



**Odhiambo v Wanyanga & another (Civil Appeal E073 of 2020)  
[2025] KECA 1621 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1621 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL E073 OF 2020  
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA  
OCTOBER 3, 2025**

**BETWEEN**

**GEORGE A. ODHIAMBO ..... APPELLANT**

**AND**

**AUGUSTINE AMEJA WANYANGA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN CHARLES ODHIAMBO WANYANGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment and decree of the Environment & Land Court at Kisumu, (Kibunja, J.) dated 5th September, 2019 in Case No. 27 of 2017)*

**JUDGMENT**

1. George Odhiambo, the appellant, is aggrieved by the judgment and decree delivered by the Environment and Land Court (ELC) (Kibunja, J.) on 5<sup>th</sup> September, 2019 dismissing his claim for cancellation of what he described as the fraudulent transfer of Land Parcel East Gem/Nyamininia/739[suit land] by respondents; and he sought reverting the title to him plus costs and interests.
2. Briefly, vide a plaint dated 24<sup>th</sup> August, 2010, George Odhiambo [George] sued Augustine Ameja Wanyanga, the 1<sup>st</sup> respondent, and John Charles Odhiambo Wanyanga, the 2<sup>nd</sup> respondent, seeking an order directing the Land Registrar to cancel the fraudulent transfer of the suit land and revert the title to his name.
3. It was his case that at all material times he was the registered owner of the suit land. However, the respondents fraudulently transferred the suit land to their names when there was a pending case between him and his brothers; and he complained that the respondents' actions had denied him peaceful occupation of the suit land.



4. In response, the respondents denied the averments and maintained that George had never been the registered proprietor of the suit land; they denied that they had fraudulently transferred the land to their names.
5. During the trial, George testified as PW1, and stated that he had been in possession of the suit land and had the original title; that the respondents had acquired another title for the suit land without him transferring it to them, as such the title held by the respondents should be cancelled. On cross-examination, George stated that he bought the suit land from his uncle Johana Wanyanga Makona, whose wife was Helena Obando Wanyanga but could not tell how the suit land moved from Helena to the respondents. He admitted that he did not involve Helena in the Maseno Court Succession Cause as he had bought the suit land from her husband.
6. The respondent testified on his own behalf and on behalf of 2<sup>nd</sup> respondent as DW1, and told the court that he inherited the suit land from his grandfather, and that Helena transferred it to them. That George had inherited the suit land without involving Helena a matter which was heard by the Land Control Board who decided that it be returned to Helena. The respondents took the matter to the Land Disputes Tribunal, Siaya which resolved in their favour although George had remained in possession of the suit land.
7. Ignatius Omolo Onjak, the retired chief of East Gem location, testified as PW2 and told the court how in 1987, the District Officer sent him to investigate a report that the appellant had been disturbing the peace. He visited the suit land and found two houses of cousins. Upon consulting the Assistant Chief and elders he found out that the suit land belonged to one Wanyanga Makona and that George had filed a Succession Cause in the Magistrate's Court at Maseno and obtained a grant of letters of administration and listed the suit land as one of the assets of the deceased. He then wrote to the District Officer recommending that the widow of Wanyanga Makona to be registered as the proprietor of the suit land. After the death of Wanyanga Makona who was the registered owner of the suit land, the heirs to the estate were his widow, Helena and Emmanuel Wanyanga.
8. The trial Judge dismissed the suit after concluding, inter alia, that:
  - i. That from the evidence tendered by the Plaintiff in form of copy of the green card/register for East Gem/Nyamininia/739, the suit land, which is undisputed or challenged, the land was first registered on the 26th October 1970 in the name of Wanyanga Makokha. That the said Wanyanga Makokha is claimed by both the Plaintiff and the 1st Defendant to have been their kin.
  - ii. That the evidence adduced by the Plaintiff in the form of certified true copy of court order issued on the 2<sup>nd</sup> March 1973 in Maseno District Magistrate Court Succession Cause No. 4 of 1973, which is not rebutted or controverted, George A. Odhiambo, the Plaintiff, was declared the legal owner of the suit land and an order issued for him to be registered as its proprietor. That subsequently the Plaintiff was registered as the proprietor of the suit land on the 23rd May 1973 through transmission (Succession) and had a correction of name registered on the 11th December 1990 as confirmed by the copy of the green card/register. That the Plaintiff was issued with a title deed, which he told the court he still retains, though the land has reportedly changed hands to Helena Alando Wanyanga on 20th January 1995, and later to the Defendants on the 19th March 1997 allegedly through transfer as per the copy of the green card/register. That the Defendants were then issued with a title deed on the 19th March 1997.
  - iii. That the Plaintiff has denied transferring the title of the suit land to the said Helena and stated that the signature appended on the transfer form was not his. That the Land Control Board



application form he remembered signing were for subdivision to enable him give the land to his son Patrick Gumba. The 1st Defendant agreed that the dispute over the ownership of the suit land between the Plaintiff and Helena had been heard by the Land Control Board, after which the land was returned to Helena, who later transferred it to them. The court has noted that there is no evidence tendered that the Plaintiff has ever lodged a complaint with the police or Land Registrar that documents bearing a signature not by him, had been used to transfer the land to Helena without his knowledge. That though the Plaintiff had obtained good title to the suit land when he got registered with it on the 23rd May 1973, he relinquished all interests he held upon transferring it to Helena Oando Wanyanga on the 20th January 1995. The transfer was properly done as the Land Control Board consent was applied for and obtained on the 29th October 1987. That had the Plaintiff been dissatisfied with the land being transferred to Helena, he would have taken legal steps including reporting to the police, but did not. That it is the Defendants who lodged the Siaya Land Disputes Tribunal Case No. 71 of 2009 against the Plaintiff, that was decided on the 17th November 2010 in favour of the Defendants. That no appeal appear to have been filed and there is no confirmation that the award was ever filed with the court and adopted as the court's judgment.

- iv. That as the Plaintiff has not particularized the fraudulent activities that he attributed to the Defendants, and he has not tendered evidence as required by Section 107 of the Evidence Act, Chapter 80 of Laws of Kenya to prove that the Defendants acquisition of title to the suit land was fraudulent, his claim must fail. That however, due to the history relating to the suit land, the court finds this is a case where costs should not follow the events as required by Section 27 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. That therefore, each party will bear its own costs.
9. The learned judge concluded that George had failed to prove his case against both respondents and dismissed his claim with no order as to costs.
10. The appellant was aggrieved by the judgment and filed an appeal to this Court on grounds, inter alia, that the learned Judge erred in law and fact: in finding that the claim of fraud was not sufficiently pleaded, conflating criminal prosecution of fraud, which requires a police abstract, with a civil claim for fraud which is provable on a balance of probabilities; failing to evaluate the evidence and in relying on the findings of the Siaya Land Dispute Tribunal a tribunal which lacked jurisdiction to handle the matter.
11. When the appeal came up for plenary hearing, learned counsel Ms. Koech appeared for the appellant while learned counsel Mr. Aduol appeared for the respondent. Both counsel adopted their written submissions which they had filed earlier and made brief oral highlights.
12. It was submitted for the appellant that the learned judge erred in prioritizing procedural technicalities over substantive justice. In his determination, the learned judge found that by failing to particularize the fraudulent activities attributed to the respondents, the appellants' claim failed.
13. The appellant admits that the plaint did not strictly comply with Order 2 Rule 10[1][a] of the Civil Procedure Rules but maintains that in his witness statement, oral evidence and submissions, he invited the court to infer fraud by evaluating the specific documentary evidence.
14. Relying on the case of Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 6 Others [2013] eKLR, the appellant submitted that the combined effect of Article 159 of the Constitution emphasizes substance over form and structure. Further, the Court's overriding objective is to achieve fair, just, speedy, proportionate, time and cost saving disposal of cases commends the Court to exercise discretion in favour of the appellant in the circumstances.



15. Regarding the holding that the failure to report fraud to the police disapproved fraud, the appellant faults the learned judge for conflating the criminal prosecution which requires a police report with a civil claim which is provable on a balance of probabilities. The appellant insists that various reports were made to local authorities, the District Officer, Chief Land Registrar and District Land Registrar over the interference with the suit land.
16. Drawing from the case of *Kuria Kiarie and 2 Others vs Sammy Magera* [2018] KECA 467[KLR], the appellant submitted that fraud in civil cases is distinct from criminal procedures and the absence of a police report does not invalidate a civil claim. The appellant provided prima facie evidence of forgery which the trial court dismissed without proper analysis.
17. As relates to the evaluation of the evidence, the appellant contends that the learned judge disregarded and misapprehended the evidence produced regarding the ownership of the suit land and the actions of fraud.
18. It is further argued that the appellant acquired the suit property through an offer to purchase between the appellant and Wanyanga Makona, an uncle to the appellant, which offer was accepted before the area chief and consideration paid. The letter of offer, though written in Dholuo, was considered during the trial and accepted as an offer for sale. Upon the demise of Wanyanga Makona, the appellant registered the suit land in his name through transmission as evidenced in Maseno District Magistrate Court Succession Cause No. 4 of 1973, and thereafter paid the registration fees and the necessary charges.
19. The appellant maintains that during the process, the widow did not challenge the initial transfer of the suit land during the deceased's lifetime and furthermore, at that time, under the Registered *Land Act* spousal consent was not required to transfer a property.
20. As regards the fraudulent transfers, the appellant submits that the documents relied on by the respondents to prove their ownership leads to an irresistible inference of fraud for the reason that they produced an application for consent dated 17<sup>th</sup> August 1987 allegedly filed by the appellant who categorically denied executing such a document during examination in chief, the identity number provided on the said application does not belong to the appellant, the signature appended bears a stark difference with the appellant's true signature, the consent was approved in the absence of the appellant and the transfer forms were executed and registered 3 years later contrary to the provisions of the Land Control Board.
21. The appellant submits further that upon the illegal transfer of the suit land to the deceased's widow, the suit land was then transferred to the respondents fraudulently as the application for Land Control Board consent is not dated, the said letter was issued on 5<sup>th</sup> March 1997 making a reference to the application dated 4<sup>th</sup> March, 1997, the title deed is issued on 2<sup>nd</sup> April 1997 yet the title deed issued to the respondent is dated 19<sup>th</sup> March 1997.
22. As to whether the learned judge erred in relying on the decision of Siaya Land Disputes, the appellant submits that no material evidence was produced to support the testimonies; and contends that Section 3 of the Land Dispute Tribunal Act[repealed] limited the jurisdiction of the Land Disputes Tribunal to handle matters of title or ownership involving registered land or fraud or forgery claims; and the appellant had no obligation to appeal against the tribunal's decision as it was invalid ab initio.
23. On his part, counsel for the respondents submitted that despite the appellant claiming to have purchased the suit land from Wanyanga Makona, he neither confirmed to the Court the parcel number he had been invited to buy neither did he state the parcel he purchased from his uncle.



24. Relying on Sections 38 of the Land Act as amended by Section 55 of the Land Laws [Amendment] Act of 2016 together with Section 3 of the Law of Contract Act, the respondent submits that for there to be a binding contract three elements need to be fulfilled which include offer, acceptance and consideration. That in the case of *Maina & 87 Others vs. Kagiri* [2014] KECA the Court held that for a purported oral agreement of sale of land to be valid, there ought to be sufficient proof of full payment of the consideration price and actual possession of the land by the purchaser.
25. It is further submitted that in the instant appeal, there is no evidence that the conditions were fulfilled and further, that the respondents have had the suit land from 1922; have even buried their grandparents thereon; and that no one has ever raised any objection.
26. Regarding fraud, the respondent submits that despite the appellant pleading fraud, he neither stated the particulars nor adduced evidence to facilitate the proof of the existence of those facts.
27. During the trial, the appellant had the burden to adduce the evidence of the allegations of fraud that he made against the respondents in the main suit which he did not. The appellant alleged that the documents presented by the respondents to prove ownership of the suit land were marred with fraud. However, in rendering his determination, the learned judge considered the documents and found that the transfer was properly done.
28. Lastly, on costs, the respondent submits that it is trite that costs follow the event. Relying on the case of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya and Another* [2016]eKLR, the respondent submits that since the appellant did not establish his case against the respondents on a balance of probabilities, they should be awarded the cost of the appeal herein.
29. This is a first appeal where this Court is required to conduct an independent appraisal and analysis of the facts and the law and arrive at its independent conclusion as prescribed under rule 31(1)(a) of the Court of Appeal Rules, 2022. In so doing, the Court is required to take into consideration that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses testify to be in a position to assess their demeanor. See *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212 as reiterated in *Mugwe vs. Waititu Babayao & Another; Speaker, Kiambu County Assembly & 2 Others (Interested Parties) (Civil Appeal 245 of 2018)* [2023] KECA 1422 (KLR).
30. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, in this appeal the main issue for determination is who is the rightful owner of the suit land and related to that is the question whether the appellant established fraud as against the respondents to the required standard to impeach the respondent's title to the suit land.
31. It is trite that he who alleges must prove. Section 107 of the Evidence Act provides that he or she who asserts must prove that the facts alleged exist. The burden of proof lay with the appellant to establish his right to the suit land. See *Swaleh Mohamed Waziri & 3 others vs. Houd Mohmoud Athman & Another* [2020] eKLR. In the case of *Anne Wambui Ndiritu - vs. Joseph Kiprono Ropkoi & Another* [2004] eKLR, this Court held that:

“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80...There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...The two sections carry forward the often-repeated evidential adage: ‘he who asserts must prove’”.



32. As is clear from the record, the appellant claimed that he purchased the suit land from his uncle Johana Wanyanga Magona who was Helena's husband. He testified that upon the demise of Wanyanga Magona, he registered the suit land in his name through transmission. However, while undertaking a search on the suit land, he discovered that the suit land he noted that the suit land had been secretly transferred to the respondents. It was his case that he moved various authorities seeking to recover the same in vain.
33. Be it as it may, the appellant did not adduce any documentary or oral evidence to prove that the suit land belonged to him, or to prove that the respondents had fraudulently transferred the same to themselves.
34. Without any evidence that demonstrated ownership of the suit land by the appellant, the appellant failed to discharge the burden of proof that he purchased the suit land from Wanyanga Magona.
35. On the contrary, the respondents through the evidence adduced by their witnesses clearly demonstrated that they were the legal owners of the suit land by virtue of being the heirs of Wanyanga Makona who was the registered owner of the suit land.
36. The appellant claimed that the registration of the suit land was done secretly, and was thus imputing fraud on the part of the respondents. It is an established legal principle that fraud must not only be specifically pleaded but must also be strictly proved.
37. In the case of *Eldoret Express Limited vs. Tawai Ltd and Another* [2019] eKLR, this Court stated that:

“Fraud is a serious thing to allege and there is a requirement that it be particularized and then proved to a standard that is higher than a mere balance of probabilities. See *R. G. Patel v Lalji Makanji* [1957] EA

314. The degree of proof must be such as to create a moral certainty though it need not reach the criminal standard of proof beyond a reasonable doubt. This has to be so because allegations of fraud in a civil suit carry with them an element of criminality and are referred to as being quasi-criminal in nature. As Esther put it more than a century ago in *Le Leure v Gould* [1895] 1 & B. 491 at p. 498, “a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind.”

38. Similarly, in *Vijay Morjaria vs. Nansingh, Madhusingh Darbar & Another* [2000] eKLR Tunoi JA stated that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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 distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

39. And in *Kinyanjui Kamau vs. George Kamau* [2015] eKLR the Court stated that:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs 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. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

40. Given those parameters, did the appellant present sufficient evidence before the trial court on the basis of which their plea of fraud could be sustained? Did he discharge the burden of proof?
41. There is no doubt that in his plaint, the appellant did not comply with the requirement of stating the particulars of fraud. Though fraud was specifically pleaded in paragraph 5 of the plaint the particulars thereof were not itemized.
42. Having failed to plead the particulars of fraud in his pleadings and, to specifically prove them in court, the appellant cannot fault the trial court for not finding the transfer of the suit land to the respondents fraudulent.
43. The learned judge was right in holding that the appellant did not successfully challenge the respondent's title to suit Land.

It is clear that the respondent's proprietary interest in the suit premises was properly and lawfully registered, and in the absence of prove of fraud, their title cannot be impeached. We hold that the appeal is without merit and accordingly dismiss it with costs to the respondents.

**DATED AND DELIVERED AT KISUMU THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

