeconcluded, "it was highly unlikely that he would have allowed his brother, Morris Ndafu

(the appellants' father), to allocate his land to his sons when he (Morris Ndafu) had his own land measuring 18Ha, which is more than twice the size of the suit land;

b. Second, the learned judgenoted that "the suit land measures 8.4Ha which translates to 20.8 acres and the total acreage of land which the appellants alleged to have been allocated by their father out of the suit land totals to 21 acres." If this was the case, the only conclusion that could be drawn, the learned judgereasoned, is that the appellants' father "threw away his brother from the suit land to create room for his sons", which event was highly unlikely since he had his own land;

c. Third, the learned judgeobserved that even though the appellants stated in their affidavits that the respondent never lived on the suit land, their testimonies during cross-examination conceded that the respondent had, indeed, lived with her late husband in the suit land since 1977 and continued doing so until her house was burned.

d. Fourth, the learned judgenoted that the evidence of the respondent's occupation of the suit land which can be inferred from the appellants' testimonies in cross-examination mirrored the testimony of the respondent who told the court that got married to the Deceased in 1977 and they lived in the suit land since that time until 1993 when he died. She further stated that they were not blessed with any children and when the Deceased died, she remained alone in the suit land until the year 2008 when her house was burned and she was chased by the appellants who menacingly wielded pangas as they did so. The respondent, however, testified, and was not credibly controverted, that despite moving away from the suit land, she continued farming and leasing the suit land until the year 2010 when the appellants together with their father threatened to kill her.

e. Fifth, as alluded to above, the learned judgefound the appellants' claim that the respondent left the suit land of her own volition when her husband died incredulous. Instead, the Learned Judge made a factual finding that the appellants' entry and occupation of the suit land had been achieved through violence and menaces. The court made a finding that the respondent lived in the suit land with her late husband but was forcefully evicted therefrom following his demise in 1993. In reaching this conclusion, the learned judgecited and quoted in extenso a letter from the chief of Napara location dated August 29, 2016, to the Deputy Registrar of the High Court, Bungoma, which was produced as evidence without objection. That letter summarized the tribulations that the respondent went through in the hands of the appellants and their father with regard to the suit land. Further evidence of the violence and menaces by the appellants to achieve entry and occupation of the suit land, the learned judgefound, was provided in the Assistant Chief's letter dated September 8, 2008, addressed to the Police concerning the respondent's house having been burned and the respondent having been chased away and threatened by the 1st appellant not to set foot on the suit land.

27. Based on this analysis, the learned judgeconcluded that the claim for adverse possession by the appellants failed for two reasons:

a. First, that the evidence showed that entry and occupation of the suit land had been achieved through violence and menaces hence negating an essential element of adverse possession: that the occupation be peaceable. In this regard, trial court cited *Kimani Ruchine & Another v Swift Rutherford & Company Ltd* 1980 KLR 10, *Robert Shume & Others v Samson Kalama* [2015] eKLR and *Mtana Lewa v Kahindi Ngala Mwagandi*, Civil Appeal No 56 of 2014 [2015] eKLR.

b. Second, that the evidence demonstrated that the appellants had been in possession for less than the statutorily required period of twelve years. This is because, the learned judgeopined, the evidence showed that the respondent had been in possession of the suit land until at least 2010.

28. Having reached the consequential finding that the claim for adverse possession had failed, the learned judgeturned to the question whether he could, on the facts of the case, grant a remedy to the respondent. In considering this question, the learned judgequite straight-forwardly conceded that the respondent had not counter-claimed or pleaded for any relief from the court. However, the learned judgepivoted his analysis on the equitable principle that equity would not suffer a wrong and be without remedy, and cited the case of *Macharia Mwangi Maina & Others v Davidson Mwangi Kagiri* [2014] eKLR.

The learned judgealso cited the guiding principles set out under section 18(d) of the *Environment and Land Court Act* and article 10(2)(b) of the *Constitution*, all of which put an emphasis on national values and principles of governance, specifically, equity, human rights, non-discrimination and protection of the marginalized.

29. The learned judgetook the view that it would be unfair to the respondent to hand her only a "pyrrhic victory" if the court did not make orders that would bring the dispute to a definitive finality, in addition to doing justice to the parties. This was because, the learned judgeobserved, the case at bar was a well-choreographed scheme by the appellants to ensure that the respondent does not inherit her husband's land because of her gender and inability to bear children, contrary to the anti- discrimination provisions of article 27(3),(4) and (5) of the *Constitution*. The learned judge was particularly concerned that if he did not make any final orders with regard to the ownership of the suit land, the appellants would continue in occupation while the respondent, a poor widow, would continue "languishing" in the corridors of the Reformed Catholic Church premises where she had sought refuge after being chased from her home by the appellants.

30. In this regard, the learned judgenoted that the respondent was acting in person and as is typical with pro-se litigants, her pleadings could not be expected to be elegant. Therefore, the court reasoned, it was not remarkable that the respondent did not plead any counter claim. The Learned Judge leaned on *Odd Jobs v Mubia* 1970 EA 476 for the proposition that where parties have canvassed any issue and left it to the court to decide, the court can pronounce judgment on the same even though it was not pleaded. The learned judge observed including *Ngugi Ticha v Kiritu Ticha & others*, Civil Appeal No 40 of 2004 [2014] eKLR and *Uyas Industries v Diocese of Meru* 1982 KLR 114.

31. In the learned judge'sview, in the course of the proceedings, it had become clear that the parties wanted a decision as to the ownership of the suit land and evidence was led on that; and whereas the appellants claim to the suit land was based on adverse possession, they insisted that the suit land in fact belonged to their late father, notwithstanding the fact that the suit land was registered in the name of Barasa Waswa since November 1, 1972. On the other hand, the respondent's case was that the appellants were "malicious and were applying short cuts to acquire the suit land."

32. The learned judgeobserved that during her examination-in- chief, the respondent had stated that she wanted the court to give her, her land; and when she was cross examined, she stated that she wanted the government to help her get back her land. Based on this evidence, the learned judgeconcluded that it was clear that substantive resolution of the case required the court to make a decision whether the respondent was entitled to the suit land, whilst bearing in mind that the same was not registered in her name.

33. Pivoting from the holding in *Anne Nyathira v Samuel Mungai Mucheru & others*, Civil Appeal No 68 of 2015 NBI [2016 eKLR] which followed the decision in *Odd Jobs v Mubia* (*supra*), and holding that the case at bar was on all fours with it, the Learned Judge, having already found that the respondent was the wife of Barasa Waswa alias Jonathan Barasa Mbotiki, the registered proprietor of the suit land; and drawing from the fact that she obtained a grant of letters of administration in respect of the Deceased estate's in which the suit land was the only property listed therein; and taking into consideration that she had no children, concluded that the respondent was entitled to be registered as the proprietor of the suit land through transmission as provided under section 61(1) of the *Land Registration Act*, 2012. Having come to that conclusion, the learned judge then reasoned that the appellants were trespassers on the suit land and were, thus, liable to eviction.

34. The learned judgeultimately made the following orders:

    1. The plaintiffs' claim is dismissed.

    2. A declaration is hereby issued that the land parcel No West Bukusu/West Siboti/607 is the property of the defendant.

    3. The defendant shall forthwith apply to the Land Registrar Bungoma who shall register her as the proprietor of the land parcel No West Bukusu/West Siboti/607.

    4. The plaintiffs, their families, agents, servants and any other persons occupying the land parcel No West Bukusu/West Siboti/607 shall vacate it within three (3) months of this judgment or be evicted therefrom.

    5. Thereafter, the plaintiffs, their families, agents, servants or any persons acting through them shall permanently be restrained from trespassing upon, ploughing or doing any acts which are prejudicial to the defendants' proprietary interests in the land parcel No West Bukusu/West Siboti/607.

    6. Each party shall meet their own costs, this being a family matter.

35. Aggrieved by the decision of the trial court, the appellants filed a Notice of Appeal dated September 21, 2021, and a Memorandum of Appeal dated June 17, 2022, in which they raised six (6) grounds of appeal. These were that the learned judge erred in law and fact when:

    1. He dismissed the appellants suit against the weight of evidence on record.

    2. He ordered that the land parcel No West Bukusu/West Siboti/607 is the property of the defendant when we are all aware it was the property of the Deceased.

    3. He ordered the defendant to apply to the land registrar Bungoma who shall upon application register the respondent as the proprietor of land parcel No West Bukusu/West Siboti/607 in disregard of the succession caused filed in the lower court.

    4. He disregarded the appellants evidence and testimony thus arriving at a wrong conclusion.

    5. He held that Barasa Waswa was the same person as Jonathan Barasa Mbotiki.

    6. He held that the appellants be evicted by the respondent from the land in dispute.

36. Consequently, the appellants prayed that the appeal be allowed with costs to the appellants, judgment of the superior court be set aside and this Court give its judgment as per the evidence on record.

37. During the virtual plenary hearing of the appeal, learned counsel, Mr Simiyu appeared for the appellants and learned counsel, Ms Adongo, appeared for the respondent. Both parties filed written submissions and relied entirely on them.

38. The appellants opted to cover grounds 1 and 4 as one, grounds 2 and 3 as one, and grounds 5 and 6, separately.

39. The appellants reminded this court on its role as the first appellate court, which is 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). This is the standard I shall use in analyzing the instant appeal.

40. As regards grounds 1 and 4, which are that the learned judgedisregarded the evidence and testimony of the appellants and dismissed the suit against the weight of the evidence on record, the appellants argued that the totality of the evidence before the trial court proved that the appellants were in use and occupation of the suit land. The appellants also argued that evidence on record showed that the respondent filed a dispute at the Land Dispute Tribunal claiming part of land parcel No West Bukusu/West Siboti/524 that ought to have been subdivided between her and her brother-in-law (appellants' father), as shown by the letters dated October 16, 2010, by the Chief of Napara location and the letter dated May 13, 2010 by the District officer of Siboti. In addition, the appellants alleged the letter dated December 19, 2006, by the District Officer of Bumula division was with respect to the respondent's complaint about land parcel No West Bukusu/West Siboti/524 and not the suit land.

41. The appellants submitted that the letter dated August 29, 2016, is the first letter that raised the issue with respect to the suit land and it was what the Learned Judge heavily relied on in his judgement and disregarded the contents of the letters stated herein above and the proceedings of the Land Dispute Tribunal which all dealt with land parcel No West Bukusu/West Siboti/524. The appellants urged that the trial court ignored the two sets of the Land Dispute Tribunal proceedings in which one set, the land parcel No was changed by the respondent to read land parcel No West Bukusu/West Siboti/607 instead of West Bukusu/West Siboti/524. The appellants further argued that the position taken by the respondent when claiming land from the appellants' father was that they were both residing on land parcel No West Bukusu/West Siboti/524, which position was different from the current position in respect of the suit land. They cited *Wambugu v Njuguna* (1983) KLR 173 in which the court held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

42. As regards grounds 2 and 3, the appellants submitted that it was not in dispute that the suit land is registered in the name of the Deceased and that at the time this suit was instituted, the respondent had obtained the grant of letters of administration and certificate of confirmation of grant. The appellants argued that the trial court had no jurisdiction to make such orders as they were contrary to section 61(1) and (2) of the *Land Registration Act*; and further, article 162(b) of the *Constitution* does not give the superior court jurisdiction to deal with estates of Deceased persons. It was urged that the power of the court ended when it declared whether adverse possession was proved or not.

43. The appellants argued that the learned judgeoverstretched the principle in the case of *Anne Nyathira v Samuel Mungai Mucheru & others*, as the situation in the instant case is clearly catered for by the *Law of Succession Act* and the *Land Registration Act*, which Acts are administered by different courts under our constitutional dispensation. They submitted that the totality of the evidence proved that they were in use and occupation of the suit land and that the order of the trial court was premature

as the suit land was still in the name of the Deceased. The appellants urged that in case the finding of the court was correct, then eviction should take place upon completion of the succession proceedings and upon filing another suit for such orders.

44. The appellants did not make any submissions on ground 5 and 6 as stipulated. Be that as it may, the issue of eviction has been summarily argued in paragraph 43 above.

45. Opposing the appeal, the respondent deduced the issues of determination into four (4) as follows:

    a. Whether the learned judgeerred in law and fact in finding that Barasa Waswa was the same person as Jonathan Barasa Mbotiki.

    b. Whether the learned judgeerred in finding that the suit land belonged to the respondent and ordered that the same be registered in her name.

    c. Whether the learned judgeerred in dismissing the appellants suit against the weight of the evidence and whether he disregarded their evidence.

    d. Whether the learned judgeerred in determining that the appellants be evicted from the suit land.

46. On the first issue, the respondent argued that the learned judgeconsidered both the documentary evidence and oral evidence of the appellants and concluded that "Barasa Waswa" and "Jonathan Barasa Mbotiki" was one and the same person. She argued that the Learned Judge specifically referenced the Chief's letter dated February 13, 2012 in which the appellants' father acknowledged that Jonathan Barasa Mbotiki's alias was Barasa Waswa. Further, the respondent argued, the learned judgeconsidered the different names the appellants referred to the registered proprietor and the fact that they acknowledged that they were related to the respondent, and "saw beyond their lies that indeed the names referred to one and the same person."

47. Respecting the second issue, the respondent contended that the trial court was right in holding that the suit land belonged to the respondent and made orders for her to be registered as the proprietor, since it made a finding from the evidence before it that indeed the respondent was the wife to the Deceased and had lived with him in the suit land until his demise in 1993. Also, even after his demise, the respondent continued to reside in the suit land until the year 2008 when her house was burned and she was forcefully evicted, refrained from building another house and her sugarcane plantation were destroyed; after which the appellants took over possession of the suit land. The respondent argued that the appellants occupation and possession of the suit land was forceful and not peaceful, contrary to the pre-requisite of a claim by way of adverse possession. In any event, the respondent contended that being the only surviving spouse and dependent of the Deceased, there having been no children in their marriage, the law dictates that the surviving spouse is entitled to *inter alia*, a life interest of the whole of the intestate estate, which interest is only reconsidered after her re-marriage.

48. Turning to the third issue, the respondent contended that the trial court considered all the evidence before it and weighed it carefully. The respondent argued that whereas the appellants contended that the suit land belonged to their father, one Morris Ndafu Mbotiki, who allocated them portions thereof during his lifetime, there was evidence from the green cards which showed that the Deceased as the registered proprietor of the suit land since November 1, 1972. Additionally, there was evidence that after the demise of the Deceased in 1993, the respondent continued to reside in the property until 2008 when her house got burned and she was forcefully ejected. These allegations, the respondent submitted, were corroborated by numerous pieces of documentary evidence from different institutions she sought help from. In any event, the respondent contended, the instant suit was filed

prematurely before the end of the statutory period of 12 years since at the time of filing the suit in 2016, only 8 years had lapsed as the respondent moved from the suit land in 2008.

49. Finally, on the fourth issue, the respondent submitted that the evidence led during trial was to the effect that the parties wanted a decision as to the ownership of the suit land. The respondent argued that the issue of ownership was extensively covered by both parties during trial and whereas the appellants reiterated their prayers to be declared as owners, the respondent maintained that she wanted the court to give back her land. As such, the trial court found that the issue of ownership was one that it was obligated to determine. Therefore, argued the respondent, guided by the decision in *Odd Jobs v Mubia* 1970 E.A 476, the trial court rightfully held that being the only beneficiary to the registered proprietor, the respondent was entitled to apply to the land registrar to be registered as the owner of the suit land. This meant, submitted the respondent, that the appellants were trespassers and ought to vacate the suit land or be evicted.

50. As rightfully stated by the appellants, 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 my 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, I am obligated to be cognizant of the fact that I 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).

51. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, three issues present themselves for determination in this appeal:

    a. First, whether the appellants successfully proved all the elements of the claim for adverse possession respecting the suit land.

    b. Second, whether the learned judge erred in finding that the suit land belonged to the respondent and making an order for her to be registered as the proprietor thereof.

    c. Third, whether the learned judge erred in finding that the appellants were trespassers and should therefore vacate the suit land or be evicted within three months of the judgement.

52. In Kenya, ownership by adverse possession has been given statutory underpinning in sections 7, 13, 17 and 38 of the *Limitations of Actions Act* (cap 22 of the Laws of Kenya). section 7 of the *Act* states that:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

53. Section 13, on the other hand stipulates:

> "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this *Act*, the land in reversion is taken to be Adverse Possession of the land".

54. section 17 goes on to provide as follows:

> " Subject to section 18 of this *Act*, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished".

55. Finally, section 38(1) and (2) states:

> "(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this *Act*, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
>
> (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

56. Courts, on the other hand, have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession. The leading cases from this court in this regard include: *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR; *Titus Kigoro Munyi v Peter Mburu Kimani*, Civil Appeal No 28 of 2014; *Wambugu v Njuguna* [1983] KLR 172) and *Karuntimi Raiji v M'makinya* [2013] eKLR.

57. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be:

a. Adverse to the interests of the owner – meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;

b. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;

c. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;

d. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;

e. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;

f. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years.

58. Did the appellants satisfy all these six elements which are essential to the establishment of a claim of adverse possession? As rehashed above, the Learned Trial Judge concluded that the appellants had failed to establish two of the six elements: that they obtained possession without force; and that they had possession for a period of at least twelve years.

59. I begin the analysis by observing, like the trial court, that from the undisputed facts in this case, the appellants had established that they had possession to the suit land which was adverse to that of the respondent; and that the possession was actual, open and notorious.

60. The key issues are whether the appellants established, on balance, that they had peaceably obtained possession and that it was for a period of at least twelve years. I am also doubtful whether, in the circumstances, the possession can be said to be exclusive.

61. For both inquiries, the question whether "Barasa Waswa" and "Jonathan Barasa Mbotiki" was one and the same person is key. It is the cog that unlocks the analytical puzzle in the case: if "Barasa Waswa" and "Jonathan Barasa Mbotiki" was one and the same person, it would follow that he was the Deceased brother to the appellants' father; and further that the respondent was his widow; and that they lived on the suit land until his demise in 1993. This is especially so because the appellants conceded in cross-examination that their uncle, who they referred to as "Jonathan Barasa Mbotiki" had lived on the suit land until his demise in 1993.

62. I have re-produced above, at length, the reasoning of the learned judgeon this point. I must say, with respect, that I find the learned judge'sanalysis careful and factually sound. I say so for the at least four reasons some of which persuaded the learned judgeto come to his conclusion as well:

a. First, the testimonies of the appellants on cross examination as reproduced in paragraph 22 of this judgment show that, in spite of themselves, the appellants acknowledged that "Barasa Waswa" and "Jonathan Barasa Mbotiki" was one and the same person. The appellants not only interchanged in their reference to him, but they also conceded that the respondent was his widow.

b. Second, the documentary evidence produced by the respondent variously described the Deceased as "Johathan Barasa Mbotiki alias Barasa Waswa." As the Learned Judge observed, the most explicit reference is found in the proceedings before the Bumula Land Dispute Tribunal which were produced by the respondent as evidence without objection by the appellants. While the proceedings involved land parcel No West Bukusu/West Siboti/524, not the suit land, as the Learned Judge noted, the appellants' late father acknowledged in his testimony at the Tribunal that the respondent was the wife of his late brother, "Jonathan Barasa Mbotiki" and the Tribunal resolved that the respondent was to be given a piece of land thereof, as part of a share of her late husband namely, "Jonathan Barasa Mbotiki alias Barasa Waswa".

c. Third, two letters written by the Area Chief – one dated 13/02/2012 and the other dated 29/08/2016 – which were also produced by the respondent sans protestation by the appellants matter-of-factly refer to the Deceased as "Jonathan Barasa Mbotiki alias Barasa Waswa".

It is remarkable that these two letters were written four years apart but contain the same information; and it is noteworthy that the former was written before the present litigation was conceived. Its probative value and credibility is, therefore, quite high.

d. Fourth, as the learned trial judgepointed out, the respondent filed a succession cause with respect to the estate of the Deceased back in in Bungoma Succession Cause No 46 of 2016. In that cause, she described herself as the sole heir to the estate of the Deceased. She also listed the suit land as the only asset available for transmission. She obtained Letters of Administration on April 29, 2016. However, the appellants did not file any protest in that cause though it would appear that they were aware of it because they are the ones who produced the documents related to the cause during the trial.

63. The upshot is that there is overwhelming evidence that "Barasa Waswa" and "Jonathan Barasa Mbotiki" is one and the same person. That same evidence establishes that the respondent was his wife. That same evidence establishes that the Deceased was, therefore, the registered proprietor of the suit land since November 1, 1972. As the learned judgeobserved, it appears that it is not a co-incidence that the appellants' father was registered as the proprietor of the adjoining land measuring 18.0 Ha on the same day. I, therefore, equally share the incredulity of the learned judgeto the allegation that the appellants' father allocated the appellants portions of the deceased's land between 1970 and 1986 when the deceasedwas still alive.

64. This lack of credence is compounded by the fact that the appellants, in perhaps flashes of momentary candour, conceded in cross-examination that the deceasedlived on the suit land with the respondent until his demise; and that the respondent lived there with him. For example, the 1st appellant was, at first categorical that "the defendant never lived on the land at all" (see page 82 of the Record of Appeal). However, in cross-examination, he suddenly concedes: "It is true that your house was burnt." (page 83 of the Record). It follows that one must be living in a house built on the land for it to be burnt.

65. On the other hand, the 2nd appellant is a little more forthright. In his examination-in-chief, he says: "It is not true that we chased the defendant from the land in dispute. She left after her husband died." (page 83 of the Record). In cross-examination, he says:

> " When your husband died, you left the home." (page 83 of the Record). This is as direct a concession as one can get that the respondent was in occupation of the suit land – at least until her husband died. It is noteworthy that the concession by the 2nd appellant directly contradicts the categorical assertion by the 1st appellant that the respondent never lived on the suit land. It is also at variance with the appellants' pleadings.

66. Finally, the 3rd appellant stated: "The defendant left the suit land in 1993 after her husband died. It is not true that we chased her away. She left on her own." Then in cross-examination he admitted: "You (respondent) came to the suit land in 1987."

67. What emerges from this evidence as coupled with the respondent's own testimony is the clear and convincing demonstration that the respondent lived on the suit land at least until the deceaseddied in 1993. What also emerges is that the evidence by the appellants is clumsily curated to give the impression that the respondent abandoned the suit land in 1993; and that, therefore, they have been in peaceful but adverse possession since then. However, like the Learned Trial Judge, I disbelieve that narrative. This is so for at least three reasons:

a. First, as demonstrated above, the appellants' testimonies were contradictory, self-serving and, for the most part, incredible.

b. Second, the testimony of the respondent was straight- forward and remained unshaken on cross- examination. This is in contradistinction to the testimonies of the appellants which seemed to fall apart on cross-examination or perfunctory analysis.

c. Third, the respondent's narrative that she remained on the suit land until 2010 is backed up by documentary evidence. This are the two letters by the Chief – including one that describes in detail how her house was burnt down by "unknown people" and how the appellants continued harassing her with the hope that she would abandon her claim to the property.

d. Fourth, the respondent's narrative is further supported by contextual evidence: that she was now homeless only given sanctuary by the Redeemed Catholic Church. It is incredible that the respondent would abandon the land left to her by her husband only for her to go search for sanctuary in a church as an indigent person. Further contextual evidence is provided by the efforts she has put, detailed in her documentary evidence, to get the suit land to revert to her. Indeed, even if the respondent was not in actual possession until 2010 as I have expressly found, the appellants would not have been able to prove that they were in exclusive possession of the suit land. This is because, throughout their period of supposed actual possession, the respondent remained active in attempting to oust their possession using administrative and legal means. A claimant cannot be said to be in exclusive possession when the true owner is actively resisting the claimant's colour of right to occupy the suit property whilst asserting her own right to own and occupy the suit property.

68. These two conclusions – that the respondent was in occupation and possession of the suit land at least until 2010 hence making the period shorter than the minimum twelve years required for a claim of adverse possession to accrue; and that the appellants' possession was not exclusive – are enough to defeat the appellants' claim for adverse possession. However, as the learned trial judgefound, there is an even more fundamental reason to reject the claim: that the occupation and possession was obtained by actual and threatened violence. That violence is well narrated in the testimony of the respondent, which the learned trial judgefound believable – and I have no reason to depart from those findings – as well as the documentary evidence presented to the trial court – especially the letters dated August 29, 2016and February 13, 2012. These letters, by the Area Chief, corroborate the respondent's testimony that she was, in fact, forcefully ejected from the suit land by the appellants.

69. The upshot of this analysis is that the Learned Judge was correct to conclude that the appellants had failed to prove all the elements of adverse possession.

70. I will now turn to the second issue raised in this appeal. This is whether it was open to the learned trial judgeto make orders that the suit land be registered in the name of the respondent yet she had not filed a counter-claim. The appellants raise two complaints in this regard. The first one is that the learned judgeought not to have issued the reliefs to the respondent because she did not file a counter-claim. The second one is that the appropriate cause where the orders should have been issued should have been the Succession Cause – and not the case at bar. This objection is pivoted from the argument that the Learned Judge, being a judge of the Environment and Land Court, whose jurisdiction is circumscribed under article 162(2) of the *Constitution*, had no jurisdiction to give the orders. This is because, the appellants argue, the orders given are in the nature of orders to transmit land by inheritance which is in the nature of succession, a subject matter outside the jurisdiction of the Environment and Land Court.

71. I will reverse the order and deal first with the latter argument. It is true that the jurisdiction of the Environment and Land Court is limited by the *Constitution*. The Supreme Court emphasized this in *Republic v Karisa Chengo & 2 others* [2017] eKLR. The case at bar was also about title to land; and the orders the Learned Trial Judge gave respected ownership of the suit land – clear subjects reserved

to the Environment and Land Court by dint of article 162(2) of the *Constitution*. The fact that the same parcel of land was identified as part of the estate of the Deceased does not, *ipso facto*, bereave the Environment and Land Court of jurisdiction. Indeed, the opposite position is the correct one: the fact that ownership of the parcel was contested makes the Environment and Land Court the appropriate forum to determine the question. I agree with what Musyoka J. stated in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR with regard to the jurisdiction of the Probate and Administration:

> " The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets."

72. In the case at bar, there was an essential question whether the suit land belonged to the estate. That was the matter that the learned judgehad to deal with. The learned judgedid not delve into questions of collection or preservation of the estate; and neither did he deal with questions related to identification of survivors and beneficiaries or distribution of the estate. He was, thus, within his jurisdictional limits to deal with the appropriate orders that needed to be made in the case.

73. That leads to the question whether the Learned Judge was in error for granting a relief not pleaded by way of counter-claim. The learned judgewas alive to the potential legal difficulties this could cause. He weighed the rival positions in law and delicately charted a way forward by creating a narrow exception in which he placed the case at bar; and then proceeded to grant relief.

74. As a general rule, a relief for which no prayer or pleading was made should not be granted. If a courtconsiders or grants a relief for which no prayer or pleading was made, this would ordinarily amount to a miscarriage of justice. The leading case in this regard is this court's decision in *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR. In that case, this Court stridently stated the applicable 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."

75. This case states the general rule applicable. It certainly represents good law; one with sound policy rationale and objectives. However, as *Odd Jobs v Mubia* (*supra*) and *Anne Nyathira v Samuel Mungai Mucheru & Others*, Civil Appeal No 68 of 2015 NBI [2016 eKLR] demonstrate, there is a narrow exception to this general rule. The exception is stated in *Odd Jobs v Mubia* (*supra*), in the following words:

> " (i) A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;
>
> (ii) On the facts, the issue had been left for decision by the court as the advocates for the appellant led evidence and addressed the court on it."

76. It is probably prudent to unpack when the facts of a case would fit within the narrow *Odd Jobs* exception. In my view, it is only open for a court to base its decision and grant relief on an unpleaded issue where the following conditions are met:

a. When the issue the court seeks to frame for relief is prominently germane in the evidence adduced by both parties and all the relevant matters respecting the issue have litigated and all the potential evidence made available to the court and the only failure was the technical one of failing to request for the specific relief in the pleadings;

b. When the parties exhaustively addressed the issue for which the court seeks to grant a relief;

c. When no useful purpose will be served by the matter being litigated in a different form except to unnecessarily prolong the litigation process;

d. When the dictates of substantive justice compel that relief be granted rather than requiring that a new matter be filed, for example, where the evidence before the court shows that a party is likely to continue suffering oppression by the other party or where the new matter may be time barred;

e. When the relief is incidental or logically consequential from the pleaded matters and the court comes to the conclusion that in spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue in question by producing evidence;

f. When the failure to plead the relief was not a product of bad faith, tactical maneuver to give an advantage to the unpleading party. In this regard, some of the factors the court considers is whether the party was acting in person as well as the circumstances in which the matter was filed. For example, some matters are filed in an emergency mode where drafting mistakes can be made due to the pressure of time. *Anne Nyathira* case, for example, was a burial dispute which began as a request for a post-mortem exam to determine the cause of death; and

g. When neither party will suffer objective prejudice if the court grants the relief on the evidence adduced.

77. These factors are conjunctive not disjunctive: all must be present before a party can benefit from the exception. All these factors are based on an overriding fairness criterion: the need to ensure that the parties went into trial knowing all the rival case and led all the evidence not only in support of their contentions but also in refutation of those of the other side.

78. Did the case at bar satisfy these factors for the exception to apply? I believe it did. As the learned judgeconscientiously reasoned, the issue that was litigated before him and over which both documentary evidence and oral testimony was adduced was the issue of ownership of the suit land. The parties addressed the issue comprehensively and each party specifically asked the learned judgeto "give them" the suit land. Furthermore, the respondent was acting in person, and no stench of bad faith tactical maneuver rises from both her pleadings and conduct in the matter. From the manner in which the litigation proceeded, it can be objectively said that the question of ownership of the suit land was prominently germane in the evidence adduced and was logically consequential from the pleaded facts despite the lack of a counterclaim. In spite of the deficiency in the pleadings, the parties knew the case and they proceeded to trial on the issue of ownership by producing evidence. Finally, as the learned judgerationalized at length, the dictates of substantive justice militate in favour of the relief being granted in the specific circumstances of this case. This is due to the palpable oppression that the respondent has already suffered and would likely continue to suffer in the hands of the appellants. The details are reproduced elsewhere in this judgment.

79. I would, therefore, conclude that the learned judgewas not in error in granting the relief of a declaration of ownership of the suit land by the respondent; and then in giving the further logically consequential orders of registration of the suit land in her name and ejectment of the appellants from the suit land.

80. The upshot is that the appeal lacks merit. I would dismiss it with costs to the respondent.

Judgment of Kiage, JA

1. I have had the benefit of reading in draft the judgment of my learned brother Joel Ngugi, J A and I am in full agreement with his reasoning, the conclusions he reaches, and the order he proposes.

2. As Tuiyott, J A also agrees, the appeal is dismissed with costs to the respondent.

Judgment of Tuiyott, JA

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

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

JOEL NGUGI

.....

JUDGE OF APPEAL

P.O KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR