

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMABAY**  
**ELC APPEAL NO E015 OF 2025**

**VITALIS OLOGI ONYANGO.....1<sup>ST</sup>**

**APPELLANT**

**JAMES OMONDI OGINGO.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**MARK ODUOGO ODINGO.....1<sup>ST</sup>**

**RESPONDENT**

**MAURICE OKOTH ODHIAMBO.....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

**Being an Appeal from the Judgment and Decree of Hon.  
Onzere E.M (PM) in (NDHIWA PMCELC/E044/2023 VITALIS  
OLOGI ONYANGO VS MARK ODUOGO OGINGA, MAURICE  
OKOTH ODHIAMBO & THE LAND REGISTRAR HOMABAY  
COUNTY)**

**AS CONSOLIDATED WITH**

**(NDHIWA PMCELC/E045/2023- MAURICE ODHIAMBO OKOTH VS  
VITALIS OLOGIONYANGO & JAMES OMONDI OGINGO)**

**INTRODUCTION**

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1. This is an appeal arising from the judgment of Honourable Onzere E.M. Principal Magistrate delivered on 2<sup>nd</sup> April, 2025 in NDHIWA ELC NO. E044/2023 as consolidated with NDHIWA ELC NO. E045/2023.
2. The Appellants filed a Memorandum of Appeal dated 8<sup>th</sup> April, 2025 appealing against the said judgment on the following grounds: -
  1. **That the learned trial Magistrate erred in law and fact by seemingly pouring cold water on the evidence tendered in support of the Appellants' case in the subordinate court without giving any reason for doing so.**
  2. **That the Learned Magistrate erred in both law and fact by failing to consider, analyze and appreciate the law and appellants' written submissions.**
  3. **The Learned Magistrate erred in both law and fact in being biased against the appellants.**
  4. **The Learned Trial Magistrate erred in law in law, in failing to consider and completely ignoring the arguments raised by the Appellants in their Written Submissions filed by the Appellant.**

- 5. The Learned Trial Magistrate erred in law in failing to analyze the facts and legal arguments advanced vide the Plaint before Court thereby reaching to (sic) an erroneous decision.**
- 6. The Trial Magistrate erred in law and fact by failing to apply the balance of convenience thereby directing that the Appellants who have been in occupation of the suit parcel be evicted.**
- 7. The Trial Magistrate erred in fact and law when she deviated from the recommendation of the surveyor's during the testimony that land register ought to be amended to reflect the true position on the ground.**
- 8. That the Trial Magistrate erred in fact and law when he failed to appreciate that the Respondent did not obtain the second Land Control Board Consent but nonetheless proceeded to hold that process of transfer was not irregular and therefore was free from fraud.**
- 9. The Trial Magistrate also erred in law and fact when she failed to appreciate that the Respondent had**

**breached the contract by failing to clear the balance of the purchase price of the suit parcel.**

3. The Appellants seek orders allowing the appeal and setting aside the trial magistrate's judgment. They also seek for costs of the appeal.

### **BRIEF FACTS**

4. The 1<sup>st</sup> Appellant had filed a suit against the Respondents vide a Plaint dated 10<sup>th</sup> October, 2023 alleging that the 1<sup>st</sup> Respondent, in breach of contract, fraudulently and unlawfully acquired the suit property Kanyamwa/Kabonyo/Kwandiku/2618. He gave the particulars of breach of contract add paragraph 15 which he stated as being one, that defendant failed to render the full purchase price hence going against the terms of the contract which was binding on both parties. He then gave the particulars of fraud on the part of the first and third defendants at paragraph 19 of the Plaint and on the part of the 3<sup>rd</sup> defendants at paragraph 20. He sought for an order of forfeiture as damages of the sum of Kshs. 80,000 paid as deposit to the 1<sup>st</sup> Defendant, a declaration that the subdivision and transfer of the suit property to the 2<sup>nd</sup> Respondent was illegal and a permanent injunction restraining the Respondents

from interfering with the Appellants peaceful occupation of the suit property.

5. The Respondents in response filed their Statement of Defence dated 14<sup>th</sup> December, 2023 wherein they denied the Appellants allegations. Nevertheless, he admitted the existence the contract of sale of the parcel of that in question. He added that, on the contrary to the plaintiff's allegations, he paid the full purchase price to the plaintiff and that both he and the said party attended the Land Control Board for purposes of consent for transfer of the land to the plaintiff, was asked by the Land Control Board officials whether he had been paid the full amount, to which he answered in the affirmative hence the reason for attendance at the Land Control Board for the transfer, and the consent was granted.
6. The suit was heard and the trial magistrate in his judgment dated 2<sup>nd</sup> April, 2025 dismissed the Appellants case and ordered for their eviction from the suit property.
7. The Appellants 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 27<sup>th</sup> May, 2025 where he identified the following issues for determination;

1. **Whether the 1<sup>st</sup> Respondent breached the terms of the sale agreement.**
2. **Whether the transfer and subdivision of the suit land were illegal for want of Land Control Board consent and absence of a professional surveyor.**
3. **Whether the learned magistrate erred in disregarding the recommendation by the County Land Surveyor.**
4. **Whether the fraud was proved and whether fraud and illegality can confer valid title.**
5. **Whether the eviction orders were unjust and contrary to equity.**

9. On the first issue, counsel submits in the affirmative and argues that the Appellant's evidence was unchallenged on the basis that only Kshs. 50,000/= was paid out of Kshs. 130,000/=, leaving a balance of Kshs. 80,000/= unpaid. He relied on the case of **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR.**

10. On the 2<sup>nd</sup> issue, counsel also submits in the affirmative and argues that the 1<sup>st</sup> Respondent's transfer, having been done without the requisite consent, was a nullity in law. He added that

the purported subdivision was done without engagement of a competent licensed land surveyor, resulting in inaccurate parcel boundaries thus irregular. He relied on the Court of Appeal case of **Kariuki V Kariuki [1983] KLR 225** and **Section 6(1)** of the **Land Control Act**.

- 11.** The third issue, counsel submitted that the County Land Surveyor's report established that the land register contained errors and did not reflect the true position on the ground. He added that he recommended that the register be amended.
- 12.** He argued that the trial court's dismissal of the Surveyor's recommendation was a serious error in law and fact, amounting to a misdirection and miscarriage of justice. He cited the Court of Appeal case of **Mutonyi V Republic [1982] KLR 203**
- 13.** On the fourth issue, it was his submission that the LCB consent by the 1<sup>st</sup> Respondent was unlawfully applied and unprocedurally obtained thus resulting to a fundamental illegality that vitiated the entire transaction.
- 14.** He also submits that an application for such consent ought to be made to the Board within six months of the making of the agreement. He cited **Section 8(1) of the Land Control Act**.

- 15.** Counsel also submitted that the 1<sup>st</sup> Appellant had not applied for consent to transfer the suit land. It was his argument that the 1<sup>st</sup> Respondent relied on a consent whose source, process, and authenticity remained unexplained thus *void ab initio* and a legal nullity from inception.
- 16.** He cited the case of **Munyua Maina V Hiram Gathiha Maina [2013] eKLR** and **Arthi Highway Developers Ltd V West End Butchery Ltd & 6 Others [2015] eKLR**. He submitted that the 1<sup>st</sup> Respondent's actions of obtaining title without the consent to transfer, amounted to fraud and illegality thus vitiated all transactions.
- 17.** On the final issue, it was counsel's submission that having ignored both contractual breach and fraudulent dealings, the trial court proceeded to have the Appellants evicted from land they lawfully occupied and developed. He added that such an order offended both equity and justice.
- 18.** He further submits that the 2<sup>nd</sup> Appellant was a bonafide purchaser who had purchased a portion from the 1<sup>st</sup> Appellant in year 2017 and not the portion allegedly sold to the 1<sup>st</sup> Respondent.

He cited the case of **Kenya Airways Ltd V Satwant Singh Flora [2013] eKLR.**

- 19.** He urged the court to allow the appeal with costs.
- 20.** Counsel for the Respondent filed his submission dated 12<sup>th</sup> November, 2025 and identified six issues for determination as extracted from the grounds of appeal.
- 21.** On the first issue was whether the Learned Trial Magistrate erred in law by failing to consider the evidence, facts, and legal arguments presented by the appellants in their plaint. He relied on Sections 107, 108 and 109 of the Evidence Act and submitted that the burden of proof lay with the appellants to provide plausible evidence of their claim of illegal subdivision of parcel no. 2618.
- 22.** He submitted that the 1<sup>st</sup> Appellant failed to produce any documents to prove that the signatures or thumbprints on the transfer and mutation forms were not his. He further submitted that on cross examination, the 1<sup>st</sup> Appellant admitted that the details, thumbprints, and signatures on the land documents were his. He argued that the 1<sup>st</sup> Appellant also acknowledged meeting the surveyor and signing mutation forms, indicating he was aware of the subdivision.

- 23.** He further submitted that the 1<sup>st</sup> Appellant had already sold and transferred parcel no. 2833 to the 2<sup>nd</sup> Appellant before the sale to the 1<sup>st</sup> Respondent which contradicted his claim of being unaware of the subdivision.
- 24.** Counsel submitted that the Respondent provided evidence of an elaborate process for the issuance of the title deed for parcel no. 2834, including a duly executed transfer form and approved consent, which the Appellants failed to rebut.
- 25.** It was his submission that the trial magistrate's finding could not be questioned since the Appellants failed to prove their allegations of fraud. He relied on the case of **Simon V Tassur (Environment and Land Appeal 21 of 2019) [2023] KEELC 2266 (KLR)**.
- 26.** On the second issue, of whether the Learned Magistrate was biased in any way, counsel while submitting in the negative, relied on the case of **Kamau & another V Kingdom Bank Limited (Civil Suit E001 of 2022) [2025] KEHC 2545 (KLR)**. He argued that the issue of bias by the Appellants was an afterthought.
- 27.** The third issue was whether the Learned Magistrate erred in fact by failing to apply the balance of convenience by directing the appellants to vacate the disputed land. It was his submission that

the Respondents as the registered owners of the suit parcel, they were entitled to the protection of their property rights and quiet occupation. He argued that the Appellants' continued presence on the land was an act of trespass that limited the Respondents' rightful use of their property.

**28.** He relied on the case of **Mwasaru V Nyange (Environment and Land Appeal E016 of 2024) [2025] KEELC 1360 (KLR)** and submitted that the trial court did not err in issuing eviction orders once a party had proven how they acquired their title deed to the required standard.

**29.** The fourth issue for determination was whether the Learned Trial Magistrate deviated from the surveyor's recommendation regarding the need for an amendment to reflect the true position on the ground. He submitted that any measurement discrepancies or recommendations for amendments did not negate the fact that the Appellants were in occupation of land they did not own, parcel no. 2834 and that they were using it for their benefit at the expense of the registered owner.

**30.** The fifth issue was whether the Trial Magistrate failed to appreciate that the respondent allegedly did not attend the second

land board consent meeting, and proceeded to affirm that the transfer process regular and free from fraud. While submitting in the affirmative, he relied on the case of **Warari V Wangora & another (Civil Appeal 504 of 2019) [2022] KECA 1334 (KLR)**.

- 31.** He submitted that in proving that the transfer was valid, the Respondents presented a consent document which showed that the 2<sup>nd</sup> land board meeting for the transfer had taken place and was duly approved.
- 32.** The final issue was whether the Learned Trial Magistrate erred in fact and law by failing to appreciate that the respondent had allegedly breached the contract by failing to pay the purchase price. Counsel submitted in the negative and argued that the balance for the land was tied to obtaining land board consent and that the 1<sup>st</sup> Appellant willingly attended the land board meeting on 20<sup>th</sup> January, 2012 thus effecting the transfer.
- 33.** He further submitted that the balance of Kshs. 51,000/- was due by 19<sup>th</sup> January, 2012 and since the 1<sup>st</sup> Appellant attended the board meeting the following day being 20<sup>th</sup> January there was *prima facie* evidence that the sum had been paid.

## **Analysis and Determination**

**34.** 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.**

**35.** 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 ...”**

**36.** 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.”**

**37.** **Section 107 of the Evidence Act** provides:

**“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”**

**38.** **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.”**

- 39.** It was the Appellant's case that being the registered owner of the suit property, he had not sold it to the 1<sup>st</sup> Respondent. It is trite law that he who alleges must prove. Therefore, the burden of proof to prove lay on the 1<sup>st</sup> Appellant to successfully discharge it.
- 40.** It is this court's view that there was sufficient evidence that parcel 2618 was originally owned by the 1<sup>st</sup> Appellant who admitted that he sold part of the suit property to the 1<sup>st</sup> Respondent. His evidence was only merely oral that he did not sell the land, yet at paragraph 19 of his Plea he pleaded that there 1<sup>st</sup> Defendant breached the contract of sale of the land.
- 41.** It is this court's humble view that since parties are bound by their pleadings, the Plaintiff was bound by his claim that there was a sale that took place, save that to him, the Defendant did not fulfill his part of the bargain by not paying all the price. Thus, there was a sale. Further, on his part the 1<sup>st</sup> Defendant produced agreements of sale, applications for consent to transfer the land as made to the land control board, the consent thereto and the transfer. Notably, from the evidence in the said documents, the application for consent was executed by both the seller and the buyer, and the transfer too, besides the latter having even passport size photos of

the parties attached thereto. In my view, it was incumbent upon the Plaintiff to disprove that these documents that supported the contrary position he gave that there was no sale yet he pleaded that there was a breached one were indeed not genuine.

**42.** Notably, the 1<sup>st</sup> Appellant under paragraph 20 of his Plaint alleged fraud on the part of the Respondents. However, it is trite law that allegations of fraud need to be strictly proved. He did not adduce any evidence to that effect. He only stated in his written statement that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants fraudulently and illegally subdivided the land and transferred it to the 1<sup>st</sup> Defendant without his knowledge and first obtaining a land control board consent. The Plaintiff did not explain how, if there was fraud and he did not sign the application for the land control board and even the transfer, his photograph and even the Personal Identification Number (PIN) can into the possession of the 1<sup>st</sup> Defendant. As stated below, there was a grave admission by the Plaintiff, in cross examination, that he gave the PIN to the 1<sup>st</sup> Defendant. What was it for, if it was not for the transfer of the land? And how is it that he would give the PIN which is usually among the last documents to be handed over in a conveyance, without there being a consent for transfer, duly

signed by him? This court finds that the denial he made during the testimony, including that the photograph on the transfer was not clear whether it was his image or not, were mere lies.

**43.** The Court of Appeal in Mombasa, Civil Appeal No. 312 of 2012-  
**Emfil Limited V Registrar of Titles Mombasa & 2 others**  
**[2014] eKLR** held as follows:

**“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”.**

**44.** In addition, **Section 26(1) of the Land Registration Act** provides:

**“...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—**

**-on the ground of fraud or misrepresentation to which the person is proved to be a party**

**-Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

- 45.** This court has keenly perused the court record and it is not in dispute that the 1<sup>st</sup> Appellant in as much as he claimed that the subdivision of the suit parcel was irregular, he admitted that he executed the transfer forms.
- 46.** In addition, it is this court’s view that the 1<sup>st</sup> Appellant greatly contradicted himself in evidence having claimed that he was not aware of any mutation forms yet on the other hand, he confirmed that he had consented to have sold and issued parcels no. 2833 and 2834 to the 2<sup>nd</sup> Appellant and 1<sup>st</sup> Respondent respectively.
- 47.** It was also the surveyor’s evidence that the Appellants had encroached onto the 1<sup>st</sup> Respondent’s parcel of land. I have perused the surveyor’s evidence and he did not admit any form of discrepancy on the measurement as alleged by the Appellants. In

addition, he confirmed that he saw the mutation form which from the evidence, it was never challenged.

- 48.** Having considered the evidence, it is also this court's view that the sale of the suit property was proper by virtue of the sale agreement dated 22<sup>nd</sup> December, 2011 which was not challenged.
- 49.** In light of the above, it was clear that the Appellants failed to prove their case on a balance of probabilities.
- 50.** Consequently, it is this court's humble view that it is in agreement with the trial magistrate that the transfer of the suit parcel by the 1<sup>st</sup> Appellant was indeed proper and that the 2<sup>nd</sup> Respondent is the lawful owner of the property having purchased it from the 1<sup>st</sup> Respondent.
- 51.** The upshot of the foregoing is that the appeal is devoid of merit and is therefore dismissed with costs to the Respondents.
- 52.** Orders accordingly.

**Judgment dated, signed and delivered virtually via the Teams Platform this 4th Day of March 2026.**

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

**In the presence of,**

Court Assistants: Terence and Ms. Fiona

Mr. Adingo Advocate for the Appellant (online)

Ms. Kimberly Advocate for the Respondent (online)