

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. APPEAL CASE NO.E013 OF 2024

MOSES OCHIENG AMOLO APPELLANT

VERSUS

JUDITH AWINO OKOLA (Suing as the Legal Representative of

MARTHA GRACE ONYANGO- Deceased 1st RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

(Being an Appeal from the Judgement and decree of Honourable K. Cheruiyot - Senior Principal Magistrate delivered on the 22nd March, 2024 in KISUMU MC ELC NO.212 OF 2018)

BETWEEN

JUDITH AWINO OKOLA (Suing as the Legal Representative of

MARTHA GRACE ONYANGO- Deceased PLAINTIFF

VERSUS

MOSES OCHIENG AMOLO 1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 2ND DEFENDANT

J U D G E M E N T

A brief background of the appeal herein is that the Appellant was the 1st Defendant in KISUMU CMC EL CASE NO.212 OF 2019 (herein

referred to as the suit) wherein he, together with the Hon. Attorney General had been sued by the 1st Respondent herein vide the amended plaint dated 27th March, 2019. Perusal of the amended plaint which is on page 67 of the record of appeal shows that the 1st Respondent was in the suit in her capacity as the personal representative of the estate of Martha Grace Onyango, deceased, and that the subject matter was a parcel of land known as KISUMU/DAGO/937 (herein referred to as the suit land).

The record shows that the suit had originally been filed by the said Martha Grace Onyango as KISUMU HCCC NO 129 OF 2012 which was later transferred to the Environment and Land Court, Kisumu and later vide the court order dated 4th April 2018 transferred to the Chief magistrate's Court at Kisumu assigned case No 212 of 2018 for hearing and disposal. The record further shows that the original plaintiff (Martha Grace Onyango died in the pendency of the suit and was substituted with the 1st Respondent on 19th March 2019.

The complaint of the 1st Respondent in the suit was that the suit land had been, in the year 2010, transferred by the 2nd Respondent herein to the appellant by fraudulent and illegal means. The Respondent sought for orders of permanent injunction, declaration

of a constructive trust, an order discharging all encumbrances registered on the title, an order of transfer of the title in respect of the suit land in favour of the 1st Respondent, general damages for trespass and costs of the suit.

The proceedings of the trial court which are on pages 184 to 249 of the record of appeal show that the suit was heard before the trial court which, vide the judgement delivered on 22nd March, 2024 found that the 1st Respondent overwhelmingly proved her case and was entitled to the relief sought with costs.

The court then entered judgement in favour of the 1st Respondent and against the Defendants in the suit as prayed in the amended plaint. The court assessed and awarded general damages at Kshs.500,000/-.

The appeal

Aggrieved by the judgement dated 22nd March, 2024, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 26th March, 2024. The Appellant seeks for orders that the decision, judgement and decree of the learned trial Magistrate be set aside and, in its place, the 1st Respondent's suit be dismissed with costs and the title held by the Appellant be upheld and that the 1st Respondent be ordered to bear the costs of the appeal.

Submissions

Vide directions given on 3rd June, 2025, the appeal was heard by way of written submissions.

Submissions for the Appellant

Written submissions dated 26th June, 2025 were filed by the firm of Kouko & Odero Advocates LLP, on behalf of the Appellant. Counsel submitted that it was not disputed that the Appellant was the current registered owner of the suit land and that he acquired it from Ambrose Abongo Owiti. That the copy of register (green card) produced as exhibit showed that the land had belonged to Ambrose Adongo Owiti from 4th November, 1991 when it was transferred to and registered in his name till the year 2010 when he sold it to the Appellant and title deed issued to the Appellant on 4th October, 2010. That there was no element of fraud demonstrated as between Ambrose Adongo Owiti and the Appellant and that there was no evidence that the Appellant was party to any act of fraud.

Counsel submitted that fraud must not only be specifically pleaded but also strictly proved. That although the standard of prove is not prove beyond a reasonable, it is higher than proof on a balance of probabilities required in other civil claims. Counsel relied on the

case of Kinyanjui Kamau -vs- George Kamau [2015]eKLR where it was held, *inter alia* that;

“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 was certainly not one beyond a reasonable doubt as in criminal cases.”

Counsel submitted that in the instant case, the allegations of fraud were not specifically pleaded and that no evidence was adduced to prove the allegations.

Counsel relied on the Court of Appeal decision in Mombasa Civil Appeal No.312 of 2012 Emfil Limited -vs- Registrar of Titles Mombasa & 2 Others [2014]eKLR and John Kamunya & another vs John Nginyi Muchuri & 3 Others [2015]eKLR and submitted that the Appellant demonstrated that he acquired the title to the suit land in good faith and did not participate in any fraud. Counsel urged the court to protect the Appellant’s proprietary rights guaranteed by article 40 of the Constitution.

Regarding the award of Kshs.500,000/- as general damages, Counsel submitted that the 1st Respondent only pleaded in

paragraph 9 of the amended plaint that she was entitled to mesne profits, on account of trespass. Counsel relied on Section 2 of the Civil Procedure Act and the case of Attorney General -vs- Halal Meat Products Limited [2016]eKLR where it was held that where a person is wrongfully deprived of his property he /she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.

Counsel submitted that the 1st Respondent needed to present evidence to warrant the award of mesne profits. That the 1st Respondent did not table any evidence to enable the honourable court make an award of Kshs.500,000/-.

Counsel urged the court to allow the appeal.

Submissions for the 1st Respondent

Written submissions dated 5th August, 2025 were filed by the firm of Ogejo, Omboto & Kijala Advocates LLP for the 1st Respondent. Relying on the provisions of sections 107, 108 and 109 of the Evidence Act and the case of Evans Otieno Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR Counsel submitted that the rule of the thumb in evidence is that he who alleges must prove.

That the deceased, Martha Grace Onyango, had conducted search and found out that the appellant herein was the registered owner

yet she had never entered into any agreement for sale of the land and had never attended any Land Control Board to transfer the suit land to anybody.

That with regard to the sale agreement, Mr. Rayola Olel in the letter dated 13th December, 2012 established that the agreement made and signed by him was the one marked “MFO - 4”. That the deceased died before the second sale agreement was drawn thus she could not have entered into any sale agreement for sale of the land, that she did not transfer or surrender the land certificate to the Appellant. That the transfer forms were not signed. That the Land Registrar confirmed that the Land Registry does not have records to show that the land was ever transferred to Ambrose Adongo Owiti and later to the Appellant. That Nelson Ogeto the Land Registrar confirmed that there were no supportive record that there was a transfer of title from Martha Grace Onyango to Ambrose Owiti and from Ambrose Owiti to the Appellant.

That the trial court duly considered and analysed the evidence and found that the 1st Respondent had overwhelmingly proved her case.

Regarding the award of Kshs.500,000/- as mesne profits, Counsell relied on the case of Rajan Shah t/a Rajan S. Shah and Partners -vs-

Bipiri P. Shsar [2016]KEHC 1880 (KLR) and Hulsburry's Law of England 4th Edition Volume 45 on the definition of mesne profits, and submitted that trespass being actionable without proof of any damages and mesne profits being another term for damages for trespass, the 1st Respondent did not have to specifically prove and plead the damages that she encountered.

Counsel submitted that the mesne profits awarded by the trial court were accurate and justified.

On costs, Counsel relied on the case of Cecilia Karuru Ngaya -vs- Barclays Bank of Kenya and Another [2016]eKLR and submitted that the 1st Respondent having proved her case on a balance of probabilities and having succeeded in the suit is entitled to costs. Counsel urged the court to dismiss the appeal.

Issues for determination

From the ground of appeal raised, the Memorandum of appeal, the Appellant framed 2 substantive issues for determination as follows;

- a) whether the evidence tendered in court proved fraud by the Appellant to the requisite standard of proof and if the 1st Respondent proved her case against the Appellant.

b) whether an award of Kshs.500,000/- as mesne profits was justified.

c) Costs.

Analysis and determination

This is a first appeal and as such the court is obligated to delve into the evidenced placed before the trial court, re-analyse and re-evaluate it to come to an independent finding/conclusion as held in *Gitobu Imanyara & 2 others -vs- Attorney General [2016] e KLR*

The first issue for determination related to the evidence placed before the trial court, whether it proved fraud as claimed by the 1st Respondent.

The record shows that the 1st Respondent's evidence before the trial court comprised of her testimony and the documents she produced as exhibits. The 1st Respondent who testified as PW1 adopted the contents of her witness statement as her evidence in chief.

The 1st Respondent had stated in her witness statement that the deceased was the registered proprietor of land parcel known as KISUMU/DAGO/937. That sometimes in January, 2012 while on routine visit to her property, the suit land, the deceased found that the Appellant had fenced it and that upon inquiry, the Appellant

informed the deceased that he was now the registered proprietor of the suit land. That this was confirmed by a search conducted by the deceased. That the deceased had never entered into any agreement for the sale and had never attended any Land Control Board for transferring the land to anybody.

That upon investigation, the firm of Olel, Onyango, Ingutiah & Company Advocates who drew the sale agreement confirmed that the sale agreement they drew was the one the deceased produced and marked as MGO -4 and annexed to the Supporting Affidavit of the deceased dated 3rd July, 2012.

That the deceased died way after the sale agreement was drawn and that thus she never entered into any agreement for sale of suit land. PW1 produced the documents on her list of documents as exhibit P. 1 to P. 8.

On cross-examination she stated that she did not know who sold the land to the Appellant. That the land agreement shows that the Appellant purchased the land from Ambrose Abongo Owiti.

The documents produced as exhibits by the 1st Respondent included Land Certificate of the suit land, certified copy of register for the suit land, sale agreement for the suit land, Letter of Consent, copy of Court order issued on 17th October, 2018 by

Senior Resident Magistrate, Siaya, copy of Letter dated 9th October, 2012 to Olel, Onyango, Ingutiah & Company Advocates, copy of Letter dated 13th December, 2012 by Olel, Onyango, Ingutiah & Company Advocates, Copy of death certificate of Martha Grace Onyango, deceased.

On behalf of the Appellant, the Appellant testified as DW1 and adopted the contents of his witness statement as his evidence in chief. He had stated in the witness statement that he bought the land from Ambrose Abongo Owiti. That he had conducted a search prior to the land sale agreement and conducted due diligence to confirm that the vendor was the bona fide registered proprietor.

That the vendor took him (Appellant) to his Advocate's office where an agreement was duly written and signed and witnessed before one Rayola O. Olel Advocate and all the agreements were duly signed and initialized on all pages by Ambrose Abongo and witnessed again on all pages by Mr. Olel.

That a green card issued to him by the Land Registry office in Kisumu confirmed that Ambrose Abongo Owiti was the registered owner of the suit land since 4th November, 1991. That he paid the purchase price, the requisite stamp duty and transfer was effected

in his favour. That Ambrose Abongo appeared at the Land Control Board as the duly registered owner.

That upon transfer of the land to his name, he set up a site house and did cultivation on the land. That the only document he has in respect of the suit land are the one he has submitted to court as part of his defence to this case.

That he never submitted any details to the CID, Kisumu. That he has in constant and physical possession of the property since he purchased it.

That it is his belief that there is a collusion between Mr. Olel and persons unknown to him like the 1st Respondent to try to dispossess him of the property after the death of Mr. Ambrose Abongo.

That he has never had any dealings with Martha Grace Onyango or any of her personal Representatives.

The Appellant produced documents as exhibits namely;

Copy of original title deed for KISUMU/DAGO/937, copy of certificate of official search for KISUMU/DAGO/937, copy of sale agreement for KISUMU/DAGO/937 dated 26th June, 2010. Copy of green card, application form for consent of the Land Control Board, copy of Letter of Consent of the Land Control Board.

On cross-examination, the Appellant stated that he entered into a sale agreement with Ambrose Abongo Owiti. That the agreement produced as PW5(b) was the genuine agreement. That the 1st Respondent's letter to Olel Advocate as well as the response thereto was not copied to him.

The Appellant produced other documents when he was recalled namely acknowledgement receipt dated 3rd August, 2010, Further acknowledgement receipt dated 15th October, 2010, money transfer dated 15th November, 2021, transfer form.

He stated further that the agreement he produced was the genuine land sale agreement.

DW2 was Francis Olel Advocate, he testified and confirmed that the agreement he drew was the one which had been produced as P. Exhibit 5(b) which was marked WGO4. That the seller was selling as a representative of Onyango who was deceased as per the agreement. That Ambrose was selling as an administrator.

For the 2nd Defendant Nelson Ogeto, a Land Registrar testified as DW3.

The 1st Response's case was found on the tort of fraud. The particulars of fraud pleaded under paragraph 5 of the amended plaint were:

- (1) The failure of the 2nd Defendant to seek the prior consent of the Plaintiff before procuring, facilitating and effecting the transfer of the suit property to the 1st Defendant and the acceptance thereof by the 1st Defendant of either the transfer of the proprietary rights thereof.
- (2) The issuance by the 2nd Defendant of a certificate of title to either the 1st Defendant without reference to the Plaintiff and the acceptance thereof by the 1st Defendant of either the certificate of title or the assignment of the benefit of the Plaintiff
- (3) The 1st Defendant entry into an agreement of sale for the suit property with persons unknown and without capacity to act for and/or on behalf of the Plaintiff.
- (4) The procurement by the 1st Defendant consents from the Land Control Board to transfer the suit property without reference to the Plaintiff and the acceptance by the 2nd Defendant of the same.
- (5) The registration by the 2nd Defendant in the register of the suit property of the 1st Defendant as the

proprietor of the suit property of the suit property and the acceptance of the same by the 1st Defendant.

(6) The recognition by the 2nd Defendant of the 1st Defendant as the absolute proprietor of the suit property to the exclusion of the Plaintiff and the acceptance thereof by the 1st Defendant.

It is not in dispute that at some point, the suit land was registered in the name of Martha Grace Onyango. The green card produced as exhibit shows that the land was conveyed to her name on 7th October, 1985. The green card shows that on 4th November, 1991 the land was conveyed into the name of Ambrose Abongo Owiti.

The Plaintiff denies that the deceased ever conveyed the land to Ambrose Abongo Owiti. The Plaintiff did not however sue Ambrose Abongo Owiti as the person who took the land from the deceased and had in his name for a long period before selling it to the Appellant herein.

The Appellant demonstrated that he bought land from the said Ambrose Abongo Owiti. He averred that Ambrose Abongo Owiti presented himself to him (Appellant) as owner of the land. That he did due diligence by conducting search and buying a copy of

register (green card) both of which showed that Ambrose Abongo Owiti was the registered owner of the subject land.

He also produced a land sale agreement and acknowledgement receipt for payment of the purchase price to show that he bought the land from the said Ambrose Abongo Owiti at valuable consideration. He testified that the agreement was written and the entire conveyance process done by Mr. Francis Olel Advocate (as he then was) whom he called as DW2.

DW2 confirmed having done the land sale agreement between the Appellant and Ambrose Abongo Owiti and conducting the entire conveyance. He testified that he received the payments and disbursed it to the vendor, that he did due diligence and that he prepared the transfer forms.

However, the 1st Respondent introduced and produced two versions of the land sale agreement which the 1st Respondent claimed the Appellant had surrendered to the police during investigations.

Perusal of the agreements show that the contents thereof are essentially the same, save that in one agreement, the vendor was selling the land in the capacity of a personal representative and administrator of the estate of the late Martha Grace Onyango-deceased and in the other, the Vendor was selling the land as the

registered owner. The difference appears only on page 1 of the agreements.

It was the 1st Respondent's case that Ambrose Abongo Owiti was ever a personal representative or administrator of the estate of the deceased and claimed that as at the date of the agreement, Martha Grace Onyango was still alive. They produced certificate of death No.0071150 showing that Martha Grace Onyango died on 20th April, 2014. This is also corroborated by the fact that she initiated the present suit which was filed on 9th July, 2012 and was only substituted later upon her death in the pendency of the suit.

The date of the sale agreement is the same on both versions of the agreement namely; 26th June, 2010.

The Appellant denied knowledge of the agreement that shows that the vendor was a personal representative of the deceased. He denied that he gave the said agreement to the police. He testified that the version of the agreement drawn by the Advocate and which they signed was the one which was initialized by both parties and witnessed by the advocate at every page of the agreement at the time of execution thereof.

Looking at the two versions of the sale agreement, the agreement where the vendor was selling the land as the registered owner

which was produced as exhibit P,5(c) is the one that is initialized at the foot of each page and signed and stamped with the stamp of Rayola O. Olel Advocate & Commissioner for oath.

The version of the agreement where the vendor sold as personal representative and administrator of the estate of Martha Grace Onyango is not initialized or countersigned and stamped by the Advocate.

DW2, the advocate testified that in the agreement he wrote, the seller was selling the land as administrator of the estate of Martha Grace Onyango. However, on cross-examination, DW2 stated that;

“the seller was Ambrose Abongo Owiti. I initialized on the pages. **These as per exhibit 5(b)** and 5(c) P. exhibit 5(c) is signed by me and there is my stamp on it.”

P exhibit 5(c) is the agreement produced by the Appellant as the only agreement he knows of. DW2 further testified that due diligence was done but did not indicate whether the due diligence revealed to him that the seller held the land as administrator of the estate of Martha Grace Onyango, if indeed that was the position. And if he did, whether he required the vendor to produce Letters of administration to show that he had capacity to sell the land.

Although DW2 wrote a letter to the 1st Respondent's Advocate that the agreement he drew was the one marked MGO-4 which is the version where the vendor was selling as personal representative of the estate of the deceased, the contents of the letter contradicts with the testimony of DW2 in court when he acknowledged that the agreement produced as P. exhibit 5(c) was signed and stamped by him.

The 1st Respondent claimed to have referred the matter to the police for investigation. And further claimed that as a result the appellant surrendered the agreements to the police. No evidence was availed of such a report having been made, of the findings of the police to confirm whether indeed fraud was found to have been committed or not and what steps were taken and against who.

The police officer(s) to whom the appellant was alleged to have surrendered the agreements were not called as witnesses.

Yet a reading of the judgement of the trial court shows that the Land Registrar relied on this evidence to find that the 1st Respondent had overwhelmingly proved her case.

I have also examined the evidence by the Land Registrar that was placed before the trial court. The Land Registrar did not challenge the fact that the documents of ownership held by the appellant

originated from the Land Registry. The trial court noted in its judgement that the green card indicated that the registered owner of the suit land after Martha grace Onyango was Ambrose Abongo Owiti who later transferred the suit property to the appellant. The green card is the land register kept by the Land Registrar. It confirmed the chronology of the registrations as claimed by the appellant.

As submitted on behalf of the Appellant, the standard of proof for claims based on fraud is higher than proof on a balance of probabilities.

The evidence placed before the trial court by the 1st Respondent did not meet the standard of proof.

No basis was laid for the award of Kshs.500,000/- as mesne profit

I find that the appeal has merit and hereby allow it as follows:

- i. The judgement of the trial court is hereby set aside.
- ii. The 1st Respondent's suit before the trial court is dismissed with costs to the appellant.
- iii. Costs of the appeal to the appellant.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 4th day of December, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen - Court Assistant.

Kouko for the appellant

Abur h/b for Owuor for the 1st Respondent.

No appearance for the 2nd Respondent.