



**Ondigo v Alenga & another; Nzuki & another (Interested Parties) (Environment and Land Appeal E003 of 2024) [2026] KEELC 276 (KLR) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E003 OF 2024  
NA MATHEKA, J  
JANUARY 27, 2026**

**BETWEEN**

**SIMON ONDIGO ..... APPELLANT**

**AND**

**DAVID AMUHANDA ALENGA ..... 1<sup>ST</sup> RESPONDENT**

**VIOLET MEDICHA ALENGA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NICODEMUS MUOKI NZUKI ..... INTERESTED PARTY**

**MBUKONI HOLDINGS LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

1. The Appellant appeals against the Judgment made on 5<sup>th</sup> day of February, 2024 by M/S Deffine Nyaboke Sure in Kangundo Chief Magistrate’s Court ELC Case No. E035 of 2022 on the following grounds;
  1. The learned trial Magistrate erred in law by holding that the Appellant (Defendant) deliberately failed to appear in court during the hearing of the suit while the trial court did not provide its link to the virtual platform/court for the entire court for the week 27<sup>th</sup> November, 2023 to 1<sup>st</sup> December 2023.
  2. The learned trial Magistrate erred in law by failing to grant the Appellant an opportunity to his constitutional right to a fair hearing before delivery of Judgment as the Appellant had explained his failure to appear in court due to the failure of the trial court to provide a link for virtual hearing. Further there were no directions that the hearing of the suit was by physical appearance in court.



3. The learned trial Magistrate erred in law by holding that the title to LR Donyo Sabuk/ Komarock Block 1/80088 (from LR 1/431) from the 1<sup>st</sup> Interested Party was genuine not obtained by fraud between the Respondent and the 2<sup>nd</sup> Interested Party who had no capacity to transfer a title to the Respondent.
  4. The learned Magistrate erred in law by failing to handle and hear the Appellant's Notice of Motion dated 29<sup>th</sup> January, 2024 seeking to stay the delivery of Judgment scheduled for 5<sup>th</sup> February, 2024 and reopen the suit for the Appellant to give his evidence and/or cross examine the Respondents evidence.
  5. The learned trial Magistrate erred in law by holding that the Appellant did not produce evidence of fraud and yet the Appellant had filed his witness statement together with the list documents which were pointing to fraud on the part of the Respondents and the 1<sup>st</sup> Interested Party/Respondent.
2. The Appellant prays that;
- i. The Appeal be allowed and Judgment entered on 5<sup>th</sup> February, 2024 be set aside and the case be referred to the Chief Magistrate's Kangundo for hearing and determination on merit.
  - ii. The Appellant be allowed an opportunity to be heard a fair hearing in exercise of his constitutional rights.
  - iii. Costs of this Appeal.
3. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. On the first ground of the appeal the Appellant states that the learned trial Magistrate erred in law by holding that the Appellant (Defendant) deliberately failed to appear in court during the hearing of the suit while the trial court did not provide its link to the virtual platform/court for the entire court for the week 27<sup>th</sup> November, 2023 to 1<sup>st</sup> December 2023.
5. Article 50 of *the Constitution* states that a party must be accorded a right to fair hearing which is tandem with the audi alteram partem cardinal principle of law which provides that parties must be given an opportunity to be heard before adverse orders can be made against them. The Court of Appeal had an opportunity to elucidate on this principle in the case of Pashito Holdings Limited & Another vs Paul Nderitu Ndungu & 2 Others [1197] eKLR when it stated;

The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".There is



an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."

6. In the case *Kiai Mbaki & 2 others vs Gichuhi Macharia & another* (2005) eKLR the court stated as follows;

The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

7. I have perused the court file and find that on the 10<sup>th</sup> July 2023 the matter came up in court for directions and Mr. Nyaberi was present for the 2<sup>nd</sup> Interested Party and was holding brief for Ms. Kalii for the Defendant. The Defendant was given timelines to comply with Order 11 and matter fixed for hearing on the 27<sup>th</sup> November 2023 with an order that there would be no adjournment. On 27<sup>th</sup> November 2023 the Defendant was absent and the matter proceeded ex parte at 12 noon. Court links are usually permanent and one wonders how the Appellant accessed the court on all the other mention dates. Indeed, the date was taken by consent and the Appellant could not have sat back knowing very well they did not have the link. I find the excuse given unreasonable and I reject it. I find that the trial Magistrate did not err by using her discretion proceeding ex parte as the final adjournment had been given.

8. On the substance of the Appeal this court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:

- a. Who is the lawful proprietor of the land parcel known as plot number LR No. Donyo Sabuk/Komarock Block 1/80087 and Donyo Sabuk/Komarock Block 1/80088?
- b. What orders should this court issue?

9. I have carefully perused the documents produced as exhibits and find that the Respondents produced titles for plot number LR No. Donyo Sabuk/Komarock Block 1/80087 and Donyo Sabuk/Komarock Block 1/80088 issued on 9<sup>th</sup> March 2020 in their names.

10. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;

Subject to this Act, 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."

11. Section 26 (1) of the [Land Registration Act](#) states as follows;

The Certificate of Title issued by the Registrar upon registration ... 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... 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."



12. The Court of Appeal 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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

13. Section 26 of the *Land Registration Act* which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in *Attorney General vs Torino Enterprises Limited* (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

We have considered the provisions of section 26 of the *Land Registration Act* (repealed) in light of the provisions of Article 40 of *the Constitution* which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of *the Constitution* which states that: "The rights under this Article do not extend to any property that has been found to have been unlawfully acquired." Guided by the provisions of Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See *Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another* [2018] eKLR."

14. PW1, the Plaintiff has led evidence that on or about the 1<sup>st</sup> October 2016 he bought the suit land from Nicodemus Muoki Nzuki, ID No. 14522052 who was the legal and registered owner for plot numbers 54 and 55 of land parcel number Donyo Sabuk/Komarock Block 1/431 for Kshs. 600,000/= . He produced Mbukoni Holdings Transfer form, Cooperative Bank transaction receipt on 1<sup>st</sup> October 2016, Mbukoni Holdings Limited share certificate No. 243 for plot numbers 54 and 55 dated 1<sup>st</sup> October 2016, Mbukoni Holdings Limited share certificate No. 987 for plot numbers 54 and 55 in the name of Nicodemus Muoki Nzuki dated 4<sup>th</sup> October 2004. Mbukoni Holdings Limited receipt for Kshs. 40,000/= dated 1<sup>st</sup> October 2016 and photographs of the said construction.
15. The Defendant in his defence stated that he is the legal purchaser together with Obed Augustus Akuma of the suit parcels from 2<sup>nd</sup> Interested Party, Mbokoni Holdings Limited. He produced the Ownership Certificate serial number 2394 for plot 54 in the name of Ondigo Simeon Mose dated 27<sup>th</sup> November 2008. Ownership Certificate serial number 2394 for plot 54 in the name of Obed Augustus Akuma dated 27<sup>th</sup> November 2008. A letter dated 30<sup>th</sup> May 2022 from the 2<sup>nd</sup> Interested Party stating that Obed Augustus Akuma and Simeon Mose Ondigo were the rightful owners of the suit plots No. 54 and 55. Certificate of beacons for serial number 1914 for plot 55 dated 27<sup>th</sup> November 2008 in the name of Odingo Simon Mose and Certificate of beacons for serial number 1915 for plot 54 dated 27<sup>th</sup> November 2008 in the name of Obed Augustus Akuma. That the Plaintiffs' titles are forged documents. No evidence of fraud has been adduced against the Plaintiffs.



16. Section 109 of the Evidence Act Cap 80 is clear that;

"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."

17. The well-known mantra "he who asserts must prove." Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that "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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."

18. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

19. Whosoever 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.

20. Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

21. Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

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.

22. The Plaintiff /Respondent testified in the trial court that 1<sup>st</sup> October 2016 he bought the suit land from Nicodemus Muoki Nzuki ID No. 14522052 who was the legal and registered owner for plot numbers 54 and 55 of land parcel number Donyo Sabuk/Komarock Block 1/431 for kshs.600,000/=. He produced Mbukoni Holdings Limited share certificate No. 987 for plot numbers 54 and 55 in the name of Nicodemus Muoki Nzuki dated 4<sup>th</sup> October 2004. On the other hand, it is the Defendant defence that he is the legal purchaser together with Obed Augustus Akuma of the suit parcels from 2<sup>nd</sup> Interested Party, Mbokoni Holdings Limited. He produced the Ownership Certificate serial number 2394 for plot 54 in the name of Ondigo Simeon Mose dated 27<sup>th</sup> November 2008. Ownership Certificate serial number 2394 for plot 54 in the name of Obed Augustus Akuma dated 27<sup>th</sup> November 2008. This is clear evidence that the suit plots were first issued to Nicodemus Muoki Nzuki



on the 4<sup>th</sup> October 2004 who sold the same to the Plaintiff in 2016 and the 2<sup>nd</sup> Interested Party had no right to arbitrarily if at all, re issue them to someone else. I find that the suit land had already been sold to the Nicodemus Muoki Nzuki in 2004 and later to the Plaintiff in 2016 and was not available for sale to the Defendant in 2008.

23. I find that the Defendant and or the 2<sup>nd</sup> Interested Party were being fraudulent knowing very well the suit land was not available for sale and were trying to outsmart the Plaintiff. I agree with the trial court that Plaintiff/Respondent has established that he is the legitimate proprietor of the suit plots and hence entitled to the said orders in the plaint. I find this appeal is not merited and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 27<sup>TH</sup> DAY OF JANUARY 2026.**

**N.A. MATHEKA**

**JUDGE**

