



Odhiambo v Sarman Group Company Limited (Environment and Land Appeal E028 of 2023) [2026] KEELC 791 (KLR) (16 February 2026) (Judgment)

Neutral citation: [2026] KEELC 791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E028 OF 2023
FO NYAGAKA, J
FEBRUARY 16, 2026**

BETWEEN

TOM MBOYA ODHIAMBO APPELLANT

AND

SARMAN GROUP COMPANY LIMITED RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. J. m Nang'ea
(CM) delivered in Homa Bay CMELCC Case No. E045 of 2022)*

JUDGMENT

1. By way of Plaintiff dated 5th September 2016, the Respondent/Plaintiff sought the following orders in the trial court;
 - a. Declaration that the Plaintiff is 'the lawful', Bona-fide and Registered owner of LR. NO. Kasgunga/Kamreri/4021, that is, the suit Property herein.
 - b. An Order of Eviction against the Defendant, his Agents and/or Servants from LR. NO. Kasgunga/Kamreri/4021.
 - c. Permanent Injunction restraining the Defendant by either by himself, Agents, Servants and/or anyone claiming under the Defendant from entering, re-entering upon, trespassing onto, laying a claim to, Leasing, building onto, interfering with and/or in any other manner, whatsoever dealing with the suit Property or any Portions thereof, that is, LR. NO. Kasgunga/Kamreri/4021, in any manner Prejudicial and/or adverse to the rights and Interests of the Plaintiff.
 - d. General Damages for Trespass.
 - e. Costs of this suit be borne by the Defendants.



- f. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
2. In the Plaint, the plaintiff pleaded that prior to the year 2013, the Defendant was the lawful and bona fide Registered Proprietor of the Property otherwise known as LR. No. Kasungu/Kamreri/4021, and in respect of which the Defendant was issued with Title Deed. On or about the year 2010, the Defendant was sued by one Tobias Okumu Otieno, vide Homa - Bay PMCC NO. 63 OF 2010, whereupon a Judgment was entered against the Defendant. Upon the entry of Judgment, it was incumbent upon the Defendant to settle the Decretal sum, to avoid execution Proceedings being commenced and/or carried out.
 3. He pleaded that the Defendant neglected to settle the Decretal sum and hence, the Decree Holder commenced execution proceedings, culminating into the attachment and sale of LR. NO. Kasungu/Kamreri/4021 vide Public Auction. Further, that the Public Auction was held and the Plaintiff emerged and was declared as the Higher Bidder and paid the requisite consideration culminating into the issuance of the Certificate of Sale and the execution of the Transfer Instrument to and/or in favour of the Plaintiff. Subsequently, on or about 11th July 2013, the Property was lawfully transferred and registered in the name of the Plaintiff. Consequently, the Plaintiff became the lawful and legitimate Proprietor of the suit Property.
 4. He averred that he by virtue of being the registered proprietor, he is bestowed with exclusive rights to possess, occupy and use the entire of the suit Property, to the exclusion of all and sundry. That the suit Property has since been sold, alienated and transferred to the Plaintiff, but the Defendant has continued to occupy and/or use the suit Property, albeit without the authority and/or permission of the Plaintiff.
 5. The Appellant herein filed a statement of defence where he denied in the allegations of the plaintiff and denied that he was obliged to vacate his matrimonial home since the purported sale was done illegally after a valid order of the Court had stopped the attachment and sale. Further, that since 1st September 2008 he was the proprietor of the suit land and duly occupied the same and erected a permanent home which he occupies with his family he cannot be called a trespasser or be held liable for trespass and the claim for damages for trespass is misguided.

Hearing at the trial court

6. The matter then proceeded for full hearing, with the Plaintiff calling 2 witnesses and the defendant testifying as the only defence witness.
7. PW1 was Osman Sharrif Ibrahim, the Managing Director of the Plaintiff who adopted his witness statement as evidence in chief. He urged that the suit land is in occupation of a previous owner and that the company is now the registered owner. Further, that the land was acquired by the company through a public auction and that ownership was not obtained fraudulently. He stated that the Company was the highest bidder at the auction and in the circumstances, the defendant is a trespasser.
8. During cross examination, he stated that they bought the land at an auction on 20th July 2012 and paid Kshs. 950,000/- on the said date in cash. The balance was paid by cheque and the total amount was Kshs. 2,450,000/-. He further stated that he visited the land and there are structures on the same and that he made the visit before the eviction. He saw the structures on the land on 11th July 2013 and consulted their advocates who served the defendant with notice of instructions of the suit.
9. PW2 was Oscar Otieno Odongo an auctioneer who adopted his witness statement as evidence in chief and proceeded to testify. He urged that he was engaged in an auction at which the plaintiff bought



land parcel No. KASGUNGA/KAMURERI/4021. That he executed warrants of attachment and sale issued vide Homabay CMCC NO.63/2010 and the plaintiff bought the land during the public auction where there was no fraud in the process. The earlier owner of the land lodged a complaint against him with the auctioneer's board, which complaint was dismissed. The complaint was lodged after the plaintiff had obtained ownership of the land.

10. During cross examination, he stated that the public auction was on 20th July 2012 but his witness statement erroneously shows the date as 13th July 2012. There was confusion because they were also concluding another eviction during the same period. He stated that he had the newspaper in which they advertised the sale to wit; 'The People' newspaper which confirms that the auction was to be conducted on 20th July 2012. The plaintiff paid Kshs. 950,000/- in cash at the fall of the hammer at the auction and he issued a receipt for the sum for the full auction price of Kshs. 2,450,000/-. He visited the land and there were structures on the same, which visit was before the auction, on 11th July 2013. The cheques were cleared for payment and they issued the receipt dated 24th August 2012 before one cheque was cleared for payment. He then issued the auctioneers certificate of sale dated 20th July 2012.
11. The defendant testified as DW1 and adopted his witness statement as evidence in chief. He stated that he was the registered proprietor of Land Parcel No. Kasgunga/Kamreri/4021 and in the year 2010, Tobias Okumu Otieno sued him in Homa Bay PMCC No. 63 of 2010 demanding a refund for his purchase price which he had paid when he was disposing the said land by way of sale to him. On 5th March 2012 the Court ordered that he refund Tobias Okumu Otieno the sum of Kshs. 632,310/=. By 13th March 2012, he had repaid a sum of Kshs. 355,000/= as part of the decretal sum pending payment of 277,310/= which the Court ordered that he repay the said balance within 60 days. Within the 60 days period, he offered the advocate for Tobias Okumu Otieno Kshs. 100,000/= which sum he rejected on the basis that he needed to comply with the order of the Court.
12. He stated that on 4th July 2012, the decree holder, through Odongo Investment advertised Land Parcel No. Kasgunga/Kamreri/4021 for sale by way of public auction to recover the remaining decretal sum. The defendant made an application by way of a Notice of Motion dated 17th July 2012 which application was heard ex parte on 19th July 2012 and the Court granted interim orders restraining the defendant from attaching Land Parcel No. Kasgunga/Kamreri/4021. On 20th July 2012, he went to Mbita Post Office where the public auction was to take place by 7:00 a.m. His advocate sent a representative to serve the Court Order which order was received under protest by the auctioneer, claiming that it had been overtaken by events. He further indicated that he had received the same order at 11:49 a.m. to justify his allegation of the order having been overtaken by events. He stayed at Mbita Post Office from 7:00 a.m. to noon and didn't see the auctioneer ring the bell.
13. On 16th October 2012 upon application by the decree holder's advocate, N. N. Njagi PM ordered that a sum of Kshs. 197,838/= be paid to the decree holder and the balance deposited to the Court. Sometimes in September 2016 he was served with a plaint and summons to enter appearance to the High Court Civil Case No. ELC 278 of 2016 whereby he was sued that he be evicted and pay damages for trespass. He immediately instructed his advocates filed a Memorandum of Appearance on 4th November 2016 but for unknown reasons he failed to file a defence, which failure led to the entry of ex parte judgment and the subsequent appeal that led him to file the instant defence. He urged that he had peacefully, continuously, and openly possessed the building in the disputed land as his matrimonial home since the same was erected and still lives in the same to-date.
14. During cross examination he stated that he did not know the registered owner of the land and was aware that the court allowed sale of the land. That the court had earlier given an order stopping the sale and he did not understand the circumstances in which the sale was again allowed to proceed. The injunction



order against the sale was issued in Kisumu Law courts and Homabay Law court had allowed sale of the land. The Auctioneers were served with the Kisumu court order on 19th July 2012, the same date the order was issued but he had not filed the process server's return of service. He had also complained against the Auctioneers conduct before the Auctioneers Board which complaint was rejected as time barred.

15. The defence closed its case and the parties filed submissions. As aforesaid, the trial court entered judgement in favour of the plaintiff.
16. Upon considering the evidence before him, the learned trial Magistrate found in favour of the Plaintiff. Being dissatisfied with the judgment and decree, the Appellant filed a Memorandum of Appeal dated 22nd May 2023 premised on the following grounds:
 1. The Learned trial Magistrate misdirected himself on several matters of law and facts.
 2. The Learned trial Magistrate erred in law of procedure in failing to take into consideration the weight and effect of compliance with Order 22 rule 69(1) of the Civil Procedure Rules when a court has to decide whether a sale was valid or not.
 3. The Learned trial Magistrate erred in law in failing to note that the amount of Kshs, 1, 500, 000/= shown in the two post-dated cheques given during the sale is shown on the Transfer Forms and Title Deed on registration which clearly shows that no money was paid by the purchaser at the fall of the hammer as required by law nor is any receipt shown by PW2, the Auctioneer to that effect.
 4. The Learned trial Magistrate erred in law of evidence in deciding the case against the weight of evidence.
 5. The Learned trial Magistrate erred in land law in failing to appreciate the fact that the respondent was not a bona fide purchaser even in a sale by auction and failing to appreciate the effect of Order 22 rule 75 of the Civil Procedure Rules and the fact that the entry in the Title Deed conflicts with the evidence of the Auctioneer who sold the property to the respondent.
 6. The Learned trial Magistrate erred in law in failing to give consideration to Section 28(a)(b) and (h) of the Land Registration Act as read with section 26(1) of the Land Registration Act.
17. The parties filed submissions on the appeal.

Appellants' Submissions

18. Counsel for the Appellant submitted that PW2 Oscar Odongo T/A Odongo Investment Auctioneers on cross examination alleged that Kshs. 950,000/= was paid on the fall of hammer and two post-dated cheques of Kshs. 750,000/= each were paid at the fall of the hammer and that he issued a receipt. However, when he was called upon to produce the receipt he produced a receipt for Kshs. 2, 450,000/= issued on the 20th July 2012 the same date of the sale whereas by that date the two cheques of Kshs. 1,500,000/= were to be cleared on 20th August 2012 and 20th September 2012 respectively. On cross examination PW2 admitted that although he was paid Kshs. 950,000/= on the fall of the hammer he did not issue a receipt for the same. Further, that the Title Deed for Kasgunga/Kamreri/4021 registered in the name of the respondent and entry No. 7 shows that the land was sold at Kshs. 1, 500,000/=. He pointed out that in the plaint dated 5th September, 2016 no mention is made about the amount at which the respondent purchased the land. The deliberate avoidance of disclosing the purchase price of the land by the plaintiff clearly implies some fraudulent intention or sign that the law was not properly followed.



19. Counsel cited the provisions of Order 22 rule 69(1) of The Civil Procedure Rules and urged that the conduct of the buyer, the auctioneer and the advocate for the respondent obviously points at the involvement of some illegality and gives room for speculations that the sale may have been done on private arrangement and the money actually paid is not known or disclosed. It may also mean that the court, the land registrar, the Kenya Revenue Authority or the owner of the property was not supposed to know the truth. Whatever is the case it points to some illegality or irregularity and for the trial magistrate to order otherwise is an omission in law.
20. On grounds 5 & 6, he cited the provisions of Order 22 rule 75 of The Civil Procedure Rules and urged that the fact that the auctioneer went ahead with the sale despite the fact that the auction had been stopped by a court order and also no deposit of 25% of the price was paid at the fall of the hammer which shows that there was an obvious irregularity. Consequently, the acquisition by alleged purchaser at an auction and the subsequent registration of the suit property in favour of the respondent at Kshs. 1, 500,000/= when the purchaser is alleging to have paid Kshs. 2,450,000/= is unlawful and illegitimate. If the sale and registration of the land to the respondent had been done properly the respondent would have been the proprietor thereof as provided by section, 24, 25 and 26 of The [Land Registration Act, 2012](#). In that case continued occupation of the land and the house on it by the appellant from the 20th July 2012 would be an act of trespass and since the suit land is registered land the appellant and his kin would acquire title thereto on the expiry of 12 years by adverse possession. Alternatively, under section 28(h) of The [Land Registration Act](#) the defendant would have an overriding interest on the said land. In the circumstances no declaration can be made by the court that the plaintiff is the lawful bonafide registered owner of the suit land or property.
21. He cited Section 26 (1) of the [Land Registration Act](#) and the case of *Teresia Wangari Mbugua v Jane Njeri Nduati & Another* (2020) eKLR and the Black's Law Dictionary definition of a "bona fide purchaser. He additionally cited the case of *In the estate of Mohamed V Duba & Another* (Civil Appeal No. 83 of 2019) (2022) KECA 442 (KLR) on the definition of the same and urged that in the instant case, the demeanour of PW1 clearly disclosed that they colluded with the court broker (PW2) to defeat the provisions of order 22 rule 69 (1) of The Civil Procedure Rules as well avoid payment of adequate stamp duty to the Kenya Revenue Authority by declaring the price as Kshs. 1, 500,000/= instead of Kshs. 2,450,000/= which is an irregularity. He therefore cannot be a bona fide purchaser.
22. Counsel submitted that Section 28 (h) of the [Land Registration Act](#) by declaring whether an occupant of land has acquired overriding interest exempts such occupant from being evicted from the land since he has an interest to protect thereon which supersedes that of the title holder. The respondent's having procured registration through illegality and irregularity as pointed above the occupation and continued possession of the land by the appellant cannot constitute actionable trespass. The appellant was the owner of the land on first registration and still lives on the land with his family. Although the order to sell the property was validly made by a competent court the same was not executed properly and legally and consequently all the transactions including the registration are irregular. Counsel prayed that the trial court's judgement be set aside and costs be awarded to the appellant.

Respondents' Submissions

23. Counsel urged that the Appellant seems to be attacking the process of the Public Auction carried out on the 20th July 2012 vide a Court Order in Homa - Bay CMCC NO. 63 OF 2010 which made an order that the suit Property be attached and sold for purposes of satisfying the Decree therein. Pursuant to the said order in execution of a Decree, the suit Property was auctioned on the 20th July 2012 despite the Appellant obtaining orders vide KISUMU CMCC NO. 205 OF 2012. It was clearly stated in the



said Order by the Auctioneer upon receipt that the order had been overtaken by event as the sale had been conducted at 11.49 a.m.

24. Counsel urged reproduced the evidence of DW1 and urged that the Decree holder was executing lawful decree in the said suit. The Respondent produced PEXH 1-20 demonstrating how the sale and transfer of the suit property was effected. Further, that the, the Appellant had sought to set aside the sale and it invoked Order 22 Rule 75 of the Civil Procedure Rules and it was dismissed by the said Court that had issued execution order on the 31st October 2014. That order was not appealed against by the Appellant. That the issues that were raised in the defence at the Trial Court and same being the subject of the instant Appeal had been decided by the very court that issued the execution order.
25. Counsel urged that the issues of the legality of the sale vide Public Auction had been addressed by the Trial Court vide Homa - Bay CMCC 63 OF 2012. It was the Court that dealt with the issue of execution and pursuant to Section 34 of the *Civil Procedure Act*, any issues involving execution of decrees and orders must be dealt with by the same court that issued the order and/or Decree. The Appellant had approached the Court when same lodged an Application pursuant to Order 22 Rule 75 of the Rules.
26. Counsel urged that Section 34 of the *Civil Procedure Act* is very explicit. The issues raised by the Appellant herein in the trial Court involved the execution of a decree and that the only court that was well placed to address any issue arising therefrom was the court that issued the decree in this case, Homa - Bay CMCC 63 OF 2012. The Trial Court had no jurisdiction to entertain the argument being placed before it by the Appellant. Besides, there was no Counter-Claim of whatsoever kind alluding to fraud. He cited the authority of Alice Kerubo Nyambati v Ochoki Mogaka & Another KISH HCC NO. 263 OF 2009 (Unreported) in this regard.
27. Counsel urged that the sale was not against Order 22 Rules 69 and 75 of the Civil Procedure Rules. PW1 testified that he made a deposit of Kshs.950, 000/= on the date of Auction and subsequent Kshs. 1,500, 000/= vide two cheques. This was corroborated vide a letter dated 19th October 2012 which confirmed that the suit property was sold at Kshs.2, 450,000/= and the balances after various deductions was deposited in Court. It is this argument that was placed before the court vide Homa - Bay CMCC 63 OF 2012 which Court made a finding that the sale was proper and/or in order. That decision was not appealed against.
28. The defendant conceded that the court authorized the impugned sale. The defendant signals his dissatisfaction with the Court but there is no evidence that he successfully challenged the order in an appropriate forum. That the court herein is being asked to make a decision on a question of execution which had been dealt with by the appropriate court. Having paid Kshs. 950, 000/= on 20th July 2012, the balance of purchase price could only be paid pursuant to the law and not otherwise. PW2 acknowledged receiving Kshs.950, 000/= which was more than 25% of the purchase price as provided under Rule 69. It was the duty of the Appellant vide a Counter-Claim to allege fraud but same did not. He had raised similar issues vide Homa - Bay CMCC 63 OF 2012 which was the proper forum to address any issue revolving execution of the decree including the sale. The burden of proving the allegations on fraud was on the Appellant who alleged. The Respondent relied on the case of KInyanjui Kamau v George Kamau Njoroge [2015] eKLR And James Muniu Mucheru v National Nbank Of Kenya Limited [2019] eKLR in this regard.
29. Counsel submitted that Section 107 of the *Evidence Act* places the burden of proving the alleged on the person alleging. That burden was not correctly discharged by the Appellant herein. The issue of sale of the suit property vide Public Auction was res judicata vide the ruling in Homa - Bay CMCC 63 OF 2012 thus no contrary finding would be issued. The Appellant was at liberty to Appeal against the



ruling vide Homa - Bay CMCC NO. 63 OF 2012 but same decided to sleep on his right as correctly observed by the said magistrate.

30. On ground 6 of the appeal, counsel urged that the Appellant alleges that the Trial Court failed to give considerations to provisions of Section 28 (a), (b) and (h) of the Land Registration Act and for clarity, Section 28 (a) was deleted by Act No. 28 of 2016. Further, that the Land Laws Amendment Act hence that ground does not stand. He stated that parties are bound by their pleadings and in this case, the Appellant did not implead trust nor rights acquired vide prescription and/or limitation. HE urged that the occupation by the Appellant on the suit property was interrupted by the legal Proceedings vide Homa - Bay CMCC NO. 63 OF 2012. Other than not lodging any Counter-Claim, the register of the suit Property was opened in the year 2008 when the Appellant was the registered owner. Four (4) years later, the suit was transferred to the Respondent. Section 28 of the Land Registration Act thus could not come to the aid of the Appellant. On the other hand, the Title of the suit Property was taken away pursuant to a lawful Court Order in execution of a Decree which process was challenged by the Appellant vide Homa - Bay CMCC NO. 63 OF 2012. Ground 6 thus fails. He prayed that the appeal be dismissed with costs.

Analysis and Determination

31. The following issues arise for determination; Whether the trial court erred in entering judgement in favour of the Plaintiff
32. Before delving into the issue for determination, I must first state the duty of this court as an appellate court. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. It was held 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.”

33. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held 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 reanalyse 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.”

34. The following issues arise for determination;

i) Whether the trial court erred in failing to find that the sale of land was invalid

35. Regarding this, the grounds of appeal may be condensed herein into basically two: that the learned trial magistrate erred in law in failing to consider fully and properly the evidence of the parties, and that he erred in law by not giving due regard to Sections 28(a), (b) and (h) of the Land Registration Act as read with Section 26(1).
36. The entire appeal is premised on the grounds that the public auction of the suit land was irregular as there was an injunction in place stopping the sale of the land, at the time the auction took place. The sale of the land arose from the judgment and decree in Homa Bay PMCC 63 of 2010, where



the Appellant's land was sold by auction in execution of the decree therein. The Respondent then instituted Homabay CMELCC 45 of 2022 seeking the eviction of the Appellant. The Appellants contention is that vide an order issued on 19th July 2012, the sale had been stopped and therefore was irregular in the circumstances. However, the Appellant conceded that there was no return of service of the said order filed in court.

37. A reading of the record reveals that the Appellant had challenged the sale of the land vide an Application dated 9th June 2014 which was expressed to be brought under Order 22 Rule 75. Upon considering the application, the trial court found that the sale of the suit land was procedural and dismissed the application vide a ruling dated 31st October 2014. Further, the grounds of the application were similar to those in the present appeal and the ruling from the said application was never challenged. Section 34 of the Civil Procedure Act provides as follows;

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

38. From the onset, the Appellant could not have challenged the process of execution in a separate suit but upon the respondents' efforts to secure the proprietary rights in the suit land, the appellant then proceeded to challenge the process of execution two years later, in the suit seeking eviction. That notwithstanding, as the challenge of the process of execution was determined in favour of the respondent therein, and the ruling was never appealed against, it is my considered view that the trial court was correct to find that the process of sale was not contrary to a court order and therefore lawful.

39. Additionally, the Appellant made allegations of fraud in the sale of land. A fundamental principle of fraud is that the same must be specifically pleaded and proved. This was aptly expressed in *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently”

40. Indeed, fraud cannot be inferred from facts. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud....”

41. He who alleges must prove, this position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides 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.”



42. Sections 109 and 112 of the same Act states as follows:

“ 109. 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.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

43. On the question of burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & Another* [2015] eKLR, posited thus:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

44. The burden of proof on the allegations of fraud was on the Appellant. On the part of the respondent, there was proof of the process of the sale provided with the Respondent having paid and PW2 acknowledged having received Kshs.950, 000/=, which was more than 25% of the purchase price as provided under Rule 69. The Respondent produced cogent evidence of the process of sale including the cheques issued for payment of the consideration, stamp duty declaration and receipts, the advertisement in the newspaper, the consent and transfer forms and the gazettment of the transfer and registration of the instrument. It is these very documents that the respondent produced upon the process of execution being challenged by the trial court and the court correctly found them proof of the sale of land being lawfully conducted. The Appellant on his part, apart from making sweeping allegations of fraud, did not provide any cogent evidence that could even be compared to the respondents' evidence.

45. In Ground 6 the appellant sought to rely on the provisions of Section 28(a)(b) and (h) of the [Land Registration Act](#) as read with section 26(1) of the same Act. Section 28(a), (b) and (h) provide that;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) deleted by Act No. 28 of 2016, s. 11(a)

(b) trusts including customary trusts;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;



45. Section 26(1) 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.”

46. The provisions above envisage a situation of the interrelationship between the ownership of land and the interests that other persons who are not the legally registered owners can have and exercise over that owner’s title as to impeach it. Thus, under Section 26(1) of the Act, once someone is declared registered owner, his title is prima facie evidence that he/she is indeed the proprietor. It may be impeached on the grounds provided, such as fraud, misrepresentation or acquisition by way of a corrupt scheme. This, the registration of the appellant as owner is not shown to have taken place though such illegal processes. Similarly, the declaration that was sought by the Respondent before the trial court and granted did not involve such schemes or impeachable actions. Further, Section 28(b) and (h) provide for where despite the ownership, a trust or the existence of circumstances the *Limitation of Actions Act* provides or the law regarding prescription respectively, do bring in impeachment of the title in issue.

47. I have carefully considered the evidence that was before the trial court. It does not in any way show that there was a customary trust that would stand on the way of the Respondent having acquired the suit land by way of a public auction. In any event, trust, including customary trusts should be specifically pleaded and proved. Similarly, there was no evidence of prescription or limitation of actions regarding the declaration that was sought by the Respondent, and finally granted by the trial court.

48. The upshot of the foregoing is that the appeal lacks merit. It is dismissed in its entirety. The judgment of the trial court is upheld. The Respondent shall have the costs of this Appeal.

49. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 16TH DAY OF FEBRUARY 2026.**

HON. DR. IUR NYAGAKA

JUDGE

From 1:30 PM

Mr. G. S. Okoth Advocate for the Appellant

Mr. Langat for Oguttu Mboya & co. Advocates for the Respondent

