

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND COURT LAND APPEAL E014 OF**  
**2025**

**MUSA OWUOR OUMA.....1<sup>ST</sup>**

**APPELLANT**

**TABITHA JUMA OWUOR.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**PAMELA AKOTH ONDURU**

**(Suing as the Personal  
Representative of Mourice  
Onduru Akwogo- Personal  
Representative of Okuogo**

**Amolo alias Okuogo Omolo).....1<sup>ST</sup>**

**RESPONDENT**

**ELIZABETH AKINYI ONYANGO.....2<sup>ND</sup>**

**RESPONDENT**

**THE LAND REGISTRAR RACHOUNYO SOUTH....3<sup>RD</sup>**

**RESPONDENT**

***(Being an Appeal from the Judgement and Decree of  
Hon. S.O Ongeru (SPM) in Oyugis SPMECLCC E059 of 2021  
delivered on 20<sup>th</sup> March 2025)***

**JUDGEMENT**

**Brief facts**

1. By way of a Complaint dated 26<sup>th</sup> August 2021, the Respondent herein, then the Plaintiff, sought the following orders;

**a) An order cancelling the title deed number West Kasipul/Kodera/Karabach/1283 currently in the name of the 3<sup>rd</sup> Defendant.**

**b) An order for permanent injunction against the Defendants their agents, employees and/or servants.**

**c) General damages for trespass.**

**d) Costs and interest of this suit**

2. The Plaintiff pleaded that he is the son to one OKUOGO AMOLO alias OKUOGO OMOLO who was the registered owner of the parcel of land known as West Kasipul/Kodera/Karabach/997. His father died on the 2<sup>nd</sup> September 1992. Thereafter, the Plaintiff entered into an agreement for the sale of a portion of the said parcel of land to the 1<sup>st</sup> Defendant at an agreed price of Kenya Shillings Eighty-Five Thousand (Kshs. 85,000/=). Out of the said purchase price he only paid a sum of Kshs. 24,000/= and abandoned the agreement in *toto*.

- 3.** He pleaded that the 1<sup>st</sup> Defendant never took possession of the suit property and he, the Plaintiff, has been in the occupation, ownership and use of the same. Further, that while conducting succession proceedings to his father's estate he did an official search over the father's parcel of land and discovered that the land had already been subdivided into two portions, being West Kasipul/Kodera/Karabach/1282 and 1283 respectively. He learned that no. 1282 was still in his father's name while No. 1283 had been registered in the name of the 1<sup>st</sup> Defendant, then the 2<sup>nd</sup> Defendant and now in the name of the 3<sup>rd</sup> Defendant.
- 4.** Further, that he had sold a portion of the parcel of land which was under title deed West Kasipul/Kodera/Karabach/1282 to one Walter Odhiambo who was financing the succession process, and the Plaintiff had to succeed the only portion which was in his father's name, being West Kasipul/Kodera/Karabach/1282, to have the authority to transfer the portion that was sold to Walter Odhiambo to him.

5. He pleaded that his father died in the year 1992 and he only filed a succession cause to succeed his father's estate in the year 2016 vide the Oyugis Succession Cause No. 103 of 2016 whereof he was appointed as his father's Personal Representative and hence the dealings by the Defendants in the land were illegal. He set out the particulars of the defendants' fraud and prayed that the suit be allowed.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Statement of Defence dated 15<sup>th</sup> November 2021 where they denied all the allegations in the Plaint. Further, they pleaded that on 24<sup>th</sup> October 1993, the 1<sup>st</sup> Defendant entered an Agreement for Sale with the Plaintiff to purchase a portion of Parcel No. 997 measuring Seven (7) acres (2.4 Hectares) at a Price of Kshs. 30,800/= . The parcel was in the name of the Plaintiff's late Father, one Okuogo Omolo, as per the Certificate of Official Search issued on 24<sup>th</sup> December 1993. Further, in the Sale Agreement signed before the then Resident Magistrate in Winam Law Courts, the Plaintiff, at Clause 8, swore before the said Court that he was the only heir of the Estate of his late father Okuogo Amolo whose name was registered on the Title and the Sale Price was

Kshs. 30,800/= out of which the Plaintiff signed that he had received Kshs.18,000/= and the balance was Kshs.12,800/= to be paid in 60 days.

7. After the 1<sup>st</sup> Defendant cleared payment of the balance of the Purchase Price, the Plaintiff applied and obtained Consent from the Land Control Board at Oyugis on 06/04/94 to Sub-Divide the Land before Transferring the Portion under sale to the 1<sup>st</sup> Defendant.
8. They pleaded that the Consent to Sub-Divide the Land was issued to the Plaintiff on 06/04/94 and a Surveyor was Commissioned by the Parties to prepare the Mutation Forms which were Submitted to the District Surveyor-Homa Bay on 29/04/94 subsequent to which an Application for Consent to Transfer the 2.4 Hectares under Sale was made and the Original Parcel was Sub-divided into Two Sub- Titles No. 1282 & 1283 on 25/11/94 and Title No. 1282 remained in the name of the Plaintiff's Deceased Father (Okuogo Omolo) and Title No. 1283 transferred into the name of the 1st Defendant in terms of the Consent issued by Oyugis Land Control Board.

- 9.** Upon being issued with the Title Deed on 25/11/94, the 1st Defendant took occupation of the Land and settled therein. The Plaintiff and his Family settled on the Land in December 1994 and built their home with the 2nd Defendant who is the 1st Defendant's wife. They stayed on the Land until December 2005 when the 1st Defendant retired. Due to the nature of the 1st Defendant's work of being a pastor of the Seventh Day Adventist Church which entailed him being transferred often, that is, Transfers and Movement to different Stations and Districts, the 1st Defendant transferred the subject Parcel No. 1283 to his wife (2nd Defendant) on 01/09/95.
- 10.** They stated that it is therefore dishonest, untruthful and scandalous for the Plaintiff to allege that the Sale was for Kshs. 85,000/= contrary to the clear contents of the Sale Agreement dated 24/10/93 which was attested before the Magistrate at Winam Law Court in Kisumu. Further, it was dishonest for the plaintiff to allege that the 1<sup>st</sup> and 2<sup>nd</sup> defendants never took possession while they did so from December 1994 to 2005 upon the 1<sup>st</sup> Defendant's retirement. Additionally, it was dishonest for the Plaintiff to aver that he

never participated in the transactions yet he even signed the Mutation Forms and surrendered the title deed for the transfer of the subdivision to the 1<sup>st</sup> Defendant.

**11.** Additionally, the plaintiff was aware that the 1<sup>st</sup> and 2<sup>nd</sup> defendant were husband and wife and had settled on the land as per the Chief's confirmation letter.

**12.** The Defendants pleaded that it was after the 1<sup>st</sup> Defendant was transferred to Wire Station in December 2005 when the he and his wife decided to sell the parcel to 1<sup>st</sup> Defendant. They entered into an agreement on 15/11/2007 and saw the suit land transferred to him after following the necessary procedures. They denied the particulars of fraud and illegality levelled against them while they reiterated that the sales and transfers of the suit land were done with the full knowledge of the Plaintiff, and the said party was fully aware that parcel No. 1282 remained in the name of Okuogo Omollo.

**13.** They pleaded that the agreement of sale over the original parcel No. 997 having been effected on 24/10/1993 and Consent to subdivide made on 06/04/1994 and transfer of parcel No. 1283 on 25/11/1994, the entire suit was barred by

the Limitation of Actions Act. Further, the plaintiff had not come to court with clean hands and committed perjury, concealment of material facts and falsehoods. They prayed for dismissal of the suit with costs to them (1<sup>st</sup> and 2<sup>nd</sup> Defendants).

### **Evidence**

**14.** The matter then proceeded for hearing with the plaintiff testifying as the sole witness while the defendant testified and called one witness.

**15. PW1**, Pamela Akinyi, the 1<sup>st</sup> Respondent herein, then the Plaintiff, adopted her witness statement as evidence in chief and produced her documents as evidence. She stated that she was the Plaintiff's wife, having gotten married to him in the year 2001. Her husband was the son of Okuogo Amolo alias Okuogo Omolo who died on 2nd September 1992. By then the father-in-law was the registered owner of parcel number West Kasipul/Kodera/Karabach/997. Her husband had previously sold a portion of his father's parcel of land to the first defendant. The agreed sum was Kenya Shillings 85000/=. However, the 1st Defendant paid only Kenya Shillings 24,000/=.

**16.** She added that when she got married to the plaintiff, she found him in the ownership, occupation and use of the whole of the parcel of land. The 2nd Defendant had never used or occupied it. In 2016, Walter Odhiambo to whom the husband had sold a portion of the land, wanted to get his title deed. He agreed to finance the Succession Cause so that he would get authority to transfer the land to him. That was the time he discovered that the suit land had been illegally subdivided into parcel numbers, West Kasipul/Kodera/Karabach/1282 and 1283 respectively.

**17.** Further, her husband filed Oyugis Succession Cause No. 103 of 2016 wherein he was appointed the personal representative of the late father's Estate. It was clear that the entries on the green card respecting the suit property number West Kasipul/Kodera/Karabach/1283 were done when/ yet the father-in-law had already died, and no Succession had been carried out hence the same was null and void ab initio. She prayed that 3rd Defendant's title deed be cancelled and reverts to her father in law's name. She also prayed for damages for trespass unto the Father's property.

- 18.** During cross examination, she stated that she was the 2<sup>nd</sup> wife of the late Maurice Onduru. She stated that she was not present when the transaction happened and denied stating that they sold the land for Kshs. 85,500/-. She was not aware that her husband received Kshs. 18,000/- and had not seen any agreement. She did not know the property was to be transferred and confirmed that the land was sub divided to Walter Odhiambo in 2016.
- 19.** The plaintiff closed her case and the defendant called a witness in support of his case.
- 20.** **DW1** was **Musa Owuor Ouma**, who adopted his written witness statement. The statement was an exact replica of the averments in the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Defence save that it was written in the 1<sup>st</sup> person. Thus, the court needs not rehash it but considers the contents in it as evidence in chief as adopted.
- 21.** Orally, he urged that the deceased sold the land at Kshs. 30,800 and he paid two installments after 60 days in December 1993. He further stated that the deceased processed the transfer and he got the title deed on 25<sup>th</sup> January 1994. He informed the chief that he intended to build

on the land and proceeded to build his house and has lived there for 9 years. Further, that Pamela Onduru was present.

**22.** During cross examination he stated that he purchased the land from Maurice Onduru on 24<sup>th</sup> January 1993 and that the agreement was for 6 acres. He stated that the land was in the name of Maurice's father and that they agreed that he does succession. He urged that he paid for the land but did not have any acknowledgment of the same.

**23.** The trial court found that the sub division of West Kasipul/Kodera Karabach 1997 was illegal and cancelled all titles arising from the same, directing that they revert to the name of the late Okuogo Omolo.

**24.** Being aggrieved by the decision of the trial court, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 3<sup>rd</sup> April 2025 premised on the following grounds;

**1)The Learned Magistrate erred in law and fact in entertaining a fatally defective suit which was statute barred and in which the 1<sup>st</sup> Respondent who prosecuted the suit on behalf of the deceased plaintiff was not the personal and legal**

**representative of the original purported registered owner of the suit property Okuogo Amolo alias Okuogo Omolo.**

**2) The Limited Grant of Administration Ad-Litem issued to the 1<sup>st</sup> Respondent Pamela Akoth Onduru as Plaintiff in the lower court in OYUGIS-SPMCC SUCCESSION CAUSE No. E100 OF 2023 was in respect of the Estate of Mourice Onduru Akwogo (Deceased) and she was never substituted as the Administrator of the Estate of Okuogo Amolo alias Okuogo Omolo in OYUGIS-SPMCC-SUCCESSION CAUSE No. 103 OF 2016 to prosecute the suit on behalf of the estate of Okuogo Amolo alias Okuogo Omolo.**

**3) The above legal technical issues rendered the suit fatally defective and untenable having been raised both in the proceedings and submissions BUT ignored by the Trial Magistrate rendering the Judgment and Decree dated 20/03/25 untenable and the same should be set aside.**

**4) There was no evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who were the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the subordinate court were served with summons to enter appearance and they never participated in the proceedings, a fact which was raised in the pleadings, proceedings and submissions BUT the same was ignored by the learned Magistrate rendering the Judgment and Decree dated 20/03/25 untenable and the same should be Set Aside.**

**5) The Learned Magistrate erred in Law and fact in totally misapprehending the Pleadings (Plaint and Defence by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants), the Documentary and Oral Evidence produced in Court especially the Admissions by the Original Plaintiff that he sold the portion of the Suit Property to the 1<sup>st</sup> Appellant (1<sup>st</sup> Defendant) on 24/10/93 after the death of his father on 02/09/92 only to come back and challenge the said Sale in October 2021 after 29 Years.**

**6) The Learned Magistrate erred in Law and fact in totally ignoring the 1<sup>st</sup> Appellant's evidence that**

**the sub-division and Transfer processes were undertaken by the deceased plaintiff Mourice Onduru Akwogo which took over one (1) year from the date of the sale agreement (24/10/93) until the date of the transfer of the portion to the 1<sup>st</sup> Appellant on 25/11/94 during which period it was the deceased plaintiffs legal duty and obligation to file for succession, undertake sub-division and effect the transfer in the name of the 1<sup>st</sup> Appellant and there was no evidence tendered to suggest or prove that it was the 1<sup>st</sup> Appellant who undertook the process since the deceased plaintiff held the original title deed of the parent suit property and processed all the sub-divisions.**

**7)The evidence tendered before the subordinate court by the 1<sup>st</sup> Appellant which was never challenged or controverted proved that it was the deceased plaintiff who held the parent title deed and took the 1<sup>st</sup> Appellant to the Land Board to obtain consent to sub-divide and transfer the**

**portion of the land to the 1<sup>st</sup> Appellant and this evidence was ignored by the trial magistrate.**

**8) By the Judgment and Decree, the learned magistrate conferred a benefit to the perpetrator of the alleged intermeddling and proceeded to award Costs of the Suit to the 1<sup>st</sup> Respondent who admitted that she was not aware of the transaction and was married to the deceased plaintiff as a second wife in 2001 over ten (10) years after the transaction had been concluded.**

**9) The decision and judgment of the lower court is lopsided, unbalanced, not supported by the evidence tendered, biased, misapprehends the pleadings and totally ignored the law and submissions by the Appellants and should therefore be set aside.**

**10) The decision, judgment and decree is grossly erroneous as it seeks to restore a property which the deceased plaintiff admitted in paragraph 14 of the plaint that he had further subdivided and sold to other third parties and therefore the final decree**

**and resultant orders are totally absurd and the same should be set aside.**

**25.** The parties prosecuted the Appeal by way of written submissions. The appellant filed submissions through the firm of Messrs. T.O. K'Opere & Co Advocates dated 15<sup>th</sup> August 2025 whereas the Respondent filed submissions through the firm of Messrs. Kisaka & Associates dated 1<sup>st</sup> December 2025. But they also elected to highlight the submissions orally.

### **Appellants Submissions**

**26.** Learned counsel for the appellant laid out the background of the suit and proceeded to submit on the grounds of appeal. The appellants maintained that under grounds 1 and 5 of the memorandum of appeal, the suit in the lower court was statute barred by the limitation of actions act. The sale agreement between the 1<sup>st</sup> appellant and the deceased plaintiff (Mourice Onduru Okuogo) was signed on 24/10/93 and the sub-division and transfer was concluded on 25/11/94 more than one year later whereas the suit in the lower court was filed on 26/10/21 (27 Years later). The subsequent transfers to the 2<sup>nd</sup> Appellant and the 2<sup>nd</sup> Respondent were

concluded on 01/09/95 and 28/06/12 respectively. The suit in the lower court was therefore hopelessly filed out of time.

**27.** As relates to the capacity of the 1<sup>st</sup> Respondent, who took over the prosecution of the lower court case from her deceased husband pursuant to a limited grant of letters of administration ad-litem issued in Oyugis-Succession Cause No. E100 of 2023, the 1<sup>st</sup> Respondent was never substituted as the Administrator of the Estate of Okuogo Amolo in Succession Cause No. 103 of 2016, on whose behalf and Estate the Lower Court Proceedings were filed and prosecuted, and in whose favour the Final Judgment and Decree was issued after cancellation of all the Sub-divisions.

**28.** Counsel urged that the lack of evidence that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were served with summons to enter appearance renders the entire proceedings in the subordinate court and the final judgment and decree irregular. This was more fatal in respect of the 2<sup>nd</sup> respondent who is the registered proprietor of title no. 1283 which was cancelled and nullified without her being heard. The failure to serve the 3<sup>rd</sup> defendant and ensure her participation in the lower court proceedings was fatal and

goes to the root of the competency of the suit as was held by the Court of Appeal in the case of; Misnak International (UK) Ltd -Vs- 4MB Mining Ltd C/o Ministry of Mining, Juba Republic of South Sudan & 3 Others (2019) 1 KECA 471 (KLR).

**29.** Counsel urged that in relation to Grounds 6 and 7 of the Memorandum of Appeal, the trial magistrate misapprehended the evidence and shifted the burden of proof from the plaintiff to the defendants which was erroneous in law. The deceased plaintiff acknowledged having been in possession of the original title documents of the suit property which he surrendered to the lands office (registrar) before the sub-titles were issued could not run away from his involvement in the sub-division process which he undertook in two stages; original sub division of title no. 997 to title nos.1282 and 1283 and subsequent sub-division of title no. 1282 to title nos. 2309 and 2310 (2) one of which the deceased plaintiff and his substituted wife admitted they sold to Walter Odhiambo in 2016 long before he filed this suit in 2021.

**30.** Counsel urged that the Plaintiff could not rely on a purported fraud to which he was an active participant and

seek to benefit from the process which he now claims to have been irregular. By the lower court conferring a benefit to the deceased plaintiff, who admitted selling several portions of the suit property to the 1<sup>st</sup> Appellant and subsequently to Walter Odhiambo, without obtaining the Grant of Letters of Administration cannot be visited on the purchasers.

**31.** It was the Appellants' case that the evidence of the substituted plaintiff was wanting and she clearly admitted that she was not privy to all the facts and circumstances of the suit, having been married to the deceased plaintiff in 2001, as a second wife which was almost ten (10) years after the original transactions had been concluded. Further, that the lower court putting any weight to her testimony was wrong as set out in grounds 8, 9 and 10 of the memorandum of appeal. That the entire evidence of the 1<sup>st</sup> respondent (plaintiff) was hearsay which should not have been given any weight by the subordinate court.

**32.** Counsel maintained that all evidence and pleadings clearly pointed to the deceased plaintiff as the architect of all the transactions leading to the sale, mutations, sub-divisions,

obtaining consents from the land control board and eventually transferred the various sub-divisions to the purchasers.

- 33.** Counsel urged that this Appeal is merited based on the Grounds set out in the Memorandum of Appeal dated 03/04/25 together with the Submissions advanced and the Authorities cited.

### **Respondents Submissions**

- 34.** Learned counsel for the respondent submitted that before initiating the suit before the trial court, one Mourice Onduru Akwogo obtained a Grant of Letters dated the 20<sup>th</sup> September 2016. Unfortunately, the said Mourice Onduru Akwogo passed on during the pendency of the suit before court. His wife, the 1<sup>st</sup> Respondent herein, sought to substitute him to proceed with the case after obtaining an Ad Litem Grant dated the 16<sup>th</sup> of February 2024. Further, that the Appellants did not raise any objection to the 1<sup>st</sup> Respondent proceeding with the case as it was and hence they acquiesced to the 1<sup>st</sup> Respondent substituting the 1<sup>st</sup> Plaintiff and to proceed in his shoes.

- 35.** Counsel urged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were duly served with the summons as required by the law. However, it has been a practice that in land matters parties do not request for judgment in default of appearance hence the reason why the suit proceeded as it is.
- 36.** Furthermore, that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants are represented and they represented their suits before court. He urged that they have no business arguing the case for parties who chose not to appear before court. He stated that counsel should alternatively seek instructions from the said parties and represent them instead of sympathizing with them.
- 37.** On whether the court disregarded the evidence of the late Mourice Akwogo that he sold land to the 1<sup>st</sup> petitioner, counsel urged that the deceased admitted having sold a portion of land to the 1<sup>st</sup> Appellant. The bone of contention is the 1<sup>st</sup> Appellant taking it upon himself to illegally sub divide his late father's name un-procedurally yet he had not even concluded paying the balance of the Purchase Price. All this was done yet his father was deceased. The actions of the

Appellants were malicious and clearly, they were meant to disinherit the late Mourice Onduru Akwogo.

**38.** Counsel posited that it is not in dispute that at the time of the alleged sub division of the suit property the land was in the name of Okuogo Omolo alias Okuogo Amolo. The Appellants have alleged that the land was sub divided by the late Mourice Akwogo Onduru and availed a copy of a letter of consent dated 6<sup>th</sup> of April 1994 apparently signed by one Okuogo Omolo the deceased registered owner. The Appellant also availed a copy of mutation forms signed by the deceased one Okuogo Omolo. The Application for the letters Land Board Consent form does not bear any signature of Mourice Akwogo. He urged that once a person dies it is a requirement that another person ought to effect succession to attain the locus standi to deal with the deceased's property or to deal on his behalf. The Appellant availed documents in the name of the deceased person whom they confirm to have died yet they want a court of law to deem the documents as valid and procedural.

**39.** Counsel urged that the Law of Succession Act came into force in the year 1981 and further, that the Plaintiff stated

that he entered into an agreement for sale of land after his father died in the year 1992. The 1<sup>st</sup> Defendant has availed an agreement dated the 24<sup>th</sup> of October 1993. At this time the Law of Succession Act was already in force. He cited Section 45 (1) of the Law of Succession Act and urged that the actions of the Winam Court magistrate, the Land Surveyor and the Land Registrar amounted to intermeddling. Subsequently the title deed which was issued to the 1<sup>st</sup> Appellant was and is an illegality and same as the subsequent transfers.

**40.** Counsel urged that the documents availed before court bear the name Okuogo Omolo who was dead at the time. Clearly the late Mourice Onduru Akwogo did not issue any consent because he did not have the capacity to do so. Furthermore, the Appellant availed a LCB application form which was unsigned, it not clear who applied for the alleged consent.

**41.** Counsel maintained that the appeal lacks merit and should be dismissed.

### **Analysis & Determination**

**42.** This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized in **Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR** 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.”**

**43.** Additionally, the Court the of Appeal, in the case of **Susan Munyi v Keshar Shiani (2013) eKLR** stated as follows:

**“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions**

7. Also, in **Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123** wherein the Court of Appeal held:

***“...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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”***

8. It was also restated in **Williamson Diamonds Ltd and another v Brown** [1970] EA 1, it 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.”***

9. Further, in **PIL Kenya Limited v Oppong [2009] KLR 442**,

it was held that:

***“It is the duty...of a first appellate court to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanour and giving allowance for that”.***

10. Similarly, the decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR** adds to the voice. It

was held in it as follows;

***“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.”***

**44.** The position of this Court at this level being clear as guided above, it opines that the issues that emerge for determination are;

**i) Whether the suit was fatally defective on the grounds of substitution of the Plaintiff**

**45.** The crux of the appeal is that the Respondent was not the legal representative of the estate of the purported registered owner and therefore, the same rendered the entire suit fatally defective. The suit in the trial court was instituted vide a Plaint dated 3<sup>rd</sup> August 2021, by Mourice Onduru Akwogo, the son of the purported registered proprietor of the suit land, the late Okuogo Amolo.

**46.** From the evidence on record, he was granted a grant of letters of administration in Oyugis Succession Cause No. 103 on 20<sup>th</sup> September 2016. However, he passed away on 13<sup>th</sup> June 2023 and vide an application dated 5<sup>th</sup> February 2024, he was substituted by his wife in the proceedings, as she had obtained a grant of letters of administration ad litem. The question that remains to be answered is, can 'delegated' authority be passed onto another? The answer to that question would lay the foundation as to whether the wife

obtained proper legal capacity to proceed with the case. If she did not, then did the case continue to survive or it abated after twelve months of failure to follow the law?

**47. Black's Law Dictionary, 9<sup>th</sup> Edition, page 1026,** defines Locus Standi as

**“the right to bring an action or to be heard in a given forum”.**

**48.** The appellants' contention is that the Grant ad Litem was in respect of her husband and not of the proprietor of the suit land, Okuogo Omolo. In essence, the appellant challenges the locus standi of the Respondent to prosecute the suit after the demise of her husband. In **Ibrahim v Hassan & Charles Kimenyi Macharia; interested party [2019] eKLR** the court held:

**Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from**

**the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.**

**49.** Section 54 of the Law of Succession Act provides: -

**A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act**

**50.** A Grant of Administration ad Litem is essentially a Grant limited to the representation of the Estate in any legal matters. Whoever receives the grant cannot, in case he passes away, “pass” that grant to an heir or successor. His or her authority or position in the Grant dies with him: to be fair to say, ends at his time of death. The Estate can only start another representation of it afresh and “*hand it over*” from that Estate to the new grantee.

**51.** Mrima J. **in Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi,**

**Deceased) [2016] KEHC 4186 (KLR),** expounded on the same as follows: -

**“The law further provides for various forms of limited or special grants.**

**....**

**In this discussion, I will deal with two forms which are material to the matter before me. One form is the one commonly known as Limited Grant of Letters of Administration Ad Litem which is provided for under Form 14 of the Fifth Schedule of the Act and deals with suits. The said provision states as follows: - 'when it is necessary that the representation of a deceased person be made a party to a pending suit and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching**

**the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution'.**

**From the foregone, it is clear that a Limited Grant of Letters of Administration Ad Litem is usually used when the estate of a deceased person is required to be represented in court proceedings.....”**

**52.** In the instant case, the respondent was granted a grant of administration ad litem on 16<sup>th</sup> February 2024, which was clearly for the purposes of representing the estate of Mourice Onduru Akwogo. The law does not provide for the representation of a legal representative of the estate of a deceased person in this manner, or to say, “*a transfer of the representation*”. In order for the respondent to have locus standi, she would have to be appointed a representative of the estate of the proprietor of the suit land, and not a representative of the estate of a deceased administrator of an estate.

**53.** The Law of Succession Act doesn't expressly envisage the substitution of an administrator upon death. Section 81 of the Law of Succession Act provides thus:

**“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them...”**

**54.** In the case of **Re Estate of Mwangi Mugwe alias Elieza Ngware (deceased) [2003] eKLR**, the court held the view that:

**“...the operative word is “substitution”. The Law of Succession Act has no provisions talking about substitution of a deceased single administrator...In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground “that the**

**grant has become useless and inoperative through subsequent circumstances.” The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator.”**

**55. Similarly, Hon. Musyoka J. held as follows in *Re Estate of George Ragui Karanja (Deceased)* [2016] eKLR:**

**“The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative... It would appear to me that once all the holders of a grant die, section 81 of the Act**

**would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.**

**56.** It also follows that appointment of a proper legal representative of the Estate having not been made within the twelve months of the death of the legal representative for the purposes of the suit means that after that period, the suit abated in terms of Order 24 Rule 3(2) of the Civil Procedure Rules. The trial Court therefore proceeded to determine the suit before it on an illegality.

**57.** It follows that the proceedings were irregular as the administrator of the estate of the purported proprietor was not substituted and therefore the respondent had no locus to prosecute the suit further upon the death of her husband. It

follows that the only option is to allow the appeal and set aside the decision of the trial court.

***ii. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were condemned unheard***

**58.** Additionally, the respondent had sought orders adverse to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, seeking cancellation of the title deed for parcel no. 1283. Ultimately, the court gave the relief that the title held by the 3<sup>rd</sup> Defendant, and of course the parcel No. 1282 held by the Walter Odhiambo whom the Plaintiff's husband claimed to have sold to, be cancelled. The question that remains to be answered is, was the party who was the owner of parcel No. 1283 at the time of the proceedings before the trial court given opportunity to be heard. How about the one who held parcel no. 1282 who was never joined as a party in the proceedings at all?

**59.** It is a cardinal rule of both natural justice and even the constitution, at Articles 25 and 50(1), that a party should not be condemned unheard. It is fundamental principle that should never be derogated from. In *Rex vs Deferral* 1937 AD 370 and 373, the court stated that,

“the audi alteram partem principles literary means, “hear the other side’. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present ones evidence to the dispute or claim”.

**60.** In the case of Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553) it was held that:

“The Court observes firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision

makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision...It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her

case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.”

**61.** Therefore, the individuals who were named as parties, and whose rights would be affected as was that of the 3<sup>rd</sup> Defendant, ought to have been heard. But upon a perusal of the record and the proceedings, there is no evidence that the 3<sup>rd</sup> defendant was ever served. There is no evidence of the court have received a return that summons to enter appearance were served on her but she did not participate in the proceedings yet her title was to be cancelled. Consequently, she was condemned unheard given the nature of the orders issued. It does not lie on the Respondents to submit that the appellant is arguing the case of another (party). “An illegality is an illegality” and it goes of the root of a decision.

**62.** Where a matter proceeds in an instance against a party who is not served, it does so against both a constitutional right of that person and a rule of natural justice that a party

cannot be condemned unheard. Even where the party is unaware that his rights have been trampled upon by him not being presented an opportunity to be heard, a court of justice should and is obligated *suo motto* to correct such an injustice.

**iii. Whether the plaintiff's conduct was unconscionable and equity should frown at it**

**63.** The Plaintiff pleaded that his father died on 2<sup>nd</sup> September 1992. He averred further that the transfer of the property belonging to his late father was fraudulently and illegally transferred to the Defendants. He was carefully not to plead how in the first place the transfers may have been originated, that is to say, whether other than the subdivision and transfers of property of the deceased person (father), there were any agreements entered over the same property by him or any other person. He only relied on intermeddling of the Estate. But he singled out the Defendants only. He deliberately and carefully avoided bringing in the intermeddling of the Estate by one Walter Odhiambo whom he acknowledges he sold parcel No. 1282 to. The question is, was the sale of the said parcel to Walter legal if the one to

the 1<sup>st</sup> Defendant was illegal? Why be selective in application of the law and in his actions? It bespeaks great dishonesty on the part of the plaintiff: that which suits him he will support but that which does not he will deny even in the face of the truth.

**64.** Evidence was led, and the Defendants' pleadings show, that indeed the Plaintiff sold the portion of land that was finally registered in the names of the Defendants respectively. That indeed, the initial Plaintiff even appeared before the Resident Magistrate in Winam and swore about him being the only heir to the father's estate and entered into the agreement in question.

**65.** Indeed, it is true and the law that Section 45 of the Law of Succession Act prohibits intermeddling of the estate of a deceased person. It is illegal and I agree with the trial magistrate that nothing can sanitize the illegality when it occurs. However, where is the place of the constitutional principle of equity? Proprietary estoppel and constructive trusts arise when a party by their conduct cause a party to change their position to the latter's detriment. A *promissor* who holds himself out that he is able to do that which he

promises and causes the recipient to change his position to his harm cannot resile his actions and abandon the promise.

**66.** In the instant case the original plaintiff held out to the 1<sup>st</sup> Defendant that he was able to transfer the portion he sold to him upon completion of the purchase price and he put him in possession and processed the transfer. He cannot resile. His conduct is unconscionable.

**67.** Lastly, even assuming then that his conduct cannot of itself form the basis for the plaintiff's actions to fall under estoppel, Section 7 of the Limitation of Actions provides that he cannot recover land he did not sue to recover after it being out of his possession without his permission for over 12 years. In the instant case, once the agreement entered into was deemed and indeed was illegal, the party who took possession of the suit property began to occupy it without the permission of the plaintiff or seller. He ought to have recovered it within 12 years. Otherwise his title was extinguished. Indeed, it was.

**iv. Whether the Respondent's testimony was admissible**

**68.** The appellant admitted that she knew not the transactions that took place in 1993 before she was married to the initial plaintiff's home. Her evidence then could not support the allegations that there was fraud.

**69.** Therefore, even if the 3<sup>rd</sup> defendant had been properly served, in light of the erroneous substitution of the plaintiff, the judgment by the trial court and the proceedings lack merit and cannot stand.

**70.** Given the irregularities of the proceedings and the shortcomings in the legal requirements in the plaintiffs' pleadings as analyzed above for the Plaintiffs to found a valid claim, it is my considered view that the appeal is merited. It succeeds in the following terms:

**The decision of the trial court delivered Oyugis SPMECLCC No. E059 of 2021 on 20th March 2025 is hereby set aside. The entire suit is dismissed, with costs being to the Defendants in it, and those of the instant Appeal to the Appellants herein.**

**71.** Orders accordingly.

Judgment **dated, signed and delivered via the Teams Platform this 20<sup>th</sup> Day of January 2026.**

**HON. DR. IUR NYAGAKA**  
**JUDGE**