



REPUBLIC OF KENYA



**Ogutu v Ogada & 3 others (Environment and Land Appeal  
E040 of 2021) [2025] KEELC 428 (KLR) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 428 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E040 OF 2021  
SO OKONG'O, J  
FEBRUARY 4, 2025**

**BETWEEN**

**JMES ONUNGA OGUTU ..... APPELLANT**

**AND**

**JESSICA OGADA ..... 1<sup>ST</sup> RESPONDENT**

**OLIECH OGADA ..... 2<sup>ND</sup> RESPONDENT**

**THOMAS AGOO ..... 3<sup>RD</sup> RESPONDENT**

**JAGERO OGALO ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. W.K. Onkunya  
SRM delivered on 9th June 2021 in Kisumu CMC ELC No. 87 of 2018  
(formerly Kisumu ELC No. 92 of 2017 and Winam PMCC NO. 87 of 2014)*

**JUDGMENT**

**Brief Facts**

1. This appeal is against the judgment delivered by Hon. W.K. Onkunya on 9<sup>th</sup> June 2021 in Kisumu CMC ELC NO. 87 of 2018 (hereinafter referred to as “the lower court”). The Appellant instituted a suit against the Respondents through a plaint dated 3<sup>rd</sup> June 2014 which was later amended on 30<sup>th</sup> March 2017.
2. The Appellant averred that he was the registered owner of all that parcel of land known as Kisumu/ Korando/822 on which he had established a home for his son (hereinafter referred to as “the suit property”). The Appellant averred that he purchased the suit property from one, Mr. Francis Agoo Ogada, deceased (hereinafter referred to only as “Agoo Ogada” where the context so permits. The Appellant averred that the 1<sup>st</sup> Respondent was the widow of one, Ogada Ouko, deceased (hereinafter



- referred to as “the deceased”). The Appellant averred that the 2<sup>nd</sup>- 4<sup>th</sup> Respondents were cousins of Agoo Ogada. The Appellant averred that he enjoyed quiet and peaceful occupation of the suit property until 1<sup>st</sup> June 2014 when the Respondents together with their relatives brought the body of Ogada Ouko (the deceased) to the suit property for burial.
3. The Appellant averred that neither the deceased nor the Respondents had ever lived on the suit property. The Appellant averred that the Respondents had no interest in the suit property and as such they had no right to proceed with the burial of the deceased on the suit property.
  4. The Appellant prayed for judgment against the Respondents jointly and severally for;
    - a. An order of a permanent injunction restraining the Respondents by themselves, their agents, servants and /or anyone claiming under the Respondents from burying the body of Ogada Ouko, deceased on the suit property or in any other way interfering with the Appellant’s proprietary rights over the suit property.
    - b. A declaration that the Appellant was the rightful owner of the suit property.
    - c. Costs of the suit.
    - d. Such further and/or other relief as the court may deem fit and expedient to grant.
  5. The Respondents filed a joint statement of defence in the lower court on 7<sup>th</sup> July 2014 which they amended on 26<sup>th</sup> September 2018. In their amended statement of defence, the Respondents denied the Appellant’s claim in its entirety. The Respondents denied that the Appellant had purchased the suit property from Agoo Ogada. The Respondents averred that the purported sale was a fraud and a sham meant to deprive the beneficiaries of the estate of Agoo Ogada of their inheritance. The Respondents averred that Agoo Ogada and the Respondents who were his relatives did not consent to the Appellant’s occupation of the suit property which in any event had been subdivided. The Respondents averred that the Appellant had never owned or occupied the suit property and that they did not need the consent of the Appellant to enter the suit property.
  6. The Respondents averred that during the land adjudication exercise in Kisumu Korando Adjudication Section on 27<sup>th</sup> June 1980, the suit property was demarcated and recorded in the name of Agoo Ogada as the owner thereof. The Respondents averred that Agoo Ogada should have been the 1<sup>st</sup> registered owner of the suit property. The Respondents averred since the suit property was adjudicated and recorded in the name of Agoo Ogada, it was not possible that a register for the suit property could be opened on 13<sup>th</sup> March 1990 with the Appellant as the 1<sup>st</sup> registered proprietor of the suit property. The Respondents termed the Appellant’s claim over the property fraudulent.
  7. The Respondents prayed that the Appellant’s suit be dismissed with costs. Although the Respondents never pleaded a counter-claim, the Respondents purported to seek prayers in their defence. The Respondents sought; an order of injunction against the Appellant restraining him from interfering with the Respondents’ possession of the suit property and an order of eviction of the Appellant from the suit property.
  8. The lower court heard the matter and delivered a judgment on 9<sup>th</sup> June 2021. The lower court held that the Appellant was irregularly registered and issued with a title deed for the suit property. The lower court found that the suit property having been adjudicated and recorded in the name of Agoo Ogada, there was a process that the Appellant who claimed to be a purchaser of the property had to follow before the property could be registered in his name. The lower court found that the Appellant did not prove that he followed due process in acquiring the title to the suit property. The lower court also found that the Respondents were not registered as the owners of the suit properties and had not obtained



a grant of letters of administration in respect of the estate of Agoo Ogada. The lower court held that the Respondents were not entitled to the reliefs that they had sought. The lower court dismissed the Appellant's suit with costs and ordered the Land Registrar Kisumu County to cancel the registration of the Appellant as the owner of the suit property and register the property in the name of Agoo Ogada.

9. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 10<sup>th</sup> June 2021 which was amended on 30<sup>th</sup> November 2023. The Appellant challenged the lower court's judgment on the following grounds;
  1. The learned magistrate erred in law and fact by completely ignoring the fact there was a legally enforceable sale agreement between the Appellant and the late Francis Agoo executed before completion of the adjudication process and in respect of which the Appellant obtained proprietary rights in the suit property for valuable consideration.
  2. The learned magistrate even after finding that the Appellant was the first registered owner of the suit property, erred in law and fact by faulting the Appellant for not producing transfer documents by which he got registered and finding on that singular fault that the Appellant's title deed to the suit property was obtained illegally.
  3. The learned magistrate erred in law and in fact by holding that the Appellant's title deed was obtained illegally when the Respondents neither pleaded and attributed illegality against the Appellant, sought prayers in respect thereof nor adduced evidence sufficient to lead the court to find the Appellant's title deed impeachable.
  4. The learned magistrate erred in law and in fact by directing that the land registrar does cancel the title in respect of the suit property registered in the name of the Appellant and instead register the title in the names of Francis Agoo (deceased) whose personal representative was not a party to the suit and when the Respondents pleaded no counterclaim in which such a prayer was sought.
  5. The learned magistrate erred in law by ordering the rectification of the suit property's register to affect the Appellant's title who was in possession thereof and acquired the same for a valuable consideration, with no knowledge of the omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
  6. The learned magistrate erred in law by delivering a judgment granting reliefs to the Respondents when the Respondents did not have a counterclaim.
  7. The learned magistrate erred in law by ignoring the tenets of the role of a judicial officer by adding to the pleadings and evidence on record giving rise to a miscarriage of justice.
10. The Appellant prayed that the appeal be allowed with costs and that the judgment and decree of the lower court delivered on 9<sup>th</sup> June 2021 be set aside and judgment be entered for the Appellant as prayed in his amended plaint in the lower court dated 30<sup>th</sup> March 2017.
11. This court directed that the appeal be argued by way of written submissions. The parties complied with the court's directions and filed submissions.

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

12. The Appellant filed submissions dated 19<sup>th</sup> March 2024. The Appellant submitted that there was a valid and enforceable agreement of sale between the Appellant and Agoo Ogada dated 1<sup>st</sup> October



1986. In support of this submissions, the Appellant cited Harris JA in *Garvey v. Richards* [2011] JMCA 16 where he stated that:

“It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable, essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”

13. The Appellant submitted further that the Respondent claimed that there was no sale agreement between Agoo Ogada and the Appellant and as such the Appellant’s claim was fraudulent. The Appellant submitted that a claim anchored on fraud must be specifically pleaded and strictly proved. In support of this submission, the Appellant cited *Kuria Kiarie & 2 Others v. Sammy Magera* [2018]eKLR.
14. The Appellant submitted that in the absence of evidence that the sale agreement between the Appellant and Agoo Ogada was fraudulent, the trial court should have reached the conclusion that the Appellant and Agoo Ogada’s intention was to create a legal relationship that conveyed to the Appellant proprietary rights over the suit property for valuable consideration. The Appellant submitted that he had been in peaceful occupation of the suit property since 1986 and in 2014 when the Respondents purported to bury the deceased on the suit property, Agoo Ogada’s purported rights or those of his successors in the property had long lapsed by virtue of Section 7 of the *Limitation of Actions Act*.
15. The Appellant submitted that failure to produce transfer forms and a conveyance in which Agoo Ogada had transferred the suit property to the Appellant should not have been sufficient to lead the trial court to find the Appellant’s title deed was impeachable. The Appellant submitted further that the Respondents in their statement of defence did not seek to impeach the Appellant’s title. The Appellant submitted that by impeaching the Appellant’s title when no such prayer was sought by the Respondents by way of a counterclaim or cross suit, the trial court descended into the arena of the dispute which was outside its duty. The Appellant submitted that the court was bound by the pleadings by the parties and it was not part of the duty of the court to enter upon an inquiry into the case before it other than adjudicate upon specific matters in dispute which parties themselves had raised in the pleadings. In support of this submission, the Appellant cited *IEBC & Another v. Stephen Mule & 3 Others* [2014] eKLR, *Joseph Mbuta Nzui v. Kenya Orient Insurance Company Ltd.* [2015] eKLR and *Libyan Arab Uganda Bank for Foreign Trade and Development & Anor v. Adam Vassiliadis* [1986]UG CA.

### **The Respondents’ submissions**

16. The Respondents filed submissions dated 6<sup>th</sup> June 2024. The Respondents submitted that the court had jurisdiction to direct the Land Registrar to cancel the registration of the Appellant as the proprietor of the suit property and to order rectification of the register. The Respondents submitted that such jurisdiction flowed naturally and directly from the court’s declaration of invalidity and nullity of the Appellant’s title. In support of this submission, the Respondents cited *Ethics and Anti-Corruption Commission v. Eunice N. Mugalia & Sammy Silas Komen Mwaita*, Kisumu Court of Appeal, Civil Appeal No. 39 of 2019, *Macfoy v. United Africa Co. Ltd.* (1961) 1 ALL ER 1169 and *Kipkobel Arap Misoi v. Proscila Chepkorir*, Kisii ELC No. 43 of 2005 [2016] eKLR.



17. The Respondents submitted that even if they had not sought to impeach the Appellant's title to the suit property, that could not bar the court from finding that the Appellant's title was impeachable since it was illegally obtained. The Respondents submitted that the Appellant's case was that he purchased the suit property from Agoo Ogada on 1<sup>st</sup> October 1986. The Respondents submitted that the Appellant conceded that the sale transaction took place before the completion of the adjudication process and from his evidence, he did nothing between October 1986 and March 1990 when he became the first registered proprietor. The Respondents submitted that the register for the suit property in the name of the Appellant as the first registered proprietor of the suit property showed that the same was opened on 13<sup>th</sup> March 1990 whereas the register for the same land in the name of Agoo Ogada produced by the Land registrar showed that it was opened on 10<sup>th</sup> January 1995. The Respondents submitted that the registration of the suit property in the name of the Appellant could only have happened if the Appellant had filed an objection or appeal to the minister during land adjudication or by a transfer from Agoo Ogada to the Appellant after land adjudication when the land had already been registered in the name of Agoo Ogada.
18. The Respondents submitted that the Land Registrar confirmed that the adjudication register which was forwarded to his office bore the name of Agoo Ogada as the person who should have been registered as the first registered proprietor of the suit property. The Respondents submitted that the Land Registrar was unable to explain why the register which he produced bore the name of the Appellant instead of that of Agoo Ogada. The Respondents submitted that the evidence of the Land Registrar confirmed that there was an error or fraud in the registration of the Appellant as the proprietor of the suit property. The Respondents submitted that the Land Registrar confirmed that the only adjudication record he received from the Director of Land Adjudication was the one dated 26<sup>th</sup> June 1980 and there were no objections or appeal to the minister. The Respondent cited Section 28 of the [Land Adjudication Act](#) and Section 11 (2A) of the Registered [Land Act](#) Chapter 300 Laws of Kenya (now repealed) and submitted that the adjudication register for Korando Adjudication Section showed that Agoo Ogada was the owner of the suit property after the conclusion of all objections relating to the said land yet the Land Registrar caused the suit property to be registered in the name of Appellant.

### **Analysis and Determination**

19. 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] 2EA 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.”
20. 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.
21. 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.

22. The Appellant challenged the lower court judgment on 8 grounds. I will consider grounds 1, 2, 2A and 3 of appeal together and similarly grounds 3A, 3B, 4 and 5 of appeal. With regard to grounds 1, 2, 2A and 3 of appeal, I disagree with the Appellant that the lower court ignored the existence of the agreement of sale dated 1<sup>st</sup> October 1986 between the Appellant and Agoo Ogada and that the lower court's finding that the Appellant's title to the suit property was irregularly and unprocedurally acquired was erroneous. From its judgment, the concern of the lower court which is also the concern of this court was how the interest of Agoo Ogada in the suit property that had already been ascertained and recorded in the name of Agoo Ogada during the land adjudication was transferred from Agoo Ogada to the Appellant. It was common ground before the lower court that the suit property was demarcated and recorded in the name of Agoo Ogada as the owner thereof during land adjudication in Kisumu Korando Adjudication Section. I agree with the Respondents that the suit property could only be registered in the name of the Appellant as the first registered owner if the Appellant had successfully raised an objection during the land adjudication or successfully appealed to the minister under the *Land Adjudication Act* Chapter 284 Laws of Kenya. The agreement of sale that the Appellant produced in evidence was not sufficient to transfer the ownership of the suit property to the Appellant. The Appellant's case against the Respondents in the lower court was based on trespass. The burden was on the Appellant to prove that the suit property was transferred from Agoo Ogada and registered in his name lawfully, and as such, he held a valid title. How the ownership of the suit property moved from Agoo Ogada to the Appellant was a fact within the knowledge of the Appellant. In *George Mbiti Kiebia & Another v. Isaya Theuri M'lintari & 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.”

23. The Appellant did not tell the lower court how the suit property moved from the name of Agoo Ogada to his name. In the absence of such evidence, the lower court cannot be faulted for its finding that the registration of the suit property in the name of the Appellant was unprocedural and illegal. The production of the agreement of sale was not sufficient to discharge the burden of proof that was on the Appellant. For the foregoing reasons, I find no merit in grounds 1, 2, 2A and 3 of appeal.
24. As concerns grounds 3A, 3B, 4 and 5 of appeal, the following is my view: Order 2 Rule 4 of the Civil Procedure Rules provides as follows:

4.

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
  - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
  - (c) which raises issues of fact not arising out of the preceding pleading.



- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

25. 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.”

26. It was common ground that the Respondents did not plead a counter-claim. As I mentioned earlier in the judgment, the Respondents sought reliefs in their statement of defence without indicating that they were doing so by way of a counter-claim. That is contrary to the requirements of Order 7 Rule 7 of the Civil Procedure Rules. In the circumstances, the said prayers in the defence could not be recognised by the court as a counter-claim and the court rightly rejected the same although for a different reason. I agree with the Appellant that since there was no counter-claim by the Respondents seeking the rectification of the register of the suit property by the cancellation of the Appellant’s title and registration of the deceased Agoo Ogada as the owner of the suit property, the lower court erred by making an order for the cancellation of the Appellant’s title. The rectification of the register of the suit property was not pleaded and the prayer was not sought. In my view, the court having made a finding that the suit property was irregularly and illegally registered in the name of the Appellant and that the Appellant had no valid title to the property which could support an action for trespass, the court should have stopped at the dismissal of the Appellant’s suit which was not proved. Having made a finding that the Respondents were not the administrators of the estate of the deceased, Agoo Ogada, the lower court should have left the issue of cancellation of the title held by the Appellant to the administrator of the estate of Agoo Ogada to pursue. Given the foregoing, I find merit in grounds 3A, 3B, 4 and 5 of appeal.



## **Conclusion**

27. In conclusion, the Appellant's appeal succeeds in part. The judgment of the lower court delivered on 9<sup>th</sup> June 2021 and the decree of the court issued on the same date are hereby varied by setting aside the order by the lower court directing the Land Registrar Kisumu County to cancel the registration of the suit property, Kisumu/Korando/822 in the name of the Appellant as the owner thereof and the title deed that was issued to him, and to register the property in the name of Francis Agoo, deceased. The rest of the judgment and orders made by the lower court shall remain undisturbed. Each party shall bear its costs of the appeal.

**DELIVERED AND DATED AT KISUMU ON THIS 4<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. Mwesigwa for the Appellant

Mr. M. J. Orenge for the Respondents

Ms. J. Omondi-Court Assistant

