



Ominde v Odongo; Odongo (Plaintiff to the Counterclaim); Ominde & 3 others (Defendant to the Counterclaim) (Environment and Land Case Civil Suit 300 of 2016) [2025] KEELC 298 (KLR) (28 January 2025) (Judgment)

Neutral citation: [2025] KEELC 298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 300 OF 2016
SO OKONG'O, J
JANUARY 28, 2025**

BETWEEN

WALTER EDWIN OMINDE PLAINTIFF

AND

VICTOR OTIENO ODONGO DEFENDANT

AND

VICTOR OTIENO ODONGO PLAINTIFF TO THE COUNTERCLAIM

AND

WALTER EDWIN OMINDE DEFENDANT TO THE COUNTERCLAIM

LAND REGISTRAR, KISUMU COUNTY DEFENDANT TO THE COUNTERCLAIM

LAND SURVEYOR, KISUMU COUNTY DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. The Plaintiff filed this suit against the Defendant on 15th November 2016. The Plaintiff averred that he was the registered proprietor of all that piece of land known as Kisumu/Nyalenda “B”/1508 (hereinafter referred to as “Plot No. 1508”). The Plaintiff averred that Defendant owned no land in the neighbourhood. The Plaintiff averred that on or about 11th November 2016, he found the Defendant’s contractor ferrying and assembling building materials on Plot No. 1508 with the intention of fencing off a portion thereof to block the Plaintiff from accessing Plot No. 1508. The Plaintiff averred that the Defendant with the aid of hooligans threatened to harm the Plaintiff if he made any attempt to enter



- Plot No. 1508. The Plaintiff averred that the Defendant's aforesaid action was unlawful and amounted to trespass.
2. The Plaintiff sought judgment against the Defendant for an order of a permanent injunction restraining the Defendant from trespassing onto, presenting himself as the proprietor of, dealing with, evicting and/or interfering with the Plaintiff's quiet possession, use and occupation of Plot No. 1508, a declaration that the actions of the Defendant complained of amounted to trespass on Plot No. 1508 and entitled the Plaintiff to damages, and costs of the suit.
 3. The Defendant filed a statement of defence on 22nd September 2017. The statement of defence was amended with leave of the court on 19th May 2022 to plead a counter-claim against the Plaintiff, the Land Registrar, Kisumu County, the Land Surveyor, Kisumu County and the Attorney General. In his defence and counter-claim dated 19th May 2022, the Defendant denied the Plaintiff's claim in its entirety. The Defendant denied that he had trespassed on Plot No. 1508 and intended to dispossess the Plaintiff of the same. The Defendant averred that he was the proprietor of all that parcel of land known as Kisumu/Nyalenda "B"/1182 ("Plot No. 1182") which he purchased from one, John Odhiambo Onunga.
 4. The Defendant averred that when he was buying Plot No. 1182, the same was abutting Lake Victoria. The Defendant averred that there was no piece of land between Plot No. 1182 and the lake. The Defendant averred that as the owner of land abutting the lake, he was entitled to own any land which became available between Plot No. 1182 and the lake as a result of the recession of the lake water. The Defendant averred that he came to learn that after purchasing Plot No. 1182 and settling thereon, someone created titles for land between Plot No. 1182 and the lake that came about as a result of the lake water recession and registered the same as land parcels Kisumu/Nyalenda "B"/1507, 1508 and 1468. The Defendant averred that the creation of the said parcels of land had the effect of arbitrarily depriving the Defendant of his riparian land right in violation of Article 40 of *the Constitution*. The Defendant averred that the land parcels, Kisumu/Nyalenda "B"/1507, 1508 and 1468 were created from a riparian area and as such the titles thereof were not valid.
 5. The Defendant averred in the alternative that he had never entered or occupied Plot No. 1508. The Defendant averred further in the alternative that if the dispute between the parties concerned the boundary between Plot No. 1508 and Plot No. 1182, the court had no jurisdiction to determine the same.
 6. In his counter-claim, the Defendant/Plaintiff in the counter-claim reiterated the contents of his amended defence and averred that he was the owner of Plot No. 1182 which measured approximately 0.3 of a hectare. The Defendant averred that he acquired Plot No. 1182 in 2005 and that the lower part of the property abuts the Lake Victoria riparian area. The Defendant averred that two years prior to the filing of the suit, he had seen the Plaintiff in the main suit/1st Defendant in the counter-claim trying to reclaim the said riparian land by dumping thereon building waste and murram.
 7. The Defendant averred that in June 2017, he received a letter from the Plaintiff with an attached court order stopping the Defendant from trespassing on Plot No. 1508. The Defendant averred that when he purchased a Registry Index Map (RIM) for Nyalenda "B" area Map Sheet No. 6, he learnt that the same had been amended following the illegal creation of new land parcels on the lake riparian area. The Defendant averred that the 1st to 3rd Defendants in the counter-claim colluded to illegally and fraudulently create the said parcels of land and to amend the RIM. The Defendant pleaded several particulars of fraud and illegalities committed by the 1st to 3rd Defendants in the counter-claim. The Defendant averred that the 1st to 3rd Defendants in the counter-claim extended the size of land parcel Kisumu/Nyalenda "B"/564 (Plot No. 564) to cover a large area that consisted of the Lake Victoria



riparian land. The Defendant averred that the 1st to 3rd Defendants in the counter-claim illegally subdivided Plot No. 564 to create Plot Nos. 1467 and 1468 and proceeded to subdivide Plot No. 1468 to create Plot Nos. 1507, 1508 and 1468. The Defendant averred that the 1st to 3rd Defendants in the counter-claim illegally converted riparian land which was public land into private land contrary to the provisions of Article 162 of *the Constitution*.

8. The Defendant averred that as a result of the illegal and fraudulent activities by the 1st to 4th Defendants in the counter-claim, the Defendant had suffered loss and damage. The Defendant averred that he had direct access to the lake which had been encroached on by the Plaintiff. The Defendant averred that he had been denied access to the lake and Plot No. 1182 had lost prestige and value. The Defendant averred that the acts of the 1st to the 4th Defendants complained of were illegal, null and void.
9. The Defendant sought judgment against the Plaintiff and the other Defendants in the counter-claim for; a declaration that Plot No. 1508 was illegally created and that the same is on a lake riparian land, a mandatory injunction compelling the 2nd and 3rd Defendants in the counter-claim to cancel all the entries in the register creating Plot Nos. 1508 and to amend the RIM to revert the riparian land to its original position, a permanent injunction restraining the Plaintiff/1st Defendant in the counter-claim, his agents, servants, employees or anybody claiming through him from interfering with the Defendant's quiet use and possession of Plot No. 1182, general damages for unlawful conversion, and punitive damages against the 2nd to 4th Defendants.
10. The Plaintiff filed a reply to defence and defence to the Defendant's counter-claim dated 6th October 2023. In his reply to defence, the Plaintiff denied all the allegations contained in the defence save where the same consisted merely of admissions. In his defence to the counter-claim, the Plaintiff denied the Defendant's claim in its entirety. The Plaintiff averred that he purchased Plot No. 1508 from one, Obala Minala in 1972 and a survey of the land was carried out some years later and he was issued with a title deed in 1994. The Plaintiff averred that during the survey, Obala Minala realised that part of his former Plot No. 564 was left out during the land adjudication and that the old survey map extended the lake shore and placed his home inside the lake. The Plaintiff averred that Obala Minala applied for a re-survey to correct the error so that the survey map reflects the true ground position of his plot. The Plaintiff averred that after the re-survey, Obala Minala's Plot No. 564 was subdivided into two portions, Plot No. 1467 and Plot No. 1468. The Plaintiff averred that Plot No. 1467 was subdivided further to give rise to Plot No. 1507 and Plot No. 1508. The Plaintiff averred that the Registry Index Map(RIM) was amended accordingly to reflect these developments. The Plaintiff denied that Plot Nos. 1467, 1467, 1507 and 1508 were created illegally and fraudulently.
11. The Plaintiff denied that the Defendant's Plot No. 1182 had abutted Lake Victoria. The Plaintiff averred that Plot Nos. 1507 and 1508 were subdivisions of Plot No. 1467 and were not subdivisions of Plot No. 564 as claimed by the Defendant. The Plaintiff denied that Plot No. 1508 was on Lake Victoria riparian reserve. The Plaintiff urged the court to dismiss the Defendant's counter-claim. The 2nd, 3rd and 4th Defendants to the counter-claim neither entered appearance nor filed a defence.
12. At the trial, the Plaintiff adopted his witness statement as part of his evidence in chief. He told the court that; he purchased Plot No. 1508 in 1972 from Obala Minala. Obala Minala owned Plot No. 564 but his homestead was outside the plot. Obala Minala applied for the re-survey of his Plot No. 564 to correct its boundaries. When that was done, the boundaries of Plot No. 564 were adjusted and two new parcels of land were created, Plot No. 1467 and Plot No. 1468. Plot No. 1467 was further subdivided in 1994 to give rise to Plot No. 1507, and Plot No. 1508 that was sold to him.
13. The Plaintiff stated that Plot No. 1507 and Plot No. 1508 left a 30-meter Lake Victoria riparian reserve. He stated that Plot No. 1508 was not on the lake riparian reserve. He stated that a survey that was



- done following an order issued by the court returned a finding that Plot No. 1508 was not on the lake riparian reserve. The Plaintiff produced the documents attached to his further list of documents dated 6th October 2023 as a bundle as P.EXH.1. He stated that he had not developed Plot No. 1508 due to the court case. He stated that he wanted the Defendant to remove a structure that he had erected on his land.
14. On cross-examination, the Plaintiff stated that he purchased land from Obala Minala before the land adjudication exercise was undertaken in the area and that later on, he and Obala Minala realised that there was a problem with the boundary of the land. The Plaintiff admitted that during the resurvey of Plot No. 564 owned by Obala, Obala's neighbours should have been involved. On examination by the court, the Plaintiff told the court that Plot No. 564 measured 0.15 of a hectare.
 15. The Plaintiff's next witness was Lukas Odhiambo Obala (PW2). PW2 adopted his witness statement dated 10th October 2023. PW2 stated that he was the son of Obala Minala who sold Plot No. 1508 to the Plaintiff after the boundary of the original plot was corrected.
 16. The Plaintiff's last witness was Valentine Oiro (PW3). PW3 told the court that he was a surveyor. He told the court that he prepared a report dated 19th August 2023 on the instructions of the Plaintiff. He stated that his instruction was to survey Plot No. 1508 and to confirm its position. He stated that Plot No. 564 which gave rise to Plot No. 1507 and Plot No. 1508 was initially a small portion of land. He stated that the boundary of Plot No. 564 had left out the homestead of the owner, Obala Minala and that the resurvey brought the same within the land. On examination by the court, PW3 stated that he was neither a registered nor a licensed surveyor.
 17. After the close of the Plaintiff's case, the Survey Map (Diagram 6) for Kisumu District, Kolwa Location, Nyalenda "B" Registration Section certified on 17th March 2000 was produced as P.EXH.2 and Survey Map (Diagram 6) for Kisumu District, Kolwa Location Nyalenda "B" Registration Section certified on 7th February 2019 was produced as P.EXH.3. The documents were produced in evidence by consent of the parties.
 18. The Defendant gave evidence as DW1. The Defendant adopted his witness statement dated 13th February 2024 as part of his evidence in chief and produced his bundle of documents dated 14th February 2024 as D.EXH.1. The Defendant told the court that he was the owner of Plot No. 1182 while the Plaintiff owned Plot No. 1508. He stated that Plot Nos. 1508 and parts of Plot No. 1507 and Plot No. 1468 were on floating vegetation. He stated that these plots were not on land and were part of Lake Victoria. He stated that the iron sheet structure that the Plaintiff was complaining about was on his land and that the space that was in front of his land was Lake Victoria riparian reserve. He stated that Plot No. 1508 claimed by the Plaintiff was part of the lake riparian reserve. He stated that Obala Minala's home is next to the lake and had always been on Plot No. 564. He stated that the survey plans that created Plot Nos. 1507 and 1508 were tampered with. He stated that his parcel of land Plot No. 1182, and Plot No. 1183 were subdivisions of the same parcel of land which abutted the lake riparian reserve. He stated that Plot No. 1182 was traversed by a road and was situated on both sides of the road.
 19. He stated that Plot No. 1467 which gave rise to Plot Nos. 1507 and 1508 was said to be a subdivision of Plot No. 564 but there was no record at the land registry on how Plot No. 564 was subdivided to give rise to Plot No. 1467 and Plot No. 1468. He stated that the mutation through which Plot No. 564 was subdivided to give rise to Plot No. 1467 and Plot No. 1468 was not in existence. He stated that it was at the point of creation of Plot No. 1467 and Plot No. 1468 that the fraud he was complaining about was committed.



20. On cross-examination, the Defendant stated that he was not sure if the Land Registrar, Kisumu, the Land Surveyor, Kisumu and the Attorney General, the 2nd, 3rd and 4th Defendants in his counter-claim were served with the counter-claim. He stated further that the Land Registrar and the Surveyor who came to the site on the orders of the court did not reach Plot No. 1508 claimed by the Plaintiff because it was under water. He stated that he purchased Plot No. 1182 in 2001 but did not obtain a title deed until 2019. He stated that a re-survey could be done but it must be carried out legally. The Defendant's next witness was John Odhiambo Onunga (DW2). DW2 adopted his witness statement as his evidence in chief. On cross-examination, DW2 stated that he did not have a copy of the agreement of sale that he entered into with the Defendant.
21. The Defendant's last witness was Partick Opiyo Adero (DW3). DW3 told the court that he was a licensed land surveyor practising in Kisumu. He stated that he was instructed by the Defendant to do a ground survey to establish the position of Plot No. 1182 in relation to Lake Victoria. He stated that he was informed by the Defendant who owned Plot No. 1182 that the owner of Plot No. 1508 had claimed that the property existed between Plot No. 1182 and Lake Victoria. He stated that he prepared a report dated 24th September 2020 on the terms of his reference which had already been produced by the Defendant as an exhibit.
22. On cross-examination, DW3 admitted that a Registry Index Map (RIM) can be amended following a re-survey. He stated that in the old RIM, Lake Victoria extended up to the road and when he visited the site in 2020 for the purpose of his assignment, there was a large space between the lake and the said road. He stated that the riparian reserve for Lake Victoria was 30 meters from the highest water mark. He stated that he was not aware that there was a re-survey of Plot No. 564 since all the survey maps he looked at did not show any such re-survey. He stated that if there was a re-survey, it would have been captured in the said survey maps. On re-examination, he stated that if the re-survey was lawfully undertaken, he would have reached a different conclusion in his report. On examination by the court, DW3 stated that from P.EXH. 3, Plot No. 564 did not extend to Plot No. 1182. He stated that it was the alleged re-survey that extended the boundary of Plot No. 564 up to Plot No. 1182. He stated that Plot No. 1182 had a lake frontage that was taken away during the said re-survey.
23. After the close of evidence, the court visited the site of the properties in dispute on 5th March 2024 in the presence of the parties, their advocates and surveyors. The court was taken a round the properties in dispute and took note of their physical state and locations on the ground in relation to the lake. The court took several photographs which are on record.
24. The parties made closing submissions in writing. The Plaintiff filed submissions dated 30th April 2024. The Plaintiff framed three issues for determination namely; whether the Defendant had encroached or trespassed on Plot No. 1508 owned by the Plaintiff and if so, whether the orders sought should be issued, and who should bear the costs of the suit. The Plaintiff cited Sections 24 and 25 of the [Land Registration Act](#) 2012 and submitted that the Defendant had encroached on Plot No. 1508 owned by the Plaintiff and built thereon a temporary structure. The Plaintiff submitted that the encroachment was continuing. The Plaintiff submitted that the encroachment was confirmed by the report filed in court by the Kisumu County Surveyor and the Land Registrar who confirmed that whereas Plot No. 1508 had lake frontage, Plot No.1182 owned by the Defendant had no such frontage. The Plaintiff submitted that the said County Surveyor and County Land Registrar established the boundaries of Plot No. 1508 and 1182 and what the court was called upon to do was to ensure that the established boundary was observed by the Defendant. The Plaintiff submitted that he had proved his case against the Defendant on a balance of probabilities and as such was entitled to the reliefs sought in the plaint including the costs of the suit.



25. The Defendant filed submissions dated 26th March 2024. The Defendant submitted that the main issue in contention in the suit was the origin of Plot No. 1508. The Defendant submitted that the Plaintiff claimed to have acquired Plot No. 1508 from Obala Minala who owned Plot No. 564 which measured 0.15 of a hectare. The Defendant submitted that from the evidence on record, Plot No. 564 which measured 0.15 of a hectare went through a subdivision process that yielded Plot No. 1468 measuring 0.06 of a hectare, Plot No. 1507 measuring 0.26 of a hectare and Plot No. 1508 measuring 0.48 of a hectare making a total of 0.8 of a hectare. The Defendant submitted that the fundamental issue for determination by the court was how land measuring 0.15 of a hectare could upon subdivision yield parcels of land with a total area of 0.8 of a hectare. The Defendant submitted that land measuring 0.65 of a hectare that was added to Plot No. 564 to make it 0.8 of a hectare was curved from the adjacent Lake Victoria riparian reserve. The Defendant submitted that this encroachment on the lake riparian reserve through the creation of Plot No. 1508 which was a beneficiary of the 0.65 of a hectare curved from Lake Victoria riparian reserve deprived the Defendant's parcel of land, Plot No. 1182 and the neighbouring Plots like Plot No. 1183 of their lake frontage.
26. The Defendant submitted that according to Articles 62 and 67 of *the Constitution*, riparian land is public land which should not be allocated for private use. The Defendant submitted that a resurvey of land is normal but has to involve all those who may be affected thereby. The Defendant submitted that the purported resurvey of Plot No. 564 which yielded additional 0.65 of a hectare in favour of Obala Minala did not involve the owners of the neighbouring parcels of land. The Defendant submitted that the purported re-survey was manipulated to create Plot No. 1508 from the Lake Victoria riparian reserve. The Defendant submitted that it was not enough for the Plaintiff to dangle his title for Plot No. 1508 as proof of his ownership of the property. The Defendant submitted that the Plaintiff had a duty to explain to the court how Plot No. 564 which measured 0.15 of a hectare gave rise to various parcels of land including Plot No. 1508 measuring a total of 0.8 of a hectare. The Defendant submitted that the Defendant had a duty to establish that his title to Plot No. 1508 was acquired legally and procedurally which he failed to do. The Defendant cited Section 19(1) of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) and submitted that the RIM could not be amended save on the basis of a Mutation Form. The Defendant submitted that in the absence of a Mutation Form for the subdivision of Plot No. 564 and the Plaintiff's inability to explain the purported re-survey of Plot No. 564, the only conclusion that can be arrived at is that the purported resurvey was fraudulent.
27. In conclusion, the Defendant submitted that the Plaintiff acquired Plot No. 1508 which was curved out of Lake Victoria riparian reserve without following due process. The Defendant submitted that the Plaintiff's claim is unfounded and should be dismissed with costs.
28. I have considered the pleadings, the evidence tendered and the submissions by the parties. I have before me, the Plaintiff's claim in the main suit and the Defendant's counter-claim. In his claim, the Plaintiff has contended that the Defendant trespassed on his parcel of land, Plot No.1508 and attempted to fence off the same to block the Plaintiff from accessing the land. The Plaintiff has sought a declaration that the acts of the Defendant complained of amounted to trespass and a permanent injunction restraining the Defendant from interfering with the Plaintiff's quiet possession, occupation and use of Plot No. 1508. The Plaintiff has also sought damages for trespass.
29. On his part, the Defendant has denied that he has trespassed on Plot No. 1508. The Defendant has claimed that he is the owner of Plot No. 1182 which had a lake frontage. The Defendant has claimed that Plot No. 1508 was illegally and fraudulently created on the lake riparian reserve in front of Plot No. 1182 thereby blocking the Defendant's access to the lake. The Defendant has sought a declaration that Plot No. 1508 was illegally created from the lake riparian reserve, an order cancelling the title and



a permanent injunction restraining the Plaintiff from interfering with his quiet possession and use of Plot No. 1182.

30. The issues arising for determination in the main suit and the counter-claim in summary are; whether Plot No. 1508 was lawfully created and registered in the name of the Plaintiff, whether the Defendant trespassed on Plot No. 1508, whether the Plaintiff is entitled to the orders sought in the plaint, and whether the Defendant is entitled to the orders sought in the counter-claim.
31. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed), and Sections 24, 25 and 26 of the *Land Registration Act* 2012, protect land ownership. Sections 27 and 28 of the Registered *Land Act* provide as follows:
27. Subject to this Act -
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
32. Section 143(1) and (2) of the Registered *Land Act* provides that:
- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
 - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
33. Sections 24, 25 and 26 of the *Land Registration Act*, 2012 provide as follows:
24. Subject to this Act—



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (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, unprocedurally or through a corrupt scheme.

34. It is clear from the foregoing provisions of the land statutes that a title to land can be challenged on grounds of fraud, mistake, misrepresentation, illegality, corruption or procedural infraction. The burden is on the person seeking to impeach a title to establish grounds for such impeachment. Once the said grounds have been established sufficiently, the burden shifts to the owner of the land to satisfy the court that the title was acquired lawfully and procedurally. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the



facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)

35. The legal burden of proof is static but the evidential burden of proof keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”

36. The following facts have been established by the evidence on record adduced by both parties in relation to Plot No. 1508 owned by the Plaintiff: Plot No. 1508 measures 0.48 of a hectare. Plot No. 1508 has its origin in land parcel Kisumu/Nyalenda “B”/564 (Plot No. 564). Plot No. 564 measured 0.15 of a hectare only. Plot No. 564 measuring 0.15 of a hectare is said to have been subdivided into two portions namely; Plot No. 1467 which measured 0.74 of a hectare and Plot No. 1468 which measured 0.06 of a hectare. It is not clear at all how Plot No. 564 measuring 0.15 of a hectare increased in size more than three (3) times upon subdivision to give rise to two parcels of land measuring a total of 0.8 of a hectare. Plot No. 1182 came into existence on 3rd March 1991 according to its title deed that



was produced in evidence. From the old survey records produced in evidence by the parties, Plot No. 564 before its purported subdivision did not share a boundary with Plot No. 1182 owned by the Defendant. There existed Plot No. 565, Plot No. 566 and Plot No. 568 between Plot No. 564 and Plot No. 1182 which appeared to have been a subdivision of Plot No. 569 (See 53rd Edition of the RIM for Kisumu District, Kolwa Location, Nyalenda “B” Registration Section, Diagram No.6(D.EXH.1), 16th Edition of the RIM for Kisumu District, Kolwa Location, Nyalenda “B” Registration Section, Diagram No.6(P.EXH.2, and Document No. 6 in P.EXH.1). Again from the said old survey maps, both Plot No. 564 and Plot No. 1182 had lake frontage. Both abutted the Lake Victoria riparian reserve.

37. As mentioned earlier, Plot No. 564 which measured 0.15 of a hectare was upon subdivision into Plot No. 1467 and 1468 increased in size threefold to measure 0.8 of a hectare. There was an increase of 0.65 of a hectare to the size of Plot No. 564. From the evidence on record, this increase in size was achieved by curving out what used to be Lake Victoria riparian reserve and making it part of Plot No. 564. The Plaintiff claimed that the increase in the size of Plot No. 564 resulted from a re-survey of the Plot. The Plaintiff tendered no evidence of how the alleged re-survey was carried out. There was no mutation that increased the size of Plot No. 564 from 0.15 of a hectare to 0.8 of a hectare before it was purportedly subdivided. There is no evidence from all the survey maps produced in evidence showing that there was a re-survey of Plot No. 564. There is no evidence in the form of a title, an extract of a register or a certificate of title showing that Plot No. 564 measured 0.8 of a hectare at any time. There is no evidence from all the survey maps produced by the parties showing that Plot No. 564 had at any time covered the entire area from Plot No. 954 to the South up to Plot No. 1182 to the North.
38. What we have from the available survey maps are Plot No. 1467 and Plot No. 1468. There is no evidence in the form of amendments in the RIM showing how these two parcels of land came into existence. These two land parcels appeared from nowhere in the 79th Edition of the RIM for Kisumu District, Kolwa Location, Nyalenda “B” Registration Section, Diagram 6. At the same time when they appeared, there was also an inset in the RIM for the subdivision of Plot No. 1467 into Plot No. 1507 and Plot No. 1508. The only mutation on record is that for the subdivision of Plot No. 1467.
39. I agree with the Defendant that in the absence of evidence of re-survey of Plot No. 564, its purported increase in size from 0.15 of a hectare to 0.8 of a hectare was illegal and fraudulent. I agree with Patrick Opiyo (DW2) when he stated in his report that the purported re-survey was mischievous. The Plaintiff did not also persuade me that the whole of the hitherto lake riparian reserve between Plot No. 564 and Plot No. 1182 measuring 0.65 of a hectare belonged to Obala Minala and was wrongly left out of his land during the land adjudication in the 1990s. I agree with the Defendant that part of Plot No. 1507 and the whole of Plot No. 1508 owned by the Plaintiff were fraudulently and illegally created from the hitherto Lake Victoria riparian reserve. I agree with the Defendant that the riparian reserve from which Plot No. 1507 and Plot No. 1508 were created was Government land and could not be acquired through the purported re-survey process by Obala Minala and the Plaintiff. The two had to apply for the same if available for allocation, receive a letter of allotment and meet the conditions thereof. It is common ground that the mysterious increase in the area or size of Plot No. 564 and the subsequent illegal and fraudulent creation of Plot No. 1507 and Plot No. 1508 from Plot No. 1467 which was alleged to be a subdivision of Plot No. 564 took away Plot No. 1182’s lake frontage. The access to the lake riparian reserve that the owner of Plot No. 1182 enjoyed prior to the said illegal activities was taken away. Even if Obala Minala or the Plaintiff had applied to the Government to be allocated the said lake riparian reserve, the same could not have been allocated to them without consulting the owners of the neighbouring parcels of land. In this case, it is common ground that the owners of the neighbouring parcels of land were not consulted or involved in the purported re-survey of Plot No. 564 which resulted in their access to the lake riparian reserve being taken away.



40. For the foregoing reasons, it is my finding that Plot No. 1508 owned by the Plaintiff was created and registered in the name of the Plaintiff illegally and fraudulently. The Plaintiff does not therefore hold a valid title in respect of Plot No. 1508 which can enjoy the protection of the law. The Plaintiff having failed to establish his title over Plot No. 1508, the Plaintiff who is not in possession of Plot No. 1508 cannot maintain an action for trespass. When the court visited Plot No. 1182 and Plot No. 1508 on 5th March 2024, Plot No. 1508 was completely covered with lake water the more reason why it was left as a lake riparian reserve and was not included as part of Obala Minala's Plot No. 564.
41. Even if the Plaintiff had established that he had a valid title to Plot No. 1508, I would still not have found that the Defendant had trespassed on the said property. In his submissions, the Plaintiff relied on the report prepared by the District Land Registrar, Kisumu East and County Director of Surveys on 24th June 2019 as supporting his trespass claim against the Defendant. In my view, I have found nothing in the two officers' report that supports the Plaintiff's contention that the Defendant had trespassed on Plot No. 1508. It is common ground that Plot No. 1182 and Plot No. 1508 are located off Kisumu-Dunga Road and that they border or abut a 7-meter feeder /access road/road reserve. All the survey maps that were produced in evidence showed that Plot No. 1182 is traversed by the said road. The Plaintiff had claimed that the Defendant had put up a temporary structure on Plot No. 1508. When the court visited the site, the court saw the structure that was on one side of the said 7-meter road towards the lake. The Defendant claimed that the structure was on Plot No. 1182 while the Plaintiff claimed that it was on Plot No. 1508. The structure can be seen in the satellite images that are attached to the report dated 19th August 2023 by Valentine Oiro of the County Government of Kisumu which was produced in evidence by the Plaintiff as part of P.EXH.1. In the image that shows the locations of Plot Nos. 1507, 1468, 1508, 1182 and 1183, the structure complained of by the Plaintiff can be seen falling within Plot No. 1182 just below Plot No. 1183. The structure can be seen clearly in the photograph marked "Point B" in the report by Patrick Opiyo dated 24th September 2020 where the structure can be seen standing next to the wall of Plot No. 1183 and the 7-meter road traversing Plot No.1182. I find the Plaintiff's claim that the Defendant has trespassed on Plot No. 1508 not proved. The Plaintiff has in the circumstances failed to prove his case against the Defendant to the required standard. The Plaintiff is therefore not entitled to the reliefs sought against the Defendant.
42. As concerns the Defendant's counter-claim, it is my finding that the Defendant has proved on a balance of probabilities that Plot No. 1508 owned by the Plaintiff was created and registered in the name of the Plaintiff illegally and fraudulently. The Defendant is therefore entitled to the declaratory and injunctive reliefs sought against the Plaintiff. The Defendant has however not made a case for damages.
43. In conclusion, I hereby make the following orders in the matter;
- a. The Plaintiff's claim against the Defendant in the main suit is dismissed with costs to the Defendant.
 - b. Judgment is entered in the counter-claim for the Defendant/Plaintiff in the counter-claim against the Plaintiff /1st Defendant in the counter-claim for;
 - i. A declaration that the parcel of land known as Kisumu/Nyalenda "B"/1508 is situated on Lake Victoria riparian reserve and as such was illegally created.
 - ii. The Land Registrar Kisumu County and the Land Surveyor, Kisumu County shall within 90 days from the date hereof cancel all entries in the register creating Kisumu/Nyalenda "B"/1508 and shall amend the Registry Index Map for Kisumu District, Kolwa Location, Nyalenda "B" Registration Section, Diagram No.6 by deleting the



said parcel of land therefrom and restoring it to its original position as lake riparian reserve.

- iii. A permanent injunction restraining the Plaintiff in the main suit/1st Defendant in the counter-claim by himself or through his agents, servants, employees or anybody claiming through him from interfering with the Defendant in the main suit/Plaintiff in the counterclaim's quiet occupation, use and enjoyment of the parcel of land known as Kisumu/Nyalenda "B"/1182.
- iv. The costs of the counter-claim.

DATED AND DELIVERED AT KISUMU ON THIS 28TH DAY OF JANUARY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

The Defendant in person

Ms. J. Omondi-Court Assistant

