



**Oloo & 2 others v Alego & 2 others (Environment and Land Appeal  
E018 of 2022) [2023] KEELC 395 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E018 OF 2022  
AY KOROSS, J  
FEBRUARY 2, 2023**

**BETWEEN**

**SIMON CHIAMBE OLOO ..... 1<sup>ST</sup> APPELLANT  
JENIFA AKINYI OWINO ..... 2<sup>ND</sup> APPELLANT  
FREDRICK ODHIAMBO CHIAMBE ..... 3<sup>RD</sup> APPELLANT**

**AND**

**MATHEWS JUMA ALEGO ..... 1<sup>ST</sup> RESPONDENT  
REGISTRAR OF LANDS-BONDO ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of Principal Magistrate Honourable  
J.P. Nandi given on 28/04/2022 in Bondo PM ELC Case Number 36 of 2018)*

**JUDGMENT**

**Background of the Appeal**

1. The gist of this appeal can be found in a plaint dated February 22, 2016 where the 1<sup>st</sup> respondent, claimed Peter Omuya Alego (deceased) was the sole registered owner of South Sakwa/Barkowino/2730 (hereinafter referred to as ‘the suit property’). The Peter Omuya Alego died on July 5, 1991 allegedly leaving the 1<sup>st</sup> respondent as the sole dependent surviving him.
2. Without obtaining grant of letters of administration, the 1<sup>st</sup> appellant together with the 2<sup>nd</sup> respondent caused the suit property to be transferred in the 1<sup>st</sup> appellant’s name who subsequently transferred it to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants who were respectively his wife and son. The 1<sup>st</sup> respondent and Peter Omuya Alego were brothers while their father was Alego Omuya.



3. The 1<sup>st</sup> respondent prayed
  - (i) a declaration the transfer and registration of the suit property in the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants were fraudulent and void
  - (ii) an order the registration of the suit property in the 1<sup>st</sup> appellant's name and its subsequent transfer to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants be cancelled and the register be rectified by reinstating it in the name of Peter Omuya Alego
  - (iii) an order the 2<sup>nd</sup> and 3<sup>rd</sup> appellants surrender their title deed
  - (iv) eviction of the appellants
  - (v) permanent injunction and,
  - (vi) costs.
4. The 2<sup>nd</sup> appellant died prior to institution of the suit. The 1<sup>st</sup> and 3<sup>rd</sup> appellants entered appearance on March 22, 2016 and filed a statement of defence dated March 11, 2016 wherein they denied the averments made in the plaint. The 1<sup>st</sup> appellant stated he lawfully acquired proprietary interest over the suit property by an agreement of sale apparently made in 1986 between him and Peter Omuya Alego. The title document was issued to him on July 28, 1992.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a defence dated November 13, 2016 wherein they denied the averments made in the plaint and put the 1<sup>st</sup> respondent to strict proof.
6. In a reply to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' defence dated November 21, 2016, the 1<sup>st</sup> respondent joined issue with the allegations made in the plaint and put the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to strict proof.
7. After the parties had testified and closed their respective cases, the trial magistrate in his judgment found the 1<sup>st</sup> appellant had not tendered evidence showing how he was registered as the proprietor of the suit property subsequent to the death of Peter Omuya Alego. The trial magistrate also found the 1<sup>st</sup> respondent had proved his case and entered judgment in his favour.

### **Appeal to this court**

8. Dissatisfied with the above judgment, the appellants filed a memorandum of appeal dated May 11, 2022 in which they raised 5 grounds of appeal;
  - a. That the trial magistrate erred in fact and law in finding the 1<sup>st</sup> respondent had proved his claim on a balance of probability without sufficient evidence;
  - b. That the trial magistrate erred in law and fact by failing to appreciate the totality of the evidence before him and the submissions made by the appellants thus arrived at an erroneous conclusion;
  - c. That the trial magistrate erred in fact and law by directing the registration of the suit property be reverted to the name of the Peter Omuya Alego;
  - d. That the trial magistrate erred in fact and law in failing to appreciate the fact that an agreement of sale was properly executed and there was proof of sale and signed transfer documents; and
  - e. That the trial magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.



9. The appellants sought the following reliefs: the appeal be allowed with costs, the lower court judgement be set aside and the appellants be declared the lawful owners of the suit property.

### **The appellants' submissions**

10. The appellants' counsel, Mr Sala filed written submissions dated October 27, 2022 in which he identified two issues for determination; (i) whether there was a valid contract between the 1<sup>st</sup> appellant and Peter Omuya Alego and (ii) whether there was fraud on the appellants' part.
11. On the 1<sup>st</sup> issue, counsel submitted that by the agreement of sale dated 27/7/1989 between the 1<sup>st</sup> appellant and Peter Omuya Alego, the parties intended to create legal relations and being privy to this agreement, the 1<sup>st</sup> respondent went as far as testifying in ELC Case Number 236 of 2015 that he witnessed Peter Omuya Alego selling the suit property and that Peter Omuya Alego even executed transfer forms. That sometimes on 3/05/2016, the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent entered into an agreement where the 1<sup>st</sup> appellant was to subdivide the suit property and transfer a portion to the 1<sup>st</sup> respondent; the 1<sup>st</sup> respondent declined to honour the agreement.
12. In that regard, counsel relied on the case of *Garvey v Richards* [2011] JMCA 16 where Harris JA 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. On the 2<sup>nd</sup> issue, counsel submitted the 1<sup>st</sup> respondent failed to prove his case in accordance with the provisions of Section 107 of the *Evidence Act* which reads: -
- ‘107. Burden of proof.
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.’
14. Counsel also relied on the decisions of *Ratilal Gordhanbai Patel v Lalji Makanji* [1957] EA 314 and *Umlila Mabindra Shah v Barclays Bank International & another* [1979] KLR.

### **1st Respondent's Submissions**

15. Mr. Lawi Ogutu, counsel for the 1<sup>st</sup> respondent filed written submissions dated November 7, 2022. In it, counsel argued his submissions on the grounds of appeal in a chronological manner.
16. On 1<sup>st</sup> and 2<sup>nd</sup> grounds, counsel argued the evidence presented by the 1<sup>st</sup> respondent before the trial court sufficiently supported his case; he proved his case to the required standards.
17. On the 3<sup>rd</sup> ground, counsel submitted the actions of the 1<sup>st</sup> appellant contravened the provisions of Section 45 of the *Law of Succession Act* and Section 26 of the *Land Registration Act* and the court was bestowed with responsibility of reverting the suit property to Peter Omuya Alego. In that regard,



counsel cited the case of *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR where the court held: -

‘The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title.’

18. On the 4<sup>th</sup> ground, counsel submitted the 1<sup>st</sup> appellant’s testimony was contradictory; the agreement of sale that he produced was between the 1<sup>st</sup> appellant and Alego Omuya and not between the 1<sup>st</sup> appellant and Peter Omuya Alego. Counsel invoked the rule of *nemo dat quod non habet* which means no one can give what they do not have. Counsel further contended the 1<sup>st</sup> appellant distanced himself from a document allegedly executed by him and the 1<sup>st</sup> respondent that the 1<sup>st</sup> respondent would withdraw the trial court suit in exchange for a slice of the suit property.
19. Counsel submitted that in *George Were Nyakora v Fredrick Odhiambo Chiambe* [2022] eKLR, this court had found the 3<sup>rd</sup> appellant culpable of fraud in his dealings over the suit property.

### **Analysis and Determination**

20. I have thoroughly considered the records, grounds of appeal and parties’ rival submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not joined in these proceedings however, I consider the error as mere technical. Since it is a first appeal, I am at liberty to consider both matters of fact and of law and come up with my own conclusions.
21. From the appellants’ submissions, it is apparent they abandoned and/or consolidated their grounds of appeal into two. The appellants’ memorandum of appeal touched on two primary areas; a consideration of the evidence produced by the parties in the lower court and the subsequent disposal orders. Taking these into account, I will deal with the appeal on two consolidated grounds in a consecutive manner;
  - a. That the trial magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion; and
  - b. That the trial magistrate erred in fact and law by directing that the registration of the suit property be reverted to the name of Peter Omuya Alego.
22. I shall turn to the evidence as produced in the lower court in order to come up with my own findings.
23. On the 1<sup>st</sup> ground, the appellants’ counsel interrogated the impugned judgement on two prongs; prove of fraud by the 1<sup>st</sup> respondent and the agreement of sale.
24. It is trite law that he who alleges must prove. In the trial court, the 1<sup>st</sup> respondent produced documents evidencing that Peter Omuya Alego was registered as the proprietor of the suit property on 31/7/1986, he died on 5/07/1991, the 1<sup>st</sup> appellant was registered as the proprietor on July 28, 1992, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were registered on 1/3/1995 and he (1<sup>st</sup> respondent) obtained limited grant of letters of administration on Peter Omuya Alego’ estate on December 18, 2015. He pleaded and particularised fraud. A collection of these chronology of events leaves no shadow of doubt that the 1<sup>st</sup> appellant obtained title to the suit property after the demise of Peter Omuya Alego without probate proceedings



being conducted on Peter's estate. In *Mary Ngonyo Kiume v Charles Muisyo David & 2 others: Exams Housing Cooperative Society Limited (Interested Party)* [2022] eKLR Angote J, expressed himself thus;

‘It is trite that when the Certificate of Title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title...’

25. I have anxiously gone through the entire lower court record to establish if the 1<sup>st</sup> appellant dispelled the 1<sup>st</sup> respondent's evidence by showing the root of his title and save for the agreement, there was none. This court is alive that in *George Were Nyakora v Fredrick Odhiambo* (*supra*) it found thus on the dealings over the suit property;

‘The only way to investigate fraud is to interrogate the ownership of the alleged fraudulent party. From the evidence adduced, Peter Omuya Alego died on 5/07/1991 whereas from the register of South Sakwa/Barkowino/2730, South Sakwa/Barkowino/2730 was transferred from Peter Omuya Alego's name to Simon Chiambe Oloo; the defendant's father on July 28, 1992. Whereas limited grant of Peter's Estate was issued to Mathews Juma Alego who was a brother to Peter on December 18, 2015. It was Mathews's assertion that the defendant's title to the suit property was fraudulently acquired because it was not possible for Simon to acquire title to South Sakwa/Barkowino/2730 without first obtaining grant of letters of administration of Peter's Estate. In his pleadings, the defendant did not address this issue and the plaintiff's evidence stands uncontroverted...It is my finding that the title document registered in the defendant's name was fraudulently acquired. Emphasis added.

26. I need not say more on the issue of fraud and I will turn to the agreement of sale that was produced by the 1<sup>st</sup> appellant. An agreement of sale does not render a purchaser a registered owner, nay, it is antecedent to a transfer process. The mandatory provisions of the repealed Section 108(1) of the Repealed *Registered Land Act*, which was the regime the suit property fell in provided that;

‘108.

- (1) Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.
- (2) Leases and charges shall be presented for registration in triplicate.
- (3) Instruments shall contain a true statement of the amount or value of the purchase price or loan or other consideration (if any), and an acknowledgement of the receipt of the consideration.’ Emphasis added.

27. Though the 1<sup>st</sup> appellant has alluded that he produced the transfer document before the trial magistrate, the impugned judgment in paragraph 17 stated ‘The 1<sup>st</sup> defendant did not produce ...even the transfer’. A scrutiny of the court record bears witness that none was produced.

28. On the agreement of sale, the trial magistrate in his judgment at paragraph 16 stated: -

‘the 1<sup>st</sup> defendant in his defence dated 11/4/2016 averred that purchase the(sic) suit land from Peter Omuya Alego in 1986 and in his witness statement dated 16/3/2021 he bought the land via sale agreement dated 27/7/1989. The 1<sup>st</sup> defendant produced the said agreement of sale as D-1. A look at the said agreement it (sic) shows that the 1<sup>st</sup> defendant bought the



land from Alego Omuya and not Peter Omuya Alego...This means that Omuya Alego at the time of the sale was not the registered owner...and sold land that did not belong to him.'

29. From the record, this agreement of sale was produced by the 1<sup>st</sup> appellant. It shows it was executed by the 1<sup>st</sup> appellant, Alego Omuya, Genga Wajango and a Mr. Juma Alego. The 1<sup>st</sup> respondent denied that he was the said Juma Alego.
30. The 1<sup>st</sup> respondent testified that Alego Omuya was his father. In cross examination, the 1<sup>st</sup> appellant testified

'in the olden days, one was approaching the father of the son who owns the land as it was the father who was distributing the land.'

In re-examination he testified

'We sat as a family with Peter Alego Omuya, Alego Omuya, Wathews (sic) Juma and Juma's mother.'

What emerged from these testimonies were that Alego Omuya was the father of Peter Omuya Alego. Peter Omuya Alego who was then alive and the registered owner did not sign the agreement. The trial magistrate correctly analysed this position and I cannot fault him.

31. The 1<sup>st</sup> respondent's witness statement in Kisumu ELC Case Number 236 of 2015 dated 2/06/2016 was produced before the trial court where the 1<sup>st</sup> respondent admitted Peter Omuya Alego executed the agreement of sale together with the necessary transfer documents. A day thereafter, the 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent allegedly executed an agreement dated 3/6/2016. This agreement was not interrogated by the trial court but since I have been called to examine it, I will address myself on it.
32. The 1<sup>st</sup> respondent denied executing this agreement and contended that an offer of Kshs 300,000/= was made to an agent in the 1<sup>st</sup> appellant's advocates offices; he declined to execute the agreement. On the basis of this agreement, the trial court found the appellants' then counsel S.M. Onyango conflicted and requested him to instruct another advocate to take over the conduct of the proceedings; which he did. In this agreement, the 1<sup>st</sup> appellant was to give the respondent a portion of 0.06 ha of the suit property on the understanding he would withdraw the trial court suit that is the subject of this appeal.
33. Though the 1<sup>st</sup> respondent denied signing this agreement, the difference of one day between the witness statement dated 2/06/2016 and the agreement dated 3/6/2016 raises more questions than answers. This witness statement is a contradiction to the 1<sup>st</sup> respondent's witness statement in the suit that is the subject of this appeal. In fact the plaintiff in ELC Case Number 236 of 2015 ended up testifying as PW2 in the suit that is the subject of this appeal.
34. This speaks a lot about the character of the 1<sup>st</sup> respondent; he is a schemer, a person who knows what side his bread is buttered on and will not hesitate to pounce on his prey.
35. The 1<sup>st</sup> appellant is not an angel too, he never executed an agreement of sale with the registered proprietor Peter Omuya Alego and there is no evidence a transfer instrument was executed by Peter Omuya Alego. If he was indeed a duly registered owner, why would he want to transfer a portion of the suit property to the 1<sup>st</sup> respondent who was Peter Omuya Alego's administrator? It is my conclusion that the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent were bedfellows.
36. The claim of fraud which was before the trial court was proved to the required standard. The purported agreements were pegged on an illegality. The trial court as a custodian of law could not shut its eyes on the illegal agreements and fraudulent dealings over the suit property. I place reliance of the Court



of Appeal decision of *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* [2004] eKLR where the court cited with approval the case of *Heptula vs Noormohamed* [1984] KLR 580 by stating thus;

‘ “No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.” ’

37. On the 2<sup>nd</sup> ground, the trial magistrate having established fraud, was bound by Section 80 (1) of the *Land Registration Act* to order a cancellation or amendment of any registration over a parcel of land; which he did.
38. It is my ultimate finding the trial magistrate exercised his discretion properly and arrived at a proper determination and this court finds no reason to upset it.
39. For the reasons stated above, the upshot is that the appellants’ appeal is not merited and accordingly, the appeal herein is disallowed and dismissed entirely and the judgment of the trial court is upheld. Because it is trite law that costs follow the event, the appellants will bear the costs of the appeal. For the avoidance of doubt, for the reason the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in these proceedings, no costs are awarded to them.

**DELIVERED AND DATED AT SIAYA THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**FEBRUARY 2, 2023**

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

**In the Presence of:**

Mr. Sala for the appellant present

N/A for 1<sup>st</sup> respondent

N/A for 2<sup>nd</sup> & 3<sup>rd</sup> respondents

Court assistant: Ishmael Orwa

