

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC APPEAL NO. E051 OF 2024

JACINTA ANYANGO AMIMO.....1ST
APPELLANT

JACOB ROBERT MALALA..... 2ND
APPELLANT

-VERSUS-

**DERWA OCHIENG MBAYI (Suing as a personal representative
of the estate of ELISHA OCHIENG OGOLA).....1ST**
RESPONDENT

MONICA OCHIENG OCHIENG.....2ND
RESPONDENT

**(Being an appeal from the judgment and decree of Hon.
Maureen Shimenga SRM given on 4th July 2024 in KISUMU
CMELC No. E052 of 2020)**

JUDGMENT

This appeal is challenging the judgment delivered by Hon. Maureen Shimenga (SRM) on 4th July 2024 in Kisumu CMCELC No. E052 of 2020 (hereinafter referred to as “the lower court suit”). The Respondents

brought the lower court suit against the Appellants through a plaint dated 11th December 2020. The Respondents averred that the 1st Respondent was the son of one Elisha Ochieng Ogola, deceased (hereinafter referred to only as “the deceased”), and the 2nd Respondent was the 1st Respondent’s stepmother. The Respondents averred that the 1st Respondent was the legal owner of all that parcel of land known as Title No.Kisumu/ Pandpieri/943 (hereinafter referred to as “the suit property”). The Respondents averred that the suit property was registered in the name of the 1st Respondent by his deceased father, Elisha Ochieng Ogola, during the land adjudication exercise in the area where it is situated. The Respondents averred that the 2nd Appellant fraudulently and illegally caused the suit property to be transferred to his name in 1985 through the cancellation of the name of the 1st Respondent in the adjudication record, and the replacement of the same with the name of the 2nd Appellant following a purported objection proceedings in which they never participated. The Respondents averred that the suit property was subsequently registered in the name of the 2nd Appellant in 1987, who thereafter sold and transferred the property to the 1st Appellant

on 24th February 2016. The Respondents averred that they discovered the Respondents' acts of fraud and illegal dealings with the suit property on 22nd December 2018 when they conducted a search at the land registry on the suit property. The Respondents averred that they were unable to enjoy possession and use of the suit property because the 1st Appellant had built a house thereon and had refused to vacate the same.

The Respondents prayed for judgment against the Appellants for:

- a) A declaration that the Respondents were the rightful owners of the suit property.
- b) A declaration that the new title deeds for the suit property were acquired fraudulently.
- c) General damages for fraud and trespass.
- d) An order for the eviction of the Appellants from the suit property.
- e) A permanent injunction restraining the Appellants, their agents, servants, assigns, relatives, or whomsoever claiming title or acting on their behalf from remaining on, occupying, continuing

to occupy, constructing a structure on, selling, trespassing, and or encroaching, and in any other manner interfering with the suit property.

f) Costs of this suit

g) Any other relief this court may deem fit to grant.

The Appellants filed a statement of defence and a counterclaim against the Respondents on 29th July 2021. In their defence, the Appellants denied all the allegations made against them in the plaint. The Appellants averred that the suit property was lawfully registered in their names, and prayed that the suit be dismissed with costs. In their counterclaim, the Appellants averred that sometime in June 2020, the Respondents illegally moved into the suit property and illegally built a structure thereon. The Appellants averred that the Respondents had continued with their occupation of the suit property notwithstanding demands that they remove the structures they had constructed thereon. The Appellants averred that the Respondents' conduct amounted to trespass, which entitled the Appellants to damages. The Appellants prayed for judgment against the Respondents for;

- a) An order directed at the Respondents, by themselves, their agents, servants, or any other person claiming through them to demolish and remove the illegally erected structures on the suit property, and in default, they be evicted therefrom and their developments thereon demolished.
- b) A permanent injunction restraining the Respondents by themselves, their agents, servants, or other persons claiming through them from trespassing on and/or remaining upon the suit property.
- c) Costs of this suit.

The Respondents filed a reply to the defence and defence to the counterclaim on 19th August 2021. The Respondents averred that they were the legal owners of the suit property, the property having been registered in the name of the 1st Respondent by his deceased father, Elisha Ochieng Ogola. The Respondents prayed that judgment be entered in their favour as prayed in the plaint and the Appellants' counterclaim be dismissed with costs.

The lower court heard the Respondents' claim and the Appellants' counterclaim and delivered a judgment on 4th July 2024 in favour of the Respondents against the Appellants. The lower court framed three issues for determination, namely, who was the owner of the suit property, whether the Respondents were entitled to the orders sought in the plaint, and whether the Appellants were entitled to the orders sought in their counterclaim. The lower court found that there was an objection to the adjudication of the suit property in favour of the 1st Respondent. The court held, however, that the objection proceedings were not conducted in accordance with the law. The lower court found that the 2nd Appellant failed to prove how he acquired the suit property. The lower court stated that although the 2nd Appellant had claimed that he purchased the suit property from the 1st Respondent, the 1st Respondent's National Identity Card number in the agreement of sale relied on by the 2nd Appellant was not that of the 1st Respondent. The court also took issue with the name of the 2nd Respondent, who was said to have witnessed the agreement of sale. The court stated that her name in the agreement was different from the name on her National Identity Card, and that her identity card

number in the agreement was also different from the number on her National Identity Card. The lower court held that the 2nd Appellant did not acquire the suit property lawfully, and as such, it was immaterial that the 1st Appellant was an innocent purchaser of the property from the 2nd Appellant. The lower court held that the Respondents had proved their case on a balance of probabilities, while the Appellants had failed to prove their counterclaim. The lower court entered judgment in favour of the Respondents as prayed in the plaint. The court declared that the Respondents were the rightful owners of the suit property and ordered the eviction of the Appellants therefrom. The court also issued a permanent injunction restraining the Appellants from having any dealings with the suit property. The Respondents were also awarded the costs of the suit.

The Appellants were aggrieved by the decision of the lower court and preferred the present appeal. In their memorandum of appeal dated 17th July 2024, the Appellants challenged the lower court's judgment on the following grounds:

1. The decision of the learned trial magistrate dismissing the suit was against the weight of the evidence on record and the judicial decisions of courts.
2. The learned trial magistrate erred in fact and in law in shifting the evidential burden of proof to the Appellants on the issue of minutes or objection proceedings.
3. The learned trial magistrate erred in fact and in law in holding that there was no proof of the decision that was arrived at during the objection to the Land Adjudication process.
4. That having held that there was an objection to the adjudication process, the trial court erred in law and fact in concluding that the same was not done as per the Land Adjudication Act.
5. The learned trial magistrate erred in fact and in law in holding that the 2nd Appellant failed to produce evidence to show how he acquired the suit property, and that the 2nd Appellant acquired the suit property illegally.
6. The trial court failed to hold that the 2nd Appellant had a good title to the suit property.

7. The trial court, while appreciating that the 1st Appellant bought the suit property as an innocent purchaser, failed to apply the doctrine of innocent purchaser for value without notice to the benefit of the 1st Appellant.
8. The learned trial magistrate erred in fact and in law in failing to find that the Respondents' suit violated Section 26 as read with Section 29 of the Land Adjudication Act.
9. The learned trial magistrate erred in fact and in law in failing to find that the Respondents' suit was time-barred and thus the trial court did not have the jurisdiction to hear and determine the suit.
10. The Learned trial magistrate erred in fact and in law in failing to find that the Appellants had proved their case in the counterclaim.

The Appellants prayed that the appeal be allowed and the judgment of the lower court be set aside, the Respondents' suit in the lower court be dismissed with costs, and the Appellants' counterclaim in the lower court be allowed with costs. The Appellants also prayed for the costs of the appeal.

The appeal was heard by way of written submissions.

The Appellants' submissions

The Appellants filed submissions dated 5th March 2025 in which they submitted on each ground of appeal separately. On ground one of appeal, the Appellants submitted that the trial court's determination was against the evidence on record. The Appellants submitted that the trial court dismissed the Appellants' counterclaim, whereas the Appellants had produced evidence before the court showing that they were the owners of the suit property and that they acquired the same lawfully. The Appellants submitted that the 2nd Appellant bought the suit property from the 1st Respondent in 1984 when the 1st Respondent was 24 years old. The Appellants submitted that during the land adjudication in 1985, the suit property was adjudicated in the name of the 1st Respondent. The Appellants submitted that the 2nd Appellant successfully lodged an objection and had his name entered in the adjudication record as the owner of the suit property. The Appellants submitted that the 2nd Appellant later sold the suit property to the 1st Appellant sometime in 2008. The Appellants

submitted that the trial court ignored all of the evidence adduced by the Appellants and erroneously proceeded to dismiss the counterclaim.

On the second ground of appeal, the Appellants submitted that the Respondents failed to adduce any evidence of the 1st Respondent having been in school in 1985. The Appellants submitted that it was the duty of the Respondents to adduce the evidence of not having been given an opportunity to be heard at the objection hearing. The Appellants submitted that the Respondents did not discharge the legal burden of proof under Section 107 of the Evidence Act, Chapter 80 Laws of Kenya. The Appellants submitted that the legal burden of proof was on the Respondents to bring before the court the proceedings or minutes of the objection proceedings to demonstrate that they were not heard, which burden they failed to discharge. The Appellants submitted that the Respondents did not produce any evidence showing that the 1st Respondent was in school at the time of the objection hearing. The Appellants cited Ahmed Mohammed Noor v. Abdi Aziz Osman [2019] eKLR in support of this submission. The Appellants submitted that the burden could not shift to them until the

Respondents had discharged their legal burden to prove through evidence any fraud on the part of the Appellants. The Appellants submitted that they produced sufficient evidence to demonstrate that there was an objection made which was allowed, and the suit property was registered in the name of the 2nd Appellant. The Appellants submitted that even though they had no legal or evidential burden of proof, they nevertheless discharged the burden.

On the third ground of appeal, the Appellants submitted that whereas the trial court stated that there was no proof of the decision that was arrived at during the objection proceedings, the Appellants provided enough proof that an objection was lodged and a determination made to give the 2nd Appellant the suit property. The Appellants submitted that the objection was conducted in accordance with the Land Adjudication Act, Chapter 284 Laws of Kenya. The Appellants submitted that the 2nd Appellant objected, made the payment for the objection, the objection was heard and determined, giving the 2nd Appellant the suit property. The Appellants submitted that the trial court could not hold that there was an objection and at the same time hold that the same was not done as per the Land Adjudication Act

solely due to the lack of evidence of minutes or proceedings when the evidence produced by the Appellants demonstrated the existence of the objection and its determination.

On ground four of appeal, the Appellants submitted that the 2nd Appellant provided enough evidence of his acquisition of the suit property at the adjudication stage. The Appellants submitted that the 2nd Appellant's objection was successful and the 1st Respondent's name was replaced with that of the 2nd Appellant in the adjudication record. The Appellants submitted that the Respondents who participated in the objection proceedings never appealed the decision, if they were aggrieved with the decision of the land adjudication officer. The Appellants submitted that they had a right to appeal to the Minister within sixty days from the date of the determination of the objection. The Appellant submitted that since the Respondents did not appeal the determination of the objection, the same was final as far as the issue of the ownership of the suit property was concerned.

The Appellants submitted that while the trial court appreciated the fact that the 1st Appellant was an innocent purchaser of the suit property, the trial court failed to apply the doctrine of innocent purchaser for value without notice to the benefit of the 1st Appellant. The Appellants submitted that the 1st Appellant purchased the suit property at Kshs. 400,000/- from the 2nd Appellant, who was the first registered owner of the property. The Appellants submitted that the 1st Appellant took possession of the suit property in 2008 when she paid the first installment to the 2nd Appellant and put up structures thereon. The Appellants submitted that no one came up to claim the suit property from the 1st Appellant until this suit was filed in 2020.

On ground five of appeal, the Appellants submitted that the 2nd Appellant lodged an objection under Section 26 of the Land Adjudication Act to the adjudication of the suit property in the name of the 1st Respondent, despite the 1st Respondent having sold the property to the 2nd Appellant. The Appellants submitted that the objection was heard and determined. The Appellants submitted that a party aggrieved with the determination of an objection under Section 26 of the Land Adjudication Act is required under Section 29 (1) of the

Land Adjudication Act to appeal within 60 days. The Appellants submitted that the Respondents did not appeal the determination and had come to court 35 years later, alleging procedural anomalies in the objection proceedings. The Appellants submitted that the Respondents' claim violated Section 29 of the Land Adjudication Act.

On ground six of appeal, the Appellants submitted that Section 29 (1) of the Land Adjudication Act provides that a party aggrieved with the determination under Section 26 of the Land Adjudication Act is required to appeal within 60 days. The Appellants submitted that the Respondents did not appeal the determination and had come to court 35 years later to challenge the same. The Appellants submitted that the Respondents' claim was time-barred.

On ground seven of appeal, the Appellants submitted that they raised a counterclaim against the Respondents over their trespass on the suit property. The Appellants submitted that the Respondents' occupation of the suit property was admitted by the 1st Respondent during cross-examination at the lower court. The Appellants submitted that the 1st Appellant was the legal owner of the suit

property and that the Respondents had no right or authority to occupy and use the same. The Appellants submitted that they were entitled to the orders sought in the counterclaim.

The Respondents' submissions

The Respondents filed submissions dated 2nd April 2025. The Respondents submitted that what the court had been called upon to determine was whether the judgment of the trial court should be set aside. The Respondents submitted that, as the first appellate court, this court is enjoined to review the evidence on record, evaluate it, and reach its own conclusion on the matter. In support of this submission, the Respondents cited Selle & Another v. Associated Motor Boat Co. Ltd. & Others [1986] E.A 123. The Respondents cited Sections 107(1), (2), and 109 of the Evidence Act and submitted that the Appellants failed to produce the minutes of the objection proceedings as proof that an objection was filed, heard, and determined by the adjudication officer. The Respondents submitted that there was no evidence that due process was followed in the alleged objection proceedings, which led to the cancellation of the

name of the 1st Respondent in the adjudication record and replacement thereof with the name of the 2nd Appellant.

The Respondents submitted that the burden of proof of the counterclaim lay on the Appellants and, as such, the Appellants could not shift the same to the Respondents. The Respondents submitted that the burden of proof lay on the Appellants to prove the objection proceedings, which they failed to do. On the issue of the alleged sale agreement between the 1st Respondent and the 2nd Appellant, the Respondents submitted that there was evidence of fraud on the face of the said agreement. The Respondents submitted that the identity card number in the agreement against the 1st Respondent's name did not belong to the 1st Respondent. The Respondents submitted further that the name of the 2nd Respondent, who was alleged to have witnessed the agreement, was indicated in the agreement as Monica Ochieng Mbayi instead of Monica Achieng Ochieng, and the identity card number against her name did not belong to her. The Respondents submitted that all these discrepancies pointed to the falsification of documents.

On the issue of the 1st Appellant being a bona fide purchaser for value without notice, the Respondents submitted that if the 1st Appellant had conducted sufficient inquiry into the 2nd Appellant's title, she would have discovered the anomalies highlighted above. The Respondents submitted that the 1st Appellant ought to have enquired into the history behind the 2nd Appellant's title. In support of this submission, the Respondents relied on Kukan & Another (Administrator of the Estate of the late Jason Kukan Lila) v. Kibutha (Civil Appeal 339 of 2018) (2023) KECA 742 (KLR).

The Respondents submitted that they proved their case to the required standard. The Respondents submitted that they demonstrated that the cancellation of the name of the 1st Respondent and replacement of the same with that of the 2nd Appellant in the adjudication register was erroneous, and that there was no agreement of sale of the suit property between the 2nd Appellant and the 1st Respondent. On the issue of the limitation period, the Respondents submitted that they were not aware that the suit property was registered in the name of the Appellants fraudulently until 2018. The Respondents submitted that for the purposes of

limitation of action, time started to run in 2018 when they discovered the fraud. In support of this submission, the Respondents relied on Justus Tureti Obare v. Peter Koipetai Nengiso [2014] e KLR and Nzoia Sugar Co. Ltd v. Kenya Ports Authority [1990] e KLR.

Analysis and Determination

I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the memorandum of appeal filed by the Appellants, and the submissions by the parties. This being a first appeal, this court has to reconsider and reevaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.

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] E.A.L.”

In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212, the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

From the grounds of appeal, I am of the view that the main issue arising for determination in this appeal is whether the lower court erred in its finding that the Respondents had proved their case against the Appellants, while the Appellants’ counterclaim was not proved.

In Maingi Mutisya Nzioka v. Mbuki Kisavi [2014] eKLR, the court stated that:

“The issue of a first registration being immunized from enquiry and rectification, even in the face of patent fraud, in which the registered proprietor is implicated, is a strange and peculiar one. It seems to us highly doubtful that a perpetrator of fraud can in conscience be permitted by statute to keep the fruits of his fraud and wave a statutory protection as a cloak and shield no matter what salutary public policy considerations, if any, may have informed the provision. As the matter was not urged before us in that precise formulation, however, we shall not further delve into it. It is enough that the learned Judge proceeded on the face value statutory bar to impeachment of a first registration.”

The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). It is common ground that the 2nd Appellant was the first registered owner of the suit property. The 2nd Appellant was registered as the owner of the suit property on a first registration on 2nd January 1987. From the decision of the Court of Appeal cited above, there is an indication that there is no absolute immunity to those owning land on a first registration under the

Registered Land Act if the title is challenged on account of a patent fraud in which the registered proprietor is implicated. As mentioned earlier in the judgment, the Respondents challenged the Appellants' titles to the suit property on the ground that the 2nd Appellant, who transferred the suit property to the 1st Appellant, was registered as the owner of the suit property fraudulently, and as such, he had no valid title in the property which he could transfer to the 1st Appellant.

The Appellants, on the other hand, claimed that they held valid titles in the suit property and that the Respondents were trespassers thereon. The issue that I need to determine in the appeal is whether the parties proved their respective cases.

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.”

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.”

The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“[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.

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law..."

In Miller v. Minister of Pensions [1947] 2 All ER 372, Lord Denning J. stated that:

"Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties'

explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.

The Respondents claimed that the suit property was adjudicated in favour of the 1st Respondent during the land adjudication in Kisumu Pandpieri Adjudication Section in the 1980s. The Respondents claimed that the 2nd Appellant fraudulently caused the 1st Respondent’s name to be cancelled from the adjudication register and replaced by the name of the 2nd Appellant, who was subsequently registered as the owner of the suit property on 2nd January 1987. The burden of proof of the alleged fraud, which the Respondents claimed to have discovered in December 2018, 31 years after the registration of the 2nd Appellant as the owner of the suit property, was on the Respondents.

The term fraud is defined in Black’s Law Dictionary, 9th Edition, as follows:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, and intentional. As applied

to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

In Vijay Morjaria v. Nansingh Madhusingh Darbar & another [2000]eKLR, the court (Tunoi JA) stated as follows:

“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.”

In Railal Gordhanbhai Patel v. Lalji Makanji [1957] EA 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In their particulars of fraud, the Respondents alleged that the 2nd Appellant illegally acquired the title deed for the suit property, transferred the same to the 1st Appellant, and connived with the land registrar to register the suit property first in the name of the 2nd Appellant and subsequently in the name of the 1st Appellant. What evidence did the Respondents place before the lower court in proof of the alleged fraud? The Respondents told the lower court that the suit property was owned by the 1st Respondent’s deceased father and that during the land adjudication, the 1st Respondent’s father, who was the 2nd Respondent’s husband, caused the 1st Respondent to be recorded in the adjudication record as the owner of the suit property. The Respondents contended that they knew all along that the suit property was owned by them and that it was not until 2018 that they discovered that the suit property was registered in the name of the 2nd Appellant as the first registered owner, and that the 2nd Appellant had transferred the property to the 1st Appellant. The Respondents

averred that the suit property was purportedly registered in the name of the 2nd Appellant following successful objection proceedings during the land adjudication process in 1985. The Respondents contended that they were strangers to the alleged objection and did not participate in the same. The Respondents contended that the 1st Respondent was still in school when the purported objection proceedings took place and could not have been a party to the same. The Respondents contended that the purported proceedings were a fraudulent scheme to dispossess them of the suit property, which was registered in the name of the 1st Respondent to hold in trust for the family. The Respondents produced a copy of the extract of the register for the suit property, a copy of a letter dated 21st February 2019 from the District Land Registrar, Kisumu to the Director of Land Adjudication & Settlement, Nairobi, requesting “copies of the duplicate Adjudication Records” in relation to the suit property, a copy of the adjudication record with the name of the 2nd Appellant with some notes at the back, a copy of a form with entries regarding the outcome of the objection proceedings relating to the suit property, a copy of adjudication sketch diagram showing the

cancellation of the name of the 1st Respondent in the diagram and the insertion of the name of the 2nd Appellant, and copies of photographs said to have been taken on the suit property.

The Respondents placed before the court, evidence showing that the suit property was adjudicated in favour of the 1st Respondent, and that the name of the 1st Respondent was subsequently cancelled from the adjudication record and replaced with that of the 2nd Appellant following an objection by the 2nd Appellant. I am satisfied that the Respondents placed evidence before the lower court in proof of their fraud allegations against the 2nd Appellant, which, if not rebutted by the Appellants, would have been sufficient to prove their case.

The evidential burden of proof shifted to the Appellants to prove that the 2nd Appellant acquired the suit property lawfully, and as such held a valid title which he passed to the 1st Appellant. The 2nd Appellant admitted that the suit property was adjudicated in favour of the 1st Appellant. The 2nd Appellant averred that he acquired the suit property lawfully from the 1st Respondent during the land adjudication process. The 2nd Appellant averred that he purchased the suit

property from the 1st Respondent on 4th January 1984 at a consideration of Kshs. 21,000/-. The 2nd Appellant averred that the 1st Respondent and he entered into a written agreement of sale before the Assistant Chief Nyalenda Sub-Location, and in addition to the Assistant Chief, the execution of the agreement was also witnessed by the 2nd Respondent. The 2nd Appellant averred that following that agreement for sale, he filed an objection with the Land Adjudication Officer to the registration of the suit property in the name of the 1st Respondent. The 2nd Appellant contended that the Respondents participated in the objection proceedings, and the objection was allowed. The 2nd Appellant contended that it was after the objection was allowed that the name of the 1st Respondent was cancelled from the adjudication record and replaced with the name of the 2nd Appellant. The 2nd Appellant averred that he was thereafter registered as the owner of the suit property in 1987. The 2nd Appellant averred that he took possession of the suit property and started putting up some structure thereon before he sold the property to the 1st Appellant in 2008 and subsequently transferred the property to her in 2016. The 2nd Appellant averred that for all the years that the suit

property was in his name and even after he transferred the same to the 1st Appellant, no one made any claim of ownership over the property until 2020 when the Respondents brought their lower court suit. The Respondents produced as exhibits, a copy of the agreement of sale dated 4th January 1984, a copy of a receipt dated 11th January 1985 for the fees paid for late objection against the 1st Respondent, copies of the adjudication and objection records, which were also produced by the Respondents, a copy of the Land Certificate in the name of the 2nd Appellant dated 20th November 1987, a copy of the extract of the register for the suit property, a copy of the agreement of sale between the Appellants dated 26th May 2008, a copy of the transfer of land between the Appellants dated 27th October 2015, a copy of the title deed dated 2nd March 2016 in the name of the 1st Appellant and a copy of certificate of official search dated 22nd February 2021.

I have carefully analysed the evidence presented to the lower court by the parties. It is my finding that the Respondents did not prove their case of fraud against the Appellants to the required standard. The Appellants satisfactorily answered the evidence of the alleged

fraud adduced by the Respondents. I am satisfied that the 2nd Appellant purchased the suit property from the 1st Respondent on 4th January 1984, and it was following that sale that the 2nd Appellant filed an objection to the adjudication of the property in the name of the 1st Respondent. The lower court found as a fact that the objection was indeed lodged by the 2nd Appellant. I do not think that the objection could have taken the normal route of elaborate proceedings by the Land Adjudication Officer since it was based on a sale agreement duly executed by the parties. The documents from the Director of Land Adjudication and Settlement produced in evidence by both parties proved on a balance of probabilities that the 2nd Appellant lodged an objection which was considered by the Land Adjudication Officer and allowed. It was on the basis of that successful objection that the name of the 1st Respondent was cancelled from the adjudication record and replaced by that of the 2nd Appellant. It is common ground that the Respondents did not occupy the suit property from 1985 until 2020, when they filed the lower court suit. The evidence adduced by the 2nd Appellant that he took possession of the suit property soon after the property was sold to

him and erected a structure thereon without any objection from anyone was not rebutted. The evidence adduced by the 1st Appellant that she also took possession of the suit property after the same was sold to her by the 2nd Appellant and erected structures thereon without any objection was also not rebutted. In fact, the Respondents admitted in their plaint that the 1st Appellant had structures on the suit property. I agree with the Appellants that the Respondents' claim over the suit property, which was brought 35 years after adjudication and 33 years after the suit property was registered in the name of the 2nd Appellant, was stale and an afterthought. How was the 2nd Appellant supposed to produce proceedings of the objection proceedings conducted 35 years ago? The court is concerned that the 1st Respondent could go to the extent of denying his identity card number in the agreement of sale, so as to repossess the land that he sold three decades ago. Curiously, the 1st Respondent did not produce a copy of his identity card in evidence. He did not even mention it in his witness statement, like the other witness who testified in support of his case. The same thing happened with the 2nd Respondent. The issue of the identity card number in the agreement of sale not being

that of the 1st Respondent was raised for the first time in the Respondents' submissions. Without the Identity Cards of the Respondents being produced in court, there was no way in which the lower court could say that the numbers of the identity cards in the agreement of sale produced in evidence by the 2nd Appellant did not belong to the respondents. In my view, nothing arose from the 1st Respondent's alleged student status. The 1st Respondent was 24 years old in 1984 and could enter into a valid agreement of sale.

It is my finding that the Respondents did not prove their case against the Appellants. It is my finding that the 2nd Appellant acquired the suit property lawfully and had a valid title when he sold and transferred the property to the 1st Appellant. In the circumstances, the 1st Appellant acquired a valid title in the suit property. It is common ground that the 1st Appellant was in possession of the suit property when the Respondents invaded the same and erected structures thereon. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others*

[2006] eKLR, it was held that title to land carries with it legal possession. Halsbury's Laws of England 3rd edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another’s land, or sends filth or any injurious substance which has been collected by him on his own land to another’s land.”

It is my finding that the Appellants proved that the Respondents had trespassed on the suit property. It is my finding that the lower court erred in its finding that the Respondents proved their case against the Appellants and that the Appellants' case was not proved.

Before concluding this judgment, I wish to deal with a procedural issue that was raised by the Appellants before the lower court but was not determined by the court. The 1st Respondent brought this suit as a legal representative of the estate of his deceased father, Elisha

Ochieng Ogola. This fact is expressly set out in the heading of the plaint. The 2nd Respondent, on the other hand, was joined in the suit in her own personal capacity, maybe as the widow of the deceased, Elisha Ochieng Ogola, and the 1st Respondent's stepmother. In paragraph 5 of the plaint, the Respondents stated as follows:

“5. The 1st Plaintiff is the son of Elisha Ochieng Ogola-deceased and he brings this action as the legal representatives and/or administrator of the said deceased's estate.” Emphasis added.

The 1st Respondent left no doubt in the foregoing paragraph that he was suing in a representative capacity, as the administrator of the estate of Elisha Ochieng Ogola, deceased, and not in his personal capacity, as Derwa Ochieng Mbayi. The 1st Respondent could not, therefore, seek any relief in his personal capacity but could only do so on behalf of the estate of Elisha Ochieng Ogola, deceased.

Order 4 Rule 4 of the Civil Procedure Rules provides as follows:

“4. Where the plaintiff sues in a representative capacity the plaint shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaint shall

state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.”

Order 3 Rule 7 of the Civil Procedure Rules provides as follows:

“7. No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”

As correctly submitted by the Appellants before the lower court, Elisha Ochieng Ogola, deceased, had no interest of any nature in the suit property. The property was neither adjudicated in his favour nor registered in his name at any time. The suit by his estate for the recovery of the suit property was therefore misconceived. The same position applied to the 2nd Respondent. The 2nd Respondent had no interest of any nature in the suit property. The lower court erred in the circumstances in declaring that the 1st Respondent, in his capacity as the administrator of Elisha Ochieng Ogola, deceased, and the 2nd Respondent, as the widow of the deceased, were the rightful owners

of the suit property, and should have possession of the same. The 1st Respondent did not prove that the deceased had any interest in the suit property. The 2nd Respondent similarly did not prove that she had any interest in the property. There was therefore no basis at all for entering judgment in the Respondents' favour. It follows from the foregoing that whether the claim was brought by the 1st Respondent in his personal capacity as it was treated by the lower court or in his capacity as the administrator of the estate of Elisha Ochieng Ogola, deceased, the claim was not proved and should have been dismissed.

Conclusion

In conclusion, I find merit in the Appellants' appeal. The appeal is allowed. The judgment and orders made by the lower court on 4th July 2024 in favour of the Respondents are set aside and substituted with an order dismissing the Respondents' suit in the lower court, and entering judgment for the Appellants as prayed in their counterclaim filed in the lower court dated 27th July 2021. The Appellants shall have the costs of the appeal.

Delivered and signed at Kisumu on this 30th day of October 2025

S. OKONG'O
JUDGE

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

Mr. Okoth for the Appellants

Mr. Awuonda for the Respondents

Ms. Anne-Court Assistant

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