

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO. E56 OF
2024

PETER OTIENO OKECH... ..

APPELLANT

VERSUS

MARY AUMA OWITI..... 1ST

RESPONDENT

LILIAN OBARA OJWANG2ND

RESPONDENT

(Being an Appeal from the judgment and decree of Hon. S.

Ongeri (PM) in Oyugis PMELCC 06 of 2020 delivered on

29th October 2024)

JUDGEMENT

A brief history

1. By way of an Amended Plaintiff dated 26th August 2020, the Appellant sought the following orders in the trial court.

1) That the registration as proprietors of the 1st and 2nd defendants be cancelled in respect of land title deed no: WEST KASIPUL/KODERA/KANYAMWA/655 registered in the name of the 2nd defendant be cancelled and the relevant land registry of Rachuonyo North, South and East be directed to

rectify the register and the plaintiff be registered as the proprietor.

2) Cost of this suit be provided for

3) Any other relief this honourable court may deem fit to grant.

2. In the Amended plaint, he pleaded that at all material times the late Opuh Misoru was the registered owner of the suit land and never sold his land. That upon his demise the plaintiff continued to live on the suit land. On 20th March 2018 the 1st defendant went to stop the plaintiff from cultivating the land. The plaintiff then visited the lands office and discovered that the defendant had fraudulently transferred the suit land through her husband on 19th June 1996. He set out the particulars of fraud and prayed that the suit be allowed.
3. The 1st defendant filed a defence dated 16th August 2021 where she denied the contents of the plaint. The 2nd defendant also filed an amended statement of defence dated 31st May 2022 where she denied the contents of the plaint.
4. The matter then proceeded for full hearing where the plaintiff called one witness while the defence called 2 witnesses.

5. **PW1** was the Plaintiff, **Peter Otieno Oketch** who testified that the suit land belonged to his father who passed on 12th June 1987 and was not survived by any heir. That he took out letters of administration and has been using the land since his uncle died. He stated that he was called by the area chief who told him not to use the land as it belonged to one Owiti Odede. He adopted his witness statement as evidence in chief and produced a list of documents as exhibits.
6. During cross examination, he stated that he loves on his fathers' land and that he ploughed the suit land for 8 years before the chief told him to stop. When shown Pexh 1 he stated that he is the one who gave the information to the registrar and indicated himself as a step son. That he did not do a letter to the registrar to defeat the transfer of the land.
7. The plaintiff closed its case and the defence called two witnesses in support of its case.
8. **DW1** was **Mary Muma Owiti** who adopted her witness statement as evidence in chief. She urged that the property was lawfully transferred into the name of her husband then into hers vide succession.
9. During cross examination, she stated that the suit land belonged to her husband Joseph Owiti Odede who bought the

land from Christine Ojwang in 1996 and that she was a witness to the transaction. That their house got burnt and their documents were lost but she did not report the loss of the documents. Further that her husband sold the land legally. She could not recall when the land was registered but that he bought the land in 1996. Additionally, that when they were farming on the land nobody came to claim it.

10. DW2 was **Lilian Obara Ochieng** who adopted her witness statement as evidence in chief. She stated that through his agent, her husband entered into a sale agreement with the 1st defendant on 10th march 2020 for the sale of the suit land. Her husband was to pay in two instalments of Kshs. 570,000/- each. She maintained that her husband followed the due process as a purchaser and denied the plaintiff's allegations.

11. During cross examination, she stated that the due process was followed by her husband in the purchase of the property. That he bought the land from Mercy Awiti Muma who was the registered owner and her husband Joseph Owiti was the original owner. She urged that the title was not defective and there was no caution on the land.

12. Upon considering the testimonies of the witnesses and the evidence tendered on court, the trial court dismissed the appellant's suit for failure to prove the case to the required standard.

The Appeal

13. Being aggrieved with the decision of the trial court, the appellant instituted this appeal vide a memorandum of Appeal dated 25th November 2025 premised on the following grounds;

1) The Learned Honourable Magistrate erred in fact and law by failing to appreciate that the original owner of land parcel NO. WEST KASIPUL/KODERA KAMIYAWA/655 was one OPUATH MISORI who died on the 12th October 1987 hence could not enter into any transaction and thereby arising at a wrong decision and to which decision has occasioned a miscarriage of justice.

2) The Learned Honourable trial Magistrate erred in fact and law by failing to appreciate that one JOSEPH OWITI ODEDE now deceased and to whom the 1st respondent derived authority from and being the Administratrix of his estate, was an active and a

conscious intermeddler and could therefore not acquire and obtain registration into his name regarding land parcel NO. WEST KASIPUL/KODERA KAMIYAWA/655 hence arriving at a wrong decision and to which decision 1ms occasioned a miscarriage of Justice.

3) The Learned Honourable Trial Magistrate erred in fact and law by holding that the respondents acquired good title to land parcel NO. WEST KASIPUL/KODERA KANYANWA/655 through purchase and transaction whereas there was overwhelming evidence tendered in Court showing that the original deceased owner one OPUATH MISORI left the suit property as forming part of his intestate and as at the time the respondents criminally dealt with the subject suit parcel of land no Certificate of Confirmation of Grant had been issued to anybody including the respondents and therefore the Honourable Court's decision has occasioned a serious miscarriage of justice.

4)The Learned Honourable Trial Magistrate erred in fact and law by considering and giving weight to irrelevant and trivial issues especially having regard to ownership and sale while ignoring legal issues to determine whether the titles that the respondents held were valid or not hence arriving at wrong decision.

5)The Learned Honourable Trial Magistrate erred in fact and law by placing higher degree of burden of proof against the appellant whereas once the appellant had established that the original registered owner was long deceased as at the time the 1st respondent through her late husband JOSEPH OWITI ODEDE caused the transfer of the suit land into his name, then the burden of proof shifted to the respondents hence arriving at a wrong decision and to which decision has occasioned a miscarriage of justice.

14. The parties were directed to file submissions on the appeal.

Appellants' submissions

15. Learned counsel for the appellant submitted that the 1s registered owner died on 12th October 1987 and left his title

intact. That it formed part of the estate of the deceased. That the appellant obtained grant of letters of administration litem and nobody petitioned for grant of letters of administration of the deceased and therefore the transaction between Christine Ojwang and Joseph Odede in 1996 was of a criminal nature which offended section 45 of the Law of Succession Act. He maintained that Christine had no capacity to transfer the land citing the decision in Mombasa ELC 36 of 1995 – Katama Kalome vs Mombasa Principal Council & Anor. Further Joseph Owiti Odede acquired no proprietary interest in the suit land and therefore had no capacity to transact over the subject title. He urged that it is correct to state that the subsequent entries after entry number 1 are illegal and must be deleted. He urged that the defence of adverse possession cannot stand as the registered owner was a deceased person. He urged the court to allow the appeal with costs.

2nd Respondents submissions

- 16.** Learned counsel for the 2nd respondent urged that the in his testimony before the trial court, the Appellant testified that the late Opuh Misoro died on the 12th of June 1987. The Appellant relied and produced a death certificate which

records that the date of registration is the 13th of February 2006 which is 19 years later after the death of the said Opuh Misor, if at all the said Opuh Misor died. That it is indicated on the death certificate that the informant was P. Otieno the Plaintiff herein. The Death certificate records that the Plaintiff herein is a stepson yet he is a nephew which fact he admitted during cross examination before the trial court. The Plaintiff also confirmed at the hearing that he is the one who gave the details captured in the death certificate to the Registrar of births and deaths.

17. Furthermore, the Appellant confirmed that Opuh Misor had brothers and sister and that some of his own siblings were also still alive and that none of them had interest in the land. The Appellant did not call any of them as his witnesses. Counsel urged that the trial court did not find it safe to find in favour of the Appellant merely on an entry on the death certificate which death certificate was primarily manufactured and /or modelled on the sole information given by the Appellant. The Appellant did not avail any other documents to corroborate his allegations. On the part of the 1st Respondent, she had laid before the trial court a clear track of the processes that were followed for the suit

property to shift from Oputh Misor , to his late husband to her name and then to the 2nd Respondent. On the other hand, the Appellant did not avail any evidence to prove that the processes followed in changing ownership of the suit property from all the parties herein-before named were flawed

18. Counsel urged that the Appellant has alleged that the original registered owner of the suit property who was his uncle died on the 12th of October 1987 yet he did not make effort to take possession of the suit property or gain the ownership thereof by maybe filing a succession cause. The Appellant further confirmed that he never put any encumbrance on the parcel of land to secure his interest all this time until when the 2nd Appellant bought the same and became a registered owner. He pointed out that it was fishy and cunning that the Appellant had to wait for decades until when the 1st Respondent's husband had died to make any claims over the land. The Appellant confirmed that he has his own parcel of land that was given to him by his biological father and that he lives on the said parcel of land. The Appellant claimed that he only tills the suit property which he alleged to have done for 8 years when he was stopped by the area chief. The question that beckons is: if at all the

original owner died on the 12th of October 1987 and the Appellant only tilled the land for 8 years then who was using it all the remaining years and why did he never move to obtain his legal right over the land?

19. Counsel urged that a claim for fraud is a claim that necessitates a higher standard of proof as the proof is not on a mere balance of probability but tilts towards proof beyond reasonable doubt as it's required in a criminal case. He urged that the Appellant has not discharged the onus of proof.

20. Counsel submitted that the late Joseph Owiti Odede was not an intermeddler. The Appellant has not availed evidence to substantiate the same. The only evidence that the Appellant availed before court is a death certificate which he is doctor of all the details captured therein. The other evidence is a green card which he claims that entries were entered after the original owner had passed. The Appellant did not call the Land Registrar to disown the details therein. He urged that the Land Registrar is the sole custodian of the land registered and the green card and the Appellant ought to have sued the Land Registrar if at all he had all questions as to the entries made therein. The Green card is clear evidence

of the truthfulness and correctness of the information exhibited thereon. For any contrary to be taken then the maker and/or custodian of the same should have been summoned before court. He placed reliance on the case of KINYANJUI KAMAU V GEORGE KAMAU [2015] ECLR among a plethora of authorities in this regard.

21. Counsel submitted that the Appellants are the ones who alleged fraud and so the burden of prove shifted to them to prove that indeed the Respondent committed fraud in having the transfer forms with himself. He urged that the threshold for proof of fraud has been stated in several decided cases, citing Railal Gordhanbhai Patel Vs Lalji Makanji (1957) E.A 314 and the case of Central Kenya Ltd vs Trust Bank Ltd & 4 others. C.A No.215 of 1996 in this regard.

22. Counsel urged that the trial court rightfully upheld the title held by the 2nd Respondent's husband to be a good title. He cited section 26 of the Land Registration Act and submitted that the Appellant did not submit any substantive evidence to prove that the title deed held by the 1st and then the 2nd Respondent were obtained fraudulently. That the Appellant argued further that as per the green card the late Joseph Owiti Odede became the registered owner of the suit

property on the 19th of June 1996. The Appellant argues that the transfer was done posthumous the demise of Oputh Misori. This claims cannot only be arrived at only on the premise of a death certificate prepared wholly on the information furnished by the Appellant.

23. The Appellant alleged that the suit property was sold to one Philip Ojwang on the 10th of March 2020 and was transferred to his name on the 7th of April 2020 there is nothing strange about the time frame as it is dependent on the readiness of the parties that were involved. This does not cannot be deemed to be fraud on the part of the 2nd Respondent's husband. As at the time the 1st Respondent's husband was getting into the picture the suit property was in the name of the 1st Respondent herein. Furthermore, the green card had no red flags as there was no caution or restriction to bar him from any transaction. The suit property was free of any encumbrances, there was third party occupying the land apart from the 1st Respondent. The 2nd Respondent carried out the necessary due diligence that was required of him. Furthermore, the 1st Respondent has not denied having sold the said parcel of land to the 2nd Respondent. The 1st Respondent has not denied having given the necessary

consents and transfer forms to bestow ownership of the suit property to the 2nd Respondent's husband. The 2nd Respondent's husband was a bona fide purchaser for value which has not been denied.

24. On whether the trial court failed to consider whether the titles that the respondent held were valid, counsel urged that the Appellant was to avail an investigation report to negate the validity of the title deeds. That he did not call the land registrar to deny the validity of the title and/or verify the entries thereof. Clearly the court was not persuaded by the Appellant hence its verdict. The court was not in error but acted on the evidence that was laid before it.

25. On the burden of proof shifting, counsel urged that the Appellant did not discharge his burden of proof and neither did the burden shift to the Respondents. The only evidence produced by the Appellant was a death certificate whose authenticity was cast in doubt. The doubt was never cured and the Appellant did not call any other witness to corroborate the evidence he adduced. The Appellant did not table any agreement before court to prove that his uncle gave him the suit property. Counsel urged that the appeal is

not merited and prayed that the same be dismissed with costs.

Analysis and Determination

26. The issue that arises for determination is; **Whether the trial court erred in dismissing the Appellants suit**

27. The duty of a court on appeal has been stated severally in various celebrated decisions. In **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, the court stated 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 re-analyse 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.”

28. In **Williamson Diamonds Ltd and another v Brown** [1970] EA 1, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but

must reconsider the evidence and make its own evaluation and draw its own conclusion.”

29. The Appellants’ contention in the trial court was that the defendants were fraudulently registered as proprietors of the suit land and therefore, he sought to have the title registration revoked and the register rectified.

30. It is trite law that he who alleges must prove. This position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 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. Sections 109 and 112 of the same Act states as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

32. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof),

the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

- 33.** Having established that the burden of proof was on the appellant, the next port of call is to determine whether the same was satisfied to the required standard.
- 34.** The appellants’ claim was premised on the assertion that the suit land which was registered in his uncles’ name was fraudulently transferred to the defendants. The 2nd defendant, on her part, produced the sale agreement signed by her husbands’ agent, Owala Nyakach, who purchased the suit land from Mary Auma Owiti and produced a sale agreement and a title deed to that effect.
- 35.** While I note that the 1st respondent did not provide any evidence as to how the land was transferred into her husbands’ name, she alleged that the documents were lost in a fire. However, the burden of proving the fraudulent transfer was upon the appellant.

36. Given that the allegations were those of fraud, the burden of proof was slightly higher than that of civil liability of a balance of probabilities. A fundamental principle of fraud is that the same must be specifically pleaded and proved. This was aptly expressed in **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently”

37. Indeed, fraud cannot be inferred from facts. It must not only be pleaded but proven. In **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs Stephen Njoroge Macharia [2020] eKLR**, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the

Court would make a finding that indeed there was fraud....”

- 38.** This Court has carefully analysed the evidence of the parties. Given that it was the plaintiff who had the burden of proof, his evidence regarding the issue is crucial. A careful reading of his written statement and the oral testimony does not lead to finding any evidence on the fact of fraud: not at all. It means that there was no fraud committed by the defendant’s husband or any other person in the acquisition of the suit land.
- 39.** Given the above finding, I am therefore in agreement with the trial court that the appellant failed to prove the allegations of fraud to the required standard. It is not enough to merely state that there was fraud, one must show which element of and specifically how the fraud occurred, with cogent evidence, which the appellant failed to do.
- 40.** In the premises, I find that the appeal lacks merit. The same is dismissed with costs to the 2nd Respondent.

Judgment dated, signed and delivered virtually via the Teams Platform this 17th day of December 2025

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Ms. Kisaka Advocate for the 2nd Respondent

Mr. Anyul for the Appellant

Mr. Bana for the 1st Respondent, absent served.