

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT IN HOMABAY**  
**ENVIRONMENT AND LAND COURT APPEAL NO. E021 OF**  
**2025**

**ELIJAH OTIENO OWINO.....1<sup>ST</sup>**

**APPELLANT**

**BEN OWINO OTIENO.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**THE DISTRICT LAND REGISTRAR**

**RACHUONYO.....1<sup>ST</sup>**

**RESPONDENT**

**JAPHETH NYAOKE.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

**1.** This ruling pertains to the Appeal before this court. By way of a Plaint dated 22<sup>nd</sup> September 2023, the Appellants sought the following orders in the trial court;

**1) An order nullifying gazette notice number 10242 dated 7<sup>th</sup> August 2022 and reinstating the proprietorship of parcel of land known as TITLE DEED NUMBER; EAST KARACHUNYO/KAMSER SEKA/1274 measuring approximately (0.34) Ha situated in East Karachuonyo Seka to the 1<sup>st</sup> Plaintiff as at 21/08/2000.**

**2) An order declaring transfer of parcel of land known as TITLE DEED NUMBER; EAST KARACHUNYO/KAMSER SEKA/1274 measuring ID**

**approximately (0.34) Ha situated in East Karachuonyo Seka in favour of the 2<sup>nd</sup> Defendant issued on 10<sup>th</sup> November 2022 ultra vires and fraudulent thus null and void ab initio.**

**3)An order directed to the District Land Registrar, Rachuonyo to rectify the register by cancellation of the entries relating to the transfer of TITLE DEED NUMBER; EAST KARACHUNYO/KAMSER SEKA/1274 registered and issued respectively on 10<sup>th</sup> November 2022 in favour of the 2<sup>nd</sup> Defendant over the Suit Property.**

**4)An order for the vacant possession of the suit property.**

**5)An award of general damages in that regard.**

**6)Costs of this suit plus interest thereon at court rates from the date of the judgment until payment in full.**

**7)Any other or further relief as the Honourable Court may deem fit to grant**

**2.** They pleaded that the defendants fraudulently transferred the suit land from the 1<sup>st</sup> plaintiff.

**3.** The 2<sup>nd</sup> defendant filed a statement of defence dated 16<sup>th</sup> October 2023. He denied all the allegations in the plaint and urged that he is the registered proprietor of the suit land having purchased the same from the 1<sup>st</sup> plaintiff.

**4.** The matter then proceeded for full hearing where the Plaintiff called 4 witnesses whereas the defendant called 4 witnesses. For the reasons given in the analysis below, I

need not reproduce the evidence of the witnesses and analysis at this stage

5. The trial court considered the evidence tendered in court and the pleadings and submissions and vide the judgement delivered on 22<sup>nd</sup> April 2025, the suit was dismissed.

6. Being aggrieved with the judgement of the trial court, the Appellants instituted the present appeal vide a Memorandum of Appeal dated 20<sup>th</sup> May 2025 premised on the following grounds;

**1) The Learned Magistrate erred in fact and law by failing to properly evaluate and determine the issue of the two alleged sale agreements produced by the 2<sup>nd</sup> Respondent, which indicated that the suit land was purportedly sold twice. The Appellants had raised this critical issue to demonstrate the fraudulent nature of the transaction, but the Learned Magistrate disregarded it without analysis, thereby occasioning a miscarriage of justice.**

**2) The Learned Magistrate erred in law and fact by failing to consider the irregularities in the documents presented by the 2<sup>nd</sup> Respondent purporting to transfer the Title to parcel of**

**Land KARACHUONYO/KAMSER SEKA/1274 to the 2<sup>nd</sup> Respondent. The Appellants had demonstrated that the documents were procedurally flawed and did not meet the legal requirements under the Land Registration Act.**

- 3) The Learned Magistrate erred in law and fact by completely disregarding the Appellants' claims against the 1st Respondent who failed to verify the legitimacy of the documents before effecting the alleged replacement of title and transfer and subsequently failed to appear in court despite being served with pleadings.**
- 4) The Learned Magistrate erred in law and fact by dismissing the 1<sup>st</sup> Appellant's credible testimony that he never signed any sale agreement nor received any consideration for the purported sale of the land. The onus was on the 2<sup>nd</sup> Respondent to prove the authenticity of the purported Sale Agreements payment of consideration thereof to the 1<sup>st</sup> Plaintiff.**
- 5) The Learned Magistrate erred in law and fact by ignoring the evidence of the Police Occurrence Book (OB) entry produced by the Appellants, which documented alleged loss of title with the 2<sup>nd</sup> Respondent's telephone number indicated therein as the contact person, demonstrating fraud.**
- 6) The Learned Magistrate erred in law and fact by relying on photographs allegedly showing the 1<sup>st</sup> Appellant's participation in the transfer process, which were never legally produced or exhibited during the trial. This reliance on unproduced**

**evidence violated the principles of fair trial and procedural justice.**

- 7) The Learned Magistrate erred in law and fact by overlooking material contradictions in the 2<sup>nd</sup> Respondent's witness statement and testimony, including that of his witnesses. These inconsistencies undermined the credibility of the Respondents' case, yet the court was reluctant to address them.**
- 8) The Learned Magistrate erred in law and fact by disregarding the testimonies of PW3 (Richard Adoul Nyatieno-Brother to the 1<sup>st</sup> Appellant) and PW4 (Robert Ouko-the Only son to the 1<sup>st</sup> Appellant who was all through present at home and gave testimony as to no sale agreement signed and money paid), thus no sale agreement existed and that the transfer was fraudulent.**
- 9) The Learned Magistrate erred in law by misplacing the burden of proof on the Appellants instead of requiring the Respondents to prove the legality of the contested transactions, particularly in light of the serious allegations of fraud.**
- 10) The Learned Magistrate erred in law and fact by making prejudicial findings by characterization of the 1<sup>st</sup> Appellant's credibility basing it on subjective impressions rather than objective assessment of evidence legality of the contested**

**transactions, particularly in light of the serious allegations of fraud.**

- 11) The Learned Magistrate erred in law and fact by making prejudicial findings by characterization of the 1<sup>st</sup> Appellant's credibility basing it on subjective impressions rather than objective assessment of evidence.**
  - 12) The Learned Magistrate erred in law by improperly drawing adverse inferences from the Appellants' alleged failure to avail a report presuming existence and contents of a report without evidence that such report had been completed or served on the Appellants, therefore shifting the burden to the Appellants to disprove allegations about a document whose existence wasn't established.**
  - 13) The Learned Magistrate erred in law and fact by disregarding the Appellants' evidence and testimonies wholly, by failing to properly evaluate all the issues framed for determination and only basing his decision on the alleged two sale agreements.**
- 7.** The appeal came up for hearing. The parties were directed to file submissions and they did. However, the court has perused the record of appeal and from the index, the same is indicated to run until page 231 but the copies filed in court and the copies filed on the case tracking system only run until page 218. The judgement and the decree which the

appellant seeks to appeal against are not contained in the record which contravenes the provisions of Order 42, Rule 2 of the Civil Procedure Rules which provides that:

**“where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”**

8. Order 42 Rule 13 (4) (a), (b) and (f) further provides that:

**“Before allowing the appeal to go for hearing the judge shall be satisfied that inter alia, memorandum of appeal, pleadings and the judgment, decree or order appealed are on the court record, and that such of them as are not in the possession of either party have been served on that party.**

**(a) the memorandum of appeal;**

**(b) the pleadings;**

**(c) the notes of the trial magistrate made at the hearing;**

**(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

**(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

**(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

**Provided that—**

**(i) a translation into English shall be provided of any document not in that language;**

**(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).**

**9.** the **only ddfddf**

**10.** The upshot of the foregoing is that before an appeal is set down for hearing, it must contain the judgement and decree of the trial court. The logic behind this is that the appellate court needs to have an opportunity to see the decision it is to overturn and analyse it, otherwise, the court cannot be said to have considered an appeal without the actual decision it is to overturn or allow.

**11.** In the case of **Loopa & another (Suing as the legal representative of the Estate of Stephen Ng'ulia (Deceased)) v Technoplast Ltd [2022] KEHC 13597 (KLR)** the court held that:

**“The contents of the Record of Appeal by Order 42 Rule 13 of the Civil Procedure Rules include judgment, order or decree appealed from. Indeed Order 42 Rule 2 provides that where a certified copy of decree or order is not filed, the court need not consider whether to reject the appeal summarily**

**under section 79B of the Act until “such certified copy is filed.” Clearly, in the High Court, a certified copy of decree or order is a mandatory requirement the default of which may be cured by filing it in a supplementary record in accordance with Order 42 Rule 2 of the Civil Procedure Rules.**

**While the requirement of attaching a decree or order appealed from is not a technicality, in the spirit of Article 159 (2) (d) of the Constitution and the overriding objectives stated under Section 1A and 1B of the Civil Procedure Act, this court is mandated to consider the wider interests of substantial justice and there is no room the draconian decision to strike out the appeal for want of a certified decree, judgment or order in High Court appeals governed by Order 42 Rule 2 and 13 of the Civil Procedure Rules. It is my understanding that the sanction for failure to attach a decree or order in appeals to the High Court is not the striking out of the appeal but the refusal to proceed to set down the appeal for hearing under Order 42 Rule 13 (4) of the Civil Procedure Rules until a certified copy is attached. The rule states that “before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record....”**

**12. Further, in Cooperative Bank of Kenya v Otiyo & 6 others (Environment and Land Appeal E039 of 2024)**

**[2025] KEELC 8053 (KLR) (11 November 2025)**  
**(Ruling)**, this court, in considering the effect of a defective record of appeal which did not contain a copy of the decree, held as follows:

***“34. The determining phrase herein above is that the judge has to be satisfied, before setting down the appeal for hearing, that the documents required to constitute the Record of Appeal are in it, and that those that are compulsory, being the Memorandum of Appeal, the pleadings and the judgment or ruling and decree or order appealed from are part of the Record of Appeal. The effect of failure to include the compulsory documents renders the Record of Appeal incurably defective....***

***36. I note that paragraph (f) of Order 42 Rule 13 of the Civil Procedure Rules is explicit regarding the compulsory decision of the trial court which must be included in the Record. It provided that the Record of Appeal must contain “the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.” It is a fact that there is a copy of the judgment appealed from on the record of appeal. Only the decree is missing. Should that render the appeal completely defective? The answer lies in the interpretation of the sub rule. The conjunction “or” is definitive in the sense that a Record of Appeal should contain one or other of the documents mentioned. Thus, where a judgment is***

***contained in a record of appeal there is no need for a decree. And unlike the Court of Appeal rules which require specific documents including a decree to be filed and stipulate that where it is not filed the record of appeal is defective and the appeal is struck out, in the Civil Procedure Rules there is no provision as that. In any event the Court of Appeal rules contemplate an appeal in that court which is commenced with a notice of appeal rather than a memorandum of appeal. When a record of appeal is struck out in this level of appeal it leaves the memorandum of appeal still intact."***

**13.** In the instant appeal neither the Judgment nor the decree are part of the record. Thus, the Record of Appeal is incurably defective. It must be struck out. But as held in the Cooperative bank case above, that does not destroy the entire appeal. Only the record of appeal is struck out, leaving the memorandum of appeal intact.

**14.** In the circumstances, I find that the appropriate action, which is in the interest of justice, is to strike out the record of appeal and give the appellant an opportunity to be heard. I therefore order as follows;

**1) The record of appeal filed by the appellants is hereby struck out.**

**2) The supplementary record of appeal filed by the 2<sup>nd</sup> respondent is hereby struck out.**

**3) The appellant is granted 30 days to file a complete record of appeal.**

**4) The parties shall have 15 days consecutively after the filing of the record to file submissions on the appeal upon service of each document.**

**5) Costs in the cause.**

**6) The matter be mentioned on 3<sup>rd</sup> March 2026 for compliance with the above directions regarding fresh filings.**

**15.** Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 15<sup>th</sup> day of December 2025.

HON. DR. *IUR* NYAGAKA  
JUDGE

**In the presence of,**

Tonge Yoya Advocate for the Appellant alongside

Imelda Marcos Advocate for the appellant

Ms. Onyoo Advocate for the 2<sup>nd</sup> Respondent

No. appearance for 1<sup>st</sup> Respondent