

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELCA APPEAL NO. E031 OF 2024

PETER OLWERO OBONYO.....
.....APPELLANT

VERSUS

PHILIP SOTI OWUOTI.....1ST
RESPONDENT

HON. ATTORNEY GENERAL.....2ND
RESPONDENT

JUDGMENT

**(Being an appeal from the judgment of the Principal
Magistrate Hon. C. N Choka Oruo (PM) delivered on the
8th November, 2024 in Rongo ELC No. E042 of 2021)**

INTRODUCTION

- 1.** This is an appeal arising from the judgment of Honourable C. N. Choka Oruo Principal Magistrate, delivered on 8th November, 2024 in Rongo ELC No. E042 of 2021.
- 2.** The Appellant filed a Memorandum of Appeal dated 28th November, 2024 appealing against the said ruling on the following grounds: -

**1. The Learned trial Magistrate misdirected himself
on several matters of land law and facts.**

- 2. The Learned trial Magistrate erred in land law in holding that once a person was in possession of a title deed of a parcel of land he is the proprietor thereof regardless of how he acquired the same.**
- 3. The Learned trial Magistrate erred in land law in failing to appropriate the exceptions set out by Section 26(1)(a) and 1 (b) of The Land Registration Act.**
- 4. The learned trial Magistrate erred in law of Evidence in deciding the case against the weight of evidence, in that:**
 - a) He failed to appreciate that the 15' defendant in cross-examination admitted that he neither attended the Land Control Board nor obtained the Land Control Board's consent.**
 - b) He failed to take note that the 1st defendant admitted that he failed to pay the stamp duty or other prescribed fees for registration of any transfer.**

- c) He failed to take note that the 1st defendant did not produce any evidence of transfer of the land from the alleged vendor to himself.**
- d) He failed to appreciate that the 1st defendant admitted having seen and found the plaintiff's homestead on the land he alleges to have purchased.**
- 5. The Learned trial Magistrate erred in law in failing to enter judgment against the 2nd defendant who had failed to enter appearance and or file defence.**
- 6. The Learned trial Magistrate erred in law of tort in failing to appreciate that the conduct of the 1st defendant amounts to actionable trespass to land and that the defendant should have been found liable for committing the tort of trespass to land and be condemned to pay damages.**
- 7. The Learned trial Magistrate erred in law in condemning the appellant to pay the costs of the suit.**

3. The Appellant seeks orders setting quashing the decision of the trial magistrate's judgment and setting aside the judgment and orders made. He prays that the appeal be allowed with costs.

BRIEF FACTS

4. The Appellant had filed a plaint dated 26th August, 2021 seeking an order of permanent injunction to restrain the Respondents from trespassing onto land parcel Sakwa/Kadera-Kwonyo/859 the suit property herein. He also sought for an order declaring that he was the rightful owner of the suit parcel and an order of eviction against the 1st Defendant.
5. The 1st Respondent filed his Defence dated 18th October, 2021 where he denied the Appellant's claim. He averred that the suit parcel was rightfully registered in the name of Petro Obonyo Lwero and a title deed issued.
6. The trial court heard the case and found that the Appellant had failed to prove ownership of the suit parcel.
7. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

Submissions

8. Counsel for the Appellant filed his submissions dated 5th August, 2025 where on grounds 1, 2 and 3, he relied on the **Court of Appeal case of Munyu Maina V Hiram Gathiha Maina (2013) eKLR** and **Mary Adhiambo Njuguna suing as the legal representative of the estate of Benard Ayieko Okoth v Mary Anyango Odeny suing as the legal representative of the estate of Jacob Odeny Owange and Another (Homabay ELC Appeal No. E001 of 2022)**. He submits that save for the title deed having been produced as proof of ownership by the 1st Respondent, no Land Control Consent (LCB) consent or transfer forms were filed to justify ownership. He cited **Section 26** of the **Land Registration Act**.
9. He further submits that the 1st Respondent failed to show why Petro Obonyo Olwero would subdivide the land to all his sons except the 1st born son. He argues that the 1st Respondent and the Land Registrar took advantage of the similarity of names of the deceased and that of his son.
10. It was his submission that the duration taken for the processing of the title was suspect.
11. On ground 4, counsel submits that the 1st Respondent failed to produce an LCB consent, a copy of the attested transfer form,

official receipts confirming payment of the registration fees and stamp duty.

12. On ground 6, it was his submission that the 2nd Respondent despite having been served with the summons failed to enter appearance or file defence. He submits that the trial magistrate ought to have entered judgment against the 2nd Respondent.

13. On ground 7, counsel submits that the 1st Respondent admitted that he saw the Appellant's home when he was purchasing it. He added that he could have brought the Appellant on board if he indeed he legally purchased the suit parcel. He submits that the Appellant's occupation of the suit parcel made him acquire an overriding interest on the land. He relied on **Section 28(h) of the Land Registration Act.**

14. It was his submission that the 1st Respondent did not have a good title to the suit parcel and should be condemned to pay damages for trespass.

15. On the final ground, he urged the court to set aside the trial court's judgment with costs to the Respondents.

16. Counsel for the Respondent on the other hand filed his submissions dated 22nd October, 2025 where he identified four issues for determination. The first issue was whether the learned

magistrate erred in finding that the Appellant failed to prove fraud. He submits that the 1st Respondent's title deed was duly issued by the Land Registrar and that no credible evidence to show that the registration was tainted with fraud or illegality. He cited **Section 26(1) of the Land Registration Act** and the **Court of Appeal case of Kinyanjui Kamau V George Kamau [2015]**.

17. It was his submission that the Appellant merely alleged fraud without any supporting documents.

18. The second issue for determination was whether the 1st Respondent lawfully acquired title to No. Sakwa/Kadera-Kwoyo/859. While submitting in the affirmative, counsel relied on **Sections 24(a) and 25(1) of the Land Registration Act** and the case of **Alice Chemutai Too V Nickson Kipkurui Korir & 2 Others [2015] eKLR**. He also submits that there was no evidence of any coercion, mistake or irregularity.

19. On the third issue of whether the trial court misdirected itself on law or fact, he submits in the negative and relied on the case of **Selle V Associated Motor Boat Co. Ltd [1968] EA 123**.

20. He also relied on **Section 7 of the Civil Procedure Act** and submits that the Appellant in re-litigating on issues already determined underscores the abusive nature of the present appeal.

21. On the final issue of whether the appeal was merited, counsel submits in the negative and argues that the Appellant failed to discharge the evidential burden to prove fraud.

Analysis and Determination

22. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:

1. Whether the appeal is merited.

2. Who should bear the cost of the appeal.

23. Being a first appeal, the court relies on a number of principles as set out in **Selle and another V Associated Motor Boat Company Ltd and others [1968] 1 EA 123:**

“...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 ..."

24. Further, in the case of **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)** the court held that:

"This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect."

25. It was the Appellant's case that the 2nd Respondent was negligent in registration of the suit parcel No. Sakwa/Kadera-Kwonyo/859, in the 1st Defendant's name. It was his further

claim that the 1st Respondent failed to produce evidence in form of the LCB consent nor transfer forms thus alleging that the title was unprocedurally procured.

26. The 1st Respondent on the other hand contends that the Appellant merely alleged collusion between the Respondents but failed to adduce evidence proving the same.

27. **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.”

28. **Section 109 of the same Act** provides:

“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 the fact shall lie on any particular person.”

29. It is this court’s view that the burden squarely lay on the Appellant to prove that the title in the 1st Respondent’s name was unprocedurally and/or irregularly acquired. Section 26(1) of the Land Registration Act provides that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

30. In this case, during cross examination, the Appellant admitted that the suit property belonged to his father and that he (the father) had sold it to the 1st Respondent without his consent. He also admitted that the 1st Respondent had been in possession of the suit property since 2014. The Appellant produced a title and Green card in the 1st Respondent’s name.

31. The 1st Respondent on the other hand testified that he bought the suit parcel on 1st September, 2014 from the 1st Respondent’s

father before his demise on 1st April, 2016. He produced a copy of the sale agreement which the Appellant did not challenge.

32. I am not convinced that the father was under any obligation to obtain the consent of the Appellant before he sold the land he owned. Children should leave parents, unless the parent who is selling is doing so in absence of the other spouse upon their death but before obtaining letters of administration.

33. Notably, the Appellant did not challenge the title deed nor the green card which had the 1st Respondent's name listed as the 3rd entry neither did he call the Land Registrar as a witness to corroborate his testimony. It is my opinion that the evidence by the plaintiff remained as allegations which were not proved.

34. Section 24(a) of the Land Registration Act provides that:

“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.”

35. Section 26(1) of the Land Registration Act further provides that:

“...the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge...”

36. I have keenly perused through the record and the evidence adduced during trial and it is not in dispute that the Appellant failed to discharge his burden. It is this court’s view that the trial magistrate did not err in finding that the Appellant failed to provide any evidence that challenged the manner in which the 1st Respondent acquired the title to the suit parcel.

37. The 1st Respondent had, indeed, filed a Statement of Defence denying the allegations in the Plaint. He, however, failed to file a Counterclaim in which he should have prayed that the caution

placed on the suit parcel by the Appellant be removed. Thus, the court could give what was not pleaded.

- 38.** It is trite law that parties are bound by their pleadings, and the court should not trudge into granting that which has not been pleaded, unless whatever relief other than that which is pleaded is arising out of the necessity to give efficacy to the main reliefs granted. In the circumstance, it is this court's view that in as much as the trial court found that the 1st Respondent was the owner of the suit parcel, the trial magistrate erred in fact and law in directing the Land Registrar Migori County to remove the caution registered by the Appellant because in any event the Land Registrar was not a party to the proceedings. He was therefore condemned unheard. It does not matter that the Attorney General was sued in that behalf since the actions of the Land Registrar are not vicarious to those of the chief government legal advisor, the Attorney General.
- 39.** As a parting shot, the appellant having lost this appeal, and the land having been found to be belonging to the 1st Respondent, he is advised to think wisely and act by hastening to remove the caution before a suit is instituted against him because should it

he delay, and he is sued, he may meet unnecessary costs: he shall be the one to blame for the costs that may be incurred.

40. The upshot of the foregoing is that the appeal partially succeeds in terms of **ground 1** while the rest of the grounds fails in its entirety.

41. Each party to bear its own costs.

23. Orders accordingly.

JUDGMENT Dated, **SIGNED** and **DELIVERED** virtually via the Teams Platform this **29th day of January 2026.**

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Mr. Oyala Advocate for the Appellant

Mr. Ogwe for the Respondent.