



**Oginda v Nyamwange & 2 others (Environment and Land Appeal
10 of 2024) [2025] KEELC 18483 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 18483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 10 OF 2024
MAO ODENY, J
DECEMBER 19, 2025**

BETWEEN

ANN KEMUNTO OGINDA APPELLANT

AND

CALEB ISABOKE NYAMWANGE 1ST RESPONDENT

ABRHAM BIRUNDU NYANGOTO 2ND RESPONDENT

DISTRICT LAND REGISTRAR NAKURU 3RD RESPONDENT

(Being an Appeal from a Judgment and decree delivered by Hon. E.G Nderitu Chief Magistrate, Molo delivered on 23rd January, 2023 in MOLO ELC NO 91 OF 2019)

JUDGMENT

1. This appeal arises from the Judgment and decree by Hon. E.G Nderitu, Chief Magistrate, Molo, delivered on 23rd January, 2023, in MOLO ELC NO 91 OF 2019. The Appellant herein being dissatisfied with the said judgment, lodged a Memorandum of Appeal dated 22nd February, 2024, and listed the following grounds of appeal:
 - a. That the Honourable Trial Magistrate erred in law and fact by failing to consider and evaluate the evidence on record accurately leading to a wrong conclusion that the Plaintiff had proved his case.
 - b. That the Honourable Trial Magistrate erred in law and fact in dismissing the Appellant's Counterclaim yet there was ample evidence that the Appellant was the rightful owner of the subject land Nakuru/Molo/Kapsita 467.



2. The 1st Respondent had sued the Appellant, the 2nd and 3rd Respondents in the trial court vide a Plaint dated 4th November, 2013, which was subsequently amended on 17th May, 2018. The 1st Respondent sought the following orders against the Appellant:
 - a. A declaration that the plaintiff is the registered proprietor of land parcel No. Nakuru/Molo/Kapsita/467 and the 4th defendant is a trespasser thereon.
 - b. A permanent injunction restraining the 4th defendant from trespassing into the land parcel No. Nakuru/Molo/Kapsita/467, constructing structures thereon, fencing, occupying or in any other way, interfering with the plaintiff's quiet possession.
 - c. An eviction order for removal of all structures presently constructed on the land parcel No. Nakuru/Molo/Kapsita/467.
 - d. Costs and interest.
3. The 1st Defendant in the trial court, filed a counterclaim dated 20th November, 2013, seeking the following orders:
 - a. That the Defendant be declared the legal owner of the parcel of land Nakuru/Molo/Kapsita/467.
 - b. That the title deed held by the Plaintiff herein be cancelled.
 - c. That the Plaintiff's suit be dismissed with costs.
 - d. Costs and interest thereof.
 - e. Any other relief that the Honourable Court may deem fit.
4. The Appellant filed a counterclaim in the trial court dated 20th November, 2013, which was amended on 1st July, 2015, and further amended on 14th January, 2022, seeking the following orders:
 - a. That the Plaintiff's suit against her be dismissed with costs and for the counterclaim to be allowed.
 - b. That the 4th Defendant (Ann Kemunto Oginda) be declared the legal owner of the parcel of land Nakuru/Molo/Kapsita/467.
 - c. That the title deed of parcel of land Nakuru/Molo/Kapsita/467 held by the Plaintiff herein be cancelled.
 - d. That the Plaintiff's suit be dismissed with costs.
 - e. That in the event that the Plaintiff's claim in the main suit succeeds, then the 2nd Defendant in the counterclaim be ordered to refund the 4th Defendant (now Plaintiff in the counterclaim) the sum of Ksh 680,000/= that had been paid to him together with costs and interest from the date the money was paid to him.
 - f. Costs and interest thereof.
 - g. Any other relief that the Honourable Court may deem fit.



5. The trial court in its judgment dated 23rd January, 2023, issued the following orders:

“I do find that the Plaintiff has established his case against the 4th Defendant herein and grant the following prayer:

1. A declaration is hereby issued that the Plaintiff is the registered proprietor of the suit land Nakuru/Molo/Kapsita/467 and the 4th Defendant is a trespasser thereon.
2. An order of permanent injunction restraining the 4th Defendant from the suit land is hereby issued.
3. The 4th Defendant has 60 days within which she should vacate the suit land Nakuru/Molo/Kapsita/467 failure to which eviction order to issue.
4. The Plaintiff will have the cost of the suit to be met by the 4th Defendant.

The 4th Defendant counterclaim also succeeds in the following terms:

1. The 2nd Defendant to the counterclaim Abraham Birundu Nyangoto do refund the part purchase price of Kshs 616,000 to the 4th Defendant with interest at court’s rates from the date of the agreement i.e 30th April 2013 till payment in full.
2. The cost of the counterclaim to be met by the 2nd Defendant to the counterclaim Abraham Birundu Nyangoto.

Appellant’s Submissions

6. Counsel for the Appellant filed submissions dated 10th November, 2025, and submitted that Abraham Birundu Nyangoto acted unfairly by dealing with the Appellant and the Respondent, hence should be surcharged besides refunding the sum of Ksh 616,000/= with interest. Counsel further urged the court to impose a penalty on the 2nd Respondent to the tune of Ksh 5,000,000/= together with costs of this Appeal.

1st Respondent’s Submissions

7. Counsel for the 1st Respondent filed submissions dated 14th October, 2025, and identified the following issues for determination:

- a. Whether the instant appeal is competent, considering that it discloses no prayers/orders sought from this court?
- b. Whether the Trial Magistrate failed to consider and/or evaluate evidence hence reaching a wrong conclusion that the 1st Respondent herein had proven his case?
- c. Whether the Learned Trial Magistrate erred in law and fact by dismissing the Appellant’s counterclaim despite the evidence provided by the Appellant?

8. On the first issue, counsel submitted that the Appellant having failed to include prayers that he would like this honourable court to grant is not deserving of any remedy. Counsel relied on Rule 88 of the Court of Appeal Rules (2022) and the cases of Acceler Global Logistics vs Gladys Nasambu Waswa &



- another Malindi Civil Appeal No 1 of 2019, Independent Electoral and Boundaries Commission & another vs Mule & 3 others [2014] KECA 890, Patrick Lumumba Wakhusama vs Edward Ndungu & another [2021] KEELRC 2063 (KLR) and Mohammed & another vs Biliel KEELC 4799 (KLR).
9. On the second issue, counsel relied on Section 107 of the *Evidence Act* and submitted that the court correctly found that the 1st Respondent proved his case on a balance of probabilities and that the Appellant failed to do so.
 10. On the third issue, counsel submitted that there is no justification for interfering with the trial court's finding that the 1st Respondent is the absolute owner of the suit property having legally acquired the title. Counsel relied on the cases of Kuria Kiarie & 2 others vs Sammy Magera, Civil Appeal No 326 of 2017 and Mohamed Mohamoud Jabane vs Highstone Butty Tongoi Olenja, Civil Appeal No 2 of 1986.

Analysis And Determination

11. The issue for determination is whether the appeal has merit. This being a first appeal, the court is guided by the principles in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, where the court held as follows:

“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 the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
12. Similarly, in the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212, the Court of Appeal held that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
13. The Appellant contends that the Trial Magistrate failed to consider the evidence on record accurately. The court notes that the Appellant's case at the trial court was premised on fraud and misrepresentation on the part of the Plaintiff. It is on record from the evidence of the parties that the Trial Magistrate considered the Appellant's counterclaim and found that the appellant ought to have proved the allegation of fraud which must be specifically pleaded and proved as was held in the Court of Appeal case of Vijay Morjaria Vs Nansingh, Madhusingh Darbar & another [2000] eKLR as follows:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”
14. Counsel for the Appellant urged the court in her submissions to grant additional orders against the 2nd Respondent, which were neither specifically sought at the trial court, nor made an application to



tender additional evidence in the appeal. In the case of Daniel Toroitich Arap Moi Vs. Mwangi Stephen Mureithi and Another (2014) eKLR, the court observed as follows:

“...submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties, “marketing language”, each side endeavouring to convince that this case is the better one. Submissions we reiterate do not constitute at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”

15. The Appellant has failed to show that the Trial Magistrate erred or failed in any way to consider the evidence on record or the Appellant’s counterclaim as alleged. There would be no valid reason to interfere with the Trial Court’s decision as the Appellant had failed to prove the allegation of fraud against the Respondent. The upshot is that the Appeal is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF DECEMBER 2025.

M. A. ODENY

JUDGE

