Odindo v Odindo (Environment and Land Appeal E028 of 2024)
[2025] KEELC 6240 (KLR) (4 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6240 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E028 OF 2024

FO NYAGAKA, J

SEPTEMBER 4, 2025

BETWEEN

CLEMENT TOKO ODINDO ..... APPELLANT

AND

MICHAEL ASETO ODINDO ..... RESPONDENT

(Being an Appeal against the Judgement of Hon E.M. Onzere delivered on 28th November 2023 in Ndhiwa Principal Magistrates' ELC Case No. 16 of 2019)

JUDGMENT

1. By way of a Plaint dated 18th April 2019 the Respondent sought the following orders in the trial court;
    1. An order directing the land registrar to correct the register by registering the Plaintiff as the proprietor of land parcel number Kanyamwa/Kabonyo/Kwandiku/268 and the defendant as the proprietor of land parcel number Kanyamwa/Kabonyo/Kwandiku/262.
    2. Costs of the suit.
    3. Any other relief this Honourable Court may deem fit and just to grant.
2. In his Plaint, the Claimant pleaded that Kanyamwa/Kabonyo/Kwandiku/262 was erroneously registered in the names of the Plaintiff while parcel number Kanyamwa/Kabonyo/Kwandiku/268 was erroneously registered in the names of the defendant. Further, that the Plaintiff has been in occupation of Kanyamwa/Kabonyo/Kwandiku/268 since 1979. He urged that he being the last born in the family was, under customary law, the one supposed to remain in the land with the ancestral home to wit Kanyamwa/Kabonyo/Kwandiku/268. He pleaded that the defendant had entered into the suit without his consent. He urged the court to allow the claim.

3. The Respondent (being the defendant in the trial court) entered appearance and filed a statement of defence dated 14th May 2019. He denied the contents of paragraph 1 and 2 of the Plaint as they resided at East Kanyamwa location in Ndhiwa sub-county and not as alleged by the plaintiff herein. He further denied the averments contained in paragraph 4 of the plaint and maintained that the parcels were correctly registered in the names of the plaintiff and defendant. He maintained that there was no mistake during the time of registration. He further denied the contents of paragraph 5 of the Plaint but admitted that the last born in the family, according to Luo customary laws, is the one who is supposed to remain in the ancestral home. Further, that that was the reason as to why their father decided to sub-divide the land. He stated that the ancestral home stands in land parcel no. Kanyamwa/Kabonyo/Kwandiku/262 and not parcel no 268, urging the court to dismiss the suit with costs.

Hearing at the trial court

4. PW1 was Michael Aseto Odindo who testified that the defendant was his brother and first born. He, PW1, was the last born. That their father divided land to them in 1972, when he was 12 years old. He later learnt their father gave his brother number 262 where he went and constructed a house while his was No. 268. That when he grew up, his father told him that they ought to change the numbers to reflect the correct parcel number. He stated that he was staying with their father in parcel No. 268 which was in the names of the defendant and further, that their custom was that the young son remains in the homestead. He stated that he resided on No. 268 despite his name not appearing on the title deed and further that he, instead, was registered as owner of parcel that no. Kanyamwa/Kabonyo/Kwandiku/262. He produced the title deed as P-Exhibit2. He testified that the defendant had since moved to parcel No. 268 where he (PW1) resides. Further, that he buried his son and wife in parcel no. 262 and also on 14/4/19 he came with people and constructed a house thereon.

5. He testified that he had resided on No. 268 and constructed a permanent house on it. He produced a search for the parcel no. 268 as P-Exhibit 3, the search for No. 262 as P-exhibit 4, a copy of green card for No 268 as P-exhibit 5, and for No. 262 as P-exhibit 6. He also produced a copy of letter from the Lands Office dated 28/3/2018 as P-exhibit 7 and prayed the court that the titles change to reflect the true position.

6. During cross examination, he stated that the home of Mzee Odindo lived on Parcel No. 268 and that he died in 1999. Further, that the land was subdivided in 1972 and, as noted from the Adjudication Record in his List of Documents, that adjudication was done in 1979. He stated that his father distributed the land to them and Land Adjudication Officers came. He stated that he became registered owner of parcel No. 262 on 14/8/92. Further, that he was waiting for his brother to come before they change registration the parcel numbers. Further, that the defendant was one who changed the parcel numbers. That his father did not have his names recorded on parcel No. 262. He stated that he did not reside on parcel No. 262. But that Title deed No. 262 was in his possession. That the Title deed for 268 was also in his possession and the defendant also had a title deed for No. 268.

7. He testified that the defendant went to his land No. 262 and came back. That he did not construct a house in the defendant's land thinking he would not return home. He denied any intention to snatch his brothers' land.

8. PW2 was Samuel Abade Ogwea a cousin to the parties. He stated that he knew their home and that the land had been subdivided. That he knew their portions as Clement is on the right side according to culture as he is the first son. That the elder son cannot move to the left side of the homestead especially if they had constructed their homes. He stated that being the elder he ought to do the right thing.

Further, that he had heard about the mix up as the title deed numbers different from what is on the ground.

9. During cross examination, he stated that he did not know their parcels of land. He could not recall the year of adjudication and was not aware they were allocated in 1979. Further, that he was aware from adjudication time Clement was given 268 and Michael was given 262. He couldn't tell the parcel numbers and that there was a time Clement was away from home for about 4-5 years. He stated that he was not aware that it is at this time that Michael went and build in land for Clement.

10. PW3 was Sarah Auma Opondo. She stated that Clement was her elder brother in law while Michael is the youngest. She adopted her witness statement as evidence in chief. She stated in her written statement that both her father in law, Mr. Nichodemo Odindo, who was parties deceased father and the Defendant (now appellant) were in charge of the ancestral land because the plaintiff (now respondent) was a minor. She added that Clement had recently (in relation to the filing of the suit) constructed a homestead on Michael Aseto's land without his knowledge. When the Plaintiff and his wife asked what was happening their inquiry fell on deaf ears. She added that the Plaintiff and his wife had been living on the disputed parcel of land since 1979 when subdivision was done. She could not understand why the Defendant invaded the suit land. She prayed that the land registrar does rectify the titles.

11. During cross examination, she stated that she was married to Peter in 1980 and Nicodemo was still alive. He subdivided his land to his 4 sons and the subdivided land is still there and she knew how the land was subdivided. She stated that the 1st son left where he was staying and went to the others land. Clement was given land on the right side of the home. In 2019 he migrated to Michael's land. That Nicodemo was buried where Michael is staying.

Defence Case

12. DW1 was Clement Toko Odindo who testified that their father distributed the land before his death where his land was no. 268 and Michael was given no. 262. That it is not true Michael should be on land no. 268. Further, that Michael was now occupying his (Defendant's) land no. 268 and he wanted him evicted from it. He testified that he left home and went to Tanganyika while leaving his daughter to work on his land. When he came back from Tanganyika, he found Michael staying on his land, and he had built his house on it. He too built his house on the land, and when he told Michael to move out of the land, he brought him to court. He testified that he could swap land with Michael as it will be against their tradition. He produced a Copy of search for land No. 262 - Dexh 1 Copy of title deed for land No. 268 - Dexh 2 Green card of land No. 262 - Dexh 3 Green Card of Land No. 268 – D Exh 4 Adjudication record - Dexh 5 Letter of 28/3/2018 - Dexh 6.

13. During cross examination, he stated that the plaintiff was his brother and their last born. Further, that the ancestral home is on land no. 262 and there were around 9 houses on it. All the sons of Odindo were initially staying on land No. 262 including the plaintiff and had erected their "simbas" on land no. 262. He admitted that his children died and he buried them on parcel land No. 262. His wife also died when he was still on his father's land and he buried her on it, that is, parcel no. 262. He stated that his father sub divided the land in 1972. Then he subdivided the land but he could not recall the exact time he got the title to the land. He estimated it to be about 2017. He stated that Clement is on parcel No. 268, Peter's family is on parcel No. 266, and Otieno Odindo's children on parcel No. 264. He stated that he built his house on land no. 268 in 1986.

14. He stated further that he built a grass thatched house but it was destroyed and he built another house on the same spot the other one was. He admitted that he built the new house in 2019, and had built many houses on the land. Further, that when he went to Tanganyika he came back and found his houses had

been destroyed. He then built another house on Kanyamwa/Kabonyo/Kwandiku/268. He testified that the Land Registrar had been compromised to state that his house is on land Kanyamwa/Kabonyo/Kwandiku/262. Further, that their father gave them the land during the demarcation process and that is when sub division was done. That they surrendered the documents during the process and when he came back from Tanganyika, he collected his title deed. He was issued with a search and title at the lands' office.

15. DW2 was Jane Agola Toko the daughter to Clement. She stated that according to traditions, the last son remains at the homestead (of the parents) and the 1st son leaves the home. Further, that her grandfather was staying on land no. 262 and that is where he was buried. That Michael currently stays on 262 and 268 belongs to Clement Toko Odindo. Parcel no. 262 is registered in the name of Clement.

16. During cross examination she stated that she was 14 years old at the time the land was sub divided. That Michael had since been on land 268 from about the year 2000. She stated that she was not aware that there was confusion in the issuance of title deeds.

17. The court then directed the Land registrar Homa Bay County visit the suit parcel and conduct a report to assist the court in reaching a just determination of the case. The report was conducted and filed in court.

18. The parties filed their submissions and vide the judgement delivered on 28th November 2023, the trial court entered judgement in favor of the Plaintiff directing the Land Registrar to correct the register by registering the Plaintiff as the owner of parcel no. 268 and further, ordered the defendant to vacate the said land and remove any structures he had erected.

19. Being aggrieved by the judgement, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 11th June 2024 premised on the following grounds;

    1. The Learned Trial Magistrate grossly erred and misdirected herself in law and fact and failed to fully or at all, analyze, interpret, comprehend, apply and appreciate the pleadings filed, witness statements, the evidence and exhibits; and thereby reached a wrong, false and invalid conclusions and findings that were contrary to the pleadings evidence and the law by wrongly and erroneously finding and holding that;

        a. The Land Registrar Homabay County is ordered to correct the register by registering the plaintiff as the owner of Land Parcel Number Kanyamwa/Kabonyo/Kwandiku/268 and the defendant as the registered owner of Land Parcel No. Kanyamwa/Kabonyo/Kwandiku/262.

        b. The defendant is ordered to vacate Land Parcel No. Kanyamwa/Kabonyo/Kwandiku/268 and remove any structures he has erected on that parcel within the next Forty-Five (45) days failure to which the plaintiff be at liberty to evict him from the land and while at it comply with section 152G of the *Land Act*.

        c. Costs of the suit are awarded to the plaintiff.

    2. The Learned Trial Magistrate erred and misdirected herself in law and fact by grossly failing to correctly, sufficiently or at all to analyze and interpret the Law especially the applicable *Land Adjudication Act* and the *Land Act* as well as the pleadings, witness statements and evidence; and thereby failed to correctly find and hold that the Appellant was the sole registered indefeasible proprietor by a first registration of Land Parcel No. Kanyamwa/Kabonyo/Kwandiku/268 as his own share acquired during adjudication and that his title deed was

absolute, indefeasible and not liable to defeat, challenge, interference or rectification whether by the clan/family or trial court,

3. That the Learned trial Magistrate erred in law and fact in finding that the Respondent had proved his case against the Appellant despite the evidence on record that could not permit the interference with the Appellant's title deed as a first registered owner having been present during adjudication process in the presence of all his brothers and 12 committee members.

4. That the Learned trial Magistrate erred both in law and fact in finding that the Respondent proved his case when the weight of evidence strongly pointed that the appellant herein was and is still the sole proprietor of the suit parcel known as Kanyamwa/Kabonyo/Kwandiku/268 as a first registered owner and occupying the same.

5. That the learned trial Magistrate erred in law and fact by believing in each and every allegations stated by the respondent against the appellant yet the said allegations were not proved to the required standard by the respondents. All that was stated never proved and neither was it substantiated with any documents as it's required by law.

6. That the Learned Trial Magistrate erred in law of evidence in basing his judgment on a surveyor's report which was never produced as evidence by the surveyor and put to test on cross examination and thereby the Magistrate entered the arena and made decisions on evidence collected by himself.

7. The Learned Trial Magistrate grossly erred in law and misdirected herself in that she relied on the County surveyor's report and ignored the evidence that had been tendered in court as to which parcel of land was regarded the ancestral land despite the fact that there was no evidence that the Appellant participated in the survey exercise or was represented.

8. The Learned Trial Magistrate erred in law and fact in accepting evidence from the Respondent and the county surveyor when they both contradicted each other.

9. The Learned Trial Magistrate erred in Law and in act in disregarding the Appellant's evidence thus arriving at a wrong Judgement.

10. The Learned Trial Magistrate erred in Law and in fact in disregarding the Appellant's evidence thus arriving at a wrong judgment.

11. The learned trial Magistrate erred in Law and in fact in ordering the Appellant to vacate Kanayamwa/Kabonyo/Kwandiku/268 which land he had built on and had been living on being his land.

12. That the learned trial Magistrate erred in law and fact granting the Respondent costs of the suit.

13. The judgment and orders of the Learned trial Magistrate amount to an illegal rectification of the register in respect of the first, registration which affects an absolute registered title of the defendant in possession and is unreasonable, unsustainable and a possession and a violation of Article 40 of *the constitution* of Kenya 2010, sections 27,28 & 143 of the Registered *Land Act* 300 applicable to the title and all Judicial/Legal Authorities thereon and amounts to an illegal or unlawful overthrow by a subordinate court of the land laws as lawfully settled in Kenya.

20. The parties prosecuted and defended the appeal by way of written submissions.

Appellant Submissions

21. Learned counsel for the appellant set out the duty of the appellate court and gave a summary of the parties' cases. He set out both the Appellant's and the Respondent's cases and stated that as per the Adjudication Record produced by the Respondent as PEX 6, both properties appear to be first registration properties whose numbers were assigned during adjudication and demarcation in the presence of their father. He stated that the demarcation book shows that this was done way back in the 1970s. As per the said Adjudication Record, the Respondent became aware that his land was number 262 and he even went to the Adjudication Officers and had his name rectified from Aseto Odindo to Micahel Aseto Odindo. He urged that he actually signed as the owner, and had there been a mistake, he would have raised it much earlier at the Objection stage where he had his name corrected and during the lifetime of his father. The same would have been corrected then and during the lifetime of their father. He stated that the respondent chose to keep quiet from 1979 to 2019 only to allege that there was a mistake way after their father, who assigned both lands, had died.

22. He stated that as per the sketches drawn and presented to court by both Caleb O. Onyango (County Surveyor) and Trinity Geospatial (Private Surveyor), the 2 properties do not share a common boundary. From 262 (for the Respondent), one goes to 266; 267; before reaching 268 (for the Appellant). He urged that the burden of proof was squarely on the Respondent herein throughout the proceedings at Ndhiwa. Since he was relying on "Mistake", he had the burden of proving that there was indeed a mistake committed during registration, how the mistake was committed and in fact, whether or not the Appellant, a blind man, was part of or aware of the mistake so as to defeat the Appellant's title based on the alleged mistake.

23. Counsel cited Section 24 of the *Land Registration Act* and urged that the Appellants registration as the proprietor of parcel number Kanyamwa/Kabonyo/Kwandiku/268 vested in him an absolute ownership of the land, together with all rights and privileges belonging or appurtenant thereto. He cited Section 25 (1) of the *Land Registration Act* and urged that if his title is to be defeated, it must only be defeated in the manner contemplated by the *Land Registration Act*. Further, that throughout the proceedings, there was no evidence or proof that there was any fraud committed in the allocation of numbers 262 to him and 268 to the Appellant. There was no evidence whatsoever that any illegality was committed or of a mistake having been committed. Their father was alive and present and he is the one who was assigning his sons land and further.

24. He urged that for the Appellant to be deprived of his land parcel number 268 there are questions that must be answered to wit; Whether there was there a mistake, or fraud, or illegality in the issuance of the numbers and the properties and subsequently in the registration; Whether the Respondent moved the court within the required time of, say 3 years as per the *Limitation of Actions Act* or whether the respondent sought leave of the Court to lodge this complaint way past the stipulated timeframe. Further, whether the alleged customary law proved as to warrant the cancellation of the Appellant's title to parcel number 268.

25. Counsel submitted that throughout the proceedings, none of the above questions could be answered in the affirmative. Further, that the Land Registrar V. K. Lamu did advise the Respondent rightly vide her letter dated 28th March, 2018, produced by the Respondent. Looking at the whole situation, she advised that nothing warranted the cancellation of the Appellant's title and that it was needful for the Respondent to convince the Appellant to consent to a possible exchange of the properties.

26. Counsel submitted that from the certificates of official search and other official land records, land parcel number Kanyamwa/Kabonyo/Kwandiku/268 which is for the Appellant is a whole 2.3 Hectares. This,

converted to Acres, is 5.7 Acres. He stated that it was neither pleaded nor proved that the Respondent's home on this property occupies the whole property or whether the Respondent has fenced the whole of it. Further, that both parties were living on parcel number 268 belonging to the Appellant. The best thing for the Respondent to do would have been to ascertain what portion of the property he occupies and uses, and he ought to have lodged a claim for adverse possession to the same, something he did not do. counsel submitted that parties are bound by their pleadings and they can only get what they ask for.

27. Counsel submitted that the Land Adjudication Processes had governing laws that required parties aggrieved by the processes to lodge complaints immediately. This was not done and the Respondent cannot feign ignorance because he even went and had his name corrected and he signed. That shows he knows how to access the offices. It shows he accepted his parcel number 262 very well. That perhaps the problem is the size because number 262 is 1.6 Hectares while number 268 is 2.3 Hectares. If this is the case, if there was a claim for injustice or discrimination, it ought to have been brought against the Father to the Parties, Nicodemo, in his lifetime, because he was the original owner of the land before adjudication and further, because he is the one who decided what part to give to which son.

28. Counsel urged that *the Constitution* of Kenya, 2010 at Article 2(4) and the *Judicature Act*, Chapter 18 Laws of Kenya allow the application of Customary Law where it is not repugnant to justice and morality. He stated that the court was not told what the Respondent stands to suffer if he takes possession of his parcel number K/K/Kwandiku/262 which is rightfully his. There was no attempt by the Respondent to bring any elders to appraise the court of the importance of this custom, and why it could be so important as to defeat title issued on a first registration and without defect. It was the duty of the Respondent to establish this fact very well and what he stands to suffer. Further, that if the Respondent truly stood to suffer anything, couldn't he have raised the matter at the time when he went to sign for rectification of his name at the Land Adjudication Office, during the lifetime of their father? If there is indeed a taboo worthy or revoking and/or annulling a title, couldn't their father, who assigned them both lands, have known this more than them?

29. Counsel urged the court to allow the appeal with costs so that the Appellant is buried on his land. Nothing bars the Respondent from claiming adverse possession to the part of parcel number 268 that he occupies.

Respondents' Submissions

30. Counsel submitted that it is important to bring to the attention of this Court that this present appeal did not emanate from any burial dispute. Further, that the grounds of appeal filed by the Appellant too have nothing to do with burial dispute as this appeal was filed due to dissatisfaction with the trial Court's judgement in a land case.

31. Counsel further submitted that it is not in dispute that the parties are brothers and further, that they were allocated their respective parcels of land. For instance, Michael Aseto Odindo was allocated L.R. No. Kanyamwa/Kabonyo/Kwandiku/268, which was the homestead, however, the same was mistakenly registered in the name of his elder brother who was allocated LR No. Kanyamwa/Kabonyo/Kwandiku/262 which did not form part of the homestead.

32. Counsel submitted that the Appellant had buried his wife and son in L.R. No. Kanyamwa/Kabonyo/Kwandiku/262 and there was no dispute over such burial on the said land. That looking at the Green Cards of the two suit parcels, it is clear that the said parcels were both registered on the 14.08.1992, which is same date, month and year. It is therefore possible that erroneous swapping of names in the said parcels could have occurred at that time of the registration.

33. Counsel submitted that from the Plaint, the Respondent had pleaded mistake and or error, during the registration and not 'fraud' as is alleged by the Appellant. It was a mistake that happened during the registration suit parcels and could be resolved through and an amendment of the land register, as was directed by the trial Court. He submitted that Section 79 of the *Land Registration Act*, provides for rectification of the register where mistake or fraud is proved. He cited the case of Esther Ndegi Njiru & another Vs Leonard Gatei (2014) eKLR and submitted that the Respondent had proved that there was a mistake during the registration of the suit parcels which mistake was to the effect that wrong names were registered in wrong parcels.

34. Counsel urged that the said registrations were conducted on 14th August 1992, when the Respondent was already staying and cultivating the suit parcel of land from as early as 1971. Being that the Respondent was the youngest son, it is not in dispute that he is the one who was entitled to inherit the homestead which is situated in L.R. No. Kanyamwa/Kabonyo/Kwandiku/268 but mistakenly or erroneously registered in the name of the Appellant's father-in-Law. The registration was therefore a mistake, which the Court had the power to direct the Land Registrar to amend under Section 79 (1) (c) of the *Land Registration Act*. Counsel additionally cited the case of Mary Ruguru Njoroge vs Samuel Gachuma Mbugua & 4 Others (2014) eKLR in this regard.

35. Counsel submitted that customary law has a place in the Kenyan Legal Systems, urging that Articles 2(4) and 159 (2) (c) of *the Constitution* of Kenya recognize the application of the customary law provided it is not inconsistent with *the Constitution* and written laws. He cited Section 3(2) of the *Judicature Act* and submitted that it is a practice under the Luo Customs that the youngest son is the one to remain in the homestead, in order to take care of his aging parents. This was the exact scenario in the present case. He stated that the Court, through the Surveyors' Report established that the homestead of the deceased parents of the parties to this case were constructed in L.R. No. Kanyamwa/Kabonyo/Kwandiku/268. The report also established that the remains of the deceased parents of the parties to this appeal were buried in L.R. No. Kanyamwa/Kabonyo/Kwandiku/268. That the Respondent herein who is the youngest son in their family, has a home in the same L.R. No. Kanyamwa/Kabonyo/Kwandiku/268, where he has been in the occupation since 1971. The Appellant on the other hand was allocated L.R. No. Kanyamwa/Kabonyo/Kwandiku/262, as the eldest brother of the Respondent. It is in the said suit parcel that where he constructed a home and even buried his wife and son.

36. Counsel submitted that it is therefore not right for the Appellant to take advantage of the mistake that occurred during the land registration, to insist that he is entitled to remain in the homestead of their deceased parents, when the Respondent is the youngest son, and as such is the one entitled to remain in the homestead going by the Luo Customs. Further, considering the principal of equity, justice and fairness, the Respondent has been staying and cultivating the family homestead L.R.No. Kanyamwa/Kabonyo/Kwandiku/268 that was mistakenly registered in the name of his eldest brother for quite a long time. He cited the case of Josiah Kiche Mosi v David Ngoto Mosi [2016] KEHC 8729 (KLR) in this regard.

37. Counsel urged that this appeal lacks merit and deserves outright dismissal with costs to the Respondent.

Analysis and Determination

38. This Court has considered the instant appeal. The appellant raised thirteen grounds of appeal. I have carefully analyzed them. They were not only repetitive but some were argumentative hence not meeting the threshold of grounds of appeal. Grounds of appeal ought to be simple straight forward statements

indicating the areas where the court of the lower level erred either in law or fact. For the instance case, for instance, when by the first ground the appellant stated that the Learned Trial Magistrate grossly erred and misdirected herself in law and fact by failing to fully or at all, analyze, interpret, comprehend, apply and appreciate the pleadings filed, witness statements, the evidence and exhibits, thereby reaching wrong, false and invalid conclusions and findings contrary to the pleadings, evidence and the law, he summarized everything that he intended to raise against the decision impugned. This was the second ground he raised about misdirection, misinterpretation, insufficiency in analysis of the facts and the law as well as pleadings., and in ground three about proof of the case by the plaintiff, and ground four about the weight of the evidence as to proprietorship of the parcel of land in issue (parcel No. 268), and ground five about the trial magistrate believing allegations not proved by the plaintiff, and six about basing the judgment on a surveyor's report which was not produced in evidence, and seven, about the learned magistrate ignoring evidence tendered as to which parcel of land was regarded ancestral land, and so on. I need not repeat the correlation of the remaining ground with the first one since they are plainly obvious in that respect. In essence all the grounds raised revolved around the first ground of appeal. Thus, there was no need for the appellant to repeat them in the subsequent grounds.

39. Having noted that the grounds are collapsed into one, basically, I now proceed with first restating the role of this Court as an appellate one. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR. It was held as follows;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must 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 allowances in this respect."

40. In Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR the Court held as follows;

> " This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and re analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

41. That being said, from the memorandum of appeal and the submissions, the following issues arise for determination;

    i. Whether the trial court erred in finding that the Plaintiff had proved his case

42. The cause of action in the trial court arose from the claim that the suit land was erroneously registered in the name of the defendant, who is a brother to the plaintiff. Evidence was led to the extent that according to the customary law of the parties, the last born son always remains in the ancestral land which has the home. PW1 testified that he was the brother to the appellant herein and he was the youngest brother. Further, that their father divided the land amongst them in 1972. His testimony was corroborated by PW2 and PW3. Additionally, DW1 confirmed that the Plaintiff was the last-born son and according to their (Luo) custom, the last-born son was supposed to stay on the land on which the home of the parents was, hence regarded as the ancestral land.

43. In order to gain clarity on the situation on the ground, the court directed that the land surveyor conduct a site visit and consequently, file a report. The surveyor accordingly visited the suit land and

filed his report in court. From the report, it emerged that the ancestral home was on parcel number 268 and further, that the deceased wife to the defendant was buried on parcel no. 262. This set of facts corroborated the plaintiff's position to wit; that he was apportioned parcel no. 268 in accordance to custom.

44. Even if the Report of the surveyor could be discarded, as argued by the Appellant in his submissions, there are stark facts which the evidence of the parties brought out. One was by the Plaintiff that he resided on parcel No. 268 with his late father until the father died and still left him on it. Secondly, PW2 and DW1 agreed in their evidence that in deed the Plaintiff resided on the said parcel of land, and had built a home on it. Additionally, the Defendant admitted the he went to Tanzania and left his daughter to work on the parcel now occupied by the Plaintiff, that is parcel No. 268, and that he had built a grass thatched house on it and when he found it destroyed he put up others and they too were destroyed. This evidence was not supported by DW2 hence it is unreliable. On the converse he, DW1, admitted that he had put up the latest house on the land it 2019, when he came back from Tanzania. That evidence agreed with that of PW1 and PW2 that indeed the Defendant had moved onto parcel No. 268 in that recent period which when he tried to ask the Plaintiff to move from the parcel of land he sued him in the case that gave rise to the instant appeal. That being so, it was clear that the appellant had all along since the father subdivided the land in 1972 never occupied parcel No. 268.

45. That being the case, and the evidence led in the trial court being that parcel No. 268 was registered in the Defendant's name while parcel No. 262 was registered in the Plaintiff's name, and the fact being admitted that when the Defendant's children and wife died they were buried on parcel No. 262, it is clear to me that if the Defendant knew all along that parcel No. 262 was not his by way of custom he should not have buried his family members on it. His thought now to move to parcel No. 268 is driven by sheer greed and intent to cause disharmony in the family. Thus, did the Court err in finding that the plaintiff had proven his case to the required standard? I hold that it did not.

46. The suit land was registered as a first registration, which registration was the subject of the dispute. Does it mean that it could still stand if there was an error in its registration? Section 80 of the *Land Registration Act* provides as follows;

    (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

    (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default

47. In my assessment of the record of the trial court and the decision therein, I am satisfied that the trial court understood the facts of the case and showed a clear understanding of the principle of first registration. The respondent herein clearly proved that there was mistake in the registration of his brother and it should be rectified. The weight of the evidence, the analysis thereof and the conclusion arrived at were sound.

ii. Whether, in the alternative, the parties' titles as registered had been extinguished

48. The Plaintiff testified that all along, since 1972 when the parcels of land were subdivided he remained in occupation of parcel No. 268 with his late father. Even after his registration on 14th August 1992, the Respondent continued to reside on the parcel No. 268 to date. He has built a permanent house on it. He did this without the permission of the Defendant. Further, there was evidence led to the effect

that indeed the Defendant resided on parcel No. 262 and had even buried his late wife on it. It too was not with the permission of the Plaintiff given that the Plaintiff knew all along that the parcel of land the Defendant occupied was rightly his hence no need for consent to do so. In any event the Defendant/ Appellant admitted that he was away in Tanganyika and that the house which he built on parcel No. 268 and which was standing on it, and which the Plaintiff/Respondent disputed its erection on the land was that done in 2019 or thereabouts.

49. The Defendant pleaded that the claim by the Plaintiff was not tenable. He urged that he be let to be registered as owner of parcel No. 268 and occupy it. It was clear indeed the parties resided on the respective parcels of land without the permission or consent of the other, and the period of occupation was more than twelve years. Thus, even if this Court were to be wrong in its finding that indeed the lower court's finding was correct, the legal position that would stand on the way of the appellant being granted the continued registration of the suit land in his name is Section 7 of the *Limitation of Actions Act*. The reason is that the Appellant wants to recover land that is not in his possession and had not been in his possession for a period of over twelve years. Thus, even if he were to be registered as owner of parcel No. 268, I doubt if his title can continue to exist and I do find that it is extinguished.

50. Section 7 of the *Limitation of Actions Act* provides that;-

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

51. Further, Section 13 provides that:

> "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
>
> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.
>
> (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land."

52. It is not in dispute that the parties have resided on the sit lands for a long time, at least more than twelve years. I find no merit in this appeal and dismiss it.

iii. Who to bear the costs of the Appeal

53. This Appeal has been lost. Section 27 of the *Civil Procedure Act* provides that costs follow the event unless the Judge for good reasons to be recorded opines otherwise. I am alive to the fact that virtually in every litigation the successful party always salivates for the kill: the award of costs. This is not an isolated case since money has been expended towards arriving at the above result. But I must bear in mind that in ordinary parlance there is give and take, especially where relationships exist. That being

so, it is not in dispute that the parties herein are siblings: the younger has won against the elder one. Even if it would have been vice versa ultimate aim of the Court would be to encourage harmonious relationships. Thus, to foster the bond these two parties shared from birth, may I let them go and 'fight' no more. Thus, each shall bear their own costs of this Appeal.

54. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 4TH DAY OF SEPTEMBER 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 12:18 PM to 12:29 PM in the presence of,

Ms. Quinter Adoyo Advocate for he Appellant

Mr. Adingo Elvis Advocate for the Respondent

Mr. Terence, Court Assistant.