



**Miyayi v Kisera (Being Sued as the Legal Representative of Pamela Achieng Kisera alias Pamela Owiti Kisera - Deceased) (Environment and Land Appeal E077 of 2024) [2025] KEELC 4564 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4564 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E077 OF 2024**

**E ASATI, J**

**JUNE 12, 2025**

**BETWEEN**

**PAUL OJUKI MIYAYI ..... APPELLANT**

**AND**

**JACK OMONDI KISERA (BEING SUED AS THE LEGAL REPRESENTATIVE OF PAMELA ACHIENG KISERA ALIAS PAMELA OWITI KISERA - DECEASED) ..... RESPONDENT**

*(Being an appeal from the whole of the judgement of the Chief Magistrate's court at Kisumu (Hon. D. O. Onyango) delivered on 2nd September 2024 in MCELC/131/2018)*

**JUDGMENT**

**Background**

1. A brief background to the appeal herein, as can be gathered from the record of appeal, is that the Appellant, Paul Ojuki Miyayi, was the Plaintiff in Kisumu CMC ELC Case No.131 of 2018 and the Respondent the Defendant. The record shows that the suit had initially been filed at the Environment and Land Court at Kisumu as Kisumu ELC Case No.232 of 2016 but was later transferred to the Chief Magistrate's court for hearing and disposal.
2. Vide the plaint dated 30<sup>th</sup> August, 2016, the Appellant had sued the Respondent over a parcel of land known as Kisumu/Wang'aya 1/2471 which the Plaintiff claimed to have purchased from one Ismael Owuoth Asiri which land the appellant further claimed was later transferred to him by the Administratrix of the estate of the seller and that he took possession thereof.
3. The Appellant's complaint in the suit was that the Defendant/Respondent had trespassed onto the suit land. The Appellant therefore sought for an order of permanent injunction restraining the Respondent and costs of the suit.



4. The record further shows that in response to the Appellant's claim the Respondent filed amended Defence and Counter-claim dated 6<sup>th</sup> December, 2022. Vide the Counterclaim, the Defendant sought for:
  - a. A declaration that L.R. No. Kisumu/Wang'aya 1/2471 belongs to the family of Owiti Mbeche (Deceased) and was fraudulently registered in the name of the Plaintiff.
  - b. A permanent injunction restraining the Plaintiff either by himself, servants, proxies and agents separately and jointly from selling, disposing, transferring or using as collateral all that piece or parcel of land known as No. Kisumu/Wang'aya 1/2471 other than transferring it to the Defendant.
  - c. The cost and interest of the suit.
  - d. Any other relief the court may deem fit and just to grant.
5. The suit was heard before the trial court which vide the judgement dated 2<sup>nd</sup> September, 2024 found that the registration of the suit land in favour of the Appellant was procured in an irregular and fraudulent manner. The court revoked and cancelled the said registration and made an order reverting the land to the name of Owiti Mbeche and awarded costs to the Respondent.

### **The Appeal**

6. Aggrieved by the judgement, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 18<sup>th</sup> September, 2024 seeking for orders that;
  - i. The appeal be allowed.
  - ii. The honourable court be pleased to set aside the judgement delivered on 2<sup>nd</sup> September, 2024 in Kisumu CM'S Court MCELC 131/2018 by Hon. D.O. Onyango and substitute it with a judgement allowing the plaint as prayed and dismissing the counter-claim with costs.
  - iii. The court award the costs of the appeal to the Appellant.
  - iv. Any other or further relief as the Honourable court may deem fit.

### **Submissions**

7. Vide directions taken on 29<sup>th</sup> January, 2025 the appeal was heard by way of written submissions.

### **Submissions for the Appellant**

8. Written submissions dated 7<sup>th</sup> February, 2025 were filed on behalf of the Appellant by the firm of Odhiambo Owino & Company Advocates. Counsel framed the issues for determination to be;
  - a. Who was the first registered owner of No. Kisumu/Wang'aya 1/2471
  - b. Did the Appellant acquire a good title?
  - c. Was the Respondent's counterclaim defective?
  - d. Was the Respondent's counter-claim time barred?
  - e. Was the court right in dismissing the Appellant's suit and allowing the counterclaim with costs?



9. Counsel submitted that the register in respect of the suit land was opened on 23<sup>rd</sup> October, 2003 and the land registered in the name of Ismael Owuoth Asiri as the first registered owner and title deed issued to him on 26<sup>th</sup> April, 2005.
10. That adjudication record produced as exhibit showed that the name of Owiti Mbeche had been cancelled and replaced with the name of Ismael Owuoth Asiri. That the Respondent produced a land sale agreement between Owiti Mbeche and Ismael Owuoth Asiri which shows that Owiti Mbeche sold the land to Ismael Owuoth Asiri.
11. That it appears that there was an objection filed whose outcome was that;

“Objection allowed. Plot be transferred to Ismael Owuoth Asiri. Name of Defendant to be cancelled.”
12. That the outcome was never challenged in a court of law. That the estate of Ismael Owuoth Asiri was not sued to defend the title. That the title given to Ismael Owuoth Asiri was never challenged, revoked or cancelled. That Owiti Mbeche never complained about registration of the suit land in the name of Ismael Owuoth Asiri.
13. That the root of the title and how it ended in the name of the Appellant was explained.
14. Counsel submitted that the *Land Adjudication Act* under which the title was processed had a window of solving adjudication disputes through the District Land Committees. Counsel relied on the provisions of sections 19, 20, 26 and 29 of the *Land Adjudication Act*.
15. That the dispute resolution channel provided by law was never exploited by Owiti Mbeche or his children who were the parents of the Respondent. That the Respondent should have exhausted the internal dispute resolution mechanisms set out in the *Land Adjudication Act* if he had an issue with the Adjudication records.
16. Counsel submitted that the Appellant was an innocent purchaser for value. He relied on the provisions of Section 26(i) of the *Limitation of Actions Act* and the case of *Katende -vs- Harida & Company Ltd* cited with approval in *Lawrence Mukiri -vs- Attorney General & 4 Others* [2013]eKLR.
17. Counsel submitted further that because Ismael Owuoth Asiri died before he transferred the sold land to the Appellant, his widows transferred the land to the Appellant. That this was not done to defeat justice or steal land from the Respondent’s family.
18. That particulars of fraud were not pleaded and proved.
19. That even if succession to the estate of Ismael Owuoth Asiri was not procedurally done, this by itself was not evidence that the land belong to Owiti Mbeche.
20. That as the family of Ismael Owuoth Asiri had no problem with the Appellant’s title, the court can let the Appellant’s title stand in light of the principles of equity.
21. Counsel submitted that the counterclaim by the Respondent was time barred. That the counterclaim was filed 10 years after discovering that the land was registered in the name of the Appellant.
22. Counsel relied on the case of *Joshua Ngatu -vs- Jane Mbinda & 3 Others* (2019)eKLR.
23. That the counterclaim was defective as it was not accompanied with a Verifying Affidavit as required under Order 7 Rule 5 of the Civil Procedure Rules 2010. Counsel relied on the Case of *Priska Onyango Ojuang & Another -vs- Henry Ojwang Nyabende* [2018]eKLR among others where it was held that



the filing of a Counterclaim without a Verifying Affidavit renders the Counterclaim defective and should be struck out. Counsel urged the court to allow the appeal.

### **Submissions for the Respondent**

24. Written submissions dated 3<sup>rd</sup> March, 2025 were filed on behalf of the Respondent by the firm of Akinyi & Company Advocates. In response to grounds 1 and 7 of appeal, Counsel reiterated the trial court's findings that the registration of the Appellant as the owner of the suit land No. No.Kisumu/Wang'aya 1/2471 was fraudulent because the adjudication records as contained in the Respondent's exhibit 7 showed that the suit land was originally registered in the name of Owiti Mbeche who died in 1977 but was later changed to the name of Ismael Owuoth Asiri in 1983 long after Owiti Mbeche had died under very unclear circumstances.
25. That there was no sale agreement between the Appellant and Ismael Owuoth Asiri produced and that this was contrary to the provisions of section 3 of the Law of Contract Act.
26. In respect of ground 2 of Appeal, Counsel reiterated the finding of the trial court that the suit land was not sold by Owiti Mbeche to Ismael Owuoth Asiri before registration because Owiti Mbeche died in the year 1977 whereas the purported sale agreement was made on 10<sup>th</sup> May, 1983 long after Owiti Mbeche had died intestate.
27. In respect of the ground 4 of the appeal, Counsel also reiterated the trial Magistrate's findings of elevating the adjudication record over the Land Registry as captured in the green card.
28. In respect of ground 10 and 11 of the appeal, Counsel submitted that the counterclaim was not time barred.
29. Counsel urged the court not to interfere with the findings and decision of the trial court but to dismiss the appeal.

### **Issues for Determination**

30. The substantive issue that presents itself for determination herein is whether or not the trial court erred in dismissing the appellant's suit and allowing the Respondent's Counterclaim.

### **Analysis and determination.**

31. This being a first appeal, this court reminds itself of the duty to re-examine and re-analyze the evidence placed before the trial court with a view to arrive at independent conclusion and thus determine whether the findings of the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the court held that:

“this being a first appeal, it is trite law that 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 a 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.”

32. The Appellant's claim was anchored on the title deed that he held in respect of the suit land. His case before the trial court was that he was the registered owner of the suit land having been so registered and title issued to him on 14<sup>th</sup> January, 2009 hence entitled to the protection of the law.



33. Under the provisions of sections 107 to 109 of the *evidence Act* which provide that:

Section 107(1)

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

the burden of proof rested with the appellant.

34. The appellant’s title to the suit land was questioned by the Respondent who vide the defence denied the appellant’s claim and vide the counterclaim pleaded that the suit land which belonged to the family of Owiti Mbeche, deceased, was fraudulently transferred and registered in favour of the Appellant. The Respondent pleaded the particulars of fraud on the part of the appellant as;

- a. Falsely removing Owiti Mbeche’s name from the land records and replacing it with his at the land registry.
- b. Colluding with the lands officers to defraud the family of Owiti Mbeche of their inheritance.
- c. Fraudulently registering himself as the proprietor of the suit land.
- d. Aiding in the preparation and acquisition of the title deed of the suit land.

35. When title to land is challenged, the holder thereof has an obligation to explain the root of the title and demonstrate that the same is a good or valid title.

36. The Court Appeal in the case of *Munyu Maina – versus – Hiram Gathiha Maina*, Civil Appeal number 239 of 2009 held as follows:

“We state that when a registered proprietor’s root of 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 from any encumbrances including any and all interests which would not be noted in the register.”

37. The elements for a good root of title were listed by the Court of Appeal in *Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School* (2023) eKLR as follows:

1. it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;



2. it must contain a recognizable description of the property; and
  3. it must not contain anything that casts any doubt on the title.
38. The appellant's explanation of the root of his title as contained in his pleadings and evidence was that he had purchased the land from the late Ismael Owuoth Asiri. That Ismael Owuoth Asiri died before he transferred the land to him but since he had paid the full purchase price, the deceased seller's widows namely; Monica Ooga Owuoth and Yunis Nyaduwa Asiri (deceased) transferred the land to him.
39. The Respondent challenged this account on the following grounds, firstly that the widows of Ismael Owuoth Asiri had no capacity to transfer the land that was registered in the name of Ismael Owuoth deceased to the appellant as they had not taken out Letter of Administration to the estate of the deceased.
40. It was not denied that Letter of Administration to the estate of Ismael Owuoth Asiri had not been taken out as at the time of transfer of the suit land in favour of the appellant. The fact that the widows were related to the deceased registered owner by reason of being his widows did not give them capacity to transact in the suit land. They could not pass a good title to the Appellant. In *Re: Estate of Barasa Kanenje Manyia (deceased) Succ Cause No. 263 of 2002 (2020) KWHC 1 (KLR)* it was held, inter alia, that the mere fact that a person is a surviving spouse or child of the deceased does not make him or her a personal representative of the deceased, that one needs to be appointed by the court as such. This is supported by the provisions of section. Section 2, 45, 79 and 82 of the *Law of Succession Act*.
41. The second ground upon which the Respondent challenged the Appellant's explanation is that there was no evidence that the Appellant bought land from Ismael Owuoth Asiri. No land sale agreement was produced by the Appellant to demonstrate that he bought the land from Ismael Owuoth Asiri.
42. It had been submitted that he was an innocent purchaser for value without notice of any defect in the title. The way to prove this is firstly by production of evidence of purchase. His list of documents dated 30<sup>th</sup> May, 2016 on page 12 of the record of appeal does not include a land sale agreement. Perusal of his evidence in chief in the proceedings confirms that the Appellant did not produce any land sale agreement to evidence his purchase of the suit land.
43. The third ground upon which the Respondent challenged the Appellant's title was that the said Ismael Owuoth did not own the suit land as it belonged to the Respondent's kin by the name Owiti Mbeche.
44. A copy of the adjudication record was produced to show the genesis of the suit land, the Adjudication record showed that the first name to be recorded as owner of the land was Owiti Mbeche. It further shows that that later the name Owiti Mbeche was cancelled and replaced with the name of Ismael Owuoth Asiri.
45. The Appellant stated that he was not aware that Ismael's name had been inserted on the adjudication record irregularly. He stated further that he did not know who owned the land before 2001 when he claimed to have bought the land.
46. PW2 on cross-examination stated that his father (Ismael Owuoth Asiri) had bought the land from Owiti Mbeche. There was no land sale agreement produced to show this. The adjudication record produced showed that the name of Owiti Mbeche was deleted and replaced with that of Ismael Owuoth Asiri as a result of objection proceedings. PW2 said nothing about the objection proceedings that led to cancellation of the name of Owiti Mbeche.
47. The adjudication record contained remarks that;



Objection allowed. Plot to be transferred is Ismael Owuoth Asiri. Name of Defendant to be cancelled”.

48. The remarks were indicated to have been submitted by Ismael Owuoth Asiri. The objection number was indicated to be 331 and the date 10<sup>th</sup> October, 1993. The remarks were not signed or stamped by the Adjudication Officer. The place for the Adjudication Officer to sign is blank. There is no indication that there was any input by Owiti Mbeche. The objection proceedings were not produced as exhibit to show that indeed such proceedings took place. According to the evidence placed on record by the Respondent, Owiti Mbeche died on 11<sup>th</sup> June, 1977 hence the remarks on the adjudication record, cancelling his name were made (on 10<sup>th</sup> October, 1993) long time after his death. PW2, the son of Ismael Owuoth Asiri stated on cross-examination that he never met Owiti Mbeche.
49. Upon keenly re-examining the evidence placed before the trial court, I find that the Appellant was not able to explain the root of his title.
50. The trial court was justified to dismiss his suit which was anchored on the title he held.
51. On the other hand, I find that the Respondent proved the counterclaim before the trial court.
52. In *Samson Wafula Wanyonyi v Ngugi Njuguna t/a Golden Eagle Bus Services* [2016] e KLR the court referred to the case of *Makube v Nyamoro*(1983) KLR 403 where the court held as follows;  

...A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong legal principles in reaching the findings he did...”
53. I find no reason in the present case to interfere with the findings and decision of the trial court.
54. The appeal lacks merit and is hereby dismissed. Costs of the appeal to the Respondent.  
Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 12<sup>TH</sup> DAY OF JUNE, 2025 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Odhambo for the Appellant

N/A for the Respondent.

