



**Baya & 549 others v Wachu Ranch (D.A) Company Ltd (Civil Appeal 53 of 2020) [2023] KECA 1486 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1486 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL 53 OF 2020  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**ALEX MWALIMU BAYA & 549 OTHERS ..... APPELLANT**

**AND**

**WACHU RANCH (D.A) COMPANY LTD ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (O. A. Angote, J.) delivered on 25th November 2016 in E.L.C No. 207 of 2013)*

**JUDGMENT**

1. By a plaint dated October 18, 2013, the respondent, Wachu Ranchi (DA)) Company Limited, sued Alex Mwalimu Baya and 549 others (the appellants) in the Environment and Land Court at Malindi in Malindi ELC No 207 of 2013 praying for judgment against the appellants for: a permanent injunction to restrain them, their employees and/or agents from remaining on LR No 13600 (the suit property) belonging to the respondent; a permanent mandatory injunction compelling the appellants by themselves, their servants and/or agents to demolish and remove all the illegal construction being on the suit property, and to demolish all the buildings and illegal erections interfering with the respondent's activities; eviction and/or removal of the appellants from the suit property; a permanent injunction against the appellants restraining them from interfering with the suit property; cost of the suit and interest thereon at court rates.
2. The respondent's case was that it was the registered owner of the suit property measuring approximately 28,911 hectares within Tana River County; that the respondent had applied for and lawfully obtained the suit property from the government in 1976 whereupon it was issued with the requisite title documents in 1991; that the appellants had at no time been the registered owners of the suit property; that the the suit property was allocated to the respondent for ranching activities, and that the respondent had carried out, and continues to carry out these activities on the suit property; that the appellants were fully aware of its ownership, but had elected to ignore that fact; that the appellants



had on diverse dates encroached on and forcibly occupied the suit property, thereby preventing the respondent from enjoying quiet possession thereof; that the appellants were trespassers on the suit property, and were making it impossible for the respondent to carry out its ranching activities; that the appellants were hostile to the respondent and to the local administration when attempts were made from time to time to remove them; that the appellants had refused to vacate the suit property; and that the respondent stood to suffer irreparable loss if the appellants were not evicted therefrom.

3. In their defence dated February 14, 2014, the appellants denied the respondent's claim and averred that, if the respondent was the registered owner of the suit property, its registration as such was irregular, illegal and unprocedural; that they had been in possession and occupation of the suit property for a long period of time; that they took possession thereof long before 1976; that the appellants had no notice of allocation of the suit property to the respondent, and that no meetings were ever convened to sanction the allocation and agree on proposals for compensation; that the respondent had never been to the suit property, and had not undertaken any developments thereon; that, to the contrary, the suit property was owned by, and in actual possession of, the appellants, who had fully developed it and built dwelling houses, carried out agricultural and other commercial activities; and that the respondent's application for and allocation of the suit property was procured by undue influence or fraudulent conduct since the respondent, the commissioner of lands and the then county council of Tana River were all aware of the appellants' occupation of the suit property.
4. Upon hearing the parties, the ELC (O A Angote, J) delivered its judgment dated November 25, 2016 allowing the respondent's claim with costs to the respondent. In its judgment, the trial court granted a permanent injunction restraining the appellants by themselves, employees and/or agents from remaining on the suit property; a permanent injunction restraining them from interfering with the suit property; a permanent mandatory injunction compelling the appellants by themselves, their servants and/or agents to demolish and remove all the construction and structures situate on the suit property; and an order of eviction to remove the appellants, their employees and/or agents from the suit property.
5. Aggrieved by the judgment of O A Angote, J, the appellants moved to this court on appeal on 7 grounds set out in their memorandum of appeal dated April 27, 2020 faulting the learned Judge for, *inter alia*: failing to appreciate the fact that the respondent had not taken out summons to enter appearance for all the appellants and, thus, the proceedings were instituted without notice of most of the appellants who stood to be affected by the decree; failing to appreciate that the appellants had filed their submissions, but presumed that none had been filed; failing to evaluate the evidence adduced by the appellants who testified in the proceedings; failing to appreciate the fact that the respondent's suit was barred by statute of limitation; failing to appreciate that the respondent was in breach of the terms of its lease by sub-leasing the suit property; failing to appreciate that the respondent had undertaken no activities on the suit property, and that the ranch was a ghost project; and for failing to visit the *locus in quo* as requested by the appellants.
6. In support of the appeal, learned counsel for the appellants M/s Richard O & Co filed written submissions dated June 30, 2021 elucidating on the respective grounds of appeal, but citing no judicial authorities in that regard.
7. Opposing the appeal, learned counsel for the respondent M/s Gicharu Kimani & Associates filed their written submissions dated May 27, 2021 citing the High Court decision in [Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others](#) [2016] eKLR where the court held that "the purpose of summons to enter appearance is to inform a defendant of institution of a suit." The court also made reference to the Court of Appeal decision in [Equitorial Commercial Bank Limited v Mobansons \(k\) Limited](#) [2012] eKLR to which we will shortly return.



8. In addition to the foregoing, learned counsel cited the High Court decision in *Lucy Nyokabi Nyambura v Ruth Dama Charo & 2 others* [2018] eKLR where the trial court made reference to the celebrated Supreme Court decision in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* [2014] eKLR for the proposition that counsel and their clients have a duty to abide by court directions as the only way to have court business conducted with some certainty.
9. We have considered the appeal, the submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the *Rules* of this Court is to reappraise the evidence and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this court, the Court of Appeal for Eastern Africa, stated that:
 

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”
10. To our mind, the following four issues commend themselves to us for determination, namely: whether the respondent’s failure to take out and serve summons to enter appearance on each and every one of the appellants was fatal to its claim in the trial court; whether, in any event, the respondent’s case was barred by statute of limitation; whether the trial court erred in holding that the respondent was the rightful owner of the suit property, and in granting the impugned orders; and what orders ought we to make in determination of this appeal, including orders on costs.
11. On the 1<sup>st</sup> issue, the appellants contend that the respondent’s failure to take out and serve summons to enter appearance on all the appellants in compliance with the mandatory provisions of order 5 rule 1 of the *Civil Procedure Rules* rendered its suit fatally defective. According to them, their appearance was inconsequential, and that such appearance does not cure a defective suit which, in any case, should have been declared a non-starter.
12. In their response, learned counsel for the respondent submitted that the appellants were at all material times represented by M/s Katsoleh & Company, who were duly served with summons to enter appearance on the appellants’ behalf and, thereafter, proceeded to enter appearance on their behalf on 6<sup>th</sup> December 2013. Counsel relied on the provisions of order 5 rule 8 of the *Civil Procedure Rules, 2010* which reads:
  8. Service to be on defendant in person or on his agent [order 5, rule 8.]
    1. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
    2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”
13. This Court in *Equitorial Commercial Bank Limited v Mohansons (k) Limited* [2012] eKLR held as follows on the matter:
 

“We definitely appreciate and agree that the object and scope of summons is to make the defendant aware of the suit filed against him and to afford him time to appear and follow



the process of law. It was re-emphasized by Mr Odera that the purpose in this case was adequately and sufficiently achieved and the defect or the irregularity, if any, was waived. The case of *Nanjibhai Prabhudas & Co Ltd v Standard Bank Ltd* [1968] EA (K) 670 was relied upon wherein the Court of Appeal held that:-

- i. Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.
- ii. Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing.

Sir Charles Newbold at page 681 and 683 of *Nanjibhai's case (supra)* observed as under:-

“The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant.

The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

14. Having carefully considered the provisions of order 5 rule 8 and the afore-cited judicial decisions, we agree with counsel for the respondent that the appellants cannot claim that the respondent did not take out summons to enter appearance for all the appellants since they all entered appearance and proceeded to defend the suit in the trial court. Neither can they fault the learned Judge for not considering their plea on this account. To our mind, doing so would have been an exercise in futility. On our part, we elect to address ourselves on this issue to set the law straight and leave no stone unturned in our attempt to render a just determination of the appellants’ appeal. Otherwise, we think it a non-issue, the appellants having entered appearance and filed their defence. In effect, this ground of appeal fails.
15. Turning to the 2<sup>nd</sup> issue as to whether the respondent’s suit in the trial court was barred by statute on account of the appellants’ prolonged occupation of the suit property, we take note of the fact that the alleged statute bar was not pleaded before the trial court. It is apparent from the record as put to us that this issue was raised for the first time on appeal to this Court. We nonetheless take cognisance of the fact that it is essentially jurisdictional and may be raised at any time in the proceedings, including proceedings on appeal. In the circumstances, we consider it necessary to pronounce ourselves thereon as we hereby do.
16. This Court in *Isaack Ben Mulwa v Jonathan Mutunga Mweke* [2016] eKLR held that:

“ Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be {{term{refersTo | title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality.} res judicata}} simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts. As



explained by the learned authors Winfield and Jolowicz in *Winfield and Jolowicz on Tort*, 11<sup>th</sup> edition, Sweet and Maxwell, London, 1979 at page 342:-

‘Trespass, whether by way of personal entry or by placing things on the plaintiff’s land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.’ ”

17. Likewise, the Court of Appeal in *Muthiora v Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara – Deceased)* [2022] KECA 28 (KLR) also held that:

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

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

In *Black’s Law Dictionary* 8th Edition, a continuing trespass is defined as:-

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

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

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

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

19. In conclusion, the appellants having entered into and remained on the suit property without the respondent’s consent continued to trespass thereon, and every subsequent day of such occupation refreshed the respondent’s cause of action in trespass. Indeed, the injury complained of in the respondent’s suit was continuous and actionable in tort. Accordingly, we find nothing to fault the learned Judge for granting the injunctive relief and the eviction orders sought. Likewise, this ground of appeal fails.

20. The 3<sup>rd</sup> issue is the mainstay of this appeal, namely who as between the appellants and the respondent were the rightful owners of the suit property. As gathered from testimonies of their witnesses at the hearing before the trial court, the appellants’ case was that their occupation of the suit property was consequent upon allocation by their elders during the period between 1998 and 2008. As the learned Judge correctly found, none of them was in occupation of the suit property before grant to the respondent of title thereto in 1991. In any event, we find no legal basis for the appellants’ claims founded on the purported allocation of portions of the suit property by elders in their community, and particularly, elders that had no legal mandate so to do.



21. In the circumstances, we hereby affirm the learned Judge’s finding and ultimate decision in paragraph 50 of the impugned judgment where he had this to say:

“ 50. Considering that no evidence was produced to show that the village elders had the legal mandate of allocating the Defendants the land which was already registered and in view of the provisions of section 23 of the Registration of Titles Act (repealed) as read together with section 26 of the Land Registration Act, I find and hold that the plaintiff has proved its case on a balance of probabilities.”

22. This court in Embakasi Properties Limited & another v Commissioner of Lands & another [2019] eKLR held:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,” it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is *prima facie* evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.”

23. Section 26(1) of the Land Registration Act, 2012 affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition. The section reads:

“ 26. Certificate of title to be held as conclusive evidence of proprietorship

1. The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”

24. Section 26 of the Land Registration Act is a substantive re-enactment of section 23 of the Registration of Titles Act (repealed), which reads:

23. Certificate of title to be held as conclusive evidence of proprietorship.



1. The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

25. It is noteworthy that the respondent’s grant was issued by the registrar on February 8, 1991 under the repealed *Registration of Titles Act*. From that date on, the respondent was the “absolute and indefeasible owner” of the suit property in the absence of fraud or misrepresentation on its part in its acquisition. We find nothing on the record as put to us to suggest that the respondent acquired its grant illegally, unprocedurally or through a corrupt scheme.

26. A careful perusal of the record as put to us discloses no evidence of the fraud or misrepresentation alleged by the appellants to have characterised the allocation of the suit property and the grant to the respondent in respect of the suit property. Indeed, no such evidence was led and, in effect, their allegations remains just that – an empty plea devoid of substantiation by evidence in proof thereof. Their appeal also fails on that score. The only other observation we need to make at this point is that failure by the learned Judge to honour the appellants’ request to visit the locus quo was inconsequential, and did not by any means impact the impugned judgment.

27. Finally, we turn to the 4<sup>th</sup> issue as to what orders we ought to grant in final determination of this appeal. Our finding on the three main issues is decisive of the appeal before us. Having found that the respondent’s suit was not barred by the statute of limitation, and there being no evidence of fraud, misrepresentation or other illegality on the part of the respondent, we hold that the respondent remains the absolute and indefeasible owner of the suit property and, in effect, the appellants’ appeal fails in its entirety. Accordingly, we hereby order and direct that:

- a. the appellants’ appeal be and is hereby dismissed;
- b. the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (O. A. Angote, J.) delivered on November 25, 2016 be and is hereby upheld; and
- c. the costs of this appeal be borne by the appellants.

**DATED AND DELIVERED AT MALINDI THIS 8TH DAY OF DECEMBER, 2023.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

**DEPUTY REGISTRAR**

