



**Olwal v Haggai (Sued as the legal representative of the Estate of Jane Ogola - Deceased) (Environment and Land Appeal E021 of 2020) [2024] KEELC 446 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 446 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E021 OF 2020  
SO OKONG'O, J  
FEBRUARY 1, 2024**

**BETWEEN**

**STEPHEN AGAI OLWAL ..... APPELLANT**

**AND**

**DIXON OBONYO HAGGAI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JANE OGOLA - DECEASED) ..... RESPONDENT**

**JUDGMENT**

**Background**

1. All that parcel of land known as Title No. West Kisumu/Ojola/24xx (hereinafter referred to only as “the suit property”) was registered in the name of one, Peter Oringo Olwal (hereinafter referred to only as “the seller”). On 9<sup>th</sup> February 2000, the seller sold the suit property to Jane Ogola, deceased (hereinafter referred to only as “the Respondent”) at a consideration of Kshs. 80,000/-. The suit property was subsequently registered in the name of the Respondent on 9<sup>th</sup> March 2003 and she was issued with a title deed on 24<sup>th</sup> April 2003.

**The Lower Court Suit**

2. In 2010, the Respondent filed a suit in the High Court namely, Kisumu HCCC No. 150 of 2010 against the Appellant herein. The Respondent’s High Court suit was transferred to this court and assigned case number Kisumu ELCC No. 845 of 2015. This court subsequently transferred the suit to the Principal Magistrate’s Court at Maseno on 8<sup>th</sup> February 2018 where it was assigned case number PMC ELC No. 7 of 2018 (hereinafter referred to only as “the lower court” or “the lower court suit”).
3. In her lower court suit, the Respondent averred that she was the registered proprietor of the suit property and that sometime in October 2010, the Appellant entered the suit property without her



permission, erected structures thereon and started living on the same. The Respondent averred that the Appellant admitted his acts of trespass and undertook on 1<sup>st</sup> September 2010 to demolish the said structures and vacate the suit property. The Respondent averred that the Appellant had not vacated the property and that the Appellant's said acts of trespass had denied her the use and enjoyment of the suit property. The Respondent sought a declaration that the Appellant was a trespasser on the suit property and should be evicted therefrom. The Respondent also sought the costs of the suit.

4. In his defence in the lower court, the Appellant denied that the Respondent was the registered owner of the suit property and that she had purchased the same from Peter Oringo Olwal (the seller). The Appellant admitted that he had entered and occupied the suit property. The Appellant averred that if at all the Respondent was registered as the owner of the suit property, the said registration was irregular, fraudulent and a nullity. The Appellant contended that the Respondent had purchased a property that belonged to a deceased person from a person who had no capacity to sell the same and without the consent of the beneficiaries of the deceased's estate. The Appellant averred further that at the time the Respondent purchased the suit property, the Appellant had been in continuous and uninterrupted use thereof for 12 years. The Appellant averred that the Respondent's claim over the suit property was time-barred. The Respondent filed a reply to defence in which she denied all the allegations in the Appellant's defence.
5. At the trial before the lower court, the Respondent told the court that she was the owner of the suit property and that the Appellant entered the property in 2010 and put up a house thereon. The Respondent stated that she went to the suit property and found the Appellant living thereon. The Respondent stated that through the intervention of the area chief and the District Officer, the Appellant agreed to vacate the property. The Respondent produced several documents as exhibits in proof of her case. The Respondent called one witness who corroborated her evidence.
6. The Appellant adopted the contents of his witness statement dated 26<sup>th</sup> November 2018 as his evidence in chief. In the statement, the Appellant stated that he was a son of Olwal who had four sons and a daughter. He stated that Olwal had his homestead on the suit property. The Appellant stated that he had his own home on the suit property and that he had occupied the property with his siblings since he was born. He stated that he was neither informed nor consulted over the sale of the suit property to the Respondent. He stated that he learnt of the sale of the suit property when he was arrested by police officers from Ojola and put in police custody where he was forced to sign a blank piece of paper as a condition for his release. He stated that he was born on the suit property in 1958 and had put up his home on the property in 1987. He stated that the Respondent had not set foot on the suit property. He termed the purported sale of the suit property to the Respondent a fraud. The Appellant called one witness, Margaret Alila Odipo who corroborated his evidence.
7. The lower court considered the pleadings, the evidence adduced by the parties and the written submissions and delivered a judgment on the matter on 2<sup>nd</sup> December 2020.
8. The lower court made a finding that the Respondent was the registered proprietor of the suit property and that the Appellant did not produce any document in support of his ownership claim to the suit property. The lower court noted that the Appellant was not registered as the owner of the suit property. The court noted further that the Appellant's contention that he ought to have been consulted by the seller who was the registered owner of the property before he sold the same to the Respondent had no basis. On the Appellant's claim to the suit property by adverse possession, the court held that he had no jurisdiction to determine the issue and that in any event, the Appellant did not adduce sufficient evidence in support of the claim. The lower court in conclusion declared the Appellant a trespasser on the suit property and ordered him to vacate the same within 30 days failure to which he be evicted therefrom. The Appellant was also ordered to pay the costs of the suit.



## The Appeal

9. The Appellant was dissatisfied with the said judgment of the lower court and filed the present appeal on 28<sup>th</sup> December 2020. In his Memorandum of Appeal dated 21<sup>st</sup> December 2020, the Appellant challenged the decision of the lower court on the following grounds;
  1. The trial magistrate erred in fact and law in finding and holding that the Appellant was a trespasser on the suit property and ordering his eviction therefrom.
  2. The trial Magistrate erred in law and fact in failing to appreciate the fact that the Respondent did not prove that consent of the land control board was obtained for the sale transaction relating to the suit property thereby casting doubt on the validity of the sale and the Respondent's title.
  3. The trial Magistrate misdirected himself by finding and holding that the mere existence of a title deed in the name of the Respondent meant that the same was validly and legally obtained.
  4. The trial Magistrate misdirected himself in holding that the lower court had no jurisdiction to deal with the defence of time bar raised under Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya.
  5. The trial Magistrate misdirected himself by finding and holding that the objection to the suit raised by the Appellant under Section 7 of the [Limitation of Actions Act](#) amounted to an adverse possession claim.
  6. The trial Magistrate did not exhaustively analyse and deal with the Appellant's evidence especially that part in which the Appellant stated that he was born on the suit property in 1958 and had lived on the suit property since then.
  7. The trial Magistrate failed to find and hold that the Appellant's open and continuous occupation of the suit property created an overriding interest under Section 30 of the [Land Registration Act](#) and that the Respondent's title was extinguished by adverse possession.
  8. The trial Magistrate erred in law and fact in his finding that the fact that no counter-claim had been filed by the Appellant meant that the court could not consider the issue of limitation of actions, adverse possession and overriding interest.
  9. The trial Magistrate misdirected himself in law and fact in holding that no evidence had been tendered as to the Appellant's long and continuous occupancy and use of the suit property.
  10. The trial Magistrate having established that the seller of the suit property to the Respondent and the Appellant were brothers and that the suit property belonged to their father, it was a misdirection on the part of the trial magistrate to declare the Appellant a trespasser on the suit property and to order his eviction from the property.
  11. The trial Magistrate erred in law and fact in failing to appreciate, find and hold that the agreement of sale of land that was exhibited by the Respondent together with the documents acknowledging receipt of money did not meet the conditions set in Section 3 of the [Law of Contract Act](#) and as such the sale was void ab initio.
  12. The entire judgment of the trial court was against the weight of evidence adduced and contrary to the applicable law and had thus occasioned a miscarriage of justice.



10. The Appellant prayed that the appeal be allowed, the judgment and decree of the lower court be set aside and substituted with an order dismissing the Respondent's suit in the lower court. The Appellant also sought the costs of the appeal and the lower court suit.

### **The Submissions**

11. The Respondent died on 8<sup>th</sup> November 2022 and was substituted in the appeal by her legal representative, Dixon Obonyo Haggai on 27<sup>th</sup> July 2023. The appeal was argued by way of written submissions. The Appellant filed submissions dated 14<sup>th</sup> September 2023. The Appellant argued grounds 1,2,3,4 and 5 of the appeal together. The Appellant submitted that he challenged the validity of the Respondent's title to the suit property in his defence in the lower court in which he contended that the said title was obtained irregularly and fraudulently. The Appellant cited Section 26(1) of the [Land Registration Act](#), 2012 and submitted that a title to land can be impeached if it is obtained fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme. The Appellant submitted that title to land is not proved by merely producing a title deed. The Appellant cited *Munyu Maina v. Gathiha Maina*[2013]eKLR in support of this submission. The Appellant submitted that the court had a duty to interrogate the process through which the Respondent acquired the suit property to confirm that it was free from irregularities and/or corrupt practices. The Appellant submitted that one of the procedural requirements before a title is acquired through transfer is the Land Control Board Consent (LCB Consent). The Appellant submitted that he had contended before the lower court that no LCB Consent was obtained and that the Respondent who had the burden of proving that the consent was sought and obtained did not produce the same in evidence. The Appellant submitted that the lower court should have made a finding that the transaction between the seller and the Respondent was null and void for lack of LCB Consent pursuant to Section 6 of the [Land Control Act](#), Chapter 302 Laws of Kenya. The Appellant cited several cases in support of this submission which I have considered.
12. The Appellant also argued grounds 6,7,8 and 9 of the appeal together. The Appellant submitted that he pleaded in the lower court that the Respondent's suit was time-barred pursuant to Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. The Appellant submitted that he adduced evidence showing that he had occupied the suit property for more than 12 years. The Appellant submitted that his testimony on this issue was corroborated by the evidence of PW2. The Appellant submitted that the evidence he tendered on this issue was not rebutted by the Respondent who never visited the suit property before purchasing it.
13. The Appellant submitted that the right of the seller who sold the suit property to the Respondent to claim the suit property from the Appellant accrued in 1987 when the Appellant put up his home on the suit property. The Appellant submitted that the Respondent filed the lower court suit in 2010 about 23 years after the cause of action had arisen. The Appellant submitted that the Respondent's suit was time-barred and should not have been entertained by the lower court. The Appellant submitted that the lower court's contention that it had no jurisdiction to deal with the issue of limitation of actions was a misdirection. The Appellant cited two decided cases in support of this submission.
14. Grounds 10,11,12 and 13 of the appeal were also argued together. The Appellant submitted that the Appellant's long and open occupation of the suit property created an overriding interest in the land in favour of the Appellant recognised under Section 28(h) of the [Land Registration Act](#), 2012. The Appellant submitted that the law recognised a right acquired or in the process of being acquired by virtue of the law relating to the limitation of actions or by prescription. The Appellant submitted that the Appellant had demonstrated that he had a right to the suit property through limitation of actions and as such the lower court misdirected itself in its analysis of evidence and the law thereby



arriving at an erroneous finding that the Appellant had not established ownership of the suit property. The Appellant submitted that if the Respondent had visited the land, she would have noted that the land was occupied by the Appellant. The Appellant urged the court to find that the Appellant had an overriding interest in the suit property.

15. Ground 14 of the appeal was argued alone. The Appellant submitted that the sale agreement between the seller and the Respondent in respect of the suit property did not meet the conditions of a valid contract for the disposition of an interest in land set out in Section 3(3) of the [Law of Contract Act](#), Chapter 16 Laws of Kenya. The Appellant urged the court to find that the transaction between the seller and the Respondent was null and void for lack of a legally acceptable contract. In conclusion, the Appellant submitted that the Appellant did not agree to vacate the suit property. The Appellant submitted that nothing of substance turned on the purported agreement. The Appellant urged the court to allow the appeal with costs.
16. The Respondent filed submissions dated 3<sup>rd</sup> October 2023. The Respondent responded to all the grounds of appeal together. The Respondent submitted that the Respondent established in the lower court that the Appellant was a trespasser on the suit property and that the lower court's finding to that effect was well grounded in law and evidence on record. On the issue of whether the Respondent's suit in the lower court was time-barred, the Respondent submitted that the Respondent acquired the suit property through an agreement for sale dated 9<sup>th</sup> February 2000. The Respondent submitted that the property was transferred to the Respondent in 2003 and she brought the lower court suit in 2010. The Respondent submitted that the Respondent brought the suit within 10 years of entering into the said agreement of sale and as such the suit was not time barred. The Respondent submitted that the Appellant did not tender any evidence showing that he put up a home on the suit property in 1987. The Respondent submitted that PW2 testified to the effect that the suit property had no structures at the time it was purchased by the Respondent and that the Respondent had even paced beacons on the land after purchasing the same. The Respondent submitted that the appeal had no merit and urged the court to dismiss the same with costs.

### **Analysis and determination**

17. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the advocates for the parties. This being a first appeal, this court has a duty to consider and re-evaluate the evidence on record and to draw its conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2 E.A 212 the Court of Appeal stated among others 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.”

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.



18. The court will also 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.

19. I have carefully reviewed the pleadings and the evidence that was adduced by the parties in the lower court. I am unable to fault the final finding and holding by the lower court in the matter. I must commend the Appellant’s advocates for the eloquent, forceful and persuasive submissions made before this court in support of the appeal. In some instances, however, the language used to express the Appellant’s dissatisfaction with the findings of the lower court was uncalled for. As the Court of Appeal stated in *Kenya Ports Authority v. Kuston (Kenya) Limited*(supra), the duty of this court is not to hear the lower court case afresh. The duty of the court is to re-evaluate the pleadings and the evidence on record to determine whether the decision arrived at by the lower court on that evidence and the applicable law was justified. In *Abok James Odera t/a A.J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates*(supra) the court stated that:

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

20. It is not open to an appellant in an appeal to argue a new case that was not pleaded in the lower court and in respect of which no evidence was led. 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.”

21. I will consider the Appellant’s grounds of appeal together. The Respondent sued the Appellant for trespass on the suit property. In his defence, the Appellant denied the alleged trespass. The Appellant denied that the Respondent was the registered owner of the suit property. The Appellant contended



in the alternative that if indeed the Respondent was registered as the owner of the suit property, the registration was irregular, illegal and a nullity. In his particulars of fraud and illegality, the Appellant contended that the suit property belonged to a deceased person and that the Respondent purchased it from a person who had no capacity to sell it in that the person had not obtained a confirmed grant. The Appellant contended further that the Respondent acquired the property without the consent of the beneficiaries of the deceased's estate. The Appellant also claimed that the Respondent acquired the property while the same was under the continuous and uninterrupted use of the Appellant.

22. The Appellant did not claim any ownership right over the suit property. The Appellant claimed that the suit property belonged to an unnamed deceased person in respect of whose estate a Grant of Letters of Administration had not been confirmed. The Appellant did not give the particulars of the succession proceedings in which the alleged Grant of Letters of Administration had been issued and his relationship with the deceased that would have made him a beneficiary of his estate. The Appellant also averred that the suit property had been under his continuous and uninterrupted use for more than 12 years and as such, the Respondent's claim was time-barred. The Appellant did not however give the particulars as to when he entered the suit property and what use he had put the suit property as at the time the Respondent acquired the same.
23. Apart from his claim that the Respondent acquired the suit property fraudulently and illegally by; purchasing it from a person who had no capacity to sell it, purchasing it without the consent of the beneficiaries of the deceased owner and purchasing it while the same had been in continuous and uninterrupted occupation of the Appellant, and that the Respondent's suit was time-barred, the Appellant pleaded no other defence to the Respondent's claim.
24. The Appellant did not plead that the sale of the suit property to the Respondent was null and void for want of the Land Control Board Consent (LCB Consent). The Appellant did not also plead that he had acquired an overriding interest in the suit property under Section 30 of the [Land Registration Act, 2012](#). There was also no plea by the Appellant that the agreement for sale between the Respondent and the seller, Peter Orimbo Olwal was null and void for failure to comply with the provisions of Section 3(3) of the [Law of Contract Act](#), Chapter 16 Laws of Kenya. 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."(emphasis added)
25. All the issues that I have raised above had to be pleaded before evidence could be led in proof thereof. The same were not pleaded as required by the Civil Procedure Rules neither was evidence led in proof of the same. The same were raised in the Appellant's submissions in the lower court while others have been raised for the first time in this appeal.



26. At the trial, the Appellant relied entirely on his witness statement dated 26<sup>th</sup> November 2018 in his defence to the Respondent's claim. The Appellant added nothing more to that statement. The statement was a one-page 7 short paragraph document which did not contain much. In the statement, the Appellant stated that his father had his home on the suit property. He stated further that he also had his home on the suit property which he had put up in 1987 and that he had occupied the property with his siblings since he was born in 1958. He added that he was not consulted or informed before the suit property was sold. Apart from the fact that he was occupying the suit property, the Appellant did not tell the court that he had a proprietary interest in the suit property and the basis for that interest. The Appellant did not mention anything in his evidence about the Respondent's alleged failure to obtain the LCB Consent or alleged non-compliance with Section 3(3) of the Law of Contract Act.
27. The Appellant's witness in the lower court, Margaret Alila Odipo (DW2) also adopted her witness statement dated 26<sup>th</sup> November 2018 as her evidence in chief. In the statement, she stated that the suit property belonged to the Appellant's father and that the Appellant had occupied the property since he was born and had built his home thereon in 1987.
28. The Appellant and his witness gave evidence after the testimony of the Respondent and her witness, Haggai Nyangweso Alenya. The Respondent told the court that she was the registered owner of the suit property and that in 2010 she was informed that somebody was putting up a house on the property. She stated that she came to the suit property and found the Appellant constructing a house thereon. She stated that she reported the Appellant to the area chief and subsequently to the District Officer. As I mentioned earlier, the Respondent produced several documents in support of her claim to the suit property which included a copy of transfer of land form, a copy of a title deed and a certificate of official search.
29. The Respondent's witness, PW2 who was the Respondent's father-in-law told the court that he handled most aspects of the transaction relating to the suit property on behalf of the Respondent who was living and working in Mombasa. He told the court how he was approached by the seller that he wanted to sell the suit property and how he contacted the Respondent who agreed to purchase the suit property at Kshs. 80,000/-. PW2 who appeared to know the Appellant and the seller's family well told the court how he prepared the agreement of sale and had it executed, how the purchase price was paid after which the property was transferred and registered in the name of the Respondent. PW2 told the court that the suit property belonged to the seller who had a house on it. He stated that the seller pulled down the said house after the sale and went and put up a home elsewhere. PW2 told the court that after the sellers' house was pulled down, the suit property remained without any structure. PW2 stated that the parties appeared before the Land Control Board and they were issued with consent for the transaction. PW2 stated that after the Respondent purchased the land, he was the one who was using it before the Appellant encroached on the land. On cross-examination, PW2 maintained that the only house that was on the suit property during the sale transaction was the seller's house. He stated that the seller's siblings had no houses on the suit property. On re-examination, PW2 stated that the suit property belonged to the seller and that the Appellant was given another parcel of land by his father the particulars of which he provided.
30. What I have set out is the state of the pleadings and evidence that was before the lower court. I agree with the Appellant that the burden was on the Respondent to prove her case before the lower court. Trespass is any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18<sup>th</sup> Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. From the evidence on record, the Respondent proved on a prima facie basis that she purchased the suit property from the seller, paid the full purchase price and had the property transferred to her. She



proved that at the time of purchasing the suit property, the same was owned by the seller and that the Appellant was not in occupation thereof. The Respondent also proved that the Appellant entered the suit property in 2010 without her permission and had remained in possession. I am of the view that once the Respondent proved on a prima facie basis that she was the registered owner of the suit property and that the Appellant had entered and occupied the same without her consent or permission, the burden shifted to the Appellant to prove that he had reasonable cause to occupy the suit property. 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, 4<sup>th</sup> 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.”
31. While the legal burden of proof is static, 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 had the following to say 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...”
32. Section 26(1) of the *Land Registration Act*, 2012 which the Appellant relied on in support of his appeal provides as follows:
- 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.”

33. The burden was on the Appellant to prove that the Respondent’s title was obtained fraudulently or through misrepresentation or that her certificate of title was acquired illegally, unprocedurally or through a corrupt scheme. I have already highlighted the evidence that was tendered by the Appellant before the lower court. The Appellant had a duty to establish that he had a valid interest in the suit property that entitled him to remain in occupation thereof. I agree with the lower court that no such interest was established. I agree with the lower court’s observation that if indeed the Appellant had a proprietary interest in the suit property, he should have brought a counter-claim against the Respondent. Although the Appellant claimed to have been born on the suit property and that he had established his home thereon in 1987, the Appellant did not adduce any evidence of the existence of the said 1987 home. The Appellant did not also challenge the evidence of the Respondent that when she purchased the suit property the only structure on the property was the sellers’ home and that the Appellant and the sellers’ other siblings had no homes on the suit property. Like in the lower court, the Appellant has not convinced me that he occupied the suit property continuously from 1987 and that when the Respondent purchased the suit property in 2000, the land was purchased with him in occupation. If indeed he was in occupation of the land in 2000, I can see no reason why the Respondent would have waited until 2010 to report to the area chief that he was putting up structures on the suit property. I do not also understand how the Appellant would have had an overriding interest in land that he claimed to belong to his deceased father and which he occupied by virtue of his relationship with his father.

34. About the time bar argument, again as found by the lower court, there was no evidence to support the same. According to the evidence on record, the Respondent was registered as the owner of the suit property on 9<sup>th</sup> March 2003. The evidence adduced by the Respondent that was not challenged by the Appellant in my view was that the Appellant was not in occupation of the suit property when the Respondent acquired the same and that the Appellant encroached thereon in 2010 the same year the lower court suit was filed. I cannot therefore see how the Respondent’s suit filed in 2010 when the cause of action for trespass arose could be said to have been time barred. I did not follow the Appellant’s submission that the time started running against the Respondent in 1987 when the Appellant allegedly put up his homestead on the suit property.

### **Conclusion**

35. Due to the foregoing, I find no merit in all the grounds of appeal put forward by the Appellant against the lower court judgment delivered on 2<sup>nd</sup> December 2020. The lower court misdirected itself in some of its findings but the same did not affect the conclusion that it arrived at. The appeal is dismissed with costs to the Respondent.

**DELIVERED AND DATED AT KISUMU ON THIS 1<sup>ST</sup> DAY OF FEBRUARY 2024**



**S. OKONG'O**

**JUDGE**

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

Mr. C.Onyango for the Appellant

Ms. Ouma for the Respondent

Ms. J.Omondi-Court Assistant

