

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC LA NO. E015 OF 2024

ANTONY ONYANGO ADEMBA

APPELLANT

= VERSUS =

KENNETH ODHIAMBO RESPONDENT

(Being an appeal from the ruling and order in **BUSIA CMCC ELC NO E067** of **2021** delivered by **HON P. A. OLENGO (SENIOR PRINCIPAL MAGISTRATE)** on 20th August 2024.

R U L I N G

- KENNETH ODHIAMBO NALWENGE** (the Respondent herein) was the plaintiff in **BUSIA CHIEF MAGISTRATE'S COURT ELC CASE NO E067** which he approached in his capacity as the legal representative of the Estate of the late **RAFAIL ADEMBA ONGAYO**. He impleaded **ANTONY ONYANGO ADEMBA** (the Appellant herein) and **WILIMINA NECHESA** vide his plaint dated 19th May 2021 in which he claimed that he was at all material times the grandson of the late **RAFAIL ADEMBA ONGAYO** who was the registered proprietor of the suit land being parcel **NO**

MARACHI/BUJUMBA/444. It was his case that the Appellant and **WILIMINA NECHESA** had fraudulently subdivided the said land and created land parcels **NO MARACHI/BUJUMBA/1264, 1265** and **1266** which they then transferred to themselves and one **AUGUSTINE ONYURA MAJUANDA.**

2. The Appellant and **WILIMINA NECHESA** filed a joint defence denying that the Respondent was a grandson of the **RAFAIL ADEMBA ONGAYO.** They further denied that the said **RAFAIL ADEMBA ONGAYO** was the registered proprietor of the land parcel **NO MARACHI/BUJUMBA/444** and all the allegations of fraud pleaded against them. They added that infact sub-division of the original land parcel **NO MARACHI/BUJUMBA/444** and the transmission of the resultant titles was pursuant to an order issued in **SUCCESSION CAUSE NO 107** of **1989.**

3. The suit was heard by **HON P.A. OLENGO SENIOR PRINCIPAL MAGISTRATE** who vide a judgment delivered on 11th September 2023 found that the Respondent had not proved the allegations of fraud against the Appellant and that the process of sub-division of the land parcel **NO**

MARACHI/BUJUMBA/444 and the transmission of the resultant portions being **MARACHI/BUJUMBA/1264, 1265** and **1266** was proper. The trial magistrate therefore dismissed the Respondent's suit but made no orders as to costs. However, a certificate of costs was drawn.

4. The Respondent moved back to that Court vide his Notice of Motion dated 6th February 2024 seeking the following remedies:

a) **Spent**

b) **That the Honourable Court be pleased to issue an order of temporary injunction and/or stay of execution of the decree and judgment made by the Honourable Court pending the hearing and determination of the application.**

c) **That the proceeding for execution and/or Notice to show cause why the Respondent should not be committed to civil jail for non-payment of the taxed costs scheduled for 21st February 2024 be held in abeyance.**

d) **That the Honourable Court do hold up (sic) the judgment made has an error apparent on the**

face of the record and it should be varied set aside and/or reviewed.

e) Costs.

5. The gist of the Motion which was based on the grounds set out therein and supported by the Respondent's affidavit was that there was an error on the face of the record as there was no provision for costs and therefore the assessment of costs was void ab initio. That the Respondent was not informed about the date of the judgment and therefore the execution proceedings were a nullity.
6. The Appellant filed Grounds in support of prayer (d) of the Motion dated 6th February 2023 (the Motion is actually dated 6th February 2024) and raised the following grounds:
 - 1) The Court by error or inadvertence failed to award costs of the suit to the Appellant.
 - 2) Costs follow the event unless the Court orders otherwise.
 - 3) The judgment should be reviewed to the extent that costs of the suit be awarded to the Appellant and the certificate of costs up-held.

It is not clear how the trial magistrate directed that the Motion be canvassed. All I can see are the submissions by the Respondent dated 29th April 2024 but none from the Appellant. Nonetheless, a ruling on the Motion was delivered by **HON P. A. OLENGO (SENIOR PRINCIPAL MAGISTRATE)** on 20th August 2024 allowing it but awarding costs to the 2nd defendant.

7. The Appellant is aggrieved by that ruling and has moved to this Court vide his memorandum of appeal dated 30th August 2024. In faulting the trial magistrate's ruling, the Appellant has raised the following six (6) grounds of appeal:

- 1) The learned magistrate erred in law and fact in re-writing his judgment without any jurisdiction to do so.
- 2) The learned magistrate erred in law and fact in purporting to sit on appeal against his own judgment.
- 3) The learned magistrate erred in law and fact in raising and determining issues that had not been raised before him in the application for review.

- 4) The learned magistrate erred in law and fact in making orders that were incapable of implementation and/or execution.
- 5) The learned magistrate erred in law and in fact in purporting to reverse the Appellants registration of the suit land obtained in a probate Court while sitting as and Environment and Land Court.
- 6) The learned magistrate erred in law and fact in arriving at a decision that flew in the face of established judicial procedure and practice.

The Appellant therefore prays that this appeal be allowed with costs and that:

a) The ruling and order of 20th August 2024 to the extent that it affects L.R NO MARACHI/BUJUMBA/1266 be set aside and the judgment dismissing the Respondent's suit be restored.

b) The Appellant be awarded costs of the suit before the trial Court.

8. The Respondent filed two documents headed **“NOTICE OF CROSS-APPEAL.”** The first is dated 29th May 2025 and the

second 9th May 2025. The first one raises only 3 issues while the second one raises 7 issues. For purposes of this appeal, I shall rely on the **“NOTICE OF CROSS-APPEAL”** dated 9th May 2025.

9. To begin with, and while there is no specific provision as to how a party seeking to file a cross-appeal must approach the court. I have no doubt that the proper procedure would be through a **“MEMORANDUM OF APPEAL”** and not **“A NOTICE OF CROSS-APPEAL.”** This Notice is clearly incompetent and is for striking out.
10. Nonetheless, and in keeping with the enabling provisions of **Article 159 2(d)** of the **Constitution** as well as **Sections 1A, 1B, 3** and **3A** of the **Civil Procedure Act**, I will address it. In any event, the Appellant has not complained of any prejudice caused to him.
11. The Respondent raised the following seven (7) grounds in the said **“NOTICE OF CROSS-APPEAL”**:
 - 1) The Learned Magistrate erred in law and in fact in failing to revert **MARACHI/BUJUMBA/1265** back to **JOSEPH OTIENO** as **ANTONY ADEMBA** had fraudulently obtained **MARACHI/BUJUMBA/1265**

and 1266 through correction of name which was not correct.

2) The Learned Magistrate erred in law and fact in failing to see that **ANTONY ONYANGO ADEMBA** and **WILIMINA NECHESA** fraudulently sub-divided the land parcel that **JOSEPH OTIENO** got from land parcel **NO MARACHI/BUJUMBA/444** through succession cause **NO 107** of **1989**. The certificate of confirmation of Grant was issued on 12th September 1991 and **AUGUSTINE ONYURA** got 1.75 acres while **JOSEPH OTIENO** got the remainder out of land parcel **NO MARACHI/BUJUMBA/444/**

3) The Learned Magistrate erred in law and fact by saying that the 2nd Respondent got the land after purchasing it from the Administrator of the Estate of the deceased who got it through succession process in Court yet in the certificate of confirmation of Grant issued on 12th September 1991, the Administrator **MARISIANA AKELLO ONGAYO** was

to hold in trust for **JOSEPH OTIENO**. She therefore had no land to sell to the 2nd Respondent.

- 4) The Learned Magistrate erred in law and in fact in failing to revert back land parcel **NO MARACHI/BUJUMBA/1265, 1266** to **JOSEPH OTIENO** so that the succession can be done instead he reverted one parcel **NO MARACHI/BUJUMBA/1266** and this has stopped the Land Registrar from performing his duty.
- 5) The Learned Magistrate erred in law and in fact to say that the 2nd Respondent's purported land sale agreement was not attested by witness, signed by Administrator and even the buyer as required by law, it is only the seller in the said agreement.
- 6) The Learned Magistrate erred in law and fact when he found that **WILIMINA NECHESA** was wrongly sued and yet she was registered on the land for **JOSEPH OTIENO** deceased.
- 7) The Learned Magistrate erred in law and fact when he found that **WILIMINA NECHESA** should be paid costs and yet she obtained land from a thief.

Reasons wherefore the 1st Respondent prays that this cross-appeal be allowed and the trial Court ruling be set aside and costs of the appeal:

a) The ruling and order of 20th August 2024 to the extent that both **MARACHI/BUJUMBA/1265** and **MARACHI/BUJUMBA/1266** do revert to **JOSEPH OTIENO**.

b) The 1st Respondent be allowed costs of the appeal and trial Court.

12. The Court directed that the Appeal and the Notice of Cross-Appeal be canvassed by way of written submissions. The same have been filed both by **MR OMONDI** instructed by the firm of **F. OMONDI & COMPANY ADVOCATES** for the Appellant and by **MR OUMA** instructed by the firm of **B. M. OUMA & COMPANY ADVOCATES** for the Respondent.

13. I have considered the appeal, the Notice of Cross-Appeal, the record and the submissions by counsel.

14. The then East African Court of Appeal set out the duty of a first appellate Court in the case of **OKENO -V- R 1972 E.A. 32** as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya - v- R 1957 E.A 336 and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw it’s own conclusions. (Shantilal M. Buwala - v- R 1957 E.A. 570). It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make it’s own findings and draw it’s own conclusions. Only then can it decide whether the magistrates findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witness. See Peters -v- Sunday Post 1958 E.A 424.”

See also the decisions in the cases of **SELLE & ANOTHER - V- ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123, ABOK JAMES ODERA & ASSOCIATES -V- JOHN**

**PATRICK MACHIRA T/A MACHIRA & COMPANY
ADVOCATES 2013 KECA 208 KLR, KENYA PORTS
AUTHORITY -V- KUSTON (KENYA) LTD 2009 2 EA 212
and also MWANASOKONI -V- KENYA BUS SERVICES
1985 KLR 931.**

1. NOTICE OF CROSS-APPEAL BY THE RESPONDENT

15. Although filed as a cross-appeal against the ruling delivered on 20th August 2024, the grounds set out therein clearly show that it is an appeal against the judgment of the trial Court delivered on 11th September 2003. For instance in paragraphs one (1) and two (2) of the memorandum of cross-appeal, it is stated that:

1: “The Learned Magistrate erred in law and in fact in failing to revert MARACHI/BUJUMBA/1265 back to JOSEPH OTIENO as ANTONY ONYANGO ADEMBA had fraudulently obtained MARACHI/BUJUMBA/1265 and 1265 through correction of names which was not correct.”

2: “The Learned Magistrate erred in law and in fact in failing to see that ANTONY ONYANGO ADEMBA and WILIMINA NECHESA fraudulently sub-divided the land parcel that JOSEPH OTIENO got from land parcel NO MARACHI/BUJUMBA/444 through SUCCESSION CAUSE NO 197 of 1989. The certificate of confirmation of Grant was issued on 12th September 1991 and AUGUSTINE ONYURA got 1.75 acres while JOSEPH OTIENO got the remainder out of land parcel NO MARACHI/BUJUMBA/444.”

16. A cross-appeal is defined in **BLACK’S LAW DICTIONARY 10TH EDITION** as:

“an appeal by the appellee, usu heard at the same time as the Appellant’s appeal.”

The Appellant’s appeal is the one dated 30th August 2024 and lodged herein on the same day. It was the appeal admitted on 19th March 2025 and was against the ruling delivered on 20th August 2024. It was not an appeal against the judgment delivered on 11th September 2003 and yet the

cross-appeal, as I have already demonstrated above, is clearly crafted as being against the said judgment yet it is headed as a cross-appeal against the ruling delivered on 20th August 2024.

17. The cross-appeal is clearly for dismissal.

2. APPEAL AGAINST THE RULING DELIVERED ON 20TH AUGUST 2024:

18. This appeal can easily be determined on the basis of grounds raised in paragraphs 1, 2 and 3 of the memorandum of appeal.

19. The Motion that gave rise to the impugned ruling was the Respondent's application dated 6th February 2024 seeking the main remedy that the judgment delivered on 9th September 2023 be reviewed, varied or set aside on the ground that there is an error on the face of the record and in particular, that there was no provision made for costs and therefore, the certificate of costs issued is a nullity and further, that the Respondent had not been informed about the date of the delivery of the judgment which he only

discovered when the execution process with regard to the taxed costs was in progress.

20. On the issue of costs, the trial magistrate in the first paragraph of the impugned ruling rightly found that there was an error on the face of the record with regard to costs. This is how the trial magistrate addressed himself at pages 1 and 2 of the impugned ruling (pages 114 and 115 of the record of appeal):

“I have looked at the judgment and I agree that the same has an error. The first error is that the judgment did not provide for costs and further that the judgment did not deal with the case against the 1st defendant but only dealt with the case of the 2nd defendant. I think the error was during typing and the Court did not realize the error before delivery.”

With regard to the error on costs, there can be no doubt that it was clearly an error on the face of the record. In the judgment, the trial Court dismissed the Respondent’s suit against the Appellant but made no order as to costs. The Respondent’s suit against the Appellant was premised on

allegations of fraud in the manner in which the original land parcel **NO MARACHI/BUJUMBA/444** had been sub-divided to create the land parcels **NO MARACHI BUJUMBA/1264, 1265** and **1266**. In dismissing that claim against the Appellant, the trial Court said the following in the last paragraph of the judgment dated 11th September 2023:

“I agree with the defendant’s that the plaintiff did not prove the allegations or particulars of fraud against the defendants. The process of transmission of the deceased estate was procedural since the Grant was confirmed and the 2nd defendant was later sold the land after she was appointed as administrator. The suit therefore fails and the same is hereby dismissed.”

It is clear from the last sentence in that judgment that no provision was made for costs. Costs follow the event unless the Court, for reasons to be provided, decided otherwise. The failure to award the Appellant costs of the dismissed suit was clearly an error on the face of the record and which the trial Court, even on it’s own motion, could correct by

invoking the provision of **Sections 99** and **100** of the **Civil Procedure Act**. Therefore, with regard to the issue of costs, the trial magistrate was entitled to correct that error in the ruling delivered on 20th August 2024.

21. However, the trial magistrate went further in that ruling and said the following at page 2 of the impugned ruling (page 115 of the record):

“It is true that the 2nd defendant got the land after purchasing the same for the Administration of the Estate of the deceased who got it through succession process in Court. There can’t be a fraud through the Court process. However, regarding the case of the 1st defendant, he did not buy it from the administrator but got it through a correction of laws (sic). But the plaintiff insists that the said Joseph Otieno is his father and not Anthony Onyango Ademba. This needs further and thorough interrogation. On my part, I did not get satisfied that Joseph Otieno and Anthony Onyango Ademba is one and the same person. It is therefore my view that the

land parcel **NO MARACHI/BUJUMBA/1266** to revert back to the name of **Joseph Otieno**. The plaintiff can thereafter file a succession case in respect of estate of **Joseph Onyango Ademba** and **Anthony Onyango Ademba** can make objections in that case to prove that he is also called **Joseph Otieno** and that the said piece of land belongs to him. The judgment is therefore reviewed with an order that the land Parcel NO L.R **MARACHI/BUJUMBA/1266** to revert to the name of **Joseph Otieno** and that the 2nd defendant to have the costs of the suit as she was wrongly sued.”

The import of all the above is that having previously dismissed the suit against the Appellant, albeit without an order for costs, vide the judgment dated 11th September 2023, the trial magistrate on a frolic of his own sat on an appeal against his own judgment and reviewed it in favour of the Respondent vide the impugned ruling the subject of this appeal. That is not the purview of an application for review under **Order 45 of the Civil Procedure Rules**. In the case of **NATIONAL BANK OF KENYA LTD -V- NDUNGU NJAU**

C.A. CIVIL APPEAL NO 211 of 1996 (1997 eKLR) and which has been cited by counsel for the Appellant, the Court stated as follows in the penultimate and last paragraph of its ruling:

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

In the case of **FREDRICK OTIENO OUTA -V- JARED ODOYO OKELLO & 3 OTHERS, SUPREME COURT PETITION NO 6 of 2014 [2017 KESC 25 KLR]** the **SUPREME COURT** while considering the scope of it's

jurisdiction to review its own judgments, rulings and orders, reviewed cases from various jurisdictions and cited with approval the following passage from the Nigerian case of **ALHAJI MUHAMMADU MAIGARI DINGYADI & ANOTHER - V- INDEPENDENT NATIONAL ELECTORAL COMMISSION & OTHERS SUIT NO SC 32 of 2010** where it was held that:

“Any other error outside this saving clause would not be permitted by the slip Rule since the judgment would then have represented what the Court decided and any alteration or variation would be a variation of the substantive part of the judgment. The inherent power of the Court can only be invoked if there is a missing link in the main body of the judgment and steps must be taken to fill the gaps as clear as the ambiguity in the interest of justice. The exercise of this power should not be used to review or rehear the case or alter the rights and obligations of the parties under the Ruling or Order made.”

Emphasis mine.

In his submissions, counsel for the Respondent cited the decisions of the **SUPREME COURT OF INDIA** in the case of **GANPAT -V- STATE OF HARYANA 2010 - 12 SCC 59.4.**

where it was held that:

“There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to it’s own conclusion. The first appellate Court can also review the trial Court’s conclusion with respect to both facts and law.

It is the duty of first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed. When the trial Court has breached provisions of the Constitution as ignored statutory provisions or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material or has ignored material documents, or in any manner compromised the accused’s rights to a

fair or prejudiced the accused etc. the appellate Court is competent to reverse the decision of the trial Court depending on the materials in question.”

Counsel then goes on to add that:

“We submit therefore that the Court sitting as the first appellate Court has jurisdiction to re-evaluate and subject the evidence to fresh scrutiny to read its own conclusion.”

Earlier on in his submissions, counsel for the Respondent had referred at length to the evidence adduced before the trial Court by the witnesses including how the land parcel **NO MARACHI/BUJUMBA/1265** was acquired through a succession process and that **MARISAINA AKELLO** was to hold it in trust for **JOSEPH OTIENO** etc.

22. With regard to the issues of costs, this Court has already found that it was an error on the face of the record and which clearly called for review.

23. However, counsel has clearly got it wrong in his interpretation of the decision of the **SUPREME COURT of INDIA** in the case of **GANPAT -V- STATE OF HARYANA**

(supra). That case involved the duty of the appellate Court reviewing the trial Court's decision and see whether it is grounded on both law and the facts. Much like the test set out in **OKENO -V- R 1972 E.A. 32** and the other cases which I set out at the commencement of this ruling. The circumstances in the Motion before me and which is the subject of this ruling are quite different. The trial magistrate in this case took it upon himself to play the role of an appellate Court and purported to re-consider the evidence afresh and proceeded to re-write his judgment as I have already cited in paragraph 21 of this Judgment. That was clearly beyond the jurisdiction of a Court which is considering an application for review of a judgment or order. The trial magistrate usurped the jurisdiction of an appellate Court and thereby fall into error. This Court must therefore intervene and set aside that ruling.

24. The Respondent's Motion dated 6th February 2024 and which gave rise to the impugned ruling had also sought an Order for setting aside the judgment dated 11th September 2023. That judgment was not an ex parte judgment which could be amenable to setting aside. And as is now clear, the trial

magistrate while purporting to exercise review jurisdiction went overboard.

25. The up-shot of all the above is that having considered the cross-appeal, the appeal, the record and submissions, by counsel, the Court makes the following disposal orders:

- 1) The Notice of cross-appeal is dismissed with no order as to costs.**
- 2) The appeal is allowed and the ruling and order of 20th August 2024 to the extent that it affects the land parcel NO MARACHI/BUJUMBA/1266 is set aside and the judgment dismissing the Respondent suit is restored.**
- 3) The Appellant shall have costs of the appeal and of the suit before the trial Court.**

BOAZ N. OLAO

JUDGE

19TH NOVEMBER 2025

Ruling dated, signed and delivered by way of electronic mail on this 19th day of November 2025 with notice to the parties.

Right of Appeal.

BOAZ N. OLAO

JUDGE

19TH NOVEMBER 2025