



REPUBLIC OF KENYA



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**Akoth (Sued as Philip Okoth) v Odongo & 4 others (Civil Appeal
10 of 2021) [2025] KECA 1622 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1622 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 10 OF 2021
HA OMONDI, LK KIMARU & LA ACHODE, JJA
OCTOBER 3, 2025**

BETWEEN

PHILIP JUMA AKOTH (SUED AS PHILIP OKOTH) APPELLANT

AND

MAXWEL OTIENO ODONGO 1ST RESPONDENT

JOHN MURWA MUSEMATE 2ND RESPONDENT

MAUREEN CHACHA 3RD RESPONDENT

JOHN MUSYOKI 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

*(Being an appeal from the judgment of the Environment and Land at
Kisumu (S.M. Kibunja, J.) dated 3rd February, 2020 and delivered at
Kisumu (A. Ombwayo, J.) on 6th March, 2020 in ELC Case No. 362 of 2015)*

JUDGMENT

1. This is an appeal from the judgment and decree of the Environment and Land Court at Kisumu (Kibunja, J.) delivered on 6th March 2020 in Kisumu ELC Case No. 362 of 2015.
2. By a plaint dated 11th July, 2005, the 1st respondent, Maxwell Otieno Odongo [Maxwel], filed suit against the appellant, Philip Juma Okoth [Philip], seeking an order of permanent injunction prohibiting Philip or his agents from interfering, trespassing and encroaching into his plot Kisumu Municipality/Block 11/134 [suit land], an order for Philip to demolish the structures unlawfully erected on the plot and reinstating the suit land to the status it was before the trespass and costs.



3. It was the 1st respondent's case that at all material times, the suit land is registered in his name. However, sometimes in June 2005, the appellant through his agents, employees and or workers moved onto the suit land and commenced constructions thereon without his consent, hence this suit.
4. In response, the appellant filed his defence and counterclaim dated the 18th July, 2005 in which he denied the 1st respondent's claim and averred that he had acquired ownership of the said land through a sale agreement from Henry Murwa Musemate, John Mwangangi Musyoki and Maureen Chacha before taking possession and erecting the structures the 1st respondent had complained of.
5. He further stated that the said suit land was still in the names of the three named vendors at the time and that the 1st respondent's title was irregular, fraudulently obtained and a nullity in law. The appellant listed the particulars of fraud, nullity and irregularity under to include failure to pay the statutory stand premium to the government, registering the lease without the consent of the Commissioner of Lands and without a corresponding register. The appellant prayed for the 1st respondent's suit to be dismissed with costs and judgment be entered for him in terms of the counterclaim.
6. The appellant intimated that he would apply to join John Murwa Musemate, Maureen Chacha, and John Musyoki as third parties seeking indemnity for any loss or damage by them should he be found liable to the 1st respondent. Following the application in that regard, he was granted leave to issue a Third-Party Notice to John Murwa Musemate, Maureen Chacha, and John Musyoki [Third parties] by an order dated 5th October 2005. He also claimed Kshs.3,000,000/- in damages for breach of contract, as well as costs.
7. It was his case that the claim arose from the sale of leasehold property by the Third Parties, who allegedly misrepresented themselves as the registered proprietors. The appellant purchased the land for Kshs.1,850,000/- and began constructing a residential house, which was now under threat of demolition due to ownership dispute. The appellant sought for:
 - i. Damages for loss caused,
 - ii. a refund of the purchase price,
 - iii. reimbursement of costs from the main suit and third-party proceedings.
8. In his evidence, the 1st respondent testified that the lease and the Certificate of Lease dated the 6th April, 1993 were in his name. However, in 2005, he noted that the appellant was interfering with the land after breaking down the fence and gate. Upon contacting the Commissioner of Lands, he learnt that there existed two titles over the suit land.
9. The 1st respondent testified that he bought the suit land from Kobia, Muthurania and George Onyiro in 1990. That the vendors signed the transfer and gave him the letter of allotment and he engaged a surveyor in 1993 who completed the exercise and the Plot was registered as Block 11/134. The Commissioner of Lands had determined that the title document held by the Third Parties was invalid. On being cross-examined, the 1st respondent admitted that he made the payment required under the allotment letter on 5th October, 1993. That only one G.O.A. Onyiro signed the transfer form out of the three vendors. The Search conducted in October 2008 confirmed that he was still the registered proprietor of the suit land.
10. To support his case, the 1st respondent called George Gichumu Gacheche, the District Land Registrar, Kisumu who testified and produced a copy of the white card (register) for Kisumu Municipality/Block 11/134 confirming that it was leased to the 1st respondent on 6th April, 1993 and that the said title had not been recalled.



11. On his part, the appellant told the court that he bought the suit land from the three Third Parties on the 26th April, 2005 at Kshs. 1,850,000/-. That he constructed a family home on the land at Kshs.6,000,000/- from April, 2005 and completed in 2006. That he did not have any knowledge of any defect in the title held by the Third Parties. He pointed out, among others that the payment of Kshs.32,943.35/- made for the unsurveyed plot on 8th October, 1993 was made outside the 30 days given in the letter of allotment.
12. On being cross-examined, the appellant admitted being aware that the third parties who sold the suit land to him had been asked in writing to surrender the lease back to the Commissioner of Lands but did not know whether they complied.
13. In his determination, the learned judge found that the District Land Registrar in his evidence stated that from their records, the 1st respondent was still the registered proprietor of the suit land. The judge further noted that the said testimony confirmed the position of the Commissioner of Lands vide the letter dated 26th August, 2008 addressed to the 1st Third Parties and copied to the 1st respondent directing the third parties to surrender the title registered in their names on 20th November, 2001 as another title over the same land had been registered way back on 6th April, 1993 which position was confirmed by the appellant although he admitted not being aware whether the third parties complied.
14. The learned judge further noted that in his evidence, the appellant did not exhibit any title document to show that the suit land had been lawfully, regularly and procedurally transferred to his name.
15. Relying on Section 26(1) of the *Land Registration Act* No. 3 of 2012, the learned judge found the 1st respondent the absolute and indefeasible owner of the suit land subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the Certificate of Title issued by the Land Registrar. The learned judge observed that the 1st respondent's title could only be challenged on grounds of fraud or misrepresentation, which he is proved to have been a party or by showing that the Certificate was acquired illegally, unprocedurally or through a corrupt scheme which the appellant failed to do so.
16. The learned judge found that the 1st respondent had proved his claim against the appellant to the standard required of a balance of probabilities and dismissed the counterclaim. The judge further found that the appellant had established his claim against the John Murwa Musemate, Maureen Chacha and John Musyoki for payment of Kshs.3,000,000/- (Three Million) plus costs of the 1st respondent's suit and the Third-Party proceedings.
17. These are the findings that led the appellant to come before this Court on appeal, based on grounds that:
 - i. the Learned Judge gravely erred in: holding that the court is obligated by Section 26 (1) of The *Land Registration Act* (No.3 of 2012) to take the 1st respondent as the absolute and indefeasible owner of the suit land when the validity of the 1st respondent's title had been challenged and successfully impugned under Section 26 (1) (b) of The *Land Registration Act* (No.3 of 2012).
 - ii. failing to find and hold that the 1st Respondent had a defective title which could not sustain a cause of action against the appellant who was in possession by virtue of another title issued to the 2nd, 3rd and 4th respondents.
 - iii. failing to consider whether or not the said Letter of Allotment could have conferred any valid title and interest on the 1st respondent, to whom no Letter of Allotment had been made, yet a finding that the 1st respondent's claim and title to the suit property was based on the Letter



of Allotment dated 25th May, 1990 in favour of J. K. Kobia, J. M. Muthurania and G. O. A. Onyiro.

- iv. holding that the appellant had failed to prove the nullity and irregularity of the 1st respondent's title by failing to discharge the onerous task of providing evidence in proof as required by Section 107 as regards the 1st respondent's title.
 - v. holding that the Appellant had failed to prove fraud on the part of the 1st respondent, when the issuance of the Certificate of Lease to the 1st respondent without a Letter of Allotment and on the strength of the Letter of Allotment dated 25th May, 1990 was itself prima facie evidence of fraud to which the 1st respondent was a party.
18. Basically, the appellant's grievance is that the learned Judge had not properly evaluated the evidence before him, and had been wrong in the finding that he was not the bona fide registered owner of the suit property.
 19. In support of the appeal, it was submitted for the appellant that the 1st respondent's indefeasible title was under challenge. The appellant relied on the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR where it was held that when a registered proprietor's root of the title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free of any encumbrances.
 20. It is further contended that in the present appeal, the 1st respondent's title was registered on 6th April, 1993; that the basis of the said title is an allotment letter issued to J.K. Kobia, J.M. Muthurania and G.O.A. Onyiro on 25th May, 1990; that there was no separate letter of allotment issued to the 1st respondent. On the other hand, the root of the second title is the letter of allotment dated 16th June 1999 issued to Henry Murwa Musemate, John Mwangangi Musyoki and Maureen Chacha dated 20th November, 2001. The difference between the two is that the 1st respondent never held any letter of allotment in his name, thus what was sold to him was an allotment letter. That at the time the allotment letter dated 16th June, 1999 was issued, the lease had already expired by operation of the law; there was no letter of acceptance by J.K. Kobia, J.M. Muthurania and G.O.A Onyiro; and that the prescribed charges were made 30 days after the specified time.
 21. Relying on the case of *Chemey Investment Limited vs. Attorney General & 2 Others* [2018] eKLR it is submitted that the certificate of lease issued in the name of the 1st respondent was therefore irregularly and fraudulently obtained, it is not indefeasible and is not protected by Section 26 of the *Land Registration Act* as held by the trial court.
 22. In rebuttal, it was submitted for the 1st respondent that in his evidence, he produced the Certificate of lease showing that he is the registered proprietor of the suit land. Further, in support of his claim, the 1st respondent called the Land Registrar who confirmed that from the records at the Lands Office in Kisumu, the 1st respondent was the registered proprietor of the suit land.
 23. Regarding the validity of the title, it was submitted that the appellant did not hold any title to the suit land; that in his evidence, the appellant only exhibited a signed transfer of lease which had not been registered. Further, the said transfer was null and void because it was purportedly issued after the first respondent's title had been issued. Relying on the case of *Ardhi Highway Development Limited vs. West End Butcheries Ltd and 6 Others* [2015] eKLR, it is submitted that the rule is that where two equities conflict, the first in time prevails.



24. As to whether the appellant was entitled to damages, it is submitted that the acts of the appellant have kept the 1st respondent out of the suit land from 2005, thus he is not entitled to any relief.
25. This being a first appeal, our duty as the first appellate court is to re-evaluate, re-assess, and re-analyze the evidence on record and then determine whether the conclusions reached by the trial court should stand or not. This principle was reiterated in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1968] EA 123, where the court stated:
- “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 allowance in this respect.”
26. Having considered the record of appeal, the written submissions by both parties, the authorities cited, and the law, the main issue for determination is who the legitimate owner of the suit property?
27. In addressing the issue, it is important to begin with the observation that the suit before the ELC that culminated in the impugned judgment was instituted by Maxwel Otieno against Philip Juma Akoth. His action against Philip Juma was founded on trespass on the basis that he had, without any colour of right, without authority or consent, entered into and trespassed on the property in respect of which he claimed to be the registered proprietor.
28. Trespass was defined by this Court in the case of *William Kamunge Gakui vs. Eustace Gitonga Gakui* (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) as a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land.
29. There was no dispute that the suit property was originally Government land. Over it, the appellant relies on the Third Parties Certificate of lease registered on 16th June 1999 and issued on 20th November 2001. On his part, the 1st respondent has a certificate of lease registered on 25th May 1991 and issued on 6th April 1993. The trial court traced the history leading to the registration of the two certificates of lease, and concluded that the 1st respondent’s certificate was procedurally and validly acquired, but that the one relied on by the appellant was not. The question for our determination is whether the learned Judge erred in his findings on the issue of who had a valid claim to the suit property.
30. With regard to proof of ownership *visa vis* a title document, the Court in the case of *Munyu Maina vs. Hiram Gathiha Maina* [2013] eKLR stated as follows:
- “We state that when a registered proprietor’s root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
31. The 1st respondent’s claim is based on the letter of allotment dated the 25th May, 1990 in favour of J. K. Kobia, J. M. Muthurania and G. O. A. Onyiro, over Kisumu Municipality – UNS Residential Plot and attached Plan No. 30973 XL/12A and sale agreement dated the 24th October, 1990 and after surveying the Plot was registered in his name. He also produced a title in his name.



32. On his part, the appellant hinged his proprietorship to the suit property on the sale agreement dated 26th April 2005 between him and Henry Murwa Musemate, a holder of power of attorney dated 3rd February, 2005 on behalf of John Mwangangi Musyoki and Maureen Chacha for Kshs.1,850,000/-, a copy of letter of allotment dated 16th June, 1999 for Residential Plot – Block 11/134 Kisumu Municipality measuring 0.3402 hectares, copy of lease, and Certificate of Lease dated 20th November, 2001 in the names of Henry Murwa Musemate, John Mwangangi Musyoki and Maureen Chacha. However, he did not produce any title registered in his favour.
33. In his submissions, the appellant faults the learned judge for failing to properly consider all the evidence on record and that he did not consider the law, procedures and formalities related to the acquisition of title and therefore, had come to the wrong conclusion that the 1st respondent's title was valid. Secondly, that the learned Judge had erred in finding for the 1st respondent that his title was protected under section 26 of the [Land Registration Act](#).
34. According to learned counsel, the evidence on record revealed that the 1st respondent's title did not go through a legal and formal process unlike the title the appellant relies on which had been properly and procedurally issued. Counsel contended that there was no formal written acceptance of the offer contained in the letter of allotment, the prescribed charges were paid after the 1st respondent had been registered as a proprietor and a certificate of lease issued and that by that time the letter of allotment had expired due to effluxion of time.
35. Considering the appellant's evidence, on cross-examination, he admitted that he was aware of the Commissioner of Lands direction to the third parties to surrender the title for the suit land but could not tell whether the directive was complied with.
36. This Court in *Wambui vs. Mwangi & 3 Others* (Civil Appeal 465 of 2019) [2021] KECA, emphasized that the sanctity of title vested in a title holder under sections 25 and 26 of the [Land Registration Act](#) is absolute and indefeasible, challengeable only on grounds of fraud or misrepresentation to which the owner is proved to be a party. Further, in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others* [2015] eKLR, the Court held that the appellant's title was protected under section 23 of the Registration of Titles Act and was guaranteed by [the Constitution](#), reinforcing the principle that a registered title is conclusive evidence of ownership unless proven otherwise.
37. The Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) held that the burden of proving the legality and validity of a title rests with the buyer. The court confirmed that a registered title to property can be invalidated if the process followed prior to the issuance of the title did not comply with the law, meaning that innocent buyers cannot rely on the principle of indefeasibility of title if the initial allocation of the land was illegal or unprocedural.
38. In his evidence in chief, the District Land Registrar confirmed that at the time of his testimony, the 1st respondent was still the registered proprietor of the suit land. The testimony confirmed the position of the Commissioner of Lands, who, by a letter dated 26th August, 2008, addressed to the third parties and copied to the 1st respondent, recalled the title issued to the Third Parties, a fact which the appellant admitted. The appellant only produced a sale agreement that he purchased the suit land from the third parties but failed to adduce evidence on how the third parties acquired the title to the suit land before selling it to him. The appellant did not discharge the burden of proof in support of his case.
39. The 1st respondent gave credible evidence in regard to the background on how he was registered as the owner of the suit property compared to that of the appellant. The 1st respondent also presented as part



of his evidence a register in respect of the suit land confirming that the suit land was leased to him on 6th April, 1993.

40. The basis for the legal burden of proof is provided in section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya. The said section states as follows:
- (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.'
41. The majority decision of the Supreme Court in Presidential Election Petition No 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR had the following to say on the evidential burden of proof in paragraph 132 that:
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and 'remains constant through a trial with the plaintiff, however, 'depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.'
42. The appellant did not discharge the evidential burden in establishing the facts in support of his case, therefore the learned judge correctly addressed himself to the issues and properly traced the history of ownership of the suit land. The appellant has failed to show that the learned judge did not properly evaluate the evidence that was adduced or that he acted on wrong principles. In *Jabane vs. Olenja* [1986] KLR 661, this court said as follows:
- More recently, however, this court has held that it will not likely differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
43. After careful consideration and re-evaluation, we find that the learned judge did not act on wrong principles, and his findings on the question of ownership were reached after a careful and thorough analysis of the history of the ownership documents that were produced in evidence by the parties. The evidence on record demonstrates that the 1st respondent's ownership is backed by evidence that forms a credible trail from the point of allotment to the taking of possession, while the appellant did not adduce sufficient evidence to prove his allegations on the acquisition of title to the suit property by the vendors, he allegedly purchased the property from. The learned judge cannot be faulted for holding so.
44. The appellant alleged fraud on the part of the 1st respondent in his acquisition of the suit property in his defence. It is trite that allegations of fraud must be pleaded and strictly proved. The Supreme Court of Kenya in *Wamae & 97 Others vs. Barclays Bank of Kenya Limited* (Petition 19 (E022) of 2020) 5 (KLR), emphasized that fraud must be distinctly proved and cannot be inferred from mere allegations. Similarly, in *Trattoria Limited vs. Maina & 3 Others* (Petition (Application) 26 (E029) of 2022) 54 (KLR) the court reiterated that the burden of proving fraud lies with the party alleging it, and such allegations must be supported by clear and convincing evidence.
45. In the instant appeal, although fraud was pleaded as against the 1st respondent, the appellant did not provide any evidence to support the particulars thereof. In fact, the evidence from the Land Registrar



confirmed that the title obtained by the 1st respondent was proper. In his determination, the learned judge stated as follows:

“That the Plaintiff’s title could only have been challenged on grounds of fraud or misrepresentation, which he is proved to have been a party or by showing that the Certificate was acquired illegally, unprocedurally or through a corrupt scheme. The responsibility to present such evidence lay on the Defendant who challenged the title. That though the Defendant had set out the particulars of fraud, nullity and irregularity of the Plaintiff’s title at paragraph 7 of his defence and counterclaim, he failed to discharge the onerous task of providing evidence in proof as required by Section 107 of the *Evidence Act* Chapter 80 of Laws of Kenya to the standard required of above balance of probabilities. That the Defendant’s task was made harder by the position taken by the 2nd Third-Party of denouncing in their pleadings the title documents upon which the 1st third parties claimed the suit land, that they attempted to sell to him, and the evidence by PW2 that remains unrebutted that the Plaintiff is the registered proprietor of the suit land.”

46. In the case of *Vijay Morjaria vs. Nansingh Madhusingh Dabar & Another* [2000] eKLR Tunoi, JA. stated that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

47. In the same vein, this Court in the case of *Kinyanjui Kamau vs. George Kamau Njoroge* [2015] eKLR reiterated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

48. The appellant therefore had the burden, beyond proof on a balance of probabilities required in ordinary civil cases, to impeach the title to the property in favour of the 1st respondent. Did he do so?

49. There was indeed no fraud proved at all on the part of the 1st respondent and the trial court did not err in finding that the 1st respondent title was indefeasible and thus protected by Section 26 of the *Land Registration Act*. The 1st respondent established his right to the property, and allegations of fraud by the appellant were not proved.

We do not find any error in application of the law or established legal principles as to warrant an interference with the trial court’s decision. The upshot is that the appeal lacks merit and is dismissed. We award costs of the appeal to the 1st respondent.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

H. A. OMONDI



.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

