

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCLA NO. E015 OF 2024

GEORGE OCHOLA.....1ST APPELLANT

DORCAS AYOMA MBALANYA.....2ND APPELLANT

VERSUS

JOSEPH ANJICHI ABURILI (Suing as the legal

Administrator of the estate of the late

OBED ABURILI OTENYO, deceased..... RESPONDENT

(Being an appeal from the judgement of honourable J. A. Agonda, Principal Magistrate Vihiga, delivered 28th June 2024 in VIHIGA MCELC NO 18 OF 2019)

JUDGEMENT

Introduction

A brief background of the appeal herein is that the appellants herein were the Defendants in VIHIGA MCELC NO. 18 of 2019 (the suit) wherein they had been sued by the Respondent in his capacity as the administrator of the estate of the late Obed Aburili Otenyo, deceased.

The record of appeal dated 6th March 2025 shows that vide the plaint dated 24th April, 2019, the Respondent claimed that the deceased was the bona fide registered owner of all that parcel of land known as WEST BUNYORE/EBUSIKHALE/2253 (herein referred to as the suit land). That on or about 14th March 2019, the 1st appellant unlawfully transferred the suit land to the 2nd appellant who threatened to

evict the respondent's tenants from the suit land. The respondent therefore sought for a declaration that transfer of the suit land from the name of the deceased was illegal and null, an order compelling the Land Registrar Vihiga to revert registration of the suit land to the name of the deceased, an order of permanent injunction and costs of the suit.

The record shows that the appellants contested the respondent's claim by filing Statement of Defence dated 3rd May 2022 vide which they denied the claim.

The suit was heard before the trial court which vide the judgement delivered on 28th June 2024 found that the respondent had proved his claim on a balance of probabilities and entered judgement for the respondent against the appellants as prayed in the plaint.

The Appeal

Aggrieved by the in judgement, the appellants preferred the present appeal vide the Memorandum of Appeal dated 15th July 2024 on the grounds that : -

1. The learned trial Magistrate erred in law and fact in holding that the first appellant took the law into his hands and filed application for confirmation of grant in Maseno without the consent of his co-administrator when there was evidence that upon the respondent being issued with grant of Letters of Administration on 14th September, 2007, the respondent refused to apply for confirmation of the grant thereby necessitating the Ist appellant to

apply for fresh grant which was issued on 20th January, 2011 and confirmed on 16th February, 2011 and consequently the respondent was not a co-administrator with the 1st appellant in Maseno Principal Magistrate's Court Succession Cause number 39 of 2005.

2. The learned trial Magistrate erred in law and fact in holding that the 1st appellant obtained the certificate of confirmation of grant unlawfully when there was abundant evidence that the 1st appellant together with one JOEL ABURILI had made an application in Maseno Principal Magistrate Court Succession Cause Number 39 of 2005 that reasonable provisions be made for them as dependents of the late Obed Aburili Otenyo which application was allowed and L.R.No.s WEST BUNYORE/EBUSIKHALE/203 and 2253 were given to the 1st appellant defendant and his brother JOEL ABURILI and that upon refusal by the respondent to apply for confirmation of grant and transfer L.R NO.WEST BUNYORE/EBUSIKHALE/203 and 2253 in the name of the 1st appellant and one JOEL ABURILI, the first appellant was issued with a fresh grant and certificate of confirmation of grant which gave effect to the order of court on entitlement of the 1st appellant and the brother JOEL ABURILI.
3. The learned trial Magistrate erred in law and fact in holding that the 2nd appellant became the owner of L.R. No. WEST BUNYORE/EBUSIKHALE/2253 by obtaining a fraudulent registration when the estate of the deceased had not been distributed among the dependents when there was uncontroverted evidence that on 1st April, 2011 one George Aburili and Joel Aburili were entered on the register of L.R No.WEST BUNYORE/EBUSIKHALE/2253 to share the parcel

equally amongst themselves pursuant to order of court in Maseno Senior Resident Magistrate's Court Succession Cause Number 39 of 2005.

4. The learned trial Magistrate erred in law and fact in failing to note that on 1st April, 2011 when the 1st appellant registered certificate of confirmation of grant issued in Maseno Succession Cause Number 39 of 2005, the said grant had not been revoked and consequently the registration was not fraudulent.
5. The learned trial Magistrate erred in law and fact in holding that the respondent was the legitimate owner of L.R No. WEST BUNYORE /EBUSIKHALE/2253 when there was abundant evidence that L.RNO.WEST BUNYORE/2253 was owned by OBED ABURILI OTENYO and that the 1st appellant was a beneficiary of the same having been declared a dependent to the estate and entitled to L.R. No. WEST BUNYORE /EBUSIKHALE/2253 together with his brother JOEL NGALA ABURILI.
6. The learned trial Magistrate erred in law and fact in failing to appreciate that when Kisumu High Court ordered that the 1st appellant and the respondent be co-administrators, L.RNO.WEST BUNYORE/EBUSIKHALE/2253 was already registered in the name of the 1st appellant and that the title deed issued to the 1st appellant was not cancelled and that the distribution by the High Court at Kisumu was a re-confirmation of what the Maseno Court had ordered.
7. The learned trial Magistrate erred in law and fact in ordering cancellation of title to L.R No. WEST BUNYORE/EBUSIKHALE/2253 from the name of the 2nd appellant on allegation of fraud in the absence of proof of fraud on the part of the 2nd appellant.

The appellants seek for orders that the appeal be allowed, the judgement and orders of the learned trial Magistrate in Vihiga PMC ELC No. 18 of 2019 be set aside, the plaintiff's suit be dismissed with costs and that that the appellant be awarded costs of the appeal.

Submissions

Pursuant to directions given on 10th June 2025 the appeal was heard by way of written submissions.

Submissions by the appellants

Vide the written submissions dated 7th July 2025 filed by the firm of Bogonko, Otanga & Co. Advocates on behalf of the appellants, the appellants compressed the seven grounds of appeal into listed in the Memorandum of appeal into two grounds.

The first ground is that the learned trial Magistrate erred in law and fact in holding that the transfer of L.R No. WEST BUNYORE/EBUSIKHALE/2253 from the name of the deceased using a revoked grant was illegal and unlawful and that the same should be cancelled and the suit property revert to the deceased.

Counsel submitted that the respondent was not a joint administrator to the estate of the late Obed Aburili Otenyo deceased as at 1st April, 2011 when the 1st appellant was registered as proprietor of L.R No. WEST BUNYORE/EBUSIKHALE/2253.

That an application filed in the suit seeking an order of temporary injunction restraining the 2nd appellant from selling, transferring, disposing entering onto, evicting the Respondents tenants or in any other way whatsoever interfering with land parcel No. WEST BUNYORE/EBUSIKHALE/2253 was dismissed and that in an appeal arising from the dismissal the Judge held inter alia that the grant from Maseno Court which the 1st appellant used to transfer the suit property to the 2nd appellant had not been revoked when the 1st Respondent transferred it to his name and that the High court never cancelled the title which was then in the name of the 2nd appellant.

Counsel submitted that during the pendency of the Succession Cause Number Kisumu HC Succession Cause No. 77 of 2013, the registration of the 1st appellant as proprietor of L.R No. WEST BUNYORE/EBUSIKHALE/2253 was not cancelled at all. That after the Judge had heard the parties in Kisumu Succession Cause number 77 of 2013 he issued orders that did not alter the distribution earlier on made in Maseno court namely; that GEORGE OCHOLA ABURILI and JOEL NGALA ABURILI to share L.R NO. WEST BUNYORE/EBUSIKHALE/203 and

2253 equally and JOSEPH ACHICH ABURILI to get WEST BUNYORE/EBUSIKHALE/ 203 and 2287.

That therefore the learned trial Magistrate erred in law and in fact in holding that the 1st appellant took the law into his hands and filed application for confirmation in Maseno without the consent of his co- administrator.

That at the time the 1st appellant got registered as proprietor of L.R WEST BUNYORE/EBUSIKHALE/2253 he had a valid grant of Letters of Administration and that it was an error on the part of the learned Magistrate to hold that the registration was pursuant to a revoked Grant. That on 1/4/20211 when the 1st appellant registered certificate of confirmation of grant issued in Maseno Succ. Cause No. 39 of 2005 the said grant had not been revoked and that therefore the registration was not fraudulent.

The 2nd Consolidated ground of appeal is that the learned trial Magistrate erred in law and or fact in ordering cancellation of L.R WEST BUNYORE/EBUSIKHALE/2253 from the name of the 2nd appellant on allegation of fraud in the absence of proof of fraud.

In support of this ground, it was submitted that from the evidence, on or about 1st March 2018 GEORGE OCHOLA ABURILI and JOEL NGALA ABURILI offered to sell and the 2nd appellant accepted to buy L.R WEST

BUNYORE/EBUSIKHALE/2253 at which time the land was registered in the name of George Ochola Aburili having been issued with title on 3rd May 2011. That the agreed consideration was a sum of Ksh 4,000,000/= of which a sum of Ksh 400,000/= was paid as a commitment fees and the balance of Ksh 3,600,000/= was to await determination of the dispute between the 1st appellant and the respondent. That the dispute was resolved vide KSM Succ Cause No. 77 of 2013 as follows; -

- a) George Ochola Aburili and Joel Ngala Aburili were to share equally L.R No.s WEST BUNYORE/EBUSIKHALE/203 and 2253
- b) Joseph Ochola Aburili to be registered as owner of L.R No.s WEST BUNYORE/EBUSIKHALE/ 204 and 2287

That on 15th March 2019 the 2nd appellant paid to 1st appellant and Joel Ngala Aburili a sum of ksh 3,600,000/= being the balance of agreed consideration and was issued with title deed.

Relying on the provisions of section 80 of the land Registration Act and the case of Job Mariithi Waweru –vs- Patrick Mbatia (2008) eKLR Counsel submitted that the respondent never led any evidence in support of his averment that as at 1st April, 2011 the respondent was a co-administrator and that his signature was required or

that the 2nd appellant did cause the omission, fraud or mistake or substantially contributed to it by her act, neglect or default.

That the 2nd appellant is an innocent purchaser for value and in possession and that her title is protected by section 80(2) of the land Registration Act. That it was an error on the part of the learned trial Magistrate to order cancellation of title to L.R No. WEST BUNYORE/EBUSIKHALE/2253 on allegations of fraud.

That the respondent has absolutely no known interest in the suit land distributed to the 1st appellant and Joel Aburili who decided to dispose of the land to the 2nd appellant. Counsel urged the court to allow the appeal with costs to the appellant.

Submission for the respondent.

Written submission dated 23rd July 2025 were filed by the firm of Mukabi & Co Advocates on behalf of the respondent. Counsel submitted that the trial court was legally right to hold that the transfer of L.R No. WEST BUNYORE/EBUSIKHALE/2253 from the name of the deceased using a revoked grant was illegal and unlawful and that the same should be cancelled and the suit property revert to the deceased.

That the 1st appellant was registered on 1st April, 2011 as administrator of the estate of Obed Aburili Otenyo vide Succ Cause No. 39 of 2025 Maseno Court.

That on 1st April, 2011 the 1st appellant together with Joel Aburili were the registered owners using the certificate of confirmation of grant dated 16th February 2011. That the 1st appellant was aware that there was succession cause No. 77 of 2013 in the High Court of Kenya at Kisumu whereby the respondent had an application to revoke the Grant of Letters of Administration Intestate issued with Maseno Court.

That the High court at Kisumu vide its ruling delivered on 4th July 2013 set aside the orders of the court issued on 21st November 2011 together with all the consequential orders and the 1st appellant and respondent were made joint administrators of the estate of the late Obed Aburili Otenyo. That in essence the High Court set aside the proceedings in Succ Cause No. 39 of 2005 at Maseno court. That the ruling of the High Court at Kisumu that distributed the estate of the deceased should be adhered to.

That fraud and illegality in the way the appellants acquired registration of the suit land was pleaded, particularized and proved.

On the second ground of appeal Counsel submitted that the title of the 2nd appellant was not clean. That the 2nd appellant did not produce the alleged agreement dated 1st March 2018 and that the only document produced was an acknowledgement. That the 2nd appellant did not produce Letter of Consent from the Land Control

Board to prove that indeed the transaction was supported by legal instrument of transfer.

Relying on the provisions of section 6 of the Land Control Act and the case of Hiram Ngaithe Githire -vs- Wanjiku Munge (1979) eKLR counsel submitted that the provisions of the Land Control Act are of an imperative nature to the extent that its absence the transaction is unlawful.

That the 2nd appellant failed to conduct due diligence. That the proprietary interest in the suit land passed to the Respondent after the conclusion of the succession cause No. 77 of 2013.

Counsel relied on the case of Munyu Maina -vs Hiram Gathiha Maina (2013) eKLR where it was held, inter alia, that when a registered proprietor's root of title is under challenge the registered proprietor must go beyond the legality of how he acquired the title and show that the acquisition was legal, formal and free from encumbrances including any and all extent which could not be noted in the register.

Counsel also relied on section 26 of the Land Registration Act and the case of Arthi Highway Developers Limited –vs- West End Butchery Limited & 6 others (2015) eKLR and submitted that the appeal has no merit and urged the court to dismiss it with costs.

Analysis and determination

This being a first appeal, this court is obligated to re-analyse and reconsider the evidence placed before the trial court and draw its own conclusions. In Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123 it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated that

“an appeal to this 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

The respondent’s complaint in the suit was that the 1st appellant fraudulently transferred the suit land to the 2nd appellant yet the land belonged to Obed Aburili Otenyo deceased in respect of whose estate succession had not been concluded.

The respondent had pleaded in the plaint that the deceased was the bona fide registered owner of all that parcel of land known as WEST BUNYORE/EBUSIKHALE/2253 and that on 14th March 2019 the 1st appellant had fraudulently caused the suit land to be transferred to the 2nd appellant. The

particulars of fraud pleaded were that the 1st appellant transferred the suit property without consent and signature of the respondent who was a co-administrator of the estate, transferred the property using a grant that had been revoked, failing to obtain the necessary valid consent to transfer the suit property and unlawfully attempting to evict the respondent's tenants from the suit property.

The burden of proof to prove the particulars of fraud lay with the respondent.

Perusal of the proceedings shows that the respondent in his testimony stated on cross-examination that the title which the 1st appellant had obtained was never revoked and that the 1st appellant and Ngala Aburili were still to get parcel No. 203 and the suit land after the conclusion of Succ. Cause No. 77 of 2013.

I have also perused the testimony of one Immaculate Onyuka, Court Administrator Kisumu Law Courts who testified that the distribution of the estate done in Succession Cause No. 77 of 2013 was that Joseph Anjichi Aburili was allocated land title numbers WEST BUNYORE/EBUSIKHALE/ 204 and 2287 to receive whole share, while the 1st appellant and Joel Aburili were allocated parcel numbers WEST BUNYORE/EBUSIKHALE/203 and the suit land herein to be shared equally among themselves.

It was the evidence of the said Immaculate Onyuka that the certificate of confirmation of Grant in the High court Case (H.C Succ cause No. 77 of 2013) was in agreement with the distribution of the estate in the Maseno matter.

I have perused the certificate of confirmation of Grant in Maseno PMC Succ Cause No. 39 of 2005 in respect of the estate of Obed Aburili Otenyo and in favour of the 1st appellant. It was dated 16th February 2011. It distributed the estate of the deceased as follows; -

“Joseph Anjichi to get the whole of WEST BUNYORE/EBUSIKHALE/204 and WEST BUNYORE/EBUSIKHALE/2267.

George Ochola Aburili and Joel aburili to get WEST BUNYORE/EBUSIKHALE/2253 and WEST BUNYORE/EBUSIKHALE/203 to share equally among them.”

From the two certificates of Confirmation of Grant, the suit land belongs to the 1st appellant and Joel Aburili after distribution. Both the Maseno Court and the High Court at Kisumu passed the proprietary interest in the suit land to the 1st appellant and Joel Aburili. The respondent was allocated different parcels of land. It is not clear what interest the respondent is pursuing. If indeed he has tenants on the suit land then he is trespassing onto land allocated to other parties. It was submitted on behalf of the respondent that the ruling of the High court should be adhered to.

Adhering to the ruling means that the suit land remains the property of the appellants and not the respondent.

Further, I have perused the copy of register (green card) in respect of the suit land and it shows that the suit land was transmitted from the deceased to the 1st appellant on 1/4/2011 as Administrator of the estate pursuant to Succ Cause No. 39 of 2005 PM's Court at Maseno and on the same date it was transferred to the 1st appellant and Joel Aburili to share equally among themselves pursuant to the Succ Cause No. 39 of 2005 Maseno PM's Court.

The evidence placed before the trial court therefore was that the transmission of the land from the name of the deceased into the name of the 1st appellant was pursuant to a certificate of confirmation of Grant issued by the PM's Court at Maseno and which was valid as at the time of transmission.

Both the court at Maseno and the High court distributed the suit land to the 1st appellant and Joel Aburili hence the respondent having no stake on the suit land, had no locus standi to sue for cancellation of title. By the year 2019 when the respondent filed the suit, certificate of confirmation of Grant in Kisumu Succ. cause No. 77 of 2013 had already been issued. It was issued on 18th April, 2018. The respondent did not challenge the certificate of confirmation of grant.

The 1st appellant and Joel Aburili having been allocated the land had the right to do with it as they desired, including selling it to the 2nd appellant. No evidence of fraud in the transaction between the 2nd appellant and the 1st appellant and Joel Aburili was exhibited.

I find that the trial court erred in making an order for cancellation of the title held by the 2nd appellant on allegation of fraud.

Conclusion

In conclusion the court finds that the appeal herein has merit and hereby allow it in the following terms;

- a) the Judgement of the trial court dated 28th June 2024 is hereby set aside and substituted with a judgement dismissing the suit with costs to the appellants.
- b) Costs of the appeal are awarded to the appellants.

Judgement dated and signed at Vihiga and delivered virtually this 30th day of October, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen - Court Assistant.

No appearance for the Appellants.

Mukabi for the Respondent.