



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sidonyi & 6 others v Ochada (Environment and Land Appeal  
E010 of 2024) [2025] KEELC 3363 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3363 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E010 OF 2024**

**BN OLAO, J**

**APRIL 25, 2025**

**BETWEEN**

**ALLAN SIDONYI ..... 1<sup>ST</sup> APPELLANT**  
**AMOS OPADIA KADIMA ..... 2<sup>ND</sup> APPELLANT**  
**MICHAEL KADIMA ..... 3<sup>RD</sup> APPELLANT**  
**WALTER NACHAKI KADIMA ..... 4<sup>TH</sup> APPELLANT**  
**GEORGE BIRIKO KADIMA ..... 5<sup>TH</sup> APPELLANT**  
**JOSEPH ONYANGO ..... 6<sup>TH</sup> APPELLANT**  
**EDWARD WERE KADIMA ..... 7<sup>TH</sup> APPELLANT**

**AND**

**THADDAEUS BRIGHT OCHADA ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. E. A. Nyaloti Chief Magistrate  
Busia delivered on 28th May 2024 in Busia CMC ELC Case No E070 of 2020)*

**JUDGMENT**

1. Thaddaeus Bright Ochada (the Respondent herein and suing as the Legal Administrator to the Estate of the deceased Musa Musikhe Kadima – hereinafter Kadima) approached the Chief Magistrate’s Court Busia and impleaded Allan Sidonyi Kadima, Amos Opadia Kadima, Michael Kadima, Walter Nachaki Kadima, Geore Biriko Kadima, Joseph Onyango Kadima and Edward Were Kadima (the 1<sup>st</sup> to 7<sup>th</sup> Appellants respectively) with respect to the land parcel Samia/bukangala/B/1833 (the correct parcel number is infact Samia/bukangala/B183). It was the Respondent’s case that the deceased was the proprietor of the land parcel No Samia/ Bukangala/B183 which had been bestowed upon him by his father and which he was supposed to share with his brothers. That the deceased sub-divided the



land to create land parcels No Samia/ Bukangala/“B” 475, “B” 477, “B” 478 and “B” 479 (the suit properties) but on or about 10<sup>th</sup> March 2019, the Appellants unlawfully and without any colour of right trespassed thereon and cut down trees and also attempted to sell the same and advised tenants in rental houses not to pay rent to the beneficiaries of the Estate of the deceased. Allegations of fraud were levelled against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. The Respondent sought judgment against the Appellants in the following terms:

- a. General Damages.
  - b. Permanent injunction restraining the Appellants from trespassing, selling, disposing or in any way interfering with the ownership of the suit properties.
  - c. Costs of the suit.
2. The Appellants filed an amended defence and counter-claim dated 4<sup>th</sup> October 2021 where they pleaded, inter alia that the original land parcel No Samia/bukhangala/B/183 belonged to their father Zablon Kadima Musikhe (musikhe) who entrusted his eldest son Kadima to distribute it among his brothers, the church and some settlers. The Appellants pleaded that the Respondent was infact only entitled to deal with the land parcel No Samia/ Bukangala/“B” 478 belonging to his father Kadima and had no locus to deal with the other parcels of land. They denied the allegations of fraud levelled against them. They added that prior to his death, MUSIKHE had appointed the 1<sup>st</sup> Appellant to be chairman of the family to ensure that his sons respect the boundary of the land allocated to them but KADIMA failed to do succession as demanded by the family members.
3. In their counter-claim, the Appellants pleaded that the original land parcel No Samia/ Bukangala/ “B” 183 measuring 45.7 Hectares belonged to the late Musikhe who died intestate domiciled in Kenya on 27<sup>th</sup> February 1973 but on 27<sup>th</sup> January 2009, Kadima illegally and un-procedurally registered himself as the owner thereof without the due process of the land and sub-divided it to create the land parcels No Samia/ Bukangala/ “B” 467, “B” 468, “B” 469, “B” 470, “B” 471, “B” 472, “B” 475, “B” 476, “B” 478 and “B” 480 without succession and leaving out several beneficiaries of Mukhise.
4. In their counter-claim, the Appellants sought judgment against the Respondent in the following terms:
1. Cancellation of the titles to the land parcels No Samia/ Bukangala/“B” 467, “B” 468, “B” 469, “B” 470, “B” 471, “B” 472, “B” 475, “B” 476, “B” 478 and “B” 480 and the same to revert to the name of MUSIKHE.
  2. Costs of the counter-claim.
  3. Such further of other reliefs as may be appropriate.
- They also sought the dismissal of the Respondent’s suit with costs.
5. The Respondent as well as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were the only witnesses who testified before HON. E. A. NYALOTI CHIEF MAGISTRATE during the plenary hearing.
6. Having heard the parties and after considering the submissions by the respective counsel, the trial magistrate found in favour of the Respondent and dismissed the Appellants’ counter-claim. She entered judgment for the Respondent as prayed for in the plaint.
7. It is that judgment delivered on 28<sup>th</sup> May 2024 which provoked this appeal. In seeking to have the said judgment set aside, the Appellants have proffered the following six (6) grounds of appeal:



1. That the learned trial magistrate erred in law and in fact in failing to appreciate the prayers in the counter-claim hence dismissing the same.
2. That the learned trial magistrate erred in law and in fact in finding that the Respondent in avoiding the rigours of succession went to have the name of the Appellants crossed without succession and went on to find for the Respondent.
3. That the learned trial magistrate erred in law and fact in ignoring the submission and loughing (sic) off sound and serious legal contentious (sic) of descending into the arena of the dispute by challenging evidence of the Appellant which had not been disputed by the Respondent hence a wrong decision.
4. The judgment of the trial Court is unreasonable and contrary to law and facts of the case presented before the trial Court.
5. The trial magistrate erred in law and in fact when she found that the Respondent had proved his case on the required standard without a clear ratio decided hence a wrong decision.
8. The Appellants therefore sought the following orders:
  - a. The judgment and decree of the Honourable Court dated 28<sup>th</sup> May 2024 on the counter-claim be substituted and in it's place by the judgment of this Court.
  - b. The Respondent be ordered to bear costs of this appeal and in the lower Court.
9. When the appeal was placed before me for directions on 9<sup>th</sup> October 2024, I directed that it be canvassed by way of written submissions. MR OUMA counsel for the Appellants filed his submissions dated 11<sup>th</sup> December 2024 and although there is an affidavit of service showing that MR JUMBA counsel for the Respondent had been served with the Appellants' submissions on 13<sup>th</sup> December 2024, when the appeal came up for mention on 18<sup>th</sup> December 2024 to confirm compliance, there was no appearance by MR JUMBA and neither had he filed any submissions on behalf of the Respondent. This judgment has therefore been drafted without the benefit of submissions by the Respondent.
10. I have considered the record of appeal and the submissions by the firm of B. M. OUMA & COMPANY ADVOCATES for the Appellants.
11. This is a first appeal. The then East African Court of Appeal outlined the duty of the Appellate Court on a first appeal and stated the following in the case of OKENO -V- R 1972 E.A. 32:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (PANDY -V- R 1975 E.A 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions – SHANTILAL M. RUWALA -V- R 1957 E.A 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide, whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see PETERS -V- SUNDAY POST 1958 E.A 424”.

See also the case of SELLE AND ANOTHER -V- ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS 1968 E.A. 123. In the case of ABOK JAMES ODERA T/A A.J. ODERA & ASSOCIATES -V- JOHN PATRICK MACHIRA & COMPANY ADVOCATES C.A. CIVIL



APPEAL NO 161 of 1999 [2013 eKLR], the Court of Appeal also captured the duty of a first appellate Court as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

The Court then went on to cite the following passage from the case of KENYA PORTS AUTHORITY -V- KUSTON (KENYA) LTD 2009 2 E.A. 212:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw it’s own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

I shall be guided by the above precedents and others in determining this appeal.

12. The Respondent’s case in the trial Court was that the land parcel NO SAMIA/BUKANGLA/“B’/183 was the property of KADIMA but the Appellants had fraudulently sub-divided it to create land parcels No Samia/ Bukangala/“B” 475, “B” 477, “B” 478 and “B” 479. The allegations of fraud were however only pleaded as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants in paragraph 10 of the plaint as follows:

- i. “Attempting to sale transfer and/or dispose of the suit land herein without the knowledge of the Plaintiff”
- ii. “Notifying the tenants on the suit land of their intent to collect rent when they knew they did not have capacity to do so.”
- iii. “Misrepresenting to third parties of ownership of the suit land.”

The Respondent then pleaded in paragraph 11 of his plaint thus:

11: “That the Defendants have made an attempt of disposing and/or transferring the suit property herein save that there (sic) efforts were discovered before they could execute their plan.”

The Appellants’ defence and counter-claim, on the other hand, was that the land parcel No Samia/ Bukangala/“B”/183 belonged to their late father ZABLON KADIMA MUSIKHE (MUSIKHE) who had entrusted his eldest son MUSA MUSIKHE KADIMA (KADIMA) to distribute it to his brothers, the church and settlers/workers on the land. That the said KADIMA, illegally, unprocedurally and without carrying out the succession process registered himself as the proprietor of the said land and thereafter proceeded to sub-divide it leaving out the other beneficiaries.

13. In my view, there are three (3) issues which this Court ought to determine in this appeal. These are:

1. Whether the deceased KADIMA irregularly and fraudulently transferred the land parcel No Samia/ Bukangala/“B” 183 and sub-divided it.
2. Whether this Court should cancel the transfer and sub-division and revert the land parcel No Samia/ Bukangala/“B’ 183 to the original owner MUSIKHE.
3. Who bears the costs.

14. On issue NO 1, the Respondent suing as the Administrator to the Estate of KADIMA had pleaded in paragraphs 4 and 5 of his plaint as follows:



- 4: “That the deceased was bestowed ownership of land known as L.R. No Samia/ Bukangala/ “B”/1833 by his father which land was supposed to be shared equally with his brothers.”
- 5: “The deceased did acquire title to the same property sometimes in the year 2013 this was to lessen the rigours of going through succession, upon obtaining the said title, the deceased did subsequently transfer titles to several of his brothers and they each obtained their own titles as a result of transfer. The Respondents herein were among the beneficiaries of the transfer and they each obtained title.”

In their amended defence and counter-claim, the Appellants pleaded in paragraph 20 that:

- 20: “The counter-claimants/defendants further avers that MUSA MUSIKHE KADIMA caused L.R No Samia/ Bukangala “B”/183 to be sub-divided into several numbers being SAMIA/ BUKANGALA/ “B” 467, 468, 469, 470, 471, 472, 475, 476, 478 and 480 without succession.”

In ground NO 1 of the memorandum of appeal, the Appellants have taken issue with the trial magistrate for having “erred in law and fact in finding that the Respondent in avoiding the rigours of succession went on to have the name of the Appellants crossed without succession and went on to find for the Respondent.” The Respondent himself having conceded in paragraph 5 of his plaint that KADIMA had obtained the registration of the land parcel No Samia/ Bukangala/ “B”/183 without the “rigours of going through succession”, that in itself, was a sufficient reason to dismiss the Respondent’s suit. The copy of the Green Card to the land parcel No Samia/ Bukangala/“B”/183 shows that it was first registered in the name of ZABURON KADIMA on 23<sup>rd</sup> March 1971 and title was issued on 28<sup>th</sup> April 1972. On 27<sup>th</sup> January 2009, there was a change of name to MUSA MUSIKHE KADIMA otherwise known as ZABURON KADIMA. That title was subsequently closed on 10<sup>th</sup> May 2016 following the sub-division to create land parcels No Samia/ Bukangala/467-480. In support of his claim, the Respondent had only produced a copy of Limited Grant of Letters of Administration Ad Litem, issued to him on 4<sup>th</sup> December 2018 in respect to the Estate of MUSA MUSIKHE KADIMA. He did not produce any confirmed Grant. He has in fact conceded, as is clear from his own plaint, that KADIMA avoided “the rigours of going through succession.”

15. Basically, what the Respondent did by transferring and sub-dividing the land parcel No Samia/ Bukangala/ “B” 183 before confirmation of Grant was unlawful under Sections 55 and 82 of the [Law of Succession Act](#) and amounted to intermeddling with the Estate of MUSIKHE which is a criminal offence under Section 45 of the same Act.
16. How did the trial magistrate resolve the respective claims of the Respondent (Plaintiff) and the Appellants (Defendants)? This is what the trial magistrate said in paragraphs 25 and 26 of the impugned judgment:
- 25: “There is no proof that the Plaintiff fraudulently obtained the land in question or the Plaintiff intermeddled in the property of a deceased person.”
- 26: “The Defendants in their defence have singled out L.R SAMIA/BUKANGALA “B” 183 which is different from the land the Plaintiff owns. The Defendants have not produced any surveyors report or evidence from the Land Registrar that SAMIA/BUKANGALA/ “B” 183 is in any way connected to L.R. SAMIA/BUKANGALA “B”/477, SAMIA/BUKANGALA “B” 478 and SAMIA/BUKANGALA “B”/479.”

The above findings were clearly an error both in law and in fact on the part of the trial magistrate. As I have already stated above, the Respondent had already confirmed through his own pleadings that he had not complied with the process of “going through succession,” when he transferred and sub-divided the land parcel No Samia/ Bukangala/“B” 183. Indeed when he was cross-examined by MR



OUMA during the plenary hearing on 4<sup>th</sup> July 2023, the Respondent said he had only obtained “a Limited Grant Ad Litem”. That Grant only allowed him to sue or defend on behalf of the Estate of KADIMA but not to transfer or sub-divide the land parcel No Samia/ Bukangala “B”/183. That was clear evidence of fraud on his part and amounted to intermeddling with the Estate of a deceased person. There was infact a clear, unequivocal and unambiguous admission on the part of the Respondent himself both in his plaint and in his oral evidence that he had intermeddled with the Estate of KADIMA without a confirmed Grant. Therefore, all that the Respondent purported to do with respect to the land parcel No Samia/ Bukangala/“B” 183 was a nullity and void ab initio – MACFOY -V- UNITED AFRICA CO. LTD 1961 3 ALL E.R 1169. On that ground alone, this appeal must be allowed.

17. On issue NO 2, the trial magistrate erroneously took the view that since a surveyor’s report was not produced, there was nothing to connect the land parcel No Samia/ Bukangala/“B” 183 and the land parcels No Samia/ Bukangala/“B” 477, “B” 478 and “B” 479. However a perusal of the Green Card to the land parcel No Samia/ Bukangala/“B” 183 clearly shows that the title was closed on 10<sup>th</sup> May 2016 following it’s sub-division to create the land parcels No Samia/ Bukangala/467 to 480. It was therefore an error on the part of the trial magistrate to find, as she did, that those parcels of land were not connected. A surveyor’s report was not necessary to show that the titles No Samia/ Bukangala/467, 468, 469, 470, 471, 472, 475, 476, 478 and 480 which the Appellants, by their counter-claim, sought to be cancelled, were the resultant sub-divisions of the original land parcel No Samia/ Bukangala/“B”/183. The copy of the Green Card was self-explanatory.

18. The trial magistrate also went on in paragraph 24 of the impugned to state that:

24: “The Defendants have produced death certificate to prove that their late father died in 1973 but the same is not certified. The Defendants ought to have availed the original death certificate in Court and produced a certified copy of the same.”

That KADIMA died on 16<sup>th</sup> March 2018 and MUSIKHE on 27<sup>th</sup> February 1973 were not really in dispute. The copies of Limited Grants of Letters of Administration produced by the Respondent and the Appellants were also self-explanatory and were not contested. There was therefore no need for any of the parties to produce the original or certified copies of the death certificates. Nothing really hinged on that.

19. There was sufficient evidence on record to demonstrate that the Plaintiff’s father KADIMA irregularly and fraudulently transferred and sub-divided the land parcel No Samia/ Bukangala/“B” 183 and the Plaintiff, as the Administrator to his Estate, had no right to the orders which he sought. His case was for dismissal.

20. And since the transfer and sub-division of the land parcel No Samia/ Bukangala/“B” 183 to create the land parcels No Samia/ Bukangala/“B” 467, 468, 469, 470, 471, 472, 475, 476, 478 and 480 had been procured un-procedurally, the trial magistrate should have invoked the provisions of Section 26 of the [Land Registration Act](#) which empowers the Court to cancel any registration to land which has been obtained through fraud, misrepresentation, illegally, unprocedurally or through a corrupt scheme. From the evidence on record, it is obvious that the Respondent was not entitled to the orders which he sought. His claim was for dismissal. On the other hand, the Appellants had adduced sufficient evidence to justify the orders sought in their counter-claim and the trial magistrate erred in law and in fact when she allowed the Respondent’s claim and dismissed the Appellants’ counter-claim. This appeal must therefore be allowed.

21. On the issue of costs, it is provided in Section 27 of the [Civil Procedure Act](#) that they follow the event unless for good reason, the Court decides otherwise. In the circumstance of this case, it has



become obvious that the parties are family. They will remain family irrespective of the orders made by this Court in this appeal. To assist them go over this dispute without any further financial burdens attendant with an order of costs against each other. I find it prudent to direct that each party meet their costs both here and in the Court below.

22. The up-shot of all the above is that having considered this appeal, this Court makes the following disposal orders:
1. The appeal is allowed.
  2. The judgment and decree of the subordinate Court dated 28<sup>th</sup> May 2024 is hereby set aside and substituted with an order dismissing the Respondent's suit and allowing the Appellants' counter-claim.
  3. Being family, the parties will have to go back to the drawing board and decide how best to distribute the land parcel No Samia/ Bukangala/"B" 183 among the beneficiaries.
  4. The parties shall meet their costs both here and in the Court below.

**BOAZ N. OLAO**

**JUDGE**

**25<sup>TH</sup> APRIL 2025**

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 25<sup>TH</sup> DAY OF APRIL 2025 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.**

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**25<sup>TH</sup> APRIL 2025**

