



REPUBLIC OF KENYA



**Odiado v Okubi (Environment and Land Appeal E002 of 2023)  
[2024] KEELC 5103 (KLR) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5103 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

**BN OLAO, J  
JULY 9, 2024**

**BETWEEN**

**SPINSLETA ARAMBEE ODIADO ..... APPELLANT**

**AND**

**JAMES NANYWENI OKUBI ..... RESPONDENT**

*(Being an appeal from the Judgment of HON. T. A. MADOWO SENIOR  
RESIDENT MAGISTRATE BUSIA delivered on 25th August 2023 in  
BUSIA CHIEF MANGISTRATE'S COURT ELC CASE NO 101 of 2023)*

**JUDGMENT**

1. Spinsleta Arambée Odiado (the Appellant herein moved to the Chief Magistrate's Court Busia vide her plaint dated 9<sup>th</sup> August 2023 and later amended on 16<sup>th</sup> August 2023 and sought judgment against James Nanyweni Okobi (the Respondent herein) in the following terms with respect to the land parcel No Samia/Butabona/813 (the suit land):
  - a. A permanent injunction to be issued against the Respondent from burying the remains of his wife one Scholastica Anyango Nanyweni on the suit land, disposing off, intermeddling with, transferring, alienating, remaining on, cultivating and/or in any other way interfering with plot number L.R Samia/Butabona/813 situate at Busia herein referred to as the suit land.
  - b. An order directing the Land Registrar Busia to register the names of the Appellant and his mother that is Spinsleta Arambée Odiado And Rose Abonyo Odiado herein the Co-Administrators as proprietors as per the Certificate of Confirmation of Grant issued on 16<sup>th</sup> November 2021 on the suit parcel NO Samia/Butabona/813 situate at Samia Busia.
  - c. A declaration that any transactions that were conducted before the issuance of the Certificate of Confirmation of Grant issued on 16<sup>th</sup> November 2021 is null and void.



- d. An order directing the Land Registrar Busia to issue new title deeds to the Appellant and his mother as co-owners of the suit land Samia/Butabona/813 to conform with the Certificate of Grant issued on 16<sup>th</sup> November 2021.
  - e. A declaration that the Respondent's action on the suit land are illegal and/or unlawful.
  - f. General damages.
  - g. Costs of the suit.
  - h. Interest on (a), (b) and (c) above at Court rates.
  - i. Any other relief that this Honourable Court may deem fit and just to grant.
2. The basis of the Appellant's case in the trial Court was that he was at all material time the legal Administrator of the Estate of Odiado Abuori Okundi (herein the deceased) who was, until his demise, the registered owner of the suit land. That he had obtained the grant of Letters of Administration in respect to the deceased's Estate on 16<sup>th</sup> May 2019 and the same was confirmed on 16<sup>th</sup> November 2021 vide Busia Chief Magistrate's Court Succession Cause No 290 of 2019. He pleaded further that the Respondent's wife one Scholastica Anyango NanywenI had died on 30<sup>th</sup> July 2023 and he was intending to bury her remains on the suit land on 12<sup>th</sup> August 2023 which action would cause him substantial loss and damage hence this suit.
  3. The Respondent filed a defence and counter-claim dated 15<sup>th</sup> August 2023 in response to the Appellant's suit.
  4. He denied that the deceased was until his demise the registered owner of the suit land or that the Appellant had obtained a Confirmed Grant in respect to the deceased's Estate in Busia Chief Magistrate's Succession Cause No 290 of 2019. The Respondent pleaded that infact the Appellant was appointed as the Administrator to the Estate of the deceased on 1<sup>st</sup> February 2005 in Nairobi High Court Succession Cause No 120 of 2004. That the Respondent assisted the Appellant to obtain the said Grant with the consent of his (Appellant's) mother who had sold part of the suit land to the Respondent. Upon confirmation of the said Grant on 6<sup>th</sup> October 2010, the Appellant was given a portion of the suit land measuring 3.5 acres while the Respondent was given 3.0 acres.
  5. Thereafter, the Appellant conspired with his mother one Rose Abonyo Odiado and filed a purported consent order on 15<sup>th</sup> March 2019 purporting to revoke the Grant issued by the High Court and purported to apportion the suit land between the Appellant and his mother to the exclusion of the Respondent The Respondent therefore pleaded that he purchased 3 acres out of the suit land and was registered as a co-owner together with the Appellant in the ratio of 3.5 acres for the Appellant and 3.0 acres for himself by an order of the High Court dated 6<sup>th</sup> November 2014 and that both are next door neighbours residing on the suit land each with their own separate portion. He added that his wife Scholastica Anyango Nanyweni had suddenly died on 30<sup>th</sup> July 2023 and was set for burial on 12<sup>th</sup> August 2023 yet the Appellant had fraudulently caused the Court to stop the burial of the Respondent's wife on the suit land knowing well that the Respondent and his family had been peacefully residing on the suit land for a period of 20 years. Particulars of that fraud were pleaded in paragraph 12(i) to (v) of the defence and counter claim.
  6. The Respondent pleaded further that as a result of the Appellant's fraudulent action of stopping the burial of his wife, he suffered loss and damage quantified at Kshs.344,000 which he sought in his counter-claim.



7. The Respondent therefore sought judgment against the Appellant in the following terms:
  1. The Appellant's suit be dismissed with costs.
  2. Judgment be entered for the Respondent in the sum of Kshs.344,000.
  3. General damages.
  4. Costs of the counter-claim.
8. The Appellant filed a reply to the defence and a defence to the counter-claim. He denied that the Respondent had purchased the suit land. He also denied the allegations of fraud or that he had conspired with his mother to revoke the Grant and added that if the Respondent has been living on the suit land for a period of 20 years, which he denied, then the Respondent has been doing so as a trespasser. He also denied that Respondent had suffered damage and loss as alleged. He urged the Court to dismiss the Respondent's counter-claim with costs and that judgment be entered for the Appellant as per his plaint.
9. The suit came up for hearing before Hon. T. A. Madowo Senior Resident Magistrate on 17<sup>th</sup> August 2023 when the Appellant who was the only witness in support of his case testified. The Respondent also testified and called as his witness Charles Denis Kapula Okello. Thereafter, submissions were filed by Ms Memia then counsel acting for the Appellant and by Mr J. V. Juma counsel for the Respondent.
10. Having considered the evidence by the parties and the submissions by counsel, the trial Magistrate delivered her judgment on 25<sup>th</sup> August 2023. She dismissed the plaintiff's suit with costs and similarly dismissed the Respondent's counter-claim but without costs.
11. The judgment provoked this appeal in which the Appellant raised the following grounds as per his amended memorandum of appeal dated 15<sup>th</sup> December 2023 in which he sought to set aside the orders by the trial Magistrate. These are:
  - a. That the learned Magistrate erred in law and fact by failing to find and hold that the Respondent did not prove his case as against the Appellant to the required standard.
  - b. That the learned Magistrate erred in law and fact by descending to determine issues not pleaded and canvassed by the parties hence arriving at a wrong decision.
  - c. That the learned Magistrate erred in law and fact by failing to find the procedure and/or manner used to acquire the suit parcel NO Samia/Butabona/813 located at Samia on the part of the Respondent herein was unlawful and or illegal.
  - d. That the learned Magistrate erred in law and fact by denying the Appellant the right to be heard when she failed to grant leave to the Appellant to file both further affidavit and supplementary submissions to respond to issues raised by the Respondent.
  - e. That the learned Magistrate erred in law and fact by making a decision in favour of the Respondent that exceeded the weight of the facts, evidence as adduced by the Appellant (sic) hence arriving at a biased decision.
  - f. That the learned Magistrate erred in law and fact by placing reliance on mere allegations which were never proved at all by way of either evidence or expert opinion.
  - g. That the learned Magistrate erred in law and fact by declaring that the Respondent bought the suit property from one Janerosa Odiado who is a stranger to the suit property.



- gA) That the learned trial Magistrate erred in law and fact denying the Appellant stay of execution of the impugned judgment pending filing of appeal and/or leave to appeal against the judgment.
  - h. That the learned Magistrate erred in law and fact by allowing the counter-claim without proof of the particulars therein capture part of the Appellant's proceedings that would have been crucial in making a determination in this appeal.
  - i. That the learned Magistrate's analysis of the case, the finding and decision was marred with the biasness, was full of assumptions and lacked sound legal facts and evidence in support of her decision.
  - j. That the learned Magistrate descended into raising and determining issues that were never raised or canvassed by parties during trial hence occasioning an injustice to the Appellant's case.
  - k. That the learned Magistrate determined the whole suit without subjecting the matter to pre-trial directions and the pleadings were never closed.
12. Arising out of the above, the Appellant sought the following orders:
- a. That the appeal be allowed.
  - b. That the Honourable Court does find the Appellant has a right to ownership of the suit land L.R Samia/Butabona/813 located at Samia and proceed to allow the case in the trial Court as prayed for.
  - c. That the judgment delivered on 25<sup>th</sup> August 2023 be set aside and the Busia Magistrate's Court Elc Case No E101 of 2023 be allowed in terms of prayers (b) to 1 of the said claim.
  - d. That subsequent to grant of relief (a), (b) and (c) above, this Honourable Court be pleased to order the exhumation of the Respondent's wife's remains from the suit land.
13. The appeal has been canvassed by way of written submissions. The same have been filed by Mr. Opwapo instructed by the firm of Opwapo & Company Advocates for the Appellant and by Mr J. V. Juma instructed by the firm of J. V. Juma & Company Advocates for the Respondent.
14. I have considered the record of appeal and the submissions by counsel.
15. Before I delve into the appeal, I must state that I could not comprehend ground NO (h) thereof. Half of it is also cancelled while the other half is not. It is not clear if this ground was intended to be amended because the memorandum of appeal was amended. If that was the desire of the Appellant, then the whole ground ought to have been cancelled and not just half of it. And even if this Court was to invoke the provisions of Article 159 (2) (d) of *the Constitution*, that ground, as I have stated above, is difficult to comprehend. I shall therefore omit it in my consideration of this appeal.
16. This being a first appeal, my duty is to re-consider and re-evaluate the evidence on record and draw my own conclusions. In so doing, I must remember that un-like the trial Court, I neither saw nor heard the witnesses as they testified. I should therefore give due allowance in the regard and give reasons for the decision which I shall make either in up-holding or setting aside the impugned judgment. In the case of Peters -v- Sunday Post Ltd 1958 E.A. 424, it was stated thus:

“Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide.”

An appellate Court will interfere with the finding of fact by the trial Court where such finding is based on no evidence or on a misapprehension of evidence or the trial Court is shown demonstrably to have acted on wrong principles in reaching the finding – see also *Selle & Another -v- Associated Motor Boat Company Ltd* 1968 E.A. 123 and *Mwanasokoni -v- Kenya Bus Services Ltd* 1985 KLR 931 [1985-eKLR] among others. I shall be guided by the above precedents and others in considering this appeal.

17. Grounds (a) and (c) of the amended memorandum of appeal can be considered together. They fault the trial Magistrate for failing to find that the Respondent did not prove his case to the required standard and also, that she erred in law and fact by failing to find that the Respondent had unlawfully and illegally acquired the suit land. In the impugned judgment, the trial Magistrate identified as among the issues for her determination the ownership of the suit land. In determining that issue, the trial Magistrate interrogated the various Grants of Letters of Administration issued by different Courts with respect to the Estate of Odiado Abuori Okundi Aka Odiado Abuora Okudi Aka Odiado Obuori the late father of the Appellant and who, according to the documents filed herein and in particular the Green Card, was the first registered proprietor of the suit land on 21<sup>st</sup> November 1978. That Estate was the subject of several succession proceedings and which the trial Magistrate carefully examined on whether in fact the Respondent was entitled to a share of the suit land measuring 3.0 acres as pleaded in his defence. She considered the confirmed Grant issued by Hon. L. Ambasi Chief Magistrate In Busia Magistrate Succession Cause No 290 of 2019 on 16<sup>th</sup> November 2021 where the suit land which measures 2.6 Hectares (6.425 acres) was apportioned between the Appellant and his mother ROSE Abonyo Odiado. The Appellant’s share was 2.5 Hectares while his mother’s share was 4.0 Hectares. Prior to that, however, and in Nairobi High Court Succession No 120 of 2004 which had been filed some fifteen (15) years earlier than the Succession Cause NO 290 of 2019 at Busia Chief Magistrate’s Court and in which the Appellant was in fact Petitioner, the suit land was transmitted to him and the Respondent in the following shares:

“Spinsleta Arambe Odiado – 3.5 acres

James Nayweni Okubi – 3.0 acres”

The Grant was confirmed by Justice D. A. Onyancha on 6<sup>th</sup> October 2010. Pursuant to that confirmed Grant, the Appellant and Respondent sought the consent of the Funyula Land Control Board vide their application dated 25<sup>th</sup> November 2014 to sub-divide the suit land. The County Surveyor Busia subsequently wrote to both parties vide his letter dated 26<sup>th</sup> November 2014 advising them that a visit would be made to the suit land on 4<sup>th</sup> December 2014 for purposes of sub-dividing the suit land. Having been the Petitioner in Nairobi High Court Succession Cause No 120 of 2004 in which he recognized the Respondent as a beneficiary to the suit land entitled to a portion measuring 3.0 acres, it was clearly fraudulent for the Appellant and his mother to approach the subordinate Court in Busia 15 years later and obtained a confirmed Grant in which they were the only beneficiaries to the estate of the deceased. In the impugned judgment, this issue was considered at length by the trial Magistrate and at page 7 thereof, she stated the following:

“Next is the issue of the High Court Succession Cause NO 120/2004 where the plaintiff was issued with a grant over his father’s Estate on 1.02.2005. A confirmed grant was issued on 6.10.2010 where the suit land measuring 6.5 acres was apportioned to the plaintiff 3.5 acres and the Defendant 3 acres. The green card produced over the land was not disputed by the plaintiff. It reflects that on 6.11.2014, the Busia Land Registrar acting on orders in



the High Court file, registered the portions of the land as issued in the grant in the names of the plaintiff and the defendant. As at 14.8.2023, the official search from the Busia Land Registry reflected that the land measuring 2.6 Ha was registered in the name of the plaintiff and defendant.”

The trial Magistrate clearly considered the evidence and arrived at the conclusion, rightly so in my view, that pursuant to the confirmed grant issued by a superior Court, and which was of course binding on her, the Respondent had demonstrated that he was entitled to the 3.0 acres out of the land parcel NO Samia/Butabona/813. A party who obtains any property pursuant to a Court order cannot be said to have done so illegally or unlawfully. The confirmed grant issued by Onyancha J In Nairobi High Court Succession Cause No 120 of 2004 on 6<sup>th</sup> October 2010 was never revoked. Instead, it was acted upon by the Land Registrar Busia on 6<sup>th</sup> November 2014 by registering the Appellant and Respondent as joint owners of the suit land in the ratio 3.5 acres and 3.0 acres respectively. The confirmed grant issued to the Appellant and his mother in Busia Chief Magistrate’s Succession Cause No 290 of 2019 could not override the one issued by Onyancha J on 6<sup>th</sup> October 2010.

18. The trial Magistrate did not err in law or fact by making a finding that the Respondent acquired ownership of 3.0 acres of the suit land procedurally. Those grounds of appeal are devoid of any merit.
19. In ground (b), the trial Magistrate is assailed for descending into the arena of litigation and determining issues that were not pleaded or canvassed by the parties. Those issues have not been identified by the Appellant in his memorandum of appeal. However, in his submissions, counsel for the Appellant suggests that the trial Magistrate declared the Respondent to be the owner of the suit land by way of adverse possession. After citing the provisions of Section 38 of the *Limitation of Actions Act*, counsel for the Appellant proceeds to submit as follows:

“The Respondent herein never made any application to the High Court to be declared the lawful owner of the suit property by virtue of adverse possession. He never pleaded the issue of adverse possession in his defence and counter-claim filed in the trial Court. Courts only award what is pleaded for as a Court of law cannot award a party relief that was not pleaded.”

On his part, counsel for the Respondent submitted as follows on the same issue in paragraphs 25 and 26 of his submissions:

- 25: “Issue NO 2 whether the trial Court had jurisdiction to determine a claim for adverse possession which claim was not pleaded in the first place.”
- 26: “The issue of adverse possession arose due to the fact that at the time of sale of the land to the Respondent by the Appellant’s mother with the concurrence of the Appellant. She had no capacity to sell. The Respondent took possession immediately and the Appellant proceeded to obtain a Grant in the High Court and distributed the Estate of his father and in the process, the Appellant gave the Respondent the 3 acres he had purchased. They both went to Funyala Land Control Board and obtained the relevant consent – see page 94 of the Record of Appeal. This issue is therefore academic.”

I have perused the pleadings by both parties and indeed the issue of adverse possession was never raised by any of them. I have also perused the impugned judgment and at no point did the trial Magistrate make even a fleeting reference to any of the parties having pleaded adverse possession. The nearest that the trial Magistrate came to discussing adverse possession is at page 9 of her judgment where she cited Section 7 of the *Limitation of Actions Act* and proceeded to find that the Appellant’s suit was “time barred.” The threshold of sustaining a claim to land by way of adverse possession is well settled in law and although Section 7 of the *Limitation of Actions Act* is one of the provisions usually cited in such



a claim, mere reference to it did not mean that the trial Magistrate determined the dispute before her on the basis of adverse possession.

20. That ground similarly fails.
21. In ground NO (d), the Appellant takes issue with the trial Magistrate for denying him the right to be heard by failing to grant him leave to file both a further affidavit and supplementary submission to respond to the issues raised by the Appellant.
22. I have perused the record of the proceedings before the trial Magistrate. When the parties closed their cases on 17<sup>th</sup> August 2023, counsel for the Appellant sought 3 days to file her submissions. The record is silent as to how much time counsel for the Respondent sought but the Court fixed a mention for 22<sup>nd</sup> August 2023 to confirm compliance. On that day however, counsel for the Appellant sought more time to respond to the Respondent's submissions. Counsel for the Respondent's rejoinder was that he had only been served with the Appellant's submissions that Monday at 4pm. The trial Magistrate did not address that issue but simply proceeded to fix the judgment date for 25<sup>th</sup> August 2023.
23. The record shows that although counsel for the Appellant sought 3 days to file her submissions after the close of the plenary hearing on 17<sup>th</sup> August 2023, she filed them on 21<sup>st</sup> August 2023, one day late. That was the same date that counsel for the Respondent filed his submissions a day before 22<sup>nd</sup> August 2023 when the matter was listed to confirm compliance and take a date for judgment.
24. Ideally, the trial Magistrate ought to have informed the parties why she was not prepared to give a further extension to the Appellant's counsel to file further submissions. However, I do not see how failure to grant the Appellant more time to file her submissions prejudiced the Appellant's case. The reason why counsel sought more time is captured at page 10 of the proceedings as follows:

“Ms Memia: We have just been served with the defendants'” submissions. I pray for more time to file further submissions. I pray for more time to respond.”

“Mr. Juma: It was the plaintiff who was to serve us with their submissions. They served us with their submissions on Monday at 4.00pm.”

“Ms Memia: Paragraph 8 of the submission was not in the pleadings. Paragraph 26 of the submission has no evidence in Court and paragraph 31 no evidence was led paragraph 32 and paragraph 34 there was no evidence led.”

“Mr. Juma: Paragraph 8 look at defence exhibit 6 will deal with it. Paragraph 26 is the defendant's evidence in Court. Paragraph 31 if the Court looks at the search and green card which the plaintiffs produced paragraph 31 certificate of grant was evidence in Court.”

“Court – Judgment 25.8.23.”

From the above proceedings, it is clear that counsel for the Appellant sought more time to respond to some paragraphs in the submissions by counsel for the Respondent which, in her view, were raising issues that were not part of the evidence on record. The response by counsel for the Respondent was that infact his submissions referred to exhibits which were already filed. And although the trial Magistrate decided to steer clear of those exchanges, she cannot be faulted to have erred in fact or law because counsel were now attempting to lead evidence from the bar in a hearing which had long closed. Counsel must appreciate that a trial Court is obliged to look at all the evidence on record in determining the dispute before it and does not need any prompting from counsel or the parties as to which evidence is or is not on the record. That is the primary duty of the Court once it retires to write a judgment or ruling.



25. In any case, submissions, as is now well settled, are not evidence. The trial Court can determine a dispute with or without submissions by the parties. Submissions are not evidence. In the case of Daniel Toroitich Arap Moi –v- Mwangi Stephin Muriithi & Another 2014 eKLR, the Court of Appeal said as follows with regard to the role of submissions in a trial:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties ‘marketing language’ each side endeavouring to convince the Court that it’s case is the better one. Submissions we, reiterate do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

Further, although the amended memorandum of appeal states in paragraph (d) that the trial Magistrate “failed to grant leave to the Appellant to file both further affidavit and supplementary submissions”, the proceedings of 17<sup>th</sup> August 2023 which I have already captured above show that what counsel for the Appellant sought was more time to file further submissions and not any “further affidavit.” In any case, it was already too late in the day to file any further affidavit. It cannot therefore be correct for the Appellant to claim that he was not given “the right to be heard”. He was heard by the trial Court and his counsel thereafter closed his case on 7<sup>th</sup> August 2023 as is clear from the record.

26. Ground NO (d) of the amended memorandum of appeal similarly fails.
27. Grounds (e), (f) and (i) can also be considered together. Therein, the Appellant faults the trial Magistrate for arriving at a decision which exceeded the weight of the evidence, for relying on mere allegations which were not proved and for making a decision marred with bias and assumption devoid of any legal facts. In arriving at the decision which she did, the trial Magistrate not only considered the parties oral evidence as contained in their statements as filed but also, she relied on the documentary evidence as filed. The gist of the Appellant’s evidence, as contained in her statement, was that the suit land belonged to his late father Odiado Abuori Okudi and following his demise, he and his mother obtained a grant in Busia Chief Magistrate’s Court Succession Cause No 290 of 2019 and the suit land was transmitted to them in the ratio of 4.0 Hectares and 2.5 Hectares. He therefore moved to Court when he discovered that the Respondent intended to bury the remains of his wife Scholastica Anyango Nanyweni on the suit land.
28. The Respondent’s case as per his statement dated 15<sup>th</sup> August 2023 was that he had in fact purchased a portion of land measuring 3.5 acres from the Appellant’s mother after he (Respondent) had financed the succession process in which the Appellant was appointed the Administrator to his late father’s Estate. A dispute later arose between the Appellant and his mother but the Appellant and Respondent applied for the consent of the Land Control Board to sub-divide the suit land. However, when the County Surveyor visited the suit land for purposes of surveying it, the Appellant and his family were not present. That the Appellant and his family have always known the Respondent as their neighbour and this suit was only meant to annoy him as he prepared to bury his wife on his portion of the suit land when he had already incurred expenses amounting to Kshs.384,000.
29. The trial Magistrate considered the various grants herein as well as the other documents filed and was satisfied that the Respondent was entitled to a portion of the suit land. That decision did not exceed the weight of the evidence as suggested by the Appellant. And neither did the trial Magistrate rely on mere allegations. There was cogent evidence upon which any Court, properly addressing itself, could have arrived at the same decision as the trial Court did.



30. Allegations of bias have been levelled against the trial Magistrate. However, no iota of evidence has been adduced to support that serious allegation. The term bias is a very strong word. It is defined in Black's Law Dictionary 10<sup>th</sup> Edition as:

“A mental inclination or tendency; prejudice; predilection.”

Judicial bias, which is the most appropriate term in the circumstances of a judicial function such as in this case, is defined in the same Dictionary as follows:

“A judge's bias towards one or more of the parties to a case over which the judge presides.”

In the Concise Oxford English Dictionary, the same term is defined inter alia, as:

“Inclination or prejudice for or against one thing or person, a systematic distortion of a statistical result due to a factor not allowed for in its derivation.”

It is clear that an allegation of bias against a judicial officer can lead to recusal and is not a matter to be raised lightly. Indeed under the Judicial Service (code of Conduct and Ethics) Regulations 2020, it is provided in Regulation NO 21 (1), (d) that:

“A Judge may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned where the judge –

- a. –
- b. –
- c. –
- d. has actual bias or prejudice concerning a party.”

In the case of *Heineken East Africa Import Company Ltd & Another -v- Maxam Ltd C.a. Civil Appeal No E403 & 404 of 2020* (Consolidated) 2024 [KECA] 625 KLR, the Court of Appeal had the following to say about allegations of bias:

“Allegations of bias or of a reasonable apprehension of bias are serious as they call into question not only the personal integrity of the judge, but the integrity of the entire administration of justice. There is an express constitutional requirement of judicial impartiality, and the applicable standard and test is that one must establish a reasonable apprehension of bias to be able to demonstrate judicial bias.”

It is clear that an allegation of bias is not one to be raised without sound reasons. The onus is on the party alleging bias to demonstrate it. In the circumstances of this case, there is no evidence to substantiate such an allegation. In any event, if the Appellant had a basis for raising that complaint, nothing stopped him from doing so during the trial. The view I take of the matter is that the allegations of bias on the part of the trial Magistrate have been raised without any serious convictions. So too are the allegations that the trial Magistrate relied on merely unproved allegations and not evidence in arriving at the decision which she did. To the contrary, I am satisfied that the trial Magistrate was impartial in her assessment of the evidence which could only lead to the inevitable conclusion that the Appellant's case was for dismissal.

31. Grounds (e), (f) and (i) are hereby dismissed.



32. In ground NO (g), the Appellant takes issue with the trial Magistrate for erring in law and fact by declaring that the Respondent bought the suit land from one Jane Rose Odiado who is a stranger to the suit land.
33. It is true that in his defence and counter-claim, one of the issues which the Respondent raised was that he has purchased 3 acres out of the suit land. The trial Magistrate considered that claim but found that it had not been proved. The trial Magistrate made the following finding with regard to the alleged sale agreement between the Appellant and Jane Rose Odiado at page 6 of the impugned judgment:

“The defendant relied on an undated sale agreement between him and Jane Rose Odiado for the sale of 3 acres of Samia/Butabona/813 for Kshs.45,000. The agreement was allegedly witnessed by the plaintiff which he disputed in Court. Subsequent payments were made from 11.6.2003 upto 15.11.2003 when Jane Rose Apondi acknowledged receipt of the entire sum of Kshs.45,000. The plaintiff’s counsel submitted on the issue of intermeddling over the Deceased’s person’s estate. Section 45 of the *Law of Succession Act* prevents intermeddling over the Deceased’s land; disposal of land is only permitted after a grant of representation is issued. Indeed, at the time of the agreement, there is no proof that the plaintiff’s mother had been appointed as an administrator over the Deceased’s estate. In that regard, the vendor could not transfer any rights to the property that she did not own hence I concur that the agreement was void ab initio.”

It is clear from the above that the trial Magistrate did not declare that the Respondent had purchased the suit land from Jane Rose Odiado . Indeed that was not the reason why she made a finding in favour of the Respondent. The reasons for the trail Magistrate’s finding, as is now clear from the preceding paragraphs of this judgment, was based on the Confirmed Grant issued by Onyancha J In Nairobi High Court Succession Cause No 120 of 2004 as read together with the register to the suit land.

34. Ground NO (g) is equally for dismissal.
35. In ground NO (gA), the Appellant contents that the trial Magistrate erred both in law and in fact by denying him an order of stay of execution of the impugned judgment pending the filing of an appeal and/or leave to appeal.
36. The record shows that soon after the trial Magistrate had delivered her judgment on 25<sup>th</sup> August 2023, counsel for the Appellant applied for copies of the proceeding and a stay of execution. Counsel for the Respondent objected. The trial Magistrate made the following brief ruling in dismissing the prayer for stay of execution.

“Court-certified copies of judgment and typed proceedings to be availed to the plaintiff’s counsel. Application for stay has been considered. Noting that the matter involved burial of a deceased who died on 31.7.2023, the prayer for stay is denied.”

Order 42 Rule 6 (5) of the Civil Procedure Rules permits a party to make an informal application for stay of execution pending appeal as happened in this case – it reads:

“An application for stay of execution may be made informally immediately following the delivery of judgment and ruling.”



The grant or refusal of an order of stay of execution is within the discretion of the trial Court. It is basically an issue of choices according to the circumstances of each case. The term judicial discretion is defined in Black's Law Dictionary 10<sup>th</sup> Edition as:

“The exercise of judgment by a judge or Court based on what is fair under the circumstances and guided by the rules and principles of law; a Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right – Also termed legal discretion.”

Since this ground of appeal questions the trial Magistrate's judicial discretion, I must consider it in line with the principles set down in various cases. They include the case of *United India Insurance Co. Ltd -v- East African Underwriters (kenya) Ltd* 1985 KLR 898 [1985 eKLR], where Madan JA (as he then was) made the following rendition:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that it's members if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of consideration of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

See also *Apungu Arthur Kibira -v- Iebc & Others* Petition No 29 of 2018 [2019 KESC 62 KLR] where the Supreme Court stated thus:

“We reiterate that in an appeal from a decision based on an exercise of discretionary power, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious.”

The Court then went on to adopt the following from the New Zealand Supreme Court case of *KACEM -V- Bashir* [2010] NZSC 112; 2011 2 NZLR1 where it was held at paragraph 32 that:

“In this context, a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter; (1) error of law or principle; (2) taking account of irrelevant consideration; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

The trial Magistrates' ruling declining the application for stay of execution pending appeal was brief as I have already cited above. She was solely persuaded by the fact that the dispute before her involved the burial of a deceased person who had died a month earlier. The application before the trial Magistrate was informal and brief. Equally brief was the ruling declining the order for stay of execution. I have not heard the Appellant describe in what way, if any, the trial Magistrate misdirected herself in law, misapprehended the facts, took into account consideration which she should not have done or failed to take into account considerations which she should have taken or that the exercise of discretion was plainly wrong. For my part, given the fact that the dispute involved the burial of a deceased on land which the Respondent was already in occupation and possession thereof, the trial Magistrate's exercise of discretion in declining to order a stay of execution cannot be faulted.

37. Most importantly, however, the impugned judgment was a negative order. It was not a positive order. It did not direct the Appellant or Respondent to do anything. It dismissed the Appellant's suit as well



as the Respondent's counter-claim and none of the parties was ordered to pay costs. Such is not a judgment amenable to orders of stay of execution. In the case of *Co-operative Bank Of Kenya Ltd -v- Banking Insurance & Finance Union (kenya) 2015 eKLR*, it was stated thus:

“An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in the decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a ‘positive order’ – either an order that has not been complied with or has partly been complied with.”  
Emphasis mine.

Similarly, in the case of *Western College Of Arts And Applied Sciences -v- Oranga & Others 1976 – 8- IKLR 163 [1976 eKLR]*, the then Court of Appeal for Eastern Africa addressed the same issue in the following terms:

“But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *WILSON -V- CHURCH*, the High Court had ordered the trustees of a Church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or refrain from doing anything or to pay any sum.”

The impugned judgment was a negative order. Therefore, there was nothing to be executed and nothing to be stayed.

38. Ground NO (gA) is equally dismissed.
39. Finally, in ground NO (k), the Appellant has pleaded that the trial Magistrate determined the suit without subjecting the matter to pre-trial directions and the pleadings were never closed.
40. The record shows that the Appellant filed his plaint on 10<sup>th</sup> August 2023 simultaneously with a Notice of Motion also dated 9<sup>th</sup> August 2023 in which he sought an order of temporary injunction restraining the Respondent from burying the remains of Scholastica Anyango Nanyweni on the suit land.
41. When that application was placed before the trial Magistrate on 15<sup>th</sup> August 2023, she took the view that being a burial dispute, the burial be stayed pending the hearing and determination of the suit. The parties agreed as there is no record of any objection and counsel for the Appellant informed the Court that the Appellant had “fully complied”. The Court granted counsel for Respondent 2 days from the date of service upon him of the Appellant's pleadings to comply by filing his documents. When the matter came up for hearing, both parties said they were ready to proceed. Counsel for the Appellant said he was ready with one witness while counsel for the Respondent said he was ready with two witnesses. The hearing thereafter commenced and both parties testified and closed their respective cases.
42. Given the above, the Appellant cannot now turn around and complain that there was no compliance with the pre-trial directions. The pre-trial directions are provided for under Order 11 of the Civil Procedure Rules and they are basically a case of management tool to aid the parties and the Court to expeditiously resolve the dispute by exchanging lists of their respective witnesses and statements and the documents to be relied on during the trial before the hearing commences. During those pre-trial directions, the parties may also settle any interlocutory applications and even agree on admission of documents without calling their makers. Although the record herein does not specifically mention that Order 11 of the Civil Procedure Rules had been complied with, the parties themselves, and who are the custodians of their own pleadings and those that have been served upon them by the other side, informed the trial Magistrate prior to the hearing that they had complied and were ready to



proceed with the hearing. It is therefore preposterous for the Appellant to now allege that “the learned Magistrate determined the whole suit without subjecting the matter to pre-trial directions and the pleadings were never closed.” The Appellant cannot approbate and reprobate at the same time. Once both parties informed the Court that they had complied and were ready to proceed with the hearing, there was nothing else left other than for the trial Court to proceed and hear them testify in respect of their cases. In any case, that is what was coming up before the trial Magistrate and the Appellant has not told the Court in what way he was prejudiced. This is clearly an afterthought and that ground can only be for dismissal.

43. The up-shot of all the above is that there is no merit in this appeal. It is hereby dismissed with costs.

**BOAZ N. OLAO**

**JUDGE**

**9<sup>TH</sup> JULY 2024**

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS  
9<sup>TH</sup> DAY OF JULY 2024.**

Right of Appeal

**BOAZ N. OLAO**

**JUDGE**

**9<sup>TH</sup> JULY 2024**

