



REPUBLIC OF KENYA



**Omollo v Ogul (Environment and Land Appeal E046 of 2023)
[2025] KEELC 6915 (KLR) (9 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E046 OF 2023
SO OKONG'O, J
OCTOBER 9, 2025**

BETWEEN

SAMSON KITONDO OMOLLO APPELLANT

AND

THOMAS OKUNA OGUL RESPONDENT

(Being an appeal from the judgment and decree of Hon. L.N. KINIALE (SPM) delivered on 30th November, 2023 in Nyando Senior Principal Magistrate's Court ELC No. 25 of 2019)

JUDGMENT

1. This appeal challenges the judgment and decree of Hon. L.N. Kiniale (SPM) made on 30th November 2023 in Nyando Senior Principal Magistrate's Court ELC No. 25 of 2019 (hereinafter referred to as "the lower court"). The Respondent sued the Appellant together with one Jacob Omollo Opiyo, deceased, who was the 1st Defendant in the lower court suit (hereinafter referred to as "the deceased") through a plaint dated 7th June 2019. The Respondent averred that at all material times, he was the registered owner of all those parcels of land known as Title No. Kisumu/Wawidhi B/6598 and Kisumu/Wawidhi B/8431 (hereinafter together referred to as "the suit properties" and individually as "Plot No. 6598" and "Plot No. 8431" respectively).
2. The Respondent averred that he purchased the suit properties from the deceased, Jacob Omollo Opiyo, and the Appellant through agreements of sale dated 5th January 2011 and 7th January 2011, respectively. The Respondent averred that he purchased the suit properties at a consideration of Kshs. 70,000/- and Kshs.41,000/- for Title No. Kisumu Wawidhi B/6598 and Title No. Kisumu/Wawidhi B/8431 respectively. The Respondent averred that he paid the purchase price for the suit properties in full, after which the properties were registered in his name. The Respondent averred that the area where the suit properties are situated was still under adjudication and the title deeds for the properties had



not been issued to him. The Respondent averred that the Ministry of Lands had, however, confirmed his ownership of the suit properties.

3. The Respondent averred that the Appellant and the deceased had, without any color of right, encroached on and were carrying out farming activities on the suit properties. The Respondent averred that he had repeatedly asked the Appellant and the deceased to vacate the suit properties, but his efforts had been in vain as they remained in occupation of the properties.
4. The Respondent prayed for judgment against the Appellant and the deceased for: an order of eviction from the suit properties, an order of a permanent injunction restraining the Appellant and the deceased, their employees, servants, workers and /or agents from entering upon, remaining on, taking possession of, carrying out any construction or any other activity whatsoever on the suit properties, a declaration that the suit properties legally belonged to the Respondent, and costs of the suit plus interests.
5. The Appellant and the deceased filed a joint statement of defence in the lower court on 26th June 2019. The Appellant and the deceased, Jacob Omollo Opiyo, who was the Appellant's father, admitted that they entered into agreements of sale of land with the Respondent. They contended, however, that the said agreements lacked specification as to the measurements of the portions of the land bought from the Appellant and the deceased, which omission was intentional. The Appellant and the deceased averred that the Respondent had fraudulently fenced the entire parcels of land in respect of which only portions were sold to him, leaving the Appellant and the deceased with no land to reside on and/or cultivate. The Appellant and the deceased prayed that the suit be dismissed with costs.
6. On 19th November 2020, the lower court was informed that the 1st Defendant in the lower court ("the deceased") had died and needed to be substituted. The deceased was not substituted. On 13th May 2021, the Respondent's advocate informed the court that the Respondent wished to proceed with the suit against the remaining defendant, who is the Appellant herein. The Respondent's case was heard and closed on 10th February 2022. The lower court adjourned the matter to 21st April 2022 for the hearing of the Appellant's case. On 21st April 2022, the hearing of the suit was adjourned because the Appellant's advocate was not ready. The matter was stood over to 26th May 2022 for hearing, when the matter was adjourned by consent of the parties, and stood over to 28th July 2022 for hearing. On 28th July 2022, the suit was once again adjourned, this time on the ground that the Appellant's advocate was sick. The matter was stood over to 22nd September 2022 for hearing, when it was adjourned again and stood over to 9th February 2023, on the ground that the trial magistrate was away on training. On 9th February 2023, only the Respondent's advocate attended court for the hearing. In the absence of the Appellant and his advocate, the Respondent's advocate asked the court to close the Appellant's case. The lower court noted that the matter had been pending for the defence hearing since February 2022. The court closed the Appellant's case and fixed the suit for judgment on 11th April 2023. The Appellant applied to set aside the order closing the Appellant's case and for an opportunity to present his case. The lower court dismissed the application on 5th October 2023 and fixed the suit for judgment on 30th November 2023.
7. In the judgment delivered on 30th November 2023, the lower court found that the Respondent had proved his case against the Appellant and the deceased on a balance of probabilities. The lower court declared the Respondent the lawful owner of the suit properties and ordered the eviction of the Appellant and the deceased from the suit properties. The lower court also issued an injunction restraining the Appellant and the deceased from having any dealings with the suit properties. The court also awarded the Respondent the costs of the suit. The lower court observed that the evidence adduced by the Respondent was not controverted since the Appellant did not adduce evidence. The



court observed further that the defence filed by the Appellant and the deceased was just a denial. The court stated that the Respondent proved that he purchased the suit properties from the Appellant and the deceased, and that the Respondent's ownership of the properties was confirmed by the Ministry of Lands. The court stated that it had a chance to peruse the Appellant's witness statement, which was expunged from the court record, and noted that it was similarly a mere denial. The court stated that although the Appellant and the deceased claimed that the Respondent acquired the suit properties through a corrupt scheme and fraudulently, there were no particulars of forgery, fraud, or misrepresentation pleaded against the Respondent. The court stated further that the Appellant and the deceased had, through their advocate's letters written before the filing of the lower court suit, admitted having entered into the agreements of sale of the suit properties with the Respondent. The court stated that in the said letters, the Appellant and the deceased acknowledged receiving the full purchase price, which they offered to refund.

8. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 29th December 2023, the Appellant challenged the lower court's judgment on the following grounds;
 1. That the learned Magistrate erred in law and fact by holding that the Appellant did not file any written statement, while there was on record a statement and further statement of the Appellant filed on 28th July 2022, and 25th May 2023, respectively.
 2. That the learned Magistrate erred in law and fact by holding that the Appellant's statements were expunged from the record, which holding was not supported by the proceedings.
 3. That the learned Magistrate erred in law and fact by failing to read and appreciate the court proceedings upon taking up the matter from Hon. S. O. Temu (SPM), who was on transfer.
 4. That the learned Magistrate erred in fact and in law by holding that the deceased, 1st Defendant, was not willing and able to defend the suit.
 5. That the learned Magistrate erred in fact and in law by allowing the Respondent's unsubstantiated claim that the Appellant and the deceased had trespassed upon the Respondent's land.
 6. That the learned Magistrate erred in law and in fact by denying the Appellant a chance to be heard despite filing all the requisite documents and being ready to proceed with the hearing.
 7. That the learned Magistrate misdirected herself in law and in fact by shifting the burden of proof to the Appellant.
 8. That the learned Magistrate erred in fact and in law by proceeding with the suit against the 1st Defendant in the suit, who was deceased.
 9. That the learned Magistrate erred in law and in fact by reviewing orders made by Hon. S. O. Temu (SPM) on 16th March 2023 without due process.
9. The Appellant prayed that the appeal be allowed, the judgment and decree of Hon. L. N. Kiniale (SPM) delivered on 30th November 2023 be set aside and substituted with an order dismissing the Respondent's suit with costs, an order admitting the statement and further statement of the Appellant filed on 28th July 2022 and 25th May 2023 respectively and an order of a retrial of the lower court suit.
10. The Appeal was heard by way of written submissions.



The Appellant's Submissions

11. The Appellant, in his submissions dated 10th March 2025, submitted that the duty of the court on a first appeal is well settled. In support of this Submission, the Appellant cited *Peters v. Sunday Post Ltd.* [1958] EA 424, *Timamy Issa Abdalla v. Swalleh Salim Imu & 3 Others* [2014] eKLR, *Mercy Kirito Mugeti v. Beatrice Nkatha Nyaga & 2 Others* [2013] eKLR, and *Mwangi v. Wambugu* [1984] KLR 453. The Appellant submitted that he filed a witness statement and a further witness statement on 28th July 2022 and 25th May 2023, respectively, together with a bundle of documents. The Appellant submitted that the proceedings did not indicate that the said documents were expunged from the court record. The Appellant submitted that the Appellant failed to tender evidence at the trial despite attempts to do so. The Appellant submitted that even where one party testifies and the other does not, the court still has a duty to scrutinise, evaluate, and ultimately determine the weight and veracity of the evidence presented. The Appellant submitted that the court must exercise independent judgment, considering all relevant factors to ensure that the outcome is just and equitable.
12. The Appellant submitted that the trial court failed to appreciate from the earlier proceedings before Hon. S. O. Temu (SPM) that the 1st Defendant in the lower court suit, who was also the Appellant's father, was deceased and unable to present his case. The Appellant submitted that the trial court still proceeded with the case and gave a judgment against the deceased, 1st Defendant, despite the Respondent's indication that he was not proceeding with the case against the deceased. The Appellant submitted that the lower court erred in its finding that the Respondent had proved his trespass claim. The Appellant submitted that there was no evidence that the Appellant and the deceased trespassed on the suit properties.

The Respondent's Submissions

13. The Respondent, in his submissions dated 14th March 2025, framed the following issues for determination;
 1. What was the effect of the Appellant's failure to defend the suit?
 2. Whether there was a valid contract between the parties.
 3. Who is the legal owner of the suit properties?
 4. Whether the Respondent has a good title.
14. On the 1st issue, the Respondent submitted that the Appellant and his deceased father were sued for breach of contract between them and the Respondent. The Respondent submitted that the Appellant and the deceased were served with all the pleadings and requisite documents, and they appointed an Advocate who entered an appearance on their behalf. The Respondent submitted that the Appellant and the deceased never defended the lower court suit. The Respondent submitted that the Appellant and the deceased filed witness statements and documents out of time without leave of court, and the same were expunged from the records. The Respondent submitted that despite having been granted several chances by the court to substitute his deceased father, the Appellant failed to do so.
15. On the second issue, the Respondent submitted that the parties signed agreements which indicated that they had the intention to create legal relations. The Respondent Submitted that the Appellant did not challenge the contract as being invalid, illegal, or as having been entered into under duress. The Respondent submitted that the validity of the contracts between the parties remained unchallenged.



16. On the third issue, the Respondent submitted that he proved that they entered into agreements of sale of the suit properties with the Appellant and the deceased, and that the Appellant acknowledged receipt of the consideration. The Respondent submitted that he was the lawful owner of the suit properties.
17. On the fourth issue, the Respondent cited section 26 (1) of the [Land Registration Act](#) 2012, and the case of [Elijah Makeri Nyangwa'ra v. Stephen Mungai Njuguna & Another](#) [2013] eKLR, and submitted that the area where the suit properties are situated was still under adjudication, and for that reason, titles had not been issued. The Respondent submitted, however, that the Ministry of Lands had issued a confirmation that he was the owner of the suit properties.

Analysis and Determination

18. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant, and the submissions by the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.
19. In [Gitobu Imanyara & 2 Others v. Attorney General](#) [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

“...this Court is not bound necessarily to accept the findings of fact by the court below and that 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. See *Selle and Another v Associated Motor Boat Company Limited and others* [1968] EA 123 and *Williamson Diamonds Ltd. v. Brown* [1970] EAL.
20. As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters -vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”
21. I am of the view that the Appellant’s nine grounds of appeal raise only three issues for determination by this court, namely, whether the lower court erred in its finding that the Respondent had proved his case against the Appellant and his deceased father, whether the appeal should be allowed, and if so, on what terms.
22. Order 24 Rule 4(1), (2) and (3) of the [Civil Procedure Rules](#) provides as follows;

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- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or



defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

23. The Respondent’s case was that he acquired Plot No. 6598 from the Appellant’s deceased father (the deceased), who was the 1st Defendant in the lower court suit, and Plot No. 8431 from the Appellant herein. This means that the Respondent’s claims against the Appellant and the deceased were separate and distinct, and could only be pursued against each of them. As mentioned earlier in the judgment, when the lower court suit came up for hearing on 19th November 2020, the Appellant’s advocate informed the court that the Appellant’s father, who was the 1st Defendant in the suit, had died. It is common ground that no steps were taken by the Appellant to substitute the deceased with his legal representative. On 13th May 2021, the Respondent’s Advocate informed the court that the Respondent wished to proceed with the suit only as against the 2nd Defendant, who is the Appellant herein. The hearing of the suit commenced on 10th February 2022, by which date, the Respondent’s suit against the deceased father of the Appellant had abated. In the circumstances, I agree with the Appellant that the lower court erred in entering judgment against the deceased father of the Appellant on 30th November 2023. The suit against the deceased had abated at the commencement of the hearing of the lower court suit. There was no claim by the Respondent pending against the deceased, which could be prosecuted, and in respect of which a judgment could be entered in his favour as against the deceased. A judgment entered in an abated suit against a deceased person is void and, as such, a nullity and is incapable of execution.

24. In *Macfoy v. United Africa Co. Ltd.* [1961] 3 All ER 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

25. As concerns the Respondent’s claim against the Appellant, the Respondent’s case was that he purchased from the Appellant a portion of land known as land parcel No. 389 at a consideration of Kshs. 41,000/- on 7th January 2011. At the time of the transaction, the area was still under adjudication, and as such, the land had not been registered. The Respondent contended that the parent land parcel No. 389 was subdivided, and the Appellant remained with the portion bearing the original parcel No. 389, while the portion thereof that was sold to the Respondent was given parcel No. 8431. The Respondent produced in evidence a copy of the agreement dated 7th January 2011 between the Respondent and the Appellant in respect of a portion of land parcel No. 389, a drawing showing land parcel No. 389 and the new land parcel No. 8431 after the subdivision, another drawing showing the extent of encroachment on land parcel No. 8431 to be 5m by 46m, a letter by the Land Adjudication and Settlement Officer dated 10th April 2019 confirming that the Respondent was the owner of Plot



No. 8431, and a letter dated 7th June 2019 by the Appellant’s advocates to the Respondent purporting to revoke the sale agreement that the Appellant had entered into with the Respondent for the purchase of a portion of land parcel No. 389 and offering to refund the purchase price of Kshs. 41,000/-. In the said letter dated 7th June 2019 by the Appellant’s advocates, the Appellant admitted the sale of Plot No. 8431 by the Appellant to the Respondent and the payment of the full purchase price. The Appellant also admitted that the Respondent had taken possession of the property sold to him and was cultivating the same. Unlike the deceased, who, through the same firm of advocates, also sought to revoke the agreement that the deceased entered into with the Respondent in respect of Plot No. 6598 because the Respondent was said to have taken more land than what was agreed, there was no such claim made by the Appellant against the Respondent concerning Plot No. 8431.

26. Due to the foregoing, I agree with the lower court that the Respondent proved that the Appellant sold to him Plot No. 8431 and that the Appellant had encroached on a portion of Plot No. 8431 measuring 5m by 46m. I do not agree with the Appellant that the lower court shifted the burden of proof to the Appellant. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

27. In *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

28. The burden of proof of the Respondent’s case rested with the Respondent throughout the trial. As mentioned earlier, the Respondent placed before the court evidence of purchase of Plot No. 8431, confirmation by the Appellant of the sale and payment of the purchase price, and confirmation by the Ministry of Lands of his title. After the Respondent had produced evidence in proof of his claim, the burden of proof shifted to the Appellant to prove his allegation that the agreement between him and the Respondent was unenforceable. It is common ground that the Appellant tendered no evidence at the trial in his defence. I agree with the lower court that the Appellant was given every opportunity to defend himself, which he never utilised. It is not correct, as claimed by the Appellant, that he was denied a chance to be heard. In the absence of any evidence by the Appellant in his defence, the evidence adduced by the Respondent was uncontroverted. The lower court’s finding that the Respondent had proved his case against the Appellant is unassailable.



Conclusion

29. In conclusion, the Appellant's appeal succeeds in part. As stated earlier, the judgment against the deceased, 1st Defendant, in the lower court was a nullity. The case against the Appellant, the 2nd Defendant in the lower court, was, however, proved and judgment properly entered against him. I will therefore vary the judgment of the lower court by setting aside the judgment against the deceased. The following are my final orders in the matter;

1. The judgment delivered by Hon. L. N. Kiniale SPM on 30th November 2023 in Nyando Senior Principal Magistrate's Court ELC No. 25 of 2019 is set aside as against the 1st Defendant, Jacob Omollo Opiyo.
2. The judgment shall not apply to the parcel of land known as Kisumu/Wawidhi B/6598, owned by 1st Defendant, Jacob Omollo Opiyo.
3. The judgment against the Appellant is confirmed.
4. Each party shall bear its costs of the appeal.

DELIVERED AND SIGNED AT KISUMU ON THIS 9TH DAY OF OCTOBER, 2025.

S. OKONG'O

JUDGE

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

Ms. Mwalo for the Appellant

Ms. Awuor for the Respondent

Ms. J.Omondi - Court Assistant

