



**Bunde v Nyalik (Suing as the Legal Representative of Charles  
Ochola Bunde, Deceased) & another (Environment and Land Appeal  
E018 of 2023) [2025] KEELC 459 (KLR) (10 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 459 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E018 OF 2023  
SO OKONG'O, J  
FEBRUARY 10, 2025**

**BETWEEN**

**PETER OMBAKA BUNDE ..... APPELLANT**

**AND**

**APIYO BUNDE NYALIK (SUING AS THE LEGAL REPRESENTATIVE OF  
CHARLES OCHOLA BUNDE, DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, KISUMU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. K.Cheruiyot  
SPM delivered on 11th May 2023 in Kisumu CMC ELC No. 120 of 2019)*

**JUDGMENT**

**Brief Facts**

1. The Appellant and the 1<sup>st</sup> Respondent, Apiyo Bunde Nyalik are brothers. The two had another deceased brother named Charles Ochola Bunde (hereinafter referred to only as “the deceased”). During land adjudication in Kisumu Buoye Adjudication Section, all that parcel of land known as Kisumu/Buoye/4349 was demarcated and recorded in the names of the Appellant and the deceased as the owners. The deceased died on 21<sup>st</sup> July 1991. For reasons which are not clear, the register for the suit property was opened on 15<sup>th</sup> July 2010 in the name of the Appellant as the sole registered owner of the suit property. The Appellant was registered as the first registered owner of the suit property on the same date when the register was opened and was issued with a title deed on 10<sup>th</sup> March 2016.
2. The 1<sup>st</sup> Respondent brought a suit before this court in his capacity as the administrator of the estate of the deceased, Charles Ochola Bunde against the Appellant on 5<sup>th</sup> October 2018 in Kisumu ELCC No. 52 of 2018. The suit was transferred to the lower court on 9<sup>th</sup> October 2019 and assigned a new



case number, Kisumu CMC ELC No. 120 of 2019 (hereinafter referred to as “the lower court”). In his amended plaint dated 10<sup>th</sup> August 2021, the 1<sup>st</sup> Respondent averred that the deceased was at all material times registered as the owner of the suit property and that upon his death, the family resolved that the property should be taken over by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent averred that following that resolution, the 1<sup>st</sup> Respondent moved to the suit property and built his home thereon. The 1<sup>st</sup> Respondent averred that without his knowledge or consent the Appellant unprocedurally, fraudulently and illegally caused the suit property to be transferred and registered in his name. The 1<sup>st</sup> Respondent sought from the lower court; a declaration that the suit property belonged to the 1<sup>st</sup> Respondent and that the transfer and registration of the property in the name of the Appellant was irregular, illegal, unlawful and fraudulent, and an order for the cancellation of the title deed issued to the Appellant.

3. In his amended defence and counter-claim filed on 5<sup>th</sup> January 2022, the Appellant denied that the suit property was registered in the sole name of the deceased. The Appellant averred that the suit property was registered in the joint names of the Appellant and the deceased as the proprietors thereof. The Appellant denied that there was a family resolution that the suit property should be given to the 1<sup>st</sup> Respondent. The Appellant averred that the 1<sup>st</sup> Respondent entered and occupied the suit property illegally while the Appellant was away from Kisumu. The Appellant urged the court to dismiss the 1<sup>st</sup> Respondent’s suit with costs. In his counter-claim, the Appellant reiterated that the suit property was registered in his name and the name of the deceased as the joint proprietors thereof. The Appellant averred that in 2000, the 1<sup>st</sup> Respondent unlawfully and illegally entered the suit property and put up structures thereon. The Appellant averred that the 1<sup>st</sup> Respondent refused to vacate the suit property even after a demand was made upon him to do so. The Appellant sought judgment against the 1<sup>st</sup> Respondent for an order of eviction of the 1<sup>st</sup> Respondent from the suit property and general damages for trespass.
4. The 1<sup>st</sup> Respondent filed a defence to the counter-claim dated 21<sup>st</sup> January 2022. The 1<sup>st</sup> Respondent denied that the Appellant owned the suit property jointly with the deceased. The 1<sup>st</sup> Respondent denied that his entry and occupation of the suit property was unlawful and that he was a trespasser on the property. The 1<sup>st</sup> Respondent averred on a without prejudice basis that the suit property was owned by the Appellant and the deceased as tenants in common. The 1<sup>st</sup> Respondent averred that after the death of the deceased, his family distributed his estate and the 1<sup>st</sup> Respondent was given the deceased’s share in the suit property. The 1<sup>st</sup> Respondent averred that he was in occupation of the deceased’s share of the suit property which was distinct and as such he was not a trespasser on the suit property. The 1<sup>st</sup> Respondent reiterated that the registration of the Appellant as the sole proprietor of the suit property was fraudulent and illegal. The 1<sup>st</sup> Respondent urged the court to dismiss the Appellant’s counter-claim with costs.
5. The lower court heard the matter and in a short judgment delivered on 11<sup>th</sup> May 2023, the court entered judgment for the 1<sup>st</sup> Respondent as prayed in the plaint and dismissed the Appellant’s counter-claim. The lower court framed 4 issues for determination namely; whether the suit property was owned by the Appellant and the deceased as tenants in common or as joint tenants, whether the suit property was transferred and registered in the name of the Appellant fraudulently, whether the 1<sup>st</sup> Respondent was entitled to the reliefs sought and who should bear the costs of the suit. After considering the evidence and the applicable law, the lower court found that the suit property was owned by the Appellant and the deceased as tenants in common. The court found further that the suit property was registered in the sole name of the Appellant fraudulently. Based on the said findings, the court concluded that the



1<sup>st</sup> Respondent was entitled to the reliefs he had sought in his amended plaint while the Appellant was not entitled to the reliefs sought in his counter-claim.

6. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 26<sup>th</sup> September 2023, the Appellant challenged the lower court's decision on several grounds. The Appellant contended that the lower court erred in not making a finding that since the Appellant held a title deed for the suit property and was the first registered owner thereof, he was the absolute and indefeasible owner of the property. The Appellant contended that the lower court failed to consider the evidence adduced and the submissions that were made before it by the Appellant. The Appellant contended that the decision of the lower court was against the weight of evidence. The Appellant prayed that the appeal be allowed and the costs of the lower court suit and the appeal be awarded to the Appellant.
7. The court directed that the appeal be argued by way of written submissions. Both parties filed submissions.

### **The Appellant's submissions**

8. The Appellant filed submissions dated 20<sup>th</sup> June 2021 in support of the appeal. The Appellant urged the court to allow the appeal and enter judgment in his favour as prayed in his counter-claim in the lower court. On his part, the 1<sup>st</sup> Respondent filed submissions dated 22<sup>nd</sup> July 2024 in support of the lower court judgment and urged the court to dismiss the appeal.

### **Analysis and Determination**

9. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal by the Appellant and the submissions by the advocates for the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2 EA 212 the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its 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.”

10. See also, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the first appellate court.
11. It is also settled that the appellate court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
12. The Appellant challenged the lower court judgment on several grounds which I will summarise into two grounds namely, that the lower court erred in its finding that the 1<sup>st</sup> Respondent had proved his case against the Appellant, and in entering judgment for the 1<sup>st</sup> Respondent as prayed in his amended plaint. In his amended statement of defence, the Appellant averred in paragraph 4 that the suit property was registered in his name jointly with the deceased, Charles Ochola Bunde. In his evidence on re-call,



the Appellant stated that “I am a co-owner of the land with Ochola. I owned the land jointly with Ochola”. See page 175 of the record of appeal. The Appellant also produced a letter dated 21<sup>st</sup> January 2020 from the Assistant Chief Buoye Sub-Location in which the chief confirmed that the suit property was registered in the name of the Appellant and the deceased. At the trial, the Appellant produced a copy of the adjudication demarcation sketches for Kisumu Buoye Adjudication Section which showed that the suit property was demarcated and recorded in the name of the Appellant and the deceased as joint owners. See page 122 of the record of appeal. Once the suit property was demarcated and recorded in the names of the Appellant and the deceased during the land adjudication in Kisumu Buoye Adjudication Section, the same could only have been registered in the sole name of the Appellant as the first registered owner thereof if the Appellant had successfully raised an objection during the land adjudication or successfully appealed to the minister. Refer to Sections 26, 27, 28 and 29 of the [Land Adjudication Act](#), Chapter 284 Laws of Kenya and Section 11 of the Registered [Land Act](#) Chapter 300 Laws of Kenya (now repealed). The Appellant who had a counter-claim against the 1<sup>st</sup> Respondent for trespass had the burden of proving that the suit property was transferred from the joint names of the Appellant and the deceased to the sole name of the Appellant lawfully, and as such, the Appellant held a valid title. How the ownership of the suit property moved from the joint names of the Appellant and the deceased to the sole name of the Appellant was a fact within the knowledge of the Appellant. In *George Mbiti Kiebia & Another v. Isaya Theuri M’lntari & Another* [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the [Evidence Act](#), when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia.”

13. The Appellant told the court in cross-examination that he did not acquire the deceased’s share in the suit property through succession. He told the court that the suit property was transferred and registered in his sole name by the Land Registrar on the strength of a letter that he had obtained from the chief. The suit property was registered in the sole name of the Appellant on 15<sup>th</sup> July 2010. The only letter from the chief that the Appellant produced in evidence was that dated 21<sup>st</sup> January 2020. Even if the letter had the weight attributed to it of changing land ownership, it could not have done so in this case. It is clear from the foregoing that the Appellant did not convince the lower court that the suit property moved from the joint names of the Appellant and the deceased to the sole name of the Appellant lawfully. This court is not convinced either. There was no evidence that the Appellant and the deceased were joint tenants in the suit property. Even if they were, there was no evidence that the suit property was registered in the name of the Appellant under the doctrine of survivorship. In the absence of evidence that the Appellant’s registration as the sole proprietor of the suit property was lawful, the lower court cannot be faulted for its finding that the registration of the suit property in the name of the Appellant was impeachable for procedural impropriety and illegality. The Appellant’s title could not enjoy the protection accorded under Section 26 of the [Land Registration Act](#) 2012.
14. I have agreed with the lower court’s finding that the suit property was registered in the sole name of the Appellant unprocedurally and illegally. Did this finding entitle the 1<sup>st</sup> Respondent to the reliefs that were granted by the lower court? What the lower court was supposed to do was to make orders that would restore the suit property to its status before the unlawful registration of the property in the sole name of the Appellant. The suit property remained the property of the Appellant and the deceased. The court should have cancelled the illegal registration of the property in the name of the Appellant



and directed that the suit property be registered in the name of the Appellant and the deceased. There was no basis for the lower court to declare the 1<sup>st</sup> Respondent as the owner of the suit property. The 1<sup>st</sup> Respondent was a holder of a Limited Grant of Letters of Administration Ad Litem in respect of the estate of the deceased. The limited grant was for the purpose only of filing this suit. The property should have been restored to the name of the Appellant and the deceased so that whoever was interested in the deceased's share in the property could undertake proper succession in respect of his estate before the share could be transferred to him. He could thereafter seek the partitioning of the suit property so that he and the Appellant who is entitled to a share of the property could have separate titles.

15. The 1<sup>st</sup> Respondent submitted that he was entitled to the suit property by adverse possession. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled "The present importance of pleadings" published in 1960 *Current Legal problems*, at P.174 where the author stated as follows:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

16. The 1<sup>st</sup> Respondent did not plead adverse possession, and it was not on account of adverse possession that the lower court declared him the owner of the suit property. The 1<sup>st</sup> Respondent cannot, therefore, call adverse possession to his aid, in trying to persuade this court to affirm the lower court decision. In any event, the 1<sup>st</sup> Respondent who claimed to have been given only the deceased's share of the suit property and that he was only occupying the deceased's share of the property could not claim the whole property including the Appellant's share in the property by adverse possession.
17. It is my finding that the lower court erred in declaring the 1<sup>st</sup> Respondent as the owner of the whole of the suit property which was still owned by the Appellant and the deceased as tenants in common. The order made for the cancellation of the Plaintiff's registration as the sole proprietor of the suit property and the title that was issued to him was however proper. The registration having been obtained illegally and unprocedurally was a nullity and was appropriately cancelled.
18. The Appellant had urged the court to allow its counter-claim against the 1<sup>st</sup> Respondent. In my view, the counter-claim was rightly rejected by the lower court. The tile on which the Appellant had based



his counter-claim for eviction of the 1<sup>st</sup> Respondent from the suit property was a nullity and could not support an action for trespass.

### **Conclusion**

19. In conclusion, the Appellant's appeal succeeds in part. I hereby set aside the judgment of the lower court delivered on 11<sup>th</sup> May 2023 and the decree of the court issued on 8<sup>th</sup> August 2023 and substitute them with the following orders;
1. A declaration that the transfer and registration of the Appellant, Peter Ombaka Bunde as the sole proprietor of all that parcel of land known as Kisumu/Buoye/4349 was irregular, fraudulent and unlawful.
  2. The registration of the Appellant, Peter Ombaka Bunde as the sole proprietor of all that parcel of land known as Kisumu/Buoye/4349 and the title deed issued to him following that registration are cancelled.
  3. The Appellant, Peter Ombaka Bunde shall surrender the original title deed for all that parcel of land known as Kisumu/Buoye/4349 to the Land Registrar for cancellation.
  4. The Land Registrar, Kisumu County shall register all that parcel of land known as Kisumu/Buoye/4349 in the names of the Appellant, Peter Ombaka Bunde and Charles Ochola Bunde(deceased) as the proprietors thereof.
  5. Since the Appellant and the 1<sup>st</sup> Respondent are brothers, each party shall bear its costs of the lower court suit and this appeal.

**DELIVERED AND DATED AT KISUMU ON THIS 10<sup>TH</sup> DAY OF FEBRUARY 2025**

**S. OKONG'O**

**JUDGE**

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

Mr. Mwamu for the Appellant

Ms. Nyagol for the 1<sup>st</sup> Respondent

Ms. J. Omondi-Court Assistant

