



**Agutu & another (Suing as administrators of the Estate of Andrea Abonyo
Owoth - Deceased) v Oduor & 3 others (Civil Appeal E024 of 2023)
[2025] KEELC 8299 (KLR) (27 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 8299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
CIVIL APPEAL E024 OF 2023
AE DENA, J
NOVEMBER 27, 2025**

BETWEEN

**RICHARD ALOO AGUTU 1ST APPELLANT
CHARLES ATIENO AGUTU 2ND APPELLANT
SUING AS ADMINISTRATORS OF THE ESTATE OF ANDREA ABONYO
OWOTH - DECEASED**

AND

**ISMAEL OMONDI ODUOR 1ST RESPONDENT
FRANCIS EDWARD OKOTH (SUING AS ADMINISTRATORS TO THE
ESTATE OF JULIUS ODUOR BENSON - DECEASED) 2ND RESPONDENT
THE LAND REGISTRAR, SIAYA 3RD RESPONDENT
THE HON ATTORNEY GENERAL 4TH RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate's Court at Siaya
Hon. B.B. Limo(PM), delivered on 22/11/2023 in Siaya ELC case no. E044 of 2023)*

JUDGMENT

1. The appellants were the plaintiffs in the trial court where they commenced a suit by way of a Plaint subsequently amended on 12th July 2023, in which they prayed for the following orders;
 - a. An order directing the 3rd defendant, the Siaya Land Registrar, to rectify the land register in respect of all that property known as L.R NO. SIAYA/NYAJUOK/510 measuring 3.0 Hectares by cancelling any transfer and/or all transfers and/or any sub division or sub divisions effected to the 1st and 2nd defendants' deceased father's name one JULIUS ODUOR ENSON in



respect of the suit property after the 28TH AUGUST, 1998 and reinstating the property in the plaintiffs' deceased fathers' names one ANDREA ABONYO OWOTH to allow for succession to be conducted by the deceased's beneficiary/beneficiaries to the estate;

- b. A declaration that the plaintiffs' deceased father one ANDREA ABONYO OWOTH is the rightful registered owner of all that land known as L.R NO. SIAYA/NYAJUOK/510 measuring 3.0 Hectares having been registered in the suit land on 28TH AUGUST, 1990 during adjudication period with issuance of a title deed on 28TH AUGUST, 1998 and that all subsequent transfer (s) and transaction (s) of whatever nature after 28TH AUGUST, 1998 is/are nullity and void ab initio;
 - c. An order of eviction and demolition of illegal structures within the suit land known as L.R NO. SIAYA/NYAJUOK/510 measuring 3.0 Hectares to issue against the 1st and 2nd defendants, their agents/employees/agents, relatives and/or families.
 - d. An order of permanent injunction to issue against the 1st and 2nd defendants restraining them, themselves, their servants, employees, agents, families and or relatives from entering, transferring, alienating, selling or purporting to sale and or transfer and or charge and or in any other way interfering with and or intermeddling with any part of the suit land known as L.R NO. SIAYA/NYAJUOK/510 measuring 3.0 Hectares; and
 - e. Compensation for illegal acquisition of land and/or mesne profits, trespass, construction of structure/structures in the suit property (ies) and loss of user.
 - f. That the Officer Commanding Station of Police Station of jurisdiction to oversee the implementation of the issued Court Orders.
 - g. Costs of the suit be borne by the 1st and 2nd defendants.
 - h. Any other relief which this honourable Court deems fit and just to grant.
2. The 1st and 2nd defendants responded to the above suit by a Defence and Counterclaim dated 20/7/2023 where they averred that their father was the legal owner of the said L.R NO. SIAYA/NYAJUOK/510 and not the plaintiffs father as claimed. That the parcel was a gift to their father Julius Oduor Enson by Andrea Abonyo Owuoth who had no family. Thereafter Andrea initiated the transfer by signing the requisite documents at the lands office. That after the transfer in a bid to obtain title Julius Oduor Enson discovered the title was lost and he had the same gazzeted for a replacement. They denied that the plaintiffs were the biological children or step children of Andrea Abonyo but asserted they were the children of Alexander Agutu Miduri & Joyce Amolo Agutu. They also claimed as the family of Julius Oduor Enson they have lived and farmed on the parcel for over 31 years.
3. In their counterclaim the 1st and 2nd defendants prayed for judgement against the plaintiffs for; -
- a. A declaration that the plaintiffs are neither children, step children of the deceased Andrea Abonyo Owuoth and they are not considered dependants under the *law of succession Act*.
 - b. A declaration that parcel L.R NO. SIAYA/NYAJUOK/510 was lawfully registered in the name of the deceased Julius Oduor Enson
 - c. A declaration that the Counterclaimants being in occupation of the suit property L.R NO. SIAYA/NYAJUOK/510 for 31 years have become entitled to the parcel of land by way of adverse possession



- d. A permanent injunction, eviction and demolition do issue against the defendants/plaintiffs herein their assigns, agents, servants or anyone acting on their behalf/authority from interfering, selling, leasing, planting, developing or interfering in any manner with the quiet possession and peaceful enjoyment of the counter claimants rights over L.R NO. SIAYA/NYAJUOK/510
 - e. Costs of this suit.
4. After hearing the parties the Learned trial Magistrate retired to write his judgment as follows:
- a. A declaration that the plaintiffs are neither children, step children of the deceased Andrea Abonyo Owuoth and they are not considered dependants under the *law of succession Act*.
 - b. A declaration that the parcel of land was lawfully registered in the name of the deceased Julius Oduor Enson
 - c. A declaration that the Counterclaimants being in occupation of the suit property L.R NO. SIAYA/NYAJUOK/510 for 31 years have become entitled to the parcel of land by way of adverse possession
 - d. The 2nd plaintiff Charles Otieno Agutu is hereby ordered to vacate and remove his items or structures on the suit land as soon as possible.
 - e. Eviction orders shall be issued once the defendants are done with the succession proceedings against the estate of the late Julius Oduor Enson
 - f. The plaintiffs shall pay costs of the suit and the counterclaim to the defendant.
5. Aggrieved the plaintiff appellants filed an Appeal on the following grounds:
1. THAT the learned trial magistrate misdirected himself in law and in fact by relying on untranslated document as evidence of the 1st and 2nd respondents which was in dholuo, a language the trial court is unfamiliar
 2. THAT the learned trial magistrate misdirected himself in law and fact by failing to consider that the untranslated document was not executed by the done
 3. THAT the learned trial magistrate misdirected himself in law and fact by failing to consider that the consent relied upon by the 1st and 2nd respondent had not been executed by the transferee
 4. THAT the learned trial magistrate misdirected himself in law by failing to consider the finding of a superior court as enunciated in *Elijah Makeri Nyangwae Vs. Stephen Mungai Njuguna & Another (2013)eKLR* in line with section 26 of the *Land Act*
 5. THAT the learned trial magistrate erred in fact and in law by failing to consider the Honourable court own jurisprudence enunciated in *Agabitus Okoth Owuor Vs Redempta Akinyi Ogambo & 2 Others ELCA No.11 of 2021*.
 6. On the foregoing ground it is proposed to ask this court to set aside the findings and orders of the trial court and the court be pleased to grant any other orders it may deem fit to meet the circumstances of the case.



SUBMISSIONS

7. The parties argued the appeal by way of written submissions. The appellant's submissions are dated 6/3/2025.
8. On ground No.4 of the appeal counsel highlighted the observations and findings of the court and how the fraud was perpetrated to transfer a title of a deceased person years after his death. Referring to the case of Elijah Makeri Nyangwae (supra), it was submitted that similar circumstances of misrepresentation of facts and illegal and fraudulent registration of land availed in the present case which the trial court failed to appreciate. That the same satisfied the provisions of section 26(1)(b) of the Land Registration Act and the title should be impeached. It was urged that Section 143 (1) of the Repealed Registered Land Act empowers the court to order the rectification of the Register by directing a registration to be cancelled if it was obtained by fraud or mistake.
9. That since the transfer of the suit property to the 1st and 2nd defendants father was obtained 11 years after death of Andrea Abonyo Owuoth the original owner without grant of letters of administration as the deceased could not present himself to fulfil the various statutory requirements such as obtaining LCB consent inter alia, then the same was fraudulent and illegal. Moreover it is submitted the particulars of fraud were pleaded and particularized and proved to the slightly higher standard of proof. Therefore the provisions of Section 26 (1) (b) of the Land Registration Act have been met and that the title ought to have been cancelled by the trial court.
10. It was further submitted that there was intermeddling of an estate of the deceased contrary to the provisions of section 45 of the Law of Succession Act. Intermeddling with an estate of a deceased person was evident as the 1st and 2nd respondents' father one Julius Oduor Enson transferred the Appellants/ Applicants' late father's suit land parcel L.R NO. SIAYA/NYAJUOK/510 to himself without taking out a grant for the same. Several authorities were cited to buttress this point.
11. The appellants asserted that this court has powers upon satisfaction of fraud and proof of intermeddling with an estate of the deceased without taking out letters of administration intestate to cancel any illegal title (s) and reverting the property to the name of the deceased person to allow for beneficiaries to duly have shares in the estate upon conducting succession.
12. On the 1st ground it is submitted that the 1st and 2nd respondents and their counsel on record, despite filing foreign documents dated 29/09/1993 and 19TH MAY, 1997, 2ND FEBRUARY, 1993, and 29TH SEPTEMBER, 1980, in court of foreign language, 'Dholuo' never filed nor produced a certificate of translation for the same rendering the same inadmissible in evidence.
13. On the appellants case against the 3rd and the 4th respondents it is submitted the same remains unchallenged despite evidences of proper services having been effected against them.
14. Citing section 27 of the Civil Procedure Act it is submitted costs follow events and as such the Appellants should be awarded the same with interest.

Respondents Submissions

15. The respondents submissions are dated 20/5/2025. The respondents condensed the grounds of appeal into three as summarized here below; -
SUBDIVISION - Whether the trial magistrate relied on untranslated documents in arriving at its decision; -



16. It is submitted that parties are bound by their pleadings and this issue having not been raised as a ground of appeal the same should not be considered by court.
17. That it is the Appellants who are intermeddling with the Estate of the late Andrea Abonyo Owuoth (Deceased) for they confirmed during cross examination they were not. That 1st and 2nd Respondent, they pleaded, testified and submitted that consent was obtained in 1993 and the transfer forms were executed prior to the death of the late Andrea Abonyo but submitted for registration afterwards hence there was no fraud, illegality and unprocedural irregularity on their part. That the Appellants and their witnesses admitted that the Respondents have been in occupation of the suit parcel of land even before the Late Andrea Abonyo passed away.
18. It is submitted that in the entire judgment nowhere did the trial magistrate make reference to untranslated documents. Further, the said untranslated documents were not produced. From the proceedings, the said untranslated documents were marked as DMFI 7 and 15. The same were not produced as evidence and did not therefore form part of the judicial record.

Whether the trial magistrate erred in fact and law in failing to consider that the consent relied upon by the 1st and 2nd Respondents had not been executed by the transferee

19. It was urged that it would have been more consequential if the then registered owner, had not executed the application for consent. In this case he had duly executed it by affixing his thumb print which thumb print has not been contested by the Appellants. There was no rebuttal and therefore the evidence remain uncontroverted as held in the case of Michael Njiru Kariuki v Ferdinand Ndungu Waititu & 3 others (2021) eKLR
20. It is submitted that it was evident that for the land control board consent to issue the application was duly executed and both parties appeared before the board, otherwise the same would not have been issued

Whether the trial magistrate erred in fact and law by failing to consider the finding in *Elijah Makeri Nyangwae v. Stephen Mungai Njuguna & Another* (2013)eKLR and *Agabius Okoth Owuor v. Redempta Akinyi Ogombo & 2 others* ELCA NO. 11 of 2021 in line with Section 26 of the *Land Act*.

21. That despite the legal requirement that fraud ought to be proved on a higher standard of proof it is contended that the all Appellants have done is they have shifted the burden of proof on the Respondents by basically stating that failure by the 3rd and 4th Respondents to participate in the hearing of the matter is evidence of fraud.
22. It is submitted that the 1st and 2nd Respondents had proved that consent was obtained and the transfer forms were executed prior to the death of the late Andrea Abonyo but submitted for registration afterwards hence there was no fraud, illegality and unprocedural irregularity on their part. Moreover, they had also proved being in possession of the suit land for over 31 years and are entitled to the land by way of adverse possession.
23. It is asserted that the Law of Limitation of Action is intended to protect Defendants against unreasonable delay in bringing of suits against them. the statute expects the intended Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Reliance was placed on *Hezron Kimeli Cheruiyot v Rusi Chepkemoi Chebochok and 3 others* (2021) eKLR



24. It is submitted that the trial magistrate correctly dismissed the Appellants case as they were the fraudsters masquerading as the deceased family and were out to evict the Respondents from a home they had lived in for over 30 years on fictitious, unproved, baseless claims of fraud.

ANALYSIS AND DETERMINATION

25. I have considered the appeal as filed, the lower court record, and the rival arguments proffered by both sides in their submissions.
26. The duty of an appellate court is stipulated under Section 78 of the *Civil Procedure Act* which reads;-

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

- (a) to determine a case finally;
- (b) to remand a case;
- c. to frame issues and refer them for trial;
- d. to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

27. The court of appeal in Peterson Ndung’u, Stephen Gichanga Gituro. N. Ojwang, Peter Kariuki; Joseph M. Kyavi & James Kimani V Kenya Power & Lighting Company Ltd [2018] Eklr stated as follows regarding the duty of the first appellate court: -

“.....This being a first appeal , we are reminded of our primary role as a first appellate court namely to re-evaluate , re-assess and reanalyze the extracts on record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons why.....On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate itself and draw its own conclusions though it should always beware in mind 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.....”

28. The appellant has raised five (5) grounds of appeal. However, I am of the view three issues will best dispense with this appeal namely;-
1. Whether the plaintiffs are the dependants/beneficiaries of Andrea Abonyo Owuoth
 2. Whether the registration of the suit property in the name of Julius Oduor Enson was lawful
 3. What orders should issue in the circumstances of the case and as to costs of the appeal.



Whether the plaintiffs are the children of Andrea Abonyo Owuoth

29. The plaintiffs lay claim on the suit property on the basis that they are the surviving sons to the bonafide owner of the suit property Andrea Abonyo Owuoth who I will refer to as Andrea (deceased) who was the 1st registered owner of the same. This is pleaded at paragraph 8 of the amended plaint.
30. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows: (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
31. The trial court in its analysis at paragraph 13 of the judgement observed that the 1st and 2nd plaintiff had confirmed in cross examination that they were children of Alexander Agutu and Joyce Omolo. The trial court then made a finding that the plaintiffs had lied that their fathers land was transferred without their consent. That if they were not the children of the deceased (Andrea) then they did not have locus to sue or defend his estate.
32. I have reviewed the evidence of PW1 Richard Oloo Agutu, who stated in his direct evidence that Andrea was his father. He then stated Andrea had no children. He also stated Andrea was his uncle. Cross examined by Ms Kokeyo he testified ‘My biological father is Alexander Agutu Miduri’. I have already observed that the plaintiffs pleaded at paragraph 8 that the deceased Andrea was their father, they are bound by their pleadings. In cross examination PW2 testified that Andrea was the father of the 1st plaintiff contradicting PW1 who had conceded their father was Alexander Agutu Miduri.
33. Even the restriction lodged by the 1st plaintiff against the title as seen in the Certificate of Official Search dated 16/01/2023 indicates him as son to Andrea. While PW1 sought to clarify that PEx4 corroborated that he was related to Andrea but he had already contradicted it. If indeed they meant Andrea was their uncle then nothing would have been easier than to state as such in their plaint noting that they even amended their plaint during the pendency of the proceedings. I find this very dishonest and misleading.
34. It is the finding of this court that the plaintiffs did not discharge the burden of proof that they were the sons of Andrea Abonyo Owuoth as pleaded. I find no reason to disturb the trial courts finding on this issue.

Whether the registration of the suit property in the name of Julius Oduor Enson was lawful

35. Both the plaintiffs and the defendants seem to agree throughout the entire proceedings that Andrea was the 1st registered owner of the suit property and therefore this is not in dispute. It is how the property ended up in the name of Enson the father of the 1st and 2nd defendant that is being contested by the plaintiff. A Certificate of Official Search was produced in evidence for the suit property confirming this registration at entry No.4 made on 26.5.09 and title was issued the same day. The title in the name of Julius Oduor Enson is dated 26/5/2009 and was produced as part of the 1st defendants bundle.
36. The plaintiffs case is that the above registration was obtained fraudulently. In this regard the trial court set out the provisions of section 26 of the *Land Registration Act* which provides as follows;-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or



endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

37. The trial court proceeded to analyse the issue based on the 1st and 2nd defendants claim that the suit property was given to their father Enson as a gift by Andrea before his death due to their close relationship. The defendants case is that Andrea had signed the requisite documents which allowed for the transfer of the parcel to Enson. The trial court at paragraph 15 of the judgement observed and held thus;-

‘I have perused documents in the list of documents as presented by the 1st and 2nd defendant and a cursory perusal of the green cards, application for consent before the land control board, the transfer documents summons from the lands documents and all documents presented before me.

The plaintiff did not present a witness from the land registry to state to the court that the documents presented to the court were not genuine or did not originate from the land registry.’

38. The trial court then citing the provisions of section 107 and 109 of the *Evidence Act* found that the plaintiff had failed to dislodge the defendant case and counterclaim that the land was gifted to them by Andrea before his demise.

39. It is trite that fraud must be specifically pleaded, particularized and proved to a slightly higher standard of proof than that of a balance of probabilities. The Court of Appeal in *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where the Court of Appeal stated thus:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo _vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “... We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. “..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

40. The particulars of fraud and illegality are given at page 3 of the Amended Plaintiff as intermeddling with the estate of the deceased contrary to section 45 of the *Law of Succession Act*, transferring the land to himself without authority, forging transfer, failure to procure Land Control Board Consent, absence of consideration to the deceased or his children, *res ipsa loquitur*.

41. Did the plaintiffs prove the above. Fraud cannot be inferred and therefore the maxim *res ipsa loquitur* cannot apply. The defendants claim is based on the fact that the land was gifted to their father and this is the defence. They also state the deceased had signed the documents prior to his death and therefore the registration cannot have been fraudulent. The documents were produced and analysed by the trial court.

42. The court has also reviewed the documents produced by the 1st and 2nd defendants in their bundle of documents. I will highlight the ones I find relevant to this issue. There was produced the letter



- dated 9/6/2010 addressed to the OCS Siaya Police Station by the Assistant Chief Nyajuck Sublocation confirming that Enson is the owner of the suit property; Surrender of Deceased (Andrea's) ID Card by Enson on 10/7/2002; Permit for Burial for Andrea issued to Anson on 4/8/1998 and Andreas Certificate of death. It is strange that these documents were not produced by the alleged biological sons of Andrea if truly they were.
43. All the above in my view corroborated the close relationship the two deceased enjoyed. This also confirms the bonafides of Enson the defendants father.
44. Application for Land Control Board is by George Ochien Oduor and is clearly stated to be transfer which is a Gift. Richard Oloo Ogutu (PW1) evidence in his adopted witness statement is that Andrea gave Enson land measuring approximately 0.2 Ha to put his home. This evidence is also echoed in the evidence of Charles Otieno Ogutu. This is an affirmation that indeed the 1st and 2nd defendants father was given land except for the size. This is also corroborated by the chiefs letter dated 9/6/2010 referred to earlier.
45. I agree with the trial court that against all the above the plaintiffs ought to have presented further evidence that the documents presented were not from the lands office and that they were forgeries. They also had an opportunity to compel the attendance of the land registrar. They did not. The burden of proof was on the plaintiffs. It is not enough to tell the court that there is something amiss, fraud cannot be left to guess work. The legal position has since been established that it is not allowable to leave fraud to be inferred from the facts. See *Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others* (1996) eKLR and *Vijav Morajaria vs Nansingh Madhusingh Darbar & Anor* (2000) eKLR, *Umilla w/o Mahendra Shah vs Barclays Bank International Limited & Anor* (1979) KLR.
46. In the absence of evidence in rebuttal the court can only presume that the registration was lawfully undertaken. In this regard I will rely on the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] KECA 27 (KLR) where the Court of Appeal rendered itself thus:-
86. 'We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.'
87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence..'
47. It is this courts finding that the allegations of fraud were not proved to the required standard.
48. On the alleged irregularities as to intermeddling as long as the 1st and 2nd defendants proved the land was gifted before the demise of Andrea this is what is fundamental and is what equity would sustain. I have already shown that even PW2 confirmed Enson was given land by Andrea.



49. The trial court placed reliance on Halsbury's Laws of England 4th Edition Volume 20(1) on incomplete gifts. I found the following extracts relevant

'If a gift is to be valid the donor must have done everything which according to the nature of the property comprised the gift, was necessary to be done by him in order to transfer the property and which was in his power to do'

50. Also cited by the trial court was Odunga's Digest on Civil Case Law and Procedure Vol (111) Page 2417 thus:-

' Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or third person. Likewise a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as proprietor (See Shells (sic I think it is Sneils's) Equity 29ED Page 122 paragraph 3)

51. Guided by the above authorities the trial court stated

' Been (sic) guided by the above authoritative digest, it is evident therefore that where there is an imperfect gift, the gift may nonetheless be perfected by the conduct of the parties.....the transfer documents were not impeached by the plaintiff that they are the forgeries or did not emanate from the registry.

It is therefore the finding of the court that the deceased Andrea obonyo had done what is required of him to ensure the gift was handed over to the late Julius Enson. On a balance of probabilities, I shall deem the version of the case as given by the defendant to be true and correct.'

52. The trial court on this issue found that the process leading to the registration of Enson to have been within the law and permissible.

53. I think the trial court was properly guided in arriving at the above finding and I will emphasize that the registration is permissible based on the guidance as cited.

54. Moreover Andrea had also handed over possession which I have already noted was confirmed by both plaintiffs in their evidence. It has not been disputed that Enson's entry into the property was with the permission of Andrea and spans over the 31 years. Even PW3 affirmed in cross examination that the 1st defendant had ploughed the land for a long time. Indeed I don't think equity would frown upon these arrangements. Equity considers as done that which ought to have been done.

55. Even assuming I were wrong on the above I would not impeach Enson's registration. I would uphold and validate it on the basis of possession. There was no evidence in rebuttal of their occupation by the plaintiffs who in fact confirmed it instead. In this regard I'm emboldened by the finding in *Bandi v Dzomo & 76 others* (Civil Appeal 16 of 2020) [2022] KECA 584 (KLR) Neutral citation: [2022] KECA 584 (KLR) where this court drew some relevant guidance therefrom in the following holding of the Court of Appeal:-

29. We reiterate what this Court stated in *Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others* [2015] eKLR, that:

" It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession



of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v-Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”

30. In addition section 116 of the *Evidence Act* states that: “When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”
56. I have noted the plaintiffs contention that the trial magistrate relied on untranslated documents in arriving at its decision. I have seen the documents that were in dholuo in the 1st and 2nd defendants bundle of documents. I did not see any translation thereto and therefore in law they were of no evidentiary value. However, this court notes the trial court stated that DW1 documents were produced save for No. 7 is marked -DMFI 7 & 15 (see page 15 of the Further Supplementary Record of Appeal). I have perused the subsequent proceedings and they were never produced.
57. Additionally the trial court at paragraph 15 referred to specific documents and thereafter referred to all the documents presented before court. There was no specific mention of the impugned documents. Against the absence of specific reference this court is not in a position to make a finding on whether they were relied upon.
58. Consequently I find no basis upon which to interfere with the trial court finding upholding the registration of Enson as the registered proprietor. This court upholds the title for the reasons rendered.
59. However, I’m inclined to interfere with the finding on adverse possession in view of the Court Appeal decision in Sugawara Vs Nairuko Ene Mutarakwa Kiruti (sued in her capacity as administrator of the estate of Mutarakwa Kirui Lopas alias) Civil appeal E141 of 2022 (2024) delivered on 11/10/2024 which held that the Magistrates court lacked jurisdiction to hear matters under the provisions of section 37 and 38 of the *Limitation of Actions Act* and which is binding on this court. I will uphold the 1st and 2nd defendants Counterclaim on the basis of seisin as already analysed hereinabove. Accordingly, the orders for adverse possession shall be vacated. I note that since it is trite orders of permanent injunction are issued upon determination of the rights of the parties, the same shall suffice in so far as this court has affirmed ownership by dint of possession among the other reasons rendered.
60. The upshot of the foregoing is that the appeal is hereby dismissed.
61. The final orders of the trial court in the judgement dated 22nd November 2023 are affirmed except prayer c) for the reasons I have already explained.
62. Costs of this appeal are awarded to the Respondents.

Orders accordingly

HON. JUSTICE A. E. DENA

JUDGE

27/11/2025

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

Mr. Ochanyo for the applicant

Ms. Alwala for 1st & 2nd Respondent

Court assistant: Ishmael Orwa

