

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
KISUMU ELCLA NO. E083 OF 2024

GEORGE OCHIENG ABONGO APPELLANT

VERSUS

DR. CAREN ATIENO ABONGO (Suing on behalf
Estate of Erasto Abongo Okode)RESPONDENT

MARY ATIENO ABONG'OINTERESTED PARTY

CHRISTINE MAINA BUNDEINTERESTED PARTY

***(Being an Appeal from the judgement of the Chief
Magistrates' court at Kisumu by the Hon. Ezekiel Angaga
Obina (SPM) delivered on the 12th September, 2024 in KISUMU
MCELC/E006 OF 2022).***

BETWEEN

DR. CAREN ATIENO ABONGO (Suing on behalf
Estate of Erasto Abongo Okode)PLAINTIFF

VERSUS

GEORGE OCHIENG ABONGODEFENDANT

MARY ATIENO ABONG'OINTERESTED PARTY

CHRISTINE MAINA BUNDEINTERESTED PARTY

JUDGEMENT

Background

A brief background of the appeal herein is that the appellant was the defendant in KISUMU MCELC NO. E006 OF 2022. The respondent vide the plaint dated 27th January, 2022, sued the appellant over 2 parcels

of land known as KISUMU/KANYAWEGI/971 and KISUMU/KANYAWEGI/970.

The respondent pleaded that she was a sister-in-law of the appellant. That the land parcel No. KISUMU/ KANYAWEGI/971 was the property of one Erasto Abongo Okode, deceased, while her husband by the name Churchill Otieno Abongo also deceased, was a beneficial owner of KISUMU/KANYAWEGI/970.

The respondent further claimed that the suit land parcel number KISUMU/KANYAWEGI/971 was bequeathed to her mother-in-law and later to her late husband.

Her complaint was that on 18th September, 2021 the appellant accompanied with strangers gathered at the suit lands and started constructing a house thereon. That it was clear from the appellant's actions that he fully intends to dispossess the respondent and the entire estate of the deceased of the suit lands.

The respondent therefore sought for orders of permanent injunction restraining the appellant from entering onto the suit lands, alienating the suit lands or interfering with the suit lands. She also sought for a declaration that land parcel No. KISUMU/KANYAWEGI/971 legally belongs to the estate of the deceased Mzee Erasto Abongo Okode and that Churchill Otieno Abongo, is the beneficial owner of

KISUMU/KANYAWEGI/970. The respondent also sought costs of the suit. The heading of the plaint indicates that the respondent had brought the suit on behalf of the estate of Erasto Abongo Okode, deceased.

Vide the Statement of Defence filed on 4th March, 2022, the appellant denied the respondent's claim. He stated that Erasto Abongo Okode was his biological father and the suit parcel No. KISUMU/KANYAWEGI/971 was registered in the name of his late father. That he bought a portion of parcel No. KISUMU/KANYAWEGI/970, and that he was a beneficial owner thereof.

The suit was heard before the trial court which, vide the judgement delivered on 12/9/2024, found that the respondent had proved her case on a balance of probabilities and entered judgment in her favour as prayed in the plaint with an order that each party bears its own costs of the suit.

The Appeal

Aggrieved by the judgment, the appellant filed the present appeal vide the Memorandum of Appeal dated 11th October, 2024.

The appellant sought for an order to issue quashing and setting aside the judgement and consequential decree of the lower court made on 12th September, 2024 and that the same be substituted by an order

dismissing the entire suit. The appellant further sought that the costs of the appeal and of the trial court be provided for.

The grounds of appeal as contained in the Memorandum of Appeal are that the trial Magistrate erred both in law and fact by;

1. issuing a permanent injunction restraining the appellant and his family from entering upon, remaining on, taking possession of or carrying any activity on the suit property known as Kisumu/Kanyawegi/971 which property is the appellant's matrimonial home, the appellant has constructed his matrimonial home thereon and lives with his family.
2. making the far-reaching judgement and orders, which has the consequential effect of unlawfully evicting the appellant from his matrimonial home.
3. assuming jurisdiction over a dispute concerning inheritance and succession of the Estate of Erasto Abongo Okode when there is a pending succession cause in Kisumu Succession Cause No. E959 of 2021 thereby misdirected himself by making far-reaching pronouncements on matters inheritance in the impugned judgment, which is a preserve of the succession court.

4. arrogating himself jurisdiction over a family and succession cause regarding the inheritance of the Estate of the late Erasto Abongo Okode by misdirecting himself that the deceased had distributed his Estate to his beneficiaries without proper proceedings and judgments from a court of competent jurisdiction, thereby making the said judgement null and void ab-initio.
5. finding that land parcel No. KISUMU/ KANYAWEGI/971 legally belonged to the Estate of Erasto Abongo Akode yet the same was not in dispute at all.
6. finding that Churchil Otieno Abongo now deceased has a beneficial interest in the land parcel No. KISUMU/KANYAWEGI/970 property belonging to Jared Otieno Onyuro who inherited from his father Onyuro Atenga (Deceased) a third party whose beneficiaries/legal representatives were not a party to or privy to the proceedings herein, thereby arriving at the impugned judgement affecting the interest of third parties.
7. relying on hearsay evidence of one Joseph Otieno Nyalwanda without any tangible evidence or corroboration thereby arriving at a wrong judgment.

8. failing to consider the appellant's Defence, evidence and submissions and failing to appreciate the facts and the law on the subject matter, leading to the impugned decision, which has the potential of disinheriting the appellant and his family.
9. wrongly finding that the late Erasto Abongo Okode had four wives, yet the deceased had three wives and that at the time of his demise, the deceased had allocated and distributed his Estate without any certificate of confirmation of grant from a court of competent jurisdiction, thereby arriving at a wrong decision.
10. failing to consider the suit holistically thus arriving at an impugned judgment.
11. failing to find that the respondent had interfered with the suit property parcel No. Kisumu/Kanyawegi/971 the property of the deceased by processing another title deed reading the approximate acreage as 1.9 Ha instead of 0.6 Ha which amounts to fraud and forgery.

Submissions

Vide directions given on 25/9/2025, the appeal was heard by way of written submissions.

Written submissions dated 17th December, 2015, were filed by Laichena Mugambi & Ayieko Advocates on behalf of the appellant.

Counsel submitted that the rights of the parties regarding the land parcel No. 971 should be determined by the Succession Court in the Succession Cause No. E959 of 2021 because the said property is still registered in the name of the late Erasto Abongo Okode. The trial court did not have the jurisdiction to determine the rights of the parties about land reference No. KISUMU/KANYAWEGI/971.

On whether the trial court erred in law in finding that the respondent has an interest in land registration No. KISUMU/KANYAWEGI/970 in the absence of the owners of the said land being made parties in the suit, Counsel submitted that a green card filed by the Respondent in her list of documents clearly demonstrated that the property is registered in the name of Jared Otieno Onyuro having inherited the property from his late father one Onyuro Otenga. That Jared Otieno Onyuro was not a party to the proceedings and that the judgment of the trial court affected him as a third party who was not privy to the proceedings.

That the trial court erred both in law and fact in delivering a judgment against a third party's property who was not a party in the proceedings before court.

Relying on the provisions of Section 78 of the Civil Procedure Act Order 2 Rule 16 and Order 9 Rule 2 of the Civil Procedure Act and the case of Andai & Another - vs - Ojera & Another (ELC 3 OF 2020) [2024] KEELC 1241 (KLR) (7 March, 2024) Ruling; where it was held that an unsigned pleading is a substantive issue that goes to the root of the pleadings and cannot be cured by the oxygen principle or article 159 (2) of the Constitution.

Counsel submitted that the plaint filed by the respondent in the suit was not signed. That the trial court should have addressed the matter in the judgment. That the court should have struck out the plaint and should not have granted the prayers in the plaint because the suit was incompetent ab initio. Counsel urged the court to grant the orders sought in the Memorandum of Appeal.

Written submissions dated 27th November, 2025, were filed by the firm of Sala & Mudany Advocates on behalf of the respondent.

Counsel framed four (4) issues for determination, namely;

- i. who is the lawful owner of the land parcel No. KISUMU/KANYAWEGI/971
- ii. whether the 1st respondent and her husband acquired a beneficial interest in portions of KISUMU/KANYAWEGI/970.

- iii. whether the appellant has any lawful or proven claim to parcels No. KISUMU/KANYAWEGI/970 and 971.
- iv. whether the learned Magistrate erred in the judgment in acknowledging the 1st Respondents' proprietary rights over the suit parcels.

Counsel submitted that under Kenyan law, registration confers absolute ownership and until succession is undertaken, the deceased remains the legal owner of the suit land.

Counsel relied on the case of Isack M' Inanga Kieba - vs - Isaya Theuri M'Lintari (2018) eKLR where it was held that registration of land confers absolute ownership, subject only to prove of trust or overriding interests. That the respondent does not contest that parcel No. KISUMU/KANYAWEGI/971 forms part of the estate of the deceased, that what she asserts is a beneficial claim arising from inter-house allocation, occupation and use by her mother- in-law, one Dursila Abongo.

On whether the respondent or her late husband acquired a beneficial interest in portions of land parcel known as KISUMU/KANYAWEGI/970, Counsel submitted that the respondent's family's beneficial interest in the purchased portions of parcel No. KISUMU/KANYAWEGI/970 is both recognized in equity and supported by evidence.

On whether the appellant has any lawful or proven claim to the suit lands, Counsel submitted that the 1st respondent's mother-in-law was the occupant of the land parcel number 971 during the lifetime of the deceased. That such settled occupation forms an overriding interest binding even upon successors.

That the appellant was not able to prove his claim that he was given land parcel No. KISUMU/KANYAWEGI/971 as a gift by his father and that although the Appellant claims to have bought land parcel No. 970, he produced no proof of that claim.

Counsel further submitted that the respondent approached the trial court correctly, as injunctive orders cannot be granted in a Succession Cause. Counsel relied on the case of *Estate of M'Marete M'Miriti (2017) eKLR* to support the submission.

Counsel urged the court to dismiss the appeal with costs.

Analysis and determination

From the grounds of appeal, the submissions filed, and the record of appeal generally, the issues that emerge for determination in this appeal are;

- i. whether or not the trial court erred in both law and fact in allowing the respondent's claim in respect of the suit lands.
- ii. whether the appeal herein has merit.

iii. costs

It is common ground that land parcel No. KISUMU/KANYAWEGI/971 is the property and forms part of the estate of a deceased person by the name Erasto Abongo Okode. The manner to administer, deal with, and distribute the property of deceased persons as submitted on behalf of the appellant, is as provided for in the Law of Succession Act.

Section 2 (1) of the Act provides;

“Except as otherwise expressly provided in this Act or any other written law, the provisions of the Act shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after commencement of this Act and to the administration of estates of those persons.”

The respondent’s claim in the plaint related to ownership rights of the suit land parcel No. KISUMU/KANYAWEGI/971 between the estate of the deceased and the appellant. It is clear from the heading of the plaint and from the exhibits produced that the respondent filed the suit on behalf of the estate of Erasto Abongo Okode. Limited Grant of

Letters of Administration Ad Litem annexed to the plaint and dated 21st January, 2022, allowed the respondent to file suit.

Prayer 1 of the plaint sought for an order of injunction to preserve the property of the deceased pending succession to the estate of the deceased.

Prayer 2 merely sought for a declaration that parcel No. KISUMU/KANYAWEGI/971 is the property of the deceased.

I have read the judgement and find no evidence of contravention of the provisions of the Law of Succession Act in respect of the estate of the deceased Erasto Abongo Okode by the trial court.

The trial court did not attempt to administer or distribute the Estate of the deceased. The order of injunction granted was to last until the succession is concluded.

Regarding land parcel No. KISUMU/KANYAWEGI/970, the respondent sought to protect the interest of her late husband Churchil Otieno Abongo, whom she claimed was a purchaser of portions of the said parcel of land. Although the Respondent exhibited a Limited Grant of Letters of Administration Ad Litem in respect of the estate of Churchill Abongo, the estate of Churchill Abongo was not a party in the suit. Secondly, the evidence adduced was that the said land was registered in the name of a third party who was not a party to the

proceedings. Property rights of Kenyans are protected under Article 40 of the Constitution of Kenya and sections 24, 25, and 26 of the Land Registration Act, among other laws. The record shows that the trial court proceeded to hear the claim for portions of the said parcel of land in the absence of the registered owners and found that the deceased, Churchil Otieno Abongo, was entitled to a beneficial interest in the said land parcel. This was erroneous as the constitutional rights of the registered owner thereof, to access to justice, fair hearing and the right to property were violated.

For the foregoing reasons, I find that the appeal succeeds in part. The part of the judgment allowing the claim in respect of land parcel No. KISUMU/KANYAWEGI/970 is hereby set aside.

Under section 27 of the Civil Procedure Act, costs follow the event. As the appeal has only succeeded partly, the court awards $\frac{1}{2}$ costs of the appeal to the respondent.

For avoidance of doubt, save for the part of the judgement that relates to land parcel No. KISUMU/KANYAWEGI/970 which is hereby set aside, the rest of the judgment of the trial court is hereby upheld.

Orders accordingly.

Judgment dated and signed at Kisumu and delivered virtually this 19th day of February 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

Julie h/b for Ayieko for the appellant

Sala for the respondent.