

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO.
E018 OF 2023

**JOSEPH OTOYI OYONGE (Suing as the administrator
of the estate of NICHOLAO OYONGE
OMBAYI (Deceased).....
APPELLANT**

VERSUS

JOSEPH OGUDA MBARA.....1ST

RESPONDENT

LAND REGISTRAR HOMA BAY COUNTY.....2ND

RESPONDENT

***(Being an appeal against the Judgment of Hon.
Nicodemus N. Mosei (PM) delivered on 1st November
2023 at Mbita in Mbita PMCELC No. 7 of 2020)***

JUDGEMENT

1. By way of a Complaint dated 25th February 2020, the Appellant, then the Plaintiff sought the following orders in the trial court.

1) An Order of injunction, restraining the Defendants from the sub-division, alienating, disposing and/or in any way whatsoever dealing with the plaintiffs' property LAMBWE EAST/735.

2) An Order compelling the 1st Defendant to transfer the ownership of LAMBWE EAST/735 to the rightful owners, the plaintiff herein.

3) General damages.

4) Cost of this suit.

2. The appellant pleaded that his father, the late Oyonge married the 1st Defendants' mother in the year 1974 as a 3rd wife. After staying with them for a few years, his father laid claim with the elders for his return and the matter went to the chief's baraza. The elders decided that the 1st defendant be returned to his biological father and later, his father had his own son with the 1st defendant's mother. At the time the 1st defendants' mother joined the family, the land adjudication process in the region was just commencing. He stated that their father distributed his property among all his sons before his death but his sons never transferred it.
3. He stated that when the 1st defendant left they were all adults staying on the land with their fathers. They did not know that his step mother had convinced their father to include the 1st defendant as a co-owner. He urged that the 1st defendant had no claim to the land and prayed for the orders as afore-stated.
4. The 1st defendant filed a statement of defence dated 3rd May 2021. He denied the contents of the plaint and urged that the 1st defendant's late father had three wives namely; Loise Milanya Oyonge, Isdora Omenga Oyonge and the 1st defendant's mother Siprina Anyango Oyonge was the 3rd wife and at the time of the marriage she had come with the 1st defendant and together they were blessed with one child Meshack Otieno, the 1st defendant's younger brother.
5. He stated that before his demise the late Nicholao Oyonge Ombayu distributed his Land Parcels Nos. Lambwe East/732, Lambwe East/733, Lambwe East/734, Lambwe East/735 to his sons and each of the sons including the plaintiff was

shown his respective land. Further, that the 1st defendant's mother having been remarried in the home of Nicholao Oyonge Ombayi his biological father never laid a claim on him. That even after the death of Nicholao Oyonge Ombayi and his mother he has continued to stay and live with his brother in the suit land allocated to him.

6. He averred that the only reason he wanted to subdivide the land which the 1st defendant duly informed the plaintiff and other sons of Nicholao Oyonge Ombayi was to be able to get his half share that rightfully belongs to him leaving the other half that belonged to their deceased father for the family to decide who is to inherit and therefore, he did not intend to evict the plaintiff from the land except in case the survey conducted during the subdivision reveals that any of the son's house was erected on his half portion of the suit land as the same would amount to actionable trespass. He then prayed that the suit be dismissed with costs.

7. The matter then proceeded to full hearing.

8. **PW1** was the Plaintiff, **Joseph Otoy Oyonge**, who adopted his witness statement as evidence in chief. He added that they stayed for some years as one family up to 1982 when the defendant's biological father laid their claim to the village elders against his father, claiming that his father had taken the 1st defendant's father's wife and son. He wanted his son to return to him. The matter was presided over by the Chief's baraza. The elders unanimously decided that the 1st defendant be returned to its biological father, and it was done. Consequently, the first defendant left for his biological father's home. At that time, the Plaintiff and siblings were

adults with young families. Further, their late father had children with the first defendant's mother, a son. They stayed together happily as family.

- 9.** At the time the first the defendant's mother had joined their family as a wife, land adjudication and demarcation process within Lambwe region was just commencing. His father, before his death, distributed property among his sons, but never executed transfer since that was to await his death.
- 10.** Acting in accordance to Luo customs, he showed each one of the sons, except the lastborn brother, Meshack, a son of the first defendant's mother, who was still not of age at the time where to build or establish their homes within the same property the first defendant now claimed. In 1974, his eldest brother, Samuel Okoto established his homestead on the very parcel of land and had been residing thereon since then with this family. The rest of the children established their homes on the portions their father distributed to them.
- 11.** He added that they never knew his stepmother, who was the first defendant's mother, had convinced their father to include the first defendant's name as the co-owner of the said parcel. He added that everything was possible at that time because his father was old and spent most of his time in her house.
- 12.** He added that they had resided on the parcel of land for over two (2) decades. Thus, the first defendant could not claim it as rightly his, yet he returned to his biological father's home and became of age there and married while there. He even established a homestead there. Consequently, his father bequeathed him land.

- 13.** He added that the first defendant was not his father's son owing to the foregoing. He, the plaintiff, could not even explain how the 1st defendant's name came to appear as a co-owner with his father of the parcel of land in issue. It was saddening that the first defendant could now claim that he was his late father's son and lay an inheritance claim on the property, yet he could not even attend his father's funeral.
- 14.** Further, the 1st defendant went some time back with a surveyor and the area chief to partition the land, but the plaintiff and siblings did not allow him since he had no authority to do so. As a result, the first defendant approached the second defendant, who issued a notice to carry out the subdivision of the said property into two in favor of the first defendant, through the 3rd actions.
- 15.** He accused the area chief of collusion with the first defendant. He added that the said Chief was adamant that the matter was not to be settled at family level. He even went ahead to block the plaintiff and siblings from conducting Succession processes by refusing to issue them with an Introductory Letter. They confronted the chief when he agreed to meet them at his camp. They asked him why he allowed the first defendant to carry out the subdivision of the property, yet he, the Chief, knew well that the first defendant had gone back to his biological father and that their father had died.
- 16.** He added that he knew that the 1st defendant had inherited property from his father, one Mbara. That was where he had lived his entire life and had even married while there. Therefore, it would be unjust to have him if he evicted

the plaintiff and siblings because of his selfish demands. This was because they had stayed on and called that parcel of land their home for over 2 decades.

17. During cross examination by the 1st Respondent, he averred that Land parcel No. Lambwe East /735 belonged to his father but was registered in the names of his father and the 1st respondent.

18. PW2 was **Francis Ochieng Onono** who adopted his witness statement as evidence in chief. It was to the effect that

19. PW3 was **Grace Atieno** who testified that she was married to Okoto's home in 1976 and found the 1st defendant staying in the home when he was 2 ½ years old. That he stayed in the family for 4 to 5 years then his biological father came for him. He stated that the 1st respondent went to Mbara's home and has never returned home.

20. She wrote her witness statement dated 25th February 2020. She stated in it that she was married in 1972 to Samuel Okoto Oyonge. Her late husband had built a house (simba) on his father's homestead, one Nicholas Oyonge. They stayed there until his father distributed land to each of his sons according to Luo customs, except his last-born son who was not yet of age. It was the place where each of them established their homes and lived with their families to date.

21. She added that 1st defendant resurfaced after her father-in-law's demise, to subdivide the land. He then claimed that the land was his and also in his father-in-law's name. She added that she had only been told he told the stories of what transpired between the defendant's biological father and

their late father-in-law and the reason why the first defendant had left (the home) to his biological father's, whom at a young age. It was through his return to claim the land and subdivide through John S. Oyonge and Samuel Okoto Oyonge that warranted the family to institute the suit. The first defendant then later went back with a surveyor and the area chief to partition the land. He was not allowed since he had no authority to do so and was doing it without the knowledge of her husband or his brothers.

22. DW1 was Joseph Oguda Mbara who adopted his witness statement as evidence in chief. During cross examination, he stated that he was 3 years old in 1980 and did not know Adjudication was done in 1980.

23. The Respondent closed his case and the parties filed submissions. Upon considering the pleadings, testimonies and submissions, the trial court dismissed the plaintiff's suit with costs to the 1st Respondent.

24. Being aggrieved with the decision of the trial court, the appellant instituted the present appeal vide a Memorandum of Appeal dated 27th November 2023 premised on the following grounds;

1) The Learned Magistrate erred in law and fact in failing to give proper and reasoned judgment in total disregard to the facts and evidence on court records.

2) The Learned Magistrate erred in law and fact in failing to determine the history and circumstances surrounding ownership and inheritance of the disputed suit parcel of land.

- 3) The Learned Magistrate erred in law and fact by giving a judgment that is contradicting to the proceedings and pleadings thereto and failing to take judicial notice on the issues for determination arising from pleadings, proceedings, oral and documentary evidence presented to court.**
- 4) The Learned Magistrate erred in law and fact by failing to determine the issues raised in the pleadings and proceedings thereto.**
- 5) The Learned Magistrate erred in law and fact in failing to analyze the evidence and facts as were presented by both parties.**
- 6) The Learned Magistrate erred in law and fact by ignoring and failing to consider the submissions and evidence of counsel for the appellant.**
- 7) The Learned Magistrate erred in law and fact in giving judgment against the weight of the evidence adduced by parties therein.**
- 8) The Learned Magistrate erred in law and fact in failing to consider the evidence as the matters thereto were more of the succession cause and ought to have referred the same to the family succession court of any disputes as to the ownership and inheritance of the suit property by the appellants.**
- 9) The Learned Magistrate erred in law and fact by failing to issue a declaration that the encroachment, hiving off the suit parcel of land was illegal and unlawful as the same were done after the death of the deceased and that the appellant be declared the**

rightful, legal occupant, allottee, registered and/or beneficial owners of the suit property.

- 10) The Learned Magistrate erred in law and fact in failing to take into consideration that the deceased died on the 12th December, 1996 while the 1st illegal entry was made on the 1st September, 2008 many years after the deceased death.**
- 11) The Learned Magistrate erred in law and fact failing to take cognizant that 2nd entry of the parcel of land at the lands registry was made on 6th January, 2016 which entry was made to a different person altogether.**
- 12) The Learned Magistrate erred in law and fact in failing to take cognizant on the anomalies of the entries made in the title as the same were erased, handwritten and the discrepancies of the names more particularly the names as OGUDA OYOMBE and JOSEPH OGUDA MBARA.**
- 13) The Learned Magistrate erred in law and fact in failing to take judicial notice that the 1st respondent was not the son of the deceased and that he already has inheritance with his biological father a one Mr. Mbara of whom he identifies with.**
- 14) The Learned Magistrate erred in law and fact in failing to recognize despite the 1st respondent has never lived on the suit parcel of land and that the same had already been inherited by the blood children of the deceased according to his wishes.**

- 15) The Learned Magistrate erred in law and fact in failing to take cognizant of the fact that the subject matter was more of inheritance of both the deceased and Meshach (Now Deceased) and ought to have referred the matter to the succession court for proper ventilation and distribution thereto**
- 16) The Learned Magistrate erred in law and fact in failing to call for identification of the alleged owners of the suit parcel of land as registered in the entry.**
- 17) The Learned Magistrate erred in law and fact in failing to call the 2nd & 3rd respondents to avail sheet 37 from their offices to shed light on the registration details of the owners of the land parcel thereto.**
- 18) The Learned Magistrate erred in law and fact in failing to take cognizant that it was the 1st respondent's own admission that he was not a son of the deceased and was holding the portion of the land parcel in trust for the brother deceased suit property.**
- 19) The Learned Magistrate erred in law and fact in giving the 1st respondent the orders never sought in his statement of defence.**

25. The parties prosecuted the appeal vide written submissions. The Appellant filed submissions dated 24th November 2025 through the firm of Messrs S.J. Nyang' and Co Advocates. The 1st Respondent filed submissions dated 26th January 2026.

Appellants' submissions

26. Counsel laid down the background of the suit and submitted that land acquisition and registration have a

sequence of movement and the same can be seen from green cards. That the purpose of registration and acquisition, if the same is done vide a succession cause the same is registered and the succession because number indicated and the issuing court. If the same is acquired through sale and purchase and the new registration is done, the registrar indicates so.

27. Counsel submitted that a closer look at the green card reveals that the first Entry dated 1st January, 2008, the parcel of land known as LAMBWE - EAST/735 was registered in two names that is NIKOLAO OVONGE OMBAVI(DECEASED) and Oguda Oyonge with each as having a half share thereof. That the registration was pursuant to the provisions of sections 101, 102 and 103 of the Registered Land Act.

28. Further, that after the death of Nicholao Oyonge another handwritten Entry No.2 registered on the green card dated 6th January, 2016 indicates the land is registered in the name of Nicholao Oyonge Ombayi and the 1st respondent herein. That this absurd entry was characterized by vagueness wherein the Green Card bore no respective portion to alleged owners, therefore a Joint Ownership, while the subsequent search thereof vaguely allocates a half share to alleged respective owners. No justification was shown in support of the alleged illegal entry, particularly any succession proceedings as per Section 103 of the Registered Land Act

29. Counsel urged that upon the death of a co-owner in common, the deceased co-owner's share is treated as part of his estate under Section 91(1) of the Land Act. The respondent's mischief as evidenced on the green card failed

to adhere to this provision of the law. In its place, the trial court ignored glaring errors on the green card, and failed to unravel the mystery of who registered the impugned entries on the green card.

- 30.** The appellant submitted that the Constitution of Kenya guarantees the right of a name from birth (Article 51). Further, that the Registration of Person Rule under the Registration of Persons Act, Cap 107 laws of Kenya is the applicable provision on change of names as held by the government register which provision can only be corrected or amended by a deed poll duly registered and gazette in the Kenya Gazette. Consequently, there were no grounds which could lead the trial court to make a finding that the entries on the green card were in order.
- 31.** Counsel cited the case of *Ebenyo Ekuwam Lynus vs Ekomwa Lomenen James & 2 others* (2018) KEHC 8221 (KLB) and urged that a further anomaly on the green card, which anomaly was unjustly overlooked by the trial court was that the date of certification of the green card was erased. He submitted that a doubt ought to have been raised in the trial court's mind, as to authenticity of the said green card, capable of inviting further interrogation which the court failed to consider.
- 32.** Counsel submitted that the trial court ignored the evidence pointing to an admission by the 1st Respondent that he was not the biological son of the deceased and that he was a son of one Sylvester Mbara in his village where his inheritance lies to date. That the trial court failed to make a proper finding in the circumstance that the suit land parcel

number LAMBWE EAST/735 is a subject of a succession cause and ought to have been referred to a succession court altogether.

33. Counsel submitted that there was no intimate connection or any union whatsoever between the late Nicholao Oyonge and the 1st Respondent to warrant the 1st Respondent's fraudulent allegation that he is the previously registered Oguda Oyonge, now Joseph Oguda Mbara. He placed reliance on the case of Patel through His Power of Attorney to Sahul Patel v Patel (Administrator of the Estate of Ghanshyambhai Bhailalbai - Deceased) [2024] KEELC 4977 (KLR) in this regard.

34. The appellant prayed the court allow the appeal.

Respondents' submissions

35. The Respondent urged that the original owner of the suit land before demarcation, adjudication and subsequent registration was Nicholao Oyonge Ombayi, deceased. The deceased took the 1st respondent in as a baby and he remained with the family until the death of Nicholao Oyonge Ombayi and it is during his lifetime that he allocated the 1st respondent and his other sons various portions of his land. He stated that it is clear from the record that Nicholao Oyonge Ombayi distributed his land among his sons including the 1st respondent while the same was still under Adjudication as even the 1st entry on the register in all parcels shows the register was opened on 1st September 2008. He urged that the land was already registered in the names of Nicholao Oyonge Ombayi and the 1st respondent each having 1/2 share of the said land

- 36.** He submitted that that the Appellant is misleading the Court when they state that the shares of ownership to the suit parcel by the 1st respondent and Nicholao Oyonge is ascertained yet the Search produced and the Copy of Green Card also clearly indicates and ascertains the shares held by each being half share. He urged that the evidence shows that Land Parcel No. Lambwe East/735 is registered in the names of Nicholao Oyonge Ombayi and the respondent herein with each party holding 1/2 share to the said land
- 37.** On whether the alleged fraud pertaining to the registration was proven, The Respondent urged that the appellant insinuated fraud but failed to particularly plead the same as is required by the law. That the pleadings must set out the particular acts of the person alleged to have committed fraud, including the dates and the specific misrepresentations or fraudulent actions. He stated that the pleadings are devoid of any particulars of the alleged fraud. He failed to specify how the fraud was perpetrated, who perpetrated it, or what specific acts constituted the fraud. Further, that the failure to properly plead fraud is, in itself, fatal to their case, and the allegation should be struck out on this ground alone.
- 38.** The Respondent submitted that the Appellant alleges fraud and therefore bears the heavy burden of proving it. He cited Section 107 and Section 108 of the Evidence Act and further, the holding in R.G. Patel & Co. Ltd vs. Lalji Makanji (1957) EA 314 in this regard. He reiterated that the appellant failed to present any evidence to the court to substantiate the claim of fraud. He urged the court to dismiss the appeal.

Analysis and Determination

39. The appellant listed a whopping nineteen grounds of appeal. My analysis of them is that many of them were a repetition of the other while some such as the one challenging the fact that the trial magistrate erred in failing to call for identification some of the persons was more of pushing the suit to fall under family law, specifically succession procedure, and a process akin to that of criminal law. In any event it was the parties' cases and not that of the court hence it was not obligated to call people for identification. Each party had the onus of proving either their case or defence respectively.

40. That said, this being an appeal, I must state the duty of the appellate court. In **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, the court 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.”

41. 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”.

42. The first issue that arises for determination is, **whether the trial court erred in dismissing the suit.**

43. The Appellants’ claim was premised on the allegation that the 1st defendant was not a son to his father and therefore, the co-registration of the 1st respondent as a proprietor of the suit land was fraudulent as it arose from coercion by his late mother.

44. The Court of Appeal in **Vijay Marjario Vs Nansingh, Madhusingh Darbar & another [2000] eKLR** held that:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleadings. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.

45. In **Belmont Finance Corporation Ltd v Williams Furniture Ltd** Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that

dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

46. The Appellants’ claim having been based on allegations of fraud, he was required to at the very least list the particulars of fraud that he alleged occurred that resulted in the registration of the suit and in the name of the 1st respondent. A cursory look at the pleadings reveals that the appellant did not abide by this principle. He neither pleaded nor proved fraud. Therefore, his claim of fraud in the trial court was not tenable on arrival.

47. It is trite law that he who alleges must prove. The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya which states as follows: -

1) 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.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

48. Additionally, the burden of proof on allegation of fraud is on he who alleges. In **Christopher Ndaru Kagina v Esther Mbandi Kagina & Another [2016] eKLR**, the court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

49. As stated above, the Appellant did not plead the allegations of fraud strictly as required by law. Additionally, no cogent evidence or at all was led to prove any allegations of fraud. Put succinctly, the appellant did not prove fraud. It follows that the appellant failed to satisfy the burden of proof of proving allegations of fraud and consequently, the entire suit failed for lack of merit. The appellant is advised to respect his parents’ actions in distribution including sharing of the land with the respondent.

50. It was the Plaintiff’s evidence and his witnesses that the 1st Respondent and him are brothers of the same father although of different mothers. They too stated that their late father had, before his death, distributed his land to his children, and that he included the name of the defendant in the title as a co owner. Further, that they had been residing on the respective portions of the suit land under the permission of their parents, and apparently, there was now need to set things straight on the ground. They cannot claim the occupation by way of adverse possession because the

family had settled on the land as such pending the final settlement. The plaintiff pleaded that he did not know that his step mother had convinced his father to include the 1st defendant's name on the said parcel.

- 51.** He did not lead any evidence that his mother actually convinced the father to register the 1st defendant as an owner of the property. The appellant and his two witnesses gave inadmissible hearsay evidence, for instance about what took place in the 1970s when they were either not there when the transactions leading to demarcation and registration of the 1st Defendant's name. Furthermore, this court is of the humble view that the plaintiff, now appellant, did not have any legal right to challenge the distribution of the estate his father, particularly, when it was done in the lifetime of the said father.
- 52.** The appellant's father gave a gift inter vivos, that is to say, a gift "between the living" and it was final. He cannot be heard to challenge the same at this point in life. Also, it is borne in mind that
- 53.** The upshot of the foregoing is that the appeal is dismissed. The suit having been between brothers, being, Plaintiff and 1st Respondent, each party with costs.
- 54.** Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this 3rd day of February 2026.

HON. DR. IUR FRED NYAGAKA

JUDGE

Homa Bay ELCA E018 of 2023- Judgment, D.O.D 3.2.2026

In the presence of,

Court Assistants: Fiona & Obunga

S. J. Nyang Advocate for the Appellant

1st Respondent in person (in open court)