

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC APPEAL NO. E018 OF 2024

JEREMIA ODIWUOR OPIYO..... APPELLANT

-VERSUS-

DENNIS FRANCIS ODHALO

(Suing through Daniel Jaoko Odhialo).....

RESPONDENT

(Being an appeal from the Judgment and decree of Hon. L.N. KINIALE SPM delivered on 4th April 2024 in Nyando SPM ELC No. 38 of 2020)

JUDGMENT

This appeal challenges the judgment and decree of Hon. L.N. Kiniale (SPM) made on 4th April 2024 in Nyando SPM ELC No. 38 of 2020 (hereinafter referred to as “the lower court”). The Respondent sued the Appellant in the lower court through a plaint dated 14th August 2020. The Respondent averred that he was the registered owner of the parcel known as Title No. Kisumu/Wangaya 1 /5542 (hereinafter referred to as “the suit property”). The Respondent averred that on or about 7th July 2020, the Appellant unlawfully entered and/or encroached on the suit property. The Respondent averred that the Appellant, his agents and/or servants, intended to put up unlawful

structures on and/or plough the suit property. The Respondent prayed for judgment against the Appellant for;

- a) A permanent mandatory injunction compelling the Appellant by himself or through his agents, servants, assigns, heirs, representatives, and any other person acting on his behalf whatsoever, to vacate the suit property and/or restraining them from entering, or interfering in any other manner whatsoever with the property.
- b) Eviction of the Respondent, his agents, servants, assigns, or any other person acting on his behalf whatsoever from the suit property.
- c) Cost of this suit.

The Appellant filed a statement of defence and a counterclaim against the Respondent on 27th August 2020. The Appellant averred that the registration of the suit property in the name of the Respondent was caused by fraud on the part of the Respondent and his representative/Attorney. The Appellant prayed that the Respondent's suit be dismissed with costs. In his counterclaim, the Appellant averred that he was suing as the administrator of the estates of the deceased, Barnabas Opicha Opiyo and Michael Okiri

Opiyo, who were the registered owners of the suit property, having obtained letters of administration from the court in respect of their estates in Nyando PM Succession Cause No. 28 of 2019. The Appellant averred that the suit property was registered in the names of Barnabas Opicha Opiyo and Michael Okiri Opiyo jointly. The Appellant averred that sometime in 2003, the Respondent's Attorney, Daniel Jaoko Odhialo, fraudulently approached the offices of the Land Adjudication and Settlement- Nyando Sub-County and caused the deletion of the names of the said deceased persons from the adjudication record and the substitution thereof with the name of the said Attorneys as the owner of the property. The Appellant averred that the Respondent's said Attorney caused the suit property to be registered in his name before he transferred the same to the Respondent. The Appellant averred that the registration of the suit property in the name of the Respondent's Attorney and the Respondent was fraudulent and dispossessed the estate of the deceased, Barnabas Opicha Opiyo and Michael Okiri Opiyo of the property.

The Appellant averred that he sought an explanation from the offices of Nyando Sub- County Land Registrar on the cancellation of the

names of the said deceased persons from the adjudication record of the suit property and subsequent registration of the same in the names of the Respondent's Attorney and the Respondent, but he did not get a response. The Appellant prayed for judgment against the Respondent for;

1. A declaration that the registration of the suit property in the names of the Respondent and his Attorney was fraudulent, illegal, void ab initio, and an order deleting their names from the register of the suit property.
2. An order that the suit property be registered in the name of the Appellant as the administrator of the estates of Barnabas Opicha Opiyo and Michael Okiri Opiyo, who were the joint owners of the suit property.
3. A permanent injunction restraining the Respondent, his Attorney, and assigns from entering the suit property and carrying out any development thereon.
4. Costs of the counterclaim.

The Respondent filed a reply to the defence and a defence to the counterclaim on 7th September 2020. In its judgment on the suit and

the counterclaim delivered on 4th April 2024 after hearing the parties, the lower court found that the Respondent was the registered proprietor of the suit property and that the Appellant did not prove his allegation that the Respondent acquired the suit property fraudulently. The lower court dismissed the Appellant's counterclaim and issued a permanent injunction restraining the Appellant from entering or interfering in any manner whatsoever with the suit property, and an order for the eviction of the Appellant from the suit property. The appellant was also condemned to pay the costs of the suit.

The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 11th April 2024, the Appellant challenged the lower court's judgment on the following grounds;

1. That the Learned Trial Magistrate erred in fact and law in treating the evidence and submission before her superficially and consequently coming to a wrong conclusion on the same.

2. That the Learned Trial Magistrate erred in fact and law in finding that the Respondent had proved his case on a balance of probabilities.
3. That the Learned Trial Magistrate erred in fact and in law in ignoring the Appellant's pleadings, defence, evidence, and submissions, hence occasioning herself to reach an unreasonable judgment.
4. That the Learned Trial Magistrate erred in fact and in law in failing to appreciate the Appellant's overwhelming evidence that controverted and rebutted the Respondent's evidence, thus degrading and/or lowering the Respondent's probative evidentiary value.
5. That the Learned Trial Magistrate erred in fact and law in disregarding the applicable law in the circumstances that the Appellant had put forth for her to reach a fair and reasonable judgment.
6. That without prejudice to the foregoing, the judgment reached by the lower court was in contradiction to the principles and rules of law that ought to have applied while reaching a fair and reasonable judgment.

The Appellant prayed that the appeal be allowed and the judgment and decree of the lower court be set aside and, in its place, judgment be entered for the Appellant dismissing the Respondent's case with costs in the subordinate court and further enter judgment as prayed in the counterclaim with costs. The Appellant also prayed for the costs of the Appeal.

The appeal was argued by way of written submissions.

The Appellant's Submissions

The Appellant filed submissions dated 4th April 2025. The Appellant submitted that the Respondent did not prove his case on a balance of probability. The Appellant submitted that the Respondent did not produce in evidence the agreements through which he claimed to have purchased the suit property. The Appellant submitted that the Respondent only produced a power of attorney and title deed to the suit property, as well as the certificate of official search, which purported to confirm that the suit property was registered in the name of the Respondent. The Appellant submitted that the Respondent, having failed to produce the agreement for sale, did not comply with section 3 of the Law of Contract Act, which requires an

agreement for the sale of land to be in writing. The Appellant submitted that in the absence of an agreement, the Respondent did not have a prima facie case and could therefore not have proved his case on a balance of probability.

The Appellant submitted that the trial magistrate erred in law by not putting into consideration the fact that the Respondent did not obtain the title deed to the suit property procedurally. The Appellant submitted that the trial magistrate did not apply Section 26 (1) of the Land Registration Act 2012. The Appellant submitted that the trial magistrate erred in law by failing to understand that Daniel Jaoko Odhialo and his son, Francis Odhialo, were not bona fide purchasers of the suit property. The Appellant cited several authorities in support of his submissions, which I have considered.

The Respondent's Submissions

The Respondent, in his submission dated 23rd June 2025, framed the following issues for determination;

- a) Whether or not the Respondent acquired the land parcel known as Title No. Kisumu/Wangaya 1/5542 (the suit property) fraudulently.

- b) Whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
- c) Whether the trial magistrate erred in law and fact.
- d) Who should bear the costs of the Appeal?

The Respondent submitted that Section 26 of the Land Registration Act 2012 provides that a certificate of title is prima facie evidence that the person named as proprietor of the land in the certificate 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 on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The Respondent submitted that he acquired his title legally, and as such, the title deed issued to him was sufficient proof of his proprietorship of the property.

The Respondent submitted that where a party alleges fraud, he must specifically plead the particulars thereof and strictly prove the same. The Respondent submitted that in this case, the Appellant alleged

fraud on the part of the Respondent but failed to prove the same at the trial court and before this court. The Respondent submitted that the Appellant had not proved that he was entitled to the reliefs sought before the lower court. The Respondent submitted that the Appellant failed to prove his counterclaim before the trial court on a balance of probability. The Respondent submitted that the trial magistrate did not err in law or fact in her judgment. The Respondent submitted that the learned magistrate considered all the facts presented before her. The Respondent submitted that the Appellant failed to prove before the trial court that he was the rightful owner of the suit property. The Respondent urged the court to uphold the decision of the trial court. On the issue of costs, the Respondent submitted that, as a general rule, costs follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. The Respondent prayed for the costs of the appeal.

Analysis and Determination

I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the

Appellant, and the submissions by the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.

In Gitobu Imanyara & 2 Others v. Attorney General [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

“...this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123* and *Williamson Diamonds Ltd. V. Brown [1970] E.A.L.*

In Kenya Ports Authority v. Kuston (Kenya) Limited [2009] 2EA 212 the Court of Appeal stated 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.”

From the grounds of appeal, I am of the view that the main issue arising for determination in this appeal is whether the lower court erred in its finding that the Respondent had proved his case against the Appellant and that the Appellant’s counterclaim was not proved.

In Kurshed Begum Mirza v. Jackson Kaibunga [2017] eKLR, the court stated as follows:

“ (16) Turning to the second issue; according to section 107 of the Evidence Act, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

In Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing

the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

In Miller v. Minister of Pensions [1947] 2 All ER 372, Lord Denning J. stated that:

"Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

The Respondent claimed that he was the registered proprietor of the suit property. The Respondent claimed that the Appellant had, without his permission, entered and occupied the suit property. The Appellant, on the other hand, claimed that he was occupying the suit

property as of right and that the title held by the Respondent in respect of the suit property was acquired fraudulently. The burden was on the Appellant to prove the fraud that he alleged against the Appellant.

Section 26(1) of the Land Registration Act, 2012 provides that:

“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.”

In Black’s Law Dictionary 9th Edition at page 731, fraud is defined as:

“a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

In Vijay Morjaria v. Nansingh Madhusingh Darbar & another [2000] eKLR, the court (Tunoi JA) 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. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

In Railal Gordhanbhai Patel v. Lalji Makanji [1957] EA 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a mere balance of probabilities is required.”

The Respondent produced in evidence a title deed and a search showing that he was the registered proprietor of the suit property. The Appellant produced in evidence the Adjudication Record for the suit property, which showed that during the land adjudication, the suit property was recorded in the names of the deceased, Barnabas Opicha Opiyo and Michael Okiri Opiyo as the owners thereof. The said

Adjudication Record showed further that the names of Barnabas Opicha Opiyo and Michael Okiri Opiyo were cancelled from the adjudication record and replaced by the name of the Respondent's Attorney, David Jaoko Odhialo, pursuant to objection No. 437 dated 19th April 1993, which was raised by the said David Jaoko Odhialo. The objection was allowed, and it was ordered that the suit property be transferred to the name of David Jaoko Odhialo. The letter dated 11th March 2020 from the Ministry of Lands, also produced in evidence by the Appellant, confirmed that an objection was raised against the recording of the suit property in the names of Barnabas Opicha Opiyo and Michael Okiri Opiyo as the owners of the suit property, and that their names were cancelled from the record and substituted by the name of David Jaoko Odhialo as the owner of the suit property. A copy of the extract of the register of the suit property also produced in evidence by the Appellant, showed that David Jaoko Odhialo was the first registered owner of the suit property, and that he was the one who transferred the suit property to the Respondent on 26th January 2015.

The evidence presented to the trial court by both the Appellant and the Respondent showed that David Jaoko Odhialo (also known as

Daniel Jaoko Odhialo) acquired the suit property during the land adjudication through an objection that was allowed. The Appellant produced no evidence before the court to prove his allegation that the objection proceedings through which David Jaoko Odhialo acquired the suit property were fraudulent. The fact that the Respondent did not produce in evidence a copy of the agreement of sale that David Jaoko Odhialo entered into with Barnabas Opicha Opiyo and Michael Okiri Opiyo, who were the original owners of the suit property, was, by itself, not sufficient evidence of fraud. The court has observed that although David Jaoko Odhialo was registered as the owner of the suit property on 23rd October 2003, it was not until 16 years later, in 2019, that the Appellant started laying a claim to the property. I am of the view that if any fraud was proved at the trial, it was that of the Appellant's attempt to acquire the suit property through fraudulent succession proceedings instituted in 2019. While the suit property was registered in the name of the Respondent, the Appellant managed to obtain a fraudulent certificate of official search dated 3rd October 2018 showing that the suit property was registered in the names of Opicha Opiyo and Okwiri Opiyo as of that date. The Appellant used the fraudulent certificate of official search to petition

for a grant of letters of administration intestate in respect of the estates of Opicha Opiyo and Okwiri Opiyo and caused himself to be appointed as the administrator of their estates and the sole beneficiary of the suit property. I agree with the trial court that the Appellant failed to prove that the Respondent acquired the suit property fraudulently. The trial court did not therefore err in its finding that the Respondent had proved his case against the Appellant on a balance of probabilities. The trial court was, in the circumstances, justified in entering judgment for the Respondent as prayed in the plaint and dismissing the Appellant's counterclaim with costs.

Conclusion

In conclusion, I find no merit in the Appellant's appeal. The appeal is dismissed with costs to the Respondent.

Delivered and signed at Kisumu on this 18th day of December 2025

S. OKONG'O

JUDGE

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

Mr. Achungo h/b for Mr. Odingo for the Appellant

Ms. Mawinda for the Respondent

J.Omondi-Court Assistant

ORIGINAL COPY