



**Shikuku v Shiraho & another (Environment and Land Appeal E011 of 2024)
[2025] KEELC 18512 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 18512 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E011 OF 2024
SO OKONG'O, J
DECEMBER 17, 2025**

BETWEEN

HARRISON SHIKUKU APPELLANT

AND

BEPHINE NYAWERA SHIRAHO 1ST RESPONDENT

AMOS OTIENO OSIR 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. D.O. Onyango, CM
delivered on 6th March 2024 in Kisumu CMCELC NO. E027 OF 2021)*

JUDGMENT

1. This appeal challenges the judgment and decree of the Hon. D.O. Onyango, CM, delivered on 6th March 2024, in Kisumu CMCELC No. E027 of 2021 (hereinafter referred to as “the lower court”). The 1st Respondent sued the Appellant and the 2nd Respondent in the lower court on 9th March 2021. The 1st Respondent averred that she was the registered proprietor of all that parcel of land known as Title No. Kisumu/Kogony/773 measuring 0.05 of a hectare (hereinafter referred to as “the suit property”).
2. The 1st Respondent averred that the Appellant and the 2nd Respondent had laid groundless and unlawful claims of ownership over the suit property. The 1st Respondent averred that the Appellant and the 2nd Respondent had continuously trespassed on the suit property and were carrying out activities thereon which were inconsistent with the 1st Respondent’s proprietorship rights over the property. The Appellant filed a defence on 6th April 2021. The Appellant averred that he bought a portion of the suit property from one Gordon Osiri on 30th August 1995 at a consideration of Kshs. 40,000/- which he paid in full. The Appellant averred that the said Gordon Osiri died before transferring the said portion of the suit property to him. The Appellant averred that he had buried his mother and brother on the suit property.



3. The 2nd Respondent filed a defence on 17th May 2021. The 2nd Respondent averred that he had a lawful claim over the suit property as a son and a beneficiary of the estate of Gordon Osir Jobita, who was the registered owner thereof. The 2nd Respondent denied that he had trespassed on the suit property. The 2nd Respondent raised a counterclaim against the 1st Respondent. The 2nd Respondent sought judgment against the 1st Respondent for an order cancelling the registration of the 1st Respondent as the owner of the suit property, and restoring the property in the name of Gordon Osir Jobita, deceased.
4. At the hearing, the 1st Respondent adopted her witness statement dated 8th March 2021 as his evidence in chief and produced several documents as exhibits. In the statement, she reiterated the contents of the plaint. On cross-examination, the 1st Respondent told the court that she inherited the suit property from her mother. She stated that her father bought the suit property from the then registered owner in 1993 and had it registered in the name of her mother.
5. The 2nd Respondent also adopted his witness statement dated 6th August 2021 as his evidence in chief and produced several documents as exhibits. In the statement, the 2nd Respondent stated that he was the eldest son of Gordon Osir Jobita, who was the registered owner of the suit property. He stated that his father did not sell the suit property. The 2nd Respondent told the court that the 1st Respondent's mother acquired the suit property in 1998, after the death of the then registered owner, who was the 2nd Respondent's father, in 1995, before succession in respect of his estate had been undertaken. On cross-examination, the 2nd Respondent stated that he was the son of Gordon Osir, who was the registered owner of the suit property, and that he was not aware that his father had sold the property before he died.
6. The Appellant adopted his witness statement dated 1st April 2021 as his evidence in chief and produced several documents as exhibits. In his witness statement, the Appellant reiterated the contents of his defence. On cross-examination, the Appellant stated that he used to work for the 1st Respondent's father as a mechanic and a driver. He stated further that he was staying on the suit property and that the 1st Respondent's mother was his elder sister.
7. After the close of evidence in the lower court, the parties made written closing submissions. In a judgment delivered on 6th March 2024, the lower court allowed the 1st Respondent's claim as prayed in the plaint. The lower court found that the 1st Respondent was the registered owner of the suit property and that her title had not been impeached. The lower court found that although the Appellant and the 2nd Respondent had claimed that the 1st Respondent had acquired the suit property fraudulently, the alleged fraud was neither particularized nor proved at the trial. The lower court held that the 1st Respondent was the absolute owner of the suit property and, as such, her title deserved legal protection. As concerns the Appellant's claim that he had purchased a portion of the suit property from the former registered owner, Gordon Osir, the court stated that the Appellant did not displace the evidence presented to the court by the 1st Respondent, which showed that she was the owner of the suit property. The court found that the Appellant and the 2nd Respondent were trespassers on the suit property.
8. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 15th March 2024, the Appellant challenged the lower court's judgment on the following grounds;
 1. That the learned trial magistrate erred in law and fact in failing to make inquiries into the root of the 1st Respondent's title, having correctly found that the Appellant and the 2nd Respondent were challenging the validity of the 1st Respondent's title to the suit property.



2. That the learned trial magistrate misdirected himself in law and erred in holding that the 1st Respondent's title had not been impeached because fraud had not been pleaded or proved, when the extract of title produced by the 2nd Respondent in evidence disclosed a prima facie evidence of fraud in the transfer of the suit property from the first registered owner Gordon Osir Jobita to the 1st Respondent's mother, Elizabeth Kadush Shirao without a grant of letters of administration in respect of the estate of Gordon Osir Jobita who died on 28th September 1995.
3. That since the 1st Respondent's mother was irregularly registered as the owner of the suit property on 3rd July 1998, the title held by the 1st Respondent was liable to challenge under Section 26(1)(b) of the [Land Registration Act](#) 2012.
4. That the learned trial magistrate erred in not finding that the 1st Respondent and her mother were intermeddlers with the estate of Gordon Osir Jobita, and as such the titles held by them were null and void, the same having been acquired illegally through a corrupt scheme.
5. That the learned trial magistrate erred in law and fact in failing to make any finding on the Appellant's assertion that he purchased the suit property from Gordon Osir Jobita, in 1995 and had been in actual occupation thereof, and since consent of the Land Control Board for the transaction was not obtained, the possession of the suit property by the Appellant became adverse to the title of the registered owner.
6. That the learned trial magistrate erred in fact and law in his finding and holding that the Appellant was a trespasser on the suit property, while there was evidence that the Appellant entered and took possession of the suit property with the permission of the then registered proprietor of the suit property, Gordon Osir Jobita.
7. That the decision of the learned trial magistrate was against the weight of the evidence on record.
9. The Appellant prayed that the appeal be allowed and the judgment of the lower court be set aside, and in place thereof, an order be made dismissing the 1st Respondent's suit in the lower court. The Appellant also prayed for the costs of the appeal and the lower court suit.
10. The appeal was heard by way of written submissions. The Appellant filed submissions dated 7th July 2025, while the 1st Respondent filed submissions dated 3rd July 2025.

Analysis and Determination

11. 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.
12. 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.

13. As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters –vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”

14. 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.”

15. I am of the view that the Appellant’s seven grounds of appeal raise only one issue for determination, namely, whether the lower court erred in its finding that the 1st Respondent had proved her case against the Appellant and the 2nd Respondent to the required standard.

16. 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.”

17. The 1st Respondent’s case against the Appellant and the 2nd Respondent was based on trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, *Clerk & Lindsell on Torts*, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it, legal possession. *Halsbury’s Laws of England* 3rd edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on



it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land."

18. In the Court of Appeal, Fourth District, Division 1, California, in *Ralphs Grocery Co. v. Victory Consultants Inc.* (2017) 17Cal. App.5th 245, 261; CACI No. 2000, the court stated that:

"In the instant action, Appellants have sued Respondents for trespass. "Trespass is unlawful interference with possession of property." (*Staples v. Hoefke* (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was substantial factor in causing the harm. (See CACI No. 2000)."

19. It was common ground that the 1st Respondent was not in occupation of the suit property. From the pleadings and the evidence presented before the lower court, the Appellant and the 2nd Respondent challenged the 1st Respondent's title to the suit property. The Appellant claimed that he had purchased a half portion of the suit property from the registered owner thereof on 30th August 1995, and as such had a right to possess that portion of the property. On his part, the 2nd Respondent contended that he was the son of the first registered owner of the suit property, Gordon Osir Jobita, deceased, and as such had a right to occupy the property as a beneficiary of his estate, as the property was registered in the deceased's name as of the date of his death and as such devolved to his estate. To maintain an action for trespass, the 1st Respondent had the burden of proving her ownership of the suit property and unauthorised occupation of the property by the Appellant and the 2nd Respondent.

- 2.0 I am satisfied that the 1st Respondent produced prima facie evidence that proved that she was the registered owner of the suit property. The 1st Respondent also produced evidence showing how she acquired the suit property from Elizabeth Khanush Shiraho, who was said to be her mother. The 1st Respondent's contention that the Appellant and the 2nd Respondent entered and occupied the suit property without her permission was not disputed. The burden of proof shifted to the Appellant and the 2nd Respondent, who claimed proprietary interest in the suit property to establish those claims. 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."

21. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, *Raila Amolo Odinga & Another v. IEBC & 2 Others* [2017] eKLR stated as follows in paragraphs 132 and 133 of the judgment on the evidential burden of proof, which keeps shifting during the trial:

"(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.



(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law...”

22. The 2nd Respondent produced in evidence a certified copy of an extract of the register of the suit property. According to that register, which was not disputed, the 2nd Respondent’s deceased father, Gordon Osir Jobita was the first registered owner of the suit property. He was registered as the owner of the property on 3rd February 1992. The 2nd Respondent also produced in court a copy of the Death Certificate of the deceased, Gordon Osir Jobita. The Death Certificate showed that Gordon Osir Jobita died on 28th September 1995. The date of death of Gordon Osir Jobita was also not disputed. It was not disputed in the lower court and before this court that the 1st Respondent’s mother, Elizabeth Khanush Shiraho from whom the Plaintiff was said to have acquired the suit property as a gift, was registered as the owner of the suit property on 3rd July 1998 as the second registered owner of the suit property after the deceased, Gordon Osir Jobita. It was also not disputed that the 1st Respondent was registered as the owner of the suit property on 3rd October 2019 as the third registered owner of the property after her mother.
23. The 2nd Respondent’s case was that the deceased Gordon Osir Jobita never sold the suit property to the 1st Respondent’s mother or to anyone else. The 1st Respondent contended that it was a surprise to him that the suit property had changed hands several times without the knowledge of the deceased’s family, who were yet to undertake the process of succession in respect of his estate. The 2nd Respondent contended in his evidence that the 1st Respondent acquired title to the suit property fraudulently. (See the last paragraph of the 1st Respondent’s witness statement, which he adopted as his evidence in chief).
24. The Appellant’s case was that he purchased a half portion of the suit property from the deceased Gordon Osir Jobita on 30th August 1995 while he was still alive and took possession thereof upon payment of the full purchase price and had remained in possession since then. The Appellant produced in evidence before the lower court a copy of an agreement dated 30th August 1995, said to have been entered into between the Appellant and the deceased Gordon Osir Jobita. According to the agreement, the Appellant purchased a half portion of the suit property from the deceased at a consideration of Kshs. 40,000/-. The Appellant also produced payment vouchers in proof of payment of the purchase price to the deceased. The Appellant contended that he had a proprietary interest in the said half portion of the suit property by virtue of the said agreement of sale and continuous occupation.
25. I am of the view that, on account of the evidence that was adduced by the Appellant and the 1st Respondent, the burden shifted back to the Plaintiff to establish the root of her title and prove that the title was acquired legally and procedurally from the first registered owner, Gordon Osiri Jobita from whom the 1st Respondent’s mother was said to have acquired the property. The suit property was registered under the Registered [Land Act](#), Chapter 300 Laws of Kenya (now repealed). The Registered



Land Act was repealed by the Land Registration Act, 2012. Sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed), provide as follows:

- “ 27. Subject to this Act-
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

26. The two sections have been reproduced in Sections 24 and 25 of the Land Registration Act, 2012 as follows:

- “ 24. Subject to this Act—
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

27. Section 26(1) of the [Land Registration Act](#), 2012 provides as follows:

“26.

- (1) 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.”

28. In Nairobi Civil Appeal No. E789 of 2023, Mas Construction Ltd. v. Abdul Waheed Sheik & 6 others, the Court of Appeal stated as follows:

“68. It is an indisputable fact that the appellant and the Abduls claim ownership and/or title to the same parcel of land. This Court in Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) stated as follows regarding a claim over the existence of two titles in respect of the same parcel land:

“The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable



description of the property; (c) it must not contain anything that casts any doubt on the title.”

69. In the same vein, this Court in *Munyu Maina vs Hiram Gathiha Maina* [2013] eKLR held that:

We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register.”

29. In Supreme Court Petition No. E033 of 2023, *Harcharan Singh Sehmi & another v. Tarabana Co. Limited & 5 others*, the court stated as follows:

- (ii) Whether the doctrine of Innocent Purchaser for value Without Notice protects a purchaser of an illegally/irregularly allocated title over public land

(66) This issue persistently continues to rear its head whenever the legality of a subsequent title over land following a purchase is called into question. The main bone of contention, has always revolved around the concept of “indefeasibility of title” where holders of such titles under challenge, not only erect the latter as a shield, but also tend to fall back upon the doctrine of innocent purchaser for value without notice. This Court has since pronounced itself authoritatively and with finality on the question of indefeasibility of title in circumstances where a title is called into question regarding its legality. Holders of impugned titles, especially those acquired before the promulgation of the 2010 Constitution always call into service the provisions of Section 23 of the Registration of Titles Act Cap 281 (now repealed).

(67) Pursuant to Section 23 of the repealed Act, a certificate of title was held as conclusive evidence of proprietorship. It read:

“23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

(68) Upon repeal (of the Registration of Titles Act), the effects of registration are now governed by Section 26 of the *Land Registration Act* No. 3 of 2012 which provides;

“26. (1) 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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

This draws from Article 40 that the right to property does not extend to any “property that has been found to have been unlawfully acquired.” See Article 40(1) and (6) of *the Constitution*.

(69) It is important to take note of the critical shift in terminology from the repealed Act to the current statute. Under the Registration of Titles Act, a certificate of title was to be regarded by courts as conclusive evidence that the person named therein was the absolute and indefeasible owner of the land. However, under current legislation, a certificate of title is to be regarded by courts as prima facie evidence that the person named therein is the absolute and indefeasible owner of the land. It is therefore no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.

(70) In *Dina Management Limited vs. County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), this Court held that to determine whether a party is a bona fide purchaser for value, a court must first go to the root of the title, we stated:

“94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.””

30. In an attempt to establish the root of her title, the 1st Respondent led evidence that it was her father, Richard Shiraho, who purchased the suit property from the deceased, Gordon Osir Jobita, on 5th August 1993. The 1st Respondent contended that upon purchasing the suit property, her father caused it to be registered in the name of her mother, Elizabeth Khanush Shiraho. The 1st Respondent produced in evidence a copy of the said agreement dated 5th August 1993 as an exhibit. I have perused the agreement. The agreement does not refer to any particular land parcel. It, however, shows that the deceased, Gordon Osir Jobita, sold to Richard Shiraho a farm at Otonglo at a price of Kshs. 30,000/-. At the top of the agreement, the area of the land sold is given as 0.25 of a hectare. There is a break in the chain of transactions that led to the suit property being registered in the name of the 1st Respondent’s mother, Elizabeth Khanush Shiraho. As mentioned earlier, Elizabeth Khanush Shiraho was the second registered owner of the suit property after the deceased, Gordon Osir Jobita. This means that Elizabeth Khanush Shiraho could only be registered as the owner of the suit property through a transfer of the property from the deceased, Gordon Osir Jobita. It is common ground that as at 3rd July 1998, when the suit property was registered in the name of Elizabeth Khanush Shiraho, Gordon Osir Jobita was long deceased. The question which the 1st Respondent never answered and the court below never interrogated was who transferred the suit property to Elizabeth Khanush Shiraho, from whom the 1st Respondent acquired her title to the property.



31. It is my finding that the 1st Respondent never established the root of her title and failed to demonstrate that Elizabeth Khanush Shiraho, from whom she acquired the suit property, had a valid title to the property. Elizabeth Khanush Shiraho having acquired the suit property from Gordon Osir Jobita 3 years after his death and before a Grant of Letters of Administration in respect of his estate had been issued, held no valid title in the property. The transfer of the suit property to Elizabeth Khanush Shiraho was not only illegal but could only have been done through fraud. The title held by Elizabeth Khanush Shiraho, having been tainted with illegality and fraud, was null and void. Elizabeth Khanush Shiraho did not, therefore, have a valid title in the suit property that she could transfer to the 1st Respondent. The 1st Respondent's title to the suit property was equally null and void. Elizabeth Khanush Shiraho could only transfer to the 1st Respondent what she had, a null and void title.
32. It is my finding, therefore, that the 1st Respondent did not prove that she was the lawful owner of the suit property. Since the 1st Respondent was not the lawful owner of the suit property and was not in possession of the property at the time she brought her lower court suit, her suit for trespass against the Appellant and the 2nd Respondent had no basis. I wish to add that even if the 1st Respondent's father had purchased the suit property, the agreement of sale produced in evidence showed that he only purchased a portion of the suit property measuring 0.25 of a hectare and not the whole of the suit property measuring 0.5 of a hectare. This lends credence to the Appellant's claim that he purchased the other half of the suit property from the deceased, Gordon Osir Jobita, a claim which the lower court never considered.
33. For the foregoing reasons, I disagree with the lower court that the 1st Respondent had proved her case against the Appellant and 2nd Respondent to the required standard. The 1st Respondent was therefore not entitled to the orders granted by the court on 6th March 2024.

Conclusion

34. In conclusion, I find merit in all the grounds of appeal put forward by the Appellant. The appeal is allowed. The judgment of the lower court delivered on 6th March 2024 and the decree extracted therefrom on 22nd January 2025 are set aside, and substituted with an order dismissing the 1st Respondent's suit in the lower court. The Appellant shall have the costs of the appeal and the lower court suit.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF DECEMBER 2025

S. OKONG'O

JUDGE

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

Mr. Irungu for the Appellant

Mr. Lore for the 1st Respondent

N/A for the 2nd Respondent

Ms. J. Omondi-Court Assistant

